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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

JANUARY 11, 2013 and MAY 30, 2013

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXXV

PEGGY POLACEK
OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

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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

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel E. Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
		Max Kelch	Papillion
Third	Lancaster	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	James G. Kube	Madison
		Mark A. Johnson	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
		Frank J. Skorupa	Columbus
		Patrick R. McDermott	David City
		Linda S. Caster Senff	Aurora
		C. Jo Petersen	Seward

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	Donna F. Taylor	Madison
		Ross A. Stoffer	Pierce
		Michael L. Long	Madison
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
		Edward D. Steenburg	Ogallala
		Anne Paine	McCook
		Michael E. Piccolo	North Platte
		Jeffrey M. Wightman	Lexington
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
		Paul G. Wess	Alliance

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
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 284

MEGAN SARAH ALEXANDER
ALI KASHANI AMINI
KATY AMBER ANDERSON
NATHAN DEREK ANDERSON
KYLE ALAN BARLOW
KATHLEEN REILLY BARROW
KELLY MARIE BARRY
STACIA CHRISTINE BERRY
ANDREW RYAN BIEHL
ALEXANDER DEWITT BOYD
JOHN R. BRENNAN
SARAH J. BROWER
BROOKE ASHLEY BROWN
NICHOLAS ANTHONY BUDA
JAMIE SCHMIDT BUDNICK
ZACHARY JAMES BUTZ
ERICA LYNN CARR
RANDALL P. CHEVALIER
EDWARD JAMES CIZEK IV
PAUL ANTHONY CLARK
JACQUELINE MARIE DELUCA
NICHOLAS ANDREW DEPETRO
WILLIAM EDWARD DIEDERICH III
BREANDAN CHARLES DONAHUE
MICHAEL JOHN DORIA
WILLIAM ROBERT DOSS
JAMES ROBERT DUMMERMUTH
DAVID WADE EDWARDS
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COURTNEY MICHELLE GOLDSWORTHY
R. GARRETT GOODWIN
DREW ALAN GRAHAM
LEE EDWARD GREENWALD
ELIZABETH ANNE GREGORY
LAURIE ANN HAYNIE
SARAH KATHERINE HEUERMAN
TIMOTHY RYAN HIATT
KAREN CRISTINE HICKS
LAURA B. INNS
LANCE BROWN JOINER
KAREN MARIE KEELER
RYAN ALLEN KEHM
JENNA H. KELLER
BRADLEY BARRETT KINKADE
KATHRYN CLAIRE KIRTS
CHAD MICHAEL KNIGHT
JESSICA YUMI KONG
CHRISTOPHER ROBERT KORTUM
ANDREI NICHOLAS KREPTUL
LINDA RISHELL LANE
JENNIFER MARIE LEHMER
ADAM RICHARD LITTLE
VIJAY SINGH MALIK
MICHAEL PATRICK MALONEY
PHILIP SAMUEL MARTIN
KATHERINE MARTZ
JANICE MANDLA MATTINGLY

ANDREW RUSSELL MCCARTHY
BROOKE HARRISON MCCARTHY
MOLLY MOSHER MCCLEERY
GERARD DONOVAN MCCUSKER
EMILY ZIMMER MCELRAVY
NEAL DANIEL MCMAHON
KATHERINE MCNAMARA
PATRICK EDWARD MCNAMARA
TIFFANY MARIE MELCHERS
JESSICA DIANE MEYER
IVAN EDMUND MILLER
ILISJA SHERI MORELAND
TIMOTHY RICHARD MULLINER
JEFFREY LEE MURMAN
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NICHOLAS RYAN NORTON
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DAMILOLA JOHN OLUYOLE
JORDAN MARIE OSBORNE
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ELI ANDREW ROSENBERG
ANGELA FORSS SCHMIT
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ROBERT TUCKER SINGLETON
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SARAH MARIE SMITH
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ADAM CURTIS TABOR
KEVIN PATRICK TRACY
SARAH GRACE TRAINER
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GLENN EPHRAIM WEINSTEIN
DENNIS GREGORY WHELAN
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ASHLEY DARLENE WILLIAMS
EMILY JEAN WISCHNOWSKI
TOBIN DOUGLAS WOLFE
BRANDI JO YOSTEN

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No. S-12-286: **State v. Sherrod**. Reversed and vacated. McCormack, J. Heavican, C.J., not participating.

No. S-12-390: **Sorensen v. Veach**. Affirmed. Miller-Lerman, J.

No. S-12-757: **Gillespie v. Gillespie**. Affirmed. Wright, J.

No. S-12-867: **State v. Voter**. Affirmed. McCormack, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-12-035: **Kaapa Ethanol v. Board of Supervisors**. Motion of appellee for rehearing sustained. Appeal reinstated.

No. S-12-311: **Cesar C. v. Alicia L**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-589: **State v. Vela-Montes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-12-642: **State v. Clayborne**. Summary affirmance by Court of Appeals affirmed. Record was insufficient to reach ineffective assistance of counsel claims on direct appeal.

No. S-12-658: **State v. Ortiz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-667: **State v. Belmarez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-837: **State v. Lotter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995). See, also, *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011); *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957).

No. S-12-838: **State v. Lotter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995). See, also, *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011); *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957).

No. S-12-839: **State v. Lotter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009); *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995). See, also, *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011); *Parker v. State*, 164 Neb. 614, 83 N.W.2d 347 (1957).

Nos. S-12-911 through S-12-914: **Strode v. Saunders Cty. Bd. of Equal**. Stipulation allowed; decision of Tax Equalization and Review Commission vacated, and cause remanded to the commission for further proceedings.

No. S-12-927: **State v. Jackman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-1011: **State v. Bao**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-12-1071: **State v. Lee**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-12-1137: **Liebig v. Newman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-12-1199: **McKinney v. Okoye**. Appeal dismissed. See § 2-107(A)(2).

No. S-13-130: **State v. Griswold**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-11-364: **Haubold v. Nebraska Truck Center**. Petition of appellee for further review denied on January 3, 2013.

No. A-11-495: **Smith v. Smith**. Petition of appellant for further review denied on February 27, 2013.

No. A-11-495: **Smith v. Smith**. Petition of appellant for further review denied on March 22, 2013, as untimely. See § 2-102(F)(1).

No. S-11-515: **State v. White**, 20 Neb. App. 116 (2012). Petition of appellee for further review sustained on February 21, 2013.

No. A-11-776: **Keig v. Keig**, 20 Neb. App. 362 (2012). Petition of appellant for further review denied on April 10, 2013.

No. A-11-804: **State v. Seeger**, 20 Neb. App. 225 (2012). Petition of appellant for further review denied on January 23, 2013.

No. A-11-976: **State v. Staberg**. Petition of appellant for further review denied on February 13, 2013.

No. A-11-979: **State v. Robertson**. Petition of appellant for further review denied on March 13, 2013.

No. A-11-981: **State v. Schmidt**. Petition of appellant for further review denied on May 15, 2013.

No. A-11-990: **State v. Simnick**. Petition of appellant for further review denied on April 17, 2013.

No. A-11-999: **State v. Dak**. Petition of appellant for further review denied on February 27, 2013.

No. A-11-1041: **Pohlmann v. Pohlmann**, 20 Neb. App. 290 (2012). Petition of appellant for further review denied on January 23, 2013.

No. A-11-1051: **State v. Torres**. Petition of appellant for further review denied on January 23, 2013.

Nos. A-11-1084, A-11-1085: **State v. Griffin**, 20 Neb. App. 348 (2012). Petitions of appellant for further review denied on February 13, 2013.

Nos. A-11-1084, A-11-1085: **State v. Griffin**, 20 Neb. App. 348 (2012). Petitions of appellee for further review denied on February 13, 2013.

No. A-11-1106: **State v. Boswell**. Petition of appellant for further review denied on February 13, 2013.

No. S-11-1109: **Braunger Foods v. Sears**, 20 Neb. App. 428 (2012). Petition of appellant for further review sustained on February 21, 2013.

No. A-12-046: **State v. Shadle**. Petition of appellant for further review denied on March 20, 2013.

No. A-12-074: **State on behalf of Keegan M. v. Joshua M.**, 20 Neb. App. 411 (2012). Petition of appellant for further review denied on March 13, 2013.

No. A-12-096: **Graves v. Scottsbluff Urology Assocs**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-100: **In re Estate of Stride**. Petition of appellant for further review denied on March 13, 2013.

No. S-12-112: **State v. Osborne**, 20 Neb. App. 553 (2013). Petition of appellant for further review sustained on April 10, 2013.

No. A-12-124: **Carper v. Carper**. Petition of appellant for further review denied on March 15, 2013.

No. A-12-159: **Hubbart v. Hormel Foods**, 20 Neb. App. 309 (2012). Petition of appellant for further review denied on May 8, 2013.

No. A-12-166: **Eich v. American General Life Ins. Co**. Petition of appellant for further review denied on January 3, 2013.

No. A-12-168: **State v. Harms**. Petition of appellant for further review denied on January 31, 2013.

No. A-12-183: **Traffansetdt v. Seal-Rite Insulation**. Petition of appellee for further review denied on February 13, 2013.

No. A-12-184: **Jurgens v. Irwin Indus. Tool Co.**, 20 Neb. App. 488 (2013). Petition of appellant for further review denied on May 15, 2013.

No. A-12-186: **Estate of Hansen v. Bergmeier**, 20 Neb. App. 458 (2013). Petition of appellant for further review denied on April 24, 2013.

No. A-12-204: **State v. Robertson**. Petition of appellant for further review denied on April 17, 2013.

No. A-12-213: **Comstock v. Comstock**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-243: **Maciorowski v. Maciorowski**. Petition of appellant for further review overruled without prejudice on March 28, 2013, as premature.

No. A-12-243: **Maciorowski v. Maciorowski**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-247: **State v. Stolp**. Petition of appellee for further review denied on January 23, 2013.

No. A-12-249: **State v. Door**. Petition of appellant for further review denied on March 13, 2013.

No. A-12-262: **James Neff Kramper Family Farm v. Garwood**. Petition of appellant for further review denied on March 13, 2013.

No. A-12-290: **State v. Richardson**. Petition of appellant for further review denied on April 17, 2013.

No. A-12-309: **Cheloha v. Cheloha**. Petition of appellant for further review denied on January 18, 2013, due to untimely filing.

No. A-12-316: **Anderson v. Lancaster County**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-318: **State v. White**. Petition of appellant for further review denied on January 23, 2013.

Nos. S-12-346, S-12-347: **Reynolds v. Keith Cty. Bd. of Equal**. Petitions of appellant for further review sustained on March 13, 2013.

No. A-12-352: **Hultine v. Hultine**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-354: **Harris v. Iowa Tanklines**, 20 Neb. App. 513 (2013). Petition of appellant for further review denied on April 24, 2013.

No. A-12-387: **Caton v. Department of Corr. Servs**. Petition of appellant for further review denied on February 21, 2013.

No. A-12-392: **In re Interest of Rose H. et al**. Petition of appellee Christopher H. for further review denied on May 15, 2013.

No. A-12-393: **In re Interest of Timothy H**. Petition of appellee Christopher H. for further review denied on May 15, 2013.

No. A-12-416: **State v. Olson**. Petition of appellant for further review denied on January 31, 2013.

No. A-12-449: **Yates v. T & Q Properties**. Petition of appellant for further review denied on May 8, 2013.

No. A-12-457: **State v. Adolph**. Petition of appellant for further review denied on February 13, 2013.

No. A-12-467: **State v. Cruz**. Petition of appellant for further review denied on March 27, 2013.

No. A-12-493: **Aguirre v. Union Pacific RR. Co.**, 20 Neb. App. 597 (2013). Petition of appellee for further review denied on May 8, 2013.

No. A-12-542: **State v. Cole**. Petition of appellant for further review denied on April 17, 2013.

No. A-12-544: **State v. Marzolf**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-546: **State v. Lovette**. Petition of appellant for further review denied on April 17, 2013.

Nos. A-12-553, A-12-554: **State v. Martin**. Petitions of appellant for further review denied on February 13, 2013.

No. A-12-584: **State v. Pilachowski**. Petition of appellant for further review denied on March 13, 2013.

No. A-12-616: **George v. Britten**. Petition of appellant for further review denied on February 27, 2013.

No. A-12-634: **Schoepf v. Schoepf**. Petition of appellant for further review denied on March 13, 2013.

No. A-12-635: **Wells v. Britten**. Petition of appellant for further review denied on March 27, 2013.

No. A-12-639: **State v. Pigee**. Petition of appellant for further review denied on March 20, 2013.

No. S-12-642: **State v. Clayborne**. Petition of appellant for further review sustained on February 21, 2013.

No. A-12-697: **Gomez v. Kohl**. Petition of appellant for further review denied on April 12, 2013, as untimely. See § 2-102(F)(1).

No. A-12-701: **State v. Choul**. Petition of appellant for further review denied on March 13, 2013.

No. A-12-706: **State v. Castonguay**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-735: **State v. Graf**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-737: **State v. Butler**. Petition of appellant for further review denied on January 16, 2013.

No. A-12-772: **State v. Khalaf**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-796: **Central Neb. Pub. Power & Irr. Dist. v. Hixson**. Petition of appellant for further review denied on March 27, 2013.

No. A-12-815: **Happy Cab v. City Taxi**. Petition of appellee for further review denied on March 27, 2013.

No. A-12-865: **State v. McDougald**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-869: **State v. Thornton**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-874: **State v. Peterson**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-876: **State v. Marion**. Petition of appellant for further review denied on March 27, 2013.

No. A-12-917: **State v. Rollie**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-961: **State v. Nielsen**. Petition of appellant for further review denied on April 17, 2013.

No. A-12-970: **State v. Bannister**. Petition of appellant for further review denied on April 10, 2013.

No. A-12-992: **Addleman v. Addleman**. Petition of appellant for further review denied on January 23, 2013.

No. A-12-1019: **State v. Jenkins**. Petition of appellant for further review denied on May 15, 2013.

No. A-12-1034: **Sea-Hubbert Farms v. Boston**. Petition of appellant for further review denied on March 14, 2013, as filed out of time. See § 2-102(F)(1).

No. A-12-1048: **State v. Jarman**. Petition of appellant for further review denied on May 15, 2013.

No. A-12-1114: **State v. Ransom**. Petition of appellant for further review denied on May 15, 2013.

No. A-12-1121: **State v. O'Neal**. Petition of appellant for further review denied on May 15, 2013.

No. A-12-1128: **State v. Rosado**. Petition of appellant for further review denied on May 8, 2013.

No. A-13-151: **State v. Harden**. Petition of appellant for further review denied on May 8, 2013.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

RITA A. SUTTON AND KAI CARLSON, APPELLEES, V. HELEN KILLHAM ET AL., APPELLEES, AND 3RP OPERATING, INC., INTERVENOR-APPELLANT.

825 N.W.2d 188

Filed January 11, 2013. No. S-11-083.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **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.
3. ____: ____. 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.
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, irrespective of whether the issue is raised by the parties.
5. **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.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CASSEL, Judges, on appeal thereto from the District Court for Cheyenne County, BRIAN C. SILVERMAN, Judge. Judgment of Court of Appeals affirmed.

Gregory J. Beal for intervenor-appellant.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellees Helen Killham et al.

Sterling T. Huff, of Island & Huff, P.C., L.L.O., receiver.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Per Curiam.

NATURE OF CASE

Intervenor-appellant, 3RP Operating, Inc., filed a claim with the receiver for payment of operating expenses of an oil well. The receiver denied 3RP Operating's claim. 3RP Operating intervened in the pending action in which the receiver had been appointed. Thereafter, the receiver filed a motion for summary judgment. The district court for Cheyenne County sustained the receiver's motion for summary judgment, thus approving the denial of 3RP Operating's claim. 3RP Operating appealed to the Nebraska Court of Appeals. The Court of Appeals determined that it had jurisdiction over 3RP Operating's appeal and, with respect to the merits, affirmed the district court's judgment. See *Sutton v. Killham*, 19 Neb. App. 842, 820 N.W.2d 292 (2012). We granted 3RP Operating's petition for further review. Although our reasoning differs from that of the Court of Appeals, we agree that appellate jurisdiction exists. With respect to the merits, we agree with the Court of Appeals that the claim of 3RP Operating was properly denied and that its challenge to the sufficiency of the receiver's bond is without merit. We affirm.

STATEMENT OF FACTS

This appeal stems from underlying cases filed in the county court for Cheyenne County, in which six siblings are disputing the assets of their parents' estate which was put into trusts. The county court transferred one case to the district court for Cheyenne County pursuant to Neb. Rev. Stat. § 25-2706 (Reissue 2008). That case gives rise to the instant appeal. In its order transferring the case to the district court, the county

court noted that as a general rule, equity jurisdiction remains with the district court, and that the request for damages in the case exceeded the county court's jurisdictional authority under Neb. Rev. Stat. § 24-517 (Cum. Supp. 2002).

After the case was transferred to district court, the court created a receivership pursuant to Neb. Rev. Stat. § 25-1081 (Reissue 1995). See Neb. Rev. Stat. §§ 25-1081 to 25-1092 (Reissue 1995 & Cum. Supp. 2006). The receiver and successor receiver managed the oil well at issue pending resolution of ownership issues related to the oil well. It appears from the record that the issues raised by the siblings in the underlying action have been resolved through mediation or court order but that the oil well which is the asset subject to the receivership has not been disposed of.

On January 11, 2007, 3RP Operating filed a claim with the receiver in connection with the operation of the oil well. 3RP Operating sought operating expenses from 2003 through June 2006. The receiver denied the claim. 3RP Operating intervened in the district court case, seeking payment based on contract and quantum meruit. It did not align itself with any other party.

On November 1, 2010, the receiver filed a motion for summary judgment. On December 30, the district court granted the receiver's motion for summary judgment, thus approving the denial of the claim for payment of services. 3RP Operating appealed this order.

The Court of Appeals determined that it had jurisdiction over 3RP Operating's appeal. With respect to the merits, the Court of Appeals agreed with the district court that because 3RP Operating had no corporate existence during the time period for which it sought payment, the receiver correctly denied the claim and the district court correctly approved the receiver's denial. The Court of Appeals affirmed the district court's grant of summary judgment. In connection with an unrelated assignment of error, the Court of Appeals found no merit to 3RP Operating's challenge to the adequacy of the bond of the receiver. We granted 3RP Operating's petition for further review.

ASSIGNMENT OF ERROR

On further review, 3RP Operating assigns, rephrased, that the Court of Appeals erred when it affirmed the summary judgment denying its claim and found no error with respect to the receiver's bond.

STANDARDS OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law. *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012).

[2,3] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (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.*

ANALYSIS

Jurisdiction: Final, Appealable Order.

This case is before us on further review. After extensive analysis, the Court of Appeals concluded it had appellate jurisdiction and proceeded to the merits. The Court of Appeals concluded that the order appealed from was not a final order under Neb. Rev. Stat. § 25-1911 (Reissue 2008). However, the Court of Appeals determined that the order at issue was a further direction to the receiver and concluded that it had appellate jurisdiction based on its reading of § 25-1090, which provides in part: "All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the Court of Appeals in the same manner as final orders and decrees."

[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, irrespective of whether the issue is raised by the parties. *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012). Generally, only final orders are appealable. See § 25-1911. 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).

Within its finality analysis, the Court of Appeals determined that the denial of claim order does not fall within the second category because the order is not an order that affects a substantial right and was not made during a special proceeding. In making this determination, the Court of Appeals referred to *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001), in which we stated that special proceedings entail civil remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. The Court of Appeals reasoned that because the denial of claim issue is encompassed by the receivership created under chapter 25, it was not a special proceeding and thus not an order that affects a substantial right made in a special proceeding.

The proposition in *Nebraska Nutrients* upon which the Court of Appeals relied has been abrogated by our subsequent decisions. For example, in *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 597, 788 N.W.2d 538, 546 (2010), we clarified that

> special proceedings include civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes that are not actions. This statement does not mean that statutory remedies within the civil procedure statutes are never special proceedings because, as *Webb* [*v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004)] illustrates, they sometimes are located within those statutes.

Thus, to the extent that the Court of Appeals reasoned that the order appealed from could not be a final order because it stemmed from a proceeding initiated under chapter 25 of the Nebraska Revised Statutes, we disapprove of this reasoning. Instead, we conclude that the order at issue is a final order from which an appeal may be taken. In view of this determination, we do not analyze the correctness of the Court of Appeals' determination that the denial of claim order was appealable under § 25-1090.

Merits of the Denial of Claim Order on Appeal.

The Court of Appeals determined that the district court properly entered summary judgment for the receiver, thus approving the denial of 3RP Operating's claim for operating expenses. We find no error in this decision. We note for completeness that the Court of Appeals observed that the record contains evidence that certain individuals did work to operate the well, but that the claim at issue was not presented by the individuals in their individual capacities for individual compensation and thus expressed no view on the strength of these potential claims. We agree with this observation.

In its opinion, the Court of Appeals stated:

> The district court's basic rationale for the finding that the receiver did not have to pay the claim of 3RP Operating was that the claim was being brought by a corporation for costs and expenses for the operation of the [well], but that such corporation did not even exist during the time when the claim was asserted.

Sutton v. Killham, 19 Neb. App. 842, 860, 820 N.W.2d 292, 306 (2012). The Court of Appeals continued, "3RP Operating, the corporate entity making the claim before us in this appeal, has never been the operator of [the well at issue]." *Id.* at 861, 820 N.W.2d at 307.

The claim filed by 3RP Operating was for costs and expenses from 2003 through June 2006. The undisputed evidence shows that 3RP Operating did not gain legal existence until September 2006. Based on the record, there is no issue of material fact regarding the claim; 3RP Operating is not entitled to be paid

for the operating expenses it seeks. The Court of Appeals properly determined that the district court correctly granted the receiver's motion for summary judgment.

Sufficiency of Bond.

In its opinion, the Court of Appeals recited the procedural history of the bond posted by the receiver. It is not necessary to repeat the history, except to say that after no bond was initially required, the record shows that in response to a subsequent district court order, the receiver posted a bond in the amount of $10,000. In argument made to the Court of Appeals, 3RP Operating asserted that the amount of the bond was inadequate. The Court of Appeals rejected this argument, as do we on further review.

In its opinion, the Court of Appeals considered 3RP Operating's claim regarding the receiver's bond and stated:

> The intervenor's argument is that given that the receiver had in excess of $40,000 in his possession, he should have had a bond. We cannot disagree, but the intervenor, 3RP Operating, . . . by virtue of the summary judgment which we have affirmed, has no financial interest in the estate or what remains of this case. In short, the intervenor does not make any argument telling us how this error in the proceedings caused it prejudice, and no other party complains about the matter in this appeal. Accordingly, we find no prejudice to the intervenor or any other ground for any relief to the receiver [sic] on this basis.

Sutton v. Killham, 19 Neb. App. at 864, 820 N.W.2d at 308.

We agree with this reasoning of the Court of Appeals. Although the parties initially stipulated that the receiver could serve without the necessity of posting a bond, the district court correctly determined that such waiver was not permissible under § 25-1084 and ordered the receiver to post a bond. 3RP Operating has not advanced any argument on further review which casts doubt on the reasoning of the Court of Appeals or why the outcome before the Court of Appeals should be reversed. We find no merit to this assignment of error.

CONCLUSION

We affirm the decision of the Court of Appeals finding appellate jurisdiction, affirming the district court's grant of the receiver's motion for summary judgment, and finding no merit to 3RP Operating's challenge to the sufficiency of the bond.

AFFIRMED.

CASSEL, J., not participating.

CONNOLLY, J., concurring.

I concur in the majority's judgment. I write separately to explain why the district court's order was final and appealable.

I agree with the majority that our arbitration cases show that special proceedings can be statutory remedies that lie within chapter 25 of the Nebraska Revised Statutes.[1] Moreover, I believe that our reasoning in those arbitration cases and the rules applicable to receiverships support a conclusion that receiverships are special proceedings. That is, a court can appoint a receiver only in an action that is pending, and the issues presented by a motion for a receiver are discrete and independent of the issues presented by the parties' pleadings in the action.[2] The majority's opinion, however, could be interpreted to mean that the court's order was issued in a special proceeding. But this characterization of the order would be incorrect.

Because 3RP Operating intervened in the main action between the parties, the primary jurisdiction issue is whether the appeal is from a final order *in an action*.[3] If not, then the secondary jurisdiction issue is whether Neb. Rev. Stat. § 25-1090 (Reissue 2008) authorized 3RP Operating's appeal

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[1] See, *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010); *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[2] See, Neb. Rev. Stat. § 25-1082 (Reissue 2008); *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989); *Cressman v. Bonham*, 129 Neb. 201, 260 N.W. 818 (1935); *Mann v. German-American Investment Co.*, 70 Neb. 454, 97 N.W. 600 (1903). See, also, *Kremer, supra* note 1.

[3] See Neb. Rev. Stat. § 25-1902 (Reissue 2008).

from an interlocutory order. I believe that § 25-1090 applies only to interlocutory orders, and an order cannot be both final and interlocutory. So I write to explain why 3RP Operating has appealed from a final order in an action.

Under § 25-1902, a summary judgment proceeding is a step in the overall action, not a special proceeding or summary application.[4] Orders granting partial summary judgment are usually considered interlocutory and not appealable unless the order affects a substantial right and, in effect, determines the action and prevents a judgment.[5] The order must completely dispose of the whole merits of the case and leave nothing for the court's further consideration.[6]

A substantial legal right includes those legal rights that a party is entitled to enforce or defend.[7] An order that completely disposes of the subject matter of the litigation in an action or a proceeding both is final and affects a substantial right because it conclusively determines a claim or defense.[8]

In its opinion, the Nebraska Court of Appeals noted that despite requesting the parties to brief the jurisdiction issue, the appellees had not pointed to any outstanding claim in the action.[9] After reviewing this record, I conclude that there are no unresolved issues in the action.

The record shows that in August 2004, the parties entered into a settlement agreement in the district court's presence. This entire transcript was later incorporated into a court order to set out the terms of the agreement. That transcript shows that the parties agreed to dismiss with prejudice and to mutually release each other from all claims and counterclaims, except for two opposing claims: the claim of appellee Rita A. Sutton that she was entitled to purchase her sibling's mineral interests in the property versus her sibling's counterclaims that

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[4] See *Big John's Billards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[5] See *id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Sutton v. Killham*, 19 Neb. App. 842, 820 N.W.2d 292 (2012).

they were entitled to have the property, including the mineral interests, partitioned. In March 2005, Sutton's claim was resolved against her in a summary judgment, and in August 2007, the court adopted the referee's recommendation to sell the parties' interest and divide the proceeds.

Unfortunately, the trial court did not dismiss the action and clarify that it was retaining the receiver only to perform postjudgment duties: to manage and protect the parties' interests pending an appeal and to execute its judgment to sell the property if its judgment were affirmed. Instead, in October 2008, the court permitted 3RP Operating to intervene. But the court's summary judgment for the receiver unquestionably decided the last remaining claim in the action.

The Court of Appeals concluded that the order was not a final order in an action solely because the court had not terminated the receivership.[10] I believe that this reasoning incorrectly confuses the finality of the receivership proceeding with the finality of the underlying action. Neb. Rev. Stat. § 25-1081(6) (Reissue 2008) permits a court to appoint a receiver "after judgment or decree to carry the judgment into execution, to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal." The trial court retained the receiver solely to perform the same postjudgment duties that are allowed under § 25-1081(6). So I do not believe that the court's retention of the receiver was an action that affected whether it entered a final order in the action. To conclude otherwise would indefinitely leave parties in limbo, without a right of appeal.

Because the court's order decided the last of the issues between these parties and it retained the receiver only to perform postjudgment duties, I believe that 3RP Operating has appealed from a final order in an action.

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[10] See *id.*

STATE OF NEBRASKA, APPELLEE, V. DALLAS L. HUSTON, APPELLANT.

824 N.W.2d 724

Filed January 11, 2013. No. S-11-539.

1. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.
3. **Pretrial Procedure: Evidence.** A motion to redact that seeks the exclusion of prejudicial evidence through redaction essentially functions as a motion in limine, even if it is not labeled as such.
4. **Pretrial Procedure: Evidence: Juries.** A motion asking for the exclusion of evidence in a particular manner, such as redaction, functions as a motion in limine so long as it requests that certain evidence be withheld from the jury due to its prejudicial nature.
5. **Pretrial Procedure: Evidence: Appeal and Error.** When a motion to redact evidence is overruled, the movant must object at trial when the specific evidence which was sought to be excluded by the motion is offered in order to preserve error for appeal.
6. **Rules of Evidence: Appeal and Error.** Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 2008), states that error can be based on a ruling that admits evidence only if the specific ground of objection is apparent either from a timely objection or from the context.
7. **Trial: Evidence.** Even if there are inadmissible parts within an exhibit, an objection to an exhibit as a whole is properly overruled where a part of the exhibit is admissible.
8. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
9. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
10. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
11. **Effectiveness of Counsel: Presumptions: Appeal and Error.** There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

James R. Mowbray and Jeffery A. Pickens, 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, MILLER-LERMAN, and CASSEL, JJ.

CASSEL, J.

I. INTRODUCTION

Nearly 2 months before Dallas L. Huston's jury trial for second degree murder, the district court ruled on Huston's motion to redact video recordings of his police interviews—excluding portions but allowing the remainder. On appeal from Huston's later conviction and sentence, we conclude that trial counsel did not preserve any objection to the admission of the remaining portions of the recordings at trial by merely stating, "No further objection . . . ." Huston also argues, through different counsel on direct appeal, that the failure to object constituted ineffective assistance of counsel. Because we find the record to be insufficient to adequately address the question of trial counsel's effectiveness, we do not reach this issue on direct appeal.

II. BACKGROUND

Huston and Ryan Johnson were living together as a couple in a nonsexual relationship when Huston allegedly found Johnson in their bedroom with plastic wrap wrapped around his face at around 11:15 a.m. on September 16, 2009. Huston called the 911 emergency dispatch service at 11:28 a.m. Paramedics performed lifesaving measures but were unable to revive Johnson.

Given that Johnson had previously attempted suicide, the police initially investigated his death as a suicide. As part of this investigation, they interviewed Huston numerous times. Due to the number and length of these interviews, we provide only a brief overview, focusing on pertinent sections as necessary later in the opinion.

The police first interviewed Huston on the day of Johnson's death, mainly asking him questions related to (1) the possible

reasons for Johnson's apparent suicide and (2) the events leading to Johnson's death. Huston admitted that he was alone in the house with Johnson that morning, but stated that he had gotten up around 9 a.m. and spent the morning in the living room, while Johnson slept. According to Huston, he decided to check on Johnson at approximately 11:15 a.m. because Johnson had vomited earlier that morning. Huston claimed that he then found Johnson lying on the bed with plastic wrap covering his face and no perceptible pulse.

The police again interviewed Huston on September 29, 2009. It was during this interview that Huston's multiple personalities first emerged. Huston later admitted at trial that he made up these different personalities as part of a "social experiment" and that he controlled them completely. As such, we refer to these personalities solely to provide context for Huston's statements.

Shortly before the September 29, 2009, interview, the police received a report that Huston had told his friend, Nicholas Berghuis, that the personality "Vincent" helped Johnson to commit suicide. When confronted with this report during the interview, Huston admitted that he had trouble with multiple personalities, that one of his personalities was called Vincent, and that Johnson had asked for help in committing suicide in the past, but Huston denied any involvement with Johnson's death. Huston allowed the police officers to speak with the personality "Que," who explained that when Huston made those statements to Berghuis, he was describing a nightmare he had been having since Johnson's death. The personality "Que" also directed the officers to a video on Huston's computer of "Que" pretending to kill Johnson by putting a pillow over his face.

Because Huston had told Berghuis and another friend, Christopher Wilson, that one of his personalities had been involved in Johnson's death, Berghuis and Wilson arranged with the police to set up video surveillance in Wilson's house, where Huston often spent time. Huston's conversations with Berghuis and Wilson on October 6 and 7, 2009, were recorded. During these conversations, Huston's various personalities admitted that "Vincent" assisted in Johnson's death at Johnson's

request. Specifically, the personality "Vincent" admitted to (1) wrapping the plastic wrap around Johnson's face, during which time Johnson yelled, "Get it off"; (2) holding a pillow over Johnson's face when Johnson broke through the plastic wrap while trying to breathe; and (3) listening to Johnson's last heartbeats "with enjoyment."

Following the video surveillance on October 7, 2009, the police brought in Huston for questioning. Over the course of the interview, Huston went from vehemently denying any involvement in Johnson's death to admitting that the events he described were not a dream and that he physically aided in Johnson's death, albeit through the personality "Vincent."

Huston tried to retract these statements in his next interview with the police on the evening of October 8, 2009. He denied any involvement in Johnson's death and claimed that he had been "badgered" into making a confession during the previous interview. By the conclusion of the interview on October 8, however, Huston again admitted that he participated in Johnson's death by wrapping plastic wrap around Johnson's head and holding a pillow over his face.

In an interview on October 10, 2009, Huston revealed that Johnson had asked for his help in committing suicide. Huston maintained that he "helped [Johnson] commit suicide" and that he did not "murder him."

Huston was ultimately arrested and charged with second degree murder. He pled not guilty, and his case went to jury trial in January 2011.

Prior to trial, Huston filed a motion requesting the district court to redact the video recordings of his police interviews. The State agreed with some of the proposed redactions, and the court ruled on the proposed redactions to which the parties did not agree. Some of Huston's proposed redactions were sustained, but others were not. After receiving the court's rulings, the State edited the video recordings to reflect the redactions that had been agreed to by the State or ordered by the court. These video recordings were admitted into evidence at Huston's subsequent trial and were published to the jury. When asked whether there were any objections to the admission of these video recordings, Huston's counsel

responded by stating that he had either no objection or no "further" objection.

The testimony at trial included both the video recordings of Huston's police interviews—including the proposed redactions that were not sustained—and testimony from the police officers who had conducted those interviews. Of this plethora of evidence, we mention only the nine specific portions that have been identified by Huston on appeal. These segments include evidence relating to (1) Huston's "homosexual encounter"[1] with Wilson, (2) speculation that Huston is a serial killer and Huston's future dangerousness, and (3) the opinions of police officers that Huston's actions constituted murder as opposed to assisted suicide.

First, in the video recording of Huston's interview with the police on the day of Johnson's death, Huston described his "homosexual encounter" with Wilson. Huston's conversation with the police officer conducting the interview went as follows:

> [Huston:] Okay, to be completely honest, me and [Wilson] were together once. Only once. Um, it's how it came out to [Johnson] that we might have been interested in each other, but [Wilson] decided he didn't want to do that.
>
> [Police officer:] Okay, and was this early in your relationship with [Johnson]? Or—
>
> [Huston:] [Interrupting.] Oh, no, no. . . . [Wilson] is only been back around—. See, [Wilson] has only been back in the picture as a friend of ours for like a month. . . . I believe in being upfront. Yes, one time and only one time me and [Wilson] were together and we—. Well, we went to bed together, and—
>
> [Police officer:] [Interrupting.] How long ago was that? . . . .
>
> [Huston:] . . . Three weeks ago.
>
> [Police officer:] So, it is pretty recent, then.
>
> [Huston:] Yep. . . . You probably don't want to hear this, but me and [Johnson] had kind of a unique

[1] Brief for appellant at 34.

> relationship. . . . I know it's kind of a weird situation to be in [be]cause in the 4 years of our relationship, there was never anything sexual. Um, and we allowed ourselves . . . an "open relationship." We allowed ourselves what he'd call "[expletive] buddies." . . . That one and only one time that me and [Wilson] ended up . . . was kind of a "heat of the moment," you know, "spur of the moment" type thing. . . . We ended up in bed together. We kissed. We, we made out. But it never went anywhere further than that.

While this was the only evidence of the "homosexual encounter" with Wilson, Huston's physical attraction to Wilson was referenced in several of the other video recordings received into evidence at trial. In every case, the evidence related to Wilson was received into evidence without objection from Huston's trial counsel.

Second, in the video recording of Huston's October 10, 2009, interview with the police, Huston and Sgt. Gregory Sorensen of the Lincoln Police Department discussed serial killers, the possibility that Huston was a serial killer, and Huston's future dangerousness. The dialog went as follows:

> [Huston:] . . . This is what I meant, though, when I've told everybody that I want to get help. I never thought this could happen, and now that this has happened, I am so scared that I'm capable of doing it again.
>
> [Sorensen:] Yeah, I think that that's probably really true.
>
> [Huston:] And that scares me to death because, like I said, I have never thought of myself as a violent person, and now I don't know what to think of myself.
>
> [Sorensen:] Well, especially when you consider that you have urges to kill the people that you're attracted to.
>
> [Huston:] And I've done everything that I could for the last, you know . . . . You know, the earliest memories of this I have are, say, 9, 10 years old. So 18 years I have fought myself.
>
> [Sorensen:] But most serial killers do the same thing at some point in time.

> [Huston:] Oh, wow.
>
> [Sorensen:] At some point in time, they crossed that line. I mean, when you talk about—
>
> [Huston:] [Interrupting.] I've asked myself that.
>
> [Sorensen:] Whether you're a serial killer?
>
> [Huston:] Uh-hum [yes]. I've asked myself that . . . . You've asked me if I have been suicidal in the past.
>
> [Sorensen:] Yeah.
>
> [Huston:] To be completely honest, I lied to you. Because of this, I have been. I have thought about killing myself so I wouldn't hurt anyone.

Later in the same interview, Huston stated, "I am so scared now that this could happen again."

Although not raised by Huston on appeal, at other times during the video recordings of his interviews with the police, he expressed a fear that he might commit homicide again. All of this evidence of Huston's future dangerousness was received into evidence at trial without objection.

Finally, the video recordings of Huston's police interviews referenced the opinion of the police that Huston committed murder as opposed to assisted suicide. On appeal, Huston identified four segments in which this opinion was expressed. Two of these segments were from Huston's interview with the police on October 7, 2009. During this interview, Huston engaged in the following dialog with Sorensen:

> [Sorensen:] . . . [Y]ou or Vincent were the person or persons that killed [Johnson]. And maybe at the time, it started out as a suicide, but it didn't end that way. It just didn't end that way.
>
> [Huston:] See, I don't believe that.
>
> [Sorensen:] You don't believe that it didn't end in a homicide?
>
> . . . .
>
> [Huston:] No, I don't.
>
> . . . .
>
> [Huston:] They asked me that. They asked me that. Did he fight? Did he—

> [Sorensen:] [Interrupting.] He doesn't have to fight. [All] he had to do was break the seal. [All] he had to do was try to breathe, and . . . that was his intent to stay alive—he tried to breathe.

Later in the same interview, Sorensen stated: "[W]hen you put the pillow over his face, you're killing him. He's not killing himself. You're killing him."

Huston identified two more similar comments made by Sorensen in the video recordings, the first during the interview with Huston on October 8, 2009, and the second during the October 10 interview. On October 8, Sorensen said the following:

> You made a pact to commit suicide. When he started to breathe, you put the pillow over the face, which was a continuation of the act. But, say I have a gun in my hand, and say that I want to commit suicide. And so I put it to my head, but before I pull the trigger, I put the gun down. That stops me from committing suicide. Think of this: [Johnson] didn't get a chance. [Johnson] didn't get a chance to make that decision. You made it for him, with the pillow. . . . You know I'm right. He didn't get that chance. He did not get a chance.

On October 10, Sorensen and Huston engaged in the following dialog after Huston asserted that he "didn't murder [Johnson]":

> [Sorensen:] But I don't know how else you can describe it, [Huston]. . . . This isn't assisting a suicide. This, this is just not assisting a suicide. . . . I don't know if you can understand this, but if [Johnson] looks at me right now and he says, "I can't take it anymore. You got to kill me," and I pull a gun out and I shoot him dead—
>
> [Huston:] [Interrupting.] You've tried to say that before and I do understand what you mean.
>
> [Sorensen:] [Johnson's] just asked me to kill him and I don't have that right to do that. He can ask me all he wants, but I don't have the right to do it. And this isn't any different . . . . I know that you think that it is, but it's not.

The video recordings, including all of the aforementioned evidence that the police believed Huston committed murder, were received at trial and published to the jury without objection by Huston's counsel.

The various police officers present for Huston's interviews also testified at trial. Both Sorensen and Sgt. Kenneth Koziol, also of the Lincoln Police Department, testified before the jury, and each stated that, in his opinion, Huston committed murder. While on the stand, Sorensen explained that he called the Lancaster County Attorney during the investigation of Johnson's death "because at that point we no longer had any type of assisting a suicide . . . . So I wanted to inform the county attorney that this was a murder case." And when asked why the police were "a little bit more confrontational" when questioning Huston on October 7, 2009, Koziol explained that by that time they were "pretty confident that it [was] a homicide. We [felt] that . . . Huston caused . . . Johnson's death . . . ." Huston's counsel made no objection to these statements at trial.

Although not identified by Huston on appeal, there were numerous other instances during trial when similar opinion evidence was received into evidence. In none of these instances did Huston's counsel object.

At the conclusion of Huston's trial, the jury returned a verdict of guilty. Huston was sentenced to 50 years' to life imprisonment. He timely appeals.

III. ASSIGNMENTS OF ERROR

Huston alleges, reordered and restated, that the district court erred in admitting evidence (1) of Huston's "homosexual encounter" with Wilson; (2) of the discussion relating to serial killers, speculation that Huston is a serial killer, and Huston's future dangerousness; and (3) of the opinions of police officers that Huston's actions constituted murder as opposed to assisted suicide. Huston also claims that his trial counsel was ineffective in failing to object to this and other evidence.

IV. STANDARD OF REVIEW

[1] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[2]

[2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.[3]

V. ANALYSIS

1. Error in Admission of Evidence

Huston argues that the district court erred in admitting into evidence specific portions of the video recordings of the police interviews on September 16, 2009, marked as exhibit 38; October 7, marked as exhibit 81; and October 10, marked as exhibit 95. The segments to which Huston objects on appeal were previously identified in the background section of this opinion.

Before trial, Huston had filed a motion to redact segments of the video recordings that he argued were prejudicial, irrelevant, or otherwise inadmissible. Huston's motion was sustained in regard to certain proposed redactions and overruled in regard to others. Amongst the proposed redactions overruled by the court were the segments now at issue on appeal. As a result, the video recordings marked as exhibits 38, 81, and 95 still included these segments when they were received into evidence at trial and published to the jury.

When the State offered exhibits 38, 81, and 95 into evidence at trial, the district court specifically asked Huston whether he had any objections. In all three instances, Huston responded that he had "[n]o further objection . . . ." He now argues that these responses were sufficient to preserve for appeal any error that resulted from admitting these exhibits into evidence.

Before we can consider whether Huston's responses at trial were adequate to preserve any potential errors for appeal, we

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[2] *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012).

[3] *Id.*

must first determine whether he was required, despite the filing of a pretrial motion to redact, to raise his objections to those segments when the video recordings were introduced at trial. If he was required to object, then we must consider whether his responses were sufficient. And if they were not, it would naturally follow that his failure to adequately object relieved the trial court of its obligation to rule upon the admissibility of such evidence and also precludes us from considering the issue on appeal.

(a) Necessity of Renewed Objection at Trial

A motion to redact has received little attention in our case law and has never been the subject of any thorough discussion.[4] We take this opportunity to clarify that a motion to redact is a more specific form of a motion in limine and that, as such, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.

The first recorded appearance of a motion in limine in a case before this court was in *State v. Tomrdle*.[5] In that case, we broadly defined a motion in limine as "a procedural step to prevent prejudicial evidence from reaching the jury."[6] This definition does not limit the motion in limine to any particular form. It is simply defined by its purpose of withholding prejudicial evidence from the jury, which can occur in many ways depending on the type of evidence sought to be excluded. As one commentary has noted:

> Regardless of the formalities involved, any request for an evidentiary ruling that is made in advance of trial, that seeks an order to exclude or regulate the production of

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[4] See, *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003); *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003); *State v. Palu*, No. A-06-1166, 2007 WL 2770624 (Neb. App. Sept. 25, 2007) (not designated for permanent publication); *State v. Guerrant*, No. A-02-453, 2003 WL 1962919 (Neb. App. Apr. 29, 2003) (not designated for permanent publication).

[5] *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983).

[6] *Id.* at 585, 335 N.W.2d at 283.

> potentially inflammatory evidence before the jury, and that seeks relief on the ground that the suggestive or uncontrolled revelation of that evidence to the jury may unfairly prejudice the determination of the case may be regarded as a motion in limine.[7]

In the case of evidence that is part of a larger, indivisible piece of evidence, such as a document or recording, redaction may be the most effective way of excluding prejudicial evidence from the jury. Indeed, when only certain portions of a document or recording should be excluded as prejudicial, logistics require redaction of the prejudicial portions prior to trial. In such a case, redaction becomes the means of enforcing the motion in limine.

[3,4] Because a motion in limine may be enforced through redaction, a motion to redact that seeks the exclusion of prejudicial evidence through redaction essentially functions as a motion in limine, even if it is not labeled as such. In the federal courts, a motion requesting the redaction of exhibits so as to exclude prejudicial matter is considered a motion in limine and is often referred to as a "motion in limine to redact."[8] Accordingly, we hold that a motion asking for the exclusion of evidence in a particular manner, such as redaction, functions as

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[7] 20 Am. Jur. *Trials* 441, § 7 at 455 (1973).

[8] See, e.g., *U.S. v. Gayekpar*, 678 F.3d 629 (8th Cir. 2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 375, 184 L. Ed. 2d 221; *Walls v. Buss*, 658 F.3d 1274 (11th Cir. 2011), *cert. denied*, *Walls v. Tucker*, ___ U.S. ___, 132 S. Ct. 2121, 182 L. Ed. 2d 872 (2012); *U.S. v. Laurienti*, 611 F.3d 530 (9th Cir. 2010), *cert. denied* 562 U.S. 1161, 131 S. Ct. 969, 178 L. Ed. 2d 797 (2011); *Foradori v. Harris*, 523 F.3d 477 (5th Cir. 2008); *U.S. v. Jones*, 371 F.3d 363 (7th Cir. 2004); *Klungvedt v. Unum Group*, No. 2:12-cv-00651-JWS, 2012 WL 5363002 (D. Ariz. Oct. 31, 2012); *U.S. v. Matthews*, No. 1:11-cr-00227-JAW, 2012 WL 4343741 (D. Me. Sept. 21, 2012); *U.S. v. Daniels*, No. 3:11-CR-4 JD, 2012 WL 243607 (N.D. Ind. Jan. 25, 2012); *U.S. v. Carriles*, 832 F. Supp. 2d 699 (W.D. Tex. 2010); *U.S. v. Scott*, No. 06-20185, 2011 WL 4905522 (E.D. Mich. Oct. 14, 2011) (unpublished opinion); *Kopp v. U.S.*, Nos. 10-CV-871A, 00-CR-189A, 2011 WL 3171557 (W.D.N.Y. July 27, 2011) (unpublished opinion); *Miller v. Phelps*, No. 08-178-GMS, 2011 WL 2708413 (D. Del. July 12, 2011) (unpublished opinion); *Avington v. Greyhound Lines, Inc.*, No. 05-5343 (JAP), 2008 WL 5500768 (D.N.J. Apr. 3, 2008) (unpublished opinion).

a motion in limine so long as it requests that certain evidence be withheld from the jury due to its prejudicial nature.

In the instant case, Huston's motion to redact sought the redaction of the video recordings because he thought certain statements made during the interviews were prejudicial and irrelevant. He argued that the police officers' opinions that he committed murder were "biased opinion[s]" that were "not otherwise relevant," that the conversation about his dangerousness was "overly prejudicial," and that the statements about his homosexual relationship with Wilson could elicit "prejudicial stereotypes." Because the motion to redact sought a ruling by the court prior to trial that certain evidence should be excluded because it was prejudicial, it was a form of motion in limine subject to the rules and procedures usually applicable to such motions.

[5] When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.[9] Accordingly, when a motion to redact evidence is overruled, the movant must object at trial when the specific evidence which was sought to be excluded by the motion is offered in order to preserve error for appeal.

Requiring a renewed objection in the case of a motion in limine, including a motion to redact, is consistent with the well-established jurisprudential principles of "fairness in administration," discovery of truth, and just determination.[10] Objections assist the court to make correct and fair decisions on evidentiary matters by alerting the court "'to the proper course of action'"[11] on evidentiary matters and "direct[ing] the court's attention to questioned admissibility of particular evidence so that the court may intelligently, quickly, and correctly rule on the reception or exclusion of evidence."[12]

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[9] *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

[10] Neb. Evid. R. 102, Neb. Rev. Stat. § 27-102 (Reissue 2008).

[11] Proposed Nebraska Rules of Evidence, rule 103, comment at 14 (1973).

[12] *State v. Coleman*, 239 Neb. 800, 812, 478 N.W.2d 349, 357 (1992).

In addition to facilitating the truthful and just determination of evidentiary issues in trial proceedings, the procedure of renewing an objection following a motion in limine, including a motion to redact, also provides important procedural safeguards against reversible error, because "the timely raising of claims and objections" often results in the court's being able to "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome."[13] This is particularly important when considering the admissibility of potentially prejudicial evidence such as would be raised in a motion in limine or motion to redact, as a renewed objection provides the court with a final opportunity to (1) determine the potential for prejudice within the context of other evidence at trial[14] and (2) exclude unduly prejudicial evidence *before* it is revealed to the jury if the court determines that it is indeed prejudicial.

We note at this juncture that a renewed objection may not always be required under Fed. R. Evid. 103. This federal rule was revised in 2000 to eliminate the need for a renewed objection "[o]nce the court makes a definitive ruling on the record . . . either at or before trial . . . ." Significantly, Nebraska has not adopted this amendment. Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103(1)(a) (Reissue 2008), which was identical to federal rule 103 prior to the 2000 federal revision, requires an objection in the case of *all* rulings admitting evidence in order for error to be predicated upon such ruling on appeal, even when the court previously considered the admissibility of evidence during in limine proceedings.[15]

In conclusion, we hold that Huston's motion to redact is a form of a motion in limine because it seeks the exclusion of prejudicial evidence in a pretrial proceeding, and accordingly, we review it as such.

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[13] *Puckett v. United States*, 556 U.S. 129, 134, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009).

[14] See *U.S. v. Graves*, 5 F.3d 1546, 1552 (5th Cir. 1993) (noting that "rationale for requiring either a renewed objection, or an offer of proof, is to allow the trial judge to reconsider his in limine ruling with the benefit of having been witness to the unfolding events at trial").

[15] See, e.g., *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011).

(b) Adequacy of Huston's Response

Having determined that Huston was required to renew his objection to the relevant statements at trial despite having previously objected to these same statements in his motion in limine, we now turn to the question whether Huston's responses at trial that he had "[n]o further objection . . ." were sufficient to preserve these issues for appeal.

Huston argues that he did preserve these issues for appeal because the context of his responses "indicates that counsel meant no objection other than the specific objection found in Huston's 'Proposed Redactions' . . . and in [the transcript of the video] and [the court's rulings on the proposed redactions]."[16] In so arguing, Huston relies upon § 27-103(1)(a), which provides that an objection must state "the specific ground of objection, if a specific ground was not apparent from the context," and argues that his previous motion to redact was part of the context that should have been considered when the court was ruling on exhibits 38, 81, and 95.

Nebraska courts have occasionally waived the requirement to make an objection at trial and considered an issue on appeal when a party's objection was obvious from previous proceedings before the lower court. In *State v. Mowell*,[17] we held that the defendant had preserved an issue for appeal because "the prior hearing should have made the specific ground of the objections apparent to both the State and the trial court." In that case, however, the prior hearing to which we referred took place earlier that same day. During that prior hearing, the defendant had made a record as to the foundations for his objections so as to obviate the need to explain his objections in the presence of the jury during trial. When the defendant in *Mowell* objected at trial, he stated that he was objecting "'on the basis of the objections that I made previously'" and "'for the reasons previously stated.'"[18] The Nebraska Court of Appeals also considered a similar situation in *State v.*

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[16] Brief for appellant at 36 (citations omitted).

[17] *State v. Mowell*, 267 Neb. 83, 99, 672 N.W.2d 389, 402 (2003).

[18] *Id.* at 98, 672 N.W.2d at 401.

Gardner,[19] where the defendant took issue with the trial court's exclusion of evidence. In that case, the Court of Appeals determined that "[the defendant's] pretrial argument in favor of the excluded testimony constituted sufficient notice of the substance of the evidence sought to be offered to preserve error on appeal."[20] As in *Mowell*, the defendant's "pretrial argument" in *Gardner* occurred on the same day that the evidence was offered at trial.

The situation surrounding Huston's responses at trial is distinguishable from the facts in *Mowell* and *Gardner* for two reasons. These differences are such that the context of Huston's responses at trial did not encompass the motion to redact or transform his responses into proper objections sufficient to preserve error for appeal.

First, Huston's motion to redact was too far removed in time from the offering of exhibits 38, 81, and 95 at trial to be viewed as "context" to Huston's responses. In *Mowell* and *Gardner*, the court heard the defendants' objections to the evidence on the same day as the admission of that evidence at trial. Huston's objections in the motion to redact were before the court almost 2 months prior to admission of the relevant video recordings at trial. Huston's motion to redact was filed on December 3, 2010. Exhibits 38, 81, and 95 were offered into evidence on January 25, January 31, and February 2, 2011, respectively. Given the length of time between the motion to redact and the admission of the exhibits at trial, we do not find that it was apparent from the context of Huston's responses that he intended to stand on the objections made in his motion to redact. If Huston intended to do so, he should have made that connection to the pretrial proceedings unquestionably apparent, as did the defendant in *Mowell*. Given that Huston did not do so, we do not interpret his responses to the State's offer of exhibits 38, 81, and 95 as incorporating the objections raised in the motion to redact.

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[19] *State v. Gardner*, 1 Neb. App. 450, 498 N.W.2d 605 (1993).

[20] *Id.* at 455-56, 498 N.W.2d at 609.

[6] Second, even if we accept Huston's explanation that he was incorporating the objections previously made in his motion to redact, the grounds of his objections to the specific evidence mentioned on appeal still are not apparent. Section 27-103(1)(a) states that error can be based on a ruling that admits evidence only if the "specific ground of objection" is apparent either from a timely objection or from the context. In the case before us, the grounds for Huston's objections during trial to exhibits 38, 81, and 95 were not obvious from the pretrial proceedings. The motion to redact included numerous proposed redactions, and many of those proposed redactions were not sustained by the district court. Huston now assigns error to the admission of only a few of the statements that were overruled in his motion to redact. As a result, even if the court was aware that he was relying on his previous motion, it would have had no way of knowing to which statements he maintained an objection.

In previous cases, when defendants have made references to previous motions without specifically identifying the grounds for objection at trial, this court has ruled that their objections were not sufficient. For example, we have stated that a "general objection based on the 'motion in limine' [did] not identify which of the many previously filed motions provided the purported basis for [the] objection" and advised that a defendant must "[t]ell the court the reason why the evidence is inadmissible."[21] This court also has noted that after a pretrial order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement in order to preserve the question for review on appeal because this "obviates the necessity of the trial court's guessing whether defendant wants his statement before the jury and removes the possibility of defendant's second-guessing the admissibility of the evidence after an unfavorable result."[22]

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[21] *State v. Harris*, 263 Neb. 331, 341, 640 N.W.2d 24, 34-35 (2002).

[22] *State v. Pointer*, 224 Neb. 892, 895, 402 N.W.2d 268, 271 (1987).

[7] The district court in the instant case was forced to engage in a similar guessing game because Huston failed to tell the court why exhibits 38, 81, and 95 were inadmissible. The presence of the word "further" was not sufficient by itself to transform the statement "[n]o further objection . . ." into a specific and timely objection. We also note that Huston's statements failed to specify that he was objecting to particular segments of the video recordings and not to the exhibits *as a whole*. Failing to make this distinction can affect whether an exhibit is admissible.[23] Even if there are inadmissible parts within an exhibit, "an objection to an exhibit *as a whole* is properly overruled where a part of the exhibit is admissible."[24] Therefore, because Huston's statements failed to specify the grounds for his objection and that he was objecting to only specific portions of the exhibits, these responses at trial were not sufficient to constitute a valid objection based upon Huston's previous motion to redact.

In conclusion, we hold that the grounds for any alleged objections made by Huston in response to the offers of exhibits 38, 81, and 95 were not apparent from the context and that the alleged objections were consequently not valid under § 27-103. Because Huston did not object to exhibits 38, 81, and 95—or any allegedly inadmissible statements contained therein—when they were offered into evidence at trial, any evidentiary error that resulted from admitting these exhibits into evidence was not preserved for appeal.

2. Ineffective Assistance of Counsel

Anticipating our conclusion that Huston did not preserve for appeal any error relating to the admission of exhibits 38, 81, and 95 into evidence, he argues that his trial counsel was ineffective for failing to preserve these errors for appeal. Huston specifically argues that his trial counsel was ineffective for failing to object to the pieces of evidence that were

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[23] See *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997).

[24] *Id.* at 743, 566 N.W.2d at 748 (emphasis supplied).

identified in the background section of this opinion and that relate to (1) Huston's "homosexual encounter" with Wilson, (2) speculation that Huston is a serial killer and Huston's future dangerousness, and (3) the opinions of police officers that Huston's actions constituted murder as opposed to assisted suicide.

[8,9] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[25] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[26] 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.[27] In the instant case, the record is insufficient to consider Huston's claims of ineffective assistance of counsel on direct appeal.

Huston's ineffective assistance of counsel claims all relate to his trial counsel's failure to object to certain evidence from the video recordings and from trial testimony. The majority of this evidence was included in Huston's pretrial motion to redact and was later received into evidence at trial without any objection from Huston's counsel. But at least two pieces of evidence underlying Huston's ineffective assistance of counsel claims were not included in the pretrial motion to redact. Neither did his counsel object to the evidence at trial. Huston thus claims that his counsel was ineffective either for failing to object in any way to certain evidence or for failing to renew at trial the objection to evidence previously raised in the motion to redact.

Contrary to Huston's repeated assertions that his counsel's failure to object "was not the result of a plausible trial strategy,"[28] we must consider trial strategy when reviewing

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[25] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[26] *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

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

[28] See brief for appellant at 38, 43, 46, and 50.

these failures to object. The decision whether or not to object has long been held to be part of trial strategy.[29] In another case involving video recording of a defendant's police interview, this court held that the decision not to object could be explained by a desire not to highlight the objectionable testimony following an unsuccessful attempt to have that evidence excluded.[30] Such an analysis requires an examination of trial strategy.

[10,11] When reviewing claims of alleged ineffective assistance of counsel, "[t]rial counsel is afforded due deference to formulate trial strategy and tactics."[31] There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.[32] Because of this deference, the question whether the failure to object was part of counsel's trial strategy is essential to a resolution of Huston's ineffective assistance of counsel claims.

There is no evidence in the record that would allow us to determine whether Huston's trial counsel consciously chose as part of a trial strategy not to object to the evidence identified on appeal. Therefore, because the record is insufficient to adequately review Huston's claims of ineffective assistance of counsel, we do not reach these claims on direct appeal.

VI. CONCLUSION

The party who opposes statements identified in a motion in limine, including a motion to redact, must renew his or her objections when those statements are offered into evidence at trial in order to preserve issues for appeal. Therefore, because the response "[n]o further objection . . ." did not present a valid objection, we conclude that Huston did not preserve for appeal any evidentiary error that resulted from admitting the statements he had previously moved to redact. We also conclude

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[29] See, e.g., *State v. Lieberman*, 222 Neb. 95, 382 N.W.2d 330 (1986); *State v. Newman*, 5 Neb. App. 291, 559 N.W.2d 764 (1997), *overruled on other grounds, State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

[30] See *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009).

[31] *State v. Timmens*, 282 Neb. 787, 796, 805 N.W.2d 704, 712 (2011).

[32] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

that the record is insufficient to adequately address on direct appeal whether trial counsel's failure to object denied Huston the effective assistance of counsel. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DAVID JAMES YOUNG, RESPONDENT.

824 N.W.2d 745

Filed January 18, 2013. No. S-11-968.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, David James Young, was admitted to the practice of law in the State of Nebraska on September 14, 2010. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska. On December 14, 2011, respondent was temporarily suspended. On April 17, 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. §§ 3-501.8 (conflict of interest), 3-501.15 (safekeeping property), and 3-508.4 (misconduct).

On December 7, 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 a 20-month suspension retroactive

to the date of his temporary suspension, December 14, 2011, and, following reinstatement, 2 years 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. The monitoring plan shall include, but not be limited to, the following: During the first 6 months of the 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, the last type and date of work completed on file (pleading, correspondence, document preparation, discovery, or court hearing), the next type of work and date that work should be completed on the case, any applicable statutes of limitations and their dates, and the financial terms of the relationship (hourly, contingency, et cetera). 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 as 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 with 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 20 months' suspension retroactive to the date of his temporary suspension, December 14, 2011, followed by 2 years of probation "appears to be appropriate under the facts of this case and will adequately protect the public."

FACTS

Count I.

With respect to count I, the formal charges state that on October 26 and 27, 2011, the Counsel for Discipline received two grievance letters from attorney Kelly Shattuck, one of respondent's former employers. Respondent had been employed as an associate attorney by the Vacanti, Shattuck law firm from April 26 until October 11, 2011. During the course of his employment, respondent agreed to represent a 19-year-old woman who, on August 20, 2011, was ticketed for driving under the influence and having an open container in a public place. The client contacted respondent because they had formerly worked together and respondent had given her his business card.

Also on August 20, 2011, the client signed a flat fee agreement with the Vacanti, Shattuck firm, but the agreement did not specify the amount of the fee. According to the client, respondent advised her that the normal fee was $2,000, but that respondent was going to charge her only $1,500.

The client paid respondent $750 by check on or about August 21, 2011. Respondent deposited the check on August 22 into a bank account that was not the Vacanti, Shattuck office trust account. The client paid the balance of $750 on or about September 14 by check. It appears that on the following day, that check was also deposited into the same bank account where the initial $750 was deposited.

The criminal complaint regarding the client was not filed with the county court until September 14, 2011. After accepting the case, respondent did represent the client and was able to negotiate a favorable plea agreement with the prosecutor. Respondent also represented her interest in the administrative license revocation proceedings and filed a subsequent appeal of the revocation with the district court.

According to the formal charges, during the process of severing his employment from Vacanti, Shattuck, on October 14, 2011, respondent sent an e-mail to Shattuck stating:

> "As for [the client], I have never charged anything because it was supposed to just be simple as the city didn't prosecute it as a [driving under the influence]. However, the [Department of Motor Vehicles] decided to charge forward with the [administrative license revocation], complicating matters. . . . Again, given that it was no charge and she's a friend, I'd probably keep the case and just deal with the State if need be."

After respondent left Vacanti, Shattuck, the client requested that Shattuck, not respondent, complete her case for her. During discussions between Shattuck and the client, Shattuck learned that notwithstanding respondent's e-mail of October 14, 2011, the client had in fact paid respondent $1,500 as set forth above. At no time prior to leaving the employ of Vacanti, Shattuck did respondent turn over the client's fees to the firm.

The formal charges allege that respondent's actions constitute a violation of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-501.15 and 3-508.4.

Count II.

With respect to count II, the formal charges state that in the course of respondent's representation of the client as set forth above in count I, she came to respondent's office after business hours to sign and retrieve some papers. When the client entered the office, she and respondent engaged in typical pleasantries and then went into respondent's private office to review documents. According to the client, at one point, respondent wanted to show her a picture of a motorcycle on his computer screen and directed her to come around behind the desk. According to the formal charges, when the client came around the desk, respondent pulled her down onto his lap and touched her in an inappropriate manner. Shortly thereafter, respondent and the client began exchanging personal text messages of an inappropriate nature.

The formal charges allege that respondent's actions constitute a violation of his oath of office as an attorney as provided by § 7-104 and professional conduct rule § 3-508.4.

Count III.

With respect to count III, the formal charges state that on July 26, 2011, during the course of his employment with Vacanti, Shattuck, respondent represented another female client at a custody hearing in Washington County, Nebraska, when Shattuck, the client's attorney of record, was unable to attend the hearing. Thereafter, respondent began calling, e-mailing, and text messaging the client. According to the formal charges, the messages became "unprofessional including comments of a sexual nature." The client brought this to the attention of Shattuck after respondent left the firm. According to the client, she and respondent never actually engaged in any intimate acts. When respondent left the employment of Vacanti, Shattuck, the client asked that someone other than respondent work on her case.

The formal charges allege that respondent's actions constitute a violation of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-501.8 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 §§ 3-501.8, 3-501.15, 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 suspended from the practice of law for a period of 20 months retroactive to the date of his temporary suspension, December 14, 2011. Should respondent apply for reinstatement, his reinstatement shall be conditioned upon respondent's being on probation for a period of 2 years, including monitoring following reinstatement, subject to the terms of probation agreed to by respondent in the conditional admission and outlined above. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

SELMA DEVELOPMENT, L.L.C., A NEBRASKA LIMITED LIABILITY COMPANY, ET AL., APPELLANTS, V. GREAT WESTERN BANK, A BANK CHARTERED UNDER THE STATE OF SOUTH DAKOTA, APPELLEE.

GREAT WESTERN BANK, A BANK CHARTERED UNDER THE STATE OF SOUTH DAKOTA, APPELLEE, V. MICHAEL P. EARL ET AL., APPELLANTS.

825 N.W.2d 215

Filed January 18, 2013. Nos. S-11-1021, S-11-1022.

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 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. **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.
4. **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.
5. **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.
6. **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.

Appeals from the District Court for Douglas County: PETER C. BATAILLON, Judge. Judgments vacated, and causes remanded for further proceedings.

James D. Sherrets, Diana J. Vogt, and Thomas D. Prickett, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Thomas M. White, C. Thomas White, and Amy S. Jorgensen, of White & Jorgensen, for appellee.

Mark A. Hunzeker and Jarrod P. Crouse, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for amicus curiae Home Builders Association of Lincoln.

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

WRIGHT, J.

NATURE OF CASE

In order to purchase and renovate an apartment building, Selma Development, L.L.C. (Selma), obtained a loan from TierOne Bank (TierOne) as evidenced by a note and secured by a trust deed. Upon a renewal of the loan, it was guaranteed with six individual guaranty agreements. Selma defaulted on the note, and the property was sold at a trustee's sale.

The sale price was insufficient to cover the amount of the debt, and TierOne brought an action seeking payment from the guarantors. Selma brought a separate action against TierOne to set aside the sale and quiet title. In response, TierOne filed a counterclaim against Selma seeking payment of the debt. The trial court consolidated the two actions. Selma dismissed its claims against TierOne, but specifically retained its affirmative defenses.

Following a hearing, the trial court determined the fair market value of the property to be $630,000, which greatly exceeded the $350,001 received from the trustee's sale. TierOne moved for summary judgment against Selma and the guarantors (collectively the defendants) on its deficiency actions. The court concluded that Nebraska's antideficiency statute, Neb. Rev. Stat. § 76-1013 (Reissue 2009), applied to Selma but not the guarantors. The court entered judgment against Selma for $306,229.99, the difference between the amount owed on the debt and the fair market value of the property. It entered judgment against the guarantors for $586,228.99, the difference between the amount owed on the debt and the amount received from the trustee's sale. The defendants appeal.

SCOPE OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence

show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (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.*

FACTS

Selma executed a $550,000 promissory note to TierOne on May 23, 2005, secured by a deed of trust on an apartment building located in Omaha, Nebraska. The building was a three-story 28-unit brick structure from the early 20th century. The promissory note was refinanced to $700,000 on December 5, 2005. Michael P. Earl, Louis A. Wright, Gerald W. Lee, Scott K. Schneiderman, Randall P. Roth, and Edward T. Kileen III executed separate contracts personally guarantying the note.

Selma made its last payment on the loan on November 2, 2006. It thereafter defaulted on the note, and TierOne elected to sell the property. A trustee's sale was set for November 28, 2007.

The defendants alleged that prior to the trustee's sale, Omaha Social Capital, LLC, had agreed to buy the property for $705,000. The trustee's sale was postponed to allow time for negotiations toward a possible sale. The trustee's sale was subsequently postponed several times. The last postponement extended the date of the sale to December 17, 2007, so TierOne could review financial information related to Omaha Social Capital's purchase of the property. At the December 17 trustee's sale, TierOne entered the first bid of $350,000. It sold the property to H & S Partnership, LLP, for $350,001.

On February 13, 2008, TierOne filed an action against the guarantors for payment of the remaining debt on the note, pursuant to the guaranty contracts. That case is docketed on appeal to this court as case No. S-11-1022.

TierOne alleged the real estate was sold at a trustee's sale for $350,001. The balance due on the note at the time of

the sale was $697,941.29, and after applying the sale proceeds ($350,001), there was a deficiency in the amount of $347,940.29 plus interest, late fees, and escrow balance for a total amount due of $424,896.09. Interest continued to accrue at $85.79 per day from December 17, 2007. TierOne also alleged that the guarantors were jointly and severally liable.

The guarantors denied the relevant allegations and asserted affirmative defenses, including failure to state the fair market value of the property as of the date of the trustee's sale, waiver and estoppel, and improper charging of fees and crediting of payments against the debt.

On February 20, 2008, the defendants filed a separate action against TierOne to set aside the trustee's sale and quiet title. That case is docketed on appeal to this court as case No. S-11-1021. TierOne denied the allegations made by the defendants. It counterclaimed, alleging the amount of the indebtedness owed by the defendants and asserting that the fair market value of the real estate sold by the trustee's sale was $350,001. It requested judgment against Selma in the amount of $347,940.29 in unpaid principal plus interest, late charges, and escrow balance.

The defendants filed a reply to the counterclaim, raising the same affirmative defenses of failure to state the fair market value of the real estate as of the date of the trustee's sale, waiver and estoppel, and improper charging of fees and crediting of payments.

The cases were consolidated by the trial court on November 13, 2008. On April 6, 2010, the defendants moved to dismiss all claims against TierOne in case No. S-11-1021, specifically reserving their affirmative defenses against TierOne, including the affirmative defenses raised by Selma in its reply to TierOne's counterclaim. At this point, TierOne believed that the remaining issue was the fair market value of the real estate and what, if any, deficiency remained under § 76-1013.

Meanwhile, TierOne was closed by the then federal Office of Thrift Supervision on June 4, 2010, and the Federal Deposit Insurance Corporation was appointed as receiver. Under a purchase agreement with the receiver, Great Western Bank assumed all of TierOne's interest in both cases. Great

Western Bank was substituted for TierOne in both actions. For consistency, we will continue to refer to the appellee as "TierOne."

Following a hearing, the trial court determined the property had a fair market value of $630,000 at the time of foreclosure. On March 10, 2011, TierOne moved for summary judgment, claiming the "pleadings, affidavits and depositions indicate that there are no genuine issue[s] of material fact and that TierOne . . . is entitled to judgment as a matter of law."

At the summary judgment hearing on May 5, 2011, TierOne claimed there were two issues that followed the trial court's determination that the fair market value of the real estate was $630,000: (1) whether the guarantors were entitled to the benefit of the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 2009), and (2) as to the guarantors, the amount of their liability regarding the amount of the indebtedness.

The defendants objected to TierOne's characterization of the issues, claiming the order determining the fair market value was the final order in the proceedings. The trial court disagreed. A colloquy followed between the court and counsel to the effect that the affirmative defenses had not been decided by the court at the hearing on the fair market value. The court stated that the only issue that had been decided was the fair market value and that there were "a whole bunch of issues I [the court] haven't decided yet."

At the summary judgment hearing, TierOne offered numerous exhibits. The defendants also offered exhibits, and the hearing was continued to June 2011. At a June 20 hearing, TierOne requested that the trial court take judicial notice of all evidence that had been introduced by both parties up to the date of the hearing.

The trial court also took judicial notice of the court file that was offered. Additional exhibits were offered and received, and all objections were overruled. Argument was then presented on the application of the Nebraska Trust Deeds Act. No argument was made regarding the affirmative defenses set forth in the pleadings.

On November 10, 2011, the trial court sustained TierOne's motion for summary judgment, concluding that § 76-1013 of the Nebraska Trust Deeds Act did not apply to TierOne's action against the guarantors. The court found § 76-1013 covered only "an action that is 'commenced to recover the balance due upon the obligation for which the trust deed was given as security.'"

The trial court stated that TierOne's action against the guarantors was not an action to collect on an obligation for which a trust deed had been given as security, but an action to collect on the guaranties, which were separate contracts. After looking to persuasive authority in other states, the court concluded that § 76-1013 did not apply to TierOne's action against the guarantors. The guarantors were not entitled to the protection afforded to a debtor who has given a trust deed to secure an existing note of indebtedness.

The trial court entered judgment against Selma for $306,229.99, the amount of the debt ($936,229.99) minus the fair market value of the property ($630,000). It assessed the guarantors a liability of $586,228.99, the amount of the debt minus the sale price of $350,001. The court entered judgment for court costs and interest as of April 14, 2011, against both Selma and the guarantors.

The trial court's judgments were appealed on November 23, 2011, and the cases were consolidated on appeal. We moved the cases to our 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).

ASSIGNMENTS OF ERROR

The defendants claim, summarized and restated, that the trial court erred (1) in finding that the terms of § 76-1013 do not apply to the obligation of the guarantors; (2) in not releasing the guarantors from their obligation, because TierOne's actions precluded the guarantors from appearing at the trustee's sale and protecting the value of the property; (3) in failing to find TierOne was estopped from seeking more than the fair market value of the property, because it started the bidding at a much lower amount than the fair market value, it accepted a bid of

$1 more than the opening bid, and it failed to mitigate its damages; and (4) in allowing TierOne to seek relief not pled prior to the court's order that determined the fair market value of the property in question.

We will group the errors into three categories: (1) errors relating to the trial court's order of February 4, 2011, which determined the fair market value of the real property in question; (2) errors relating to the affirmative defenses pled by the defendants; and (3) errors regarding the interpretation and application of § 76-1013.

ANALYSIS

February 4, 2011, Order Determining Fair Market Value

We first address the defendants' claim that the trial court's February 4, 2011, order, which determined the fair market value of the property, was a final order from which TierOne did not timely appeal. We conclude that the order was interlocutory and therefore not a final, appealable order.

[3,4] 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. *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012). 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. *In re Estate of McKillip, supra*.

Only the first type of final order is at issue here. To be a "final order" under the first type of reviewable order, an order must dispose of the whole merits of the case and must leave nothing for further consideration of the court. Thus, the order is final when no further action of the court is required to dispose of the pending cause; however, if the cause is retained for further action, the order is interlocutory. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994).

The February 4, 2011, order did not dispose of the whole merits of the case. Until the trial court determined that the fair market value of the real estate was greater than the trustee's sale price, Selma was obligated to pay the difference between the amount of the debt and the sale price. The guarantors were obligated to pay the same amount. When the fair market value was determined to be greater than the sale price, Selma was entitled to the benefit of the fair market value, and its obligation was reduced accordingly. See § 76-1013. The remaining issue was whether the guarantors were entitled to the benefit of the fair market value that was afforded to the debtor under § 76-1013.

The trial court determined the fair market value of the property was $630,000, which was $279,999 more than the $350,001 received from the trustee's sale. Once the court determined the fair market value was greater than the sale price, the amount of the guarantors' liability became an issue. Pursuant to § 76-1013, Selma was liable for only the difference between the debt and the fair market value. As to the guarantors, the issue became whether they were liable for the difference between the debt and the amount received at the trustee's sale or the difference between the debt and the fair market value of the property.

Thus, the February 4, 2011, order which determined the fair market value of the property was interlocutory and not a final, appealable order. The trial court still had to resolve the affirmative defenses raised by the defendants and whether § 76-1013 applied to the guarantors.

Affirmative Defenses

On November 10, 2011, the trial court entered summary judgment in favor of TierOne. The court determined that § 76-1013 did not apply to the guarantors, and it entered deficiency judgments against Selma in the amount of $306,229.99 and against the guarantors in the amount of $586,228.99.

Because there remain material issues of fact in dispute concerning the affirmative defenses raised by the defendants, we vacate the trial court's order in which it summarily entered a judgment of deficiency against the defendants.

In our recent opinion of *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012), we discussed the requirements for summary judgment. 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. *Id.* 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.*

[5] 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. *Id.* This standard explicitly invokes the idea of sufficiency of the 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."

Id. at 788, 826 N.W.2d at 234, quoting *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

TierOne argues that the defendants abandoned their claims related to how the trustee's sale was conducted because they dismissed all claims against TierOne in case No. S-11-1021. TierOne asserts the dismissal eliminated claims to set aside the trustee's sale and quiet title, as well as claims for equitable estoppel and declaratory judgment. We disagree.

In response to TierOne's counterclaim in case No. S-11-1021 and TierOne's claim in case No. S-11-1022, the defendants raised affirmative defenses. When Selma's claims against TierOne were dismissed in case No. S-11-1021, the affirmative defenses against TierOne's counterclaim were specifically reserved.

At the hearing on the motion to dismiss on April 27, 2010, the trial court noted that the affirmative defenses were not dismissed. At the first hearing on the motion for summary judgment on May 5, 2011, the court recognized that "there's a whole bunch of issues I haven't decided yet." The court then inquired as to what the issues were, noting the issues of fair market value, impairment of collateral, and amount of the deficiency. The defendants responded, "And all other affirmative defenses that we asserted in the matter."

At the hearing on summary judgment, evidence was offered and received, and the hearing was continued to June 20, 2011. At this hearing, TierOne asked the trial court to take judicial notice of the evidence already introduced. The defendants had presented evidence that TierOne promised it would contact the guarantors if the sale were to proceed on December 17, 2007, and that TierOne would bid the amount of the debt at the trustee's sale. The evidence showed that at the time of the sale, the amount of the debt was $774,897.09 and the fair market value was $630,000.

The defendants offered evidence to show that TierOne did not notify the guarantors that the sale would proceed on December 17, 2007, and that TierOne had promised to bid the amount of the debt at the sale. They also presented evidence that at least one other bidder would have attended and bid at the sale. TierOne offered evidence which disputed that it made these representations.

If the amount bid at the sale had been greater than the fair market value, Selma's liability would have been reduced. The guarantors would also benefit from an increase of the sale price. If TierOne had promised to bid the amount of the debt at the sale and had actually done so, the defendants' liability would have been extinguished. Therefore, there were material issues of fact in dispute regarding the defendants' affirmative defenses which prevented summary judgment on the amount of the indebtedness owed by the defendants. The amount of the deficiency was a material issue of fact in dispute.

Therefore, the trial court erred in granting summary judgment on this issue.

Nebraska Trust Deeds Act

The defendants claim that § 76-1013 of the Nebraska Trust Deeds Act applies to the liability of the guarantors. TierOne argues that § 76-1013 does not.

We do not reach this issue. A finding by the district court that any of the defendants' affirmative defenses are meritorious could reduce the liability of the defendants. If the district court were to find that the defendants have a valid affirmative defense because TierOne promised to bid the amount of the debt at the trustee's sale and failed to do so, the liability of all defendants would be extinguished. It would then be unnecessary to determine the application of the Nebraska Trust Deeds Act.

[6] An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012). Because of our determination that summary judgment was inappropriate, we do not reach or address the issue of the application of the Nebraska Trust Deeds Act. The parties may argue this issue on remand and in any subsequent appeal.

CONCLUSION

Once the trial court determined that the fair market value of the property was greater than the amount received at the trustee's sale, it had to determine whether the Nebraska Trust Deeds Act applied to the guarantors. Accordingly, its order determining fair market value was not a final order.

In order to enter judgment for a specific amount against either Selma or the guarantors, the court was required to consider the affirmative defenses raised by the defendants. The defendants offered evidence which created a genuine issue of material fact regarding their affirmative defenses, which precluded summary judgment. Because of this determination,

we do not reach the issue regarding the application of the Nebraska Trust Deeds Act.

We vacate the judgments against the defendants and remand the causes for further proceedings consistent with this opinion.

JUDGMENTS VACATED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

CASSEL, J., not participating.

ZIAD L. ZAWAIDEH, M.D., APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES REGULATION AND LICENSURE AND STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL, APPELLEES.

825 N.W.2d 204

Filed January 18, 2013. No. S-12-069.

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. ____: ____. 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.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
5. **Courts: Jurisdiction: Immunity.** It is well-settled law in Nebraska that sovereign immunity deprives a trial court of subject matter jurisdiction.
6. **Constitutional Law: Legislature: Immunity: Waiver.** Neb. Const. art. V, § 22, permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
7. ____: ____: ____: ____. Neb. Const. art. V, § 22, is not self-executing, but instead requires legislative action for waiver of the State's sovereign immunity.

8. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
9. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
10. **Actions: Immunity.** A suit against a state agency is a suit against the State and is subject to sovereign immunity.
11. **Actions: States: Statutes: Contracts.** The State Contract Claims Act authorizes suits for contract claims against the State, in derogation of the State's sovereignty.
12. **Actions: Statutes: Contracts.** The State Contract Claims Act is the exclusive remedy for resolving contract claims against the State.
13. **Fraud: Pleadings.** To state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that the representation was made with the intention that the plaintiff should rely on it; (5) that the plaintiff did so rely on it; and (6) that the plaintiff suffered damage as a result.
14. **Negligence: Fraud.** Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation with the exception of the defendant's mental state.
15. **Contracts: Fraud.** Fraud and deceit provide a ground for recovery that is independent of contract.
16. **Actions: Statutes: Contracts: Fraud.** A misrepresentation cause of action is not a "contract claim" under the State Contract Claims Act.
17. **Declaratory Judgments: Immunity: Waiver.** Nebraska's Uniform Declaratory Judgments Act does not waive the State's sovereign immunity, and a plaintiff who seeks declaratory relief against the State must find authorization for such remedy outside the confines of the act.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

William M. Lamson, Jr., and Denise M. Destache, of Lamson, Dugan & Murray, L.L.P., for appellant.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellees.

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

McCormack, J.

NATURE OF CASE

After our decision in *Zawaideh v. Nebraska Dept. of Health & Human Servs.* (*Zawaideh I*),[1] Ziad L. Zawaideh, M.D., filed an amended complaint against the Nebraska Department of Health and Human Services Regulation and Licensure (Department) and the Attorney General. The amended complaint alleged that the Attorney General fraudulently and negligently misrepresented the adverse effects of the assurance of compliance entered into by Zawaideh with the Attorney General. The district court granted the Department and the Attorney General's motion for summary judgment, finding the misrepresentation claims to be contract claims subject to, and barred by, the State Contract Claims Act.[2] Zawaideh appeals.

BACKGROUND

This is the second appeal in this case. In *Zawaideh I*, the following facts were established from the allegations in Zawaideh's complaint. These facts are not contested by either party in its respective briefs.

Zawaideh is a physician, licensed by and practicing in the State of Nebraska. In 2006, the Department began an investigation into a case involving obstetrical care Zawaideh provided to a patient in 2001. Terri Nutzman, an assistant attorney general, sent Zawaideh a proposed petition for disciplinary action and offered the option of an agreed settlement that would have constituted a disciplinary action against Zawaideh's license.

Zawaideh initially refused to enter into any agreement and denied any unprofessional conduct. After another proposed disciplinary settlement was refused, Nutzman offered Zawaideh an assurance of compliance. Nutzman emphasized that the assurance of compliance was not a disciplinary procedure.[3] In

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[1] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 997, 792 N.W.2d 484 (2011).

[2] See Neb. Rev. Stat. § 81-8,302 et seq. (Reissue 2008).

[3] See Neb. Rev. Stat. § 38-1,107 (Reissue 2008).

the assurance of compliance, Zawaideh would promise to no longer provide obstetrical care. Zawaideh had already given up obstetrical care, so he agreed.

As provided by the Uniform Credentialing Act,[4] Zawaideh's assurance of compliance was made part of his public record. He alleges that it is referenced on the Department's Web site and is available to the general public upon request.

Zawaideh is also licensed to practice medicine in the State of Washington. Zawaideh alleges that the Washington Department of Health learned "via public record" of the assurance of compliance and initiated a disciplinary action based solely on the assurance of compliance. Washington entered a disciplinary order that was reported to the National Practitioner Data Bank. Zawaideh alleges that the assurance of compliance has led to the termination of his professional board certification and board eligibility which, in turn, has "created difficulties" for him in recredentialing with hospitals and insurance plans.

Zawaideh alleges that he would not have entered into the assurance of compliance had he known about the potential consequences, which he alleges were issues known to Nutzman at the time she assured Zawaideh that the assurance of compliance was not disciplinary. According to Zawaideh, the incident that formed the basis of the investigation into his conduct is no longer subject to discipline under Nebraska law, and terminating the assurance of compliance would allow him to have the Washington disciplinary order removed and restore his board eligibility with the American Board of Family Medicine. Therefore, Zawaideh asked the Department and the Attorney General to rescind the assurance of compliance and expunge the public record. Each declined.

Our Decision in *Zawaideh I*

In *Zawaideh I*, Zawaideh appealed from the district court's decision to grant a motion to dismiss the complaint for failure to state a claim, pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). In his original complaint, Zawaideh argued that the execution

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[4] See Neb. Rev. Stat. § 38-101 et seq. (Reissue 2008 & Cum. Supp. 2012).

of the assurance of compliance, and the Attorney General's refusal to vacate it, deprived Zawaideh of due process of law. His original complaint asserted four causes of action:

> (1) The [Uniform Credentialing Act] is facially unconstitutional because it permits discipline to be carried out without due process of law, as assurances of compliance are not appealable.
>
> (2) The [Uniform Credentialing Act] is unconstitutional as applied in this case because Zawaideh no longer practices obstetrics, of his own accord, and the underlying occurrence is no longer subject to discipline under Nebraska law.
>
> (3) The Attorney General carried out his statutory authority in an arbitrary and capricious manner.
>
> (4) The Attorney General committed fraudulent misrepresentation by concealing the material fact that the assurances of compliance were having the effect of a disciplinary order on other physicians.[5]

We affirmed the district court's order with respect to Zawaideh's first, second, and third due process claims for relief. However, we reversed the district court's order with respect to the fraudulent concealment claim and remanded the cause for further proceedings on that claim. In the *Zawaideh I* opinion, we noted that "[o]ther issues, such as whether the fact was within Zawaideh's reasonably diligent attention or whether Zawaideh reasonably relied on Nutzman's statement, or any potential affirmative defenses, are not before us in this proceeding, and we make no comment on them."[6]

Procedural History Since *Zawaideh I*

After remand, Zawaideh filed an amended complaint asserting fraudulent and negligent misrepresentation. The suit requested the district court to "1) declare the Assurance of Compliance void or rescinded; 2) direct the [Department and the Attorney General] to expunge any references to the

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[5] *Zawaideh I, supra* note 1, 280 Neb. at 1003, 792 N.W.2d at 491.

[6] *Id.* at 1013, 792 N.W.2d at 498.

Assurance of Compliance from [Zawaideh's] public records; 3) award [Zawaideh] costs and attorney fees; and 4) grant such other relief as the Court deems just and proper." Shortly thereafter, the Department and the Attorney General filed a motion for summary judgment alleging that sovereign immunity barred Zawaideh's claims.

The district court granted the motion for summary judgment and found that the assurance of compliance was a contract subject to the State Contract Claims Act.[7] The district court noted that Zawaideh's claims were barred because he failed to procedurally comply with the State Contract Claims Act.

ASSIGNMENTS OF ERROR

Zawaideh has assigned as error the district court's finding that it lacked subject matter jurisdiction. Further, he assigns that the district court erred in finding his misrepresentation causes of action were contract claims subject to and barred by the State Contract Claims Act.

STANDARD OF REVIEW

[1-3] 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.[8] 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.[9] 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.[10]

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[7] See § 81-8,302 et seq.

[8] *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012).

[9] *Id.*

[10] *Id.*

[4] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[11]

ANALYSIS

Zawaideh's arguent is complex and at times counterintuitive. He has conceded that application of either the State Contract Claims Act or the State Tort Claims Act[12] would deprive the district court of subject matter jurisdiction over his claims. Therefore, he first argues that *Zawaideh I* precludes this court from dismissing his case for lack of subject matter jurisdiction. His second and third arguments are that neither the State Contract Claims Act nor the State Tort Claims Act apply to, and thus do not bar, his claims. For his fourth and final argument, he argues that the modified "affirmative action" test in *Doe v. Board of Regents*[13] provides the district court with subject matter jurisdiction over his claims. We will address each of these arguments in order.

[5-7] To begin, it is well-settled law in Nebraska that sovereign immunity deprives a trial court of subject matter jurisdiction.[14] Neb. Const. art. V, § 22, provides that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." This provision permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.[15] It is not self-executing, but instead requires legislative action for waiver of the State's sovereign immunity.[16]

[8,9] Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly

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[11] *Buckeye State Mut. Ins. Co. v. Humlicek*, 284 Neb. 463, 822 N.W.2d 351 (2012).

[12] See Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2008 & Cum. Supp. 2012).

[13] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[14] See *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009).

[15] *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

[16] *Engler v. State*, 283 Neb. 985, 814 N.W.2d 387 (2012).

construed in favor of the sovereign and against the waiver.[17] A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.[18]

[10] Here, Zawaideh has brought suit against the Department and the Attorney General. We have held that a suit against a state agency is a suit against the State and is subject to sovereign immunity.[19] Therefore, the burden rests with Zawaideh to demonstrate how the State has waived sovereign immunity for his misrepresentation claims.

With that in mind, Zawaideh's first argument is that our failure to dismiss for a lack of subject matter jurisdiction in *Zawaideh I* somehow precludes us from dismissing his case on that ground now. We disagree. In *Martin v. Nebraska Dept. of Corr. Servs.*,[20] we held that an appellate court is required to answer all jurisdictional questions *presented* by a case. However, simply put, we were not presented in *Zawaideh I* with the issue of subject matter jurisdiction on these misrepresentation claims.[21] In fact, in the opinion, we stated that "[o]ther issues, such as . . . any potential affirmative defenses, are not before us in this proceeding, and we make no comment on them. Rather, those matters are left to further proceedings in the district court following remand."[22] Therefore, we are not precluded from now reviewing the affirmative defense of subject matter jurisdiction.

For his second argument, Zawaideh asserts that the district court erred in finding that his misrepresentation claims were subject to the State Contract Claims Act. Zawaideh argues that his misrepresentation claims are tort actions and

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[17] *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011).

[18] *Id.*

[19] See *Doe v. Board of Regents, supra* note 13.

[20] *Martin v. Nebraska Dept. of Corr. Servs.*, 267 Neb. 33, 671 N.W.2d 613 (2003).

[21] *Zawaideh I, supra* note 1.

[22] *Id.* at 1013, 792 N.W.2d at 498.

not contract claims under the State Contract Claims Act. We agree.

[11,12] The State Contract Claims Act authorizes suits for contract claims against the State, in derogation of the State's sovereignty.[23] The State Contract Claims Act is the exclusive remedy for resolving contract claims.[24] Under § 81-8,303(1), a "[c]ontract claim shall mean a claim against the state involving a dispute regarding a contract between the State of Nebraska or a state agency and the claimant . . . ."

[13,14] It is well established that both fraudulent misrepresentation and negligent misrepresentation are tort causes of action adopted from the Restatement (Second) of Torts §§ 525 and 552.[25] To state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that the representation was made with the intention that the plaintiff should rely on it; (5) that the plaintiff did so rely on it; and (6) that the plaintiff suffered damage as a result.[26] Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation with the exception of the defendant's mental state.[27] The important thing to note is that none of the elements require an underlying contract.

[15] Although contracts are often the end result of the plaintiff's reliance on the defendant's misrepresentation, the true legal dispute for a misrepresentation cause of action is the tortious actions of the defendant.[28] We have stated that where a

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[23] See *Baldwin Carpet v. Builders, Inc.*, 3 Neb. App. 40, 523 N.W.2d 33 (1994).

[24] § 81-8,306.

[25] Restatement (Second) of Torts §§ 525 and 552 (1977). See, e.g., *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009); *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

[26] *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

[27] *Lucky 7 v. THT Realty, supra* note 25.

[28] See *L. J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7 (1988).

contractual relationship exists between persons and at the same time a duty is imposed by or arises out of the circumstances surrounding or attending the transaction, the breach of the duty is a tort.[29] In such case, the tortious act, and not a breach of the contract, is the gravamen of the action; the contract is the mere inducement creating the state of things which furnishes the occasion for the tort.[30] Thus, we have held that fraud and deceit provide a ground for recovery that is independent of contract.[31]

[16] Therefore, we hold that a misrepresentation cause of action is not a "[c]ontract claim" under the State Contract Claims Act. Our precedent requires us to strictly construe all statutes that purport to waive sovereign immunity in favor of the sovereign and against the waiver.[32] Using that as our guide, we find that a cause of action for misrepresentation is not a "dispute regarding a contract," because the gravamen of the case is in tort, independent from any underlying contract. In other words, the dispute is the tortious conduct of the defendant, not the contract itself. By excluding misrepresentation claims from the definition of contract claims, we properly narrow the applicability of the State Contract Claims Act's sovereign immunity waiver in favor of the sovereign.[33] Our interpretation is also consistent with the intent of the Nebraska Legislature, which has indicated that misrepresentation and deceit claims are torts under the State Tort Claims Act.[34] Therefore, we hold that the State Contract Claims Act does not apply to Zawaideh's misrepresentation causes of action.

For his third argument, Zawaideh argues that although his misrepresentation claims are torts, they are not subject to the

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[29] *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954).

[30] *Id.*

[31] See *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000), *overruled in part on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc., supra* note 26.

[32] *Britton v. City of Crawford, supra* note 17.

[33] See *id.*

[34] See § 81-8,219(4).

State Tort Claims Act. We again agree with Zawaideh. Section 81-8,210(4) of the State Tort Claims Act defines a "[t]ort claim" as "any claim against the State of Nebraska for money only." In *Czarnick v. Loup River P. P. Dist.*,[35] we interpreted this definition to exclude nonmonetary claims, such as actions for injunctive relief. Here, Zawaideh's amended complaint prayed for the contract to be voided or rescinded and expunged from the record and did not request monetary damages. Therefore, we find that Zawaideh's claim is not "for money only" and, thus, is not subject to the State Tort Claims Act.

[17] Finally, Zawaideh's fourth argument is that his misrepresentation claims brought pursuant to the Uniform Declaratory Judgments Act[36] are not barred by sovereign immunity under our decision in *Doe*.[37] We disagree. The problem for Zawaideh is that the State's sovereign immunity is unaffected by the declaratory judgment statutes.[38] Nebraska's Uniform Declaratory Judgments Act does not waive the State's sovereign immunity, and a plaintiff who seeks declaratory relief against the State must find authorization for such remedy outside the confines of the act.[39] Such authorization is typically found in the State Contract Claims Act, the State Tort Claims Act, and the Administrative Procedure Act.[40] Zawaideh concedes that none of these acts are applicable in this instance.

Therefore, Zawaideh argues that sovereign immunity does not apply in the first instance under the modified "affirmative action" test we set out in *Doe*.[41] In *Doe*, we stated, in dicta, that actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official

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[35] *Czarnick v. Loup River P. P. Dist.*, 190 Neb. 521, 209 N.W.2d 595 (1973).

[36] See Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2008).

[37] See *Doe v. Board of Regents*, *supra* note 13.

[38] *Logan v. Department of Corr. Servs.*, 254 Neb. 646, 578 N.W.2d 44 (1998).

[39] *Id.*

[40] See Neb. Rev. Stat. § 84-901 et seq. (Reissue 2008 & Cum. Supp. 2012).

[41] See *Doe v. Board of Regents*, *supra* note 13.

to expend public funds.[42] Without addressing the other elements of the modified "affirmative action" test, we will address whether the Department and the Attorney General are legally required to rescind the assurance of compliance.

Two cases cited by this court in *Doe* in support of the modified "affirmative action" test help define what it means to be "legally required" to act. In *State ex rel. Steinke v. Lautenbaugh*,[43] we did not apply sovereign immunity to an action to compel a county election commissioner to reverse the district changes he had made. We held that the commissioner had gone beyond his statutory authority in redistricting and, therefore, was legally required to restore the original districts.[44] In comparison, in *County of Lancaster v. State*,[45] we held that sovereign immunity applied to a lawsuit which sought to require the Department of Public Institutions to accept committed mental health patients. Our citation to *County of Lancaster* in the *Doe* opinion retrospectively suggests that despite the defendant's being legally required to act under the Nebraska Mental Health Commitment Act,[46] the lawsuit was barred because, unlike *State ex rel. Steinke*, the legally required action would require expenditure of public funds.[47] Therefore, to satisfy the "legally required" element, Zawaideh must prove either that state law requires the Attorney General to rescind the assurance of compliance or that the assistant attorney general went beyond her statutory authority by entering into the assurance of compliance.

Here, we find that the Attorney General is not legally required to rescind the assurance of compliance under either theory. First, Zawaideh does not argue that a Nebraska statute, rule, regulation, or mandate requires rescission of the

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[42] *Id.*

[43] *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[44] *Id.*

[45] *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

[46] See Neb. Rev. Stat. § 71-901 et seq. (Reissue 2009 & Cum. Supp. 2012).

[47] *County of Lancaster v. State, supra* note 45.

assurance of compliance. The assurance of compliance was a voluntary agreement, which was negotiated and entered into by Zawaideh and the assistant attorney general.[48] Thus, we find that the rescission of this agreement of compliance is at the discretion of the parties and not compelled by law. And second, the record establishes that the assistant attorney general did not go beyond her authority in entering into the assurance of compliance. Under the Uniform Credentialing Act, the Attorney General's office has the authority to enter into an assurance of compliance with a medical professional.[49] Thus, we hold that the Attorney General is not legally required to rescind the contract.

Therefore, the district court did not err in determining that it lacked subject matter jurisdiction, because sovereign immunity bars Zawaideh's misrepresentation claims.

CONCLUSION

We hold that the district court erred in finding that Zawaideh's fraudulent and negligent misrepresentation claims were subject to, and barred by, the State Contract Claims Act. However, we find that, albeit for different reasons, the district court did not err in granting summary judgment on the issue of subject matter jurisdiction.

AFFIRMED.

CONNOLLY, J., not participating.

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[48] *Zawaideh I, supra* note 1.

[49] § 38-1,108.

KERI CLARK, APPELLANT, V. ALEGENT HEALTH NEBRASKA, APPELLEE.

825 N.W.2d 195

Filed January 18, 2013. No. S-12-271.

1. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-120(2)(a) (Reissue 2010), an employee has the right to select a physician who has maintained the

employee's medical records prior to an injury and has a documented history of treatment with the employee prior to the injury. The employer shall notify the employee following an injury of such right of selection in a form and manner and within a timeframe established by the compensation court.

2. ____. In a workers' compensation case, the physician selected by an injured employee may arrange for any consultation, referral, or extraordinary or other specialized medical services as the nature of the injury requires.
3. ____. An employer is not responsible for medical services furnished or ordered by any physician or other person selected by an injured employee in disregard of Neb. Rev. Stat. § 48-120(2)(a) (Reissue 2010).
4. ____. The form and manner of the right of selection of a treating physician are established in Workers' Comp. Ct. R. of Proc. 50(B)(2) (2009).
5. ____. Workers' Comp. Ct. R. of Proc. 50(A)(6) (2009) provides that an employee may choose a physician if compensability is denied and that the employer will pay for medical, surgical, or hospital services later found to be compensable.
6. ____. Neb. Rev. Stat. § 48-120(2)(a) (Reissue 2010) provides that if compensability is denied by the employer, the employee has the right to select a physician and the employer is liable for medical services subsequently found to be compensable.
7. **Workers' Compensation: Words and Phrases.** Workers' Comp. Ct. R. of Proc. 49(A) and (C) (2006) defines compensability and denial of compensability. "Compensability" or "compensable," when used with reference to injuries or diseases, means personal injuries for which an employee is entitled to compensation from his or her employer. "Denial of compensability" or "compensability is denied" means a denial that the employee is entitled to compensation for personal injury from his or her employer.
8. **Workers' Compensation.** If an employer has sufficient knowledge of an injury to an employee to be aware that medical treatment is necessary, it has the affirmative and continuing duty to supply medical treatment that is prompt, in compliance with the statutory prescription on choice of doctors, and adequate; if the employer fails to do so, the employee may make suitable independent arrangements at the employer's expense.

Appeal from the Workers' Compensation Court: THOMAS E. STINE, Judge. Reversed and remanded.

Sean P. Rensch and Richard J. Rensch, of Rensch & Rensch Law, for appellant.

Patrick R. Guinan, of Erickson & Sederstrom, P.C., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

This is a workers' compensation case filed by Keri Clark, appellant, against her employer, Alegent Health Nebraska (Alegent), appellee. On April 18, 2010, while Clark was employed as a nurse by Alegent, she was attacked by a psychiatric patient at Immanuel Medical Center, her place of employment. The trial court found Clark suffered a compensable injury from the April 18 incident and found the incident caused an aggravation of a non-work-related head, neck, and shoulder condition for which Clark had recently undergone surgery. The trial court found medical treatment, including a 2011 surgery, was necessary and reasonable subsequent to the incident. The trial court, however, denied all compensation for treatment and bills from medical providers other than Dr. Nils Nystrom, finding that Clark failed to produce evidence of a "chain of referral" for these medical providers, pursuant to Neb. Rev. Stat. § 48-120(2)(e) and (f) (Reissue 2010), and that some of the treatment Clark received was not related to the incident. We reverse, and remand.

FACTUAL BACKGROUND

The parties do not dispute that Clark was employed by Alegent at Immanuel Medical Center as a nurse when she was attacked by a psychiatric patient on April 18, 2010, during the course and scope of her employment. Clark was grabbed from behind by the patient, by her hair and shoulder, and thrown against the wall and onto the floor, sustaining a head, neck, and shoulder injury. Six weeks prior to the incident, on March 2, Clark had undergone surgical exploration, decompression, and neurolysis of the left spinal accessory nerve for non-work-related medical issues. The surgery was performed by Dr. Nystrom.

[1-3] Alegent paid for Clark's subsequent emergency room visit after the attack. On April 23, 2010, Alegent provided Clark with Workers' Compensation Court form 50. On such form, Clark designated Dr. Nystrom as her treating physician for the injury sustained from the work incident. Section 48-120

explains the legal ramifications of selecting a treating physician for an injury subject to workers' compensation:

> (2)(a) The employee has the right to select a physician who has maintained the employee's medical records prior to an injury and has a documented history of treatment with the employee prior to an injury . . . . The employer shall notify the employee following an injury of such right of selection *in a form and manner and within a timeframe established by the compensation court*. . . .
>
> . . . .
>
> (e) The physician selected may arrange for any consultation, *referral*, or extraordinary or other specialized medical services as the nature of the injury requires.
>
> (f) *The employer is not responsible for medical services furnished or ordered by any physician or other person selected by the employee in disregard of this section*.

(Emphasis supplied.)

[4] The form and manner of this "right of selection"[1] of a "treating physician" are established in Workers' Comp. Ct. R. of Proc. 50(B)(2) (2009):

> The Court has a form the employer may use to give notice to the employee. In all cases, the notice:
>
> a. must be given to the employee as soon as possible after the employer knows about the injury;
>
> b. must tell the employee of the right to choose a *family physician* as the *primary treating physician*;
>
> c. must tell the employee to give the employer the name of the *family physician* chosen as the *primary treating physician* as soon as possible after getting notice from the employer, and before any treatment, unless it is *emergency medical treatment*;
>
> d. must tell the employee the employer gets to choose the *primary treating physician* if the employer is not given the name of the *family physician* as soon as possible after the employee receives the notice;

[1] See § 48-120(2)(a).

> e. must tell the employee the employer gets to choose the *primary treating physician* if an authorization is needed to verify prior treatment and is not given; and
>
> f. must tell the employee the *primary treating physician* may not be changed once the employer has been given the name, unless the change is agreed to by the employer or is ordered by the compensation court. A referral by the *primary treating physician* is not a change.

After identifying Dr. Nystrom as her "primary treating physician" pursuant to the above statute and rule of procedure, Clark sought treatment from Dr. Nystrom on April 27, 2010, attempting conservative treatment for her injury. Clark missed 3 days of work after the incident. She attempted to contact the caseworker identified by Alegent in order to make arrangements to receive workers' compensation benefits for this period of absence. Clark testified she received no response after several attempts to reach the designated contact. Neither Alegent nor its designated contact returned Clark's telephone calls or made arrangements to pay Clark for her treatment with Dr. Nystrom or absence from work. The record indicates no meeting occurred between Clark and Alegent or one of its representatives wherein Alegent would have informed Clark that she would not be paid for her medical treatment or absence from work. Furthermore, Alegent did not provide Clark with a written statement indicating she would not be paid for her medical treatment or absence from work.

On July 30, 2010, Alegent hired Dr. D.M. Gammel to examine Clark's medical records both prior to and subsequent to the work incident. Dr. Gammel issued his report to Clark's workers' compensation caseworker. In his report, Dr. Gammel issued an independent medical opinion stating that Clark was injured and had been treated by Dr. Nystrom, but had recovered and returned to "baseline" as of May 1, 2010. After the report was issued, neither Alegent nor Clark's workers' compensation caseworker made arrangements to pay Clark for her treatment or absence from work.

Clark later received treatment and/or was prescribed medication from at least seven other physicians. However, Dr. Nystrom did not refer Clark to any of these physicians and

Clark did not list any of them on the Workers' Compensation Court form 50. Clark also received treatment from three physicians who had been referred to Clark by Dr. Nystrom.

On September 14, 2010, Clark reported to the emergency room at Immanuel Medical Center. The record indicates that at that time, Clark complained to the staff on call about shoulder pain related to a work incident that had occurred 3 years ago—not the April 2010 incident at issue in this case.

On March 17, 2011, after almost a year of treatment for Clark's injury, Dr. Nystrom performed decompression surgery on Clark's head, neck, and shoulder areas, similar to Clark's March 2, 2010, surgery. Alegent disputed the reasonableness and necessity of that surgery and on February 17, 2011, had Clark evaluated by Dr. Charles Taylon. On February 22, prior to the March 17 surgery, Dr. Taylon opined that decompression surgery was not an accepted procedure for Clark's complaints.

On March 23, 2011, Clark filed suit against Alegent for expenses related to this incident. On April 6, Alegent filed its answer. Alegent admitted that Clark suffered a work-related incident on April 18, 2010, and that she was employed by Alegent as a nurse, but generally denied the nature and extent of Clark's injury. The only affirmative defense alleged in its answer was that Clark's injury or disability was the natural progression of a preexisting condition due to reasons other than her employment. Also, there was no discussion of any chain-of-referral issues in the trial court's pretrial order.

The main issue at trial was the compensability of the March 17, 2011, surgery performed by Dr. Nystrom. Alegent asserted that the medical treatment performed by Dr. Nystrom was not reasonable and necessary to treat Clark's injury. In its closing argument, Alegent argued, for the first time, that other medical benefits claimed by Clark fell outside the chain of referral from her primary treating physician. On March 1, 2012, the trial court entered an award in favor of Clark, finding that Clark's previous head, neck, and shoulder injury was aggravated by the April 18, 2010, attack and that the March 17, 2011, surgery was reasonable and necessary because of the injury caused by the attack. The trial court's award also

included payment for all medical expenses associated with Dr. Nystrom and those doctors Clark sought treatment with upon Dr. Nystrom's referral. Alegent received credit for the $777.02 amount it had already paid toward Clark's medical expenses, including her initial emergency room visit.

But because Dr. Nystrom did not refer Clark to the majority of the other doctors, the trial court denied payment of the medical expenses associated with those doctors. The trial court held that all of the medical expenses related to treatment from the doctors other than Dr. Nystrom, or those doctors Dr. Nystrom referred Clark to for treatment, were not compensable. The trial court stated that under § 48-120(2)(e) and (f), Clark had a duty to produce sufficient evidence showing a chain of referral from Dr. Nystrom to these other doctors, as Dr. Nystrom was the only doctor she designated on form 50 as her treating physician. The trial court found Clark had failed to do so in compliance with the statute and rules of procedure.

The trial court also found that treatment on September 14, 2010, at Immanuel Medical Center's emergency room was not related to Clark's April 18, 2010, work injury, because at the time of the visit, Clark complained of pain related to her past injury to her head, neck, and shoulder. Clark appeals.

ASSIGNMENTS OF ERROR

Clark assigns, restated and consolidated, that the trial court erred in (1) requiring chain-of-referral proof for all medical treatment Clark received from doctors other than Dr. Nystrom; (2) disallowing payment for certain medical benefits for various reasons, including that Alegent failed to plead as an affirmative defense that Clark violated the chain-of-referral provisions as set forth in § 48-120(2) and (3); and (3) finding that treatment on September 14, 2010, was not related to the April 18 work injury.

STANDARD OF REVIEW

The judgment made by the compensation court shall have the same force and effect as a jury verdict in a civil case.[2] A

[2] Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012).

judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient 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.[3]

On appellate review, the findings of fact made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[4] If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.[5] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[6]

ANALYSIS

Chain of Referral.

[5,6] Clark first assigns that the trial court erred in denying payment for all her medical expenses outside of the chain of referral to Dr. Nystrom, because the trial court found her injury was compensable and Alegent effectively "denied compensability" under § 48-120(2)(a) and rule 50(A)(6). Clark argues Alegent's denial of compensability entitled Clark to choose her treating physicians and avoid the chain of referral under § 48-120(2)(e) and (f). Rule 50(A)(6) of the Nebraska Workers' Compensation Court rules of procedure provides: "The employee may choose a *physician* if *compensability is denied* and the employer will pay for medical, surgical, or hospital services later found to be *compensable*." Section 48-120(2)(a) provides, in accord, "If compensability is denied by the [employer,] the employee has the right to select a

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[3] *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009).

[4] *Id.*

[5] *Id.*

[6] *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

physician and . . . the employer is liable for medical . . . services subsequently found to be compensable."

[7] On appeal, we must determine whether Alegent denied compensability for purposes of § 48-120 and rule 50(A)(6). The Nebraska Workers' Compensation Court rules of procedure define "[c]ompensability" and "[d]enial of compensability." "'Compensability' or 'compensable' when used with reference to injuries or diseases means personal injuries for which an employee is entitled to compensation from his or her employer . . . ."[7] "'Denial of compensability' or 'compensability is denied' means a denial that the employee is entitled to compensation for personal injury from his or her employer . . . ."[8] The trial court did not consider whether Alegent effectively denied Clark compensability pursuant to the statute and rules of procedure.

[8] Larson's Workers' Compensation Law discusses the circumstances which effectuate an employer's "denial of compensation" under statutory workers' compensation provisions similar to those of Nebraska:

> The central rule defining the circumstances under which a claimant may on his or her own initiative incur compensable medical expense may be put as follows: If the employer has sufficient knowledge of the injury to be aware that medical treatment is necessary, it has the affirmative and continuing duty to supply medical treatment that is prompt, in compliance with the statutory prescription on choice of doctors, and adequate; if the employer fails to do so, the claimant may make suitable independent arrangements at the employer's expense.[9]

Here, Clark became injured on April 18, 2010. Alegent was notified and paid for Clark's emergency room visit. Clark was provided with form 50 from Alegent and she filled it out, indicating that Dr. Nystrom would be her treating physician.[10]

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[7] Workers' Comp. Ct. R. of Proc. 49(A) (2006).

[8] Rule 49(C).

[9] 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 94.02[4][a] at 94-15 to 94-16 (2011).

[10] See *Radil v. Morris & Co.*, 103 Neb. 84, 170 N.W. 363 (1919).

Thus, at this point, Alegent had sufficient knowledge of the injury and was aware that medical treatment may be necessary. After the initial emergency room visit, on April 27, 2010, Clark reported to Dr. Nystrom, her treating physician, for treatment. Clark missed work after the incident and attempted to contact the person identified by Alegent to make arrangements to receive workers' compensation benefits for this period of absence. Clark testified she received no response after several attempts to reach the designated contact. Neither the designated contact nor Alegent made arrangements to pay for Clark's medical care.

Three months after Clark's initial treatment with Dr. Nystrom, on July 30, 2010, Alegent had Dr. Gammel examine Clark's medical records dated both before and after the incident. After his examination, Dr. Gammel issued an independent medical opinion report stating that Clark had been injured and treated by Dr. Nystrom on April 27, but that Clark had returned to "baseline" as of May 1. This report was given to Clark's workers' compensation caseworker. After the caseworker received the report, Alegent did not pay for the April 27 treatment Clark had received from Dr. Nystrom.

We find Alegent did not uphold its affirmative and continuing duty to supply medical treatment that is prompt, in compliance with the statutory prescription on choice of doctors, and adequate for Clark's specific injury. Alegent had sufficient notice of the incident; Clark's initial treatment with Dr. Nystrom, her designated treating physician; and the necessity of such treatment, but did not contact Clark or return her calls in order to cover this expense and her short absence from work. Furthermore, after Dr. Gammel reviewed Clark's case, Alegent again did not make arrangements to cover Clark's initial treatment with Dr. Nystrom or her absence from work. Thus, Alegent denied compensability for Clark's injury.[11] Clark

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[11] See, e.g., *West Side Transport v. Cordell*, 601 N.W.2d 691 (Iowa 1999); *Breckle v. Hawk's Nest, Inc.*, 980 S.W.2d 192 (Mo. App. 1998), *overruled on other grounds, Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003); *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203 (Mo. App. 1993), *overruled on other grounds, Hampton, supra*.

contacted Alegent almost a year later concerning payment of a surgery to the injured area to be performed by Dr. Nystrom. Alegent denied compensability for this medical expense after reviewing a report from one of its own physicians, never changing its position on Clark's case.

Because Alegent effectively denied compensability for Clark's injury, Clark had a right to select her own physicians for treatment. Thus, under § 48-120(2)(a) and rule 50(A)(6), Clark was entitled to choose her treating physicians and surgeons and avoid the chain of referral under § 48-120(2)(e) and (f) after her April 27, 2010, treatment with Dr. Nystrom. Furthermore, as Clark's injury was later deemed compensable by the trial court under § 48-120(2)(a) and rule 50(A)(6), Alegent is liable for all medical treatment of Clark's compensable injury, not only by Dr. Nystrom, but also the other physicians with whom Clark chose to treat as well.

Thus, the trial court erred in not considering whether Alegent denied compensability before denying Clark payment for her medical treatment outside the chain of referral from Dr. Nystrom because (1) Clark was not subject to the chain-of-referral provisions, as Alegent denied compensability for her injury, and (2) her injury was later found compensable by the trial court. We reverse the final award of the trial court and remand the cause to the trial court for a new damage award consistent with this finding.

In light of this finding, we do not address Clark's second assignment of error, in which Clark claims that the trial court erred in disallowing payment for some of her medical benefits, namely, because Alegent failed to plead as an affirmative defense that Clark violated the chain-of-referral provisions.

September 14, 2010, Emergency Room Visit.

In her final assignment of error, Clark argues that the trial court erred in finding that the medical treatment Clark incurred on September 14, 2010, was not related to her April 18 work injury. We find that this conclusion is not supported by the evidence. Although, as the trial court noted, the record of the September 14 emergency room visit indicates the history of

Clark's long-term issues with her head, neck, and shoulder areas, it is clear from the other evidence in the record that Clark was seeking treatment not because of her older injury, but because of how the April 18 injury aggravated her previous head, neck, and shoulder injury.

Less than a month before this emergency room visit, Clark was attacked at work. The trial court held that this attack left Clark with a compensable injury, including surgery performed almost a year after the event. In light of this fact and the trial court's holding, we conclude that during her September 14, 2010, emergency room visit, Clark was explaining the history of issues she had had in this area of her body at the time of the September emergency room visit. Such explanation demonstrated to the treating staff at the time of the September 14 emergency room visit that this area of her body had become aggravated by the work incident that occurred less than a month before this time. It was inconsistent for the trial court to find that Clark's head, neck, and shoulder areas were injured in April 2010, requiring surgery in March 2011, but that a September 2010 emergency room visit regarding her head, neck, and shoulder areas, occurring between these two events, was not related to the April 2010 incident. Thus, the trial court was clearly wrong in finding that Clark's treatment on September 14 was not related to the April 18 work injury. This treatment should also be deemed compensable by the trial court.

We reverse the final award of the trial court and remand the cause for a new damage award consistent with these findings. The trial court erred in requiring chain-of-referral proof for all medical treatment Clark received. Alegent denied compensability for Clark's injury, and under § 48-120(2)(a) and rule 50(A)(6), Clark was thereby entitled to choose her treating physicians and avoid the chain of referral under § 48-120(2)(e) and (f).

Furthermore, the trial court was clearly wrong in finding that treatment on September 14, 2010, was not related to the April 18 work injury. This treatment should be deemed compensable by the trial court.

CONCLUSION

Accordingly, we reverse the decision of the trial court and remand the cause for an amended final award consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
CHAD NORMAN, APPELLANT.
824 N.W.2d 739

Filed January 18, 2013. No. S-12-339.

1. **Criminal Law: Convicted Sex Offender: Evidence.** A crime that is generally not a typical sex crime may still require registration under the Sex Offender Registration Act if the court finds that evidence of sexual penetration or sexual contact was present in the record.
2. **Convicted Sex Offender: Appeal and Error.** An appellate court will affirm a court's ruling that a defendant must register under the Sex Offender Registration Act if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found with a firm conviction that the crime involved sexual contact.
3. **Evidence: Appeal and Error.** As with any sufficiency claim, regardless whether the evidence is direct, circumstantial, or a combination thereof, 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.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Michael J. Synek for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

CONNOLLY, J.

NATURE OF CASE

Chad Norman pled no contest to third degree assault. Based solely on the factual basis for the plea, the district court ordered

Norman to register under the Sex Offender Registration Act (SORA).[1] On Norman's first appeal, we reversed, and remanded for the court to consider all the evidence in the record (rather than just the factual basis) in making its determination.[2] On remand, the court found by clear and convincing evidence that Norman's crime involved sexual contact and again ordered Norman to register under SORA. Because there is evidence to support the court's finding, we affirm.

BACKGROUND

The underlying facts are set out in detail in our earlier opinion, so a summary of those facts is sufficient here. Norman pled no contest to the third degree assault of an 11-year-old boy, T.A.W. The State's factual basis for the plea alleged that Norman had touched T.A.W.'s penis and that Norman had threatened T.A.W.'s family if he told anyone about the touching. After recitation of the factual basis, the court clarified that the third degree assault charge was "'based upon the threat,'"[3] to which the State agreed. The court accepted Norman's plea and found him guilty of third degree assault.[4]

[1] A crime that is generally not a typical sex crime, such as third degree assault, may still require registration under SORA if the court finds that "evidence of sexual penetration or sexual contact . . . was present in the record."[5] In Norman's case, registration under SORA was a possibility, so the court conducted an expansive sentencing hearing. Both the State and Norman offered evidence at the hearing, which consisted primarily of police reports and deposition testimony. Norman also testified at the sentencing hearing. He denied ever sexually abusing T.A.W. and stated that there had "'never been any contact between me and him.'"[6]

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[1] Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008 & Cum. Supp. 2012).

[2] *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012).

[3] *Id.* at 993, 808 N.W.2d at 54.

[4] See *Norman, supra* note 2.

[5] § 29-4003(1)(b)(i)(B).

[6] *Norman, supra* note 2, 282 Neb. at 995, 808 N.W.2d at 54.

But the court ordered Norman to register under SORA, implicitly finding that Norman's crime involved either sexual penetration or sexual contact. The court seemingly ignored the evidence offered because the court explicitly noted that it based its ruling "'solely'" upon the factual basis for the plea.[7]

On appeal, we determined that Norman had not received due process. We noted that due process required both notice and a meaningful opportunity to be heard. Although Norman had received notice and the court had held an evidentiary hearing, we reasoned that Norman had not received a *meaningful* opportunity to be heard because the court's ruling was based solely on the factual basis for the plea.[8] We concluded that "a meaningful hearing requires consideration of evidence at the hearing as well as the factual basis and the presentence report."[9] We remanded the cause for the court to consider all the evidence in the record and determine whether Norman's crime involved sexual penetration or sexual contact. We also concluded that the State had the burden of proving sexual penetration or sexual contact by clear and convincing evidence.[10]

On remand, the court summarized our holding and then reviewed the evidence in the record. This included the factual basis, the presentence report, Norman's testimony, and the exhibits received at the evidentiary hearing. Those exhibits were the relevant police reports, the transcript of a juvenile proceeding involving T.A.W., a letter from Norman's employer to the court, and deposition testimony from both T.A.W. and his mother. The court ultimately found, by clear and convincing evidence, that Norman's crime involved sexual contact with T.A.W.

ASSIGNMENT OF ERROR

Norman alleges, consolidated and restated, that the district court erred in finding by clear and convincing evidence that

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[7] See *id.* at 996, 808 N.W.2d at 56.

[8] See *Norman, supra* note 2.

[9] *Id.* at 1009, 808 N.W.2d at 64.

[10] See *Norman, supra* note 2.

his crime involved sexual contact and ordering him to register under SORA.

STANDARD OF REVIEW

As both parties recognize, we have not previously stated our standard of review for reviewing a district court's finding of sexual contact in a SORA registration hearing. But although this is an issue of first impression, our existing case law provides some guidance.

State v. Hamilton[11] involved an analogous situation. There, the judge made the factual determination that the defendant's crime was an "'aggravated offense'" under SORA and ordered the defendant to submit to lifetime registration. We concluded, as we did in *Norman*,[12] that the judge's finding could be based on "information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report."[13] And although we did not explicitly state our standard of review for evaluating that finding, we concluded that the record "support[ed]" the court's finding.[14] So we essentially reviewed the court's finding as a question of the sufficiency of the evidence.

In *State v. Kofoed*,[15] we reviewed a court's finding under Neb. Rev. Stat. § 27-404(3) (Reissue 2008) that the defendant had committed an uncharged, extrinsic crime. Just like here, the State had the burden of proving that fact by clear and convincing evidence. We reviewed the finding as an "insufficient evidence claim[],"[16] and analogized it to that of reviewing the sufficiency of the evidence to support a conviction. But we also recognized that the State's burden in a hearing pursuant to § 27-404(3) was proof by clear and convincing evidence rather than proof beyond a reasonable doubt. So we concluded that we would affirm the court's finding "if, viewing the evidence

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[11] *State v. Hamilton*, 277 Neb. 593, 594, 763 N.W.2d 731, 733 (2009).

[12] See *Norman, supra* note 2.

[13] *Hamilton, supra* note 11, 277 Neb. at 602, 763 N.W.2d at 738.

[14] *Id.*

[15] *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[16] *Id.* at 771, 817 N.W.2d at 231.

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."[17]

[2,3] These types of factual findings under SORA, as seen in *Hamilton*, are reviewed under a sufficiency-of-the-evidence type of standard of review. And like in *Kofoed*, here the State was required to prove the existence of a fact (sexual contact) by clear and convincing evidence. So we conclude that a similar standard of review should apply to a court's finding of sexual contact in a SORA registration hearing. We hold that we will affirm a court's ruling that a defendant must register under SORA if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found with a firm conviction that the crime involved sexual contact. And, as with any sufficiency claim, regardless "whether the evidence is direct, circumstantial, or a combination thereof . . . we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact."[18]

ANALYSIS

Norman argues that the State failed to meet its burden to prove sexual contact by clear and convincing evidence and that the court's reasoning in support of its finding was unpersuasive. Although this is a close case, our standard of review is a deferential one, and there is evidence in the record to support the court's finding.

Neb. Rev. Stat. § 28-318 (Reissue 2008) defines the term "sexual contact" in part as follows:

> (5) Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts

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[17] *Id.*

[18] *Id.*

> when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

In the court's order following remand, it summarized the evidence, which included the factual basis, the presentence report, the police reports, deposition testimony, and Norman's testimony. The record showed that T.A.W. alleged that Norman had touched T.A.W.'s penis. Although T.A.W. never appeared in person before the court, the court concluded that T.A.W. had not been coached and noted that T.A.W. had "essentially testified consistently and without substantial or meaningful conflict" throughout his "prolonged deposition." And the court reasoned that the evidence of sexual encounters between T.A.W. and other children was "not inconsistent with a child being abused." The court concluded that the State had met its burden and ordered Norman to register under SORA.

Norman obviously takes issue with this finding. Norman argues that the evidence was contradictory and insufficient to find that Norman's crime involved sexual contact and that parts of T.A.W.'s story simply did not make sense. Norman also argues that the court's reasoning was flawed. Specifically, Norman argues that the court improperly emphasized T.A.W.'s sexual encounters with other children and Norman's showing lingerie catalogs to T.A.W. Norman also claims that the court gave insufficient weight to the police officer's initial suspicion that T.A.W. had been coached and that the court incorrectly determined that T.A.W.'s deposition testimony was consistent. Finally, Norman claims that the court incorrectly relied on the factual basis for the plea and parts of the presentence investigation, and argues that the court could not find T.A.W. credible because T.A.W. never appeared before the court in person.

Norman is asking us to reweigh the evidence and find in his favor. But under our standard of review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Instead, the question is only whether a rational trier of fact, viewing the evidence in a light most

favorable to the State, could have found with a firm conviction that the crime involved sexual contact. It could.

We noted in *Norman* that on remand, the court should consider the factual basis, presentence report, and the evidence in the record in determining whether sexual contact occurred.[19] Here, the State's factual basis obviously supported the court's finding because the factual basis alleged that Norman had touched T.A.W.'s penis. The presentence report also supported the court's finding. As part of the presentence investigation, the court ordered Norman to participate in a psychological and sex offender evaluation. Although the court determined that the resulting report essentially "offer[ed] no significant information or diagnosis concerning any aberrant sexual behaviors of [Norman]," the report shows otherwise. Specifically, the report concluded that Norman's test "results raise a red flag regarding his sexual interest in children. [Norman] needs to have Sex Offender therapy to address these concerns." So both the factual basis and the presentence report supported the court's finding.

The evidentiary exhibits also provided support for the court's finding. Exhibit 2 contains numerous police reports related to T.A.W.'s allegations against Norman. Those reports document the police investigation, including the interviews of T.A.W., his mother, and T.A.W.'s counselor. They note that T.A.W. told several people, including police officers, that Norman had inappropriately touched him. It is true, as Norman notes, that an investigating police officer was initially concerned that T.A.W. had been coached. But we reiterate that our standard of review requires us to view the evidence in the light most favorable to the State. This was the only evidence that T.A.W. might have been coached. And this did not stop law enforcement from continuing the investigation and eventually arresting Norman, which would indicate that coaching was ruled out as a possibility. Furthermore, this same officer reported that T.A.W.'s counselor, among others, later explained that T.A.W. was uncomfortable speaking with men. This could explain T.A.W.'s looking toward his mother

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[19] See *Norman, supra* note 2.

at the initial interview, which is apparently what the district court concluded.

The record contains T.A.W.'s deposition testimony. After reading the deposition, we agree with the district court that T.A.W. "essentially testified consistently and without substantial or meaningful conflict" throughout the deposition. We recognize that the deposition contains some inconsistencies, but T.A.W. always maintained that Norman had inappropriately touched him, and T.A.W. never wavered on that point at any time during the investigation or prosecution. Furthermore, the inconsistencies in T.A.W.'s deposition are relatively minor and may be explained by the time that had elapsed since the alleged incidents, T.A.W.'s age and situation, and the length of the deposition. We conclude that this evidence, when taken together, could lead a rational trier of fact to have found with a firm conviction that Norman's crime involved sexual contact.

We express one final note on the issue of credibility. Both Norman and the State, at oral argument, characterized the dispute as one coming down to credibility—T.A.W.'s allegations against Norman's denials. This case was a bit unique, however, because T.A.W. never testified in person before the court, and so one could argue that the court could not make a credibility determination about T.A.W. Or, at least, we would not necessarily be required to defer to such a credibility determination because the court had the same evidence before it as we do—that being a cold record. But Norman did testify in person before the court, and he denied any inappropriate touching of T.A.W. The court's finding that sexual contact occurred demonstrated that the court did not find Norman to be credible, and that determination is entitled to deference under our standard of review.

CONCLUSION

The court weighed the evidence and found by clear and convincing evidence that Norman's crime involved sexual contact. We conclude that the evidence supported that finding and affirm the court's order requiring Norman to register under SORA.

AFFIRMED.

WALENTINE, O'TOOLE, MCQUILLAN & GORDON, L.L.P., APPELLANT, V. MIDWEST NEUROSURGERY, P.C., APPELLEE.

825 N.W.2d 425

Filed January 18, 2013. No. S-12-377.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Attorney Fees: Equity.** The common fund doctrine provides that an attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund.

Appeal from the District Court for Douglas County: KIMBERLY MILLER PANKONIN, Judge. Affirmed.

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

Richard D. Vroman and Brenda K. Smith, of Koley Jessen, P.C., L.L.O., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

The law firm of Walentine, O'Toole, McQuillan & Gordon, L.L.P. (Walentine), filed a complaint seeking attorney fees from Midwest Neurosurgery, P.C. (Midwest), under the common fund doctrine. Midwest filed a motion to dismiss, which was granted. Walentine appeals.

FACTUAL BACKGROUND

Walentine represented Alan Thompson in a workers' compensation action against Thompson's employer. Following a trial, Thompson was awarded compensation, including medical expenses incurred by Thompson with Midwest, in the amount

of $33,011.20. Thompson's employer paid the sums owed to Midwest per the award.

Subsequently, Walentine filed a complaint against Midwest asserting that under the common fund doctrine, Walentine was entitled to an attorney fee from Midwest. Midwest filed a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(2), asserting that Walentine's complaint was barred by Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012). Following a hearing, the district court dismissed Walentine's complaint. Walentine appeals. We affirm.

ASSIGNMENTS OF ERROR

On appeal, Walentine assigns, restated and consolidated, that the district court erred in (1) applying § 48-125, a statute dealing with the Workers' Compensation Court, to an action in the district court, and (2) finding that Walentine was not permitted to recover attorney fees from Midwest under the common fund doctrine.

STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo.[1] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[2]

ANALYSIS

On appeal, Walentine argues generally that it was entitled to attorney fees from Midwest under the common fund doctrine and that § 48-125 has no application, because this was not an action brought in the Workers' Compensation Court.

[3] The common fund doctrine provides:

> "'An attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of

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[1] See *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 282 Neb. 762, 810 N.W.2d 144 (2011).

[2] See *id.*

> the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund.'"[3]

Walentine argues that this doctrine is applicable in this case because it was through its representation of Thompson before the Workers' Compensation Court that an award was entered allowing Midwest recovery on the amounts owed by Thompson.

Midwest, however, argues that the common fund doctrine does not provide relief to Walentine in this situation, and instead contends that Walentine is not entitled to fees as a result of § 48-125(2)(a). That subsection provides:

> Whenever the employer refuses payment of compensation or medical payments subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay medical payments subject to such section after thirty days' notice has been given of the obligation for medical payments, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award. *Attorney's fees allowed shall not be deducted from the amounts ordered to be paid for medical services nor shall attorney's fees be charged to the medical providers.*

(Emphasis supplied.)

We recognize that § 48-125(2)(a) is part of the Nebraska Workers' Compensation Act and that Walentine brought this action in district court. But the last sentence of § 48-125(2)(a) plainly states that attorney fees may not be deducted from any amount ordered to be paid for medical services and that medical providers shall not be charged for attorney fees. Walentine cannot do an end run around this prohibition simply by instead filing its action for attorney fees in district court.

Nor is this an unfair result. Under the first part of § 48-125(2)(a), "a reasonable attorney's fee shall be allowed the employee by the compensation court." Thus, Walentine

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[3] *Kindred v. City of Omaha Emp. Ret. Sys.*, 252 Neb. 658, 662, 564 N.W.2d 592, 595 (1997).

would be entitled to recover from the injured employee's employer an attorney fee for work done on the injured employee's behalf.

Furthermore, policy considerations support this conclusion. If one could recover fees from medical providers in district court, such could provide an incentive for attorneys to file for fees there instead of asking for fees in the Workers' Compensation Court. This would be of particular concern in situations that, for whatever reason, counsel felt the Workers' Compensation Court might not be receptive to its claim, but also where the Workers' Compensation Court declined to award fees or did not award the amount of fees sought by counsel. There is also a concern, as expressed by Midwest, that medical providers would decline to provide services to workers' compensation claimants for fear that the provider would later be hauled into district court by claimant's counsel's demand for fees.

In addition to arguing that § 48-125 is simply inapplicable in its district court action because it is a workers' compensation statute, Walentine also contends that in *Kaiman v. Mercy Midlands Medical & Dental Plan*,[4] the Nebraska Court of Appeals concluded that the common fund doctrine was applicable to situations such as the one presented here and that the district court erred in finding otherwise.

In *Kaiman*, the attorney of an injured employee brought an action in district court for the recovery of attorney fees from his client's health care insurer. The Court of Appeals first noted that there was no reason for the common fund doctrine to not apply. The Court of Appeals then held that because the insurer could not have been made a party in the underlying action in order to obtain fee sharing, fundamental due process required that the insurer, or any other potential fee sharer, should have a forum in which to be heard on whether it should be required to share in the payment of attorney fees. As such, the district court action was permissible.

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[4] *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992).

We agree with Walentine that the district court erred insofar as it concluded that *Kaiman* was inapplicable because it was decided prior to the enactment of the last sentence of § 48-125, which the district court stated occurred in 2011. In fact, *Kaiman* was decided on May 19, 1992. And contrary to the district court's decision, the relevant language of § 48-125 was enacted that same year.[5] But we nevertheless find *Kaiman* inapplicable.

While the relevant language of § 48-125 was enacted in 1992, it was not passed with an emergency clause[6] and thus was not effective at the time of the *Kaiman* decision.[7] And there is no indication from the *Kaiman* opinion that the Court of Appeals was aware of this new language when it issued its decision in *Kaiman*. To the extent that *Kaiman* might suggest that the common fund doctrine is available to attorneys' seeking fees from parties providing "medical services" or to "medical providers" as envisioned by § 48-125, it is disapproved.

We conclude that the plain language of the last sentence of § 48-125(2)(a) prohibits the charging of attorney fees against medical providers in Workers' Compensation Court. We decline to apply the common fund doctrine to allow Walentine a fee from Midwest from the district court when it would not be entitled to such a fee from the Workers' Compensation Court. We therefore affirm the decision of the district court dismissing Walentine's complaint.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

MILLER-LERMAN, J., not participating.

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[5] 1992 Neb. Laws, L.B. 360.

[6] *Id*.

[7] See, Neb. Const. art. III, § 27; Legislative Journal, 92d Leg., 2d Sess. 2242-43 (Apr. 14, 1992).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. JAMES C. UNDERHILL, RESPONDENT.

825 N.W.2d 423

Filed January 18, 2013. No. S-12-987.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court, relator, has filed a motion for reciprocal discipline against James C. Underhill, respondent. We grant the motion for reciprocal discipline and impose the same discipline as the Colorado Supreme Court, which we understand to be 9 months of suspension effective November 5, 2012, followed by 2 years of probation, followed by 3 months 1 day of suspension if probation is not successful.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on December 21, 1982. Respondent was also admitted to the practice of law in the State of Colorado. Respondent's conditional admission filed on September 28, 2012, with the Colorado Supreme Court and accepted on October 1, generally stipulates to trust account violations and neglect of client matters. On October 1, the Colorado Supreme Court entered an order, which stated that respondent is "**SUSPENDED** from the practice of law for a period of **ONE YEAR AND ONE DAY, WITH NINE MONTHS TO BE SERVED AND THREE MONTHS AND ONE DAY TO BE STAYED** upon the successful completion of a **TWO-YEAR** period of probation . . . ." The order stated that the effective date of the suspension was November 5, 2012. On October 15, respondent reported the suspension by the Colorado Supreme Court to the Nebraska Supreme Court's Counsel for Discipline.

On October 23, 2012, the Counsel for Discipline filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321 of the disciplinary rules. On October 31, we entered an order to show cause as to why we should not impose reciprocal discipline. On November 8, respondent responded to the order to show cause in which he requested that we enter an order with the same conclusion date as set forth in the suspension order by the Colorado Supreme Court. The Counsel for Discipline did not respond to the order to show cause.

ANALYSIS

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Murphy*, 283 Neb. 982, 814 N.W.2d 107 (2012). In a reciprocal discipline proceeding, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction. *Id.* Based on the record before us, we find that respondent is guilty of misconduct.

Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
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> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Section 3-321 of the disciplinary rules provides in part:

> (A) Upon being disciplined in another jurisdiction, a member shall promptly inform the Counsel for Discipline of the discipline imposed. Upon receipt by the Court of appropriate notice that a member has been disciplined in

> another jurisdiction, the Court may enter an order imposing the identical discipline, or greater or lesser discipline as the Court deems appropriate, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012). In his response to our order to show cause, respondent requests that we enter an order with the same conclusion date as set forth in the Colorado suspension order. The October 1, 2012, order of the Colorado Supreme Court stated that respondent is "**SUSPENDED** from the practice of law for a period of **ONE YEAR AND ONE DAY, WITH NINE MONTHS TO BE SERVED AND THREE MONTHS AND ONE DAY TO BE STAYED** upon the successful completion of a **TWO-YEAR** period of probation . . . ." The order further stated that the effective date of the suspension was November 5, 2012. We understand this to mean respondent is disciplined to 9 months of suspension to be served from November 5, 2012, followed by 2 years of probation, followed by 3 months 1 day of suspension if probation is not successful. Our understanding controls the discipline imposed in this case. Therefore, we grant the motion for reciprocal discipline and impose the same discipline as imposed by the Colorado Supreme Court, according to our understanding as set forth above, to run concurrently with the discipline imposed by the Colorado Supreme Court.

CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that respondent should be and is disciplined to 9 months of suspension to be served from November 5, 2012, followed by 2 years of probation, followed by 3 months 1 day of suspension if probation is not successful. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. He is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and

Neb. Ct. R. §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V.
TRAVIS T. MITCHELL, APPELLANT.
825 N.W.2d 429

Filed January 25, 2013. No. S-11-407.

1. **Sentences: Prior Convictions: Appeal and Error.** A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.

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 Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays 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

Travis T. Mitchell was charged with driving under the influence (DUI), fourth offense; no valid registration; and no proof of insurance. A jury found him guilty of DUI but acquitted him of the other two charges. The Lancaster County District Court determined that a conviction for driving while ability impaired (DWAI) in Colorado could be used to enhance Mitchell's

current DUI offense. He was sentenced to 3 to 5 years' imprisonment, and his license was revoked for 15 years.

Mitchell appealed to the Nebraska Court of Appeals, alleging his DWAI conviction could not be used to enhance the penalty in this case. The Court of Appeals affirmed the judgment of the district court in *State v. Mitchell*, 19 Neb. App. 801, 820 N.W.2d 75 (2012). We granted Mitchell's petition for further review.

SCOPE OF REVIEW

[1] A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

FACTS

On May 2, 2010, Mitchell was involved in a traffic accident near 70th and Dudley Streets in Lincoln, Nebraska. Sgt. Grant Richards of the Lincoln Police Department testified that he was traveling north on 70th Street and observed a vehicle on the west side of the street that was suspended on the guide wire that supported a utility pole. Richards observed Mitchell jump out of the driver's door of the vehicle. While talking with Mitchell, Richards smelled the odor of alcohol on Mitchell's breath. Richards suspected that Mitchell was under the influence of alcohol. Richards turned Mitchell over to the investigating police officer who had arrived at the scene a few minutes after Richards.

The police officer administered a horizontal gaze nystagmus test and a preliminary breath test. Mitchell was arrested and transported to the detoxification center, where his blood alcohol content was determined to be .103 grams of alcohol per 210 liters of breath.

On August 4, 2010, an information was filed in Lancaster County District Court charging Mitchell with DUI, fourth offense, a Class IIIA felony, in violation of Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197.03(7) (Supp. 2009).

He was also charged with having no valid registration or proof of insurance. Mitchell was convicted of DUI but was acquitted of the other charges.

An enhancement hearing was held on April 18, 2011. At the hearing, the State offered three exhibits as evidence of prior convictions. One of the exhibits involved a Colorado conviction. Mitchell objected to this exhibit, and the district court continued the hearing. On April 27, the court issued an order finding that Mitchell had three prior convictions for enhancement purposes under Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Reissue 2010). The court found that the State had met its burden to establish a prima facie case that "conviction under Colorado's DWAI law could also be a conviction under Nebraska's DUI law."

In addition to its DWAI statute, Colorado also has a DUI statute. See Colo. Rev. Stat. Ann. § 42-4-1301(1)(f) and (g) (West 2012). In Colorado, the distinction between DWAI and DUI is that DWAI requires that "a person has consumed alcohol . . . that affects the person to the slightest degree so that the person is less able than the person ordinarily would have been . . . to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle." § 42-4-1301(1)(g). DUI requires that "the person is substantially incapable . . . to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle." § 42-4-1301(1)(f).

Under Colorado's statutory scheme, blood alcohol content raises various permissible inferences. A blood alcohol content between .05 and .08 raises a permissible inference of DWAI. § 42-4-1301(6)(a)(II). A blood alcohol content of .08 or above raises a permissible inference of DUI. § 42-4-1301(6)(a)(III). Under Nebraska's statutory scheme, the requirements for DUI can be met in two different ways. Driving with a blood alcohol content of .08 or above results in a DUI regardless of the driver's level of impairment. § 60-6,196(1)(b) and (c). A defendant also commits DUI in Nebraska by driving "[w]hile under the influence of alcoholic liquor . . . ," § 60-6,196(1)(a), which requires impairment to an appreciable degree. See *State v. Batts*, 233 Neb. 776, 448 N.W.2d 136 (1989).

In the case at bar, the district court considered the offense of DWAI in Colorado to determine if it could establish a DUI in Nebraska. The court reasoned that because there was an upper blood alcohol limit of .08 for the offense of DWAI, a conviction for DWAI based on blood alcohol content would not be a DUI conviction in Nebraska. However, because DWAI may also be proved by evidence that the person was affected by alcohol to the slightest degree and there is no upper limit on the degree to which a person may be affected, the court concluded that a defendant could be more than slightly affected by alcohol and still be convicted of DWAI in Colorado. It reasoned that if the defendant was affected to an appreciable degree, the defendant could be convicted of DUI in Nebraska.

The district court determined that the exhibit regarding Mitchell's conviction in Colorado indicated he was more than slightly affected by alcohol. (His vehicle drifted and jerked on the road, his eyes were bloodshot, his speech was slurred, and he was unable to satisfactorily perform field sobriety tests.) The court concluded the record could be viewed as establishing that Mitchell was affected to an appreciable degree. Therefore, the State had established a prima facie case that the conviction under Colorado's DWAI law could also be a conviction under Nebraska's DUI law.

On appeal, Mitchell claimed that the district court erred in finding that his prior Colorado conviction for DWAI could be used to enhance the penalty for DUI. The Court of Appeals agreed with the district court's analysis that a conviction for DWAI based on blood alcohol content would not satisfy the requirements of a Nebraska DUI. We point out that the record did not contain Mitchell's blood alcohol content related to the DWAI conviction because he had successfully suppressed that evidence.

The Court of Appeals next considered whether a showing that a defendant was affected to more than the "'slightest degree'" could qualify as a DUI in Nebraska. *State v. Mitchell*, 19 Neb. App. 801, 806, 820 N.W.2d 75, 80 (2012). It found that a defendant could be more than "slightly affected" by alcohol and be convicted of DWAI in Colorado and that if the impairment rose to an "appreciable degree," the defendant

could be convicted under Nebraska's DUI law. *Id*. "The facts indicate [Mitchell] could have been affected to more than the slightest degree or to the level of appreciable impairment." *Id*. It concluded that the State presented a prima facie case by showing the prior DWAI conviction in Colorado could have been a violation of § 60-6,196 had the incident occurred in Nebraska. The burden then shifted to Mitchell to establish that the facts supporting the Colorado DWAI would not support a conviction under Nebraska's DUI statute.

Mitchell had two prior DUI convictions in Nebraska that were undisputed for purposes of enhancement. The Court of Appeals found that Mitchell's conviction for DWAI in Colorado qualified as a prior conviction under Nebraska statutes and that, therefore, Mitchell had three prior convictions for enhancement purposes. It affirmed the judgment of the district court.

ASSIGNMENT OF ERROR

Mitchell assigns, restated, that the Court of Appeals erred in concluding that his Colorado DWAI conviction could be used to enhance the penalty for DUI.

ANALYSIS

At the time of Mitchell's enhancement hearing, a conviction under a law of another state for a violation committed within a 12-year period prior to the offense for which the sentence was being imposed could be used to enhance the penalty for DUI if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of § 60-6,196. See § 60-6,197.02(1). The issue presented is whether Mitchell's conviction for DWAI in Colorado can be used to enhance his conviction to fourth-offense DUI in Nebraska. A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

In his argument against enhancement, Mitchell relies upon *Garcia*, in which an officer stopped Leopoldo J. Garcia after observing him driving erratically in a car dealership parking lot after business hours and then colliding with a light pole. Garcia was convicted of DUI following a bench trial on stipulated facts.

An enhancement hearing was held to determine whether Garcia's sentence would reflect the DUI as his third offense. Garcia objected to the admission of two prior California DUI convictions. He claimed that the State had not shown the prior convictions would have been violations of § 60-6,196. California DUI laws applied anywhere in the state, while in Nebraska, they applied only to highways and private property open to public access. The trial court admitted the California convictions. Garcia was convicted of DUI (third offense), and he appealed.

On appeal, Garcia argued that the State was required to establish that his convictions in California occurred on public property. The record of the California convictions did not reflect that particular fact.

The State claimed that by presenting certified copies of the prior convictions and establishing that those convictions were counseled, it made a prima facie case for enhancement and that the burden then shifted to Garcia to show why the prior offenses would not qualify as a prior offense under Nebraska law. We stated that under § 60-6,197.02, "[i]t is understood that the prior conviction must be for the offense of DUI. But we do not read § 60-6,197.02 as placing upon the State the initial burden of showing a substantial similarity of every element of the respective DUI laws . . . ." *Garcia*, 281 Neb. at 9, 792 N.W.2d at 889. We held that the prosecution had presented prima facie evidence of Garcia's prior conviction by presenting a certified copy of his California DUI convictions, which the State demonstrated were counseled. The burden then shifted to Garcia to produce evidence rebutting the statutory presumption that those documents did not reflect that an "'offense for which the person was convicted would have been a violation of [§] 60-6,196.'" *Garcia*, 281 Neb. at 13, 792 N.W.2d at 892.

We expressly pointed out in *Garcia* that in order to use the out-of-state conviction for enhancement, the prior conviction must be for the offense of DUI. We did not read § 60-6,197.02 "as placing upon the State the initial burden of showing a substantial similarity of every element of the respective DUI laws." *Garcia*, 281 Neb. at 9, 792 N.W.2d at 889. When the prosecution presented evidence of Garcia's prior counseled convictions, the burden then shifted to Garcia.

Mitchell argues that the State has never satisfied its burden to provide prima facie evidence of a prior conviction in Colorado because "[i]t is understood that the prior conviction must be for the offense of DUI." See *id*. We agree.

Both the district court and the Court of Appeals recognized that Nebraska's "any appreciable degree" requirement for DUI was higher than Colorado's "slightest degree" requirement for DWAI. See *State v. Mitchell*, 19 Neb. App. 801, 820 N.W.2d 75 (2012). However, because an individual impaired to an appreciable degree was also impaired to the slightest degree, both courts concluded that it was possible for a person to receive a DUI in Nebraska for acts that constituted a DWAI in Colorado. In their analysis, both courts looked at the facts incident to Mitchell's arrest and conviction in Colorado.

This analysis is incorrect. Mitchell pled guilty to the charge of DWAI. The theoretical possibility that a defendant's conviction for DWAI could have satisfied the Nebraska elements for DUI is not enough. The prior out-of-state conviction must be for the offense of DUI. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

Mitchell's conviction of DWAI was a determination that his conduct met the minimum requirement for violation of the DWAI statute. His conviction meant that he was impaired to the slightest degree. The conviction made no other determination of Mitchell's impairment. To enhance Mitchell's penalty for DUI because the facts of his arrest and conviction in Colorado *could* support the higher requirement for a Nebraska DUI is to enhance Mitchell's penalty based on a crime for which he was never convicted. Hence, it is the conviction for DWAI, not the record of a defendant's conduct at the time of the arrest, that is relevant to our analysis. Arguably, if

the threshold requirement for a DWAI was impairment to an appreciable degree, then a DWAI could be a DUI in Nebraska. However, it would still not conform to the requirement that the out-of-state conviction must be for DUI.

Colorado's statutes make a distinction between DWAI and DUI. The minimum threshold for proving a DWAI based on impairment in Colorado is impairment to the slightest degree. § 42-4-1301(1)(g). Impairment to the slightest degree cannot result in a conviction for DUI in Nebraska, which requires a showing of impairment to an appreciable degree. See, § 60-6,196; *State v. Batts*, 233 Neb. 776, 448 N.W.2d 136 (1989). Because the threshold for proving a DWAI in Colorado based on the level of impairment (slightest degree) is lower than the threshold for proving DUI based on the level of impairment (appreciable degree) in Nebraska, we cannot conclude that a conviction for DWAI based on impairment in Colorado would have been a conviction for DUI in Nebraska. Mitchell's conviction for DWAI does not meet the requirement set forth in *Garcia, supra*, that the out-of-state conviction be for DUI.

Mitchell pled guilty to DWAI in Colorado. While the evidence surrounding his arrest might show that Mitchell was more than slightly impaired, an enhancement is not proper simply because Mitchell's behavior could have resulted in a DUI conviction in Nebraska. For enhancement, the court examines the authenticated or certified copy of the prior conviction and whether the conviction was counseled. See *Garcia, supra*.

In the case at bar, the State did not present a prima facie case for enhancement because Mitchell was convicted of DWAI in Colorado and "the prior conviction must be for the offense of DUI." See *Garcia*, 281 Neb. at 9, 792 N.W.2d at 889. Neither the fact that Colorado's DWAI statute has no upper threshold regarding the level of impairment nor the facts surrounding the arrest are relevant to the enhancement.

CONCLUSION

Mitchell was convicted of DWAI in Colorado. This conviction could not be used to enhance the penalty for a conviction

of DUI in Nebraska. The Court of Appeals erred in concluding that a Colorado DWAI conviction could be used to enhance the penalty for a Nebraska DUI. Accordingly, the decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to remand the cause to the district court with directions to vacate Mitchell's sentence for fourth-offense DUI and to resentence him in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD L. MOLCZYK, JR., APPELLANT, V. KERRIE K. MOLCZYK, APPELLEE.

825 N.W.2d 435

Filed January 25, 2013. No. S-11-1095.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
5. **Courts: Jurisdiction.** Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court. That is, a second court lacks jurisdiction over the same matter involving the same parties.
6. **Dismissal and Nonsuit: Jurisdiction.** An order of dismissal or dismissal by operation of law divests a court of jurisdiction to take any further action in the matter.
7. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.
8. **Courts: Dismissal and Nonsuit: Jurisdiction: Pleadings: Motions to Vacate.** A court treats a motion to reinstate a case after an order of dismissal as a motion to vacate the order, and a court normally has jurisdiction over a motion to vacate an order of dismissal and reinstate a case.
9. **Actions: Jurisdiction: Parties: Notice.** A motion to reinstate a dismissed action, of which the opposing party has notice, has jurisdictional priority over a later complaint filed in a different court involving the same subject matter and the same parties.

10. **Juvenile Courts: Jurisdiction: Child Custody.** Under Neb. Rev. Stat. § 25-2740(3) (Reissue 2008), the jurisdiction conferred on a county court to decide custody issues refers to a county court sitting as a juvenile court and provides the juvenile court with concurrent jurisdiction over a custody determination for an adjudicated juvenile, not exclusive jurisdiction.
11. **Courts: Juvenile Courts: Child Custody: Time.** Under Neb. Rev. Stat. § 43-2,113(2) (Reissue 2008), if a juvenile court judge consents to a transfer of a custody case and the district court transfers the case to juvenile court, the case is "filed" with the county court, sitting as a juvenile court, or the separate juvenile court when a certified copy of the district court's transfer order is filed in the juvenile court.
12. **Juvenile Courts: Jurisdiction: Divorce: Child Custody.** Juvenile courts do not acquire jurisdiction over a marital dissolution action or a custody proceeding unless three conditions are met: (1) The juvenile court has already acquired jurisdiction over the parties' child; (2) the juvenile court judge consented to transferring the case to juvenile court; and (3) the district court has issued a transfer order, a certified copy of which has been filed in the county court, sitting as a juvenile court, or in the separate juvenile court.
13. **Trial: Judges: Presumptions: Appeal and Error.** An appellate court presumes in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise.
14. **Child Support: Rules of the Supreme Court.** Under the Nebraska Child Support Guidelines, unless the minimum support rule applies, a parent's total support, child care, and health care obligations cannot reduce the obligor's net income below the minimum net monthly income for one person that will exceed the federal poverty threshold.
15. **Divorce: Child Support.** In a marital dissolution action, to determine an obligor's net income for calculating support obligations, a court subtracts the following annualized deductions from the obligor's gross income: taxes, FICA, allowable retirement contributions, previous court-ordered child support to other children, and allowable voluntary support payments to other children.
16. **Child Support: Rules of the Supreme Court.** Under the Nebraska Child Support Guidelines, to determine if the obligor's income exceeds the minimum subsistence level, a court deducts the obligor's support obligations that are specified in the guidelines from the obligor's net income.
17. **Divorce: Attorney Fees.** In a marital dissolution action, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.
18. **Property Division.** The ultimate test for the appropriateness of a trial court's division of the marital estate is fairness and reasonableness as determined by the facts of each case.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Phillip G. Wright for appellant.

Amy Sherman, of Sherman & Gilner, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

SUMMARY

In this marital dissolution appeal, we cut through a jurisdictional jungle to determine whether the Douglas County District Court, the Lancaster County District Court, or the Douglas County Juvenile Court had jurisdiction over the action. After the Douglas County District Court dismissed the original dissolution action for lack of prosecution, the appellant, Richard L. Molczyk, Jr., moved to reinstate it. Before the court ruled on Richard's motion, the appellee, Kerrie K. Molczyk, filed a second dissolution action in Lancaster County District Court. At trial, the Douglas County District Court overruled Kerrie's motion to dismiss, concluding that its order to reinstate Richard's action related back to the date that Richard had filed the motion. The court also concluded that it had jurisdiction over the subject matter despite pending juvenile proceedings involving two of the parties' minor children.

On appeal, Richard claims that the court erred in these determinations and lacked jurisdiction. We affirm. We determine that the Douglas County District Court had jurisdictional priority over the Lancaster County District Court. Because the parties did not comply with the procedural requirements for transferring a case to juvenile court, the juvenile court did not have jurisdiction.

BACKGROUND

In March 2010, Richard filed a complaint for dissolution of marriage from Kerrie. The parties were married in 1981 and had seven children, three of whom were minors when the action was commenced. In May, Kerrie filed an answer and countercomplaint for dissolution. In August, a deputy county attorney filed a petition in the Douglas County Juvenile Court, alleging that the juvenile court should adjudicate the parties' 11-year-old son under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) because of his school truancy.

In September 2010, the district court issued a temporary order that, among other things, awarded custody of the parties' minor children to Richard, subject to Kerrie's visitation rights. On October 8, the court issued an order dismissing the action for lack of prosecution. On October 25, Richard moved the court to set aside its dismissal order and reinstate the case. The motion did not state a hearing date, but it was served on Kerrie's counsel. On November 3, Kerrie filed a complaint for dissolution in the Lancaster County District Court. Kerrie admitted in her complaint that Richard had previously filed a dissolution action in Douglas County but alleged that the court had dismissed it. She did not, however, alert the court to Richard's motion to reinstate the dismissed case. On November 4, Richard was served with summons. On November 8, Kerrie served Richard with notice that a hearing on her motion for temporary orders was set for December 3 in the Lancaster County District Court.

On November 12, 2010, in Douglas County, Kerrie's attorney filed a response to Richard's motion to reinstate. In an affidavit, the attorney averred that Kerrie had moved to Lincoln and that she wished to file an action there if the Douglas County District Court dismissed the case. The attorney's affidavit stated that Kerrie would be prejudiced by a reinstatement order because relying on the dismissal, she had forgone trial preparation and had taken action to start the case again. Kerrie's counsel admitted that she knew about Richard's motion to reinstate but argued that Richard had not set a hearing date on the motion until November 9. On November 15, the Douglas County District Court heard Richard's motion, reinstated the original case, and set aside its dismissal order.

In January 2011, the trial began in the Douglas County District Court. On the first day, Kerrie moved to dismiss the action for lack of jurisdiction. She asked the court to take judicial notice of its October 2010 order dismissing Richard's action for lack of prosecution. And she stated that the Lancaster County District Court still had jurisdiction over the action, which was pending. The court reviewed its file and the procedural history. Because Richard's motion to reinstate was

pending when Kerrie filed the second complaint in Lancaster County on November 3, the court concluded that its order reinstating the action related back to the date of Richard's motion to reinstate on October 25. The court concluded that its order reinstating the action predated the filing of Kerrie's second action. It overruled Kerrie's motion to dismiss, and the trial proceeded.

Richard testified that a juvenile proceeding regarding the parties' youngest son was pending before the juvenile court, and the court asked whether it had jurisdiction over him. Richard's attorney stated that the juvenile court would automatically dismiss the case in about 3½ months if there were no further truancy problems. Richard also stated that there was a pending juvenile proceeding regarding the parties' youngest daughter. This proceeding apparently resulted from her minor in possession arrests in April and May 2010. Richard stated that she had been complying with the juvenile court's requirements and that the court had scheduled a final disposition for the following week.

The district court heard testimony on two different dates, January 27 and June 20, 2011. On July 20, before the court entered a decree, Kerrie moved to withdraw her rest and adduce evidence about an incident with the minor children that happened after June 20. Richard responded with a motion to withdraw his rest so the court could conduct an in camera interview of the minor children. The court overruled both motions.

In November 2011, the court issued its dissolution decree. It awarded sole custody of the two children who were still minors to Kerrie, with reasonable visitation, including a summer visitation block, for Richard. It awarded Kerrie child support of $1,327 per month for the two minor children and alimony of $750 per month for 24 months, and then $600 per month for an additional 36 months. It awarded Kerrie $4,000 in attorney fees.

Richard moved for a new trial. Among other things, he asserted that the court had failed to appoint a guardian ad litem for the minor children and had failed to question them about where they wished to live. At the hearing, the court

received Richard's offer of affidavits with statements by the parties' children. It also received Kerrie's offer of a police report about an assault incident involving the minor children and a notice from the Omaha Public Schools about the parties' youngest son's continuing truancy. The court overruled Richard's motion.

ASSIGNMENTS OF ERROR

Richard assigns that the court erred in (1) determining that it had jurisdiction despite the pending dissolution action in Lancaster County and the pending juvenile court proceedings involving two of the minor children; (2) awarding Kerrie sole custody of the minor children or, alternatively, not granting a new trial; (3) awarding Kerrie alimony; (4) failing to equitably divide the marital assets and liability; and (5) awarding Kerrie attorney fees.

STANDARD OF REVIEW

[1-4] A jurisdictional issue that does not involve a factual dispute 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] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.[4]

ANALYSIS

Jurisdictional Priority

[5] We have recognized the doctrine of jurisdictional priority. Under this doctrine, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of

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[1] *Strode v. Saunders Cty. Bd. of Equal.*, 283 Neb. 802, 815 N.W.2d 856 (2012).

[2] *Martin v. Ullsperger*, 284 Neb. 526, 822 N.W.2d 382 (2012).

[3] *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[4] *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

another court.[5] That is, a second court lacks jurisdiction over the same matter involving the same parties.[6]

Under Neb. Rev. Stat. § 42-348 (Reissue 2008), a plaintiff can commence a marital dissolution action in the district court of any county in which one of the parties resides. Kerrie had moved to Lincoln before filing her action in Lancaster County District Court, and Richard continued to live in Douglas County. So the district courts of either county could have exercised jurisdiction over a dissolution action between them. The question that we must resolve is this: Does a motion to reinstate a dismissed complaint for marital dissolution in one county divest another court of jurisdiction over a later complaint filed in a different county?

[6-8] An order of dismissal or dismissal by operation of law divests a court of jurisdiction to take any further action in the matter.[7] But in civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.[8] A court treats a motion to reinstate a case after an order of dismissal as a motion to vacate the order,[9] and we have recognized that a court normally has jurisdiction over a motion to vacate an order of dismissal and reinstate a case.[10]

[9] It is true that a court has discretion to deny a motion to vacate a case.[11] But we conclude that for applying principles of judicial administration, a motion to reinstate an action should

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[5] See, e.g., *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007); *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

[6] See *In re Estate of Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980).

[7] See, *Davis v. Choctaw Constr.*, 280 Neb. 714, 789 N.W.2d 698 (2010); *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007); 27 C.J.S. *Dismissal and Nonsuit* § 14 (2009).

[8] See *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005).

[9] See, *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000); *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

[10] See *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005), citing *R. V. R. R. Co. v. McPherson*, 12 Neb. 480, 11 N.W. 739 (1882).

[11] See, e.g., *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999).

be treated the same as the commencement of an action. Judicial administration principles require the elimination of unnecessary litigation and the promotion of judicial efficiency and economy.[12] Courts enforce the jurisdictional priority doctrine to promote judicial comity and avoid the confusion and delay of justice that would result if courts issued conflicting decisions in the same controversy.[13] Under these principles, we hold that a motion to reinstate a dismissed action, of which the opposing party has notice, has jurisdictional priority over a later complaint filed in a different court involving the same subject matter and the same parties.

A motion to reinstate a dismissed case might raise other concerns if the opposing party had commenced a new action without notice that the motion to reinstate had been filed. But court filings are generally effective when filed,[14] and the record shows that Richard gave notice of his motion. We conclude that the Douglas County District Court obtained jurisdiction on the date that Richard filed his motion to reinstate the dismissed action. Thus, the Douglas County District Court has exclusive concurrent jurisdiction over the matter and the Lancaster County Court lacked jurisdiction to proceed in the second action.

Pending Juvenile Proceedings Did Not Deprive the District Court of Jurisdiction

As stated, Richard raises a second jurisdictional argument. He claims that the district court lacked jurisdiction to decide the custody of the two minor children because of pending juvenile proceedings involving them. At oral arguments, we questioned whether the juvenile proceedings are still pending because the record suggests that the court has probably terminated the cases and the issue is moot. But Richard's counsel did not clarify the mootness issue. So we explain

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[12] See *In re Estate of Kentopp, supra* note 6.

[13] See *Plant Insulation Co. v. Fibreboard Corp.*, 224 Cal. App. 3d 781, 274 Cal. Rptr. 147 (1990).

[14] See *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011).

why the juvenile proceedings did not deprive the district court of jurisdiction.

Section 43-247 of the Nebraska Juvenile Code is the primary statute, but not the only statute, setting out a juvenile court's jurisdiction. In the first paragraph of § 43-247, the Legislature has broken down a juvenile court's jurisdiction into exclusive or concurrent classifications depending on the type of adjudication at issue. Section 43-247 provides that a juvenile court has "exclusive original jurisdiction" over "any juvenile defined in subdivision (3) of this section, and as to the parties and proceedings provided in subdivisions (5), (6), and (8) of this section." The term "[p]arties" is defined to mean "the juvenile . . . and his or her parent, guardian, or custodian."[15] Under subsection (5), the juvenile court has jurisdiction over "[t]he parent, guardian, or custodian of any juvenile described in this section." So for adjudications under subsection (3), a juvenile court has exclusive jurisdiction over the juvenile and his or her parent, guardian, or custodian.

In *In re Guardianship of Rebecca B. et al.*,[16] a 2000 case, we held that when a juvenile court has assumed exclusive jurisdiction over a juvenile under § 43-247(3), a county court lacks jurisdiction to conduct a guardianship proceeding for the juvenile. We recognized that the Legislature has given county courts concurrent jurisdiction with juvenile courts over guardianship proceedings. But we held that a county court's jurisdiction must yield to the juvenile court's exclusive jurisdiction for a juvenile adjudicated under subsection (3).

Later, in *Ponseigo v. Mary W.*,[17] we held that a district court lacks jurisdiction to hear a grandparent visitation action after the juvenile court has obtained exclusive jurisdiction over the grandchild through an adjudication under § 43-247(3). But as the Nebraska Court of Appeals has explained, after this holding, the Legislature amended § 43-247.[18]

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[15] Neb. Rev. Stat. § 43-245(15) (Cum. Supp. 2012).

[16] *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000).

[17] *Ponseigo v. Mary W.*, 267 Neb. 72, 672 N.W.2d 36 (2003).

[18] See *In re Interest of Ethan M.*, 18 Neb. App. 63, 774 N.W.2d 766 (2009).

The Legislature was apparently concerned that district courts had interpreted our decision in *Ponseigo* to mean that they did not have jurisdiction to decide the custody of children who were subject to a juvenile court's exclusive jurisdiction. So in 2008, the Legislature enacted L.B. 280,[19] which was intended to expand the juvenile court's jurisdiction to include custody determinations for juveniles whom the court has adjudicated under § 43-247(3).[20] The Legislature was concerned that such a child's custody could remain in limbo in a custody dispute because the juvenile court had no authority to determine custody disputes and the district court believed it lacked jurisdiction to do so.

Thus, the Legislature amended some statutes related to a juvenile court's jurisdiction to give juvenile courts authority to decide custody disputes over adjudicated children. In the following statutes, the italicized language represents the amended language that the Legislature added.

L.B. 280 amended § 43-247(11) to give juvenile courts concurrent original jurisdiction over a "paternity *or custody* determination for a child over which the juvenile court already has jurisdiction." It also amended Neb. Rev. Stat. § 24-517(7) (Cum. Supp. 2012) to give county courts "[c]oncurrent original jurisdiction with the district court in domestic relations matters as defined in section 25-2740 and with the district court and separate juvenile court in paternity *or custody* determinations as provided in section 25-2740."

Richard relies on Neb. Rev. Stat. § 25-2740(3) (Reissue 2008), the language of which was also amended in 2008 by L.B. 280. Section 25-2740(1) defines "[d]omestic relations matters" to include proceedings under "sections 42-347 to 42-381," which include proceedings for "dissolution, separation, annulment, custody, and support." It further defines "custody determinations" to mean "proceedings to determine custody of a child under section 42-364." Section 25-2740(2) and (3) set out the following jurisdiction rules:

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[19] See 2008 Neb. Laws, L.B. 280.

[20] See *In re Interest of Ethan M., supra* note 18.

> (2) Except as provided in subsection (3) of this section, in domestic relations matters, a party shall file his or her petition or complaint and all other court filings with the clerk of the district court. The party shall state in the petition or complaint whether such party requests that the proceeding be heard by a county court judge or by a district court judge. . . . Such proceeding is considered a district court proceeding, even if heard by a county court judge . . . .
>
> (3) In addition to the jurisdiction provided for paternity *or custody* determinations under subsection (2) of this section, a county court or separate juvenile court which already has jurisdiction over the child whose paternity *or custody* is to be determined has jurisdiction over such paternity *or custody* determination.

[10] Under § 25-2740(3), the jurisdiction conferred on a county court to decide custody issues clearly refers to a county court sitting as a juvenile court because the court must have already obtained jurisdiction over the child. But § 25-2740(3) provides a juvenile court with concurrent jurisdiction over a custody determination for an adjudicated juvenile, not exclusive jurisdiction. This reading of § 25-2740(3) is consistent with § 43-245(8) of the juvenile code, which provides that "[n]othing in the Nebraska Juvenile Code shall be construed to deprive the district courts of their habeas corpus, common-law, or chancery jurisdiction or the county courts and district courts of jurisdiction of domestic relations matters as defined in section 25-2740."

Moreover, reading § 25-2740(3) consistently with other statutes on the subject shows that the Legislature did not give juvenile courts original jurisdiction over dissolution actions. It is true that § 24-517(7) gives county courts concurrent original jurisdiction with the district courts over domestic relations matters, which includes dissolutions. But the jurisdiction conferred on a separate juvenile court or county court sitting as a juvenile court is more limited. Section 42-348 of the marital dissolution statutes provides the following:

> All proceedings under sections 42-347 to 42-381 [domestic relations actions] shall be brought in the district

> court of the county in which one of the parties resides. Proceedings *may* be transferred to a separate juvenile court or county court sitting as a juvenile court which has acquired jurisdiction pursuant to section 43-2,113. Certified copies of orders filed with the clerk of the court pursuant to such section shall be treated in the same manner as similar orders issued by the court.

Under Neb. Rev. Stat. § 43-2,113 (Reissue 2008), the Legislature clearly intended that a separate juvenile court or a county court sitting as a juvenile court could acquire jurisdiction over dissolution proceedings only if the court has already adjudicated the parties' child *and* other specified conditions are met:

> (2) A juvenile court created in a separate juvenile court judicial district or a county court sitting as a juvenile court in all other counties shall have and exercise jurisdiction within [its district] with the county court and district court in all matters arising under Chapter 42, article 3, when the care, support, custody, or control of minor children under the age of eighteen years is involved. *Such cases shall be filed in the county court and district court and may, with the consent of the juvenile judge, be transferred to the docket of the separate juvenile court or county court*.

Although the second sentence in § 43-2,113(2) refers to a county court, when this sentence is read consistently with the first sentence, the Legislature obviously meant a county court sitting as a juvenile court. Moreover, § 43-2,113 is part of a group of statutes specifically addressing separate juvenile courts.[21]

The problem is that the second sentence does not clarify who should "file" a case with the county court. And we cannot read this sentence to require a party to commence a dissolution action in both the district court and the county court if the juvenile court has previously acquired jurisdiction over one of the parties' children and the party wishes the juvenile court to decide the custody issues. This interpretation would

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[21] See Neb. Rev. Stat. §§ 43-2,111 to 43-2,127 (Reissue 2008).

obviously lead to jurisdictional confusion or duplication, and we try to avoid a statutory construction that would lead to an absurd result.[22] Equally important, requiring parties to file a dissolution action in county court is inconsistent with § 42-348, which requires all dissolution actions to be filed in district court.

[11] Instead, we believe that the answer lies in § 42-348. As noted, § 42-348 provides that "[c]ertified copies of orders filed with the clerk of the court pursuant to [§ 43-2,113] shall be treated in the same manner as similar orders issued by the court." So we construe the requirement in § 43-2,113(2) that these "cases shall be filed in the county court and district court" to mean that a party must file an action or proceeding to resolve custody disputes in district court, which can lead to a transfer to the juvenile court if a party obtains the juvenile court judge's consent to a transfer. Under § 43-2,113(2), if a juvenile court judge consents to a transfer and the district court transfers the case to juvenile court, the case is "filed" with the county court, sitting as a juvenile court, or the separate juvenile court when a certified copy of the district court's transfer order is filed in the juvenile court.

[12] Under this construction, §§ 42-348 and 43-2,113(2) give a county court, sitting as a juvenile court, or a separate juvenile court concurrent jurisdiction over dissolutions or custody determinations only if specified procedures are followed. Juvenile courts do not acquire jurisdiction over a marital dissolution action or a custody proceeding unless three conditions are met: (1) The juvenile court has already acquired jurisdiction over the parties' child; (2) the juvenile court judge consented to transferring the case to juvenile court; and (3) the district court has issued a transfer order, a certified copy of which has been filed in the county court, sitting as a juvenile court, or in the separate juvenile court.

As stated, L.B. 280 amended § 43-247(11) to give juvenile courts concurrent original jurisdiction over a custody determination for a child whom the juvenile court already has jurisdiction. But when read consistently with §§ 42-348

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[22] See *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

and 43-2,113(2), the juvenile court cannot acquire jurisdiction over a custody determination unless a party has previously filed a complaint for a dissolution or a custody modification in district court. Because a juvenile court does not have concurrent, *original* jurisdiction over a dissolution action or custody dispute in the sense that a party can commence an action or proceeding in that court, the jurisdictional priority doctrine does not apply. Here, the record does not show that the parties complied with the procedural requirements for transferring the dissolution action to the juvenile court. So the pending juvenile proceedings involving the parties' minor children did not affect the district court's jurisdiction to decide the custody issues.

The Court Did Not Abuse Its Discretion

Regarding the actual decree, Richard contends that the court abused its discretion in dividing the marital estate and awarding Kerrie custody, alimony, and attorney fees. He first argues that the court failed to consider the best interests factors for custody determinations or the wishes of the minor children. He premises his argument on the court's language in the decree. In the decree, the court stated that "[Kerrie] is a fit and proper person to be awarded the sole care, custody and control of the two minor children of the parties." Because the court did not state that Kerrie's custody of the children was in their best interests, Richard argues that the decree shows the court failed to consider their interests.

[13] We disagree. We presume in a bench trial that the judge was familiar with and applied the proper rules of law unless it clearly appears otherwise.[23] Under those rules, there was ample evidence to support the court's custody determination. It would unduly lengthen this opinion and add little to our jurisprudence to detail the parties' parental shortcomings. It is sufficient to say the evidence showed that Kerrie had been the children's primary caretaker and that Richard's temporary custody of them had not been in their best interests.

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[23] *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011).

The court did not abuse its discretion in awarding Kerrie sole custody.

[14] Nor did the court abuse its discretion in awarding Kerrie alimony and attorney fees. We reject Richard's claim that the court's award of alimony left him with income below the poverty threshold. Under the Nebraska Child Support Guidelines, unless the minimum support rule applies,[24] a parent's total support, child care, and health care obligations cannot reduce the obligor's net income below the minimum net monthly income for one person that will exceed the federal poverty threshold.[25] Currently, the guidelines set the minimum subsistence level at $931,[26] and Richard does not contest that level.

[15,16] In a marital dissolution action, to determine an obligor's net income for calculating support obligations, a court subtracts the following annualized deductions from the obligor's gross income: taxes, FICA, allowable retirement contributions, previous court-ordered child support to other children, and allowable voluntary support payments to other children.[27] Under the Nebraska Child Support Guidelines, to determine if the obligor's income exceeds the minimum subsistence level, a court deducts the obligor's support obligations that are specified in the guidelines from the obligor's net income.[28]

The record shows that Richard's gross monthly income was $7,607 and his net income was $4,916. Richard's support obligations totaled $2,077. So after deducting his support obligations, Richard's remaining income was $2,839, well above the minimum subsistence level. Moreover, the parties were married for almost 30 years, and for many of these years, Kerrie stayed at home to care for their seven children. The court did not abuse its discretion in awarding Kerrie alimony.[29]

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[24] See Neb. Ct. R. § 4-209.

[25] See Neb. Ct. R. § 4-218 (rev. 2012).

[26] See *id*.

[27] See Neb. Ct. R. § 4-205.

[28] See *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007).

[29] See *Schaefer v. Schaefer*, 263 Neb. 785, 642 N.W.2d 792 (2002).

[17] Similarly, the court did not abuse its discretion in awarding Kerrie attorney fees. In a marital dissolution action, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.[30] The court awarded Kerrie $4,000 in attorney fees, and the record showed that she had incurred over $11,000 in attorney fees. In contrast to Richard's income, the record showed that Kerrie earned a monthly gross salary of $1,776 and a monthly net salary of $1,529.

[18] Finally, the ultimate test for the appropriateness of a trial court's division of the marital estate is fairness and reasonableness as determined by the facts of each case.[31] After reviewing the record, we conclude that the court did not abuse its discretion in dividing the marital assets and liabilities.

CONCLUSION

We conclude that Richard invoked the jurisdiction of the Douglas County District Court by moving to reinstate the dismissed action before Kerrie filed a second action in Lancaster County. Because Kerrie had notice of his motion, we conclude that the Douglas County District Court was reinvested with jurisdiction over the matter and that Kerrie could not initiate a new action in a different court until after the court ruled on Richard's motion to reinstate.

We conclude that the pending juvenile proceedings involving the parties' two minor children did not prevent the district court from exercising jurisdiction over the custody issues in the dissolution action. The parties did not comply with the procedural requirements for transferring the case to juvenile court.

Finally, the district court did not abuse its discretion in awarding Kerrie custody, alimony, and attorney fees. Nor did it abuse its discretion in dividing the marital estate.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.
CASSEL, J., not participating.

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[30] See *id*.

[31] See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

KAAPA ETHANOL, L.L.C., APPELLEE, V. THE BOARD OF SUPERVISORS OF KEARNEY COUNTY, NEBRASKA, AND THE COUNTY OF KEARNEY, NEBRASKA, APPELLANTS.

825 N.W.2d 761

Filed January 25, 2013. No. S-12-035.

1. **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.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Taxation.** The general common-law rule is that taxes voluntarily paid cannot be recovered.
4. **Taxation: Words and Phrases.** Taxes paid under a mistake of fact are considered involuntary and thus recoverable under the common-law rule that taxes voluntarily paid cannot be recovered. A mistake of fact is an error or want of knowledge as to a fact, past or present, or such belief in the past or present existence as a fact of that which never existed, or such real and honest forgetfulness of a fact once known, as that the true recollection or knowledge of the fact, or of its existence or nonexistence, would have caused the taxpayer to refrain from making the payment.
5. **Taxation: Legislature: Statutes: Words and Phrases.** Taxes paid under a mistake of law are considered voluntary at common law and cannot be recovered unless the Legislature has enacted a statute authorizing recovery. A mistake of law is a mistake as to the legal consequences of an assumed state of facts, which occurs where a person is truly acquainted with the existence or nonexistence of the facts but is ignorant of or comes to an erroneous conclusion as to their legal effect.
6. **Statutes.** Statutes which effect a change in the common law are to be strictly construed.
7. **Statutes: Intent.** Generally, a statutory construction which changes an express common-law rule should not be adopted unless the plain words of the statute compel it.

Appeal from the District Court for Kearney County: STEPHEN R. ILLINGWORTH, Judge. Reversed and remanded with directions.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., for appellants.

Justin R. Herrmann and Daniel L. Lindstrom, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., and William E. Peters, of Peters & Chunka, P.C., L.L.O., for appellee.

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

STEPHAN, J.

Kaapa Ethanol, L.L.C. (Kaapa), sought a refund from Kearney County, Nebraska, of a portion of its 2006 personal property taxes, alleging the taxes were paid as the result of an "honest mistake or misunderstanding."[1] The Board of Supervisors of Kearney County (Board) denied the refund, and Kappa filed a petition in error with the district court for Kearney County. That court sustained the petition in error and ordered Kearney County to refund $480,411.50. The Board and Kearney County filed this timely appeal, and we granted their petition to bypass the Nebraska Court of Appeals. We reverse.

BACKGROUND

NEBRASKA PROPERTY TAX LAW

In Nebraska, real property is taxed based upon its value as of January 1 of each year, as determined by each county assessor.[2] The assessor then submits a real property tax bill to each taxpayer.[3] Taxation of personal property also involves the county assessor, but only indirectly. Nebraska requires the owner of personal property to compile a list of all its tangible personal property having a tax situs in Nebraska.[4] The list must be on a form prescribed by Nebraska's Tax Commissioner and must be filed as a personal property tax return by the owner of the personal property on or before May 1 of each year.[5] The county assessor then reviews all personal property tax returns and changes the reported valuation of any item of personal property to conform to net book value.[6] The assessor also adds any omitted personal property and assigns

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[1] Neb. Rev. Stat. § 77-1734.01(2) (Reissue 2009).

[2] See, generally, Neb. Rev. Stat. § 77-1301 (Reissue 2009).

[3] *Id.*

[4] Neb. Rev. Stat. § 77-1201 (Reissue 2009).

[5] Neb. Rev. Stat. § 77-1229(1) (Reissue 2009).

[6] Neb. Rev. Stat. § 77-1233.04 (Reissue 2009).

net book value to it.[7] Any valuation added to a personal property tax return or added through the filing of a personal property tax return after May 1 but on or before July 31 is subject to a penalty of 10 percent of the tax due on the value added.[8] Any valuation added to a personal property tax return or added through the filing of a personal property return on or after August 1 is subject to a penalty of 25 percent of the tax due on the value added.[9]

FACTS

Kaapa owns and operates an ethanol plant located in Kearney County. On April 28, 2006, Kaapa filed its 2006 personal property tax return, reporting a total taxable value of approximately $24.5 million. Several items listed on the return were used by the plant in processing grain into ethanol; these items are generally referred to in the record as "processing equipment."

Kaapa's 2006 return was prepared by Shana Dahlgren, Kappa's chief financial officer. Dahlgren testified that prior to filing the return, she consulted with several sources to help her determine whether the processing equipment was real or personal property. Specifically, Dahlgren consulted with the Property Tax Administrator for Nebraska's Department of Property Assessment and Taxation and two licensed real estate appraisers with experience appraising ethanol plants in Nebraska. These sources advised Dahlgren that the processing equipment was personal property. Dahlgren also reviewed the personal property tax returns of other Nebraska ethanol plants and concluded that those plants categorized similar equipment as personal property. Based on this information, Dahlgren included the processing equipment as personal property on Kaapa's 2006 property tax return.

Dahlgren also filed Kaapa's personal property tax returns in 2003, 2004, 2005, and 2007. She testified that she treated the processing equipment as personal property in each of those

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[7] *Id.*

[8] *Id.*

[9] *Id.*

years as well. The county assessor, however, treated the processing equipment as real property from 2003 forward.

The differing treatment of the processing equipment by Kaapa and the county assessor in tax years 2003, 2004, and 2005 was resolved by settlement between Kaapa and Kearney County. In 2006 and 2007, no settlement was reached. But in 2007, Kaapa protested both its personal property return and the assessor's real property valuation.[10] After Kearney County denied both of the 2007 protests, Kaapa appealed to Nebraska's Tax Equalization and Review Commission (TERC).[11] On June 25, 2009, TERC held that the processing equipment was properly classified as real property in 2007, and ordered Kearney County to refund Kaapa the 2007 personal property taxes it paid on the processing equipment. We affirmed in a memorandum opinion filed on March 10, 2010, in cases Nos. S-09-707 and S-09-717.

In 2006, the year at issue in this case, Kaapa did not settle with Kearney County and did not protest its personal property return. It did, however, protest the 2006 real property assessment. Dahlgren explained that Kaapa did not protest the 2006 personal property tax return, because it received the county assessor's valuation of its real property for 2006 after the May 1 deadline to protest the personal property tax return. According to Dahlgren, she therefore did not know until after May 1 that the assessor's 2006 real property valuation included the processing equipment. The assessor testified that she reviewed Kaapa's 2006 personal property tax return before finalizing Kaapa's 2006 real property valuation. According to the assessor, she could not determine from the face of the 2006 personal property tax return whether items of processing equipment she categorized as real property were also being valued by Kaapa as personal property. The assessor requested and received additional information from Kaapa on this issue, but was still unable to determine that any items of processing equipment were listed on both tax assessments.

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[10] See Neb. Rev. Stat. § 77-1502 (Reissue 2009).

[11] See Neb. Rev. Stat. § 77-1510 (Reissue 2009).

The assessor therefore included the processing equipment in the real property valuation.

Kaapa did not amend its 2006 personal property return after receiving the assessor's 2006 real property assessment.[12] But as noted, it did timely protest the 2006 real property assessment. The Board denied the protest, and on September 18, 2007, TERC affirmed. In doing so, TERC determined that the processing equipment was properly taxed as real property in 2006. TERC's opinion did not address or resolve any double taxation issues related to Kaapa's 2006 personal property return. Kaapa appealed from TERC's decision but later dismissed the appeal.

In December 2008, Kaapa filed a claim for a tax refund with the Kearney County treasurer pursuant to § 77-1734.01, arguing it paid taxes on the processing equipment in 2006 twice because it was taxed as both real and personal property. Kaapa contended that because TERC, in addressing Kaapa's 2006 real property protest, found the processing equipment was properly classified as real property, Kaapa's listing of the equipment as personal property and payment of personal property taxes on it in 2006 was the result of an "honest mistake or misunderstanding," and that thus, it was entitled to a refund of the personal property taxes so paid. The Kearney County treasurer found no refund was due. Kaapa asked the Board to review the treasurer's finding, and the Board conducted an evidentiary hearing. The Board ultimately determined that because no "agreeable solution" could be reached, Kaapa was not entitled to the refund.

Kaapa then filed a petition in error in the district court.[13] After reviewing the evidence, that court reversed the decision of the Board. The court found that Kaapa had paid the 2006 personal property taxes on the processing equipment as the result of an "honest mistake or misunderstanding" and was entitled to a refund under § 77-1734.01. The Board and Kearney County timely appealed, and we granted their petition to bypass the Court of Appeals.

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[12] See Neb. Rev. Stat. § 77-1230 (Reissue 2009).

[13] See Neb. Rev. Stat. § 25-1901 (Reissue 2008).

ASSIGNMENT OF ERROR

The Board and Kearney County assign, restated and consolidated, that the district court erred in finding Kaapa was entitled to a refund of the 2006 personal property taxes it paid on the processing equipment.

STANDARD OF REVIEW

[1] 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.[14]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[15]

ANALYSIS

Kaapa's refund claim is based on the premise that Kaapa paid 2006 taxes on the processing equipment twice because the equipment was classified as personal property by Kaapa and as real property by the county assessor. Kaapa asserts that because TERC ultimately held that the equipment was properly classified as real property, Kaapa committed an "honest mistake or misunderstanding" when it listed the same property as personal property, and thus should receive a refund under § 77-1734.01. That statute provides in pertinent part:

> In case of payment made of any property taxes or any payments in lieu of taxes with respect to property as a result of a clerical error or honest mistake or misunderstanding, on the part of a county or other political subdivision of the state or any taxpayer, the county treasurer to whom the tax was paid shall refund that portion of the tax paid as a result of the clerical error or honest mistake or misunderstanding. A claim for a refund pursuant to this section shall be made in writing to the county treasurer to

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[14] *Banks v. Housing Auth. of City of Omaha*, 281 Neb. 67, 795 N.W.2d 632 (2011); *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011).

[15] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012); *Engler v. State*, 283 Neb. 985, 814 N.W.2d 387 (2012).

> whom the tax was paid within three years after the date the tax was due . . . .
>
> . . . This section may not be used to challenge the valuation of property, the equalization of property, or the constitutionality of a tax.

[3-5] The general common-law rule is that taxes voluntarily paid cannot be recovered.[16] The rule's purpose is to discourage litigation and give stability to taxing authorities in conducting their affairs.[17] Taxes paid under a mistake of fact are considered involuntary and thus recoverable under the common-law rule.[18] A mistake of fact is

> an error or want of knowledge as to a fact, past or present, or such belief in the past or present existence as a fact of that which never existed, or such real and honest forgetfulness of a fact once known, as that the true recollection or knowledge of the fact, or of its existence or nonexistence, would have caused the taxpayer to refrain from making the payment.[19]

Taxes paid under a mistake of law are considered voluntary at common law[20] and cannot be recovered unless the Legislature has enacted a statute authorizing recovery.[21] A mistake of law is "a mistake as to the legal consequences of an assumed state of facts, which occurs where a person is truly acquainted with the existence or nonexistence of the facts but is ignorant of or comes to an erroneous conclusion as to their legal effect."[22]

The mistake which Kaapa claims to have made with respect to its 2006 taxes is clearly one of law, because the error was with respect to whether the processing equipment legally was real or personal property. Thus, the threshold question in this

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[16] *Satterfield v. Britton*, 163 Neb. 161, 78 N.W.2d 817 (1956).

[17] See *Texas Nat. Bank of Baytown v. Harris Cty.*, 765 S.W.2d 823 (Tex. App. 1988).

[18] 85 C.J.S. *Taxation* § 1058 (2010).

[19] *Id.* at 115.

[20] 72 Am. Jur. 2d *State and Local Taxation* § 972 (2012).

[21] *Satterfield v. Britton, supra* note 16.

[22] 85 C.J.S., *supra* note 18, § 1057 at 114-15.

appeal is whether § 77-1734.01 is merely a codification of the common-law rule or whether it alters the common-law rule and authorizes recovery of taxes paid pursuant to an error of law.[23] Specifically, does the statutory phrase "clerical error or honest mistake or misunderstanding" constitute the Legislature's expression that a taxpayer can recover in Nebraska for taxes paid based on an error of law?

[6,7] In resolving this issue, we are mindful that statutes which effect a change in the common law are to be strictly construed.[24] Generally, a construction which changes an express common-law rule should not be adopted unless the plain words of the statute compel it.[25] Here, the phrase "clerical error or honest mistake" clearly refers to errors of fact. The term "misunderstanding" is less clear; it could perhaps include a misapprehension or misapplication of law. But because the language of the statute does not plainly reveal that the Legislature intended to expand the common-law rule, we must conclude that it did not.

Additionally, we note that § 77-1734.01 is included in chapter 77, article 17, of the Nebraska Revised Statutes, which bears the title "Collection of Taxes." Also contained in article 17, immediately following § 77-1734.01, is Neb. Rev. Stat. § 77-1735 (Reissue 2009), which provides a procedure whereby a taxpayer may obtain a refund of property tax payment based upon a claim that a tax "is illegal for any reason other than the valuation or equalization of the property." The existence of this separate statute governing refunds of certain taxes paid based on mistakes of law further supports the conclusion that the Legislature intended § 77-1734.01 to apply only to refunds resulting from errors of fact. Accordingly, we conclude that § 77-1734.01 is merely a codification of the common-law rule. Because Kaapa paid the 2006 personal property taxes based upon a mistake of law, § 77-1734.01 affords it no relief.

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[23] See, generally, *Satterfield v. Britton, supra* note 16.

[24] *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[25] See *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012).

The district court erred in ordering Kearney County to refund the $480,411.50.

We acknowledge that this construction of § 77-1734.01 leads to the harsh result of double taxation in this case. But a contrary construction would have led to the harsh result of Kearney County's being required to refund tax receipts which it collected and has long since paid over to other taxing authorities within its jurisdiction. In the end, we can only interpret the existing statute under our established principles, as we have done here. If the Legislature wishes to provide broader relief to taxpayers under similar circumstances in the future, it has the power to enact a statute or statutes specifically providing such relief.

CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand the cause with directions to reinstate the order of the Board denying Kaapa's claim for a refund.

REVERSED AND REMANDED WITH DIRECTIONS.

JQH LA VISTA CONFERENCE CENTER DEVELOPMENT LLC, APPELLANT, V. SARPY COUNTY BOARD OF EQUALIZATION, APPELLEE.

825 N.W.2d 447

Filed January 25, 2013. Nos. S-12-054, S-12-055.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Valuation: Presumptions: Evidence.** A presumption exists that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of

the valuation fixed by the board of equalization becomes one of fact based upon all of the evidence presented.

4. **Taxation: Valuation: Proof: Appeal and Error.** The burden of showing a valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board of equalization.
5. **Taxation: Valuation: Proof.** The burden of persuasion imposed on a complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.
6. **Taxation: Valuation: Real Estate: Words and Phrases.** The actual value of real property is the market value of real property in the ordinary course of trade.
7. **Taxation: Valuation: Real Estate.** Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach, (2) income approach, and (3) cost approach.
8. **Taxation: Valuation: Real Estate: Words and Phrases.** Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's-length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used.
9. **Taxation: Valuation: Evidence.** When an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.

Appeals from the Tax Equalization and Review Commission. Affirmed.

Rosalynd J. Koob, of Heidman Law Firm, L.L.P., for appellant.

Michael A. Smith, Deputy Sarpy County Attorney, for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

This appeal arises from a property tax protest filed by JQH La Vista Conference Center Development LLC (JQH). The property at issue is a convention center located off Interstate 80 in La Vista, Nebraska, known as the La Vista Conference

Center. In both the 2009 and 2010 tax years, the conference center was valued by the Sarpy County assessor at a total of $23,400,000. In both years, JQH protested that valuation to the Sarpy County Board of Equalization, which denied the protest. JQH then appealed both denials to the Tax Equalization and Review Commission (TERC). The cases were consolidated into one hearing before TERC. TERC denied JQH's appeal and valued the conference center at $23,400,000 for both tax years. JQH appealed TERC's decision as to both the 2009 and 2010 tax years. We affirm.

FACTS

Construction on the conference center and an adjoining hotel began in 2007, and both opened for business in July 2008. Originally, the city of La Vista was the entity building the conference center, but during construction, it was determined that this arrangement was not financially feasible. JQH, which was developing the hotel project, agreed to continue construction on the conference center in return for certain enticements, including $3 million from the city toward construction costs and a low-interest loan in the amount of $18 million.

In May 2009, another adjoining hotel was opened. The conference center is now located between two connecting hotels. Both hotels and the conference center are owned by JQH and are managed as one entity. In addition, the conference center and one of the hotels are located under the same roof and have joint financial records. However, the three properties are located on separate parcels of land and are assessed separately for tax purposes. According to the record, the conference center comprises 42,032 square feet and construction costs were about $17.8 million.

In both 2009 and 2010, the county assessor placed a total valuation on the conference center of $23,400,000 ($1,710,475 for the land and $21,689,525 for the improvements). JQH protested that valuation to the Sarpy County Board of Equalization and requested for 2009, a valuation of $12,710,475 ($1,710,475 for the land and $11 million for the improvements), and for 2010, a valuation of $11,700,000 ($1,500,000 for the land and

$10,200,000 for the improvements). Both protests were denied, and JQH appealed those decisions to TERC.

JQH presented evidence before TERC from an appraisal JQH had done on the property. That appraisal valued the property under the income, sales, and cost approaches to valuation, but relied most heavily on the income approach. JQH's appraiser ultimately recommended a value of $7,100,000 for 2009 and $10,100,000 for 2010.

The Sarpy County Board of Equalization presented the testimony of the county assessor who conducted the assessment of the conference center. The county assessor relied upon the cost approach, concluding that the income and sales approaches were not valid because of a lack of data.

TERC rejected the opinion of JQH's appraiser, specifically finding that JQH

> has not provided competent evidence to rebut the presumption that the [board of equalization] faithfully performed its duties and had sufficient competent evidence to make its determination. [TERC] also finds that [JQH] has not provided clear and convincing evidence that the determination by the [board of equalization] was arbitrary or unreasonable.

JQH appeals.

ASSIGNMENT OF ERROR

On appeal, JQH assigns, restated and consolidated, that TERC erred in determining that JQH had failed to meet its burden of establishing that the market value as assessed by the Sarpy County Board of Equalization was arbitrary, capricious, and unreasonable.

STANDARD OF REVIEW

[1,2] Appellate courts review decisions rendered by TERC for errors appearing on the record.[1] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported

[1] *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012).

by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

ANALYSIS

On appeal, JQH assigns that TERC erred in affirming the valuation of the Sarpy County Board of Equalization.

Neb. Rev. Stat. § 77-5016(9) (Cum. Supp. 2012) provides:

> In all appeals, excepting those [involving the taxpayer-initiated appeal of a county tax levy], if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is incorrect, the commission shall deny the appeal. If the appellant presents any evidence to show that the order, decision, determination, or action appealed from is incorrect, such order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.

[3-5] We have held that this language creates

> "a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action. That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board."[3]

And we have further held that

> "the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of

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[2] *Id.*

[3] *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 283-84, 753 N.W.2d 802, 811 (2008) (quoting *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989)).

> opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment."[4]

[6-8] The "actual value" of real property is

> the market value of real property in the ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach . . . , (2) income approach, and (3) cost approach. Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property, the analysis shall include a consideration of the full description of the physical characteristics of the real property and an identification of the property rights being valued.[5]

JQH makes several arguments regarding the county's valuation and TERC's affirmance of that value. JQH first argues that TERC erred in its standard of review when it found that JQH did not present sufficient "competent evidence" to rebut the presumption that the "board of equalization ha[d] faithfully performed its official duties." JQH agrees that the burden of persuasion always remained with it, but distinguishes between that burden and the initial presumption afforded to a decision of a county board of equalization.

The county defends TERC's order by suggesting that the appraisal of David Sangree, a certified appraiser, offered a mere difference of opinion and that such was insufficient to

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[4] *Id.* at 284, 753 N.W.2d at 812 (quoting *Bumgarner v. County of Valley*, 208 Neb. 361, 303 N.W.2d 307 (1981)).

[5] Neb. Rev. Stat. § 77-112 (Reissue 2009).

overcome the presumption of validity for the county's valuation. But as is argued by JQH, this argument conflates the presumption of validity offered by § 77-5016(9) with the burden of persuasion. The former is overcome by the production of competent evidence,[6] while the latter requires a showing of more than a mere difference of opinion.[7]

[9] And in this case, we conclude that TERC was incorrect when it concluded that the presumption of correctness was not overcome by competent evidence. This court held in *US Ecology v. Boyd Cty. Bd. of Equal*.[8] that when an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.[9] And at the hearing before TERC, JQH offered the 2009 and 2010 appraisals of Sangree. Sangree testified that the appraisals were prepared in conformity with the uniform standards of appraisal practice. The appraisals provided three alternative valuations of the conference center, using each of the three methods provided for by § 77-112. We therefore agree with JQH insofar as it argues that TERC incorrectly applied the standard of review and concluded that JQH had not overcome the presumption of validity under § 77-5016(9).

Because JQH overcame the presumption of validity for the county's valuation, the reasonableness of the valuation fixed by the board of equalization becomes a question of fact based upon all of the evidence presented.[10] The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.[11]

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[6] See, § 77-5016(9); *Brenner, supra* note 3.

[7] See *Brenner, supra* note 3.

[8] See *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

[9] See, also, *Schmidt v. Thayer Cty. Bd. of Equal.*, 10 Neb. App. 10, 624 N.W.2d 63 (2001).

[10] See *Brenner, supra* note 3.

[11] *Id.*

With respect to valuation, JQH argues that TERC erred in concluding that it had failed to overcome its burden to show that the market value of the property as assessed by the county was unreasonable or arbitrary. JQH essentially contends that Sangree's appraisal was correct and that the county assessor's was not. JQH primarily takes issue with the assessor's (1) failure to value the property under all three approaches allowed under § 77-112: income, sales, and cost; (2) incorrect classification of the property when applying the Marshall Valuation Service cost factors; (3) failure to take into account physical depreciation of the property; and (4) failure to consider external or locational depreciation. We conclude that JQH has not overcome its burden of showing that the county's valuation was unreasonable or arbitrary.

Under Neb. Rev. Stat. § 77-201(1) (Reissue 2009), all nonexempt real property is subject to taxation and should be valued at its actual value. As is set forth above, actual value is defined under state law,[12] and that definition provides for three methods to determine that actual value—the income approach, the sales approach, and the cost approach.

As is argued by JQH, Sangree utilized all three approaches when valuing the conference center. But it does not follow that Sangree's use of all three methods means that the county's valuation was incorrect simply because it utilized just one of those methods. First, the plain language of the statute requires the use of only one method. The county assessor's cost approach is obviously permitted under § 77-112.

Moreover, the county assessor had an explanation for his failure to utilize the other methods. The county assessor indicated that at the time of the 2009 assessment, he lacked market data with which to perform an income approach. And he further indicated that there were few, if any, sales of stand-alone conference centers to use as a basis for the sales approach. Indeed, though Sangree does provide an appraisal under the sales approach, he acknowledges that in his search, he was unable to find comparable sales for stand-alone conference centers.

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[12] § 77-112.

Because the county assessor was not provided with the actual costs of construction, he utilized the Marshall Valuation Service, which is a mass appraisal tool approved by Nebraska's Tax Commissioner and the Department of Revenue. The Marshall Valuation Service was also used by Sangree in his appraisal under the cost approach.

JQH contends that the county assessor improperly classified certain building materials when entering data into the Marshall Valuation Service—particularly taking issue with the county assessor's classification of the building materials as "Class B" rather than "Class C." But the county assessor noted in his testimony that he was able to visit the building site during construction and was also able to discuss the property with the city building inspector.

JQH next argues that the county assessor's valuation did not take into account physical depreciation in the 2010 appraisal. But when questioned about it, the county assessor noted that the county would be required to make such an adjustment only when reassessing an entire class, which occurs only every 4 to 5 years. Upon further questioning, the county assessor also indicated that if he were accounting for physical depreciation, he would also update his "manual date," and that under the cost approach, this update would likely result in an increase of the cost of the building.

JQH also contends that the county's valuation was incorrect in that it did not account for external depreciation. External, or locational, depreciation allows for a decrease in value based upon either the location of real property or other external factors.[13] But the county assessor testified that he did not make any deductions for external depreciation, because he "did not see any or observe any. . . . [T]his is one the hottest locations in Sarpy County, probably the hottest."

JQH acknowledges that it has the burden to overcome the county's valuation. Unless the taxpayer shows that the county's valuation was unreasonable or arbitrary, that valuation should be affirmed. And we conclude that JQH has not met its burden.

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[13] See *Darnall Ranch v. Banner Cty. Bd. of Equal.*, 276 Neb. 296, 753 N.W.2d 819 (2008).

A review of the county assessor's testimony shows a reasonable basis for the differences between the county's valuation and Sangree's appraisals. We further question Sangree's appraisals to the extent that the appraisals showed a substantial difference in 2009 and 2010 between the income and cost methods. It was only after deductions in those respective amounts were made for external depreciation that the income and cost approaches were equal to each other. These large deductions are suspect under the record in this case.

JQH is correct insofar as TERC erred when it found that JQH had not rebutted the presumption of validity of the county's valuation. Nevertheless, TERC did not err in affirming the valuation of the property, because JQH failed to meet its burden of showing that the county's valuation was unreasonable and arbitrary. TERC's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. JQH's assignment of error to the contrary is without merit.

CONCLUSION

The decisions of TERC are affirmed.

AFFIRMED.

CASSEL, J., not participating.

TURBINES LTD., APPELLEE, V. TRANSUPPORT, INCORPORATED, APPELLANT.

825 N.W.2d 767

Filed February 1, 2013. No. S-11-042.

1. **Default Judgments: Appeal and Error.** In an appeal from the entry of a default judgment, or the denial of a motion to stay entry of a default judgment, an appellate court will affirm the action of the trial court in the absence of an abuse of discretion.
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. **Actions: Default Judgments: Complaints: Damages: Proof.** Where a defendant is in default, the allegations of the complaint are to be taken as true against him,

except allegations of value and amount of damage. Thus, if the complaint states a cause of action, the plaintiff is entitled to judgment without further proof. The necessary corollary of this rule is that if the allegations in the complaint fail to state a cause of action, the plaintiff is not entitled to default judgment.

4. **Actions: Default Judgments: Evidence: Appeal and Error.** In determining whether a district court's entry of a default judgment is so clearly untenable as to constitute an abuse of discretion, an appellate court should assume the truth of all material facts alleged in the complaint and of any evidence offered by the plaintiff. It must then decide whether the plaintiff has established a valid cause of action.
5. **Contracts: Rescission.** Generally, grounds for cancellation or rescission of a contract include fraud, duress, unilateral or mutual mistake, and inadequacy of consideration.
6. ____: ____. Neither the doctrine of discharge by supervening frustration as set forth in Restatement (Second) of Contracts § 265 (1981) nor the doctrine of discharge by supervening impracticability under Restatement (Second) of Contracts § 261 (1981) can serve as the basis for rescission of a contract that has been fully performed.
7. ____: ____. Performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused. And the failure to perform a promise, the performance of which is a condition, entitles the other party to the contract to a rescission thereof.

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 Cuming County, ROBERT B. ENSZ, Judge. Judgment of Court of Appeals affirmed.

Thomas B. Donner for appellant.

Denise E. Frost and Clarence E. Mock, of Johnson & Mock, for appellee.

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

STEPHAN, J.

Turbines Ltd. (Turbines), a Nebraska corporation, purchased a replacement part for a helicopter engine from Transupport, Incorporated, a New Hampshire corporation, intending to use the part to fill an order Turbines had received from a customer in Singapore to be shipped to Malaysia. When Turbines learned that filling the order could subject it to criminal liability under federal law, Turbines attempted to return the part to Transupport

and obtain a refund of the $30,000 purchase price. Transupport refused to refund the payment, and Turbines brought this action in the district court for Cuming County, seeking rescission of the purchase order. Although served with summons and notice of the proceedings, Transupport failed to appear at both a pretrial conference and the trial. After receiving evidence, the district court entered judgment in favor of Turbines. Eight days later, Transupport appeared through counsel and filed motions for new trial and to vacate the judgment. The district court overruled those motions, and Transupport appealed. The Nebraska Court of Appeals determined that the district court did not err in overruling the posttrial motions. But the Court of Appeals reversed the default judgment against Transupport and ordered that Turbines' complaint be dismissed, reasoning the evidence adduced at trial did not support rescission as a matter of law.[1] We granted Turbines' petition for further review and now affirm the judgment of the Court of Appeals.

BACKGROUND

FACTS

Turbines, owned by Marvin Kottman, is in the business of helicopter sales and support. Sometime in late 2006 or early 2007, Monarch Aviation (Monarch) contacted Turbines' office in Singapore seeking to purchase a turbine nozzle. Turbines did not have the nozzle in its inventory, so it approached Transupport, a turbine engine parts supplier with which it had done business since the mid-1980's. Turbines told Transupport that it wanted the nozzle for a customer in Singapore, whom it did not otherwise identify, and e-mail correspondence between Transupport and Turbines reflects a discussion about the customer's requests and requirements. Kottman testified that the customer referred to in the e-mails was Monarch and that Transupport was aware of Turbines' plans to ship the nozzle to Malaysia.

Turbines purchased the nozzle from Transupport for $30,000 and tendered payment with the purchase order. Under

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[1] *Turbines Ltd. v. Transupport, Inc.*, 19 Neb. App. 485, 808 N.W.2d 643 (2012).

the "Remarks" section, the purchase order states, "Subject to Inspection and acceptance by customer." Kottman testified he inserted this language to document that he had explained to Transupport that he had no use for the nozzle and that if it was unacceptable to his customer, he would return the nozzle to Transupport. But additional text on the purchase order stated: "Turbines . . . is Transupport's customer, acceptance/rejection is always at customer." Kottman testified that this notation was not on the purchase order when it was sent to Transupport.

Transupport shipped the nozzle to Turbines with an accompanying invoice showing that the purchase price had been prepaid. The invoice stated that Transupport was not the "USPPI" for the item. Kottman explained that USPPI is a customs term for U.S. principal party of interest; a USPPI is required for all exports of goods. Boilerplate language at the bottom of the invoice states that the sale may include munitions list items or commerce-controlled list items and indicates that a license may be required for export. The back of the invoice includes Transupport's return policy: "**NO** RETURNS WITH OUT [sic] PRIOR AUTHORIZATION. **NO** RETURNS AFTER 90 DAYS." Kottman testified that he never agreed to this return policy.

Turbines attempted to ship the nozzle to Malaysia as directed by Monarch. The nozzle was seized in February 2007 by U.S. Customs and Border Protection (U.S. Customs), which claimed that a license from the U.S. Department of State was required to ship the nozzle overseas. After several appeals, it was determined that no license was required, and the nozzle was returned to Turbines sometime after January 2009. Turbines kept Transupport informed of the status of the nozzle during the contested seizure by U.S. Customs.

During the time that U.S. Customs retained the nozzle, Turbines learned that Monarch was redirecting goods to Iran, a prohibited destination, and that a person associated with Monarch had become the subject of a federal indictment. The indictment was unsealed in August 2007, 6 months after the parties' transaction was completed. Under federal law, if Turbines shipped the nozzle to Monarch after learning this

information, it was subject to criminal penalties. Thus, after receiving the nozzle from U.S. Customs, Turbines returned it to Transupport and requested that the purchase price be refunded. Transupport refused to do so and eventually shipped the nozzle back to Turbines' counsel.

Procedural History

In March 2010, Turbines filed its complaint seeking to compel Transupport to refund the $30,000 purchase price, based upon the purchase order language, "Subject to Inspection and acceptance by customer." William Foote, Transupport's registered agent and vice president, was personally served with the complaint on March 16, but Transupport did not answer or otherwise respond to the complaint within 30 days. On May 4, Turbines filed a motion for default judgment, and a hearing was set for June 3.

On June 2, 2010, the clerk of the district court received a letter from Transupport signed by Foote. The letter responded to the allegations of the complaint and requested dismissal of the action. On June 3, the court, on its own motion, entered a pretrial progression order. It ordered that all discovery be completed before an August 5 pretrial conference. It further ordered that the pretrial conference "shall be attended by the attorney that will act as lead counsel at the time of trial." On June 28, Turbines filed a motion to compel Transupport's compliance with certain discovery requests, and a hearing on that motion was set for the same date as the pretrial conference.

Transupport failed to appear at the August 5, 2010, pretrial conference. In an order entered the same day, the court extended the deadline for discovery to November 1 and set trial for November 29. On November 22, Turbines moved to strike Foote's letter purporting to answer the complaint, arguing it was signed by a person not licensed to practice law in Nebraska. Turbines also moved for default judgment. A hearing on these motions was set for the same day as trial.

Transupport did not appear for trial on November 29, 2010. Turbines presented evidence in support of its claim. After receiving this evidence, the court orally sustained Turbines' motion to strike Foote's letter, reasoning that Foote was not a

lawyer licensed to practice in the State of Nebraska and therefore could not represent Transupport, a corporate entity. The court then stated, "So this can then proceed as a motion for default judgment," but explained that "whether I treat it as a motion for default judgment or a trial on the merits makes no difference at this point because the evidence is only in support of the complaint because the defendant has chosen not to appear in any capacity to respond to the evidence."

The court then reviewed the evidence presented by Turbines and found it clearly showed that the "customer" referenced in the purchase order was the party to whom Turbines would provide the nozzle. The court found that because the transaction was never completed to satisfy this customer, the terms of the contract were not met and it could exercise its equitable jurisdiction to grant rescission of the contract. The court ordered Transupport to return the purchase price to Turbines upon the return of the nozzle. Transupport was also ordered to pay the costs of the proceeding. The district court's judgment memorializing these rulings was entered on December 7, 2010.

On December 15, 2010, a licensed Nebraska attorney entered an appearance for Transupport and filed several motions, including motions for new trial and to vacate judgment. The motion for new trial alleged seven different grounds, each of which is a ground listed in Neb. Rev. Stat. § 25-2001 (Reissue 2008), the statute authorizing district courts to vacate or modify judgments. The motion to vacate judgment set forth the same seven grounds and added that Transupport had a meritorious defense and that vacating the judgment was necessary for the proper and just determination of the action. In conjunction with these motions, Transupport's attorney filed an affidavit which averred that he was first contacted by Foote on December 13.

A hearing was held on December 21, 2010. Transupport introduced three affidavits, including one from Foote stating that he received the motions to strike answer and for default judgment on November 24, but that he was out of the office for Thanksgiving and his wife's heart surgery from 5 p.m. on November 24 to 4 p.m. on December 1. The affidavits were

received in support of Transupport's motion to vacate judgment. In addition, Transupport's counsel argued that it should be given an opportunity to present its meritorious defense. Counsel argued that rescission required proof of fraud, undue influence, misrepresentation, or business coercion and that the affidavits showed that none of those had occurred.

In an order denying both of Transupport's motions, the district court found that Transupport failed to satisfy any of the statutory grounds in § 25-2001 for vacating a judgment. The court also determined that the motion for new trial was nonmeritorious because it did not set forth any ground listed in Neb. Rev. Stat. § 25-1142 (Reissue 2008), the new trial statute.

Court of Appeals' Opinion

Transupport appealed, and assigned and argued to the Court of Appeals that the district court erred in (1) striking its answer, (2) overruling its motion to vacate judgment and motion for new trial, and (3) determining Turbines was entitled to rescission. The Court of Appeals determined that the district court did not err in striking Transupport's purported answer, reasoning Foote was not a member of the Nebraska Bar and therefore his letter was a nullity.[2] The Court of Appeals determined the district court did not abuse its discretion in overruling Transupport's motion to vacate judgment, reasoning Transupport failed to protect its own interests by ignoring the district court's orders and failing to appear for trial. The Court of Appeals also upheld the district court's ruling on Transupport's motion for new trial, determining that the motion did not set out any statutory grounds for a new trial as specified in § 25-1142, but instead alleged statutory grounds for a motion to vacate.

But ultimately, the Court of Appeals found Transupport was entitled to relief because the evidence did not support rescission of the contract. It found that Neb. U.C.C. § 2-615 (Reissue 2001) did not support rescission, because that section excuses a seller from timely delivering goods,

[2] *Id.*

and Transupport had delivered the nozzle. The court also found the doctrine of supervening frustration did not support rescission, because it was "impossible to say that a 'basic assumption' of the contract was Turbines' ability to export the nozzle to Monarch."[3] Lastly, the Court of Appeals concluded that a unilateral mistake did not permit rescission, reasoning that enforcement of the contract would not be unconscionable. Turbines timely filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

Turbines assigns, restated and summarized, that the Court of Appeals erred in reversing the district court's order rescinding the contract and in holding the evidence was insufficient to support rescission.

In a response to the petition for further review, Transupport assigns that the Court of Appeals erred in finding the district court properly struck "the Answer" and properly disposed of its posttrial motions. But these issues were not raised in a timely manner. The Court of Appeals' opinion was filed on January 24, 2012. Our rules provide that "a petition for further review and memorandum brief in support must be filed within 30 days after the release of the opinion of the Court of Appeals."[4] Because Transupport's response was not filed within the 30-day time period,[5] Transupport's assignments of error are not properly before the court, and we do not address them.

STANDARD OF REVIEW

[1,2] In an appeal from the entry of a default judgment, or the denial of a motion to stay entry of a default judgment, an appellate court will affirm the action of the trial court in the absence of an abuse of discretion.[6] A judicial abuse of

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[3] *Id.* at 501, 808 N.W.2d at 655.

[4] Neb. Ct. R. App. P. § 2-102(F)(1) (rev. 2012).

[5] See, *id.*; *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999).

[6] *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999).

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.[7]

ANALYSIS

We begin by addressing Turbines' argument that once the Court of Appeals determined that the district court did not err in refusing to vacate the judgment, it should have affirmed without reaching the merits of the rescission claim. This requires us to determine on what grounds a default judgment may be challenged.

[3] The general rule is that "where a defendant is in default, the allegations of the [complaint] are to be taken as true against him, except allegations of value and amount of damage."[8] Thus, if the complaint states a cause of action, the plaintiff is entitled to judgment without further proof.[9] The necessary corollary of this rule is that if the allegations in the complaint fail to state a cause of action, the plaintiff is not entitled to default judgment. While this rule developed under Nebraska's former code pleading system, we perceive no reason why it should not be applied under our current notice pleading regime.

Here, Turbines did not rely solely on its pleading, but also offered evidence in support of its motion for default judgment. Both the district court and the Court of Appeals considered that evidence when determining whether the judgment in favor of Turbines was proper. We conclude that they did not err in doing so, because a party seeking default judgment may present evidence in support of its claim.

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[7] *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012); *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

[8] *State of Florida v. Countrywide Truck Ins. Agency, supra* note 6, 258 Neb. at 124, 602 N.W.2d at 438 (emphasis omitted). Accord *Weir v. Woodruff*, 107 Neb. 585, 186 N.W. 988 (1922).

[9] *Weir v. Woodruff, supra* note 8; *State on behalf of Yankton v. Cummings*, 2 Neb. App. 820, 515 N.W.2d 680 (1994).

[4] The foregoing demonstrates that in determining whether a district court's entry of a default judgment is so "clearly untenable" as to constitute an abuse of discretion, an appellate court should assume the truth of all material facts alleged in the complaint and of any evidence offered by the plaintiff. It must then decide whether the plaintiff has established a valid cause of action. Here, the Court of Appeals essentially concluded that Turbines was not entitled to rescission as a matter of law because the allegations of its complaint and the evidence it presented failed to state a cause of action. We now review that determination.

[5] Generally, grounds for cancellation or rescission of a contract include fraud, duress, unilateral or mutual mistake, and inadequacy of consideration.[10] Turbines' complaint does not identify any specific legal grounds for rescission and does not include any allegations of fraud or duress on the part of Transupport. In its brief filed in the Court of Appeals, Turbines relied on § 2-615 and "common law contractual principles related to supervening impracticability" as its legal grounds for rescission.[11] The Court of Appeals examined the record and concluded that the pleadings and evidence did not provide a legal basis for rescission under § 2-615, the doctrines of supervening impracticability or supervening frustration, or unilateral mistake. On further review, Turbines argues that the Court of Appeals erred in its analysis of these theories and failed to consider others.

Uniform Commercial Code § 2-615

Section 2-615 provides:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
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> (a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and

[10] See *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993).

[11] Brief for appellee at 20.

> (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
>
> (c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

Comment 1 to § 2-615 states that it "excuses a seller from timely delivery of goods contracted for, where his or her performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting." The Court of Appeals reasoned that § 2-615 was inapplicable because there was no failure on the part of the seller, Transupport, to deliver the nozzle to Turbines.

Relying upon comment 9 to § 2-615, which states that under certain circumstances, it "may well apply" to the performance of a buyer under a "requirements" or "supply" contract, Turbines argues that it applies here. But this case does not involve such a contract. More important, it is not an action for breach of contract. Section 2-615 specifies circumstances under which nonperformance or delayed performance of a sales contract will not constitute a breach. Here, there is no issue of breach, because the contract was fully performed by each party in that Transupport shipped the nozzle to Turbines and Turbines remitted the purchase price to Transupport. We agree with the Court of Appeals that § 2-615 does not provide a legal basis for rescission on the facts presented here.

SUPERVENING IMPRACTICALITY AND FRUSTRATION

In *Cleasby v. Leo A. Daly Co.*,[12] we determined that business necessity justified an international architectural consulting firm's termination of a project manager's assignment at an overseas jobsite when an illness caused the manager's prolonged absence from the country where the work was being performed. In reaching this conclusion, we relied in part upon Restatement (Second) of Contracts §§ 261 and 265.[13] Section 261, entitled "Discharge by Supervening Impracticability," provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[14]

Section 265, entitled "Discharge by Supervening Frustration," provides:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.[15]

The Court of Appeals concluded that § 265 could not provide a legal basis for rescission because it was "impossible to say that a 'basic assumption' of the contract was Turbines' ability to export the nozzle to Monarch."[16] But we believe that there is a more basic question of law, namely, whether the doctrine of supervening frustration can serve as the basis for rescinding a

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[12] *Cleasby v. Leo A. Daly Co.*, 221 Neb. 254, 376 N.W.2d 312 (1985).

[13] Restatement (Second) of Contracts §§ 261 and 265 (1981).

[14] *Id.*, § 261 at 313.

[15] *Id.*, § 265 at 334-35.

[16] *Turbines Ltd. v. Transupport, Inc., supra* note 1, 19 Neb. App. at 501, 808 N.W.2d at 655.

contract that has been fully performed. In *Kunkel Auto Supply Co. v. Leach*,[17] the buyer purchased automotive equipment from the seller and gave a promissory note in payment. Both parties believed that the equipment would allow the buyer to operate a state testing station under a statute which they understood to require mandatory vehicle testing. That understanding was incorrect, and the statute was eventually repealed. When sued on the note, the buyer alleged that it was void under various theories, including the doctrine of commercial frustration derived in part from a previous version of the Restatement of Contracts on which § 265 is based.[18] We held as a matter of law that this defense was not viable because the contract, so far as the seller was concerned, was fully performed before the defense arose. We noted that the doctrine of commercial frustration "applies to executory contracts alone."[19]

In *Mobile Home Estates v. Levitt Mobile Home*,[20] the Arizona Supreme Court relied in part on our decision in *Kunkel Auto Supply Co.* in holding that the doctrine of commercial frustration could not be utilized as a basis for rescinding a fully performed contract. In that case, a mobile home dealer purchased and paid for several modular duplex dwelling units with the intention of reselling them. Resale proved difficult if not impossible because the units did not comply with subsequently adopted standards. The purchaser sought rescission of the contract and recovery of the purchase price under the Arizona doctrine of "commercial frustration," which provided that "'"when, due to circumstances beyond the control of the parties the performance of a contract is rendered impossible, the party failing to perform is exonerated." . . .'"[21] Citing

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[17] *Kunkel Auto Supply Co. v. Leech*, 139 Neb. 516, 298 N.W. 150 (1941).

[18] See, Restatement of Contracts § 288 (1932); Restatement (Second), *supra* note 13, § 265, Reporter's Note.

[19] *Kunkel Auto Supply Co. v. Leech, supra* note 17, 139 Neb. at 522, 298 N.W. at 153.

[20] *Mobile Home Estates v. Levitt Mobile Home*, 118 Ariz. 219, 575 P.2d 1245 (1978).

[21] *Id.* at 222, 575 P.2d at 1248, quoting *Garner v. Ellingson*, 18 Ariz. App. 181, 501 P.2d 22 (1972).

Kunkel Auto Supply Co. and other authorities, the court concluded: "It would be contrary to logic and common sense to hold that a contract was rendered impossible to perform when, in fact, it had already been performed."[22]

[6] We find this analysis applicable to § 265 of the Restatement, which clearly contemplates an executory contract by providing that a party's "remaining duties to render performance are discharged" by the occurrence of an event which substantially frustrates the party's principal purpose. Each of the illustrations which follow the statement of the rule involve circumstances where a party's obligation to perform an executory contract is discharged by the occurrence of an event which frustrates that party's purpose in entering into the contract.[23] We therefore conclude as a matter of law that the doctrine of discharge by supervening frustration as set forth in § 265 of the Restatement cannot serve as the basis for rescission of a contract that has been fully performed. And although the Court of Appeals did not specifically discuss the doctrine of discharge by supervening impracticability under § 261 of the Restatement, we conclude that the same reasoning applies. Like § 265, § 261 defines circumstances under which a party's obligation to perform a contract may be discharged. Neither contemplates the circumstances of this case, in which the contract was fully performed.

Failure to Agree on Material Terms

Turbines asserts that the district court properly granted rescission on the ground that the parties failed to agree on a material term of the contract and that the Court of Appeals improperly ignored this basis for the district court's judgment. Turbines relies upon the following statement by the district court to show that the court made that finding: "But it appears from the evidence that there was probably some disagreement, and the Court finds such as to the complete elements of the transaction which was never completed to satisfy the terms of

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[22] *Id.*

[23] Restatement (Second), *supra* note 13, § 265.

the contract . . . .” Immediately before making this statement, the court noted that while there may have been some confusion among the parties as to what was meant by “customer,” the evidence showed the parties understood that the customer was someone other than the two of them. Thus, Turbines is arguing that because the district court acknowledged the parties may have attached different meanings to the term “customer,” the parties failed to agree on a material term of the contract, and that rescission was properly granted.

Turbines relies upon *Sayer v. Bowley*[24] in support of its argument. *Sayer* involved an oral contract for the sale of land in which the buyer sought specific performance. This court noted:

> Unlike the situation in a case involving contracts for the sale of goods, we will not read unsettled terms into contracts for the sale of land . . . . “The parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted, or left obscure or indefinite, so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance.”[25]

Even assuming this rule applies to the present transaction, it would not entitle Turbines to relief, because the record reflects that Turbines and Transupport agreed on all material and necessary details of the bargain. Transupport agreed to supply the nozzle, and Turbines agreed to pay $30,000 in exchange for it. According to Kottman, it was agreed that Turbines could return the nozzle, if the customer found the nozzle unacceptable. But as the Court of Appeals correctly determined, there was no allegation or evidence that the nozzle was unacceptable to either Turbines or Monarch.

Failure of Condition Precedent

[7] Turbines argues that it is entitled to rescission because the remark in the purchase order, “Subject to Inspection and

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[24] *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993).

[25] *Id.* at 807, 503 N.W.2d at 170-71, quoting *Reifenrath v. Hansen*, 190 Neb. 58, 206 N.W.2d 42 (1973).

acceptance by customer," conditioned its duty to perform. This court has recognized that performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused.[26] And the failure to perform a promise, the performance of which is a condition, entitles the other party to the contract to a rescission thereof.[27]

A case relied upon by Turbines provides a good example of the application of these principles. *Gallner v. Sweep Left, Inc*.[28] involved a contract for the purchase of stock which was to be placed in escrow at a specified bank. The contract explicitly made the company's duty to place the stock in escrow "subject to the payment of $1000."[29] This court concluded that because the $1,000 was never paid, the company's duty to perform by placing the stock in escrow never arose, and that it was entitled to rescind the contract.

Here, the purchase agreement is not explicit. The clause that Turbines relies upon appears in the "Remarks" section of the purchase order. There is no other language indicating that Turbines' duty to pay was subject to its customer's acceptance of the nozzle. Kottman testified that the language was added to reflect the parties' understanding that Turbines was allowed to return the nozzle if it was unacceptable to the customer. But Kottman also testified that he sent the purchase order along with the $30,000 purchase price. Because the $30,000 was prepaid, Turbines' duty to pay could not have been conditioned on acceptance and inspection by Monarch at some subsequent date. Thus, the doctrine of failure of a condition precedent does not support the district court's grant of rescission.

Supervening Prohibition or Prevention by Law

Turbines argues that it was entitled to rescission because of the legal difficulties it would have faced if it shipped the

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[26] *D & S Realty v. Markel Ins. Co*., 284 Neb. 1, 816 N.W.2d 1 (2012).

[27] *Gallner v. Sweep Left, Inc*., 203 Neb. 169, 277 N.W.2d 689 (1979).

[28] *Id*.

[29] *Id*. at 171, 277 N.W.2d at 690 (emphasis omitted).

nozzle to Monarch. It relies on two cases holding that a party's failure to perform a contract does not constitute a breach where performance is made unlawful by a governmental entity.[30] In both cases, a seller located in the United States successfully argued that it was excused from a contractual undertaking to ship goods to a buyer in Iran as a result of export restrictions imposed by the government of the United States. In each case, the courts held that intervening action of the government which would have made shipment unlawful excused the seller's nonperformance, so that its failure to ship the goods did not constitute a breach of the contract. Neither case provides support for rescinding a contract that has been fully performed, as is the case here.

Unilateral Mistake

Finally, the Court of Appeals reasoned that Turbines' arguably unilateral mistake regarding its ability to ship the nozzle to Monarch could not provide a basis for rescission, because enforcement of the contract as made would not be unconscionable, given Kottman's admission that there were other potential customers for the nozzle.[31] We agree.

CONCLUSION

Turbines fulfilled its contractual obligation to pay in advance for the nozzle which it ordered from Transupport. In turn, Transupport fulfilled its contractual obligation to ship the nozzle to Turbines. The contract did not contemplate the circumstances which subsequently prevented Turbines from shipping the nozzle to Monarch. But the occurrence of those circumstances did not constitute a basis for rescinding the fully performed contract. Thus, although Transupport clearly ignored the district court's orders and failed to appear for trial, the district court abused its discretion in entering default judgment in favor of Turbines, because the uncontroverted facts provide

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[30] See, *Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576 (2d Cir. 1993); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 591 F. Supp. 293 (E.D. Mo. 1984).

[31] *Turbines Ltd. v. Transupport, Inc., supra* note 1.

no legal basis for rescission, and to allow such a judgment to stand would be untenable. Accordingly, although our reasoning differs in some respects, we affirm the judgment of the Court of Appeals.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DAVID E. CORDING, RESPONDENT.

825 N.W.2d 792

Filed February 1, 2013. No. S-11-870.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
3. **Disciplinary Proceedings.** 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.
4. ____. Any violation of the Nebraska Rules of Professional Conduct constitutes grounds for discipline.
5. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances, and the Nebraska Supreme Court considers the attorney's acts underlying the events of the case and throughout the proceedings.
6. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
7. **Disciplinary Proceedings: Attorney and Client.** Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney client relationship.
8. **Disciplinary Proceedings.** The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.

Original action. Judgment of public reprimand.

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

Lyle Joseph Koenig, of Koenig Law Firm, for respondent.

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

PER CURIAM.

INTRODUCTION

Following a bench trial in Lancaster County Court, David E. Cording was found guilty of third degree sexual assault and public indecency. He appealed, and the Lancaster County District Court reversed the conviction for sexual assault but affirmed the conviction for public indecency.

The Counsel for Discipline of the Nebraska Supreme Court brought formal charges based on the underlying incident, which involved respondent's solicitation of an undercover police officer to engage in a sexual act in a public place. The formal charges alleged a violation of respondent's oath of office as provided by Neb. Rev. Stat. § 7-104 (Reissue 2012) and the Nebraska rules governing professional conduct, specifically Neb. Ct. R. of Prof. Cond. § 3-508.4.

A hearing before a court-appointed referee was held on February 7, 2012, and the referee filed his report on April 19, 2012. The referee found by clear and convincing evidence that respondent's conduct violated his oath of office as an attorney and § 3-508.4(b). The referee recommended a public reprimand.

Neither party took exception to the findings and recommendations of the referee. Pursuant to Neb. Ct. R. § 3-310(L), relator moved for judgment on the pleadings. This court sustained the motion as to the facts and ordered the case to proceed to briefing and oral argument limited to the issue of discipline.

FACTS

In his report, the referee found that respondent was admitted to the practice of law in the State of Nebraska on June 25, 1974. His former practice was generally in the areas of real estate, estates, probate, wills, trusts, and some criminal appointments. On occasion, he served as an acting county attorney and as a hearing officer in probation revocation cases.

He was engaged in private practice until March 2010, but has not engaged in the practice of law since that time.

On June 15, 2010, respondent was walking in a park near Lincoln, Nebraska. An undercover police officer was present, watching for illegal sexual activity occurring in the park. The officer saw respondent and thought that respondent had signaled him. The officer began following respondent, and the two began a conversation. During the conversation, the officer indicated that he was voluntarily going with respondent. As they walked deeper into a wooded area of the park, the officer indicated that he was shy and that he had not done anything like this before. The indecent conduct followed.

Respondent's illegal conduct took place in a heavily wooded area of the park. There is nothing in the record to indicate that members of the public were present or that anyone viewed respondent's conduct. Respondent was charged in Lancaster County Court with third degree sexual assault and public indecency. He was found guilty of both counts.

On appeal, the Lancaster County District Court found the evidence failed to establish that the contact between respondent and the officer was not consensual, as required by Neb. Rev. Stat. §§ 28-320(1)(a) (Reissue 2008) and 28-318(8) (Cum. Supp. 2012) for sexual assault. The district court reversed the conviction for third degree sexual assault, but affirmed the conviction for public indecency, which was a Class II misdemeanor.[1]

Respondent had previously been convicted of sexual battery in the district court for Saline County, Kansas, on July 12, 2002, which was a misdemeanor.[2] There is no record that respondent has been disciplined previously or charged with professional misconduct in the State of Nebraska.

On June 6, 2012, this court sustained relator's motion for judgment on the pleadings, limiting judgment to the facts. We ordered the parties to brief the issue of the appropriate discipline.

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[1] Neb. Rev. Stat. § 28-806(2) (Reissue 2008).

[2] Kan. Stat. Ann. § 21-3517(b) (2007) (repealed by 2010 Kan. Laws, ch. 136, § 307).

ASSIGNMENT OF ERROR

Neither party has taken exception to the referee's report of the facts. Neither party alleges any error.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record.[3]

ANALYSIS

[2,3] When no exceptions to the referee's findings of fact are filed, we may consider the referee's findings final and conclusive.[4] Because we granted judgment on the pleadings as to the facts, the only issue before us is the appropriate discipline.[5] 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.[6] The decision to impose discipline depends upon whether the attorney's conduct violated the Nebraska Rules of Professional Conduct.[7]

Pursuant to § 7-104, every attorney admitted to the practice of law in Nebraska takes the following oath: "You do solemnly swear that you will support the Constitution of the United States, and the Constitution of this state, and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability." Under § 3-508.4(b), it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The question before us is whether respondent's criminal act of public indecency violated his oath of office and § 3-508.4(b).

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[3] *State ex rel. Counsel for Dis. v. Palik*, 284 Neb. 353, 820 N.W.2d 862 (2012).

[4] § 3-310(L); *State ex rel. Counsel for Dis. v. Pierson*, 281 Neb. 673, 798 N.W.2d 580 (2011).

[5] See *State ex rel. Counsel for Dis. v. Lopez Wilson*, 283 Neb. 616, 811 N.W.2d 673 (2012).

[6] *Palik, supra* note 3.

[7] See Neb. Ct. R. § 3-303.

Neb. Ct. R. § 3-326(A) provides:

> For the purposes of Inquiry of a Complaint or Formal Charges filed as a result of a finding of guilt of a crime, a certified copy of a judgment of conviction constitutes conclusive evidence that the attorney committed the crime, and the sole issue in any such Inquiry should be the nature and extent of the discipline to be imposed.

[4,5] Any violation of the Nebraska Rules of Professional Conduct constitutes grounds for discipline.[8] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances, and this court considers the attorney's acts underlying the events of the case and throughout the proceedings.[9] This case is one of first impression in Nebraska, in that there are no actions for attorney discipline similar to the facts in this case.

In summary, respondent argues that his conduct did not adversely reflect on his fitness as a lawyer because his actions were not undertaken when he was acting in that capacity. Respondent claims that the offense of public indecency was not an offense relevant to the practice of law because it does not involve violence, dishonesty, breach of trust, or serious interference with the administration of justice. He asserts that his actions, at best, would support nothing more than a finding that he touched someone where the touching could be observed by the public. At the time of the incident, there were no other people present and no one was in a position to observe the touching.

Under these circumstances, respondent argues there was no connection between the alleged behavior and his honesty, trustworthiness, and fitness as an attorney. There were two isolated instances, years apart, in different states. At the hearing before the referee, respondent testified that he was not conducting any legal work and that he was not doing anything

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[8] See, *id.*; *State ex rel. Counsel for Dis. v. Ellis*, 283 Neb. 329, 808 N.W.2d 634 (2012).

[9] See *State ex rel. Counsel for Dis. v. Beltzer*, 284 Neb. 28, 815 N.W.2d 862 (2012). See, also, *Lopez Wilson, supra* note 5.

which would suggest he was a lawyer. He asserted that a lawyer is not subject to disciplinary action simply because he has committed a criminal act; the act itself must reflect adversely on the lawyer's honesty, trustworthiness, and fitness.

The referee concluded that the evidence was clear and convincing that on June 15, 2010, respondent engaged in lewd conduct in a public park where the conduct could have been viewed by the public. The referee found by clear and convincing evidence that this criminal act reflected adversely on respondent's fitness as a lawyer in other respects. He also concluded that the record showed by clear and convincing evidence that respondent violated his oath of office as an attorney as provided by § 7-104.

We agree with the referee's determination that the record shows by clear and convincing evidence that respondent's conduct violated his oath of office and § 3-508.4(b). Respondent's conviction of public indecency adversely reflects on his fitness as a lawyer.

[6] The remaining issue is the nature and extent of the discipline to be imposed.[10] Neb. Ct. R. § 3-304 provides:

> (A) Misconduct shall be grounds for:
>
> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

This court has recognized six factors that should be considered when determining the appropriate discipline: (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

[10] See § 3-326(A).

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.[11]

Nature of Conduct.

The referee found that the actions of respondent in a public park were far below the conduct that the Nebraska Supreme Court and the public should expect from an attorney licensed to practice law in the State of Nebraska. We agree.

The referee concluded that respondent's conviction for sexual battery in Kansas 10 years before the hearing should not be considered in determining whether respondent violated § 3-508.4(b) because his conduct was not governed by the Nebraska Rules of Professional Conduct. At the time of the Kansas conviction, respondent's conduct was governed by the Code of Professional Responsibility. In the formal charges, relator did not allege that respondent had violated the Code of Professional Responsibility and no violation of the Code of Professional Responsibility was at issue. We agree with the referee's conclusion.

Need to Deter Others and Protect Public.

[7] This disciplinary action should serve as a warning to all members of the Nebraska bar that this court will not ignore or acquiesce in public conduct of this nature. Clearly, there is a need to preserve the public trust and confidence in members of the bar. "Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney-client relationship. As a profession, the bar continuously strives to build and safeguard such trust and confidence . . . ."[12] Public indecency by an attorney does not promote trust and confidence.

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[11] *Beltzer, supra* note 9.

[12] *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 143, 352 N.W.2d 875, 878 (1984).

Attitude of Offender.

Respondent admitted that he was charged with third degree sexual assault and public indecency but claimed he was not guilty of the crimes charged. This indicates that respondent has not taken full responsibility for his conduct. However, respondent has been fully cooperative with the Counsel for Discipline and appears to be sincerely remorseful.

Present or Future Fitness to Practice Law.

The referee found that respondent's misconduct reflected adversely upon his fitness to practice law in other respects. We agree. However, there were many letters in support of respondent which describe him as a person of integrity, a person of high character, very truthful, honorable, bright, skilled, conscientious, and hardworking, who provided excellent representation for his clients and served his clients and his community well. Respondent's contributions to his community include being past district governor of the Lions Club, an active member of the Rotary Club, and a church organist for over 40 years.

We also consider the propriety of a sanction with reference to the sanctions imposed in prior similar cases.[13] Since we have no prior cases in Nebraska with the same or similar circumstances, we look to other states.

In *State ex rel. Oklahoma Bar Ass'n v. Wilburn*,[14] the Oklahoma Bar Association filed a complaint against a licensed attorney pursuant to the rules governing disciplinary proceedings. The bar alleged that the attorney was initially charged with two counts of felony sexual battery for willfully and intentionally touching the body of a woman over the age of 16 years in a lewd and lascivious manner without her consent. There were two female victims. Both were employed as security guards at the Tulsa County Courthouse at the time of the incidents. The attorney had slapped one victim on the

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[13] See *Beltzer, supra* note 9.

[14] *State ex rel. Oklahoma Bar Ass'n v. Wilburn*, 142 P.3d 420 (Okla. 2006).

buttocks. He slapped the other victim on the buttocks as well, and also pressed his body against the buttocks of one of the victims. Both charges were subsequently amended to the misdemeanor of outraging public decency, to which the attorney pled guilty.

Rule 8.4 of the Oklahoma Rules of Professional Conduct provides: "'It is professional misconduct for a lawyer to: . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.'"[15] Rule 1.3 of the Rules Governing Disciplinary Proceedings provides for "'discipline for acts contrary to prescribed standards of conduct.'"[16]

In *Wilburn*, the Professional Responsibility Tribunal recommended a private reprimand. Contrary to the recommendation of the tribunal, the Oklahoma Supreme Court found that a public censure was the appropriate discipline. The public censure was not imposed to punish the attorney. The court had previously considered proper discipline for lawyers accused of sexually inappropriate conduct with clients and nonclients. The court concluded it must also consider the deterrent effect upon both the offending respondent and other lawyers contemplating similar conduct. It concluded that the public censure was necessary and served to protect the public and advise other members of the bar that inappropriate touching and sexually suggestive gestures and remarks would not be tolerated, regardless of whether they seemed harmless, solicited, or consensual.

Unlike respondent, the attorney's conduct in *Wilburn* occurred in a public courthouse while he was acting in his capacity as a lawyer. Nevertheless, the need exists to advise the public and members of the bar that public conduct such as respondent's will not be tolerated by this court.

In *State ex rel. Oklahoma Bar Ass'n v. Garrett*,[17] there were two incidents involving two nonclient female victims. Both

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[15] *Id.* at 421 n.2.

[16] *Id.*

[17] *State ex rel. Oklahoma Bar Ass'n v. Garrett*, 127 P.3d 600 (Okla. 2005).

situations involved inappropriate touching. Two felonies were charged and later reduced to misdemeanors, to which the attorney pled guilty. The court ordered a public censure and a year's probation with conditions.

In *State ex rel. Oklahoma Bar Ass'n v. Murdock*,[18] the Oklahoma Bar Association filed a complaint based on conduct that also resulted in a criminal charge. In the criminal case, the attorney entered a plea admitting that, if believed by a jury, the evidence would be sufficient to convict him of the misdemeanor of "Outraging Public Decency."[19] In issuing a public reprimand, the court stated that the "primary goals in imposing discipline for attorney misconduct are: preservation of public trust and confidence in the Bar by strict enforcement of the profession's integrity; protection of the public and the courts; and deterrence of like behavior by other members of the Bar."[20] The court stated that "[e]ven when the subject attorney does not need such deterrent to prevent continued misconduct, this Court's interest in explaining its expectations of professional legal practice may necessitate a more public form of discipline than that offered by private reprimand."[21]

[8] The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.[22] In the case at bar, the referee found as mitigating factors respondent's good standing with the bar and in the community, his service to the community and his clients, his cooperation with the Counsel for Discipline, his present and future fitness for the practice of law as shown by letters written on his behalf, and the fact that no client was injured. The length of time that has passed between his conviction in Kansas and the current case was considered

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[18] *State ex rel. Oklahoma Bar Ass'n v. Murdock*, 236 P.3d 107 (Okla. 2010).

[19] *Id.* at 110.

[20] *Id.* at 113, citing *State ex rel. Okl. Bar Ass'n v. Caldwell*, 880 P.2d 349 (Okla. 1994).

[21] *Murdock, supra* note 18, 236 P.3d at 113, citing *State ex rel. Okla. Bar Ass'n v. Erickson*, 29 P.3d 550 (Okla. 2001).

[22] *Beltzer, supra* note 9.

as a mitigating factor. We agree that these mitigating factors are present, and we note that respondent appears to be sincerely remorseful.

In recommending that respondent be disciplined by public reprimand, the referee noted this was a case of first impression in Nebraska, but that it appeared that acts of public indecency in other jurisdictions typically resulted in public reprimands in the absence of other aggravating factors. The referee concluded that even if respondent did not need such a deterrent to prevent continued misconduct, this court's interest in explaining its expectation of professional legal practice necessitated a more public form of discipline than a private reprimand. We have looked to attorney discipline cases in other jurisdictions, and we agree with the referee's conclusion.

Private Versus Public Reprimand.

Respondent argues that he should receive no more than a private reprimand.

In *State ex rel. Counsel for Dis. v. Murphy*,[23] we considered a motion for reciprocal discipline against an attorney. In examining § 3-304, which provides what discipline may be considered for attorney misconduct, we stated that we could not enter a judgment of private reprimand. Section 3-304 permits a private reprimand by a committee on inquiry or a disciplinary review board. If a private reprimand is not issued and formal charges are filed, this court must impose *at least* a public reprimand if it imposes discipline.

CONCLUSION

For the reasons set forth above, we conclude that a public reprimand must be imposed in order to deter other members of the bar from engaging in such public misconduct and to maintain the reputation of the bar as a whole.

It is the judgment of this court that respondent should be and hereby is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat.

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[23] *State ex rel. Counsel for Dis. v. Murphy*, 283 Neb. 982, 814 N.W.2d 107 (2012).

§§ 7-114 and 7-115 (Reissue 2012) and § 3-310(P) and Neb. Ct. R. § 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF PUBLIC REPRIMAND.

BROOK VALLEY LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, AND BROOK VALLEY II, LTD, A NEBRASKA LIMITED PARTNERSHIP, APPELLEES, V. MUTUAL OF OMAHA BANK, FORMERLY KNOWN AS NEBRASKA STATE BANK OF OMAHA, A STATE BANKING INSTITUTION, AND OMAHA FINANCIAL HOLDINGS, INC., A NEBRASKA CORPORATION, SUCCESSOR TO MIDLANDS FINANCIAL SERVICES, INC., A NEBRASKA CORPORATION, APPELLANTS.

825 N.W.2d 779

Filed February 1, 2013. No. S-12-039.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which an appellate court will not disturb on appeal unless clearly wrong. And an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party.
2. **Prejudgment Interest: Appeal and Error.** An appellate court reviews de novo whether a court should award prejudgment interest.
3. **Conversion: Property.** Conversion lies only for serious interference with possessory interests in personal property, not real property.
4. **Conversion: Words and Phrases.** Conversion is any unauthorized or wrongful act of dominion exerted over another's property which deprives the owner of his property permanently or for an indefinite period of time.
5. **Contracts: Ratification: Words and Phrases.** Ratification is the acceptance of a previously unauthorized contract.
6. **Ratification: Agents.** Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction.
7. ____: ____. Retention of benefits secured by an agent's unauthorized act with knowledge of the source of such benefits and the means by which they were obtained is a ratification of the agent's act.
8. **Ratification.** Whether there has been a ratification is ultimately and ordinarily a question of fact.
9. **Ratification: Pleadings: Proof.** Because ratification is an affirmative defense, the burden of proving ratification rests on the party who pleaded it.

10. **Partnerships: Ratification.** In cases where a partner's act is not within the scope of the partnership's business and is not authorized by the partners, a transaction is still binding on the partnership if it is ratified by those partners who would have had the power to authorize the act.
11. **Principal and Agent: Property.** "Money received to the use of another" under Neb. Rev. Stat. § 45-104 (Reissue 2010) indicates that the money is received on behalf of another person, such as an agent receiving money on behalf of his principal.
12. **Prejudgment Interest: Claims.** Prejudgment interest may only be recovered under Neb. Rev. Stat. § 45-103.02(2) (Reissue 2010) when the claim is liquidated. A claim is liquidated when there is no reasonable controversy as to both the amount due and the plaintiff's right to recover.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas J. Culhane and Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for appellants.

Michael J. Mooney, of Gross & Welch, P.C., L.L.O., for appellees.

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

CONNOLLY, J.

I. SUMMARY

Prime Realty, Inc. (Prime), acted as general partner for two limited partnerships, Brook Valley Limited Partnership (BVLP) and Brook Valley II, LTD (BVII) (collectively the partnerships). Unbeknownst to the partnerships' limited partners, Prime took out two loans from Nebraska State Bank of Omaha (the Bank) and, by deed of trust, secured the loans with the partnerships' property. The Bank ultimately sold the collateral and applied the proceeds to the loans. The partnerships sued the Bank for conversion. The partnerships alleged that the loans were for a nonpartnership purpose. As such, they alleged that under the partnership agreements, Prime lacked authority to offer the partnerships' property as collateral without the limited partners' consent (which Prime did not have). So the Bank allegedly converted the partnerships' property when it sold the collateral and applied the proceeds to the loans.

The primary issues are whether (1) the statute of limitations has run; (2) the Bank converted the partnerships' property and, if so, the amount of damages; (3) the partnerships ratified the loans; and (4) the district court properly awarded prejudgment interest. We conclude that the partnerships filed their complaint within 4 years from the Bank's sale of the collateralized lots, so their complaint was timely. We conclude that the Bank converted the partnerships' property when it applied the sale proceeds to loans, though the court improperly awarded damages in the full amount of the proceeds applied to the loans because a portion of the first loan served a partnership purpose. Also, the partnerships did not ratify the loans. Finally, we conclude there was a reasonable controversy regarding the amount due and the partnerships' right to recover on the first loan, but not the second. So prejudgment interest was proper only on the amount the Bank applied to the second loan.

II. BACKGROUND

Midlands Financial Services, Inc., was the holding company and parent corporation of the Bank. During this litigation, the Bank merged into Mutual of Omaha Bank. And Omaha Financial Holdings, Inc., Mutual of Omaha Bank's holding company, acquired Midlands Financial Services. So Mutual of Omaha Bank and Omaha Financial Holdings have stepped into the shoes of the Bank and Midlands Financial Services in this litigation. For convenience, we will refer to these entities collectively as "the appellants."

1. The Partnerships

The partnerships' principal purpose was to develop, own, and sell real estate in Sarpy County, Nebraska. The limited partners were not involved in the partnerships' day-to-day operations. Instead, Prime, as the general partner, was in charge of the partnerships' operations. James McCart was Prime's president.

The partnerships' partnership agreements were essentially identical and provided broad power to the general partner to act in the best interests of the respective partnership. But following this broad grant of power, the agreements imposed

limitations on the general partner's authority. Specifically, the agreements provided:

> Notwithstanding any other provision of this Agreement to the contrary, the General Partner shall not, *without the prior written consent of all the Limited Partners*, . . . do any of the following:
>
> . . . .
>
> (e) Possess any property; or assign the rights of the Partnership in specific property, *for other than a Partnership purpose*[.]

(Emphasis supplied.) The record shows that the Bank had copies of the partnerships' agreements and that it knew about this restriction of the general partner's authority.

2. The Loans

In July 2000, Prime applied for and received a loan from the Bank for $1,000,133. The stated purpose of the July loan was to consolidate and renew several prior loans to various entities and advance business capital. As collateral for the loan, Prime executed a deed of trust for 18 real estate lots owned by BVII. The Bank received purported signed consent forms from BVII's limited partners authorizing the transaction.

But the record shows that each consent form was a fraud and that the limited partners had not consented to the transaction. Moreover, the consent forms' fraudulent nature was readily apparent—the signature lines were askew, indicating that the signatures were "cut and paste[d]" onto the form; several of the forms contained different fonts within the form; and the signatures were on separate pages from the property description. Furthermore, the signatures were dated months before the July loan and were not notarized.

Nevertheless, the Bank authorized the July loan and accepted the deed of trust collateralizing BVII's lots. The record shows that the July loan consolidated and renewed several prior loans from the Bank to Prime ($35,040), McCart ($274,046), BVII ($250,040), BVLP ($50,030), and Spring Valley XI Joint Venture ($180,924), another business entity. Additionally, from the July loan, the Bank provided "new" money in the form

of a check payable to Prime and Heartland Title Services (Heartland) for $209,960.

In October 2000, the Bank became aware of "suspicious activity" regarding McCart's financial dealings, both personally and for businesses he was involved in. The Bank discovered that McCart had been "kiting" checks. In the words of one of the Bank's former officers, McCart had been "making deposits — or drawing checks on one bank while — and making deposits from another bank, playing the float and sometimes not having money." The federal government indicted McCart for check kiting, to which he eventually pleaded guilty. As a result of his check kiting, McCart overdrafted on Prime's checking account at the Bank for over $2.7 million.

The Bank confronted McCart on how he planned to cover the overdraft. McCart proposed, and the Bank agreed, that the Bank "loan" Prime additional money in the exact amount of the check kite ($2,721,328.47). And as collateral for the October loan, McCart (for Prime) pledged the same BVII lots from the July loan. Other property was later added as additional collateral, including two tax lots owned by BVLP. The record shows that the Bank did not obtain consent from the limited partners of BVLP or BVII regarding the October loan. The record also shows that although the October loan was labeled a "loan," the plan was always to sell the collateralized properties to repay the Bank for the $2.7 million overdraft.

Later in 2000 and during 2001, the Bank sold off many of the collateralized lots and applied the proceeds to Prime's loans. As of June 28, 2002, the collective balance remaining on the loans was $144,935.35. The district court made factual findings regarding the sales of the various lots and how the Bank applied those proceeds to the loans. The court apparently made those findings from the Bank's discovery responses.

3. Procedural History

In 2004, the partnerships sued the Bank, alleging conversion, breach of fiduciary duty, failure to comply with commercially reasonable standards, and collusion. Several limited partners testified regarding their business relationships with

Prime and McCart. They also testified to their lack of knowledge regarding the reasons for the Bank's loans to Prime and the collateralization of the partnerships' property. Several of the Bank's former officers testified regarding their knowledge of McCart's check-kiting scheme, the circumstances surrounding both loans, and how the Bank processed the lot sales. The partnerships offered expert testimony demonstrating that any purported consent forms from the limited partners were fraudulent and that the Bank had not complied with commercially reasonable banking standards in processing the loans.

Following trial, the court determined that the partnerships lacked standing to sue the appellants and dismissed the case. We reversed the court's decision on appeal.[1] On remand, the court addressed the merits of the case and first determined that the partnerships' sole cause of action was essentially an action for conversion. After evaluating the evidence, the court concluded that the Bank had converted the partnerships' property:

> The Bank's actions of encumbering [the partnerships'] property with Deeds of Trust resulted in a conversion. The partnerships were permanently deprived of their interest in the encumbered lots on the dates the lots were sold and proceeds of the sales were applied to the payoff of the July and October loans pursuant to the Deeds of Trust.

The court jointly awarded the partnerships $2,267,056.86 in damages and also awarded $2.8 million in prejudgment interest. The appellants moved for a new trial and to alter or amend the judgment. The court overruled the appellants' motions.

III. ASSIGNMENTS OF ERROR

The appellants assign, consolidated and restated, that the court erred in:

(1) concluding that the statute of limitations did not bar the partnerships' conversion claim regarding the July loan;

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[1] See *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

(2) concluding that the Bank, through its encumbering and sale of the partnerships' lots, had converted the partnerships' property;

(3) concluding that the partnerships had not ratified the July and October loans;

(4) calculating damages and, specifically, failing to award damages for the July loan based only on that portion which was for a nonpartnership purpose, and granting judgment jointly to the partnerships; and

(5) awarding prejudgment interest.

IV. STANDARD OF REVIEW

[1] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which we will not disturb on appeal unless clearly wrong. And we do not reweigh the evidence but consider the judgment in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party.[2]

[2] We review de novo whether a court should award prejudgment interest.[3]

V. ANALYSIS

1. Statute of Limitations

Although the appellants devote the first portion of their brief to discussing whether the deed of trust securing the July loan was void or voidable, we read their argument as essentially arguing that the partnerships' action regarding the July loan (but not the October loan) was time barred. The appellants note that the statute of limitations for conversion is 4 years, that the loan occurred in July 2000, and that the partnerships did not sue the Bank until August 2004. So the appellants argue the statute of limitations has run.

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[2] See *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[3] See, e.g., *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

[3] The appellants are correct that under Nebraska law, the statute of limitations for a conversion claim is 4 years.[4] But we have explained that a conversion is "any distinct act of dominion wrongfully exerted over another's *personal property* in denial of or inconsistent with his rights therein."[5] In other words, "conversion lies only for serious interference with possessory interests in personal property, not real property."[6]

The making of the July loan, by itself, did not constitute a conversion. Instead, and as the court recognized, the alleged conversion was complete when the Bank wrongfully retained the proceeds from the sale of each lot.[7] The earliest sale of any lot collateralized under the July loan was December 14, 2000. The partnerships filed their complaint on August 6, 2004, less than 4 years from that date. The partnerships' complaint was timely.

2. Conversion

[4] Conversion is "any unauthorized or wrongful act of dominion exerted over another's property which deprives the owner of his property permanently or for an indefinite period of time."[8] To prove that the Bank's actions were "unauthorized" or "wrongful," the partnerships had to prove that the loans were for a nonpartnership purpose. This is because Prime had authority to pledge the partnerships' property for a partnership purpose, but did not have authority to do so for a nonpartnership purpose without the consent of the limited partners. The appellants argue that the partnerships failed to prove that the loans were for a nonpartnership purpose.

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[4] See, Neb. Rev. Stat. § 25-207 (Reissue 2008); *Upah v. Ancona Bros. Co.*, 246 Neb. 585, 521 N.W.2d 895 (1994), *disapproved in part on other grounds, Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998).

[5] *Polley v. Shoemaker*, 201 Neb. 91, 95, 266 N.W.2d 222, 225 (1978) (emphasis supplied).

[6] *Woodring v. Jennings State Bank*, 603 F. Supp. 1060, 1065 (D. Neb. 1985). See, also, 18 Am. Jur. 2d *Conversion* § 15 (2004).

[7] Cf. *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998).

[8] *Farmland Serv. Co-op v. Southern Hills Ranch*, 266 Neb. 382, 392, 665 N.W.2d 641, 648 (2003).

(a) The October Loan Was for a Nonpartnership Purpose

We conclude that whether the loans served a partnership purpose is a factual finding, which we review for clear error.[9] Regarding the October loan, the court determined that the partnerships proved that the loan was for a nonpartnership purpose. The record shows that the sole purpose for the loan was to cover McCart's $2.7 million overdraft from his check-kiting scheme. This obviously had nothing to do with either limited partnership's purpose to develop, own, and sell real estate in Sarpy County. So under the partnership agreements, Prime did not have authority to pledge the partnerships' property as collateral for the October loan. And because the Bank's actions were similarly unauthorized and wrongful, it converted the partnerships' property when it sold the lots and applied the proceeds to the October loan. The court's determination was not clearly wrong.

(b) The July Loan Was for Both Partnership and Nonpartnership Purposes

The more difficult question is whether the partnerships proved that the July loan was for a nonpartnership purpose. The record shows that the purpose of the July loan was to consolidate and renew prior loans from the Bank to several entities and to advance business capital. The July loan consolidated prior loans to Prime ($35,040), McCart ($274,046), BVII ($250,040), BVLP ($50,030), and Spring Valley XI Joint Venture ($180,924). From the July loan, the Bank also issued a check payable to Prime and Heartland for $209,960 as "new" money. The court found that "[t]he only benefit provided to the partnerships was approximately $300,000.00 of debt reduction by virtue of the July loan. The remainder went to other entities." So the court found that the July loan—other than the portion renewing the partnerships' prior loans—was for a nonpartnership purpose.

The court's finding that renewal of the prior BVII loan was for a partnership purpose was obviously not clearly wrong.

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[9] See *Davenport Ltd. Partnership, supra* note 2.

But an issue arises regarding the renewal of the BVLP loan. The court reasoned that because the renewal of the BVLP loan benefited BVLP, it served a partnership purpose. But remember that Prime pledged *only BVII property as collateral* for the July loan. Thus, the inquiry should have been whether renewing the prior BVLP loan served BVII's purposes. As explained in more detail later in this opinion, we are remanding this cause with directions to modify the judgment regarding the July loan. The purpose of renewing the BVLP loan is a factual finding which the court must make on remand.

The question remains whether the renewal of the other three prior loans and the check payable to Prime and Heartland were also for a partnership purpose. The appellants argue that the court erred in finding they were not. The appellants argue that it was the partnerships' burden to prove a nonpartnership purpose, which they failed to do. In support of this contention, the appellants point to evidence that the payment to Heartland was to clear title to the collateralized BVII lots. The appellants also claim that the other entities benefited by the July loan might have borrowed money from the Bank to lend to BVII and that BVII might have been paying off its debts.

The appellants' latter assertion is speculation. That could have been the case, but the record does not support such a conclusion. There is evidence, however, that the check payable to Heartland and Prime was to clear title to BVII lots. If that were the purpose of that portion of the July loan, then that would qualify as a partnership purpose.

But the court determined that the portion of the July loan other than the renewal of the partnerships' prior loans did not serve a partnership purpose. And we cannot say, based on this record, that the court was clearly wrong in that determination. The record shows that the Bank made these loans to various separate business entities. The court could reasonably have found, based on the testimony, that the consolidation and renewal of prior loans for business entities other than BVII was a nonpartnership purpose.[10]

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[10] Cf. *Freidco of Wilmington, etc. v. Farmers Bank, etc.*, 16 B.R. 835 (D. Del. 1981).

For example, one former officer of the Bank testified in response to the partnerships' direct examination as follows:

> Q. And the July loan, you just told me, was for payment of Prime . . . notes, Spring Valley notes, notes of people other than [BVLP or BVII], didn't you?
>
> A. I don't know that I said that, but yes.
>
> . . . .
>
> Q. So that's not a partnership purpose for [BVLP or BVII], is it?
>
> A. No.
>
> Q. All right. So you needed —
>
> A. I don't know. I say "no" too quickly. I don't know because some of those other loans, money could have gone in through Prime to fund deals on [BVII]. We didn't look at those.

Although the witness backtracked, the court could have concluded from this testimony that payment to other nonpartnership entities was a nonpartnership purpose.

The partnerships' expert witness on banking standards also seemed to suggest that payment to nonpartnership entities was a nonpartnership purpose:

> Q. [W]hat did you notice about the deeds of trust? From whom did they come with reference to the borrower on the loans?
>
> A. The deeds of trust — the notes were for Prime . . . and the real estate — some of the real estate in question were the [partnerships], which Prime was the general partner on the first note of two million — I'm sorry, 1,000,133 dated in July of 2000.
>
> That note paid off a [BVII] note of 250,000 and a [BVLP] note of 50,000, *and the rest of the proceeds paid off personal notes, Prime . . . notes*.

(Emphasis supplied.) The court could infer from this testimony that the majority of the July loan served a nonpartnership purpose.

The record also shows that McCart was guilty of kiting checks and that McCart had an interest in each of the other entities, in one form or another. In addition to his obvious

interest in loans to himself personally and to Prime, McCart (through Prime) had an interest in both Spring Valley XI Joint Venture and Heartland. Although McCart's suspicious activity apparently only came to light in October 2000, after the July loan, the court could have concluded that the July loan money was used for a nonpartnership purpose—to fund McCart's check-kiting scheme. Furthermore, although the records contain testimony from the Bank's former officers that the "new" money was meant to pay Heartland to clear the title on the collateralized BVII lots, that explanation is undermined by Prime's being a payee on the check.

In sum, the court determined that the October loan and a majority of the July loan were for nonpartnership purposes. Those factual findings are not clearly wrong. So the Bank's accepting the partnerships' property as collateral, followed by the sale of the property and application of the proceeds to the loans, was an "unauthorized or wrongful act of dominion exerted over" the partnerships' property.[11] The Bank's actions permanently deprived the partnerships of their property. This was a conversion.

3. Ratification

Nevertheless, the appellants argue that even if its actions were improper, the limited partners' subsequent acts ratified the July and October loans. So the appellants argue that they cannot be liable for conversion.

[5-9] Ratification is the acceptance of a previously unauthorized contract.[12] Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction.[13] Further, retention of benefits secured by an agent's unauthorized act with knowledge of the source of such benefits and the means by which they were obtained is a ratification of

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[11] See *Farmland Serv. Co-op, supra* note 8, 266 Neb. at 392, 665 N.W.2d at 648.

[12] See *Stolmeier v. Beck*, 232 Neb. 705, 441 N.W.2d 888 (1989).

[13] *Bank of Valley v. Shunk*, 215 Neb. 25, 337 N.W.2d 118 (1983); *Kresha v. Kresha*, 211 Neb. 92, 317 N.W.2d 776 (1982).

the agent's act.[14] And whether there has been a ratification is ultimately and ordinarily a question of fact.[15] Because ratification is an affirmative defense,[16] the burden of proving ratification rested on the appellants.[17]

The appellants argue that the partnerships ratified the July and October loans through later transactions involving some of the limited partners. Specifically, the appellants argue that some of the limited partners borrowed money from the Bank to buy some of the collateralized lots. When a dispute arose about the repayment of those loans, those limited partners entered into settlement agreements with the Bank in March and April 2004. The agreements released those limited partners' claims against the Bank arising out of the July and October loans. The agreements also assigned to the Bank those limited partners' rights to any judgment obtained against the Bank by the partnerships in exchange for the Bank's discharging those limited partners' loans. The appellants argue that because those limited partners entered into the settlement agreements knowing the circumstances surrounding the July and October loans, they therefore ratified those loans.

[10] But the court found that the partnerships (through the limited partners) had not ratified the July and October loans, and we determine that factual finding is not clearly wrong. Even assuming that the limited partners who entered into the settlement agreements had ratified the July and October loans, *the partnerships* did not ratify them: "In cases where a partner's act is not within the scope of the partnership's business and is not authorized by the partners, the transaction is still binding on the partnership if it is *ratified by those partners who would have had the power to authorize the act*."[18]

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[14] See *D & J Hatchery, Inc. v. Feeders Elevator, Inc.*, 202 Neb. 69, 274 N.W.2d 138 (1979).

[15] See *Tedco Development Corp. v. Overland Hills, Inc.*, 200 Neb. 748, 266 N.W.2d 56 (1978).

[16] See *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997).

[17] See, e.g., *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

[18] J. William Callison & Maureen A. Sullivan, Partnership Law and Practice § 8:19 at 214 (2012) (emphasis in original) (emphasis supplied).

The appellants argue only that a "majority" of the limited partners ratified the act. But the partnership agreements required *all* of the limited partners' consent to authorize the loans. So there could be no ratification based only on the actions of a majority of the limited partners.[19] A contrary conclusion would lead to the absurd result that a majority of limited partners could ratify an unauthorized transaction and render the partnership liable for it when that act could not have been authorized without the consent of each and every limited partner. The appellants' argument has no merit.

4. Damages

In calculating damages, the court found that the appellants had applied $1,064,600.73 to the July loan and $1,202,456.13 to the October loan, for a total of $2,267,056.86 in damages. The court entered judgment against Mutual of Omaha Bank, as the Bank's successor, for the full amount. The court also entered judgment against Omaha Financial Holdings for the amount applied to the October loan, because the Bank had assigned the October loan to Midlands Financial Services, Omaha Financial Holding's predecessor.

The record supports the judgment amount for the October loan, and so the court was not clearly wrong in that determination. But we remand the cause with directions for the court to modify the judgment regarding the July loan. First, the July loan's renewal of the prior BVII loan served a partnership purpose and so applying sale proceeds for that amount to the July loan was not a conversion. So the court must reduce the July loan judgment. Second, as discussed earlier, the court improperly reasoned that renewing the prior BVLP loan served a partnership purpose because it benefited BVLP. But only BVII property served as collateral for the July loan, so the question is whether renewing the prior BVLP loan served BVII's purposes. On remand, the court should make that finding and adjust the July loan judgment if needed. Finally, we note that the partnerships (as different limited partnerships)

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[19] See *id.*

are separate entities.[20] The court is ordered to award separate judgments to the partnerships based on the ownership of the properties sold to cover the July and October loans.

5. Prejudgment Interest

The appellants argue that the court erred in awarding prejudgment interest because the partnerships' claims were not liquidated as required under Neb. Rev. Stat. § 45-103.02 (Reissue 2010). Specifically, the appellants argue that there was a reasonable controversy over both the partnerships' right to recover and the amount of any such recovery. Not surprisingly, the partnerships take the opposite stance and argue that their claims were liquidated or, alternatively, that prejudgment interest was proper under Neb. Rev. Stat. § 45-104 (Reissue 2010).

The parties dispute the proper legal framework for addressing the award of prejudgment interest. The appellants contend that §§ 45-103.02 and 45-104 are not alternate routes to recover prejudgment interest, but that the reasonable controversy requirement must be met regardless whether the case is a type enumerated in § 45-104.[21] The partnerships, on the other hand, contend that §§ 45-103.02 and 45-104 are alternate routes to recover prejudgment interest and that if the case is a type enumerated in § 45-104, whether there is a reasonable controversy is irrelevant.[22]

We see no need to resolve this issue because we conclude this case is not a type enumerated under § 45-104. So regardless which approach is correct, whether prejudgment interest is proper depends on whether this case presented a reasonable controversy. Section 45-104 provides, in relevant part:

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[20] See, Neb. Rev. Stat. §§ 67-294 and 67-409 (Reissue 2009); *Richards v. Leveille*, 44 Neb. 38, 62 N.W. 304 (1895).

[21] See, *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998); *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994).

[22] See, *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012); *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009).

> Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, *on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof*, and on money loaned or due and withheld by unreasonable delay of payment.

(Emphasis supplied.) The parties dispute whether this case involves "money received to the use of another and retained without the owner's consent."

[11] The meaning of a statute is a question of law,[23] and absent any indication to the contrary, we give statutory language its plain and ordinary meaning.[24] "[M]oney received to the use of another" under § 45-104 indicates that the money is received on behalf of another person,[25] such as an agent receiving money on behalf of his principal.[26] That is not the case here. The Bank received money in its own name and converted it to its own use. We conclude that this case does not fall under any of the enumerated categories of § 45-104.

[12] Section 45-103.02(2) provides, in relevant part, that "interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment." Prejudgment interest may only be recovered under § 45-103.02(2) when the claim is liquidated.[27] A claim is liquidated when there is no reasonable controversy as to both the amount due and the plaintiff's right

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[23] See, e.g., *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

[24] See, e.g., *In re Interest of Christopher T.*, 281 Neb. 1008, 801 N.W.2d 243 (2011).

[25] See *Fitzgerald, supra* note 22. See, also, *Investors Ins. Corp. v. Dietz*, 264 Or. 164, 504 P.2d 742 (1972); *Meade v. Churchill*, 100 Or. 701, 197 P. 1078 (1921); *Coyle v. Brasic*, No. 95 C 6788, 1996 U.S. Dist. LEXIS 11129 (N.D. Ill. Aug. 1, 1996) (unpublished memorandum opinion and order).

[26] See *Cheloha, supra* note 21.

[27] See *Fitzgerald, supra* note 22.

to recover.[28] The appellants assert that a reasonable controversy existed regarding both of these requirements.

Regarding the July loan, we agree that a reasonable controversy existed concerning the amount due and the partnerships' right to recover. Based on the distribution of the July loan money, it was unclear whether the July loan served a partnership purpose. The court was required to weigh conflicting evidence and determine whether the July loan served a partnership purpose. As such, prejudgment interest on the amount applied to the July loan was improper.

But regarding the October loan, we conclude that there was no reasonable controversy concerning the amount due and the partnerships' right to recover. There was no reasonable dispute about the amount due—it was a simple matter to determine how much money the Bank applied to the October loan. There was also no reasonable dispute about the partnerships' right to recover—there was only one purpose for the October loan, to cover McCart's check kite, and that was not a partnership purpose. This was clearly a conversion, and for an undisputed amount. As such, prejudgment interest at 12 percent per annum was proper on that amount.

VI. CONCLUSION

We affirm the court's judgment regarding the October loan. We also affirm in part the court's judgment regarding the July loan, but reverse the judgment in part and remand the cause so that the court may adjust the July loan judgment in accordance with this opinion. We direct the court to enter separate judgments as to each plaintiff partnership. Finally, we affirm the court's granting of prejudgment interest regarding the October loan, but reverse the court's granting of prejudgment interest regarding the July loan.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., and STEPHAN and CASSEL, JJ., not participating.

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[28] See, *id.*; *Cheloha, supra* note 21.

STATE OF NEBRASKA, APPELLEE, V. DAVID G. CASTILLAS, APPELLANT.

826 N.W.2d 255

Filed February 8, 2013. No. S-11-685.

1. **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. 2012), and the trial court's decision will not be reversed absent an abuse of discretion.
2. **Criminal Law: 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. **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.
4. **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.
5. **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.
6. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403.
7. **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.
8. **Motions to Dismiss: Evidence: Waiver: Appeal and Error.** When a court overrules a defendant's motion to dismiss at the close of the State's case in chief and the defendant proceeds to trial and introduces evidence, the defendant waives the appellate right to challenge the trial court's overruling of the motion to dismiss.
9. **Sentences.** It is possible, in limited circumstances, to correct an inadvertent mispronouncement of a valid sentence.
10. ____. When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
11. ____. If there is a conflict between the court's sentence and its truth in sentencing advisement, the statements of the minimum and maximum limits control.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Beau G. Finley, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

WRIGHT, J.

NATURE OF CASE

David G. Castillas was convicted of two counts of discharging a firearm at a dwelling while in or near a motor vehicle, one count of second degree assault, and three counts of use of a deadly weapon to commit a felony. He was sentenced to 5 to 20 years in prison on each conviction of discharging a firearm, 5 to 10 years in prison on the conviction of second degree assault, and 5 to 10 years in prison on each conviction of use of a weapon to commit a felony. All sentences were to be served consecutively. Castillas appeals his convictions and sentences.

SCOPE OF REVIEW

[1] 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. 2012), and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. *State v. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012).

[3] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

FACTS

Background

On June 5, 2010, a driveby shooting occurred at the home of Donald Jones in Omaha, Nebraska. On June 11, another driveby shooting occurred at the home of William Harris, who lived with his mother at the home, also located in Omaha. During the second shooting, Harris' mother sustained a bullet wound to her left arm.

Castillas, Travis Davis, Tiffany Fitzgerald, and Brandy Beckwith were charged in connection with the shootings. On April 26, 2011, the State was granted leave to file additional charges against Castillas. It filed an amended information charging Castillas with two counts of discharging a firearm at a dwelling while in or near a motor vehicle, one count of second degree assault, and three counts of use of a deadly weapon to commit a felony.

Castillas filed a motion in limine to exclude evidence of or testimony regarding an incident following the shootings, during which Castillas allegedly possessed a firearm and brandished it at Donald Betts, a witness for the State. Castillas also moved to exclude any photographs of him handling a firearm. Castillas alleged that evidence on this issue would not be reliable or relevant, that such evidence would be excludable under § 27-404(2), and that any probative value under § 27-403 would be outweighed by unfair prejudice. He also claimed the evidence would be improper propensity evidence prohibited under § 27-404. Both motions were overruled.

Jury Trial

Castillas' trial commenced on May 4, 2011, in Douglas County District Court. The State called Davis, Fitzgerald, and Beckwith. All three testified that on June 5, 2010, they drove with Castillas to Jones' house. They testified that Castillas and Davis shot at the residence multiple times with firearms. They also testified that on the night of the second shooting, all four individuals, along with a person named "Lars," drove to Harris' house and that Castillas and Davis each fired at the residence.

Events of June 4 and 5, 2010

On the evening of June 4, 2010, Castillas and Davis were "partying" with Fitzgerald and Beckwith. The four of them were taking photographs of themselves holding guns, to "look cool." One of the guns was a .45-caliber pistol that belonged to Davis, and the other was a .22-caliber rifle that belonged to Fitzgerald's father. Fitzgerald recalled that the photographs marked as exhibits 93, 94, 95, and 97 were taken that specific night, because she recognized the black dresses she and Beckwith were wearing.

Davis testified that Castillas and Fitzgerald argued about Betts on the night of the first shooting. Betts had been dating Fitzgerald, who was Castillas' girlfriend, and Castillas wanted revenge. Betts was the son of Jones, and he occasionally lived with Jones. Davis had never met Betts, but he became upset with Betts due to rumors that Betts had fired a weapon at Davis' car.

Sometime after midnight on June 5, 2010, Castillas accused Fitzgerald of continuing to talk to Betts. Castillas took the rifle, Davis took his pistol, and the four got into Beckwith's car. Beckwith drove, with Davis in the front passenger seat, Fitzgerald in the rear passenger seat, and Castillas in the rear driver's-side seat. Castillas gave Beckwith directions to Jones' house. As they drove past the house, Castillas and Davis both fired at it. Davis sat on "the [front passenger] window sill" and fired his pistol across the roof of the car, and Castillas fired the rifle out the back window. Davis testified he fired at least five

or six shots and heard Castillas fire at least two or three shots. The group then returned to Fitzgerald's house.

Jones testified that on June 4, 2010, he lived in Omaha with his wife and three of his children. Betts occasionally resided there as well. At approximately 1:30 a.m. on June 5, while Jones and his wife were in their bedroom, a bullet was fired through the bedroom wall. The couple hid in the closet as several more shots were fired. When the shooting stopped, Jones called the 911 emergency dispatch service. He testified there were no bullet holes in his house prior to this shooting. Betts was not at the house when the incident occurred.

A crime scene technician with the Omaha Police Department crime laboratory testified that she collected shell casings lying in front of Jones' house. She found five shell casings in the street and located 23 bullet holes in the house, which appeared to have been caused by bullets of two different sizes. Several bullets from the house were placed in an envelope along with the five shell casings found in the street.

Events of June 10 and 11, 2010

On June 10, 2010, Castillas, Davis, Fitzgerald, Beckwith, and "Lars" were partying at Fitzgerald's house. Castillas mentioned that Betts "hangs out" at Harris' house, and Castillas and Davis talked about "shooting that house up." The five went in Beckwith's car. Davis was in front, and Castillas was in the rear driver's-side seat. Castillas had the same .22-caliber rifle, and Davis had a new 9-mm weapon that he had just obtained. Castillas and Davis fired at Harris' house. After the shooting, they returned to Fitzgerald's house.

Harris' mother lived in Omaha with Harris and her other son. She was asleep during the early morning hours of June 11, 2010, and was awakened when a bullet struck and passed through her left arm. She fell on the floor as several more shots were fired at her house.

Other Trial Evidence

On June 11, 2010, several hours after the second shooting, Betts went to Fitzgerald's house to talk to her about the shootings. While Betts was talking to Fitzgerald outside, Castillas

and Davis came outside. Castillas went back inside, and Betts saw him in an upstairs window with a gun that looked like the .22-caliber rifle used in the shootings.

Det. David Schneider attempted to speak with Fitzgerald following the shootings. Fitzgerald and Beckwith eventually went to an Omaha police station and spoke with Detective Schneider. Initially, they were untruthful, but they later admitted that they were involved in the driveby shootings and provided a detailed account. A detective went to Fitzgerald's house and seized the .22-caliber rifle, two empty magazines, and another magazine that contained 11 rounds of .22-caliber ammunition.

Davis was arrested at his residence, and police seized his .45-caliber pistol. He initially denied involvement in the shootings but subsequently provided a detailed account that matched the accounts given by Fitzgerald and Beckwith. Detective Schneider learned that Beckwith had taken Castillas to meet a family member near Crete, Nebraska, and that Castillas had gone to Texas. Castillas was apprehended in Corpus Christi, Texas, and transported back to Nebraska.

The .22-caliber rifle seized from Fitzgerald's house and the .45-caliber pistol from Davis' house were sent to the Omaha Police Department crime laboratory for ballistic comparison. A senior technician for the crime laboratory analyzed shell casings from both shootings. She testified that the five shell casings from the first driveby shooting were from a .45-caliber pistol and that two of the bullets recovered from the first shooting had characteristics that were consistent with the .22-caliber rifle. Regarding the second driveby shooting, the technician determined that 11 shell casings were from the .22-caliber rifle, 5 were from a 9-mm weapon, and all of the bullets recovered that were suitable for comparison were consistent with a 9-mm weapon.

After the evidence was presented, the State rested. Castillas moved to dismiss all charges against him for lack of evidence. The motion was overruled, and Castillas called Fitzgerald to testify.

Following the conclusion of the testimony, the court held a jury instruction conference. Castillas objected to instruction No. 11, which dealt with voluntary flight. His objection was

overruled, and the court instructed the jury. After submission of the case, the jury found Castillas guilty of all six counts. Each of Castillas' three convictions for use of a deadly weapon to commit a felony required a mandatory minimum sentence of 5 years. See Neb. Rev. Stat. §§ 28-1205(1)(c) (Cum. Supp. 2012) and 28-105(1) (Reissue 2008). Both of his convictions for discharging a firearm at a dwelling while in or near a vehicle also required mandatory minimum terms of 5 years each. See Neb. Rev. Stat. § 28-1212.04 (Supp. 2009) and § 28-105(1). His conviction for second degree assault had no mandatory minimum sentence. See Neb. Rev. Stat. § 28-309 (Supp. 2009) and § 28-105(1).

Castillas' Sentences

A sentencing hearing was held on July 28, 2011. The court stated it intended that for purposes of parole eligibility, Castillas should serve 25 years in the Nebraska Department of Correctional Services after credit for good time. It initially sentenced Castillas to aggregate consecutive prison sentences of 50 to 80 years.

After the court's first sentence pronouncement, the court inquired whether counsel agreed that Castillas would be eligible for parole consideration in 25 years. The prosecutor opined that the court's understanding was incorrect. Counsel disagreed on the calculation of parole eligibility. In response to defense counsel's statement that Castillas might not be eligible for parole for 35 years, the court stated that was not the court's intention.

Before anyone left the courtroom, the court pronounced the following sentences, which in the aggregate amounted to 30 to 80 years:

- Count I, discharging a firearm at a dwelling while in or near a motor vehicle, 5 to 20 years.
- Count II, use of a deadly weapon to commit a felony, 5 to 10 years.
- Count III, second degree assault, 5 to 10 years.
- Count IV, use of a deadly weapon to commit a felony, 5 to 10 years.
- Count V, discharging a firearm at a dwelling while in or near a motor vehicle, 5 to 20 years.

- Count VI, use of a deadly weapon to commit a felony, 5 to 10 years.

The court's "truth in sentencing" advisement informed Castillas: "That will be a total of 30 to 80 years, meaning you have to serve 25 years to be released on parole. And after 40 years, if you lose no good time, you'll be released." The court's written order directed that the sentences be served consecutively and gave Castillas credit for 379 days served.

ASSIGNMENTS OF ERROR

Castillas alleges, summarized and restated, that (1) the court erred in allowing testimony at trial concerning whether he possessed firearms after the second shooting, (2) the court erred in admitting photographs of Castillas possessing firearms, (3) the evidence at trial was insufficient, (4) the court erred in overruling Castillas' motion to dismiss at the end of the State's case, (5) the court erred in giving jury instruction No. 11 with regard to voluntary flight, and (6) the court erred in ordering a sentence that was substantially different from its intended sentence.

ANALYSIS

Evidence Related to Possession of .22-Caliber Rifle After Second Shooting

The State introduced evidence that Betts went to Fitzgerald's home several hours after the second shooting. Betts saw Castillas holding a weapon that looked like the rifle Castillas was alleged to have used in both shootings. Before trial, Castillas moved to prohibit the State from presenting such testimony. The court overruled the motion.

Castillas alleges that during the trial, he was granted a continuing objection to this evidence and that, therefore, his alleged error concerning the admission of the evidence has been preserved for review on appeal. Castillas claims that admission of the evidence violated §§ 27-403 and 27-404.

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.

Castillas asserts that the State offered no proper purpose for this evidence and that the court should have held a rule 404 hearing.

The State argues that Castillas waived any objection to this evidence by his failure to object during Betts' testimony. Although Castillas moved to exclude the evidence before trial, he did not object or renew his motion during Betts' testimony that he went to Fitzgerald's house after the second shooting and saw Castillas with a gun that looked like the .22-caliber rifle Castillas allegedly used in the shootings. The State claims that Castillas did not raise the necessary objection, because although he had received a continuing objection during the direct examinations of Davis, Fitzgerald, and Beckwith, he did not object or renew his objection during Betts' testimony.

Neb. Rev. Stat. § 25-1141 (Reissue 2008) provides:

> Where an objection has once been made to the admission of testimony and overruled by the court it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received.

The State claims § 25-1141 does not apply to testimony given by a different witness when no objection is made to that witness' testimony. We agree. Castillas failed to object to Betts' testimony and has therefore waived his objection to such testimony.

Photographs of Castillas, Davis, Fitzgerald, and Beckwith

During the trial, the State introduced four photographs. Three of the photographs show Castillas with a rifle that resembles the .22-caliber rifle allegedly used in the shootings; the fourth does not depict a firearm. Exhibit 93 is a photograph of Castillas holding a .22-caliber rifle and posing alongside Fitzgerald, who is holding Davis' .45-caliber pistol.

Exhibit 94 is a photograph of Castillas posing by himself with a .22-caliber rifle. Exhibit 95 is a photograph of Castillas holding the rifle and posing alongside Beckwith, who is holding Davis' .45-caliber pistol. Castillas objected to these photographs, claiming they were irrelevant, were unfairly prejudicial, and violated § 27-404(2). The court overruled these objections.

Castillas claims the photographs were overly prejudicial. In support of his argument, Castillas attacks the credibility of Fitzgerald, who testified that the photographs were taken the evening of the first shooting. He asks this court to disregard such testimony, because Fitzgerald lied repeatedly to the police in order to get out of trouble and wrote false accounts of the shootings months after they occurred and because there was no other independent evidence offered to establish that the photographs were taken on the date claimed by Fitzgerald.

[5] 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. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). Fitzgerald's credibility does not control the admission of the photographs. On appeal, we do not examine the credibility of the witnesses. Fitzgerald's testimony established that the photographs were taken near the time of the first shooting. Both Davis and Beckwith acknowledged the photographs were taken, and Beckwith acknowledged they were taken on the night of either the first or second shooting.

[6] Whether the evidence was unfairly prejudicial was a decision for the trial court, whose decision we will not reverse unless there is an abuse of discretion. See *id*. The fact that evidence is prejudicial is not enough to require exclusion under § 27-403, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011). We conclude Castillas has not established that the admission of the photographs was unfairly prejudicial. The court did not abuse its discretion in admitting these photographs.

Castillas' argument that the photographs should have been excluded under § 27-404(2) is also without merit. The evidence established that the photographs were taken on or near the night of the first shooting. They were admissible as intrinsic evidence because they corroborated testimony of the witnesses that Castillas had access to and was in possession of a .22-caliber rifle at the time of the shootings.

Sufficiency of Evidence

[7] In reviewing a sufficiency of the evidence claim, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. See *State v. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012). The relevant question 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. See *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*.

Castillas claims that the evidence was insufficient to find him guilty of any of the six counts alleged in the amended information. He claims the State failed to provide even a viable narrative of why the shootings occurred. We disagree. The evidence established that Castillas had a desire to injure Betts.

Castillas asserts that Davis had a stronger motive to commit the crimes, because Davis may have believed that Betts and Harris fired shots at Davis' car. The fact that Davis might have had a motive to injure Betts and Harris supports the evidence that both Castillas and Davis participated in the shootings.

Castillas also argues that the State's dependence upon Davis, Fitzgerald, and Beckwith to support the accusation that Castillas shot at both houses is insufficient, because all three admitted to lying to police when questioned about these incidents.

These arguments have no merit. The credibility of Davis, Fitzgerald, and Beckwith is not part of our review for sufficiency of the evidence. We do not pass on the credibility of witnesses or reweigh the evidence. Viewing the evidence in the light most favorable to the State, a rational trier of fact

could have found beyond a reasonable doubt that Castillas committed the crimes charged. Castillas' argument that no rational trier of fact would have found him guilty of these six offenses because the State's witnesses were not credible is without merit.

Motion to Dismiss

Castillas claims the court erred in overruling his motion to dismiss, which was made after the State presented its case in chief. After the State rested, Castillas started to make a motion to dismiss. The court stated that Castillas could defer the motion, which he did. Castillas then called Davis to the stand. Later, while the jury was on a lunch break, Castillas moved to dismiss. He claimed the State had failed to make a prima facie case against him on any of the charges. The court overruled the motion. Castillas then called his final witness, Fitzgerald.

[8] When a court overrules a defendant's motion to dismiss at the close of the State's case in chief and the defendant proceeds to trial and introduces evidence, the defendant waives the appellate right to challenge the trial court's overruling of the motion to dismiss. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). Castillas waived his argument by calling Fitzgerald as a witness after the State had rested and after his motion to dismiss was overruled. His assignment of error is without merit.

Jury Instruction on Flight

Before the case was submitted to the jury, the court gave instruction No. 11, which provided:

> The voluntary flight of [Castillas] immediately or soon after the occurrence of a crime, with which [Castillas] has been charged, is a circumstance not sufficient of itself to establish guilt, but a circumstance nevertheless which you may consider in connection with all the other evidence in this case to aid you in determining the question of the guilt or innocence of [Castillas].

Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower

court's decision. *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012). Castillas claims he was prejudiced by instruction No. 11 because the instruction forced the jury to conclude that his departure from Omaha was a flight. He argues that the jury should have been instructed in such a way that they could differentiate between the term "flight" and mere departure. He alleges that there was no way for the jury to discern the difference between flight and departure and that without a definition of flight, the jury would not be able to consider the distinction between the two. He claims there is little evidence in the record to suggest that he left Omaha to avoid apprehension or detection.

Castillas' arguments have no merit. In *State v. Lincoln*, 183 Neb. 770, 772, 164 N.W.2d 470, 472 (1969), this court upheld the giving of a flight instruction that stated:

> "You are instructed that the voluntary flight of a person immediately or soon after the occurrence of a crime, with which the person so fleeing has been charged, is a circumstance, not sufficient of itself to establish guilt, but a circumstance nevertheless which the Jury may consider in connection with all the other evidence in the case to aid you in determining the question of the guilt or innocence of such person."

This instruction is substantively the same as the instruction given in the case at bar.

Beckwith testified that she took Castillas to Crete "days to a week" after the second shooting. She responded "[y]es" when asked whether Castillas had requested to be taken to Crete only after Detective Schneider was "kind of poking around." Beckwith was then asked, "Did [Castillas] tell you why he wanted to be taken to Crete, Nebraska?" Beckwith responded that Castillas said that "if they were looking for anybody they were looking for him." There was sufficient evidence for the jury to infer flight, see *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011), and the court did not err in giving instruction No. 11 to the jury.

Additionally, Castillas did not submit a proposed jury instruction or request a more specific instruction containing a definition of flight. If he desired a more precise jury instruction,

Castillas should have requested one at the time the instructions were being considered. See *State v. Lewis*, 241 Neb. 334, 488 N.W.2d 518 (1992). His failure to offer a more specific instruction precludes his raising this objection on appeal. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

Sentencing

Castillas claims that the court erred by imposing sentences which failed to achieve the court's expressed intent of making Castillas eligible for parole in 25 years. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

At the sentencing hearing, the court initially pronounced consecutive sentences resulting in an aggregate sentence of 50 to 80 years. The court stated: "It means that after 25 years, you'll be considered eligible for consideration — is that right?" The prosecutor and defense counsel then disagreed about the calculation of parole eligibility. In response to defense counsel's statement that the sentence pronounced might make Castillas ineligible for parole for 35 years, the court stated that was not the court's intention. The court then stated:

> My intention is that with the mandatory minimums, . . . Castillas should serve 25 years in the Nebraska Department of Correctional Services after credit for good time. So if the numbers [minimum portion of each sentence] would add up to 30, that would give it a 25-year mandatory minimum — 25-year minimum, I'm sorry. After mandatory of 20, he would have 10 years for which he would get good time credit, which would be divided in half for the 25. So we will start over.

The court sentenced Castillas to an aggregate prison sentence of 30 to 80 years: 5 to 20 years on counts I and V, for shooting at a dwelling from a vehicle, and 5 to 10 years on counts II, IV, and VI, for use of a weapon to commit a felony, and count III, for second degree assault. All sentences were to be served consecutively.

For its truth in sentencing advisement, the court informed Castillas that he would be sentenced to a total of 30 to 80

years, that he would have to serve 25 years to be released on parole, and that after 40 years, if he lost no good time, he would be released.

The statutory sentencing requirements for the charges are as follows:

- Counts I and V: discharging a firearm at a dwelling while in or near a vehicle, a violation of § 28-1212.04, Class IC felony, punishable by a mandatory minimum of 5 years and a maximum of 50 years. § 28-105(1).
- Counts II, IV, and VI: use of a deadly weapon, a firearm, to commit a felony, a violation of § 28-1205(1)(c), Class IC felony, punishable by a mandatory minimum of 5 years and a maximum of 50 years. § 28-105(1).
- Count III: second degree assault, a violation of § 28-309, Class III felony, punishable by a minimum of 1 year and a maximum of 20 years. § 28-105(1).

[9,10] It is possible, in limited circumstances, to correct an inadvertent mispronouncement of a valid sentence. *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009). Hence, it was permissible for the court to resentence Castillas to correct the sentence to match the court's intention. The court stated its intention to structure an aggregate sentence that would result in Castillas' being eligible for parole in 25 years. In imposing a sentence, it is appropriate for a sentencing court to consider how good time credit affects a sentence, that is, when a defendant will be eligible for parole and mandatory release. See *State v. Cadwallader*, 230 Neb. 881, 434 N.W.2d 506 (1989). The sentences on all six convictions were within the statutory limits. And when a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *State v. Clark, supra*.

Though the sentences pronounced were valid, they did not match the court's intention. The court miscalculated when Castillas would be eligible for parole and for mandatory discharge.

Parole eligibility is governed by Neb. Rev. Stat. § 83-1,110 (Reissue 2008), which provides in relevant part: "(1) Every committed offender shall be eligible for parole when the

offender has served one-half the minimum term of his or her sentence as provided in [§] 83-1,107 . . . . No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term." Pursuant to Neb. Rev. Stat. § 83-1,107(2)(a) and (3) (Cum. Supp. 2012), the term of a committed offender is reduced "by six months for each year of the offender's term and pro rata for any part thereof which is less than a year," but "reductions of terms . . . may be forfeited, withheld, and restored" by correctional facility officials. Section 83-1,110 makes clear that these good time reductions do not apply to mandatory minimum sentences.

In *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002), we considered whether good time credit should be applied to the maximum portion of a sentence before the mandatory minimum sentence had been served. We held that it could not, because good time credit applies only after the mandatory minimum has been served. One of the purposes behind § 83-1,107, the good time credit statute, was to ensure that no one would reach mandatory discharge before reaching parole eligibility. We stated in *Johnson v. Kenney, supra*, that it would defeat the legislative intent if a defendant reached mandatory discharge before being eligible for parole, because the minimum portion of the sentence would have no meaning.

In calculating parole eligibility in *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012), this court held that a defendant must serve the mandatory minimum plus one-half of the remaining minimum sentence before becoming eligible for parole. A jury found William D. Kinser, Jr., guilty of felony flight to avoid arrest. After finding that he had five previous felony convictions, the district court concluded that Kinser was a habitual criminal and sentenced him to a term of not less than 18 nor more than 30 years' imprisonment. Kinser argued that the sentencing order must be reversed because the court intended for him to be eligible for parole after 10 years, whereas under the sentence imposed, he would not be eligible for parole for 14 years.

We held that with the minimum sentence of 18 years, Kinser was required to serve a minimum of 10 years plus one-half of

the remaining 8 years before he would be eligible for parole. During sentencing, the court had stated:

> "[Kinser] will be sentenced . . . [o]n Count I [fleeing to avoid arrest], which is the felony, [to] not less than 18 years and not more than 30 years. The minimum will include the mandatory minimum of 10 years with a two-year revocation of his license. Those sentences will be served concurrent. I give him credit for 190 days that he has served."

Id. at 568-69, 811 N.W.2d at 233.

On appeal, Kinser claimed that the district court erred in sentencing him as a habitual criminal and in imposing an erroneous sentence. We found that the sentencing court did not clearly state that Kinser would be eligible for parole after serving 10 years, but that even if it had, the question would be resolved by Neb. Rev. Stat. § 29-2204(1) (Reissue 2008). Any discrepancy between the minimum sentence of 18 years for Kinser's flight to avoid arrest conviction and the statements of the sentencing court regarding parole eligibility would be controlled by the court's statements with regard to the minimum sentence. Pursuant to our holding in *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002), good time credit would not reduce the 10-year mandatory minimum portion of Kinser's sentence for flight to avoid arrest. Thus, assuming no loss of good time credit, Kinser was required to serve the 10-year mandatory minimum plus 4 of the remaining 8 years of the minimum sentence, less credit for time served, before becoming eligible for parole.

Logically, a defendant must serve the mandatory minimum portion of a sentence before earning good time credit toward the maximum portion of the sentence. *Johnson v. Kenney, supra*, indicates that a defendant receives no good time credit until after serving any mandatory minimum. Thus, a defendant would be unable to earn good time credit against either the minimum or maximum sentence until the defendant had served the mandatory minimum sentence. As noted in *State v. Kinser, supra*, the parole eligibility date is determined by subtracting the mandatory minimum sentence from the court's minimum sentence, halving the difference, and adding that difference to

the mandatory minimum. Similarly, the mandatory discharge date is computed by subtracting the mandatory minimum sentence from the maximum sentence, halving the difference, and adding that difference to the mandatory minimum.

Mandatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying a mandatory minimum sentence must serve the sentence on each count consecutively.

Accordingly, the court was required to sentence Castillas to consecutive terms for each conviction carrying a mandatory minimum. The court incorrectly computed Castillas' parole eligibility date because it mistakenly used 20 years as the mandatory minimum sentence instead of the required 25 years. Five of the convictions were Class IC felonies, each carrying a mandatory 5-year minimum. See § 28-105(1).

Castillas was sentenced to 30 to 80 years. Subtracting the mandatory minimum sentence, 25 years, from the court's minimum sentence, 30 years, leaves 5 years for which Castillas could receive good time credit. Castillas must serve half of those 5 years, or 2½ years, plus the mandatory minimum of 25 years before becoming eligible for parole. Accordingly, under the court's sentence, Castillas would be eligible for parole in 27½ years, assuming no loss of good time.

Similarly, subtracting the mandatory minimum sentence of 25 years from the maximum sentence of 80 years leaves 55 years for which Castillas could receive good time credit. Castillas must serve half of those 55 years, or 27½ years, plus the mandatory minimum of 25 years before becoming eligible for mandatory release. Accordingly, under the court's sentence, Castillas would reach his mandatory discharge date in 52½ years, assuming no loss of good time.

In summary, based on the sentences pronounced by the court, Castillas will be eligible for parole in 27½ years and eligible for mandatory discharge in 52½ years, assuming no loss of good time. However, the court told Castillas that he would be eligible for parole in 25 years and subject to mandatory discharge in 40 years, assuming no loss of good time.

[11] If there is a conflict between the court's sentence and its truth in sentencing advisement, the statements of

the minimum and maximum limits control. Pursuant to § 29-2204(1), in imposing an indeterminate sentence upon an offender, the court shall:

> (A) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony . . . .
>
> . . . .
>
> (b) Advise the offender on the record the time the offender will serve on his or her minimum term before attaining parole eligibility assuming that no good time for which the offender will be eligible is lost; and
>
> (c) Advise the offender on the record the time the offender will serve on his or her maximum term before attaining mandatory release assuming that no good time for which the offender will be eligible is lost.
>
> If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility or between the statement of the maximum limit of the sentence and the statement of mandatory release, the statements of the minimum limit and the maximum limit shall control the calculation of the offender's term.

Castillas argues that because the court intended to give an aggregate sentence making him eligible for parole after 25 years, the intention of the sentencing court should prevail. Castillas asserts that because the sentences rendered in this case clearly did not comport with the intention of the court, the sentences are erroneous. He requests that this court remand the cause for resentencing in conformity with the trial court's articulated intentions.

Castillas' actual aggregate sentence is computed based on the court's statement of the minimum and maximum limits of 30 to 80 years. As computed above, Castillas will be eligible for parole in 27½ years and subject to mandatory discharge in 52½ years, assuming no loss of good time.

Castillas was sentenced after he was convicted; therefore, no prejudice based on the court's mathematical error has been shown. He was given valid sentences within the statutory range, even though the sentences were contrary to the court's

intentions. If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility or between the statement of the maximum limit of the sentence and the statement of mandatory release, the statements of the minimum limit and maximum limit shall control the calculation of the offender's term. See § 29-2204(1).

CONCLUSION

For the reasons set forth, we find no merit to any of Castillas' assignments of error. We therefore affirm the judgments of conviction and the sentences imposed.

AFFIRMED.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RANDALL J. BROMM, APPELLANT.
826 N.W.2d 270

Filed February 8, 2013. No. S-11-718.

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. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal.
3. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
4. **Evidence: Proof: Words and Phrases.** Direct evidence is that evidence which proves the fact in dispute directly without inference or presumption.
5. **Evidence.** Direct evidence encompasses not just testimonial evidence, but the admission of documents and other tangible items.
6. **Search and Seizure: Police Officers and Sheriffs.** The purpose of the exclusionary rule is to deter police misconduct.
7. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Negligence.** The exclusionary rule should not apply when police mistakes are the result of negligence rather than systemic error or reckless disregard of constitutional requirements.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the District Court for Washington County, JOHN E. SAMSON, Judge, on appeal thereto from the County Court for Washington County, C. MATTHEW SAMUELSON, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

John A. Svoboda, of Gross & Welch, P.C., L.L.O., 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 arresting officer stopped Randall J. Bromm's dark-colored vehicle in reliance upon incorrect information from the vehicle's registration, which stated that the vehicle was white. In the subsequent prosecution for driving under the influence, Bromm sought to suppress evidence of the traffic stop. After he failed to obtain suppression at the county court and district court levels, the Nebraska Court of Appeals reversed, and remanded. On further review, we first decide that a copy of the county treasurer's certificate of registration provided direct evidence that the error in the vehicle's color stemmed from the registration. We also determine that the good faith exception to the exclusionary rule applies, because the county treasurer is not an adjunct of law enforcement. We reverse the decision of the Court of Appeals and remand the cause for further proceedings.

BACKGROUND

The facts are set forth in greater detail in the Court of Appeals' published decision.[1]

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[1] *State v. Bromm*, 20 Neb. App. 76, 819 N.W.2d 231 (2012).

County Court Proceedings

Bromm moved to suppress all evidence obtained as a result of the traffic stop, alleging that law enforcement did not have a reasonable, articulable suspicion to stop his vehicle. There was no issue of bad driving, but the arresting officer relied upon a discrepancy between the actual color of Bromm's vehicle as compared to the color of the vehicle from the State's motor vehicle registration records as relayed by the officer's dispatcher.

According to the arresting officer's testimony at the suppression hearing, the vehicle was a "dark color," which the officer thought was "like maroon or red or something like that." However, the officer testified that he "ran" the plate through dispatch, which reported that the license plate belonged to a "white vehicle." The stop was based solely upon an error in the registration of the vehicle, an error which the officer conceded was made by someone other than Bromm. The record of the suppression hearing did not include a copy of the vehicle's registration certificate.

The county court overruled Bromm's motion to suppress, finding that the officer had probable cause to stop Bromm based upon "observed violations of law, to wit: Fictitious Plates."

The matter proceeded to trial before the county court upon a written stipulation. Among the attachments to the written stipulation was a copy of the vehicle's registration certificate from the Burt County treasurer. In the "Description" section of the certificate, the information about the vehicle appeared in this format:

> 2009 CHEVROLET
> K1500 SUBURBAN LT 4 DR SPT UTIL
> WHI FLEXIBLE

The county court convicted Bromm of driving under the influence.

District Court's Decision

Bromm appealed to the district court, which observed that the information from the dispatcher's database was erroneous as to the color of Bromm's vehicle. The court noted that

a statute requires registration of a motor vehicle be made by application for registration to the county treasurer or other designated county official of the county in which the motor vehicle has situs and that the color of a motor vehicle is statutorily required on each new application for registration. Based upon the attachment to the stipulation, the court determined that the registration was issued by the Burt County treasurer. The court stated that there was no evidence to indicate who was at fault for the incorrect color designation on Bromm's motor vehicle registration certificate.

Although the district court determined that the sole reason for the traffic stop was erroneous, the court concluded that the good faith exception to the exclusionary rule applied. The district court reasoned that there was no evidence that the Washington County dispatcher or the arresting officer was responsible for the error or that the Burt County treasurer was connected to any law enforcement duties. The district court found the facts of the case to be distinguishable from *State v. Hisey*[2] because there was no evidence that the error was made by an adjunct to the law enforcement team.

Court of Appeals' Decision

Bromm next appealed to the Court of Appeals. The Court of Appeals considered the State's argument that county treasurers' offices should not be considered adjuncts of law enforcement because they are not involved in promulgating rules and regulations that law enforcement must enforce, nor are they integral to the laws concerning motor vehicles and persons who operate motor vehicles.

The Court of Appeals observed that the officer had received the information suggesting that Bromm's vehicle did not have proper license plates from the dispatcher—who had to be considered law enforcement—but that there was no direct evidence as to where the dispatcher had obtained the erroneous information. The Court of Appeals recalled that the burden of proof was on the State to prove the applicability of the good faith exception to the exclusionary rule, determined that the

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[2] *State v. Hisey*, 15 Neb. App. 100, 723 N.W.2d 99 (2006).

State failed to prove that the erroneous information came from the Burt County treasurer's office, and concluded that the dispatcher got the information from the Nebraska Department of Motor Vehicles (DMV). And under *Hisey*,[3] a traffic stop based upon erroneous information contained in the DMV's records was unlawful.

Accordingly, the Court of Appeals determined that the good faith exception did not apply and that the county court and the district court erred in not sustaining Bromm's motion to suppress. Based upon that determination, the Court of Appeals did not reach Bromm's assignments of error and arguments concerning the horizontal gaze nystagmus test, administration of the preliminary breath test, and alleged errors in the arresting officer's report.

We granted the State's petition for further review.

ASSIGNMENT OF ERROR

The State assigns that the Court of Appeals erred in finding that the county court and district court erred in not sustaining Bromm's motion to suppress evidence, particularly with respect to the basis for the stop of the vehicle and the sufficiency of the evidence relating to the registration.

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.[4]

ANALYSIS

On petition for further review, the State contends that the Court of Appeals erred in focusing on who transmitted the incorrect information regarding the color of Bromm's vehicle, rather than on who made the error. The State asserts that the

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[3] *Id.*

[4] *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

record contains evidence showing the error originated with the treasurer's office and that it is this error which should be considered in determining whether suppression should be employed to deter further transgressions.

In response to the State's petition for further review, Bromm argues that the Court of Appeals determined that the State failed to meet its burden of proof regarding who was at fault for the incorrect color appearing on Bromm's registration and that the Court of Appeals corrected the district court's judgment by placing the burden of proof on the issue where it should have been—with the State. Bromm asserts that the only direct evidence as to the source of the incorrect information was that it came from the dispatcher. Thus, Bromm argues that the Court of Appeals properly concluded the State had not proved the source of the erroneous information.

The record contains evidence pointing to the source of the incorrect information, and the district court considered this evidence. When the matter proceeded to trial before the county court upon the parties' written stipulation, a copy of the certificate of registration for Bromm's vehicle was admitted as one of the attachments to the stipulation. As the district court observed, statutes require that (1) every owner of a motor vehicle must apply for registration to the county treasurer or designated official of the county[5]; (2) the application shall include a description of the vehicle, "including the color"[6]; and (3) the certificate of registration shall contain a description of the motor vehicle as set forth in the application, which, as we have already noted, must include the vehicle's color.[7] Another statute mandates that county treasurers shall act as agents for the DMV in the collection of all motor vehicle taxes, motor vehicle fees, and registration fees.[8] And yet another statute requires the county to issue and file registration certificates using the vehicle titling and registration computer system prescribed by the

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[5] Neb. Rev. Stat. § 60-385 (Reissue 2010).

[6] Neb. Rev. Stat. § 60-386 (Reissue 2010).

[7] Neb. Rev. Stat. § 60-390 (Reissue 2010).

[8] Neb. Rev. Stat. § 60-3,141(1) (Reissue 2010).

DMV.[9] Thus, the functions of the county treasurer in receiving the registration information, issuing the registration, and entering the registration information in the DMV's computer system are all expressly prescribed by statute—a process which clearly traces the information entered by the county treasurer into the records of the DMV.

[2,3] The district court properly considered the evidence of the certificate of registration which had been admitted as trial evidence and was included in the record on appeal. In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal.[10] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[11] Thus, on appeal, the district court could consider the trial evidence in addition to the evidence from the suppression hearing. We conclude that the same rule applies upon subsequent appeal to a higher court.[12] Thus, the evidence of the certificate of registration is properly before us.

[4,5] Contrary to the Court of Appeals' decision, the certificate of registration is direct evidence of the registered color of Bromm's vehicle. Direct evidence is that evidence which proves the fact in dispute directly without inference or presumption.[13] It encompasses not just testimonial evidence, but the admission of documents and other tangible items.[14] The

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[9] Neb. Rev. Stat. § 60-372(1) (Reissue 2010).

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

[11] *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

[12] See, generally, *State v. Graff*, 282 Neb. 746, 810 N.W.2d 140 (2011) (district court and higher appellate court review appeals from county court for error appearing on record).

[13] *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 720 N.W.2d 372 (2006).

[14] See, NJI2d Crim. 5.0 (stating in part that "[d]irect evidence is either physical evidence of a fact or testimony by someone who has first-hand knowledge of a fact by means of his or her senses"); *State v. Davis*, 1 Neb. App. 502, 500 N.W.2d 852 (1993) (determining that jury instruction given—which mirrored that in NJI2d Crim. 5.0—accurately stated law).

certificate from the Burt County treasurer described Bromm's vehicle as "WHI," which in the absence of any other description of the vehicle's color clearly conveys that it was white. Thus, the certificate of registration showed that the error originated with the Burt County treasurer's office. Accordingly, the State met its burden to show that the error began with the treasurer's office and not with the DMV or the dispatcher. Because this burden has been met, we turn to the issue at the heart of the State's argument.

The State argues that the county treasurer's office should not be considered an adjunct to law enforcement and, thus, that the exclusionary rule should not apply in this case. As discussed in *Hisey*,[15] the distinction is important under *Arizona v. Evans*[16] for purposes of determining whether the good faith exception to the exclusionary rule should apply. In *Evans*, the U.S. Supreme Court held that evidence seized incident to an arrest based upon a negligent error by a court clerk did not need to be suppressed. The Court reasoned that the exclusionary rule was designed as a means of deterring police misconduct, not mistakes by court employees, and that there was no evidence that lawlessness among court personnel required the sanction of suppression. The Court stated, "Because court clerks are not adjuncts to the law enforcement team . . . they have no stake in the outcome of particular criminal prosecutions."[17] The Court reasoned that the threat of exclusion could not be expected to deter these individuals, nor would the behavior of the arresting officer be altered.

In the instant case, the State argues that county treasurers have even less stake in the outcome of criminal prosecutions than do court clerks. According to the State, the only reason the treasurer's office issues vehicle registrations instead of the DMV is because it is required to do so by statute. The State argues that the treasurer's office is "far more akin to a court

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[15] *State v. Hisey, supra* note 2.

[16] *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).

[17] *Id.*, 514 U.S. at 15.

clerk's office than it is to [the] DMV."[18] Thus, the State contends that the Court of Appeals improperly extended its prior decision in *Hisey*.[19]

[6] We agree with the State that a county treasurer's office should not be treated as an adjunct of the law enforcement team when application of the exclusionary rule is at issue. The purpose of the exclusionary rule is to deter police misconduct.[20] But like in *Evans*, no law enforcement agent did anything wrong. The officer in this case was justified in relying on the registration information provided to him, and his reliance upon the information was objectively reasonable. We have no reason to believe that applying the exclusionary rule under these circumstances would have any significant effect on employees of a county treasurer's office. They have no interest in maintaining inaccurate records. Like the court clerks in *Evans*, such employees are not "engaged in the often competitive enterprise of ferreting out crime"[21] and "have no stake in the outcome of particular criminal prosecutions."[22] Likewise, the Washington County sheriff's office has no control over the records of the Burt County treasurer.

[7] At oral argument, the State extended the argument set forth in its brief, contending that *Hisey* was wrongly decided. Recent precedents from the U.S. Supreme Court demonstrate a reluctance to exclude evidence where the deterrent effect would be minimal. *Davis v. U.S.*[23] concerned evidence obtained during a search conducted in reasonable reliance on binding appellate precedent in effect at the time of the search. The U.S. Supreme Court iterated that "in 27 years of practice under *Leon*'s good-faith exception, [the Court had] 'never applied' the exclusionary rule to suppress evidence obtained

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[18] Brief for appellant in support of petition for further review at 8.

[19] *State v. Hisey, supra* note 2.

[20] *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

[21] *Arizona v. Evans, supra* note 16, 514 U.S. at 15.

[22] *Id.*

[23] *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011).

as a result of nonculpable, innocent police conduct."[24] In *Herring v. United States*,[25] the U.S. Supreme Court considered whether the exclusionary rule should apply to negligent errors by law enforcement personnel. In that case, an investigator asked the county's warrant clerk to check for any outstanding warrants for the defendant's arrest and learned that there was an outstanding warrant in a neighboring county. The investigator then arrested the defendant, and a search incident to arrest revealed methamphetamine and a pistol (which the defendant, as a felon, could not possess). When the warrant clerk for the neighboring county went to retrieve the actual warrant in order to send it to the warrant clerk who requested it, she was unable to find it and subsequently learned that the warrant had been recalled 5 months earlier, although that information did not appear in the database. The Court concluded that the exclusionary rule should not apply when police mistakes are the result of negligence rather than "systemic error or reckless disregard of constitutional requirements."[26]

Although we need not decide today whether *Hisey* remains good law in light of these precedents, we conclude that the evidence in the instant case need not be suppressed because (1) the officer's reliance on the information he received from dispatch was objectively reasonable, (2) the erroneous information originated from an entity that cannot be considered an adjunct of the law enforcement team, and (3) application of the exclusionary rule under these circumstances would have no deterrent effect. Accordingly, we conclude that the good faith exception to the exclusionary rule applies and that the Court of Appeals erred in reaching a contrary conclusion.

CONCLUSION

On further review, we conclude that the Court of Appeals erred in determining that the good faith exception did not apply

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[24] *Id.*, 131 S. Ct. at 2429.

[25] *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

[26] *Id.*, 555 U.S. at 147.

and that the county court and the district court erred in not sustaining Bromm's motion to suppress. Accordingly, we reverse the decision of the Court of Appeals.

Because the Court of Appeals determined that the evidence should be suppressed, it did not consider Bromm's assignments of error and arguments concerning the horizontal gaze nystagmus test, administration of the preliminary breath test, and alleged errors in the arresting officer's report. We therefore remand the cause to the Court of Appeals to consider Bromm's remaining assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
BILLY RAMIREZ, APPELLANT.
825 N.W.2d 801

Filed February 8, 2013. No. S-12-251.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
2. ____: ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
4. **Criminal Law: Juries.** The determination of whether an injury is a "serious bodily injury" is a question of fact for the jury.
5. **Criminal Law: Restitution: Damages.** Neb. Rev. Stat. § 29-2280 (Reissue 2008) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which a defendant is convicted.
6. **Sentences: Restitution.** After the sentencing court determines that a conviction warrants restitution, it then becomes the sentencing court's factfinding responsibility to determine the victim's actual damages and the defendant's ability to pay.
7. ____: ____. Under Neb. Rev. Stat. § 29-2281 (Reissue 2008), the sentencing court may hold a hearing at the time of sentencing to determine the amount of restitution.
8. **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.

9. **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 Hall County: TERESA K. LUTHER, Judge. Affirmed.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

Billy Ramirez was convicted by a jury of third degree assault, a Class I misdemeanor under Neb. Rev. Stat. § 28-310 (Reissue 2008). The district court sentenced him to 24 months of probation and ordered him to pay restitution to the victim pursuant to Neb. Rev. Stat. § 29-2280 (Reissue 2008). Ramirez appeals the restitution order and alleges ineffective trial counsel.

BACKGROUND

Brant Van Boening and his wife, Joy Van Boening, were on a bicycle ride in Hall County, Nebraska. The couple had stopped their bicycles on the shoulder of the road to allow a few vehicles to pass. One of the vehicles waiting to pass was a truck driven by Ramirez, who was waiting to turn right.

While Joy was waiting for the vehicles to pass, Ramirez told her to "get the fuck out of the way." Joy abided and quickly crossed the road. Brant, however, remained on the shoulder and began cleaning his glasses. At the time, Ramirez believed Brant was challenging him to get out of his truck. Ramirez "laid on the horn" and told Brant to get out of his way. Brant then walked behind Ramirez' truck and began reading Ramirez' license plate number out loud. Ramirez exited the vehicle, and a verbal confrontation ensued.

After 15 to 20 seconds of arguing, Ramirez retreated to his truck and began to leave. As Ramirez pulled away, Brant stated, "[s]ee you later, ese." Ramirez, a man of Mexican heritage, took offense, stopped his truck, and again confronted Brant. According to Ramirez, he then "backslapped" Brant with his right hand. According to Joy and Brant, Ramirez punched Brant. Brant "heard a pop" and "saw white" when he was struck by Ramirez.

When a sheriff's deputy arrived on the scene, Brant reported that his jaw was causing him pain. The deputy noted that Brant's face was not swollen or bruised. The deputy offered to have an ambulance dispatched, but Brant declined in favor of seeking his own medical treatment. Ramirez was given a citation for third degree assault and was allowed to leave.

After returning home, Brant's jaw became swollen and he was unable to open or close his mouth. Brant called his dentist, Dr. David Stoddard, and went to his office 2 days after the incident. Stoddard took an x ray, which revealed that his jaw was fractured in two places. Stoddard referred Brant to Dr. Martin Tilley, an oral and maxillofacial surgeon. Tilley wired Brant's jaw shut for 6 to 7 weeks.

Voir Dire and Trial

Ramirez was charged with first degree assault under Neb. Rev. Stat. § 28-308 (Cum. Supp. 2012) and the lesser-included offense of third degree assault under § 29-2280. Before trial, LaDonna Ortega was removed from the jury pool during voir dire. According to Ramirez, Ortega was the only member of the venire with a Hispanic surname. When questioned, Ortega told the court that she had worked with Brant's parents. After voir dire was completed, the court, off the record, took the peremptory strikes from counsel. When court resumed, the court dismissed 14 members of the venire, including Ortega. Explanations were not given by the court or by counsel for any of the dismissals.

At the trial, Ramirez argued that he did not break Brant's jaw. He alleged that Brant's jaw must have been broken after the incident. At trial, the State offered the testimony of

Stoddard and Tilley. Both agreed that, based on their training and expertise, Brant's injury was consistent with being hit in the face or mouth. Stoddard noted that it would not take much force to fracture Brant's jaw because Brant is a "slightly-built guy." Tilley testified that it was not uncommon for there to be no swelling or bruising with a fractured jaw. Additionally, both Brant and Joy testified that Brant's jaw did not suffer any additional injuries between the time of the assault and the x ray taken at Stoddard's office.

At the close of evidence, both the charge of first degree assault and the charge of the lesser-included offense of third degree assault were submitted to the jury. After deliberations, the jury found Ramirez guilty of third degree assault. A restitution hearing was held, and the district court sentenced Ramirez to 24 months of probation and ordered him to pay restitution for Brant's medical bills of $2,256.62 and for his lost income of $500.

ASSIGNMENTS OF ERROR

Ramirez has assigned that the district court erred in ordering Ramirez to pay restitution for medical expenses after the jury convicted him only of third degree assault. Ramirez also alleges that his trial counsel was ineffective in failing to challenge the racial composition of the jury and in failing to make a *Batson*[1] challenge to the striking of the only member of the prospective jury panel with a Hispanic surname.

STANDARD OF REVIEW

[1,2] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.[2] An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.[3]

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[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[2] *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

[3] *Id.*

[3] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[4]

ANALYSIS

Restitution

The crux of Ramirez' restitution argument is that by not convicting him of first degree assault, the jury did not believe that Ramirez had broken Brant's jaw, which Ramirez argues is a per se "serious bodily injury" under § 28-308. Therefore, according to Ramirez, restitution for the broken jaw was improper under § 29-2280, because the damages were not "a direct result of the offense for which the defendant has been convicted." We disagree.

[4] First, Ramirez' underlying argument that a broken jaw is a per se "serious bodily injury" is without merit. The determination of whether an injury is a "serious bodily injury" is a question of fact for the jury.[5] Nebraska law does not classify injuries, such as a broken jaw, as a per se "serious bodily injury."[6] Rather, the jury is free to make such a determination on its own for purposes of a conviction.[7] Thus, the jury's decision to not convict Ramirez of causing "serious bodily injury" does not necessarily mean the jury found that Ramirez did not break Brant's jaw.

[5] Second, it is the sentencing court, not the jury, that determines what damages a victim suffered for purposes of restitution. Section 29-2280 vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which a defendant is convicted.[8] In its relevant part, the restitution statute states:

> *A sentencing court* may order the defendant to make restitution for the actual . . . loss sustained by the victim as a direct result of the offense for which the defendant

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[4] *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012).

[5] See *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

[6] See *id.*

[7] *Id.*

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

> has been convicted. . . . Whenever the *court* believes that restitution may be a proper sentence . . . the *court* shall order that the presentence investigation report include documentation regarding the nature and amount of the actual damages sustained by the victim.[9]

(Emphasis supplied.)

[6,7] After the sentencing court determines that a conviction warrants restitution, it then becomes the sentencing court's factfinding responsibility to determine the victim's actual damages and the defendant's ability to pay.[10] Under Neb. Rev. Stat. § 29-2281 (Reissue 2008), the sentencing court may hold a hearing at the time of sentencing to determine the amount of restitution.[11] The sentencing court's determination of "restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record."[12] To be relied upon by the sentencing court, the evidence must be sworn and corroborated.[13]

Here, restitution was a proper penalty for Ramirez' third degree assault conviction. Jury instruction No. 2 sets out the following: "**The elements of Assault in the Third Degree are:** (1) That . . . Ramirez caused bodily injury to Brant . . . . (2) That [Ramirez] did so intentionally or knowingly. (3) That [Ramirez] did so on or about June 27, 2010, in Hall County, Nebraska." Therefore, by convicting Ramirez of third degree assault, the jury necessarily found that Ramirez intentionally, knowingly, or recklessly caused bodily injury to Brant.

Nebraska statute allows a victim to recover medical costs and lost income associated with bodily injuries suffered during the crime for which the defendant was convicted.[14] Under § 29-2282, restitution is warranted "[i]f the offense results in bodily injury." Section 29-2282 states that "*the court* may

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[9] § 29-2280.

[10] See *State v. Clapper*, 273 Neb. 750, 732 N.W.2d 657 (2007).

[11] See *id.*

[12] § 29-2281.

[13] See *State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991).

[14] See Neb. Rev. Stat. § 29-2282 (Reissue 2008).

require payment of necessary medical care, including, but not limited to, physical or psychological treatment and therapy, and payment for income lost due to such bodily injury." (Emphasis supplied.) Therefore, Ramirez' conviction for third degree assault warranted the sentencing court's decision to hold a restitution hearing to determine the loss suffered by Brant due to his bodily injuries.

At that restitution hearing, the sentencing court properly received evidence under § 29-2280 to determine the amount of damages. Brant, under sworn testimony, and without objection, testified that he was struck in the face by Ramirez, that such strike resulted in a broken jaw, and that he incurred medical expenses and lost income as a direct result of the injury. To corroborate his damages, Brant laid the foundation for his medical bills incurred as a result of the injury. These exhibits were received and admitted into evidence by the sentencing court.

When afforded the opportunity to present testimony and evidence at the restitution hearing, Ramirez refused and stated that the entire process was a "charade." However, when given the opportunity to speak directly to the court after the restitution hearing but before the sentence was imposed, Ramirez made the following unsworn statement:

> Now, with regards [sic] to the injuries, the restitution, it was never proven that I actually caused that injury. Dr. Stoddard, the dentist that he went to see, noted the day after the incident that he saw no bleeding, no swelling, no injuries of any sort. When he went to the surgeon four days later, it was also noted that he didn't see any injuries, any bleeding, any swelling. Something had to have happened from the time that I actually slapped him to the time he went to see the surgeon.

Ramirez' statement was an unsworn and uncorroborated statement made after the court received the evidence concerning restitution. Under our precedent, the sentencing court could not properly rely on Ramirez' statement for purposes of determining restitution.[15]

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[15] See *State v. McLain, supra* note 13.

Even considering Ramirez' statement, we find the evidence presented at the restitution hearing clearly established that Ramirez broke Brant's jaw and that such injury resulted in documented medical care expenses and lost income. Brant, without objection, testified that Ramirez broke his jaw during the assault for which Ramirez was convicted. In contrast, when given the opportunity to raise a defense, Ramirez failed to provide any competent evidence to support his theory that he did not break Brant's jaw. Therefore, Ramirez' argument that his conviction did not warrant restitution is without merit.

Therefore, we hold that the district court did not abuse its discretion in requiring Ramirez to pay restitution for Brant's medical expenses and lost income for his conviction for third degree assault.

Claims of Ineffective Assistance of Counsel

[8,9] Ramirez also raises claims of ineffective assistance of trial counsel. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[16] Rather, the determining factor is whether the record is sufficient to adequately review the question.[17] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[18]

Ramirez has assigned that his trial counsel was ineffective during voir dire in two ways. First, trial counsel failed to challenge the racial composition of the jury. Ramirez alleges that the jury was composed of only Caucasians and that the entire jury pool had proportionally fewer Hispanics than resided in Hall County, Nebraska, at the time of the trial. Second, Ramirez argues that trial counsel was ineffective in failing to raise a *Batson* challenge to the striking of Ortega, who Ramirez alleges was the only member of the prospective jury with a Hispanic surname.

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[16] *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[17] *Id.*

[18] *Id.*

At this time, the record is insufficient to address Ramirez' claims. There is no evidence in the record of the racial composition of the jury pool, the procedure utilized for the jury pool, or the racial composition of the Hall County community. Additionally, for purposes of the *Batson* challenge, the record is unclear on whether Ortega was even peremptorily struck by the State. Furthermore, the record does not include defense counsel's objections, if any, to the removal of Ortega or the State's reasons for exercising the alleged peremptory challenge.

An evidentiary hearing is required to properly resolve these issues, and therefore, these issues are not appropriate for review on direct appeal. Ramirez is free to raise these issues of ineffective assistance of trial counsel in a motion for postconviction relief.

CONCLUSION

The jury's decision to convict Ramirez of assault in the third degree does not preclude the sentencing court from ordering restitution for Brant's broken jaw. A broken jaw is not a per se "serious bodily injury," and the jury's rejection of assault in the first degree does not implicate the sentencing court's findings of fact on the damages actually suffered by Brant. We also find that the record is insufficient to address both of Ramirez' claims of ineffective assistance of counsel.

AFFIRMED.

JEREMIAH J., APPELLANT, V.
DAKOTA D., APPELLEE.
826 N.W.2d 242

Filed February 8, 2013. No. S-12-517.

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: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
4. **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.
5. **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.
6. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered.
7. **Paternity: Adoption.** A biological mother may not deliberately misrepresent or withhold information as to the date of a child's birth in order to prevent the biological father from timely objecting to the adoption of the child.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Reversed and remanded for further proceedings.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Rachel A. Daugherty, of Myers & Daugherty, P.C., L.L.O., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Jeremiah J. appeals from the county court's determination that Jeremiah did not comply with the statutory requirement that to contest the adoption of his minor child, he had to file an objection within 5 business days of the child's birth. The court sustained Dakota D.'s motion for summary judgment and dismissed Jeremiah's "Amended Petition to Establish Necessity of Father's Consent to Adoption," concluding there were no

genuine issues as to the facts in this case. We reverse the judgment and remand the cause for further proceedings.

SCOPE OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (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] Statutory interpretation presents a question of law, which we review independently of the lower court's determination. *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012).

FACTS

Jeremiah and Dakota began dating in 2008 and stopped seeing each other in 2011. In the middle of June 2011, shortly after she became aware of her pregnancy, Dakota told Jeremiah she was pregnant. Following an argument, Dakota told Jeremiah he was not the father and that she did not want Jeremiah to have anything to do with the pregnancy.

In October 2011, Dakota told an adoption agency that Jeremiah was the biological father of her expected child. Danessa Kenney, a caseworker with the agency, called Jeremiah sometime in November to inform him he had been identified by Dakota as a possible biological father for the unborn child. She told Jeremiah that Dakota wanted to place the child up for adoption.

Jeremiah visited with Kenney in person on November 30, 2011, and was given a letter describing his legal rights and responsibilities. The letter stated that the expected due date for the unborn child was February 18, 2012. The letter stated in part that if he wanted to file a notice of objection, he had to do

so "within 5 business days after the birth of the child." At that time, Jeremiah expressed to Kenney that he did not want the child put up for adoption.

After his meeting with Kenney, Jeremiah attempted to contact Dakota by telephone. He was unable to reach her, but he left her a voice mail message. Dakota did not return his telephone call. He again attempted to contact Dakota on December 14, 2011. Again, Dakota did not answer and did not return his telephone call.

The child was born on February 9, 2012, but Jeremiah was not told about the birth. Jeremiah attempted to contact Dakota two times on February 13. She did not answer either of those telephone calls. However, he did manage to speak with her that day. During their brief conversation, Dakota did not tell him that the child had already been born. At the summary judgment hearing, she testified that she did not tell him the child had been born because she did not want him to know about the birth during the time period he had to object to the adoption. Her testimony was, in part, as follows:

> Q[.] Did you communicate directly with him [Jeremiah] on February 13th?
>
> A[.] Yes, I did.
>
> Q[.] Did you tell him that the baby had been born?
>
> A[.] No, I did not.
>
> . . . .
>
> Q[.] Isn't it true that you did not want him to know about the birth?
>
> A[.] Within the five to 10 business days, no, I did not.
>
> Q[.] Let me break this down. Within the five business days that he had to object to the [adoption], is that what you are referring to?
>
> A[.] Yes, I am.
>
> Q[.] You did not want him to know of the birth during that period of time[?]
>
> A[.] That is correct.

After their telephone conversation on February 13, Dakota blocked Jeremiah's telephone number.

Jeremiah called and spoke with Kenney on February 13, 2012, and asked how Dakota's pregnancy was going. Kenney

responded that she could not legally communicate with Jeremiah about the birth of the child. He asked Kenney what he needed to do to exercise his rights as a father. Kenney told Jeremiah to read the letter she had given him in November and the letter would explain to him what he needed to do. She directed Jeremiah to the Web site for the Bureau of Vital Statistics that would provide him access to the paperwork necessary to file an objection to the adoption. As of February 13, Jeremiah did not know that the child had already been born.

Jeremiah contacted a local hospital on February 15, 2012, in an attempt to discover if Dakota had been admitted to the hospital in anticipation of the child's birth. He was told she was not a patient at the hospital. He called the hospital again on February 17, attempting to discover if Dakota was a patient. He was again told she was not. On February 17, he again contacted Kenney who did not provide him with any information. Kenney testified that Jeremiah was angry during that telephone call because he could not get in contact with Dakota and Kenney would not give him any information about his child.

On February 17, 2012, Jeremiah attempted twice to contact Dakota, but was unable to reach her. As of February 17, the day before the child's original due date, Jeremiah was unable to acquire any knowledge that the child had been born and he sought legal help to file an objection. Jeremiah was never told, prior to the birth of the child, that he could file an objection to the adoption before the child was born, and he testified that he did not know it was an option.

On February 20, 2012, Jeremiah signed a "Notice of Objection to Adoption and Intent to Obtain Custody" with the Nebraska Department of Health and Human Services. On the form, Jeremiah noted that the child was due to be born on February 18, but that as of the date the form was signed, it was unknown to him if the child had been born. The notice was filed on February 21, the first business day after the February 18 expected due date. Sometime after he had filed his objection, Jeremiah was told by one of Dakota's coworkers that the child had been born and that it was a girl. He was told the incorrect birth date, and the child's name was incorrect.

On February 23, 2012, Jeremiah filed a "Petition to Establish Necessity of Father's Consent to Adoption" in the county court for Hall County, requesting the court to determine whether Jeremiah's consent was needed for the proposed adoption of the minor child. Dakota moved for summary judgment. At the hearing on Dakota's motion, the court determined that the notice given to Jeremiah on November 30, 2011, complied with the applicable statute because it advised Jeremiah to seek legal counsel immediately. It found that Jeremiah was aware of the pregnancy and that the due date was simply an estimate of when the child would be born and was not a guarantee of the birth date. It sustained Dakota's motion for summary judgment because Jeremiah failed to object to the adoption within 5 business days after the birth of the child, as required by law.

ASSIGNMENTS OF ERROR

Jeremiah assigns as error, restated, that (1) summary judgment was improper because a genuine issue of material fact remains and (2) the county court erred in granting Dakota's motion for summary judgment because the 5-day filing requirement in Neb. Rev. Stat. § 43-104.02 (Reissue 2008) was unconstitutional as applied to him.

ANALYSIS

Summary Judgment

[4-6] 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. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012). 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. *Id.* If a genuine issue of fact exists, summary judgment may not

properly be entered. *Nye v. Fire Group Partnership*, 265 Neb. 438, 657 N.W.2d 220 (2003).

The county court sustained Dakota's motion for summary judgment because Jeremiah did not strictly comply with § 43-104.02, which states:

> A Notice of Objection to Adoption and Intent to Obtain Custody shall be filed with the biological father registry under section 43-104.01 on forms provided by the Department of Health and Human Services (1) within five business days after the birth of the child or (2) if notice is provided after the birth of the child (a) within five business days after receipt of the notice provided under section 43-104.12 or (b) within five business days after the last date of any published notice provided under section 43-104.14, whichever notice is earlier. Such notice shall be considered to have been filed if it is received by the department or postmarked prior to the end of the fifth business day as provided in this section.

At the hearing, Dakota presented a prima facie case that would entitle her to a favorable verdict at trial when she introduced evidence that Jeremiah had not strictly complied with § 43-104.02. Her evidence, including affidavits, established that the child's birth date was February 9, 2012, and that Jeremiah did not file a notice of objection within 5 business days of that birth date. Jeremiah admitted that he did not file a notice within 5 business days of the child's birth. Since the statute requires a father to file a notice of objection to the adoption within 5 business days of the child's birth date and Jeremiah did not file such objection, a prima facie case was made.

The burden then shifted to Jeremiah to produce evidence that would create a material issue of fact such that granting summary judgment in Dakota's favor was improper. This burden was met through Dakota's testimony that she withheld the child's date of birth so that Jeremiah would miss the opportunity to file an objection. Summary judgment was not proper because a genuine issue of material fact existed regarding

whether Dakota was equitably estopped from relying upon § 43-104.02 because she purposefully and deliberately misled Jeremiah regarding the date of birth of the child to intentionally prevent him from complying with the statute. Kenney also testified that she did not inform Jeremiah of the birth date when he called her on February 13, 2012.

The evidence established that Jeremiah told Dakota and Kenney of his intention to contest the adoption. He actively sought the child's date of birth, but he was unable to learn the date of birth. Dakota's and Kenney's actions regarding the date of birth of the child raise an issue of material fact whether Dakota is estopped from relying upon § 43-104.02 because she deliberately attempted to deny Jeremiah information concerning the child's date of birth in order to prevent Jeremiah from objecting to the child's adoption.

[7] A biological mother may not deliberately misrepresent or withhold information as to the date of the child's birth in order to prevent the biological father from timely objecting to the adoption of the child. The 5-day notice set forth in § 43-104.02 is not meant to be used as a subterfuge for deception to prevent an alleged father from objecting to the adoption of the child in question. See *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

In *Friehe*, the biological mother of the child filed a petition for declaratory judgment in the district court for Hall County seeking a determination of the respective rights of the parties. She asserted that the putative father's rights in regard to the adoption were terminated by his failure to comply with § 43-104.02. In response, putative father asserted that the mother was equitably estopped from claiming the protection of these statutes as a result of fraudulent misrepresentations. Specifically, he alleged that the mother was equitably estopped from relying on § 43-104.02 and Neb. Rev. Stat. § 43-104.04 (Reissue 1993) because the mother intentionally hid the fact of her pregnancy from the putative father in an attempt to prevent him from exercising his right to file a notice of intent to claim paternity within the 5-day period.

In addressing the issue of equitable estoppel, we stated that the doctrine of equitable estoppel applies where, as the

result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed, citing *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994). However, we concluded that the putative father's claims for equitable estoppel were without factual support because there was no evidence that the mother intentionally hid her pregnancy from him.

On the record presented, there is a material issue of fact whether Dakota was equitably estopped from relying on §§ 43-104.02 and 43-104.04 (Reissue 2008) because she intentionally hid the fact of the child's birth in an attempt to prevent Jeremiah from objecting to the adoption. Because there is a material issue of fact in dispute, the county court erred in sustaining Dakota's motion for summary judgment and dismissing Jeremiah's petition.

Constitutional Challenges

Jeremiah asserts that § 43-104.02 as applied to the facts of this case violates his due process and equal protection rights under the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution. Because we conclude the court erred in sustaining the motion for summary judgment, we do not reach Jeremiah's constitutional challenges to § 43-104.02.

CONCLUSION

A material issue of fact exists whether Dakota was estopped from relying upon § 43-104.02 because she intentionally misled Jeremiah to prevent him from complying with the requirements of § 43-104.02. We reverse the order sustaining summary judgment in favor of Dakota and remand the cause to the county court for further proceedings.

Reversed and remanded for
further proceedings.

Connolly, J., concurring.

I concur in the court's judgment that this cause must be remanded for the district court to determine whether Dakota

intentionally misled Jeremiah about the date of the child's birth. But I disagree that this finding is relevant to a claim of equitable estoppel. Jeremiah neither alleged nor argued in the county court, nor raised on appeal, a claim of equitable estoppel. Instead, he argued at trial and on appeal that the statutes violated his due process and equal protection rights. So the inquiry is whether the county court could not constitutionally apply Nebraska's adoption statutes to bar Jeremiah's claim that his consent to an adoption is required.

The primary issue before the trial court was whether Nebraska's adoption statutes,[1] as applied to Jeremiah, violated his constitutional rights. His petition sought an order determining that he was the child's father and that his consent to an adoption was required. He invoked § 43-104.05(1), which provides a 30-day period for seeking an adjudication of such claims from the date that the putative father timely filed notice of his objection.

In his amended petition, Jeremiah alleged that he had filed his notice of objection on February 21, 2012, the first business day after the probable delivery date in Dakota's notice of the pregnancy. He alleged that Dakota had concealed the child's actual date of birth from him. He specifically claimed that to the extent his failure to comply with § 43-104.02 had rendered his consent to an adoption unnecessary, the adoption statutes violated his due process and equal protection rights.

Jeremiah also sought DNA testing to establish his paternity and an order (1) requiring his consent and (2) determining that as applied to him, Nebraska's adoption statutes violated his constitutional rights. But he did not claim that Dakota should be equitably estopped from claiming that his consent was unnecessary under § 43-104.02.

In sustaining Dakota's motion for summary judgment, the county court rejected Jeremiah's constitutional claims because he failed to timely contact an attorney after receiving notice that Dakota was pregnant and that he was the biological father. This reasoning was essentially a determination that the adoption statutes provided Jeremiah with a sufficient

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[1] See Neb. Rev. Stat. §§ 43-104 to 43-104.23 (Reissue 2008).

opportunity to protect his interest in asserting paternity and seeking custody.

The majority opinion states that Dakota presented a prima facie case that would entitle her to a favorable verdict at trial and that the burden then shifted to Jeremiah to produce evidence that would create a genuine issue of material fact. I disagree. Dakota intended her allegations that Jeremiah had failed to timely file an objection to an adoption with the biological father registry as an affirmative defense. Under our case law, however, Dakota's defense could not entitle her to judgment regardless of whether Jeremiah's allegations were true. The county court could rule for her only because it concluded that Jeremiah could have protected his rights by contacting an attorney. So I do not agree with the majority opinion's burden-shifting scheme for these adoption proceedings.

Moreover, although our case law has sometimes focused on whether the biological mother concealed the child's birth, Jeremiah's claim is not against Dakota. Jeremiah claims that under these circumstances, applying the registration deadline to bar his paternity claim violated his constitutional rights. And unlike the putative father in *Friehe v. Schaad*,[2] Jeremiah did not claim that the mother was estopped from relying on the adoption statutes because of her deceptions. So I believe that the opinion incorrectly characterizes Jeremiah's constitutional claims as an equitable estoppel claim.

Due Process Requires an Adequate Opportunity to Form a Relationship With a Child

An analysis of Jeremiah's due process claim necessarily starts with *Lehr v. Robertson*.[3] There, the U.S. Supreme Court considered whether New York's putative father statutes violated an unwed father's right to develop a relationship with his biological child. The putative father had never lived with or supported his alleged child and had rarely seen her. But

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[2] *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

[3] *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

after the mother married, her husband sought to adopt the child when she was over 2 years old. The putative father did not know of the adoption proceeding. Before the court entered the adoption decree, he had commenced a separate proceeding to have a court determine his paternity and order support payments and visitation. After the adoption was ordered, however, the court dismissed his petition. New York maintained a putative father registry and notified any registered putative father of an adoption proceeding. The putative father had not registered and argued that he did not know of the requirement. He claimed that he was entitled to notice and a hearing before he was deprived of an actual or potential relationship with his biological child.

The Supreme Court distinguished between a developed parent-child relationship and a potential relationship:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." . . . But the mere existence of a biological link does not merit equivalent constitutional protection. . . .
>
> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. . . .
>
> In this case, we are not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship. . . . We are concerned only with whether New York has adequately protected his opportunity to form such a relationship.[4]

The Court concluded that New York's putative father statutes were adequate to protect the putative father's opportunity interest and that his ignorance of the law was not a reason to criticize it. The Court also rejected his alternative argument that because he had commenced a paternity proceeding, he was

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[4] *Id.*, 463 U.S. at 261-63 (citations omitted).

entitled to "special" notice beyond what the statutory scheme would have provided had he complied:

> The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights. Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with [his biological child], we find no merit in his claim that his constitutional rights were offended because the Family Court strictly complied with the notice provisions of the statute.[5]

In analyzing the statutory scheme, however, the Court also pointed out the type of scheme that would be procedurally inadequate to protect a putative father's opportunity interest:

> If this scheme were likely to omit many responsible fathers, and *if qualification for notice were beyond the control of an interested putative father*, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt [his biological child].[6]

In a footnote, the Court stated, "There is no suggestion in the record that appellee engaged in fraudulent practices that led appellant not to protect his rights."[7]

With this due process framework set out, I turn to Nebraska's statutes.

Nebraska's Adoption Statutes Are Inadequate to Protect a Putative Father's Paternity Claim From a Biological Mother's Fraud

In Nebraska, if a biological mother withholds or misrepresents information about the child's birth to a putative father,

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[5] *Id.*, 463 U.S. at 265.

[6] *Id.*, 463 U.S. at 263-64 (emphasis supplied).

[7] *Id.*, 463 U.S. at 265 n.23.

the adoption statutes are inadequate to ensure he has an opportunity to claim paternity. This is true because if the mother withholds or misrepresents information about the child's birth, a putative father will usually not have an opportunity to timely file a notice of his objection to an adoption and intent to seek custody. And the county court misconstrued how the statutes operate by reasoning that Jeremiah could have protected his rights simply by contacting an attorney after receiving notice of Dakota's pregnancy.

Unless exceptions apply,[8] § 43-104.12 requires the mother's adoption agency or attorney to exercise due diligence to provide a statutory notice that is set out in § 43-104.13 to several categories of potential fathers. Those categories include "[a]ny person who has been identified as the biological father or possible biological father of the child by the child's biological mother . . . ."[9] Under § 43-104.13, the notice "shall be served sufficiently in advance of the birth of the child, whenever possible, to allow compliance with subdivision (1) of section 43-104.02."[10] In most circumstances, including here, § 43-104.02 requires a putative father to file a notice of his paternity claim during a 5-day period that begins on the child's date of birth.

Under § 43-104.13, the biological mother's notice to a putative father must include the following information: (1) the mother's name, that she is pregnant, and her "expected or actual date of delivery"; (2) that the mother plans to relinquish custody or join in a petition for adoption filed by her husband; (3) that the mother has identified the recipient as a possible biological father; and (4) that the recipient may have rights with regard to the child.[11] Under § 43-104.13(5), the notice must state that the recipient has the right to (a) deny paternity, (b) waive parental rights, (c) relinquish and consent to adoption, (d) file a notice of objection and intent to obtain custody

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[8] See § 43-104.18.

[9] See § 43-104.12(5).

[10] See § 43-104.13.

[11] See *id*.

under § 43-104.02, or (e) object to an adoption proceeding in a court that has already determined that he is the child's biological father.[12]

In addition, the notice must state that if the putative father plans to object to the adoption and seek custody, he should seek his own legal counsel immediately. Alternatively, if he wishes to waive his rights, he can contact the mother's agency or attorney. Finally, the notice must inform the recipient that if he is the biological father and if the child is not adopted, he has a duty to support the child and to pay for pregnancy-related expenses.[13]

But under § 43-104.13, if the biological mother's agent provides prebirth notice of the pregnancy, her agent is required to provide only the mother's *expected* delivery date. There is no requirement for the State, the biological mother, or her agent to notify the putative father of the child's birth or to notify him that he can file a prebirth notice of objection. Moreover, even if he were told that he could file a prebirth notice of objection—because of the postbirth filing requirement under § 43-104.02—the prebirth notice of objection would be insufficient to provide him with an opportunity to claim paternity and demonstrate that he is fit to be the custodial parent.

Many other jurisdictions provide a putative father with an opportunity to receive notice of an adoption proceeding or to object to an adoption if he has timely filed a notice of his intent to claim paternity with a putative father registry.[14] But the statutes vary widely in their requirements and effect.

Some of these statutes require a putative father to register a paternity claim with the registry before the child's birth *or* within a specified period after the child's birth.[15] Under

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[12] See *id*.

[13] See *id*.

[14] See Annot., 28 A.L.R.6th 349 (2007).

[15] See, e.g., Ala. Code § 26-10C-1(i) (2009); Mont. Code Ann. § 42-2-206 (2007); Tenn. Code Ann. § 36-2-318 (2001); Tex. Fam. Code Ann. § 160.402(a) (West 2008).

some state statutes, filing a prebirth claim of paternity would mean that the putative father's consent to an adoption is required, that he is entitled to notice of an adoption proceeding or a proceeding to terminate parental rights, or that he may claim paternity and object to the adoption.[16] That is not true in Nebraska.

It is true that § 43-104.01 permits a putative father to file a prebirth notice of his objection to an adoption and intent to seek custody. Yet, a prebirth registration of a paternity claim is insufficient to obtain any right to assert the claim or receive notification of an adoption proceeding. Instead, under § 43-104.02(1), a putative father's consent to an adoption is not required if he does not file a postbirth notice of an objection within 5 days of the child's birth. Based on the statute's language, this requirement applies even if the putative father has filed a prebirth notice of objection. The majority opinion illustrates that adoption agencies explain the law exactly this way to a putative father. The only possible exceptions for filing a notice of objection after the 5-day deadline apply if the biological mother provided the statutory notice after the child's birth or provided notice through publication.[17]

Nebraska is not alone is requiring a putative father to register a claim of paternity within a specified period after the child's birth. But the deadline under other state statutes with a postbirth filing requirement is typically 30 days from the child's birth.[18] Nebraska's 5-day filing deadline after the

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[16] See, e.g., *Lehr, supra* note 3; Ariz. Rev. Stat. Ann. § 8-106.01(A) (2007); Ark. Code Ann. § 20-18-702 (2005); Ind. Code Ann. § 31-19-5-4 (LexisNexis 2007); Iowa Code Ann. § 233.2(4)(b) (West 2006); Mont. Code Ann. § 42-2-203 (2007); Tenn. Code Ann. § 36-2-318(i); Wyo. Stat. Ann. § 1-22-109(a) (2011).

[17] See § 43-104.02(2).

[18] See, e.g., Ariz. Rev. Stat. Ann. § 8-106.01(B); 750 Ill. Comp. Stat. Ann. § 50/12.1(b) (LexisNexis Cum. Supp. 2009); Ind. Code Ann. § 31-19-5-12 (LexisNexis 2007); Minn. Stat. Ann. § 259.52(7) (West Cum. Supp. 2013); Ohio Rev. Code Ann. § 3107.07(B)(1) (LexisNexis Supp. 2009). See, also, Unif. Parentage Act (2000) § 402, 9B U.L.A. 322 (2001); Rebeca Aizpuru, Note, *Protecting the UnWed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 Rev. Litig. 703 (1999).

child's birth appears to be the shortest of any state statutory scheme.[19] And unlike some state statutes, Nebraska's statutes do not contain an exception for putative fathers who did not receive notice of the child's birth.[20]

It is true that under § 43-104.05, we have upheld the 30-day limitation period for commencing a paternity claim against procedural and substantive due process claims. In *In re Adoption of Baby Girl H.*,[21] the biological mother provided the statutory notice after the child's birth and the letter informed the putative father that he had 5 days from his receipt of the letter to file a notice of his objection with the registry. The putative father timely filed a notice of objection, but failed to timely commence a proceeding to adjudicate his claim in the proper court.

But here, we are not dealing with the 30-day period for commencing a paternity claim. More important, it is the 5-day time limit for filing a postbirth notice of an objection that undercuts a putative father's opportunity to object to an adoption and seek custody. Section 43-104.05(1) provides a 30-day limitation period for a putative father to commence a paternity claim *if* the putative father has "timely filed" a notice of objection under § 43-104.02. And under § 43-104.05(2), if the putative father has not timely filed the notice of objection, he is out of luck—i.e., his consent to an adoption is not required.

So, in most cases, unless the biological mother notifies the putative father of the child's birth or the putative father otherwise knows of the birth, the putative father will not have an adequate opportunity to timely file a notice of his objection to an adoption and intent to seek custody. This is likely true even if the putative father has filed a prebirth notice of objection and obtained an attorney. Simply put, the 5-day

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[19] See Aizpuru, *supra* note 18. Compare, Mo. Ann. Stat. § 453.030(3)2(c) (West Cum. Supp. 2013); N.M. Stat. Ann. § 32A-5-19(E) (2006).

[20] See, Ariz. Rev. Stat. § 8-106.01(E); 750 Ill. Compiled Stat. Ann. 50/12.1(g).

[21] See *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001), *disapproved on other grounds, Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

limitation period is not long enough for the State to notify a registered putative father of the child's birth—even if the statutes required the State to provide this notice—and for him to respond with a notice of objection.

The absence of a statutory notice of the child's birth might not present a constitutional problem if the period for filing a post-birth paternity claim were long enough for the putative father to discover the child's birth even without the biological mother's cooperation. Requiring the putative father to make inquiries about the birth is consistent with putting the burden on him to protect his potential relationship with the child. But the combination of these statutes permits the biological mother to flout the procedures intended to protect the putative father's opportunity to object to an adoption and demonstrate his fitness for custody. By withholding or misrepresenting information to the putative father about the child's birth, the biological mother has shut the door on the putative father's opportunity to object.[22]

As explained, however, the Due Process Clause requires the State to adequately protect a putative father's opportunity to form a relationship with his child.[23] And the notice provisions of Nebraska's adoption statutes will frequently not protect a putative father's opportunity interest if the biological mother withholds or misrepresents the fact of the child's birth.

This court has upheld Nebraska's 5-day filing deadline while recognizing that it might violate a putative father's due process rights when he did not have notice of his alleged child's birth. In *Shoecraft v. Catholic Social Servs. Bureau*,[24] the putative father filed a notice of his paternity 9 days after the child's birth—too late to object to the adoption.

We discussed the legislative history behind the 5-day-postbirth filing period. We stated that the Legislature had

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[22] See, also, § 43-104.04.

[23] See *In re Adoption of Baby Girl H., supra* note 21, citing *Lehr, supra* note 3.

[24] *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986).

selected this period as a reasonable time after the birth for the mother to know whether the father will step forward to claim his child and assume parental responsibilities. We concluded that the 5-day filing requirement reflected the State's compelling interest in facilitating a quick adoption when the mother does not know the biological father's intentions. In contrast, the putative father knew of the pregnancy but had not offered to pay for pregnancy expenses, and he knew of the child's birth on the same day. Nonetheless, we recognized that the adoption statutes' failure to require notification to a putative father of the child's birth "might well, in a particular case, render constitutionally suspect as violative of due process the termination of the father's rights."[25]

The next year, in *In re Application of S.R.S. and M.B.S.*,[26] we held that Nebraska's adoption statutes were unconstitutional as applied to a biological father who had lived with and supported the mother and his child for several months. The mother placed the child with an agency for adoption when he was 2 years old. We reversed the trial court's judgment that the father's consent was unnecessary because he had not filed a notice of his paternity claim with the registry until more than 2 years after the child's birth. Relying on *Lehr*, we distinguished fathers who had nurtured and supported the mother and child from those with a mere biological tie to the child. We stated that when the father has acknowledged paternity and established ties with the child, "[t]he effect of the [5-day filing] requirement is to allow the mother to singlehandedly sever a relationship between father and child, no matter what the quality of that relationship is."[27]

In two later cases, we similarly held that Nebraska's adoption statutes were unconstitutionally applied to permit a stepfather's adoption of the biological father's child without his consent in the following circumstances: (1) when the biological

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[25] *Id.* at 578, 385 N.W.2d at 451.

[26] *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

[27] *Id.* at 769, 408 N.W.2d at 278.

father has developed a relationship with the child and provided support[28]; and (2) when a court has previously adjudicated the biological father's claim of paternity and ordered visitation and support payments.[29]

In *Friehe*,[30] we again upheld the 5-day filing requirement against a putative father's as-applied due process challenge when he learned of the child's birth on the next day. In the days following the birth, the biological father and mother engaged in discussions over his desire to obtain custody and her desire for an adoption. They agreed to temporarily place the child with an adoption agency and postpone a decision. When the father contacted an attorney 2 days later, he was informed of the filing requirement, but it had expired by 1 day. The father still did not file a notice of objection until the next month, after the mother informed him that she had decided to relinquish the child for adoption. The father later filed a declaratory judgment action, claiming that the adoption statutes were unconstitutional as applied to him. The trial court rejected this claim.

On appeal, we concluded that the putative father had it within his power to assert his rights and that his ignorance of the filing requirement was not an excuse. We concluded that the putative father's own failure to act after learning of the child's birth had deprived him of an opportunity to assert his rights. Thus, under the facts of the case, the statutes did not violate his due process rights.

But here, the critical distinction is that the putative father claims he did not know of the child's birth. Jeremiah did not move for summary judgment. Accepting his allegations as true, however, the 5-day-postbirth filing requirement permitted Dakota to singlehandedly deny Jeremiah any opportunity to preserve his right to object to the adoption, establish his paternity, and seek custody.[31] She could do this only because of the

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[28] See *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.3d 404 (2009).

[29] See *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006).

[30] *Friehe, supra* note 2.

[31] Compare *In re Application of S.R.S. and M.B.S., supra* note 26.

inadequate protection of a putative father's opportunity interest in the adoption statutes.

Because Dakota has admitted to withholding the child's birth date from Jeremiah, I believe that the only remaining factual issue is whether Jeremiah otherwise knew of the child's birth. Because the court did not correctly decide the due process issue, I believe on remand it must make this finding. I would hold that if the court finds that Jeremiah could not have filed the postbirth notice of objection because of Dakota's deceptions, it cannot constitutionally apply the adoption statutes to bar his claims that he is the child's father and that his consent to the adoption is required. Other courts have reached similar conclusions.[32] Because I reach this conclusion, it is unnecessary to consider whether the statutes would also violate Jeremiah's equal protection rights if applied to bar his claims.

STEPHAN, J., joins in this concurrence.

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[32] See, *In re M.N.M.*, 605 A.2d 921 (D.C. 1992); *Petition of Doe*, 159 Ill. 2d 347, 638 N.E.2d 181, 202 Ill. Dec. 535 (1994); *Doe v. Queen*, 347 S.C. 4, 552 S.E.2d 761 (2001); *In re Adoption of Baby Boy Doe*, 717 P.2d 686 (Utah 1986).

ELAINE VANKIRK, APPELLANT, V. CENTRAL COMMUNITY COLLEGE AND NEBRASKA COMMUNITY COLLEGE TRUST, INC., APPELLEES.

826 N.W.2d 277

Filed February 15, 2013. No. S-12-591.

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. ____: ____. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.

3. **Workers' Compensation: Penalties and Forfeitures.** Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012) does not authorize an award of a waiting-time penalty when an employer is delinquent in paying medical expenses.

Appeal from the Workers' Compensation Court: JOHN R. HOFFERT, Judge. Affirmed.

Rolf Edward Shasteen, of Shasteen, Miner, Scholz & Morris, P.C., L.L.C., for appellant.

Brenda S. Spilker and Christopher M. Reid, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

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

STEPHAN, J.

Elaine VanKirk incurred medical expenses as a result of an injury sustained in the course and scope of her employment with Central Community College. The Workers' Compensation Court ordered Central Community College and Nebraska Community College Trust, Inc. (collectively the College), to pay the expenses. The College complied by making payments directly to VanKirk's health care providers within 30 days of the court's order. VanKirk then sought a waiting-time penalty, attorney fees, and interest pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012), contending she was not personally reimbursed for the medical expenses within 30 days. The Workers' Compensation Court denied relief, and VanKirk filed a timely appeal. We find no error and affirm the judgment of the compensation court.

BACKGROUND

On April 29, 2010, VanKirk inhaled fumes from a mixture of chlorine and toilet bowl cleaner during the course and scope of her employment. She subsequently developed a severe cough and shortness of breath and sought workers' compensation benefits.

In an award entered on December 15, 2011, the compensation court determined that VanKirk suffered an acute and temporary insult to her lungs when she was exposed to and

inhaled the fumes. The court awarded temporary total disability benefits of $81.85 for five-sevenths of a week of disability. The court also awarded medical expenses. In doing so, it referred to an exhibit which listed the medical expenses VanKirk incurred, the amount paid by VanKirk, and the amount due each provider. The court stated:

> The Court has carefully reviewed [the exhibit] and finds that the [College] ought to pay said outstanding charges. To the extent that [VanKirk] has paid any of these costs herself, she ought to be reimbursed as her interests appear. The fee schedule audit submitted by the [College] is to be applied.

The exhibit indicated that VanKirk had paid $13,449.18 in medical expenses for treatment related to her injury.

Within 30 days of the award, the College's counsel sent letters to the medical providers listed on the exhibit, notifying them that they would receive payment pursuant to the fee schedule audit and that they should reimburse VanKirk for the amount she had paid for her treatment. A copy of the court's award was enclosed. The letters advised the providers that they were not entitled to charge or collect more than the amount provided on the fee schedule. The College also made payments to the providers within 30 days of the award.

On February 13, 2012, VanKirk filed a motion seeking payment to her of $13,449.18, a 50-percent waiting-time penalty, attorney fees, and interest. She argued that the December 15, 2011, order required the College to pay $13,449.18 directly to her in order to make her whole for payments she had previously made to health care providers. She alleged she was entitled to a waiting-time penalty, attorney fees, and interest, because she did not receive the $13,449.18 within 30 days of the court's order. The College argued it had complied with the court's order by paying the medical providers within 30 days of the court's order. It contended the providers were then responsible for reimbursing VanKirk for any amounts she paid in excess of the fee schedule.

The court noted that both interpretations of its order were reasonable and "respectfully decline[d] the parties' invitation to state with more specificity what it meant to convey" in the

order, citing this court's recent decision in *Pearson v. Archer-Daniels-Midland Milling Co*.[1] The court reasoned, "The decree has become final and pursuant to the holding in Pearson, *supra*, what was meant is to be determined solely from the four corners of the decree itself and not by any post-mortem analysis." The court ultimately overruled VanKirk's motion, finding that because the evidence established that the College paid the medical providers within 30 days and that VanKirk had been or was going to be reimbursed for any medical expenses she personally paid, the "four corners of the decree" had been met. VanKirk appeals.

ASSIGNMENTS OF ERROR

VanKirk assigns as error the Workers' Compensation Court's (1) finding that the College had timely paid the medical expenses as ordered in the award of December 15, 2011, and (2) failing to award VanKirk a waiting-time penalty, attorney fees, and interest.

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] Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.[3]

ANALYSIS

VanKirk relies on § 48-125 as authority for her claimed entitlement to a waiting-time penalty, attorney fees, and

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[1] *Pearson v. Archer-Daniels-Midland Milling Co*., 282 Neb. 400, 803 N.W.2d 489 (2011).

[2] *Id*.

[3] *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012); *Mueller v. Lincoln Public Schools*, 282 Neb. 25, 803 N.W.2d 408 (2011).

interest as a result of the manner in which the College satisfied its liability for medical expenses. Because each item is governed by a distinct provision of the statute, we address each separately.

WAITING-TIME PENALTY

An injured worker's entitlement to a waiting-time penalty is governed by § 48-125(1), which provides in pertinent part:

> (1)(a) Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death. Such payments shall be sent directly to the person entitled to compensation or his or her designated representative except as otherwise provided in section 48-149.
>
> (b) Fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the Nebraska Workers' Compensation Court . . . .

VanKirk's claim for a waiting-time penalty is based entirely upon her contention that the College did not make timely payments of medical expenses as ordered by the court. However, in *Bituminous Casualty Corp. v. Deyle*,[4] we held that § 48-125(1) does not authorize a waiting-time penalty for an employer's delinquent payments of medical expenses. At the time of our decision in *Deyle*, the statute provided in part:

> "Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability. Whenever the employer refuses payment, or when the employer

[4] *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990).

> neglects to pay compensation for thirty days after injury, and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award."[5]

We held that the term "'compensation'" as used in the statute included "periodic disability or indemnity benefits payable on account of the employee's work-related injury or death."[6] We reasoned that because medical expenses are not paid "'periodically'" in the same manner as wages, "'compensation'" did not include medical expenses which the compensation court orders an employer to pay.[7]

VanKirk argues that *Bituminous Casualty. Corp*. does not preclude her claim because § 48-125 was amended in 1999, after that decision was made by this court.[8] However, we have considered the amended statute in later cases and have not found that the amendments authorized a waiting-time penalty for delinquent payments of medical expenses, as sought in the present case.

In *Hollandsworth v. Nebraska Partners*,[9] we noted that the amendments to § 48-125 "clearly state[d] that the waiting-period penalty applies to payments made after 30 days from the entry of a final order, award, or judgment of the compensation court."[10] We held in that case that a court-approved lump-sum settlement is subject to a waiting-time penalty, reasoning that § 48-125 "does not limit the application of a penalty to periodic payments only."[11] In addition, we noted that other provisions of the Nebraska Workers' Compensation Act permit

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[5] *Id*. at 551-52, 451 N.W.2d at 919, quoting Neb. Rev. Stat. § 48-125 (Reissue 1988).

[6] *Id*. at 553, 451 N.W.2d at 920.

[7] *Id*.

[8] See 1999 Neb. Laws, L.B. 216, § 6.

[9] *Hollandsworth v. Nebraska Partners*, 260 Neb. 756, 619 N.W.2d 579 (2000).

[10] *Id*. at 760, 619 N.W.2d at 582.

[11] *Id*. at 759, 619 N.W.2d at 582.

commutation of periodic payments to one or more lump-sum payments, "thus bringing a lump-sum payment under the scope of § 48-125."[12] *Hollandsworth* did not hold or suggest that a waiting-time penalty is required for delinquent payments of medical expenses.

We again considered the 1999 amendments to § 48-125 in *Lagemann v. Nebraska Methodist Hospital*,[13] in which we noted that the amendments effectively codified our holding in *Leitz v. Roberts Dairy*.[14] In *Leitz*, we held that the 30-day statutory time limit for paying compensation benefits, which triggers the imposition of waiting-time penalties, does not begin to run until after a final adjudication. Neither *Lagemann* nor *Leitz* holds or suggests that the 1999 amendments to § 48-125 authorized the imposition of a waiting-time penalty for an employer's delinquent payments of medical expenses.

Our holding in *Bituminous Casualty Corp.* was applied by the Nebraska Court of Appeals in a case decided after the 1999 amendments to § 48-125. In *Bronzynski v. Model Electric*,[15] the Court of Appeals concluded that § 48-125 does not authorize a waiting-time penalty for delinquent payments of medical expenses because such expenses do not constitute compensation within the meaning of the statute. The court stated that it was "apparent that a 50-percent waiting-time penalty cannot be awarded on the basis of an award of delinquent medical payments; a waiting-time penalty is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of 'medical payments.'"[16]

[3] We agree with the reasoning and holding of *Bronzynski*, and reaffirm our holding in *Bituminous Casualty. Corp.* that § 48-125 does not authorize an award of a waiting-time penalty when an employer is delinquent in paying medical expenses.

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[12] *Id.* at 760, 619 N.W.2d at 582.

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

[14] *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992).

[15] *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005).

[16] *Id.* at 371, 707 N.W.2d at 60.

As we observed in *Bituminous Casualty Corp.*, it is solely the province of the Legislature to decide whether a waiting-time penalty should apply to delinquent payments of medical expenses. To date, it has not taken such action.

Because § 48-125 did not apply to VanKirk's request for a waiting-time penalty as a matter of law, the compensation court did not err in overruling her motion for a waiting-time penalty.

Attorney Fees

An injured worker's entitlement to attorney fees is governed by § 48-125(2)(a), which provides in part:

> Whenever the employer refuses payment of compensation or medical payments subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay medical payments subject to such section after thirty days' notice has been given of the obligation for medical payments, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award.

The plain language of this statute allows an award of attorney fees if the employer is delinquent in paying medical expenses. Accordingly, we must determine whether the compensation court erred in concluding that the medical expenses at issue here were timely paid as directed in its award.

In making this determination, it is helpful to review the provisions of Neb. Rev. Stat. § 48-120 (Cum. Supp. 2012), which govern an employer's liability for an employee's medical expenses resulting from an industrial accident. Section 48-120(1)(a) provides that an "employer is liable for all reasonable medical, surgical, and hospital services."[17] Subsection 48-120(1)(b) requires the compensation court to establish a schedule of fees for the services itemized in § 48-120(1)(a).[18] And § 48-120(1)(e) provides:

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[17] See *Pearson v. Archer-Daniels-Midland Milling Co.*, *supra* note 1.

[18] *Id.*

> The provider or supplier of such services shall not collect or attempt to collect from any employer, insurer, government, or injured employee or dependent or the estate of any injured or deceased employee any amount in excess of (i) the fee established by the compensation court for any such service . . . .

Finally, § 48-120(8) provides:

> The compensation court shall order the employer to make payment directly to the supplier of any services provided for in this section or reimbursement to anyone who has made any payment to the supplier for services provided in this section. No such supplier or payor may be made or become a party to any action before the compensation court.

It is undisputed in this case that the College paid the amounts provided by the fee schedule to the providers of medical services within 30 days of the award. It is likewise undisputed that VanKirk had previously paid some of those same providers before they received payment from the College and that she was eventually reimbursed by the providers, although some of the reimbursements were not made within 30 days of the award. VanKirk contends that based on § 48-120(8), the College was required "to reimburse [her] for the payments she had made, and not simply pay the fee schedule amount to the providers and leave it to them to reimburse [her] the full amount she had paid them."[19]

But the language of the award does not specifically require the procedure VanKirk proposes. The award states that VanKirk "ought to be reimbursed" for payments she had made to the medical providers listed on the exhibit, but it does not indicate which entity should make such reimbursement. We are not persuaded that § 48-120(8) can be read to require an employer to directly reimburse an injured worker for medical expenses he or she has paid prior to the entry of an award by the court. Although § 48-120(8) authorizes the compensation court to order an employer to make "reimbursement to anyone who has made any payment to the supplier for

[19] Brief for appellant at 7.

services provided in this section," it also provides that "[n]o such . . . payor may be made or become a party to any action before the compensation court." Because the injured worker is a party to the case, we read the term "payor" as used in § 48-120(8) as limited to third-party payors, such as health insurance carriers.

In *Pearson*,[20] we stated that "§ 48-120(8) mentions third parties only insofar as it gives the compensation court the power to order a third party to be reimbursed if it pays a provider or supplier." In the present case, there is no issue involving a third-party payor. Accordingly, we conclude that the College fully and timely complied with the award by paying the scheduled fee amounts to the medical providers within 30 days of the award. We have stated that "the purpose behind § 48-120(1)(e) is to prohibit a supplier or provider from charging more than the fee schedule permits."[21] Thus, upon receipt of payment from an employer, a supplier or provider of services becomes obligated to reimburse an employee any amounts he or she has previously paid. And that is what occurred in this case. Although the reimbursements were not completed within 30 days of the award, we do not find that the College is subject to liability for attorney fees. The College's payments to the medical providers were made within the 30-day period. At that point, reimbursement of payments made by VanKirk was the responsibility of the providers, and any delay is not chargeable to the College.

Interest

Section 48-125(3) provides for an assessment of interest "[w]hen an attorney's fee is allowed pursuant to this section . . . ." Because VanKirk was not entitled to attorney fees, she was not entitled to an award of interest.

CONCLUSION

For the reasons discussed, we conclude that the compensation court did not err in overruling VanKirk's motion for a

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[20] *Pearson v. Archer-Daniels-Midland Milling Co.*, *supra* note 1, 282 Neb. at 410, 803 N.W.2d at 496.

[21] *Id.* at 409, 803 N.W.2d at 496.

waiting-time penalty, attorney fees, and interest pursuant to § 48-125. We therefore affirm the judgment of the compensation court.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ADRIENNE S. DAVIS, RESPONDENT.

827 N.W.2d 465

Filed February 22, 2013. No. S-07-640.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Adrienne S. Davis, on January 8, 2013. The court accepts respondent's voluntary surrender of her license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on August 9, 2001. On July 18, 2008, respondent was suspended from the practice of law. On December 16, 2009, respondent was reinstated to the active practice of law and placed on a 2-year probation. During the term of probation, respondent violated the terms of her probation, and on August 31, 2012, her reinstatement was revoked by the Nebraska Supreme Court and she was again suspended from the practice of law.

On January 8, 2013, respondent filed a voluntary surrender in which she admitted that since the spring of 2012, she has engaged in behaviors that would violate the terms of her probation and the Nebraska Rules of Professional Conduct.

Respondent further stated that she is aware that the Counsel for Discipline of the Nebraska Supreme Court is currently investigating her conduct. Respondent further stated that she does not challenge or contest the truth of the allegations being made against her. She further stated that she freely, knowingly, and voluntarily waived her right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered her license to practice law and knowingly does not challenge or contest the truth of the allegations made against her. Further, respondent has waived all proceedings against her in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that she freely, knowingly, and voluntarily admits that she does not contest the allegations being made against her. The court accepts respondent's voluntary surrender of her license to practice law, finds that respondent should be disbarred, and hereby orders her disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with

all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, she shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
ANGEL R. LANDERA, APPELLANT.
826 N.W.2d 570

Filed February 22, 2013. No. S-11-940.

1. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Courts: Plea Bargains.** In Nebraska, a court is never bound by the plea agreement made between a defendant and the government.
3. **Plea Bargains.** A party to a plea agreement should not be given the benefit of implied terms when the party failed to negotiate such terms.
4. **Courts: Contracts.** Courts are not to rewrite contracts to include what the parties did not.
5. **Courts: Plea Bargains.** Courts implementing plea agreements should enforce only those terms and conditions actually agreed upon by the parties.
6. **Plea Bargains: Sentences.** A sentencing recommendation need not be enthusiastic in order to fulfill a promise made in a plea agreement.

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 Platte County, ROBERT R. STEINKE, Judge. Judgment of Court of Appeals affirmed.

Nathan J. Sohriakoff, Deputy Platte County Public Defender, 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.

I. INTRODUCTION

The Nebraska Court of Appeals concluded that the State, having promised to recommend probation as part of its plea agreement with Angel R. Landera, violated the agreement when it recommended a term of incarceration as a condition of probation.[1] We granted the State's petition for further review in order to consider how courts should treat matters not explicitly addressed in a plea agreement and now hold that courts should enforce only those terms and conditions actually agreed upon by the parties. However, because the State effectively undermined its recommendation of probation and thereby violated its plea agreement with Landera, we affirm the decision of the Court of Appeals.

II. BACKGROUND

Landera entered into a plea agreement with the State after having previously pled not guilty to 2 counts of distribution of child pornography and 20 counts of possession of child pornography. The plea agreement was not reduced to writing, but was orally described to the district court as follows:

> [Public defender]: Your Honor, [Landera] is going to plead to Counts III, IV, VI, VII, XIII, XIV, XV, XVI, XVII and XX.
>
> . . . .
>
> [Public defender]: . . . The State will dismiss the balance of the charges and agree to recommend probation provided [that Landera] obtain a psychiatric evaluation and a sex offender evaluation from a reputable individual and follow through with all recommendations.
>
> THE COURT: [County attorney], does that accurately represent the plea agreement?
>
> [County attorney]: It does, Your Honor.
>
> THE COURT: Thank you. . . . Landera, your attorney has recited into the record a plea agreement reached in

[1] See *State v. Landera*, 20 Neb. App. 24, 816 N.W.2d 20 (2012).

> this case, which has been agreed to today by [the county attorney] on behalf of the State. Does that accurately represent the plea agreement as you understand it?
>
> [Landera]: Yes.
>
> THE COURT: Are there any other terms or conditions of the plea agreement that you believe exist that were not just now fully recited into the record?
>
> [Landera]: No.

Following acceptance by the court of the plea agreement, Landera withdrew his previous pleas of not guilty and entered guilty pleas to the 10 counts identified in the plea agreement (all for possession of child pornography). The court found him guilty on all counts. The 10 remaining counts were dismissed with prejudice in accordance with the plea agreement.

Prior to sentencing, the court ordered Landera committed to the Nebraska Department of Correctional Services at its Diagnostic and Evaluation Center (D&E) for a 90-day evaluation, because "the [c]ourt [was] of the opinion that imprisonment [might] be appropriate in this case but desire[d] more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence [report]."

Following completion of the 90-day evaluation, a sentencing hearing was held. At this hearing, the State made the following statement:

> Prior to reviewing the evaluation from D&E, the State was prepared to recommend probation, extensive probation, with challenging treatment. [Landera] is bright and that is evidenced by the fact he obtained a full ride pre-med scholarship. You know, he's [sic] obviously possesses a talent that a lot of people before the [c]ourt don't have. . . .
>
> In reviewing the presentence, again, for today's sentencing, along with the D&E evaluation, I'm struck and I can't recommend probation —

The State was interrupted at this point by Landera's attorney, who reminded the court that the State was bound by the plea agreement to recommend probation.

In the discussion that followed, the State claimed that it intended to stand by the plea agreement. However, the State also expressed grave concerns about Landera's ability to refrain from the use of child pornography and argued for the imposition of "punishment" because of the results of the 90-day evaluation.

In response, Landera's attorney argued that Landera was expecting "an unqualified recommendation of probation from the county attorney," but that the State had instead offered "an extremely qualified recommendation of probation." Landera's attorney concluded by asking the court to "honor the plea agreement" and "order probation."

Following allocution by both sides, the court sentenced Landera to 30 months' to 4 years' imprisonment on each count, to be served concurrently. The court specifically noted both at the sentencing hearing and in its written order that it determined Landera was not "a fit and proper person to be sentenced to a term of probation."

Landera appealed to the Court of Appeals, alleging, among other things, that the district court erred in failing to grant specific performance of the plea bargain after the State "explicitly indicated that it did not intend to follow through with the agreement."[2] Although the Court of Appeals focused considerable attention on the remedies dictated in *State v. Birge*[3] for breach of a plea agreement, it cited no authority for its conclusion that the State had in fact violated the plea agreement by recommending a term of incarceration as a condition of probation. Having reached that conclusion, the Court of Appeals vacated Landera's sentences and remanded the cause for resentencing by a different judge.[4]

The State filed a petition for further review, which we granted in order to provide further guidance on the interpretation of plea agreements.

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[2] Brief for appellant at 12-13.

[3] *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

[4] See *State v. Landera, supra* note 1.

III. ASSIGNMENT OF ERROR

The State argues on further review that the Court of Appeals erred by determining that the State violated the plea agreement with Landera.

IV. STANDARD OF REVIEW

[1] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[5]

V. ANALYSIS

1. Treatment of Implied Terms in Plea Agreement

There are two widely accepted ways that courts treat terms and conditions not explicitly included in a plea agreement. One of these views, which the Court of Appeals effectively adopted, holds that terms and conditions not expressly included in a plea agreement were intentionally omitted. The alternative view is that courts should not enforce implied terms and conditions of a plea agreement, but enforce only those terms and conditions about which the parties did in fact agree. While we find that this latter approach is more consistent with existing Nebraska case law on the interpretation of plea bargains, we begin by providing a brief overview of both views.

[2] We digress to note that some of the federal court decisions arose from alleged violations of a federal procedural rule[6] permitting courts to accept plea agreements setting forth the penalties to be imposed and to become bound by the specified disposition. In Nebraska, a court is never bound by the plea agreement made between a defendant and the government.[7] Nevertheless, the federal cases are illustrative of the respective approaches employed to determine a party's obligations under a plea agreement. For our purposes, it does not matter whether the breaching party was the sentencing court or the

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

[6] See Fed. R. Crim. P. 11(c).

[7] See *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003).

prosecuting attorney. We are concerned only with the proper analytical approach.

(a) Terms Not Expressly Included Considered Intentionally Omitted

The expansive interpretation of plea agreements embodied in the Court of Appeals' decision is consistent with early decisions from several of the federal circuit courts. One of the leading cases adopting an expansive interpretation of a plea agreement is *United States v. Runck*.[8] In that case, the Eighth Circuit considered whether the imposition of restitution as a condition of probation violated a plea agreement that provided for a maximum sentence of 3 years' imprisonment and a $1,000 fine. While recognizing that "it would be unmanageable and impractical to require every possible condition of probation to be included in a plea bargain," the court held that the imposition of a large amount of restitution "created a material change in the plea bargain."[9] Relying on the precedent of *Runck*, the First,[10] Second,[11] and Ninth[12] Circuits similarly held that when a plea agreement was silent on the matter of restitution, the imposition of restitution—even as a condition of probation—was precluded by such silence. In so holding, the Ninth Circuit explained that the failure to expressly provide in a plea agreement for restitution as a term of probation was "an intentional omission designed to preclude its imposition."[13] In contexts other than restitution, the Third[14] and Fifth[15] Circuits also interpreted silence in plea agreements as precluding prosecutors from recommending terms or conditions not expressly mentioned in the plea agreement.

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[8] *United States v. Runck*, 601 F.2d 968 (8th Cir. 1979).

[9] *Id.* at 970.

[10] See *United States v. Garcia*, 698 F.2d 31 (1st Cir. 1983).

[11] See *United States v. Burruezo*, 704 F.2d 33 (2d Cir. 1983).

[12] See *United States v. Kamer*, 781 F.2d 1380 (9th Cir. 1986).

[13] *Id.* at 1388.

[14] See *U.S. v. Gilchrist*, 130 F.3d 1131 (3d Cir. 1997).

[15] See *U.S. v. Munoz*, 408 F.3d 222 (5th Cir. 2005).

In practice, interpreting silence in a plea agreement as an intentional omission prevents the government from making any sentencing recommendations not explicitly addressed in the agreement and restricts the government to only those sentencing recommendations enumerated. In effect, the failure to include a specific term or condition in a plea agreement becomes an implicit promise by the government not to recommend that term or condition. At least one court interpreting plea agreements according to this approach has invoked the language of implicit promises, noting that the government "implicitly promised not to argue for an enhancement that was not part of the plea agreement."[16]

Significantly, however, the federal circuit courts that once espoused this position have since adopted the approach urged by the State in the instant case and now interpret plea agreements more strictly. Since 1995, the Eighth Circuit has consistently enforced only those terms and conditions actually addressed in a plea agreement,[17] contrary to its prior holding in *Runck*.[18] And within 10 years of their decisions interpreting silence as an intentional omission binding upon the government, as discussed above, the First,[19] Second,[20] and Ninth[21] Circuits each issued decisions refusing—rather vehemently, in the case of the First Circuit—to liberally interpret silence in plea agreements as they had done previously. In recent

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[16] See *id.* at 227.

[17] See, e.g., *U.S. v. Nguyen*, 608 F.3d 368 (8th Cir. 2010), *cert. denied* 562 U.S. 1076, 131 S. Ct. 679, 178 L. Ed. 2d 505; *U.S. v. Parker*, 512 F.3d 1037 (8th Cir. 2008); *U.S. v. Martinez-Noriega*, 418 F.3d 809 (8th Cir. 2005); *White v. U.S.*, 308 F.3d 927 (8th Cir. 2002); *U.S. v. Austin*, 255 F.3d 593 (8th Cir. 2001); *U.S. v. Cheek*, 69 F.3d 231 (8th Cir. 1995).

[18] *United States v. Runck, supra* note 8.

[19] See *U.S. v. Anderson*, 921 F.2d 335 (1st Cir. 1990).

[20] See *United States v. Abbamonte*, 759 F.2d 1065 (2d Cir. 1985), *overruled on other grounds, U.S. v. Macchia*, 41 F.3d 35 (2d Cir. 1994).

[21] See *U.S. v. Pomazi*, 851 F.2d 244 (9th Cir. 1988), *abrogated on other grounds, Hughey v. United States*, 495 U.S. 411, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990).

unpublished cases, the Third[22] and Fifth[23] Circuits have also made this move to a more limited interpretation of plea agreements. It is to this more restrictive interpretive approach that we now turn.

(b) Only Terms to Which Parties Agreed Considered Part of Agreement

The State urges us to reject the approach adopted by the Court of Appeals—that terms and conditions not expressly included in a plea agreement were intentionally omitted and thus cannot be recommended by a prosecutor without breaching the plea agreement—and to instead hold that courts should enforce only those terms and conditions about which the parties did in fact agree. As will become evident below, the State's approach finds considerable support in federal case law.

In *United States v. Benchimol*,[24] a majority of the U.S. Supreme Court rejected the enforcement of "implied-in-law terms" of a plea agreement and held that "it was error for [the lower court] to imply as a matter of law a term which the parties themselves did not agree upon." Although the Court's analysis was not extensive, *Benchimol* provided important precedent upon which the federal circuit courts have built. The First,[25] Third,[26] Fourth,[27] Seventh,[28] Ninth,[29] and District of Columbia[30] Circuits all have cited to *Benchimol* as the basis for declining to enforce implied terms in plea agreements.

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[22] See *U.S. v. Wells*, 124 Fed. Appx. 735 (3d Cir. 2005).

[23] See *U.S. v. Traugott*, 364 Fed. Appx. 925 (5th Cir. 2010).

[24] *United States v. Benchimol*, 471 U.S. 453, 455-56, 105 S. Ct. 2103, 85 L. Ed. 2d 462 (1985) (per curiam).

[25] See, e.g., *U.S. v. Anderson, supra* note 19.

[26] See, e.g., *U.S. v. Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989).

[27] See, e.g., *United States v. Fentress*, 792 F.2d 461 (4th Cir. 1986).

[28] See, e.g., *U.S. v. Jimenez*, 992 F.2d 131 (7th Cir. 1993).

[29] See, e.g., *U.S. v. Johnson*, 187 F.3d 1129 (9th Cir. 1999); *U.S. v. Koenig*, 813 F.2d 1044 (9th Cir. 1987).

[30] See *U.S. v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992).

[3] Courts have justified the rejection of implied terms for varying reasons, often applying standards from contract law. Some courts have reasoned that a party to a plea agreement should not be given the benefit of implied terms when the party failed to negotiate such terms.[31] The First Circuit explained this reasoning as follows:

> If defendant had wanted to condition his plea on [a certain benefit,] he could have insisted that such a term be made part of the Agreement. He did not do so. Under the circumstances, we find no reason to grant him after the fact the benefit of a condition he failed to negotiate before the fact. To read the Agreement, *ex silentio*, to include [a certain term or condition] would give defendant more than is reasonably due.[32]

Contract law principles have also steered courts to focus on the affirmative promises made by the parties in the agreement and to recognize the limitations on their assent.[33] For example, in *United States v. Fentress*,[34] the Fourth Circuit rejected a defendant's assertion that the government had promised not to make any recommendations but those identified in the plea agreement by treating that agreement as a fully integrated contract. Because the court concluded that "[e]verything the government promised to do, it did," it held that the defendant could not now supplement the agreement "with unmentioned terms."[35] The court further explained its holding as follows:

> The prosecution owed [the defendant] no duty but that of fidelity to the agreement. Neither the Constitution nor the Federal Rules of Criminal Procedure requires that a plea agreement must encompass all of the significant actions that either side might take. If the agreement does not

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[31] See, e.g., *U.S. v. Williams*, 102 F.3d 923 (7th Cir. 1996); *U.S. v. Pollard, supra* note 30.

[32] *U.S. v. Anderson, supra* note 19, 921 F.2d at 338.

[33] See, e.g., *U.S. v. Streich*, 560 F.3d 926 (9th Cir. 2009); *In re Altro*, 180 F.3d 372 (2d Cir. 1999).

[34] *United States v. Fentress, supra* note 27.

[35] *Id.* at 464.

> establish a prosecutorial commitment on the full range of possible sanctions, we should recognize the parties' limitation of their assent.[36]

The basic premise underlying all of these explanations for the rejection of implied terms in plea agreements is that parties to such agreements should only be held to terms and conditions to which they actually agreed. This is the basic principle that was laid down by the U.S. Supreme Court in *Benchimol*.[37]

Courts that refuse to enforce implied terms as part of a plea agreement have found that a party breached a plea agreement for only two reasons: (1) for violating an express term of the agreement[38] or (2) for acting in a manner not specifically prohibited by the agreement but still incompatible with explicit promises made in the agreement.[39] In practice, therefore, this approach to the interpretation of plea agreements often results in a reliance on fine distinctions between actions, particularly in the context of recommendations made under the federal sentencing guidelines.[40] In *U.S. v. Parker*,[41] for example, the Eighth Circuit held that the application of career offender status did not breach a plea agreement that prohibited the parties from seeking departures or enhancements under the sentencing

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[36] *Id.*

[37] *United States v. Benchimol, supra* note 24.

[38] See, e.g., *U.S. v. Lovelace*, 565 F.3d 1080 (8th Cir. 2009); *U.S. v. Rivera*, 357 F.3d 290 (3d Cir. 2004), *abrogated on other grounds, Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009); *U.S. v. Atkinson*, 259 F.3d 648 (7th Cir. 2001); *U.S. v. Ledbetter*, 172 Fed. Appx. 947 (11th Cir. 2006).

[39] See, e.g., *Dunn v. Colleran*, 247 F.3d 450 (3d Cir. 2001); *U.S. v. Mondragon*, 228 F.3d 978 (9th Cir. 2000); *U.S. v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998); *U.S. v. Brye*, 146 F.3d 1207 (10th Cir. 1998); *U.S. v. Canada*, 960 F.2d 263 (1st Cir. 1992).

[40] See, e.g., *U.S. v. Dahmen*, 675 F.3d 244 (3d Cir. 2012); *U.S. v. Martinez-Noriega, supra* note 17; *U.S. v. Medford*, 194 F.3d 419 (3d Cir. 1999); *U.S. v. Johnson, supra* note 29; *U.S. v. Smith*, 140 F.3d 1325 (10th Cir. 1998); *U.S. v. Pollard, supra* note 30; *U.S. v. Carrazana*, 921 F.2d 1557 (11th Cir. 1991); *U.S. v. Traugott, supra* note 23.

[41] *U.S. v. Parker, supra* note 17.

guidelines, because career offender status technically is neither a departure nor an enhancement. On the whole, it is fair to say that under this more limited approach to interpretation of plea agreements, the government has near-plenary ability to make any sentencing recommendation not explicitly precluded by the plea agreement or contradictory to one of its express terms.

(c) Conclusion Based on Nebraska Case Law

Having reviewed these two approaches, we now consider them in light of Nebraska case law—which demands that courts enforce only those terms and conditions about which the parties to a plea agreement did in fact agree.

[4] In its petition for further review, the State relied upon the analysis of the Nebraska Court of Appeals in *State v. Thompson*[42] to highlight that court's error in the instant case. In *Thompson*, the Court of Appeals rejected the argument that the State had waived its right to appeal a sentence as excessively lenient by promising in a plea agreement to "'remain silent at sentencing.'"[43] Relying upon the opinion of the First Circuit in *U.S. v. Anderson*,[44] which itself relied heavily upon the U.S Supreme Court's decision in *Benchimol*,[45] the Court of Appeals reasoned as follows:

> [T]he State's waiver of its right of appellate review must actually be part of the agreement rather than judicially created from a plea agreement that fails to even mention such a condition. In short, *we enforce the agreement that was made rather than expand it by judicial fiat*, and we hold that the State did not waive its statutory right to appellate review of the trial court's sentences.[46]

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[42] *State v. Thompson*, 15 Neb. App. 764, 735 N.W.2d 818 (2007).

[43] *Id.* at 773, 735 N.W.2d at 827.

[44] *U.S. v. Anderson, supra* note 19.

[45] *United States v. Benchimol, supra* note 24.

[46] *State v. Thompson, supra* note 42, 15 Neb. App. at 776, 735 N.W.2d at 828 (emphasis supplied).

The Court of Appeals also specifically noted that "[g]iven the general principle that courts are not to rewrite contracts to include what the parties did not, we find that what the plea agreement between [the defendant] and the State did not say is of the greatest import in resolving this issue . . . ."[47] This holding was in line with a previous opinion of the Court of Appeals[48] and a previous opinion of this court,[49] both of which enforced only those terms upon which the parties actually had agreed.

The decision of the Court of Appeals in the instant case is a departure from this precedent. By holding that the State breached its plea agreement with Landera by recommending probation "only with an additional term not contemplated when the plea agreement was made,"[50] the Court of Appeals erred. The expansive analytical approach would have the effect of ignoring the plain language of the agreement, creating a promise by the State not to recommend incarceration as a condition of probation, and expanding the plea agreement by judicial fiat.

[5] Because the approach to the interpretation of plea agreements advocated by the State is consistent with existing Nebraska case law and a large body of federal case law encompassing decisions of the U.S. Supreme Court and a majority of the federal circuit courts, we hold that courts implementing plea agreements should enforce only those terms and conditions actually agreed upon by the parties. We now

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[47] *Id.* at 773, 735 N.W.2d at 826.

[48] See *State v. Powers*, 10 Neb. App. 256, 264, 634 N.W.2d 1, 9 (2001) (State did not breach plea agreement by using letters as evidence of subsequent criminal activity because State "agreed in the plea agreement not to pursue any charges for the prior letters, but did not agree to never use the prior letters as evidence in a prosecution for subsequent criminal activity"), *disapproved on other grounds, State v. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004).

[49] See *State v. Gildea*, 240 Neb. 780, 782, 484 N.W.2d 467, 468 (1992) (terms of plea agreement "will not be extended beyond the bare terms of that agreement").

[50] *State v. Landera, supra* note 1, 20 Neb. App. at 34, 816 N.W.2d at 29.

apply this principle in the instant case to determine whether the State breached its plea agreement with Landera.

2. Whether State Breached Plea Agreement With Landera

Landera's plea agreement with the State contained two promises by each party. Landera promised to plead guilty to 10 of 22 counts in the information and to obtain a "psychiatric evaluation and a sex offender evaluation from a reputable individual and follow through with all recommendations." In return, the State promised to dismiss the remaining 12 counts and "to recommend probation." When asked by the court whether this description of the plea agreement "accurately represent[ed] the plea agreement as [he] underst[ood] it," Landera replied, "Yes." When asked whether there were "any other terms or conditions of the plea agreement that [he] believe[d] exist[ed] that were not . . . fully recited into the record," Landera responded, "No." We thus take these four promises to be the extent of Landera's plea agreement with the State.

Following the limited approach to interpretation of plea agreements, we refuse to read into this plea agreement an implied promise by the State not to recommend conditions of probation. The terms of the plea agreement included only two promises by the State: that it would (1) drop the remaining 12 counts against Landera and (2) recommend probation. The agreement did not include a promise by the State not to recommend conditions of probation. As the Court of Appeals' decision makes plain, to hold the State to any such promise requires a court to imply terms. We decline to do so. Rather, we enforce only the two promises actually made by the State, just one of which is at issue in this appeal.

The plea agreement between Landera and the State was silent as to conditions of probation. And one of the conditions of probation allowed by statute is incarceration in county jail.[51] As such, the State could have recommended incarceration as a condition of probation without breaching the plea agreement

[51] See Neb. Rev. Stat. § 29-2262(2)(b) (Cum. Supp. 2012).

and did not breach the plea agreement for the reason identified by the Court of Appeals.

But we find that the State did breach the plea agreement, albeit in a different manner, by not fulfilling its explicit promise to recommend probation. While the State made a perfunctory recommendation of probation during allocution, the tenor of its entire argument undermined its purported recommendation, thereby breaching the express term of the agreement.

At sentencing, the State began its comments by stating, "Prior to reviewing the evaluation from D&E, the State was prepared to recommend probation . . . ." A few sentences later, the State explicitly stated as follows: "In reviewing the presentence, again, for today's sentencing, along with the D&E evaluation, I'm struck and I can't recommend probation . . . ." Although the State was interrupted before finishing this sentence, these statements demonstrate that the State had changed its mind about recommending probation.

During the remainder of its comments, the State strongly suggested to the district court that it believed the court should impose incarceration *instead of probation*. It explained that the purpose of the 90-day evaluation was "to determine whether or not [Landera was] fit and proper for probation" and that Landera "had ninety days to get his act straight, to play along and he couldn't do it." The State also highlighted the predatorial nature of Landera's crimes. But the most telling portion of the State's allocution was its conclusion:

> I don't trust that if he is released without . . . punishment that he won't be inclined to reign in his impulse control. It's ninety days at D&E and he couldn't keep it under wraps for ninety days in a prison setting. So, yes, I am concerned about him being on the streets and walking past a school or looking at pornography again . . . .
>
> I don't understand how [Landera] would be able to function without continuing treatment programs . . . . But I also believe that there should be a punishment element and that should be made clear to [him]. I'd submit on that fact.

By focusing so heavily on the concept of punishment, Landera's failure to prove that he was "fit and proper for probation," and

concern about Landera's "being on the streets," the State made a powerful, albeit implicit, argument to the court that probation was simply not an appropriate sentence.

[6] We recognize that a sentencing recommendation need not be enthusiastic in order to fulfill a promise made in a plea agreement.[52] The State must not, however, effectively undermine the promised recommendation. The State's perfunctory adherence coupled with sentencing comments totally at odds with probation amounts to a failure to recommend probation. And by failing to recommend probation, it breached the plea agreement with Landera. Because we find that the Court of Appeals reached the correct result, albeit for the wrong reason, we affirm its decision to vacate Landera's sentences and remand the cause for resentencing by a different judge.

VI. CONCLUSION

We granted the State's petition for further review to consider how courts should treat terms and conditions not explicitly mentioned in plea agreements. Because the approach urged by the State is more consistent with existing Nebraska case law and the case law of a majority of the federal circuits, we find that the Court of Appeals erred in enforcing an implied promise by the State not to recommend an additional condition of probation. Rather, courts should enforce only those terms and conditions to which the parties actually agreed. Applying this standard to the instant case, we find that the State violated its plea agreement with Landera not by recommending incarceration as a condition of probation but by effectively arguing for incarceration *instead* of probation. Having reached the same result as the Court of Appeals by a different path, we affirm.

AFFIRMED.

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[52] See *United States v. Benchimol, supra* note 24.

CONNOLLY, J., concurring.

I concur in the majority opinion's judgment. I write separately because I do not agree with its reasoning. The U.S.

Supreme Court has explained that the substantial benefits of plea bargaining in the criminal justice system rest upon assumptions that the bargaining is fair:

> [A]ll of these considerations presuppose fairness in securing agreement between an accused and a prosecutor. It is now clear, for example, that the accused pleading guilty must be counseled, absent a waiver. . . . The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known. There is, of course, no absolute right to have a guilty plea accepted. . . . A court may reject a plea in exercise of sound judicial discretion.
>
> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that *when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled*.[1]

"Because a defendant pleading guilty pursuant to a plea agreement waives a number of fundamental constitutional rights, . . . the circumstances surrounding the plea agreement must comport with due process to ensure defendant's understanding of its consequences."[2] Accordingly, many federal courts have held that in determining whether the prosecution has breached a plea agreement, a court must consider whether the government's conduct is inconsistent with what the defendant would have reasonably understood when he or she entered

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[1] *Santobello v. New York*, 404 U.S. 257, 261-62, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) (emphasis supplied). Accord *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

[2] *Spence v. Superintendent, Great Meadow Cor. Fac.*, 219 F.3d 162, 167 (2d Cir. 2000) (citations omitted). Accord *U.S. v. Lewis*, 633 F.3d 262 (4th Cir. 2011).

the plea.[3] Likewise, ambiguities in an agreement are construed against the government.[4]

So I have no quarrel with the general proposition that the parties must have agreed to the terms of the agreement. But in my view, the question is whether an objectively reasonable defendant, when agreeing to plead guilty in exchange for the prosecutor's promise to recommend probation, would have understood that the prosecution could nonetheless recommend a year of incarceration as a condition of probation. The Court of Appeals' decision essentially answered no to this question. I agree.

The prosecution did not specify that it was reserving the right to seek statutory conditions as part of its agreement to recommend probation. And it clearly could have included this term in the agreement if that had been its intent.[5] I believe the Court of Appeals correctly reasoned that we do not permit a party to a contract to prevail on unstated terms or conditions. And this reasoning must certainly apply when one of the parties has such a superior bargaining position.

Moreover, the majority's reasoning would require defendants to understand that Nebraska's probation statute permits a court to impose an initial term of incarceration as a condition of probation. That rule is neither universal nor the commonly understood meaning of probation.[6] At the very least,

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[3] See, *U.S. v. Larkin*, 629 F.3d 177 (3d Cir. 2010); *U.S. v. Sharma*, 703 F.3d 318 (5th Cir. 2012); *U.S. v. Herrera*, 928 F.2d 769 (6th Cir. 1991); *U.S. v. Rodriguez-Delma*, 456 F.3d 1246 (10th Cir. 2006); *U.S. v. Horsfall*, 552 F.3d 1275 (11th Cir. 2008).

[4] See, *U.S. v. Newbert*, 504 F.3d 180 (1st Cir. 2007); *U.S. v. Griffin*, 510 F.3d 354 (2d Cir. 2007) (abrogated on other grounds as recognized in *U.S. v. MacPherson*, 590 F.3d 215 (2d Cir. 2009)); *U.S. v. Wells*, 211 F.3d 988 (6th Cir. 2000); *U.S. v. O'Doherty*, 643 F.3d 209 (7th Cir. 2011); *U.S. v. Nguyen*, 608 F.3d 368 (8th Cir. 2010); *U.S. v. Ellis*, 641 F.3d 411 (9th Cir. 2011).

[5] See *State v. Naydihor*, 258 Wis. 2d 746, 654 N.W.2d 479 (Wis. App. 2002).

[6] See, *State v. Nuss*, 190 Neb. 755, 212 N.W.2d 565 (1973); Black's Law Dictionary 1322 (9th ed. 2009).

the prosecution's failure to reserve the right to seek conditions of probation created an ambiguity that should be construed against the State.

Most important, the facts show that the prosecution did not intend to reserve the right to recommend incarceration as a condition of probation when Landera entered his plea. Instead, the State had a change of heart after the court ordered Landera's sex offender evaluation. But that is exactly the kind of government conduct that the Due Process Clause prohibits. I believe that the majority opinion will raise serious constitutional questions whether a defendant has voluntarily and knowingly entered a plea of guilty, particularly if the court did not advise the defendant that it could confine him or her to a longer period in jail than what the defendant had agreed to in a plea agreement.[7]

McCormack, J., joins in this concurrence.

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[7] See *State v. Cutler*, 121 Ariz. 328, 590 P.2d 444 (1979).

State of Nebraska, appellee, v.
Micheal C. Wills, appellant.
826 N.W.2d 581

Filed February 22, 2013. Nos. S-11-1026, S-12-415.

1. **Sentences: Appeal and Error.** Whether a defendant is entitled to credit for time served and in what amount are questions of law. An appellate court reviews questions of law independently of the lower court.
2. ____: ____. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Sentences.** Credit for time served should be taken into account so that the effective sentence is within the statutory limits.
4. ____. With consecutive sentences, periods of presentence incarceration are credited against the aggregate of all terms imposed. With concurrent sentences, such periods are credited against the longest sentence, but are, in effect, applied against all the sentences.
5. **Sentences: Probation and Parole: Appeal and Error.** It is within the discretion of the trial court whether to impose probation or incarceration, and an appellate court will uphold the court's decision denying probation absent an abuse of discretion.

Appeals from the District Court for Lancaster County: JEFFRE CHEUVRONT and STEPHANIE F. STACY, Judges. Affirmed in part, and in part reversed and remanded.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott 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, and MILLER-LERMAN, JJ.

CONNOLLY, J.

In these consolidated cases, the primary issue presented is how to properly credit a defendant with time served because of two separate criminal cases, in which two different judges sentenced the defendant at different times.

BACKGROUND

A timeline of events is necessary to set the stage for this appeal. On March 26, 2010, law enforcement arrested and jailed Micheal C. Wills for fleeing from law enforcement and leaving the scene of an injury accident (case No. S-12-415). Wills remained in jail until April 2, when the district court apparently released him on bond.

On May 28, 2010, law enforcement again arrested and jailed Wills, but on an unrelated charge of child abuse resulting in death (case No. S-11-1026). Wills apparently was unable to post bond in case No. S-11-1026. Presumably because Wills was already in jail, on June 3, Wills surrendered on his bond in case No. S-12-415. So at that point, Wills was in jail because of both cases.

On October 14, 2011, in case No. S-11-1026, a jury convicted Wills of the lesser crime of negligent child abuse, a Class I misdemeanor.[1] That same day, the court released Wills on bond, though he remained in jail because he had previously

[1] See Neb. Rev. Stat. § 28-707 (Reissue 2008).

surrendered on his bond in case No. S-12-415. On October 17, 2011, however, the court reinstated Wills' bond in case No. S-12-415 and Wills was released from jail.

In sum, the record shows that Wills was in jail solely because of case No. S-11-1026 from May 28 through June 2, 2010, a total of 6 days. The record shows that Wills was in jail solely because of case No. S-12-415 from March 26 through April 2, 2010, and from October 14 through 16, 2011, a total of 11 days. Finally, the record shows that Wills was in jail because of both cases from June 3, 2010, through October 13, 2011, a total of 498 days.

On November 2, 2011, in case No. S-11-1026, the court sentenced Wills to 1 year in jail, with credit for 504 days already served, which included all 498 days spent in jail on both cases. On January 24, 2012, in case No. S-12-415, Wills pleaded guilty to operating a motor vehicle to avoid arrest, a Class I misdemeanor,[2] and leaving the scene of an injury accident, a Class IIIA felony.[3] On April 18, a different judge of the court sentenced Wills to 2 to 4 years in prison, with credit for 11 days served. The court did not give Wills credit for any remaining days from the 498 days credited toward his earlier 1-year sentence. The court also revoked his operator's license for 5 years and ordered him not to drive any vehicle for 5 years.

This appeal involves the proper way to credit Wills for the 498 days he spent in jail on both cases.

ASSIGNMENTS OF ERROR

Wills assigns, restated and consolidated, that the district court erred in:

(1) applying all 498 days of credit for time served toward his 1-year sentence in case No. S-11-1026, thereby preventing the court from applying some of that time toward his sentence in case No. S-12-415; and

(2) imposing excessive sentences in case No. S-12-415.

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[2] See Neb. Rev. Stat. § 28-905 (Reissue 2008).

[3] See Neb. Rev. Stat. §§ 60-697 and 60-698 (Reissue 2010).

STANDARD OF REVIEW

Our standard for reviewing a district court's calculation and application of credit for time served is a bit unclear. For example, in *State v. Torres*,[4] the sole assigned error was that the court erred in failing "to credit [the defendant] for time served in jail while awaiting trial and sentence."[5] We first noted that we would not disturb a sentence within statutory limits unless the court had abused its discretion.[6] But we noted that interpretation of a statute presented a question of law, which we would review independently of the lower court.[7] In more recent cases, however, we have noted that interpretation of a statute is a question of law and that "[w]hether a defendant is entitled to credit for time served is also a question of law."[8]

[1] The latter approach is correct. No part of crediting time served requires a court to exercise its discretion, so we do not review the court's findings for abuse of discretion. We made this clear in *State v. Clark*[9]:

> [T]he credit for time served to which a defendant is entitled is an absolute and objective number that is established by the record. Therefore, the exact credit for time served to which a defendant is entitled is objective and not discretionary. The court has no discretion to grant the defendant more or less credit than is established by the record.

So, we clarify that whether a defendant is entitled to credit for time served and in what amount are questions of law. We review questions of law independently of the lower court.[10]

[2] The standard for reviewing an excessive sentence claim is well established: We will not disturb a sentence imposed

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[4] *State v. Torres*, 256 Neb. 380, 590 N.W.2d 184 (1999).

[5] *Id.* at 382, 590 N.W.2d at 185.

[6] See *id.*

[7] See *id.*

[8] *State v. Becker*, 282 Neb. 449, 451, 804 N.W.2d 27, 29 (2011).

[9] *State v. Clark*, 278 Neb. 557, 562, 772 N.W.2d 559, 563 (2009).

[10] See, e.g., *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012).

within the statutory limits absent an abuse of discretion by the trial court.[11]

ANALYSIS

Credit for Time Served

Wills takes issue with the court's crediting of his time served. The record shows that 498 days of Wills' presentence confinement qualified as credit in either case. Wills asserts that the sentencing judge in case No. S-11-1026 erred in crediting all 498 days to his 1-year sentence and that the sentencing judge in case No. S-12-415 erred in failing to credit him with the would-be remaining time. The State argues that the first sentencing judge had no discretion to enter an amount other than Wills' total credit for time served, which included all 498 days. And the State argues that once the first sentencing judge credited all the time to the first sentence, the second sentencing judge could not grant credit for the same time, because time served may be credited only once.

The calculation and application of credit for time served are controlled by statute. Different statutes address credit for time served based on whether the defendant is sentenced to jail or prison.[12] But those provisions are similar,[13] and the reasoning of cases involving either provision is applicable here. This case hinges on the court's credit for time served in case No. S-11-1026, involving a jail sentence, so we look to § 47-503. It provides, in relevant part:

> Credit against a jail term shall be given to any person sentenced to a city or county jail for time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based.

Wills argues that the court in case No. S-11-1026 erred in applying all 498 days of credit to his 1-year sentence. He

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[11] See, e.g., *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

[12] See Neb. Rev. Stat. §§ 47-503 (Reissue 2010) and 83-1,106 (Reissue 2008).

[13] Compare § 47-503 with § 83-1,106(1).

argues that the court should have applied only the amount of credit necessary to satisfy his sentence, which after good time reduction, he alleged was 190 days. Wills argues that the court was aware of his pending case in case No. S-12-415 and that if the court's crediting all 498 days "truly exhausted" Wills' credit, then Wills essentially served a sentence in excess of the statutory maximum.[14]

We have not found any factually comparable cases in Nebraska or in other jurisdictions. The answer is not obvious. But certain principles of law are relevant. It is clear that Wills was entitled to credit for time spent in jail before sentencing.[15] It is also clear that Wills was entitled to good time reduction for time spent in jail before sentencing.[16] And credit for time served may be applied only once.[17]

We conclude that the court erred in crediting all 498 days to Wills' 1-year sentence. Section 47-503 provides that a defendant is entitled to "[c]redit against" his jail term. In this context, "credit" is best defined as "a deduction from an amount otherwise due."[18] Unlike a bank account, a defendant cannot go below zero in terms of days left on a prison sentence. So the judge could not "credit" Wills with more time served than the length of his sentence. Moreover, in this context, "against" is best defined as "in exchange for," "in return for," "as a charge upon," or "to the debit of."[19] Section 47-503 grants credit for time served on a 1-to-1 ratio—so the court could not grant credit "against" Wills' jail term in excess of the length of the sentence.

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[14] Brief for appellant at 18.

[15] See § 47-503.

[16] See, 2010 Neb. Laws, L.B. 712, § 40; Neb. Rev. Stat. § 47-502 (Reissue 2010); *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996); *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988).

[17] See, e.g., *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004).

[18] Webster's Third New International Dictionary of the English Language, Unabridged 533 (1993).

[19] *Id.* at 39.

Though factually distinguishable, the rationale of *State v. Knight*[20] supports our conclusion. In *Knight*, Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981) mandated that the minimum term of an indeterminate sentence not exceed more than one-third of the maximum term. The court sentenced the defendant to 18 months to 3 years in prison on a Class IV felony, for which the maximum term was 5 years, and the court, exercising its discretion, gave no credit for 151 days already served. We concluded that "[w]hen the approximately 5-month period that defendant was in jail is added to the 18-month sentence, defendant is serving a minimum of 23 months—an amount in excess of the statutory minimum."[21] We concluded that the court, by withholding credit for time served, had improperly exceeded the statutory sentencing limit.[22]

[3] The underlying principle of *Knight* is that credit for time served should be taken into account so that the effective sentence is within the statutory limits. The court did not withhold credit for time served, but granted credit in *excess* of the sentence. But if all 498 days of Wills' credit were exhausted on a 1-year sentence, then Wills effectively served a term of imprisonment greater than the possible maximum sentence for negligent child abuse under then-existing Nebraska law.

We also note that *State v. Banes*,[23] like this case, involved time which could have been credited toward the defendant's sentence in either of two unrelated criminal cases. But in *Banes*, the court—and presumably the same judge—was able to sentence the defendant on both cases on the same day to concurrent sentences. So the defendant received full credit for all of the time he spent in presentence confinement.

[4] Had Wills' cases similarly lined up as in *Banes* for sentencing—regardless whether the sentences imposed were consecutive or concurrent—he would have received the full benefit of his 498 days already served. This is because, with

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[20] *State v. Knight*, 220 Neb. 666, 371 N.W.2d 317 (1985).

[21] *Id.* at 668, 371 N.W.2d at 319.

[22] See *id.* See, also, *State v. Ross*, 220 Neb. 843, 374 N.W.2d 228 (1985).

[23] See *Banes, supra* note 17.

consecutive sentences, periods of presentence incarceration are credited against the *aggregate* of all terms imposed.[24] And with concurrent sentences, such periods are credited against the longest sentence, but are, in effect, applied against all the sentences.[25] We see no reason for Wills to receive less than the full benefit of his time already served simply because his cases progressed differently or because he was not sentenced contemporaneously for his offenses by the same judge.

We remand the cause for the court to apply the appropriate amount of credit to Wills' sentences. In case No. S-11-1026, this requires the court to calculate and apply only the credit necessary to satisfy Wills' 1-year sentence after any reduction for good time. And in case No. S-12-415, the court would then credit any remaining days as time served against Wills' 2- to 4-year combined sentences.[26]

The State disagrees with this result. It argues that this requires the court to exercise discretion in calculating the amount of time to credit against Wills' sentences, in contravention of our mandate in *Clark*. We disagree. The court will not be exercising its discretion, but simply calculating the length of Wills' sentence following good time reduction and then applying credit against his sentence in that amount. This is all done by statute and basic math.

Second, the State argues that requiring the judge to consider good time credit assumes that Wills would have been granted that credit. But the judge need not speculate whether the defendant has earned good time credit for time already spent in jail; that information is readily discoverable. The judge simply must determine whether Wills followed the jail rules during the time spent in jail.[27] This determination is nothing new, as

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[24] See, *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011); *State v. Sanchez*, 2 Neb. App. 1008, 520 N.W.2d 33 (1994). See, also, Arthur W. Campbell, Law of Sentencing § 9:28 (3d ed. 2004 & Supp. 2012-13).

[25] See, e.g., *Banes, supra* note 17.

[26] See, *id.*; § 83-1,106.

[27] See § 47-502.

it is well established that good time credit is granted for time served before sentencing.[28]

Finally, this result does not permit a defendant to "bank" credit against a future sentence.[29] Instead, we are simply concluding that a court cannot credit more time served against a sentence than the actual length of the sentence. It just so happens that Wills accrued the 498 days of credit on *both* criminal cases, though they were separate, unrelated incidents. And because not all of the credit was used, he is able to use any applicable remaining credit to offset part of the other sentences.

Excessive Sentences

Wills argues that the court imposed excessive sentences in case No. S-12-415. Specifically, Wills argues that the court should have imposed probation rather than incarceration. The State, of course, argues that incarceration was appropriate. The record shows that the court did not abuse its discretion, so we affirm its sentencing order.

[5] The relevant principles of law are well known. It is within the discretion of the trial court whether to impose probation or incarceration, and we will uphold the court's decision denying probation absent an abuse of discretion.[30] 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.[31]

In 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.[32]

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[28] See sources cited *supra* note 16.

[29] See, e.g., *State v. Fisher*, 218 Neb. 479, 356 N.W.2d 880 (1984).

[30] See, e.g., *State v. White*, 276 Neb. 573, 755 N.W.2d 604 (2008).

[31] See, e.g., *Pereira, supra* note 11.

[32] See, e.g., *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.[33]

Wills pleaded guilty to operating a motor vehicle to avoid arrest, a Class I misdemeanor, and leaving the scene of an injury accident, a Class IIIA felony. The record shows that law enforcement attempted to pull Wills' vehicle over for failure to stop at a stop sign. Wills fled from law enforcement at high speeds, and law enforcement pursued Wills' vehicle, both in cars and by helicopter. During the pursuit, Wills hit a deer and crashed his vehicle, and then fled the scene. Wills' wife was a passenger in the vehicle, and she was seriously injured in the crash. Law enforcement tracked Wills and found him hiding in a wooded area.

The court determined that probation was inappropriate and sentenced Wills to consecutive prison terms of 1 year for the misdemeanor and from 1 to 3 years for the felony. In rejecting probation, the court emphasized the serious nature of the crimes and Wills' history of driving at high rates of speed. The court also emphasized that incarceration was necessary for the protection of the public because there was a substantial risk, supported by the presentence report, that Wills would engage in further criminal conduct if placed on probation.

The sentences imposed were within the permissible statutory ranges.[34] And based on the evidence in the record, the court did not abuse its discretion in imposing incarceration. Wills' crimes were serious, and Wills' conduct was obviously dangerous to himself, his wife, law enforcement, and the general public. The presentence report also catalogs Wills' fairly extensive criminal history, which includes eight separate traffic violations (four for various levels of speeding), as well as other crimes such as marijuana possession and disturbing the peace. The court did not abuse its discretion in imposing incarceration, and we affirm the court's sentencing order.

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[33] See, e.g., *id*.

[34] See, §§ 28-905, 60-697, and 60-698; Neb. Rev. Stat. §§ 28-105 and 28-106 (Reissue 2008).

CONCLUSION

The court improperly credited all 498 days of Wills' time served to his 1-year sentence. A court cannot credit more time to a sentence than the length of the sentence. On remand, the court should credit only enough time served to satisfy the sentence in case No. S-11-1026, after reducing the sentence for good time. The court should then credit any applicable remaining time to Wills' sentences in case No. S-12-415. We also conclude that the record supports the court's sentencing order in case No. S-12-415, and so the court did not abuse its discretion. We affirm the court's decision in that regard.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CASSEL, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LARRY L. BRAUER, RESPONDENT.

827 N.W.2d 464

Filed February 22, 2013. No. S-11-1061.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Larry L. Brauer, on January 10, 2013. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on April 5, 1979. Formal charges were filed against respondent on December 7, 2011, generally alleging that respondent neglected matters and failed to respond to the

Counsel for Discipline. On September 11, 2012, the report of the referee was filed in which the referee recommended that respondent be suspended for a minimum of 1½ years and that upon reinstatement, he be supervised for 2 years by a licensed attorney. On November 13, the Counsel for Discipline of the Nebraska Supreme Court filed a motion for judgment on the pleadings.

On January 10, 2013, respondent filed a voluntary surrender in which he stated that he does not challenge or contest the truth of the allegations being made against him. He further stated that he freely, knowingly, and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely,

knowingly, and voluntarily admits that he does not contest the allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

ODILON VISOSO, ALSO KNOWN AS ADAM RODRIGUEZ, APPELLANT, V. CARGILL MEAT SOLUTIONS, APPELLEE.

826 N.W.2d 845

Filed February 22, 2013. No. S-12-038.

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. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
3. ____: ____. On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.
4. **Workers' Compensation: Proof.** In a proceeding to modify a prior workers' compensation award, the employer has the burden of establishing a decrease of incapacity and the employee has the burden of establishing an increase.
5. **Workers' Compensation.** Temporary disability benefits should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury.

6. ____. Temporary disability benefits are discontinued at the point of maximum medical improvement, because a disability cannot be both temporary and permanent at the same time.
7. **Workers' Compensation: Words and Phrases.** An undocumented employee is an "employee" or "worker" who is covered under the Nebraska Workers' Compensation Act.
8. **Workers' Compensation.** The Workers' Compensation Court cannot order vocational retraining without determining that the worker's postinjury physical restrictions and vocational impediments prevent the worker from complying with all of the lower work priorities in Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010).
9. ____. If an injured employee is ineligible for the lower work priorities in Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010) because the employee cannot be legally placed with the same employer or a new employer, then the compensation court cannot order retraining for a new career.
10. ____. Unlike vocational retraining benefits, there are no prioritized goals that must be satisfied before a court can award indemnity for an employee's loss of earning capacity.
11. ____. Both before and after an employee's maximum medical improvement, an employee's disability as a basis for compensation under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 2010) is determined by the employee's diminution of employability or impairment of earning power or earning capacity.
12. ____. An employee's impairment of earning capacity does 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.
13. ____. An employee's illegal residence or work status does not bar an award of indemnity for permanent loss of earning capacity.
14. ____. For purposes of workers' compensation, the risk of hiring an undocumented alien falls on the employer to cover the associated costs if that worker is injured during the scope of employment.
15. ____. The Nebraska Workers' Compensation Act is designed to compensate an injured worker for two distinct losses resulting from a work-related injury or occupational disease: the loss of earning capacity based on the concept of disability and medical and other costs associated with the injury or disease.
16. ____. Because the purpose of the Nebraska Workers' Compensation Act is to compensate injured workers for injuries regardless of immigration status, the act can be applied to all workers, whether legally hired or not.
17. ____. If a workers' compensation claimant in good faith relocates to a new community, the new community may serve as the hub community from which to assess the claimant's loss of earning power.
18. ____. The first step in identifying the relevant labor market for assessing a worker's loss of earning power is to determine whether the hub community is where the injury occurred, or where the claimant resided when the injury occurred, or where the claimant resided at the time of the hearing.
19. ____. The Nebraska Workers' Compensation Act should be construed to accomplish its beneficent purposes.

20. ____. If sufficient credible data exists for a determination of an undocumented worker's loss of earning capacity in his or her community of origin and the worker has moved for legitimate purposes, and not to increase workers' compensation benefits, then the community of origin may serve as the hub community.
21. ____. A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can be reached only on the basis thereof, then the claimant cannot recover.

Appeal from the Workers' Compensation Court: RONALD L. BROWN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Ryan C. Holsten, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellant.

Caroline M. Westerhold and Colin A. Mues, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

In 2006, Odilon Visoso, an undocumented worker, was injured in the course and scope of his employment with Cargill Meat Solutions (Cargill). Following a trial in 2008, he was awarded temporary total disability benefits.

In 2011, Cargill petitioned the Nebraska Workers' Compensation Court to discontinue the temporary total disability benefits, because Visoso had reached maximum medical improvement. While the action was pending in the compensation court, Visoso returned to Mexico, his country of origin. Vocational rehabilitation experts who testified at the hearing on Cargill's petition were unable to provide credible evidence of Visoso's loss of earning capacity based upon prospective employment in Mexico. The compensation court concluded that Cargill's obligation to pay Visoso temporary total disability should cease because Visoso had reached maximum medical improvement. The court declined to award Visoso benefits for his claim of permanent impairment and loss of earning capacity. Visoso appealed.

SCOPE 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. *Sellers v. Reefer Systems*, 283 Neb. 760, 811 N.W.2d 293 (2012).

[2] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

[3] On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011).

FACTS

Visoso, also known as Adam Rodriguez, began working for Cargill in Schuyler, Nebraska, in March 2006. On May 9, Visoso suffered an injury when a 200-pound quarter of beef fell off an overhead conveyor and landed on his head. He was initially treated with numerous noninvasive treatments but eventually had surgery on his neck on October 4, 2007. Shortly after his surgery, he was fired by Cargill when it discovered he was an undocumented alien not authorized to work in the United States.

Following a trial, the compensation court found that Visoso sustained a compensable injury that rendered him temporarily totally disabled and awarded him a running award of temporary total indemnity and payment for future medical care. No determination was made regarding Visoso's loss of earning capacity or eligibility for permanent indemnity benefits. The Nebraska Court of Appeals affirmed the award of temporary total disability. See *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009).

On March 8, 2011, Cargill petitioned the compensation court for modification of the award. It stated that more than 6 months had elapsed since the entry of the award and that Visoso had reached maximum medical improvement. Visoso admitted that he had reached maximum medical improvement, but denied that he experienced a decrease in incapacity and denied that he should no longer receive temporary total disability. The parties agreed to the appointment of Karen Stricklett as the vocational rehabilitation counselor to provide a report of Visoso's loss of earning capacity, if any.

Stricklett prepared a preliminary loss of earning capacity analysis regarding Visoso's loss of earning power in the Schuyler area. She prepared a followup report in which she noted Visoso's imminent return to Mexico and her attempt to conduct a loss of earning capacity analysis for Chilpancingo, Guerrero, Mexico, the largest city near Chichihualco, which is the town where Visoso would be living and which is also in Guerrero. Stricklett concluded she needed outside help to better analyze the labor market in Mexico. Visoso moved to compel labor market research, because Stricklett was unable to perform such research in Chilpancingo without outside help and Cargill refused to pay for the additional research. Visoso relocated to Mexico in July 2011.

Following a hearing, the compensation court denied Visoso's motion for labor market research. It determined Chilpancingo, together with communities within a reasonable geographic area around it, was the "hub community" for a loss of earning capacity analysis, citing *Giboo v. Certified Transmission Rebuilders*, 275 Neb. 369, 746 N.W.2d 362 (2008).

Visoso had reported to Stricklett that Chilpancingo is about 1½ hours north of Acapulco, Guerrero, Mexico, and 2 hours south of Mexico City. Stricklett contacted Dr. Penelope Caragonne, who provides vocational services to clientele in the United States, Mexico, and Latin America. Caragonne was familiar with the Chilpancingo area, which she characterized as being an area run by a drug cartel. Due to safety concerns, she was not able to contact individual employers to ascertain the availability of employment in the area. The compensation court questioned whether adequate foundational facts or data existed

which would be sufficient for Stricklett to form an expert opinion on Visoso's loss of earning power.

In her final loss of earning capacity analysis, dated September 16, 2011, Stricklett used three separate scenarios. Her first two analyses involved the Schuyler/Columbus/Fremont area in Nebraska, the restrictions outlined by Visoso's treating physician, and the restrictions required by an independent doctor retained in the case. Finally, Stricklett attempted to perform an analysis for the Chilpancingo area. However, she did not "feel capable of providing a loss of earning capacity estimate taking into account [Visoso's] current labor market area." She did not think that any opinion she provided could "be expressed with a reasonable degree of vocational certainty."

Visoso retained Helen Long as a vocational rehabilitation expert. She computed Visoso's ability to work and earn wages in Nebraska and concluded that he sustained a 100-percent loss of his earning capacity in Schuyler. Next, she performed an analysis based on Visoso's move to Chichihualco. She concluded that regardless of his location, Visoso was "permanently and totally disabled" and had sustained a 100-percent loss of earning power.

At the hearing on Cargill's "Petition for Modification of Award," the parties stipulated that Visoso achieved maximum medical improvement on February 25, 2009. They did not agree on a change in the extent of his disability. Pursuant to the compensation court's July 14, 2011, order, Chilpancingo was used as the hub community for purposes of determining loss of earning capacity.

In its order of December 22, 2011, the compensation court concluded that Visoso had reached maximum medical improvement and that any physical restrictions thereafter were permanent, although the degree or extent of his permanent physical restrictions remained in dispute. Based on the evidence presented, the court found that Visoso was no longer temporarily totally disabled and had experienced a material and substantial decrease of physical incapacity. It concluded that Cargill, the moving party, had the burden of proof to terminate the temporary total disability payments, but that

Visoso retained the burden to establish entitlement to permanent indemnity.

It found that Visoso moved from Schuyler to Chichihualco in good faith and not to manipulate his loss of earning power. It concluded that Chichihualco was the appropriate hub community and that Chilpancingo was within a reasonable geographic distance around the hub community. The agreed-upon vocational rehabilitation counselor, Stricklett, was not able to provide a credible report on loss of earning power, because she could not find sufficient evidence for the hub community. Therefore, the court found that the evidence was insufficient to quantify Visoso's loss of earning power to award permanent indemnity and that Cargill had no further liability to Visoso. It terminated Visoso's payments for temporary total disability.

Visoso timely appealed, and we moved the case to our 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).

ASSIGNMENTS OF ERROR

Visoso assigns that the Workers' Compensation Court erred by (1) finding that Cargill met its burden of proof for modification of the award pursuant to Neb. Rev. Stat. § 48-141 (Reissue 2010) and (2) finding that Visoso was not entitled to permanent disability benefits corresponding to his loss of earning capacity.

ANALYSIS

Termination of Temporary Disability

The first question is who had the burden of proof on Cargill's motion to terminate the temporary total disability payments to Visoso. Visoso contends that Cargill had the burden to prove Visoso's decrease in disability and his degree of permanent loss of earning capacity. Cargill argues that it had to prove only that Visoso had reached maximum medical improvement, and that therefore, the running award of temporary total disability benefits should cease.

As the party seeking modification, Cargill had the burden to prove the allegations in its petition to modify the running award of temporary total disability benefits to Visoso. See, § 48-141; *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998). Cargill petitioned the compensation court for an order terminating temporary total disability payments because Visoso had reached maximum medical improvement. It alleged that Visoso reached maximum medical improvement on February 25, 2009; that Visoso was no longer temporarily totally disabled; and that his indemnity benefits on that basis should cease. Visoso admitted that he had reached maximum medical improvement, but he did not agree that there was a change in his disability.

Visoso argues that because Cargill sought the modification of his temporary total disability benefits, it also had the burden to show a decrease in his disability. He asserts that because his loss of earning power could not be ascertained, it was plain error to grant Cargill's application for modification. We disagree.

Visoso relies upon *Bronzynski v. Model Electric*, 14 Neb. App. 355, 707 N.W.2d 46 (2005). *Bronzynski* involved an application to modify a prior award of permanent partial disability benefits, wherein the employee must demonstrate an increase in his existing disability. The employee showed a change in impairment but failed to satisfy his burden of proof, because he did not also demonstrate that he sustained an increase in disability. *Bronzynski* does not apply, because Visoso has no prior award of permanent disability benefits. Had Cargill sought to reduce an award of permanent benefits, then it would have had the burden to show that Visoso had a decrease of impairment which caused a decrease in Visoso's loss of earning capacity.

[4] Section 48-141 provides, in pertinent part, that "at any time after six months from the date of the agreement or award, an application [to modify the award] may be made by either party on the ground of increase or decrease of incapacity." The employee has the burden of proving that his injury caused permanent impairment of his body as a whole as a predicate to an award for permanent disability, i.e., loss of earning capacity.

See *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). In a proceeding to modify a prior award, the employer has the burden of establishing a decrease of incapacity and the employee has the burden of establishing an increase. *U S West Communications, supra*.

[5,6] Cargill was not required to address permanent disability payments. Temporary disability benefits should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). Simply stated, when an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, permanent. *Id*. Temporary disability benefits are discontinued at the point of maximum medical improvement, because a disability cannot be both temporary and permanent at the same time. See *id*. Temporary payments do not continue after maximum medical improvement has been reached by the employee. Because Cargill established that Visoso reached maximum medical improvement, Cargill satisfied its burden of proof that Visoso's temporary total disability payments should cease.

Indemnity for Permanent Impairment

The question is what, if any, permanent disability payments Cargill should pay to Visoso. Permanent disability is an essential element of an employee's claim in workers' compensation, and therefore, the burden rests with the employee to prove the elements of his or her compensation claim. See *Green, supra*. After reaching maximum medical improvement, Visoso has the burden of proving that his injury caused permanent impairment of his body as a whole and that this permanent impairment resulted in a loss of earning capacity.

Determining Loss of Earning Power

In *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013), the primary issue was whether the employee, an undocumented alien, was entitled to indemnity

benefits. We held that the Nebraska Workers' Compensation Act (Act) applied to undocumented aliens working for a covered employer in Nebraska and that such employees were entitled to permanent indemnity benefits for work-related injuries.

[7] Cargill does not contest that Visoso is a covered employee under the Act. In *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009), the Court of Appeals concluded that an undocumented employee is an "employee" or "worker" who is covered under the Act. In *Moyera, supra*, the employer claimed the trial judge erred as a matter of law in awarding the employee, Ricardo Moyera, benefits for permanent loss of earning capacity, because Moyera was an illegal alien who had no plans to return to his native country and had taken no action to become a legal resident of the United States. The employer claimed that temporary disability benefits were different from permanent disability benefits, because temporary benefits are limited to an employee's healing period. It claimed that benefits for permanent loss of earning power should be barred for the same reason that vocational rehabilitation benefits are not allowed—because they depend upon an employee's ability to obtain lawful employment in the United States.

Moyera held that the Act covered undocumented aliens and that our decision in *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005), did not preclude an award of benefits to an undocumented alien for permanent disability. The employer argued that Moyera, like the undocumented employee in *Ortiz*, had no plans to return to his home country or to become a legal resident of the United States. Therefore, the employer claimed that Moyera had no earning capacity to lose because he had no legal right to be employed in the United States.

[8-10] We clarified why in the case of an undocumented alien vocational rehabilitation benefits are distinguishable from permanent disability benefits. The Workers' Compensation Court cannot order vocational retraining without determining that the worker's postinjury physical restrictions and vocational impediments prevent the worker from complying with all of

the lower work priorities in Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010). See *Moyera, supra*. If an injured employee is ineligible for the statute's lower work priorities because the employee cannot be legally placed with the same employer or a new employer, then the compensation court cannot order retraining for a new career. See *id*. But unlike vocational retraining benefits, there are no prioritized goals that must be satisfied before a court can award indemnity for an employee's loss of earning capacity. *Id*.

[11-13] Both before and after an employee's maximum medical improvement, an employee's disability as a basis for compensation under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 2010) is determined by the employee's diminution of employability or impairment of earning power or earning capacity. *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013). An employee's impairment of earning capacity does 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. *Id*. Therefore, an employee's illegal residence or work status does not bar an award of indemnity for permanent loss of earning capacity. See *id*.

[14] For purposes of workers' compensation, the risk of hiring an undocumented alien falls on the employer to cover the associated costs if that worker is injured during the scope of employment. See 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 66.03[4][a] at 66-21 (2011) ("with a few exceptions, illegal aliens are treated as covered employees"; under that "general workers' compensation scheme, the employer is generally responsible for paying indemnity to an injured worker as long as he or she is unable to return to work"). See, also, *Moyera, supra*.

[15,16] Such coverage conforms with the purpose of the Act: "The [A]ct is designed to compensate an injured worker for two distinct losses resulting from a work-related injury or occupational disease: the loss of earning capacity based on the concept of disability and medical and other costs associated with the injury or disease." *Foote v. O'Neill Packing*, 262 Neb. 467, 474, 632 N.W.2d 313, 320 (2001). Because the purpose is to compensate injured workers for injuries

regardless of immigration status, the Act can be applied to all workers, whether legally hired or not.

In the case at bar, Cargill petitioned the compensation court to make a determination that Visoso had reached maximum medical improvement. Visoso returned to Mexico, his country of origin, while the matter was pending. Because the court determined Visoso's move was made in good faith and not for an improper motive, the court attempted to determine his loss of earning capacity based on evidence obtained in Mexico.

The trial proceeded on the basis that Visoso was eligible to pursue his claim for loss of earning power benefits. The compensation court's denial of benefits was not based upon Visoso's status as an undocumented worker. But it denied benefits because it concluded there was no reliable evidence regarding Mexico labor markets from which to base a determination of loss of earning power. Whether Visoso was eligible to recover a permanent award for loss of earning capacity was not decided by the court because of a lack of credible evidence for which to base a determination of Visoso's loss of earning capacity.

Having concluded that Visoso is eligible for workers' compensation benefits, both temporary and permanent, we examine the location upon which to base those benefits: the place where the injury occurred or the place where Visoso now resides. Visoso moved to Chichihualco in July 2011, and the compensation court determined that Chichihualco, together with Chilpancingo, the largest city in the area and the state capital, would serve as the hub community for calculation of Visoso's loss of earning power. Chilpancingo is 45 to 60 minutes from Chichihualco and the only large community within 50 miles. The area is rural and mountainous, high in crime, and controlled by a drug cartel.

Although Stricklett, the agreed-upon vocational rehabilitation expert, attempted to find data to perform an analysis of loss of earning capacity in Chilpancingo, she was ultimately unable to do so. She could not perform a permanent loss of earning power analysis due to a lack of reliable foundational information customarily used to make the assessment. Long,

Visoso's rebuttal expert, experienced similar problems. Neither expert had previously attempted to perform a loss of earning power analysis in Mexico, so neither had the base of knowledge they had in Nebraska. They both had to rely on Internet resources that could not be verified, and neither attempted to contact employers in Mexico by telephone.

Based on the lack of sufficient information and reliable data, the compensation court determined there was no foundation to render an opinion regarding loss of earning power for the hub community of Chilpancingo. We agree; however, this does not end the analysis of Visoso's loss of earning capacity.

[17] This court has addressed which community to use as the hub community when an injured employee relocates to a new location for a legitimate purpose. See *Giboo v. Certified Transmission Rebuilders*, 275 Neb. 369, 746 N.W.2d 362 (2008). We have recognized that either the community where the injury occurred or the community where the employee has moved can serve as the hub community to establish loss of earning power. If a claimant in good faith relocates to a new community, the new community may serve as the hub community from which to assess the claimant's loss of earning power. See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[18] In *Money*, the employee moved from the Lincoln, Nebraska, area to the smaller community of Table Rock, Nebraska. The employer claimed that the employee should have to prove loss of earning capacity in both the Lincoln and Table Rock areas. We stated that "the first step in identifying the relevant labor market for assessing a worker's loss of earning power is to determine whether the hub is where the injury occurred, or where the claimant resided when the injury occurred, or where the claimant resided at the time of the hearing." *Id.* at 611, 748 N.W.2d at 59. We concluded that because the employee's move was for a legitimate purpose as determined by the compensation court, her hub community was Table Rock and not Lincoln.

In *Giboo, supra*, we confronted the question of what market to use to measure earning capacity when an employee, after suffering an injury while living and working in one

community, relocates to a new community with fewer employment opportunities. The employer urged the court to adopt a rule that would include both the market where the injury occurred and any new market where the employee relocates as hub communities. Having surveyed the various approaches other jurisdictions used to identify the hub community, we concluded that the best rule was one which regarded the employee's new community as the hub community, provided that the move was made for legitimate reasons. This was the hub community used by the court in the case at bar.

Giboo did not address whether the place of the injury could be used as the hub community if no reliable data was available regarding the place where the employee has moved.

> Courts and commentators uniformly agree that a "labor market" does not refer to a single community, but encompasses employment opportunities within a reasonable geographic area. It would seem, therefore, that the first step in identifying a labor market is to identify "the hub from which the spokes of a 'reasonable geographic area' radiate, whether it [is] from the place the injury occurred, the place the claimant resided at the time the injury occurred, or the place the claimant resides at the time of [the workers' compensation] hearing."

Id. at 375, 746 N.W.2d at 368. *Giboo* required the employee to show loss of earning capacity based only on the new location where the employee lived at the time of the hearing. However, we did not conclude that such location would be the only location allowed to show loss of earning capacity.

[19] The Act is designed to compensate an injured worker for the loss of earning capacity caused by the injury. *Powell v. Estate Gardeners*, 275 Neb. 287, 745 N.W.2d 917 (2008). As a general rule, the Act should be construed to accomplish its beneficent purposes. *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012). Undocumented workers are eligible for permanent total disability payments, and a vocational specialist can 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. See *Moyera v. Quality Pork Internat.*, 284

Neb. 963, 825 N.W.2d 409 (2013). When an undocumented worker in good faith returns to his or her country of origin, the workers' compensation court in assessing the worker's permanent impairment of earning capacity should initially determine which location is the proper hub community.

[20] If sufficient credible data exists for a determination of the loss of earning capacity in the community of origin and the undocumented worker has moved for legitimate purposes, and not to increase workers' compensation benefits, then the community of origin may serve as the hub community. See, *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008); *Giboo v. Certified Transmission Rebuilders*, 275 Neb. 369, 746 N.W.2d 362 (2008).

If the undocumented worker has returned to the worker's country of origin but no reliable data is available in his place of origin, the place where the injury occurred can be considered for the purpose of a determination of impairment of earning capacity.

Visoso was unable to present competent evidence regarding his percentage of loss of earning capacity because there was no credible evidence upon which to base a determination. In order to achieve the purposes of the Act, the compensation court should have allowed Visoso the opportunity to attempt to prove permanent loss of earning capacity using the data from the place where the injury occurred. Because neither vocational expert was able to provide sufficient credible evidence for a determination of Visoso's loss of earning capacity in Mexico, the court should have permitted Visoso to use the place of injury for such determination, if any. Failure to do so frustrated the purpose of the Act.

We do not require an employee to prove loss of earning capacity in two locations and have allowed an injured employee to show loss of earning capacity in the location to which the employee moved. See *Giboo, supra*. The opposite situation should also apply. If there is a lack of reliable and competent data available regarding Chilpancingo, Visoso should be allowed to use Schuyler, where the injury occurred, for purposes of asserting his claim for permanent indemnity.

Some states have passed legislation to address compensation claims of undocumented aliens who reside outside the United States. The Court of Appeals of New York has noted that New York's Workers' Compensation Law § 17 provided, in pertinent part, that "'[c]ompensation . . . to aliens not residents or about to become nonresidents of the United States or Canada, shall be the same in amount as provided for residents.'" *Ramroop v. Flexo-Craft Printing, Inc.*, 11 N.Y.3d 160, 168, 896 N.E.2d 69, 72, 866 N.Y.S.2d 586, 589 (2008) (emphasis omitted). The court stated, "[S]ection 17 is concerned solely with the treatment of aliens (not just undocumented aliens) who reside, or are about to reside, somewhere other than the United States or Canada." *Id.* The statute was meant to ensure that an alien's relocation outside the United States would not result in diminished compensation to the alien. *Id.*

In *Republic Waste Services, Ltd. v. Martinez*, 335 S.W.3d 401 (Tex. App. 2011), the Court of Appeals of Texas, in a wrongful death proceeding, allowed a jury to use Texas wages, rather than El Salvador wages, to determine loss of future earnings to a deceased worker. The deceased worker was an immigrant living and working illegally in Texas. He was killed in the scope of his employment, and his wife sought death benefits. The court concluded that the loss of future earnings of the immigrant was to be determined based on the income the immigrant was making at his job in the United States, rather than wages he would have made had he returned to El Salvador. *Martinez* was a wrongful death proceeding, but the reasoning of the court is analogous because data regarding wages did not exist in Visoso's country of origin.

In *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013), we allowed permanent indemnity even though the undocumented worker remained in the United States. We rejected the employer's argument that Moyera was not entitled to benefits for permanent indemnity because of his illegal residency. Because the Act made no distinction between legal and illegal aliens, we concluded it should be broadly construed to accomplish its beneficent purpose. Both before and after an employee has reached 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 in employability or impairment of earning power or earning capacity. *Moyera, supra*. An employee's illegal residence or work status does not bar an award of indemnity for permanent total loss of earning capacity. *Id*.

Other states have held that undocumented employees are covered by their state's workers' compensation statutes. See *Moyera, supra*. In *Economy Packing v. Illinois Workers' Comp.*, 387 Ill. App. 3d 283, 901 N.E.2d 915, 327 Ill. Dec. 182 (2008), the court held that an injured undocumented worker who was totally and permanently disabled was eligible for permanent total disability payments even if the worker was an undocumented alien who remained illegally in the United States. The court allowed evidence of loss of earning capacity from the place where the injury occurred.

Visoso moved from Schuyler to Chichihualco during the time his workers' compensation action was pending. And because of such move, neither vocational expert was able to provide evidence helpful to the compensation court regarding Visoso's loss of earning power in Mexico. Stricklett admitted she could not perform a permanent loss of earning power analysis. Long was also unable to offer reliable foundational information. Had Visoso remained in the United States, Schuyler would have been used as the hub community.

[21] Although the compensation court suspected that Visoso had some permanent disability, in the absence of a credible permanent loss of earning power evaluation from a professional vocational rehabilitation counselor, the court was left to guess or speculate the amount of permanent indemnity. A workers' compensation award cannot be based on possibility or speculation, and if an inference favorable to the claimant can be reached only on the basis thereof, then the claimant cannot recover. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

However, there was evidence that both experts were able to give a credible evaluation of Visoso's loss of earning capacity if the place of Visoso's injury was considered. Stricklett had performed at least two analyses using the Schuyler area as the

hub community. Allowing Visoso the opportunity to prove his loss of earning capacity based on the data of the community where the injury occurred achieves the goal of the Act to compensate employees for on-the-job injuries.

Allowing an undocumented worker to establish loss of earning capacity based on data in the community where the injury occurred reduces the incentive to hire undocumented workers so as to avoid paying workers' compensation benefits. If an employer were able to end its obligation to the impaired worker because no reliable data existed in the undocumented worker's country of origin, employers would be encouraged to hire undocumented workers to avoid paying workers' compensation benefits. This would result in an employment situation of hire, fire, report, deport, and forget the employee. This type of result conflicts with the purposes of the Act.

If an undocumented worker returns to his or her country of origin in good faith and there is sufficient and credible data to establish proper foundation for a loss of earning capacity analysis, then the community of origin may be considered as the hub community. Because no data existed for Visoso's hub community in Mexico, then the place where the injury occurred, Schuyler, should serve as the hub community.

There was evidence in the record that both experts were able to make a credible determination of loss of earning power using Schuyler as the hub community. Because of the lack of credible data from Visoso's hub community in Mexico, the compensation court should have considered Visoso's loss of earning capacity based on Schuyler as the hub community. Allowing such community to be considered would permit Visoso to attempt to meet his burden to establish permanent disability benefits.

CONCLUSION

Cargill petitioned to end payment of temporary total disability. It had the burden of proof in establishing that Visoso had reached maximum medical improvement. The compensation court correctly determined that Cargill sustained its burden, and we affirm the court's conclusion on that issue.

Visoso retained the burden to prove his permanent disability and the impairment of his earning capacity. Visoso had returned to his country of origin, and the compensation court concluded there was no credible evidence which could be used to determine his loss of earning capacity in his new community. When no credible data exists for the community to which the employee has relocated, the community where the injury occurred can serve as the hub community. Therefore, we remand the cause to the Workers' Compensation Court to allow Visoso to attempt to establish permanent impairment and loss of earning capacity using Schuyler as the hub community.

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

CASSEL, J., not participating.

LARRY BLASER ET AL., APPELLEES, V. COUNTY OF MADISON, NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT.

826 N.W.2d 554

Filed February 22, 2013. No. S-12-558.

1. **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 factual findings of the trial court unless they are clearly wrong.
2. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
3. **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.
4. **Negligence: Appeal and Error.** Whether a defendant breaches a duty is a question of fact for the fact finder, which an appellate court reviews for clear error.
5. **Statutes.** Statutory interpretation presents a question of law.
6. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
7. **Appeal and Error: Words and Phrases.** Plain error is error uncomplained of at trial and is 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.

8. **Judges: Recusal.** A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.
9. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
10. **Negligence.** It is for the fact finder in a negligence case to determine, on the facts of each individual case, whether or not the evidence establishes a breach of duty.
11. **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.
12. **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.
13. **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.
14. **Statutes.** Statutes which effect a change in the common law are to be strictly construed.
15. **Negligence.** The existence of a duty serves as a legal conclusion that an actor must exercise such degree of care as would be exercised by a reasonable person under the circumstances.
16. ____. Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.
17. **Pleadings.** The issues in a case are framed by the pleadings.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Reversed and remanded with directions.

Vincent Valentino for appellant.

Todd B. Vetter, of Fitzgerald, Vetter & Temple, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Larry Blaser, Terry McCaw, and Patricia McCaw, the appellees, brought this negligence action in the district court for

Madison County along with Sharon Blaser against the County of Madison, Nebraska (the County), the appellant, under the Political Subdivisions Tort Claims Act after Larry and Terry were injured in a single-vehicle accident in which Larry drove into a washout on a vacated county road. The appellees alleged that the County was negligent by failing to maintain the "Road Closed" warning sign. Following trial, the district court found the County liable for negligence and, after finding Larry 40-percent contributorily negligent, entered judgment against the County.

On appeal, the County claims that it was plain error for the first judge, who recused himself, to name a second judge as the successor judge. With respect to the merits, the County claims that although it may have had an obligation to warn travelers of the washout, the district court erred when it concluded that the County had a "duty" to maintain the vacated road and breached this duty. The County claims that it did not have "actual" or "constructive" knowledge its road closed warning sign was down on the day of the accident and that the district court erred when it failed to determine whether the County retained its sovereign immunity, which determination would resolve this issue.

We find no plain error with respect to naming the second judge. We determine that the district court erred when it concluded that the County had a duty to maintain the vacated road. We also determine that the district court erred when it determined that the issue whether the County had actual or constructive knowledge that its warning sign was down was a "non-issue" and when it failed to determine whether there was merit to the County's reliance on alleged retention of sovereign immunity under Neb. Rev. Stat. § 13-910(9) (Reissue 2007). We reverse, and remand this matter to the district court with directions, inter alia, to determine whether the County had actual or constructive knowledge that its road closed sign at the north end of the vacated road was not functioning properly on the day of the accident and whether the County had a reasonable amount of time to remedy the problem in order to determine whether or not the County retained its sovereign immunity.

STATEMENT OF FACTS

These parties were previously before us in case No. S-11-1048. In that prior case, the County brought an appeal based upon the same underlying facts and record described below. On June 6, 2012, we dismissed that previous appeal for lack of jurisdiction pursuant to Neb. Ct. R. App. P. § 2-107(A)(2) (rev. 2012) due to the absence of a final, appealable order. Although Sharon Blaser was an appellee in case No. S-11-1048, the district court's order filed September 15, 2011, had not disposed of Sharon's claims. Following our dismissal of case No. S-11-1048, the district court dismissed Sharon's claims by an order filed June 21, 2012. The County again appealed, and this is the appeal currently before us.

On November 9, 2008, Larry was driving his 1996 Ford Ranger pickup southbound on the vacated road, 545th Avenue, and Terry was riding as a passenger. While traveling on the vacated road, Larry and Terry drove into a washout, or a large hole in the middle of the road, approximately 12 feet wide and 8 feet deep. As a result of the accident, the pickup truck was damaged, Larry sustained mild injuries, and Terry sustained severe injuries. Patricia cared for Terry after the accident. This accident gives rise to this case.

According to the trial record, on October 19, 2004, the County's board of commissioners adopted resolution No. 2004-78, which vacated a 1-mile stretch of 545th Avenue, a north-south roadway, between 845th Road and 846th Road. However, the County specifically qualified the vacation and stated that the County retained a right-of-way over the vacated road subject to any easements of record. The intersection of 545th Avenue and 846th Road is the north end of the vacated portion of the road, and the intersection of 545th Avenue and 845th Road is the south end. Additionally, 846th Road is the county line between Madison County and Pierce County, with Madison County lying to the south.

In April 2005, after the County had vacated the road, road closed signs were placed at the north and south ends of the vacated road. Larry and Terry testified that on the day of their accident, they did not observe any road closed signs. The deputy who investigated Larry and Terry's accident stated that

a road closed sign at the north end of the vacated road had been unbolted and laid on the ground next to the upright post and was not visible from the road on November 9, 2008, the day of Larry and Terry's accident. Gary Drahota, a man who owned land and lived in the area, stated that he did not see a road closed sign at the north end of the vacated portion of the road at the intersection of 545th Avenue and 846th Road on October 27, 2008. Another man, who owns land surrounding the vacated road, testified that he recalled seeing a road closed sign at the north end of the vacated road a few days before Larry and Terry's accident.

A couple of weeks prior to the accident at issue in this case, another accident occurred involving the same washout on the vacated road. Between October 27 and October 30, 2008, Drahota notified law enforcement that he had been traveling on the vacated road when he found an abandoned vehicle in the washout. On October 30, a deputy sheriff for the County investigated this report and found the abandoned vehicle in the washout. He approached the abandoned vehicle from the south end of the vacated road, traveling north. On November 3, as part of his investigation, he discovered that one of the occupants of the abandoned vehicle had been injured as a result of driving into the washout and had sought treatment at a hospital. However, the deputy's subsequent attempts to contact the owners of the abandoned vehicle were unsuccessful. The abandoned vehicle was removed from the washout before the time of the accident at issue in this case, but the deputy testified that he did not know exactly when or how the abandoned vehicle was removed from the washout.

Sometime after the County was notified of the abandoned vehicle and before Larry and Terry's accident on November 9, 2008, the County's highway superintendent was instructed to investigate whether the signs on the vacated road were functioning properly. He testified that while he did inspect the south end of the vacated portion of 545th Avenue, he did not actually inspect the north end of the vacated portion of the road at the intersection of 545th Avenue and 846th Road, through which Larry and Terry traveled heading south prior to the accident. Regarding the north portion of the vacated

road, the superintendent stated he positioned himself 2 miles north of the county line and looked to the south. He testified that he could not see any signs from his vantage point of 2 miles away.

On December 14, 2009, the appellees along with Sharon filed their first amended complaint, bringing this negligence action against the County under Nebraska's Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2007). The appellees and Sharon alleged that the County was negligent because it failed to "correct the malfunction, destruction, or any unauthorized removal of the Road Closed signed [sic] when it had actual and constructive knowledge and notice of the malfunction, destruction, and or [sic] removal of the sign." Larry alleged that he sustained damages for personal injuries, medical expenses, damage to his vehicle, loss of income, loss of earning capacity, past and future physical pain and mental suffering. Terry alleged that he sustained damages for personal injuries, past and future medical expenses, past and future physical pain and suffering, loss of income, and loss of earning capacity. Sharon and Patricia both alleged that they sustained a loss of care, comfort, companionship, assistance, and services of their spouses as a proximate result of the negligence of the County.

In its amended answer, the County denied many of the appellees' and Sharon's claims. However, the County admitted paragraph 6 of the amended complaint, which alleged that as part of the investigation by the Madison County sheriff's office, the sheriff's office located a road closed sign that had been knocked over. The record shows that the investigation occurred on November 9, 2008, the day of the accident. The County affirmatively asserted that it is immune from suit under various provisions of the Political Subdivisions Tort Claims Act and asserted the affirmative defenses of contributory negligence, assumption of the risk, and alternative safe route. The defense under the Political Subdivisions Tort Claims Act which has been asserted in this appeal is found at § 13-910(9), which generally provides that the political subdivision retains sovereign immunity from "[a]ny claim arising out of the malfunction, destruction, or unauthorized removal

of any traffic or road sign . . . unless it is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal."

The County filed a motion for summary judgment, and the appellees and Sharon filed a motion for partial summary judgment. On July 14, 2010, the first judge entered an order in which it granted the appellees' and Sharon's motion for partial summary judgment, overruled the County's motion for summary judgment, and left for trial the issues of contributory negligence, proximate causation, and damages.

The County then filed a motion for recusal which the appellees and Sharon did not oppose. On January 4, 2011, the first judge entered an order recusing himself from the matter and assigned the case to a second judge whom he identified by name for further disposition. No party challenged this order at the time it was entered, or throughout the trial-level proceedings. In response to the County's motion, the second judge vacated the prior order which had granted the appellees' and Sharon's motion for partial summary judgment, and the case proceeded to trial.

On September 15, 2011, after a bench trial before the second judge, the district court entered an order finding that the County had a duty toward the appellees, breached its duty, and was liable for damages. The court rejected the County's defenses of immunity under various provisions of the Political Subdivisions Tort Claims Act and its other defenses except contributory negligence. After finding Larry 40-percent contributorily negligent, the court entered judgment in favor of the appellees. The court awarded judgments of $6,093.71 to Larry, $365,383.66 to Terry, and $12,000 to Patricia. The court's order did not address whether or not it was awarding any damages to Sharon; Sharon's claims were later dismissed.

Considerable argument occurred in the district court regarding the duty, if any, owed to the appellees and the particular way the County could meet its duty. The appellees alleged, and the evidence was directed at whether, the County had failed to meet its obligation to warn travelers by failing to maintain

its warning sign. In its order following trial, the district court relied on the reasoning in *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999), *abrogated, A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010), and concluded that the County had a "duty" to remedy the dangerous condition of the vacated road. The court found that the condition of the road was the proximate cause of the accident and injuries. Elsewhere in the district court's order, the court stated, "The evidence is in dispute as to the existence and position of a sign posted by the [County] at the intersection of 545th Avenue and 846th Road . . . . This is a non-issue . . . ." The district court did not make any findings as to whether the County's warning sign at the northern point of the vacated road was down and whether the County had actual or constructive knowledge that the sign was down or had a reasonable time to correct it.

On November 10, 2011, the district court denied the County's motion for new trial. The County appealed the district court's September 15 order and its November 10 order denying the motion for new trial. As stated earlier, that initial appeal, case No. S-11-1048, was dismissed for lack of jurisdiction and the rulings following our remand have disposed of all claims of all parties. The County appeals.

ASSIGNMENTS OF ERROR

The County claims, consolidated and restated, that (1) plain error was committed when the first judge, who recused himself from the case, appointed the second judge; (2) the district court erred when it determined that the County had a "duty" to repair the vacated road; (3) the district court erred when it determined that the County breached the duty to repair the road; and (4) the district court erred when it concluded that the sovereign immunity defense under §13-910(9) was not applicable and failed to determine whether the County had actual or constructive knowledge that the warning sign was down and failed to correct the problem within a reasonable time. In view of our disposition, we need not reach the County's other assignments of error.

STANDARDS OF REVIEW

[1] In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012).

[2,3] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012). When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court. *Id.*

[4] Whether a defendant breaches a duty is a question of fact for the fact finder, which an appellate court reviews for clear error. *Downey v. Western Comm. College Area, supra.*

[5] Statutory interpretation presents a question of law. *Id.*

ANALYSIS

Judge Disqualification.

The County moved for recusal of the first judge to whom the case was initially assigned. The first judge granted the motion and appointed the second judge as the successor judge. The County did not move to recuse or disqualify the second judge at the trial level. The County states in its brief on appeal that the "issue raised is whether [the first judge's] reassignment action was plain error requiring reversal of [the second judge's] subsequent trial order." Brief for appellant at 41. We do not find plain error and reject this assignment of error.

[6] The County acknowledges that it did not seek disqualification of the second judge at the trial level. We have stated that

> the rule that it is generally too late to raise the issue of disqualification after the matter is submitted for decision rests on the principle that a party may not gamble on a favorable decision. This principle does not apply when the facts constituting the disqualification are unknown, because no gamble could have been purposefully made. Instead, the issue of disqualification is timely if submitted

> at the "'earliest practicable opportunity' after the disqualifying facts are discovered."

Tierney v. Four H Land Co., 281 Neb. 658, 665, 798 N.W.2d 586, 592 (2011) (quoting *Urias v. Harris Farms, Inc.*, 234 Cal. App. 3d 415, 285 Cal. Rptr. 659 (1991)). We also stated in *Tierney* that

> [a] party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings. [Under these facts, o]nce a case has been litigated, an appellate court will not . . . disqualify a judge and give litigants "'a second bite at the apple.'"

281 Neb. at 664-65, 798 N.W.2d at 592 (quoting *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010)). The County waived this disqualification issue by not raising it at the earliest possible time at the trial level.

[7] Having waived the disqualification issue, the County nevertheless asks us to disqualify the second judge and reverse his order following trial based on plain error. We have stated that plain error is error uncomplained of at trial and is 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 *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). We do not find plain error.

[8] The Nebraska Revised Code of Judicial Conduct requires that "[a] judge shall hear and decide matters assigned to the judge, except when disqualification is required . . . ." Neb. Rev. Code of Judicial Conduct § 5-302.7 (previously found at Neb. Code of Judicial Conduct § 5-203(B)(1)). The code goes on to state that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Neb. Rev. Code of Judicial Conduct § 5-302.11(A) (previously found at Neb. Code of Judicial Conduct § 5-203(E)). We have previously stated that a trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person

who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. *Tierney, supra*.

The County suggests that the rulings in the order after trial are similar to those of the first but disqualified judge and that they thus suggest an implicit bias toward an adherence to the earlier rulings and perhaps a failure of impartial examination of the law. The record shows, however, that the second judge, as successor judge, vacated the first judge's partial summary judgment ruling and that the matter proceeded to full trial. The reversible error which is found below in this opinion, i.e., the second judge's erroneous finding that the County's knowledge of the condition of its warning signs was a "non-issue," was unique to the second judge. We find nothing in the record that indicates under an objective standard of reasonableness that the second judge's impartiality was subject to question or that his appointment as successor judge by the first judge has an appearance of impropriety.

We determine that it is not plainly evident that the first judge's appointment of the second judge is an error that if left uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. The second judge was the only remaining resident district judge in the judicial district, and his appointment did not result in an appearance of impropriety. Accordingly, the County's first assignment of error is without merit.

The County's Duty, Breach of Duty, and Sovereign Immunity.

The County claims that the district court erred when it concluded that the County had a "duty" to repair or remedy the washout in the vacated road and further erred when it determined that the County breached this duty, proximately causing damage to the appellees. The County claims that the district court erred when it failed to consider its sovereign immunity defense under § 13-910(9). In this regard, although the County concedes on appeal that its warning sign was not posted on the day of the accident, it asserts that it did not have actual or

constructive knowledge of this fact and that the district court erred when it failed to resolve the issues of whether the County had constructive knowledge of the status of the road closed sign and whether the County failed to correct this problem within a reasonable time. As explained below, we analyze the issue regarding duty and then the sovereign immunity defense and find merit to these assignments of error. We reverse the judgment entered in favor of the appellees and remand the cause with directions to the district court to make findings regarding the warning sign issue as these facts relate to the County's claim of sovereign immunity under § 13-910(9) and to consider defenses as may be appropriate and enter orders accordingly. Because the County's motion for new trial essentially encompassed its challenges to the order after trial, our analysis focuses on the reversible errors in that order. These errors also require reversal of the order denying the motion for new trial.

[9,10] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012). See, also, *Connelly v. City of Omaha*, 284 Neb. 131, 140, 816 N.W.2d 742, 753 (2012) (stating that 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"). The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Martensen, supra*. But it is for the fact finder to determine, on the facts of each individual case, whether or not the evidence establishes a breach of that duty. *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). In *A.W.*, we abandoned the risk-utility test and adopted the duty analysis in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010). More recently, in *Martensen, supra*; *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012); and *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011), we again followed the duty analysis in the Restatement (Third), *supra*.

In its order after trial, the district court noted that the County retained a right-of-way in the vacated road and that the County was aware of the road's use and its dangerous condition. The district court reasoned that because of these facts, the County had a "duty" to remedy the condition. The district court specifically found that the unremedied condition of the road was the proximate cause of the accident. Evidently as a result of this determination, the district court further determined that the issues surrounding the warning sign on the day of the accident were "non-issue[s]." In its order, the district court indicated that evidence regarding the County's warning sign was in dispute, but it made no finding regarding whether the warning sign was up or down on the day of the accident and no finding whether the County had actual or constructive knowledge of this fact and whether the County had a reasonable time within which to remedy this problem.

The district court's legal conclusion that the County had a "duty" to repair the vacated road is inconsistent with the statutes, and thus, as the County claims, the court erred in making this conclusion. The County makes several arguments regarding duty. We reject the County's suggestion relying on Neb. Rev. Stat. § 39-1401(2) (Reissue 2008) that the road lost its public character, absolving the County of responsibility, when the road was vacated with retention of the County's right-of-way. However, we agree that the County did not have a duty to maintain the road.

[11-13] We have stated that 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. *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012). 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. *Id.* 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. *Pittman v. Western Engineering Co.*, 283 Neb. 913, 813 N.W.2d 487 (2012).

With these general rules of statutory construction in mind, we turn to the applicable statutes. Neb. Rev. Stat. § 39-1402 (Reissue 2008) describes the scope of the authority of a county board regarding county roads. Section 39-1402 provides:

> General supervision and control of the public roads of each county is vested in the county board. The board shall have the power and authority of establishment, improvement, maintenance and abandonment of public roads of the county and of enforcement of the laws in relation thereto as provided by the provisions of Chapter 39, articles 14 to 20, except sections 39-1520.01 and 39-1908.

Neb. Rev. Stat. § 39-1404 (Reissue 2008) provides in effect that public roadways ordinarily remain public and do not lose their public character; nor is that character diminished by occupation, estoppel, or other similar acts. Section 39-1404 provides:

> No privilege, franchise, right, title, right of user, or other interest in or to any street, avenue, road, thoroughfare, alley or public grounds in any county, city, municipality, town, or village of this state, or in the space or region under, through or above any such street, avenue, road, thoroughfare, alley, or public grounds, shall ever arise or be created, secured, acquired, extended, enlarged or amplified by user, occupation, acquiescence, implication, or estoppel.

We read §§ 39-1402 and 39-1404 together with Neb. Rev. Stat. § 39-1725 (Reissue 2008), which provides that a county board can vacate a road completely or with qualifications such as retention of a right-of-way. Section 39-1725 provides in relevant part:

> In the event that the county board decides to vacate or abandon, *its resolution shall state upon what conditions, if any, the vacation or abandonment shall be* qualified and particularly whether or not the title or right-of-way to any vacated or abandoned fragment or section of road shall be sold, revert to private ownership, or remain

> in the public. If the county board fails to specify in a resolution as to the disposition of right-of-way, and if there shall be nonuse of such right-of-way for any public purpose for a continuous period of not less than ten years, the right-of-way shall revert to the owners of the adjacent real estate, one-half on each side thereof. When the county vacates all or any portion of a road, the county shall, within thirty days after the effective date of the vacation, file a certified copy of the vacating resolution with the register of deeds for the county to be indexed against all affected lots.

(Emphasis supplied.)

A roadway is generally said to be "vacated when its existence is terminated by direct action of public authorities." 39A C.J.S. *Highways* § 112 at 613 (2003). Such direct action is authorized by § 39-1725. "Abandonment" of a road or highway by nonuse or otherwise is generally viewed as distinguishable from "vacation," the latter of which is accomplished by affirmative action of a governing body. 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 173 at 756 (2008). See, also, *id.*, § 149. As it applies to state highways, "[a]bandon" means "to reject all or part of the [Department of Roads'] rights and responsibilities relating to all or part of a fragment, section, or route on the state highway system." Neb. Rev. Stat. § 39-1302(1) (Reissue 2008). The term "vacate" is not defined in § 39-1302.

A "[r]ight-of-way" is defined in § 39-1302(31) as "land, property, or interest therein, usually in a strip, acquired for or devoted to a road, street, or highway." Although this definition of the term "right-of-way" pertains to state highways, we apply it to the county road involved in this case.

Under the statutes, a county board is authorized to take varied actions with respect to its rights-of-way all of which demonstrate the public character of the rights-of-way. Under Neb. Rev. Stat. § 39-301 (Reissue 2008), the county board can grant permission to a landowner to divert water from one area to another along a county highway right-of-way. Under Neb. Rev. Stat. § 39-309 (Reissue 2008), the county board may remove trees and hedges planted by landowners bordering the county's

right-of-way. Neb. Rev. Stat. § 39-1816 (Reissue 2008) confers power on the county board to restrict parking on the county's right-of-way, and parking in the right-of-way in violation of no parking or restricted parking signs is punishable as a Class V misdemeanor. Neb. Rev. Stat. § 39-1702 (Reissue 2008) authorizes the county board to acquire land in fee simple or a lesser estate, and such acquired land may be a right-of-way. Taken together, these statutes show the powers of the county board with respect to the county's rights-of-way. Thus, notwithstanding the qualified vacation of the road, the character of the rights-of-way remains public.

In reading these statutes sensibly, we consider the general context in which they appear, which pertains to public roadways. It has been observed that generally, "[o]nce established, a public highway does not lose its character as a public road unless it is either vacated by the authorities in the manner prescribed by statute or abandoned." 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 148 at 736 (2008). See, also, *Board of County Com'rs v. Kobobel*, 74 P.3d 401, 406 (Colo. App. 2002) (stating that "[o]rdinarily, public highways remain public unless and until vacated or abandoned by some appropriate action"). It has also been noted:

> The discontinuance of a public highway is not favored in the law. Once it is shown that a road is a public highway, the highway is presumed to exist until it is discontinued. The general rule is "once a highway, always a highway," though of course this maxim gives way to the rules of law concerning the abandonment or vacation of a highway.

39 Am. Jur. 2d, *supra*, § 150 at 738-39.

[14] Nebraska statutes are consistent with these statements reflecting the common law. The above-quoted Nebraska statutes show that a county road is a public road which tends to remain public, see § 39-1404, but under § 39-1725, a county can completely vacate a road or there may be a vacation with a qualification, such as the retention of a right-of-way. It has been noted that "statutes governing the vacation of a public road are in derogation of the common law [concerning a public entity's continuing ownership and responsibilities

for roadways] and must be strictly construed." 39 Am. Jur. 2d, *supra*, § 148 at 737. We have recognized that statutes which effect a change in the common law are to be strictly construed. *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

For completeness, as we noted above, the County briefly refers us to one additional statute, § 39-1401(2), which provides that a public road is a road which has not been vacated. The County suggests that under this statute, the vacated road in this case lost its public character, thus relieving the County of responsibility. We reject this argument. Contrary to the County's suggestion, we read § 39-1401(2) in conjunction with the other statutes considered above, and thus, we believe that for a road to lose its public character under § 39-1401(2), there must be an unqualified vacation of the road.

At issue in this case are statutes governing the public roadways in general and statutes governing the vacating of public roadways in particular. We must read the series of statutes pertaining to county roads conjunctively so that the different provisions are consistent, harmonious, and sensible. *Pittman v. Western Engineering Co.*, 283 Neb. 913, 813 N.W.2d 487 (2012). In so doing, we read the relevant statutes to mean that a county board controls and supervises the public roads in its county. § 39-1402. Under § 39-1725, the county board may take steps to vacate a road completely, in which case the roadway would lose its public character, § 39-1401(2), or to vacate a road with qualifications such as retention of the right-of-way, in which case the road with the right-of-way retains its public character but requires responsibility by the county commensurate with its status. Thus, with respect to its public roads, we conclude that the county had a duty to exercise such degree of care as would be exercised by a reasonable county in connection with its public road which has been vacated but for which the county has retained a right-of-way.

[15,16] As a general matter, the existence of a duty serves as a legal conclusion that an actor must exercise such degree of care as would be exercised by a reasonable person under the circumstances. *Martensen v. Rejda Bros.*, 283 Neb. 279,

808 N.W.2d 855 (2012). We have stated that "'[d]uty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.'" *Id.* at 287, 808 N.W.2d at 863 (quoting *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010)). We have recognized that "'whether a duty exists is a policy decision.'" *Id.* (quoting *A.W., supra*).

In the present case, the County vacated 545th Avenue between 845th Road and 846th Road with the qualification that it retained a right-of-way pursuant to § 39-1725. In this regard, the record shows that on October 19, 2004, the County's board of commissioners vacated this portion of 545th Avenue by resolution No. 2004-78, which provided in part, "NOW THEREFORE, BE IT RESOLVED by the Board of Commissioners of Madison County, Nebraska that the county road described below is hereby vacated, and that the County shall retain the Right-of-Way subject to any easements of record, which shall remain in full force and effect."

As of November 9, 2008, the date of the accident at issue in this case, the County still retained this right-of-way, and it is undisputed that there was occasional public use. Under § 39-1725, had there been no public use of the right-of-way for a period of 10 continuous years after the resolution, the vacated road would have reverted to the adjacent landowners. The reversion provision in § 39-1725 lends support to the proposition that in the absence of reversion, the authority over the vacated road remained with the County and the road remained public in character.

Summarizing what we have noted above, because the County retained a right-of-way in the vacated road, we conclude that the County had the duty to do what a reasonable county would do having vacated a road but retained a right-of-way. The district court erred as a matter of law when it failed to reach this legal conclusion regarding duty. Perhaps using the word "duty" in a casual sense, when the district court determined that the County had a "duty" to remedy the condition of the road, it substituted a factual proposition regarding the manner in which a duty can be met or breached in place of the legal conclusion as to the existence of the duty.

In its order after trial, the district court relied on *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999), which involved, inter alia, allegations of improper maintenance of a state highway and no allegations of vacation or abandonment. Referring to *Woollen*, the district court concluded that "by retaining control of the road through retention of the right-of-way, [the County] had a duty . . . to remedy the condition [of the vacated road]." The facts in *Woollen* are distinguishable, and the reasoning in *Woollen* has been abrogated by the jurisprudence set forth in *A.W., supra*. Thus, the district court's duty analysis relying on *Woollen* was flawed. What the district court characterized as the County's legal "duty" to remedy the road was instead the factual manner by which the County could arguably meet or breach its duty. However, as explained below, the manner in which the County could meet its duty in this case was to maintain warning signs it had chosen to install rather than remedying the washout. Although there was a fleeting reference to road maintenance in closing argument, neither the controlling pleadings nor the evidence was directed at the manner in which the County might maintain the vacated road.

The statutes do not specify the responsibilities of the County for those roads which are vacated by an act of its board of commissioners but with the qualification that the County retains a right-of-way. A road that has been vacated with a qualification falls between a road that has been completely vacated and a road untouched by vacation in any degree. Based on the statutes, the logical conclusion is that a county's responsibilities regarding a road that has been vacated with a qualification are less than the obligation to fully maintain, as with a public road untouched by any degree of vacation, but more than no obligations, as with a completely vacated road. Thus, we turn to the nature of the County's responsibilities in this case and whether the County's conduct breached its duty to exercise the degree of care that would be exercised by a reasonable county under the circumstances.

In order to recover, the appellees were required to establish that the County breached its duty owed to them. See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907

(2010). The question of whether the County's conduct breached its duty regarding a vacated road in which it retained a right-of-way is a question of fact. See *id.* at 210-11, 784 N.W.2d at 913 (stating that "it is for the fact finder to determine, on the facts of each individual case, whether or not the evidence establishes a breach of . . . duty").

[17] The issues in a case are framed by the pleadings. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004). In their first amended complaint at paragraph 10, the appellees allege that the particular manner in which the County breached its duty was by

> failing to correct the malfunction, destruction, or any unauthorized removal of the Road Closed signed [sic] when it had actual and constructive knowledge and notice of the malfunction, destruction, and or [sic] removal of the sign, which sign would have notified the traveling public that the section of road was vacated and contained dangers thereon. [The County violated] the Nebraska Political Subdivisions Tort Claims Act, §13-910(9).

See, also, paragraphs 6 and 8 of the complaint.

In paragraph 19 of its amended answer to the first amended complaint, the County affirmatively alleged that it was immune from suit under, inter alia, § 13-910(9). Section 13-910(9) of the Political Subdivisions Tort Claims Act generally provides that the political subdivision retains its sovereign immunity from "[a]ny claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign . . . unless it is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal." The second sentence of § 13-910(9) continues, "Nothing in this subdivision shall give rise to liability arising from an act or omission of any political subdivision in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the political subdivision." There is no indication in this record that the County removed the warning sign, and the County does not assert an absence of liability under the second sentence of § 13-910(9).

We have previously considered § 13-910(9) and its related provisions. We have observed that the decision to install a traffic control device is ordinarily a discretionary function and that a political subdivision is immune from suit with respect to such decision. See *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002). See, also, § 13-910(2). See, additionally, Neb. Rev. Stat. § 60-6,121 (Reissue 2008) (providing that local authorities shall place traffic control devices "as they deem necessary"). In the instant case, the County exercised its discretionary function by choosing to install the road closed warning sign at the north end of the vacated road. Under § 60-6,121, once the political subdivision elects to install a device, the device must conform to the Manual on Uniform Traffic Control Devices. See *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005).

The appellees alleged that having chosen to erect a warning sign, the County was responsible to maintain it, and that the County's failure to maintain the warning sign gave rise to liability under § 13-910(9). Evidence was presented by the appellees to support these allegations, and evidence was presented by the County to disprove these allegations. The County's evidence focused on its alleged lack of notice that the sign was down on the day of the accident. Under Neb. Rev. Stat. § 81-8,219(9) (Reissue 2008), which is the statute applicable to the state equivalent to § 13-910(9), which is the statute applicable to political subdivisions, we have recognized that whether the public entity had notice of a malfunction and whether it did not correct the malfunction within a reasonable time are findings of fact. See *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007), *modified on other grounds*, 274 Neb. 267, 759 N.W.2d 113. Given the law and the record, these critical facts should have been decided by the district court as the fact finder in order to determine whether the County's defense under § 13-910(9) had merit.

The district court stated that the sign-related issue was a "non-issue" based on the district court's erroneous legal conclusion that, in any event, the County had a duty to repair the washout in the road and had breached this duty. These determinations by the district court constitute reversible error.

Therefore, we reverse the judgment in favor of the appellees and remand the cause to the district court.

Because we are remanding this matter to the district court to make determinations regarding the warning sign, we do not reach the County's remaining assignments of error.

CONCLUSION

We do not find plain error in connection with the first judge's appointment of the second judge. However, we find errors in the order after trial and the denial of the County's motion for new trial, and we reverse, and remand. We conclude that because the County retained a right-of-way in the vacated road, it had a duty to exercise such degree of care as would be exercised by a reasonable county under the circumstances. The district court erred when it concluded that the County had a "duty" to maintain the vacated road and based its negligence determination in favor of the appellees on its erroneous determination that the County breached its "duty" to maintain the road. The central issue in the case was whether the County met its obligations relative to the warning sign it had chosen to erect. The district court erred when it determined that the issue regarding the warning sign was a "non-issue." We reverse the judgment in favor of the appellees and remand the cause to the district court with directions to find whether the County had actual or constructive notice that its warning sign was down on the date of the accident and whether the County had reasonable time to correct the problem. These findings will determine whether the County retained sovereign immunity, as the County claims under § 13-910(9).

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR,
V. PHILIP M. KLEINSMITH, RESPONDENT.
826 N.W.2d 860

Filed February 22, 2013. No. S-12-1164.

Original action. Judgment of public reprimand.

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

PER CURIAM.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court, relator, has filed a motion for reciprocal discipline against Philip M. Kleinsmith, respondent. We grant the motion for reciprocal discipline and impose the same discipline as the Arizona Supreme Court, which is a public reprimand and 1 year's probation effective March 20, 2012.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on August 14, 1989. Respondent was also admitted to the practice of law in the State of Arizona and numerous other jurisdictions. On March 20, 2012, the Arizona Supreme Court issued an order which publicly reprimanded respondent and placed him on probation for a period of 1 year. The order was based on an "Agreement for Discipline by Consent," which generally stipulates to respondent's having filed improper arbitration certificates in numerous cases. This discipline was not self-reported by respondent as required by Neb. Ct. R. § 3-321. The Counsel for Discipline learned of the discipline imposed by the Arizona Supreme Court when it received a copy of an order of reciprocal discipline from the State of Utah.

On December 12, 2012, the Counsel for Discipline filed a motion for reciprocal discipline pursuant to § 3-321 of the disciplinary rules. On December 19, we entered an order to show cause as to why we should not impose reciprocal discipline. On December 31, respondent responded to the order to show

cause in which he consents to an order imposing identical discipline, or greater or lesser discipline, as we deem proper. The Counsel for Discipline did not respond to the order to show cause.

ANALYSIS

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Underhill, ante* p. 85, 825 N.W.2d 423 (2013). In a reciprocal discipline proceeding, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction. *Id.* Based on the record before us, we find that respondent is guilty of misconduct.

Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
>
> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Section 3-321 of the disciplinary rules provides in part:

> (A) Upon being disciplined in another jurisdiction, a member shall promptly inform the Counsel for Discipline of the discipline imposed. Upon receipt by the Court of appropriate notice that a member has been disciplined in another jurisdiction, the Court may enter an order imposing the identical discipline, or greater or lesser discipline as the Court deems appropriate, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012). In his response to our order to show cause, respondent has consented to the entry of a judgment imposing identical discipline, or greater or lesser discipline, as we deem appropriate. The order of the Arizona Supreme Court publicly reprimanded the respondent and placed him on probation for a period of 1 year. We grant the motion for reciprocal discipline, enter a judgment of public reprimand, and place respondent on probation for a period of 1 year, effective March 20, 2012.

CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that respondent should be and is publicly reprimanded and placed on probation for a period of 1 year, effective March 20, 2012. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL S. PITTMAN, APPELLANT.

826 N.W.2d 862

Filed March 1, 2013. No. S-11-415.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.
2. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
3. **Kidnapping.** Whether a kidnapping victim was voluntarily released without serious bodily harm should be determined by the trial judge.

4. **Kidnapping: Sentences.** The provisions of Neb. Rev. Stat. § 28-313(3) (Reissue 2008) are mitigating circumstances which may reduce the penalty for kidnapping and are therefore a matter for the court at sentencing, not the jury.
5. ____: ____. Neb. Rev. Stat. § 28-313(3) (Reissue 2008) creates a single criminal offense, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim.
6. **Kidnapping.** Rescue is not a voluntary release of a kidnapping victim.
7. **Constitutional Law: Effectiveness of Counsel.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
8. **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.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and PIRTLE, Judges, on appeal thereto from the District Court for Saunders County, MARY C. GILBRIDE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Leo J. Eskey, of Leo J. Eskey Law Offices, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Russell S. Pittman was convicted and sentenced for the Class II felony offense of attempted kidnapping. See *State v. Pittman*, 5 Neb. App. 152, 556 N.W.2d 276 (1996) (*Pittman I*). His conviction and sentence were affirmed on appeal. On postconviction, the district court denied Pittman's claims for relief, including his claim of ineffective assistance of counsel. Pittman claimed that for the purpose of determining his sentence, his trial and appellate counsels should have challenged the classification of the felony. Criminal attempt is currently

a Class II felony when the crime attempted is a Class IA felony, and it is a Class III felony when the crime attempted is a Class II felony. See Neb. Rev. Stat. § 28-201(4)(a) and (b) (Cum. Supp. 2012).

The Nebraska Court of Appeals found that Pittman's counsel was ineffective for not challenging the classification at sentencing and remanded the cause to the postconviction court for resentencing. See *State v. Pittman*, 20 Neb. App. 36, 817 N.W.2d 784 (2012) (*Pittman II*). We granted the State's petition for further review, but denied Pittman's petition for further review. For the reasons stated herein, we reverse the decision of the Court of Appeals and affirm the decision of the postconviction court, which denied Pittman's claims for relief.

SCOPE OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law. See *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012).

[2] In appeals from postconviction proceedings, an appellate court independently resolves questions of law. See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

FACTS

In the early morning on March 17, 1995, Pittman was arrested while outside the Czechland Inn in Prague, Nebraska. Dina F., his estranged wife, was working alone at the Czechland Inn, a bar, when she noticed an unfamiliar car parked at the back of the bar. Someone was ducking to the side of the car, and she believed that the person was Pittman. Pittman later parked his car by Dina's and stated that he would not leave until they talked.

Apparently thinking that Dina had called law enforcement, Pittman walked to a pay telephone and called the 911 emergency dispatch service. A deputy sheriff advised him to go home, but, instead, he returned to the bar. Dina then called a friend, who called law enforcement. A deputy sheriff arrested

Pittman, searched his car, and discovered a sawed-off shotgun, a pry bar, and a duffelbag which contained wirecutters and plastic cable ties. In his home, law enforcement found chains and dog collars attached to Pittman's bed.

At trial, the State's theory was that Pittman attempted to abduct Dina with the intent to commit sexual assault. The evidence demonstrated that Pittman did not succeed in restraining Dina, and she was not harmed. However, he was prevented from kidnapping and carrying out his intentions toward Dina because law enforcement arrived at the scene before Pittman could follow through with his plan.

After a bench trial, Pittman was convicted of attempted kidnapping and other related offenses. With respect to the attempted kidnapping, the court sentenced Pittman for a Class II felony offense. Pittman's convictions and sentences were affirmed by the Court of Appeals. See *Pittman I*. It concluded that the State presented sufficient evidence at trial to demonstrate that Pittman took a substantial step toward kidnapping his victim. *Id*.

Pittman sought postconviction relief. He alleged a variety of claims for postconviction relief, including that his trial and appellate counsel were ineffective for failing to challenge the classification of his attempted kidnapping conviction. He claimed the conviction should have been of a Class III felony, as opposed to a Class II felony, because Dina was not kidnapped and did not suffer any bodily injury. Pittman argued, therefore, that he should have been sentenced for the lesser Class III offense.

After an evidentiary hearing, the postconviction court denied and dismissed Pittman's amended petition for postconviction relief. Pittman appealed, alleging that his trial and appellate counsel were ineffective for failing to challenge the classification of his crime. At the time he was sentenced, criminal attempt was a Class II felony offense when the crime attempted was a Class IA felony offense. Criminal attempt was a Class III felony offense when the crime attempted was a Class II felony offense. See § 28-201(4)(b) (Reissue 1995). His sentence of 20 to 25 years' imprisonment for attempted kidnapping fell within the limits for conviction

of a Class II felony offense but exceeded the maximum sentence for a Class III felony offense. Neb. Rev. Stat. § 28-105 (Reissue 1995).

The Court of Appeals determined that trial and appellate counsel were ineffective in failing to challenge the classification of Pittman's crime. It reversed his sentence for attempted kidnapping and remanded the cause with directions to resentence Pittman based on the then-existing statutory penalties allowed for a Class III felony offense. It affirmed the district court's denial of Pittman's other claims for postconviction relief. See *Pittman II*. We granted the State's petition for further review.

ASSIGNMENT OF ERROR

The State claims, restated, that Pittman's trial counsel was not ineffective for failing to challenge Pittman's sentence for a Class II felony for the attempted kidnapping.

ANALYSIS

The State claims Pittman's counsel was not ineffective. Pittman was convicted of attempted kidnapping, and on direct appeal, his conviction and sentence were affirmed by the Court of Appeals. The appellate court concluded the evidence was sufficient to show that Pittman took a substantial step toward kidnapping Dina.

Kidnapping is defined in Neb. Rev. Stat. § 28-313 (Reissue 2008), which provided:

> (1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:
>
> . . . .
>
> (c) Terrorize him or a third person; or
>
> (d) Commit a felony . . . .
>
> . . . .
>
> (2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.
>
> (3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

The attempted kidnapping charge required application of § 28-201 (Reissue 1995): "(1) A person shall be guilty of an attempt to commit a crime if he: . . . (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime."

For sentencing purposes, attempted kidnapping was a Class II felony if the crime attempted was a Class IA felony offense. It was a Class III felony if the crime attempted was a Class II felony offense. See § 28-201(4)(a) and (b) (Reissue 1995).

In this postconviction appeal, the issue is whether the mitigating factors in § 28-313(3) should have been applied to Pittman's sentence. Section 28-313(3) reduces a Class IA felony to a Class II felony depending on the treatment afforded the kidnapping victim.

[3-5] Whether a kidnapping victim was voluntarily released without serious bodily harm should be determined by the trial judge. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). The provisions of § 28-313(3) are mitigating circumstances which may reduce the penalty for kidnapping and are therefore a matter for the court at sentencing, not the jury. *Becerra, supra*. Section 28-313(3) creates a single criminal offense, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. See *Becerra, supra*. If the person kidnapped is eventually released without having suffered serious bodily injury prior to trial, kidnapping is a Class II felony. See § 28-313(3).

In *Becerra, supra*, the defendant claimed ineffective assistance of counsel because trial counsel failed to offer jury instructions on the lesser-included offense of kidnapping as a Class II felony. Under § 28-313, any factual finding about whether the person kidnapped was voluntarily released affects whether the defendant will receive a lesser penalty instead of an increased penalty. *Becerra, supra*. Because there was no evidence to support a finding by the trial court that the defendant voluntarily released or liberated the victim, the defendant's motion for postconviction relief was properly overruled.

[6] Rescue is not a voluntary release of a kidnapping victim. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005). In *Delgado*, the defendant kidnapped and sexually assaulted a young girl. He kept her in his car in a park overnight. When law enforcement arrived on the scene the next day looking for the victim, the defendant attempted to hide the victim under a tree and denied knowledge of her whereabouts. We concluded that the mitigating factors in § 28-313(3) were not present because the rescue was not a voluntary release. The defendant had also physically and sexually abused the victim.

In the case at bar, trial counsel did not argue that the mitigating factors in § 28-313(3) should be applied to Pittman's sentence. Pittman was not able to kidnap Dina because law enforcement arrived on the scene and prevented him from completing his intention to kidnap and sexually assault Dina. Prevention by law enforcement of Pitman's attempt to kidnap Dina is analogous to the rescue in *Delgado*. In both situations, the defendant did not voluntarily release the victim. Law enforcement arrived to rescue the victim. Since law enforcement authorities prevented Pittman from kidnapping Dina, he cannot claim he voluntarily released her. The purpose of the mitigating factors is to encourage kidnappers to release their victims without harm. Such factors are not meant to benefit Pittman, who was prevented by law enforcement from carrying out his intent to kidnap and sexually assault Dina.

[7,8] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012). 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. *Edwards, supra*. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id*.

The factors in § 28-313(3) are mitigating circumstances. There are no mitigating factors applicable to Pittman's

sentence. Therefore, his trial and appellate counsel were not ineffective.

Pittman has failed to establish that trial and appellate counsel were ineffective in failing to raise at sentencing or on direct appeal that Pittman should have been sentenced for attempted kidnapping as a Class III felony. The court properly denied Pittman's postconviction claim of ineffective assistance of counsel.

CONCLUSION

We reverse the Court of Appeals' decision, which reversed the sentence and remanded the cause to the trial court for resentencing, and remand the cause to the Court of Appeals with directions to affirm the postconviction court's decision denying Pittman's claims for relief.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN and CASSEL, JJ., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. TERRI L. CRAWFORD, RESPONDENT.

827 N.W.2d 214

Filed March 1, 2013. No. S-11-626.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Attorneys at Law.** A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.
3. ____: ____. The license to practice law is granted on the implied understanding that the attorney's conduct will be proper and that the attorney will abstain from practices that discredit the attorney, the profession, and the courts.
4. ____: ____. Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his or her professional capacity which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.

5. ____: ____. When a complainant has made allegations of attorney misconduct, the Counsel for Discipline is required to make an initial determination of whether the allegations warrant formal investigation.
6. **Rules of the Supreme Court: Disciplinary Proceedings: Notice.** The disciplinary rules do not contemplate that an attorney must be notified of every allegation of misconduct which the Counsel for Discipline ultimately determines to be without potential merit.
7. **Rules of the Supreme Court: Disciplinary Proceedings.** The disciplinary rules do not require a formal grievance as a threshold requirement for the power to investigate allegations of misconduct or to audit attorney trust accounts.
8. ____: ____. The disciplinary rules do not limit the Counsel for Discipline's powers of investigation to the allegations stated in a grievance.
9. **Disciplinary Proceedings.** It is the formal charges, not the grievance, that limit the scope of misconduct which an attorney may properly be disciplined for.
10. **Disciplinary Proceedings: Due Process: Notice.** Due process in attorney disciplinary proceedings requires that the attorney be given notice of the proceeding and an opportunity to defend at a hearing, and that the proceeding be essentially fair.
11. **Constitutional Law: Disciplinary Proceedings: Discrimination: Proof.** The general rule is that unless there is proof that a particular disciplinary prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections.
12. ____: ____: ____: ____. In order to support a defense of selective or discriminatory prosecution, the attorney must show not only that others similarly situated have not been prosecuted, but that the selection of the defendant for prosecution has been invidious or in bad faith, based upon considerations such as race, religion, or the desire to prevent the exercise of his or her constitutional rights.
13. **Disciplinary Proceedings: Attorneys at Law.** Whatever attorneys believe is motivating opposing counsel, a judge, or the Counsel for Discipline, attorneys are nevertheless expected to maintain the level of decorum which the profession demands and to act in accordance with their duties.
14. **Disciplinary Proceedings.** An attorney's failure to respond to inquiries and request for information from the office of the Counsel for Discipline is considered to be a grave matter and a threat to the credibility of attorney disciplinary proceedings.
15. ____. The disciplinary process as a whole must function effectively in order for the public to have confidence in the integrity of the profession and to be protected from unscrupulous acts.
16. ____. Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline indicate disrespect for the Nebraska Supreme Court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.
17. ____. The Counsel for Discipline should not be forced to threaten an attorney with the suspension of his or her license in order to get the attorney to respond to requests for information.

18. ____. A failure to make timely responses to inquiries of the Counsel for Discipline violates ethical canons and disciplinary rules which prohibit conduct prejudicial to the administration of justice.
19. **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.
20. **Attorney Fees: Words and Phrases.** Advance fees are payments made by a client for the performance of legal services and belong to the client until earned by the attorney.
21. **Attorneys at Law.** The license to practice law in this state is a continuing proclamation by the Nebraska Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and as an officer of the court.
22. ____. It is the duty of every recipient of the conditional privilege to practice law to conduct himself or herself at all times, both professionally and personally, in conformity with the standards imposed upon members as conditions for that privilege.
23. **Disciplinary Proceedings.** Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts.
24. ____. Misappropriation by an attorney violates basic notions of honesty and endangers public confidence in the legal profession.
25. ____. Misappropriation as the result of a serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of improper intent or deliberate wrongdoing.
26. ____. A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.
27. ____. 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.
28. ____. Absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds.

Original action. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Christopher M. Ferdico, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., and Sheri Long Cotton, of Law Offices of Sheri Long Cotton, P.C., L.L.O., for respondent.

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

PER CURIAM.

I. NATURE OF CASE

The respondent appeals from the report and recommendation of the referee in an attorney disciplinary action. The referee recommended disbarment for violations of Neb. Ct. R. of Prof. Cond. §§ 3-501.5(f) (failure to provide detailed accounting for fees when requested), 3-501.15(a) and (c) (failure to deposit unearned fees into trust account and withdraw only as earned), and 3-508.4(c) and (d) (dishonesty, fraud, deceit, or misrepresentation and conduct prejudicial to administration of justice), and for violating the respondent's oath of office. The facts were strongly contested, and the respondent argues there was not clear and convincing evidence of the misconduct. The respondent also asserts that her due process rights were violated throughout the disciplinary proceedings and that such violations warrant a new hearing.

II. BACKGROUND

The respondent, Terri L. Crawford, was admitted to the practice of law in the State of Nebraska on April 23, 2001. Before going to law school, Crawford worked as a paralegal. She became a sole practitioner shortly after passing the bar. She predominantly practices in the areas of juvenile law and criminal defense.

Crawford maintained one trust account at Bank of the West. She maintained a personal savings account at Centris Federal Credit Union (Centris).

In September 2009, Crawford entered into an agreement to represent Nathan Cheatams. Cheatams was arrested in September 2009 in relation to a shooting that prior July. He was charged with nine felonies. A public defender was appointed for Cheatams, but Cheatams decided to hire Crawford as private counsel. On September 26, Cheatams signed a fee agreement with Crawford.

The September 26, 2009, agreement stated that Crawford would charge $150 per hour and that Cheatams would pay a $2,500 retainer. The agreement stated that "[d]uring the progression of legal services your account will be monitored and additional retainers and / or monthly installment payments may

be required in the event the initial retainer is exhausted or if the nature of your case changes." A trial retainer would be required if it appeared the case would be proceeding to trial. The agreement provided that after the initial retainer has been exhausted, "any monthly installment due will commence on the first of the month." The agreement further stated, "You will receive detailed monthly statements which will reflect all work performed on your case."

Cheatams' mother, Seleka Nolan, paid the retainer of $2,500 on September 24, 2009, and paid an additional $6,500 on January 5, 2010. Sometime around July 2010, still before Cheatams' trial, a dispute arose between Cheatams, Nolan, and Crawford regarding fees. Crawford withdrew as counsel when Nolan refused to pay her any further. Thereafter, Cheatams was represented by a public defender. Crawford refused to give the public defender the entirety of Cheatams' file, claiming confidentiality of her work product. Cheatams and the public defender now agree that this failure to forward Cheatams' file did not ultimately prejudice Cheatams' case.

1. Grievance

Nolan and Cheatams complained to Counsel for Discipline. Prior to the filing of a grievance against Crawford, written correspondence and telephone conversations between Cheatams, Nolan, and Counsel for Discipline took place. Those communications are the source of some dispute and will be set forth in more detail in our analysis below.

The grievance, signed by both Nolan and Cheatams, generally alleged that Crawford was neglectful in her representation of Cheatams, that she refused to provide an accounting of her time as requested, and that she had demanded payments beyond the agreed-upon amount. Counsel for Discipline sent the grievance to Crawford and proceeded with a formal investigation. The details of that investigation will be set forth in our analysis.

2. Formal Charges

Counsel for Discipline's investigation led to an audit of Crawford's trust account. As a result of the audit and

Crawford's responses during the course of the investigation, Counsel for Discipline determined that Crawford had misappropriated $3,500 of client funds. Counsel for Discipline also determined that Crawford had failed to cooperate with the investigation.

After the matter was reviewed by the Committee on Inquiry, Counsel for Discipline filed formal charges against Crawford. In count I, Counsel for Discipline charged that Crawford violated § 3-501.15(a) and (c) when she failed to deposit into her client trust account an unearned $3,500 from the $6,500 advance fee payment by Nolan. Counsel for Discipline also charged that Crawford violated § 3-501.5(f) by failing to provide an accounting of her services in sufficient detail to apprise the client of the nature of the work performed. Counsel for Discipline charged that Crawford violated § 3-508.4(c) by engaging in dishonesty, fraud, deceit, and misrepresentation in her communications with Counsel for Discipline during the investigation. Counsel for Discipline charged that Crawford violated § 3-508.4(d) by failing to timely respond to inquiries from Counsel for Discipline. Finally, Counsel for Discipline charged that Crawford violated Neb. Ct. R. of Prof. Cond. § 3-501.16(d) when she failed to surrender all papers and property to which Cheatams was entitled to Cheatams' subsequent counsel after her withdrawal. Counsel for Discipline charged that Crawford violated her oath of office through these same acts.

In count II, Counsel for Discipline charged that Crawford violated § 3-501.15 by routinely depositing her personal funds into her client trust account and withdrawing said funds as her personal and business needs required. Counsel for Discipline also charged that Crawford violated § 3-508.4 by refusing to provide Counsel for Discipline with the requested copies of all trust account checks issued during the time period specified and for refusing to identify the payee of each trust account check.

3. Report and Recommendation

The referee found by clear and convincing evidence that Crawford (1) failed to provide Nolan or Cheatams detailed

monthly statements reflecting work performed by Crawford on behalf of Cheatams, (2) failed to provide Cheatams' public defender with all of the contents of Cheatams' file upon exiting representation, (3) failed to cooperate with Counsel for Discipline's office in regard to the investigation of her representation of Cheatams and her handling of trust account funds in regard to Cheatams, and (4) failed to deposit in her trust account the $3,500 advance fee payment given to her by Nolan as part of a $6,500 cashier's check.

The referee concluded that through these acts, Crawford violated §§ 3-501.5(f), 3-501.15(a) and (c), and 3-508.4(c) and (d). The referee also found that Crawford violated her oath of office. The referee did not find that Crawford violated § 3-501.16(d), as alleged in the charges, because the referee considered Crawford's failure to turn over all materials in Cheatams' file to the public defender to be the result of an honest misunderstanding of her ethical obligations.

The referee recommended that Crawford be disbarred, noting that our court has been severe in regard to discipline when it comes to misappropriation of client funds. Furthermore, Crawford's untruthfulness "weigh[ed] heavily against her."

III. ASSIGNMENTS OF ERROR

Crawford assigns that the referee erred in (1) finding that Counsel for Discipline has met his burden of proof by clear and convincing evidence; (2) overruling Crawford's motion for mistrial when Counsel for Discipline withheld material allegations and evidence that significantly prejudiced her defense; (3) overruling Crawford's motion to recuse Counsel for Discipline based upon the fact that he knew or should have known from the inception of this matter that he was a necessary witness in the case; (4) finding that Crawford failed to provide an adequate explanation for her conduct, thus impermissibly shifting the burden of proof to Crawford in violation of court rules; (5) failing to find that Counsel for Discipline's failure to provide the relevant grievances until the time of trial violated Crawford's rights of due process; (6) finding that Crawford failed to cooperate with Counsel for Discipline; (7) finding that there was clear and convincing evidence that Crawford

was not truthful; and (8) finding that the conduct of Crawford rises to the level of disbarment.

IV. STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[1]

V. ANALYSIS

[2-4] A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.[2] The license to practice law is granted on the implied understanding that the attorney's conduct will be proper and that the attorney will abstain from practices that discredit the attorney, the profession, and the courts.[3] Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his or her professional capacity which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.[4] Violation of those standards, which are set forth in the disciplinary rules, must be established by clear and convincing evidence.[5] Since Counsel for Discipline does not take exception with the referee's findings, we will examine only those violations ultimately found by the referee.

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[1] *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004).

[2] Neb. Ct. R., ch. 3, art. 3, Preface.

[3] See, e.g., *State ex rel. NSBA v. Thor*, 237 Neb. 734, 467 N.W.2d 666 (1991); *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980).

[4] *Id.*

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

1. Failure to Cooperate

The evidence relating to the charges of failing to cooperate is central to all of the issues presented in this appeal. Therefore, we will address the evidence pertaining to that charge first. Upon our de novo review, we find that Crawford was antagonistic, evasive, and untruthful throughout the investigation and the disciplinary hearing. While Crawford's failure to cooperate and dishonesty will be apparent in our examination of the evidence relating to all the charges of misconduct, we find sufficient for now an examination of the investigatory correspondence between Counsel for Discipline and Crawford. Based on this evidence, we agree with the referee that Crawford showed "not only a reluctance to cooperate, but belligerence and a pattern of stalling."

Crawford's first written response to the grievance was appropriate, albeit incomplete. Crawford explained that the retainer was never intended to cover the entire case and that she never negotiated a flat fee. Apparently referring to the hearing where Crawford withdrew as counsel, Crawford stated she provided Cheatams with "a detailed itemization and accounting, which we discussed." Cheatams was purportedly unable to keep the papers, however, "because he was detained and cuffed at the hearing and not allowed to take additional documentation from his attorney." Crawford attached an aggregate billing statement reflecting $11,250 in fees and a sum of $9,000 in fees paid. Crawford itemized that the $9,000 was paid in one installment of $2,500 and another of $6,500.

On October 20, 2010, Counsel for Discipline requested an explanation regarding the billing fractions shown in Crawford's aggregate billing, photocopies of the monthly statements Crawford provided to Cheatams, an exact date for each entry of the aggregate billing statement (if not shown in the monthly statements), and a complete copy of Crawford's office file regarding her representation of Cheatams.

Counsel for Discipline also requested evidence that Crawford deposited the $2,500 money order and the $6,500 cashier's check from Nolan into her client trust account. Counsel for Discipline asked for evidence of all subsequent withdrawals made by Crawford of those funds from her trust account. If

Crawford did not deposit any of those funds in a trust account, Counsel for Discipline requested an explanation as to why not. Counsel for Discipline requested that Crawford provide all this information by November 1, 2010.

Crawford continuously evaded Counsel for Discipline's request for evidence that the advance fee payments by Nolan were properly deposited into her trust account and withdrawn only as earned. On November 1, 2010, Crawford sent Counsel for Discipline a fax requesting additional time "to receive information from my financial institution."

She did not provide those bank statements until December 1, 2010. At the disciplinary hearing, Crawford explained that she could simply walk into a bank branch and ask for the documentation Counsel for Discipline had requested. The bank, depending on how busy the employees were, could process her request immediately while she waited or the bank could process it later and have her pick it up. Crawford's testimony is unclear as to which of these two things occurred with respect to the bank statements. Her testimony is likewise unclear as to when she requested financial information from her bank.

On November 2, 2010, Counsel for Discipline expressed to Crawford that he was "concerned that you were not able to respond to my specific questions within 10 days as I requested." Counsel for Discipline explained that copies of monthly bank statements, with the requested transactions circled by Crawford, would be sufficient to satisfy his request. Counsel for Discipline obviously believed that Crawford would have these statements easily accessible pursuant to her duty under § 3-501.15(a) to preserve "[c]omplete records" of trust account funds for "5 years after termination of the representation." The comment to that rule specifies that a "lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice." Nevertheless, Counsel for Discipline directed that if Crawford was waiting for bank records for whatever reason, she should answer all other questions, identify exactly which questions she could not answer without bank records, and identify what bank records she would need to answer the questions. Counsel for

Discipline asked that Crawford provide the requested information by November 8.

On November 8, 2010, Counsel for Discipline received a letter from Crawford. Crawford did not provide the requested bank records or other documentation regarding Nolan's advance fee payments. Neither did Crawford identify what bank records were needed in order to provide the requested documentation. Crawford instead wrote, "[A]ll funds collected from a client or on his/her behalf are always deposited into my client trust account."

In the November 8, 2010, letter, Crawford did explain the billing fractions listed in her aggregate billing. Crawford admitted that she had not provided copies of monthly billing statements to Cheatams. She explained that this was "[d]ue to the fact that . . . Cheatams[']s circumstances surrounding his case were unique, in that he remained incarcerated, and the confidential nature of the billing statements, his billing would not have been mailed to Douglas County Corrections." She stated that per their agreement, Crawford instead had "face-to-face discussions, at least monthly, regarding all work performed on his behalf and he was given a detailed explanation of the work, accordingly." Crawford wrote that Cheatams' file was still being copied.

On November 9, 2010, Counsel for Discipline wrote to Crawford and reiterated his concern that Crawford was unable to promptly supply the requested information. Counsel for Discipline stated he was "surprised" that Crawford did not have her trust account records "readily available." Counsel for Discipline stated that Crawford "should be able to immediately provide all requested information regarding [her] trust account."

Counsel for Discipline wrote that regardless of whether the monthly itemized statements were given to Cheatams, he wished to see copies of the statements Crawford had discussed with Cheatams during their alleged monthly visits. If such statements did not exist, Counsel for Discipline asked that Crawford provide more detail in the aggregate statement provided to him. Specifically, Counsel for Discipline requested exact dates, a more detailed statement of the content of the

telephone call or other activity listed, telephone records showing each call, and the name of the telephone service provider and account number.

Counsel for Discipline also reiterated his concern that Crawford was unable to timely provide a copy of Cheatams' file. Counsel for Discipline stated that "[a]ny further delay in providing a copy of the file will be considered as a failure to cooperate with this investigation."

Crawford responded on November 11, 2010: "When I stated that I did not have financial records readily available, that only meant that such records from over a year ago are in storage and not in my office." Crawford explained that she thought it would be "more expeditious to make the request of my financial institution rather than waste precious time digging in boxes."

Later, in her deposition and at the disciplinary hearing, Crawford clarified that "in storage . . . not in [her] office" meant that the boxes were in one of the other rooms of her office suite and not in her personal office. But Crawford thought it would have been more time consuming to go through the boxes, because they contained 8 years of bank statements from approximately five bank accounts. Since Crawford had only one trust account, we surmise that Crawford filed not only her trust account statements in those boxes, but also the bank statements from other personal and business accounts.

Time was passing despite Crawford's apparent belief that obtaining the records from her bank was more expeditious. As of November 11, 2010, Crawford still had not provided the requested documentation regarding Nolan's advance fee payments.

Crawford stated that she was in the process of requesting telephone records. But she reiterated that she would never be able to provide the more detailed billing statement as requested by Counsel for Discipline. She said it was not her practice to provide more detail at the time billing is created and had no way to recreate such a billing statement without speculation. Crawford added: "I do not believe (or at least I have not been informed), that . . . Cheatams is disputing

that I have performed the legal services for which he has been billed."

Crawford explained that, as a sole practitioner, she had still not been able to copy Cheatams' "large file." Crawford explained that her office copier could not accommodate the volume and that she had taken the file to a copy service center to copy it and that it "will arrive under separate cover." Crawford asserted that "this should not be construed as any failure on my part to cooperate with this investigation." The record shows that Crawford's file on Cheatams consisted of 164 pages and was less than 1 inch thick.

By November 29, 2010, Counsel for Discipline had received Cheatams' file, but had still not received the documentation regarding the proper handling of Nolan's advance fee payments. In a letter to Crawford, Counsel for Discipline pointed out several items in the aggregate billing statement that did not appear to correspond to anything provided in the file. Counsel for Discipline reiterated that Crawford was required to provide an itemized billing statement which identified the date for each entry made. Counsel for Discipline pointed out that Crawford's fee agreement stated that she was working hourly and that she would provide detailed monthly statements reflecting all work performed on the case.

Counsel for Discipline made it clear that he was becoming suspect of Crawford's continued inability to provide the requested trust account information. Despite this suspicion, Counsel for Discipline was still not fully auditing Crawford's trust account. Counsel for Discipline was requesting only trust account statements and records indicating that the two advance fee payments by Nolan had been properly deposited into Crawford's trust account and properly withdrawn only as earned. In his November 29, 2010, letter, Counsel for Discipline requested, for the fourth time, this documentation.

Since Crawford had written that the original trust account statements were "in storage," Counsel for Discipline suggested that Crawford obtain an immediate printout or get the information from Crawford's bank online. Counsel for Discipline requested, in boldface type, that Crawford provide this documentation "**immediately**." Crawford later explained that she

did not try to get the requested information online, as had been suggested in Counsel for Discipline's letter, because she did not "trust [the bank's] process."

Crawford responded on December 1, 2010, finally providing some incomplete documentation of the advance fee deposits. Crawford provided bank statements for September 2009 and February 2010. But she did not provide a trust account statement for January 2010, the month Nolan gave Crawford the cashier's check for $6,500.

The September 2009 statement reflected a deposit of $2,500 on September 28 into Crawford's trust account at Bank of the West. The February 2010 trust account statement, however, did not show a deposit directly corresponding to the $6,500 advance fee payment. It instead reflected a single deposit of $13,121 and four checks written on the account totaling $10,600.

Crawford did not circle and identify the transactions as requested by Counsel for Discipline or otherwise provide the information requested concerning withdrawals on those funds only as earned. Because no other monthly bank records were provided, Counsel for Discipline still had no way of knowing when or if those funds were withdrawn.

Crawford attached a copy of the deposited $2,500 money order from Nolan. Crawford also attached the deposit slip for the $2,500 money order into her trust account.

But the $6,500 cashier's check was different. Crawford stated that the $6,500 payment had "required additional research, which is why there was a delay in responding to your request on this matter." Crawford explained that the $6,500 was part of the $13,121 deposit in February 2010 which was reflected in the February bank statement. Crawford explained that because a portion of the $6,500 had already been earned by the time she received the cashier's check from Nolan, she negotiated the cashier's check at Centris, where she kept her personal savings account. Crawford said she deposited the $3,000 earned amount of the advance fee payment into her savings account. Crawford took the remaining unearned $3,500 in cash with the intention of depositing it into her trust account. Apparently, Crawford had never

withdrawn any earned amounts from the $2,500 advance fee payment.

Crawford explained that 5 weeks after negotiating the $6,500 cashier's check at Centris, she took the $3,500 cash to Bank of the West and deposited it with other funds into her trust account as part of the $13,121 total deposit. Crawford did not explain why there was a 5-week delay in depositing the $3,500 into her trust account.

As with the $2,500 money order, Crawford provided a copy of the negotiated $6,500 cashier's check showing a bank stamp at the time of the deposit. But Crawford did not provide a deposit slip for the $13,121 deposit. Such deposit slip would have demonstrated that the $3,500 was indeed part of that $13,121 deposit.

Crawford provided a statement from her savings account at Centris showing a balance of 8 cents at the beginning of January 2010, a $3,000 deposit on January 8, and an ending balance on January 31 of $3,000.08—apparently to demonstrate that she did not deposit the entirety of the $6,500 cashier's check into her checking account.

Crawford wrote to Counsel for Discipline that she looked forward to prompt resolution of the investigation. Based on the fact that her aggregate billing showed a total fee of $11,250, Crawford also wrote that she looked forward to the final payment of the fees owed to her.

Far from resolving the investigation, it was after Crawford's December 1, 2010, letter that Counsel for Discipline expanded his investigation. On December 14, Counsel for Discipline wrote: "You have not responded to all the requests made in my letters of October 20, November 2, November 9, and November 29. Please do so immediately." Counsel for Discipline then explained that he was auditing Crawford's trust account with respect to the advance fee payments made by Nolan.

Pursuant to the audit, Counsel for Discipline requested each monthly trust account statement from September 1, 2009, to the present. Counsel for Discipline reiterated that Crawford needed to identify when any trust fund payments were withdrawn. Counsel for Discipline asked Crawford where the

$3,500 was from January 8 to February 11, 2010. And Counsel for Discipline asked that Crawford provide evidence that the $3,500 cash was part of the $13,121 deposit into the trust account on February 11. Counsel for Discipline observed that Crawford had provided no deposit slip for the $13,121 deposit, whereas she had provided a deposit slip for the $2,500 deposit. Counsel for Discipline requested that Crawford provide a deposit slip for the $13,121 deposit. In addition, Counsel for Discipline asked that Crawford identify the owners of the other $9,621 and their respective amounts.

Counsel for Discipline received a response from Crawford on December 29, 2010. Crawford wrote a list of her withdrawals from the retainer payments as: $3,000 in January 2010 and $1,000 each in March, in May, on June 3, and on June 10. The monthly trust fund statements were enclosed. As for the 5-week delay in depositing the cash, Crawford stated that any "[f]unds not immediately deposited were in safekeeping in my office safe, separate and apart from my own property or any other client's property." Crawford further explained that "[u]nfortunately, many evenings I do not leave my office until well after the bank lobby closes and I do not use the drive-through to make such deposits. As stated the funds were properly safeguarded, kept separate as required, and deposited accordingly."

Crawford attempted to respond to various questions about her billing in Cheatams' case, attaching additional notes found in a computer file. However, she again stated that she could not produce a daily itemization as Counsel for Discipline had requested. Crawford opined that such billing was not required by the Nebraska Rules of Professional Conduct. Crawford further commented that her clients had always considered the detail of her billing acceptable.

Crawford closed her letter by questioning the scope of Counsel for Discipline's investigation. She observed that "[i]n the past when a client has filed a 'grievance' I have not been questioned on how much time it takes me to accomplish a particular task." Crawford stated that the original complaint focused on an allegation of neglect and "[c]learly there has been no neglect of [Cheatams'] case." Crawford wrote,

"Somehow this inquiry has taken a turn in another direction, which is of concern."

Crawford once again failed to provide the deposit slip or any other evidence that the $13,121 deposit actually included the unearned $3,500 of Nolan's advance fee payment. Crawford did not address the reason for this failure.

On January 18, 2011, Counsel for Discipline explained that under Neb. Ct. R. § 3-906, he had the power to audit trust accounts at any time, and that he was doing so as part of his investigation of the grievance filed by Nolan and Cheatams. Counsel for Discipline opined that "[o]n any given day, a lawyer should be able to account for all funds held in trust for each client," and that "[m]ost attorneys maintain a trust account log or record for each client for whom funds are deposited into the trust account."

Counsel for Discipline asked whether Crawford maintained such a log, and if so, he asked that she provide a copy. In order to make it easier for Crawford, Counsel for Discipline provided a list of deposits and withdrawals evidenced from the audit being conducted and asked that Crawford fill in client/payee information for those transactions. Counsel for Discipline asked that this information be provided by February 2, 2011.

Instead of providing the requested information, on January 31, 2011, Crawford sent Counsel for Discipline what could be described as a letter of protest. Crawford outlined all the documentation and information she had previously provided and stated that in her opinion, much of that information had "no bearing on the grievance." Crawford stated that she found Counsel for Discipline's reference in his letter to "[m]ost attorneys" maintaining a trust account log was "at best . . . condescending." Crawford believed that she had provided information "in excess of what is necessary to make a finding that there is no merit to the grievance" and that the new request for all trust account information "disturbs me on many levels."

Crawford further wrote that Counsel for Discipline's request for client/payee information relating to her trust account was "offensive, immaterial, unreasonable[,] unduly cumbersome,

and has no bearing on the grievance filed by . . . Cheatams and . . . Nolan." Finally, Crawford commented: "It certainly makes one wonder if there is other motivation for such a request under such circumstances. My question would be why is this information being requested? Is this an inquiry regarding a disgruntled client or has it turned into something else?" Crawford concluded, "I have fully cooperated in this inquiry and provided all the necessary information that relates directly to . . . Cheatams and my representation on his case. If anything else is required please let me know, so that this matter can come to a conclusion."

Thus, Crawford still did not provide the requested deposit slip or any other evidence that the $3,500 cash representing Nolan's unearned advance payment was part of the February deposit of $13,121 into her trust account.

On February 4, 2011, Counsel for Discipline wrote to Crawford and attempted to clarify that he did not intend to be condescending and that Crawford was not being "picked on." But Counsel for Discipline repeated his previous requests for documentation. Counsel for Discipline specifically repeated his request for evidence that the $3,500 of unearned funds was part of the $13,121 deposit, as Crawford claimed.

Crawford did not respond until February 16, 2011. She telephoned Counsel for Discipline asking for additional time to produce the requested information. According to Counsel for Discipline, Crawford did not provide the requested information by the agreed-upon extended deadline. Crawford disputes that a certain date was discussed for the extension of the deadline.

In any event, having heard no further from Crawford, on March 15, 2011, Counsel for Discipline sent Crawford another letter. Counsel for Discipline gave Crawford 7 days to produce documentation proving that the $3,500 in cash was deposited into her trust account on February 11, 2010, as part of the total deposit of $13,121. Counsel for Discipline stated that if such specific information was not received by that deadline, Counsel for Discipline would seek temporary suspension of Crawford's license to practice law.

After the March 15, 2011, letter in which Counsel for Discipline threatened Crawford with imminent temporary suspension, Crawford's story about what happened to the $3,500 changed. On March 24, Counsel for Discipline received a letter from Crawford explaining that she had just discovered she had been wrong about the $3,500 being part of the February 11, 2010, deposit of $13,121.

Crawford explained that after her telephone request for additional time, she discovered the $3,500 retainer still in her office safe. According to Crawford, it had been there all along. It had been over 1 year since the $6,500 cashier's check was cashed. Crawford wrote:

> As I originally stated to you in a previous correspondence there were several deposits combined as one for the February, 2010 deposit. As it has been my practice in the past, (though no longer) these deposits were safely kept in my office safe until I could make such deposit. It appears, that only the checks were deposited and not the cash, I must have gotten distracted and grabbed only one of the envelopes instead of both. After this discovery, my recollection was that I completed the deposit slips separately for checks and cash and placed them in separate envelopes(in order to keep separate client separate). Recently, I removed all contents from my safe including important legal papers, copies of executed Will, and title documents, final arrangement documents and business documents. Underneath several manila envelopes, I located the cash, still in the envelope with the deposit slip, having never been deposited. You can imagine my shock and dismay (and I must say embarrassment) when I made this discovery. I must have only deposited the "check" envelope and not the "cash" envelope when I made the deposit.

Crawford believed "the major issue which caused this problem for me is the lack of guidance and guidelines on maintaining an attorney trust account." Crawford claimed that she had never noticed any "discrepancies" in her trust account balance because she had been depositing her earned court appointment fees into her trust account. For that same reason, Crawford

asserted that no "client funds" were affected by this error of unknowingly keeping the $3,500 unearned advance fee in her safe.

Crawford explained that "until recently," she had no reason to go back and check that the $3,500 was indeed deposited into the trust account.

Crawford attached some of the client/payee information which Counsel for Discipline had requested. To explain the delay in providing that information, Crawford said that the requested trust fund information was normally kept in each client's file. Thus, Crawford had to go through each one of her files to gather the information, which she explained was a "daunting task." Crawford sent separate lists of trust account deposits and withdrawals from September 1, 2009, to November 30, 2010, for five different clients and for numerous Douglas County appointments. She also sent copies of various checks and deposit slips.

A contemporaneously produced deposit slip reflected that $3,500 cash was deposited into Crawford's trust account on February 25, 2011. Crawford did not use the original deposit slip which she had said she had prepared when she placed the cash in a manila envelope a year before.

Crawford did not at first explain why she had not immediately reported the discovery of the $3,500 to Counsel for Discipline and had waited instead to inform Counsel for Discipline a month later in the letter received on March 24, 2011. In her deposition, Crawford said that the delay in informing Counsel for Discipline was because "we did not have that type of a relationship where I could pick up the phone and explain to you over the phone exactly what happened. I thought it would be best for me to make sure that I documented each of those steps in a letter."

On March 28, 2011, Counsel for Discipline responded that he still needed the payee information for each check written on Crawford's trust account from September 1, 2009, through November 30, 2010. Counsel for Discipline provided a form for Crawford to fill in the payee information for various transactions. Counsel for Discipline also asked for more detail

about certain cash withdrawals reflected in Crawford's trust account records.

In light of the new information contained in Crawford's recent letter, Counsel for Discipline wrote Crawford that he was extending the audit of Crawford's trust account to December 2010 through March 2011. Counsel for Discipline asked for the requested information by April 4, 2011.

Crawford failed to supply all the requested audit information. Instead, on April 7, 2011, Counsel for Discipline received another protest letter. Crawford objected to Counsel for Discipline's new requests as being overly intrusive. Crawford stated that any withdrawals were her own funds and were mostly in cash. She stated that she could not and would not account for how they were spent. Crawford noted that "laws of discrimination and civil liberties" would not allow such an inquiry by an employer. Crawford also opined that although this may not have been the most "prudent" approach, there was nothing in the disciplinary rules prohibiting her from depositing earned funds into her trust account.

Crawford commented that Counsel for Discipline, "having been fully appraised [sic] of the circumstances on the Cheatams['] grievance, ha[d] chosen to parlay the Cheatams resolved facts into some other unsolicited, unwarranted and unnecessary inquiry into other unrelated matters." Crawford again wrote that Counsel for Discipline's request "deeply disturbs me on many levels." She considered the request a random and arbitrary audit which, "[o]n its face, . . . gives the appearance that Counsel for Discipline, after being provided with documentation to address the initial grievance, is now on a 'fishing' expedition to see if there can be a 'discovery' of other matters that were not of concern to this or any client." Crawford "respectfully decline[d]" to provide Counsel for Discipline with the information, stating that "in addition to being irrelevant to the inquiry, [it] is privileged and constitutionally protected."

Attached to this letter, Crawford provided Counsel for Discipline with the monthly trust fund statements for December 2010 and January and February 2011. But she did not fill in

the form provided by Counsel for Discipline for the payee information, nor did she otherwise provide such information. That was the end of Crawford's written correspondence with Counsel for Discipline.

The record speaks for itself. Crawford continuously failed to respond to Counsel for Discipline's clear requests for documentation, and she failed to provide clear answers to Counsel for Discipline's questions during the investigation. Notably, Counsel for Discipline did not receive the requested documentation regarding deposit of the $3,500 until he threatened Crawford with imminent suspension. Crawford's correspondence evidences that she alternately evaded Counsel for Discipline's inquiries and attacked Counsel for Discipline for pursuing the investigation at all. Crawford failed to cooperate with the investigation.

Crawford argues, however, that the charges of failure to cooperate are punishment for "having the audacity to ask questions and inquire as to the relevance of [Counsel for Discipline's] investigation."[6] She argues that the root of her confusion and questioning attitude was Counsel for Discipline's failure to disclose other "grievances" from Nolan and Cheatams, consisting of the communications between the office of the Counsel for Discipline, Nolan, and Cheatams that led up to the grievance letter sent to Crawford. Notably, these "grievances" raised an "accounting issue,"[7] while the grievance letter she received did not. Crawford claims these undisclosed "grievances" were the true basis of the investigation and charges against her. In addition, Crawford asserts that the investigation and prosecution were permeated with racial bias, "although perhaps subconscious."[8] She raises these arguments to conclude both that her level of cooperation was reasonable under the circumstances and that due process demands a new disciplinary hearing. For the foregoing reasons, we find these arguments lack merit.

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[6] Brief for respondent at 12.

[7] *Id.* at 22.

[8] *Id.* at 24.

Crawford's undisclosed "grievances" arguments stem from a series of communications between Counsel for Discipline, Nolan, and Cheatams leading up to the formal grievance letter sent to Crawford. Counsel for Discipline first received a telephone call from Nolan on July 16, 2010, stating that Crawford was refusing to continue to represent Cheatams unless she paid additional funds. Nolan apparently told Counsel for Discipline at this time that she had paid Crawford $9,000, but that Crawford was acknowledging receipt of only $5,000. According to Counsel for Discipline, he called Crawford to discuss that and other allegations. And, according to Counsel for Discipline, Crawford told Counsel for Discipline over the telephone that she had received only $5,000 from Nolan. Crawford denies this conversation took place.

Counsel for Discipline then wrote to Nolan explaining that if she would like to file a grievance, she would need to write a letter detailing the allegations and providing any documentation she might have. Counsel for Discipline noted in this letter that he had spoken to Crawford about Nolan's concerns and that Crawford had told Counsel for Discipline that Nolan had paid her only $5,000. According to Nolan's testimony at the disciplinary hearing—the source of Crawford's belated discovery of the alleged undisclosed "grievances"—Counsel for Discipline told Nolan that if Nolan could provide documentation of the $9,000 payment, then, based on the fact that Crawford said she had received only $5,000, "'I would really have to investigate, because that would mean I caught her in an out lie, and we don't like that.'" Crawford emphasizes this statement as evidence of Counsel for Discipline's undisclosed bias against her.

Nolan accordingly faxed a handwritten letter to Counsel for Discipline outlining her allegations of misconduct. Nolan was recovering from a stroke, and the letter was difficult to read. The letter alleged that Crawford had agreed her representation would cost no more than $10,000 total and that Crawford had demanded money in excess of that amount in order to continue her representation of Cheatams. Nolan also alleged that Crawford had failed to provide billing statements as requested, that she had forgotten a court date, and that she visited

Cheatams only once during the course of a year. Nolan sent Counsel for Discipline copies of a money order in the amount of $2,500, dated September 24, 2009, negotiated at Bank of the West, and a cashier's check in the amount of $6,500, dated January 5, 2010, negotiated at Centris.

After receipt of the handwritten letter, Counsel for Discipline spoke with Nolan on the telephone in more detail about her allegations. They agreed that Counsel for Discipline would type a letter on Nolan's behalf and that he would send it to her for review and approval. Counsel for Discipline has explained that it is the practice of the office of the Counsel for Discipline to assist complainants with any difficulties they may have writing a grievance letter. Counsel for Discipline did so, typing up the allegations of Nolan's handwritten letter.

The first typed version of the allegations added Nolan's complaint that after paying the $2,500, she had negotiated a final payment of $6,500 which Crawford had agreed would get them through trial, and that Crawford subsequently demanded money in excess of this agreed-upon fee. In other words, Nolan was alleging that they had renegotiated the total cost for Crawford's representation through the end of trial at $9,000 and that Crawford, after receiving this amount, demanded more money in order to continue representation. That typed version did not contain the allegation that Crawford failed to acknowledge receipt of the total $9,000 in payments already made by Nolan.

Counsel for Discipline sent the typed letter to Nolan. Nolan returned it to Counsel for Discipline with the handwritten addition that Crawford had allegedly told Counsel for Discipline in a telephone conversation that she had received only $5,000 in payments.

However, Counsel for Discipline sent the original typed letter, without Nolan's handwritten additions, back to Nolan, explaining that Cheatams, as the client, should also review the letter and sign it. Cheatams did so, and this time, Cheatams, not Nolan, made handwritten additions to the letter. Cheatams did not make any significant changes. Most notably, Cheatams did not add the allegation concerning Crawford's failure to acknowledge receipt of the entire $9,000. This typed letter with

Cheatams' handwritten additions was the only grievance sent to Crawford.

Crawford first argues that the written communications represent "grievances," as defined by the disciplinary rules. Therefore, under those rules, Crawford claims she had a right to be notified of them. Neb. Ct. R. § 3-308(B) states, "The Counsel for Discipline shall . . . (2) Notify a member in writing that he or she is the subject of a Grievance and furnish the member a copy [of the grievance] within fifteen days of receipt of the Grievance."

A grievance is defined as follows:

> Any written statement made by any person alleging conduct on the part of a member which appears, in the judgment of the Counsel for Discipline, to have merit, and, if true, would constitute a violation of the member's oath, the Nebraska Rules of Professional Conduct, or these rules; allegations of misconduct not appearing in the judgment of the Counsel for Discipline to have merit are not deemed a Grievance under these rules.[9]

Crawford focuses on the "[a]ny written statement" portion of this definition.

Crawford ignores that part of the definition which qualifies a grievance as only that written statement which appears, "in the judgment of the Counsel for Discipline, to have merit." In other words, the "Grievance" referred to in § 3-308(B) is only that draft which the office of the Counsel for Discipline determines meritorious and which it directs its employees to pursue. Communications preliminary to that determination are simply "allegations of misconduct."[10]

[5] Thus, § 3-309(D) further states:

> *If* it appears to the Counsel for Discipline that allegations of misconduct may have merit and, if true, would constitute grounds for discipline, he or she shall notify the member against whom the allegations are directed that the member is the subject of a Grievance, and within fifteen days of its receipt furnish the member a copy thereof by

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[9] Neb. Ct. R., ch. 3, art. 3, Definitions.

[10] See Neb. Ct. R. § 3-309(C) (rev. 2011).

> certified mail, return receipt requested, at the member's last known address.

(Emphasis supplied.) When a complainant has made allegations of attorney misconduct, Counsel for Discipline is required to make an initial determination of whether the allegations warrant formal investigation.[11] In making this determination, Counsel for Discipline may make such preliminary inquiry regarding the underlying facts as deemed appropriate.[12]

[6] The disciplinary rules do not contemplate multiple "grievances" stemming from the same complainant as to the same representation of the same client. Nor do the rules contemplate that an attorney must be notified of every allegation of misconduct that Counsel for Discipline ultimately determines to be without potential merit. Counsel for Discipline approved only one written statement containing allegations of misconduct. That was the only grievance against Crawford. We are not persuaded by Crawford's assertion that there were several "grievances" in this case which the office of the Counsel for Discipline failed to supply to her.

Next, Crawford asserts that the scope of the investigation and the disciplinary charges against her must be limited to the scope of the grievance letter she received. In particular, Crawford asserts that the audit of her trust account was somehow improper because it had nothing to do with the charges made in the grievance, which were neglect and breach of the fee agreement.

Crawford cites to no law that would specifically support this contention. She instead relies on vague notions of due process and asserts that "[t]he rules establish that the basis for the investigation is the delivered grievance."[13]

But § 3-308(B) states, "The Counsel for Discipline shall . . . (1) Review, investigate, or refer for investigation all matters of alleged misconduct called to his or her attention *by Grievance or otherwise*." (Emphasis supplied.) Furthermore, § 3-906 of the disciplinary rules specifically gives Counsel for Discipline

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[11] *Cotton v. Steele*, 255 Neb. 892, 587 N.W.2d 693 (1999).

[12] *Id.*

[13] Brief for respondent at 22.

the broad power "to audit *at any time any trust account* required by [the court] rules." (Emphasis supplied.)

[7] Attorneys licensed to practice law in the State of Nebraska agree to operate under the supervision of the office of the Counsel for Discipline. Trust accounts, in particular, are always open to review. The disciplinary rules do not require a formal grievance as a threshold requirement for this power to investigate allegations of misconduct or to audit attorney trust accounts.

[8,9] The rules certainly do not limit Counsel for Discipline's powers of investigation to the allegations stated in a grievance. In *State ex rel. Special Counsel for Dis. v. Fellman*,[14] for instance, we explicitly noted that the violation which we found—mishandling a retainer—was not the basis for the client's complaint and was only discovered during Counsel for Discipline's own investigation of the matter. Nevertheless, that allegation was subsequently made part of the formal charges.[15] It is the formal charges, not the grievance, that limit the scope of misconduct an attorney may properly be disciplined for.

The disciplinary rules provide that if, upon conclusion of any investigation, Counsel for Discipline determines there are reasonable grounds for discipline, he or she shall reduce the grievance to a complaint specifying with particularity the facts which constitute the basis thereof and the grounds for discipline which appear to have been violated.[16] That complaint is to be forwarded to the attorney against whom it is made and to the Committee on Inquiry to determine whether there are reasonable grounds for discipline and whether a public interest would be served by filing a formal charge.[17]

We have described a hearing before the Committee on Inquiry as the equivalent of a probable cause hearing.[18] That was done in this case, and the Committee on Inquiry found

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[14] *State ex rel. Special Counsel for Dis. v. Fellman, supra* note 1.

[15] *Id.*

[16] § 3-309(G).

[17] § 3-309(H).

[18] See *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989).

reasonable grounds for discipline. The complaint against Crawford alleged that she misappropriated funds based on facts which have nothing to do with the allegation that Crawford failed to acknowledge receipt of the total $9,000 in payments made by Nolan.

Counsel for Discipline then filed the formal charges against Crawford and served those charges on her in advance of the disciplinary hearing. The formal charges alleged the facts showing misappropriation based upon the disappearance of the $3,500. Suffice it to say that those facts did not involve the allegation that Crawford failed to acknowledge receipt of $9,000 in payments. The referee ultimately determined Crawford misappropriated funds based on the facts alleged in the formal charges. There was no finding of misconduct based on the failure to acknowledge full receipt of Nolan's payments.

[10] Due process in attorney disciplinary proceedings requires that the attorney be given notice of the proceeding and an opportunity to defend at a hearing, and that the proceeding be essentially fair.[19] The "adjudication" must be preceded by notice and an opportunity to be heard which is fair in view of the circumstances and conditions existent at the time.[20] Because neither the formal charges nor the findings of the referee were based on the long-since discarded allegation that Crawford failed to acknowledge the entirety of Nolan's payments, Crawford's due process rights were not violated by the failure to disclose that allegation.

Crawford argues that, at the very least, the "concealment" of the correspondence preliminary to the grievance gave rise to "legitimate confusion" on Crawford's part during the course

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[19] See, e.g., *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968); *State ex rel. Oklahoma Bar Ass'n v. Haave*, 290 P.3d 747 (Okla. 2012); *Flamenco v. Independent Refuse Service*, 130 Conn. App. 280, 22 A.3d 671 (2011); *Attorney Grievance v. Coppola*, 419 Md. 370, 19 A.3d 431 (2011); *In re Discipline of Russell*, 797 N.W.2d 77 (S.D. 2011). See, also, Annot., 86 A.L.R.4th 1071 (1991); 7 Am. Jur. 2d *Attorneys at Law* § 105 (2007).

[20] *State ex rel. NSBA v. Dineen*, 235 Neb. 363, 365, 455 N.W.2d 178, 180 (1990).

of the investigation.[21] This confusion, Crawford asserts, was "exploited"[22] into additional charges of "non-cooperation."[23] Crawford further points out that but for the concealment of the pregrievance correspondence, there never would have been an audit of her trust account.

We fail to see the legal significance of any "but for" arguments. Undisclosed allegations motivating an inquiry do not somehow void the investigation and consequent evidence that lead to a formal complaint and charges.

And we find no merit to Crawford's argument that she was justifiably confused and that there was consequently an unfair impression that she was being uncooperative. Crawford insists that the entirety of the investigation and her attitude during that investigation were tainted by the nondisclosure of this "accounting issue."[24] As concerns any "accounting issue," Counsel for Discipline's initial requests were quite limited. Counsel for Discipline requested proof that the $9,000 in advance fees was properly deposited in a trust account and properly withdrawn when earned. This was a routine request and, as already discussed, was within the proper scope of Counsel for Discipline's authority. Whatever her confusion, Crawford was unjustified in believing that she did not have to promptly provide this information upon Counsel for Discipline's clear request.

The record reflects that it was not until months of delay and Crawford's apparent inability to produce simple documentation showing the proper handling of Nolan's two advance payments that Counsel for Discipline decided to more fully audit Crawford's trust account. Whatever "accounting issue" was the subject of the initial allegations of misconduct, Crawford's failure to provide routine trust fund documentation during the course of the investigation raised entirely different accounting issues. And Counsel for Discipline was candid throughout the investigation as to his concerns and

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[21] Brief for respondent at 22.

[22] *Id.* at 23.

[23] *Id.* at 22.

[24] *Id.*

how those concerns had been raised. Crawford's evasion and attitude throughout the investigation were not justified by any confusion.

Crawford next asserts that her recalcitrant communications with Counsel for Discipline reflected a reasonable belief that the investigation was the result of racial or other impermissible bias against her. Crawford relatedly argues that the entire investigatory and disciplinary process was contaminated with racial bias. Crawford asserts that due process demands a new disciplinary hearing with a special prosecutor to substitute for the Counsel for Discipline who prosecuted this case. Because we find no evidence of impermissible bias, we find no merit to these arguments.

The discretion of the office of the Counsel for Discipline and of the Committee on Inquiry is informed by considerations in the disciplinary rules, the rules of professional conduct, relevant case law, and other practical factors peculiar to each case.[25] We have said that these factors and guidelines afford sufficient legal guidance to obviate the danger of arbitrary or discriminatory enforcement.[26]

[11,12] The general rule is that unless there is proof that a particular disciplinary prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections.[27] In order to support a defense of selective or discriminatory prosecution, the attorney must show not only that others similarly situated have not been prosecuted, but that the selection of the defendant for prosecution has been invidious or in bad faith, based upon considerations such as race, religion, or the desire to prevent the exercise of his or her constitutional rights.[28]

As proof of bad faith prosecution here, Crawford first points to the failure to disclose the correspondence preliminary to

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[25] See *State ex rel. Counsel for Dis. v. James*, 267 Neb. 186, 673 N.W.2d 214 (2004).

[26] *Id.*

[27] See *id.*

[28] See *id.*

the grievance. For the reasons already discussed, the undisclosed allegation that Crawford failed to acknowledge receipt of the full $9,000 in client funds was never deemed by the office of the Counsel for Discipline to have likely merit. Regardless, there was no obligation to disclose the allegation. Therefore, such nondisclosure does not indicate impermissible bias against Crawford.

Crawford next argues that the record reflects a "deeply held level of distrust"[29] by Counsel for Discipline throughout the process. She concludes that such distrust is contrary to the objectivity that due process demands. While we agree that the record reflects some distrust, we disagree that it raises the specter of impermissible bias. Due process does not demand that Counsel for Discipline "trust" the attorneys under investigation. If prosecutors' distrust of the persons being prosecuted were contrary to due process, then we cannot imagine how the adversary system would function.

Crawford presents the affidavit of Dr. Omowale Akintunde to prove this distrust stemmed from impermissible racial animus. Akintunde is a tenured associate professor of Black studies at the University of Nebraska at Omaha. Akintunde averred that he had examined the exchanges between Counsel for Discipline and Crawford and that he had also examined other disciplinary cases occurring around the same time as the investigation of Crawford. Akintunde concluded that the disciplinary process pertaining to Crawford "was entrenched with unrecognized and unacknowledged racial bias." Akintunde explained that Counsel for Discipline had demonstrated "improper motive" and "microagression," which Akintunde defined as the "subtle, stunning, often automatic verbal (and non-verbal) exchanges which are 'put downs' of blacks by offenders." To illustrate his conclusions, Akintunde points to Counsel for Discipline's "aggressive, threatening and intended intimidation in statements and comments throughout his correspondence with [Crawford] and exchange during the deposition i.e. threats of 'suspension' and the 'most attorneys' language."

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[29] Brief for respondent at 24.

In our de novo review of the record, we find that the statements made by Counsel for Discipline fail to reveal any racial bias. Counsel for Discipline is charged with the task of supervising attorneys, compelling information from them during an investigation, and pursuing formal charges where appropriate. Many of the targeted attorneys perceive this as aggressive and otherwise threatening. The more uncooperative the attorney under investigation, the more Counsel for Discipline may be forced to "threaten" that attorney to get the necessary information. Counsel for Discipline's threat of suspension was a credible and reasonable threat given Crawford's failure to respond to clear requests which, as a licensed attorney, she was obligated to comply with.

We also fail to see how Counsel for Discipline's comment referring to "[m]ost attorneys" indicates racial animus. It is our belief and hope that most attorneys indeed handle their trust accounts with the care that Counsel for Discipline expected of Crawford. We expect, and the office of the Counsel for Discipline ought to also expect, that all licensed attorneys live up to the same standards set forth by our rules of professional conduct.

In her brief, Crawford further points to an exchange during her deposition as "evidence of the subconscious perceptions outlined by . . . Akintunde."[30] Toward the end of the deposition, when Counsel for Discipline attempted to explain his investigation of Crawford as a normal part of the responsibility of his office to maintain the sanctity of attorney trust accounts, Crawford said, "What I don't understand is why it appears to be very aggressive when it comes to black attorneys in Nebraska." Counsel for Discipline responded:

> Q. Prior to today, . . . had you [Crawford] and I ever met?
>
> A. I have never met you.
>
> Q. How did I know that you were African-American or black, or however you want to identify yourself?
>
> A. How did you know that?
>
> Q. How do you know I knew that?

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[30] *Id.* at 29.

> [Counsel for Crawford]: Objection, argumentative, form and foundation. If you would like to ask her a relevant question, I have no objection to that, but you're asking — you're testifying here now.
>
> [Counsel for Discipline]: I am asking her why she's calling me a racist.

According to Crawford, "[f]or [Counsel for Discipline] to internalize that comment [by Crawford discussing her 'honestly held perception that black attorneys are treated differently in Nebraska'] and act so harshly to it as a specific affront on him, is evidence of the subconscious perceptions outlined by . . . Akintunde."[31]

In our view of the record, Crawford asked Counsel for Discipline why the office of the Counsel for Discipline was so aggressive against "black" attorneys. This was, in essence, a charge of racism. Counsel for Discipline responded to this charge. We observe from the record that Counsel for Discipline was at that moment already palpably frustrated with Crawford's continuous refusal to clearly answer Counsel for Discipline's questions. Long discourses took place over topics such as the wording of the fee agreement or the size of manila envelopes. Rarely would Crawford simply affirm or deny an allegation or answer a question with a "yes" or "no." Counsel for Discipline could have kept his emotions more in check, but we do not see subconscious "internaliz[ation]" demonstrating Counsel for Discipline was racially biased. In any event, such psychological inferences would not satisfy Crawford's burden of proof. Crawford has failed to demonstrate that Counsel for Discipline's pursuit of the disciplinary investigation or his conduct during the investigation was racially motivated or the product of any other impermissible bias.

[13] Crawford may have genuinely felt Counsel for Discipline was motivated by racial animus or some other personal vendetta against her. Crawford presented evidence of a previous grievance and how she felt that Counsel for Discipline was out to "'get [her].'" Crawford also testified that "we, those who look like me, don't feel like disciplinary counsel is our

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[31] *Id.*

friend, and more of a foe." But Crawford's perceptions do not justify her failure to cooperate in this case. Attorneys licensed to practice law in this state ought to be deferential to the office of the Counsel for Discipline in its essential role of monitoring the integrity of the profession. Furthermore, whatever attorneys believe is motivating opposing counsel, a judge, or Counsel for Discipline, attorneys are expected to maintain the level of decorum that the profession demands and to act in accordance with their duties.

[14,15] We have repeatedly emphasized how important it is for an attorney to respond to inquiries and requests for information from Counsel for Discipline.[32] We have held that an attorney's failure to respond to inquiries and request for information from the office of the Counsel for Discipline is considered to be a grave matter and a threat to the credibility of attorney disciplinary proceedings.[33] The disciplinary process as a whole must function effectively in order for the public to have confidence in the integrity of the profession and to be protected from unscrupulous acts.[34]

[16-18] Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from Counsel for Discipline indicate disrespect for this court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.[35] Counsel for Discipline should not be forced to threaten an attorney with the suspension of his or her license in order to get the attorney to respond to requests for information.[36] A

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[32] See, e.g., *State ex rel. Counsel for Dis. v. Smith*, 278 Neb. 899, 775 N.W.2d 192 (2009); *State ex rel. Counsel for Dis. v. Carbullido*, 278 Neb. 721, 773 N.W.2d 141 (2009); *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

[33] See, e.g., *State ex rel. Counsel for Dis. v. Hutchinson*, 280 Neb. 158, 784 N.W.2d 893 (2010); *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

[34] *State ex rel. Counsel for Dis. v. James, supra* note 25.

[35] *State ex rel. Counsel for Dis. v. Smith*, 275 Neb. 230, 745 N.W.2d 891 (2008).

[36] *State ex rel. Counsel for Dis. v. James, supra* note 25.

failure to make timely responses to inquiries of Counsel for Discipline violates ethical canons and disciplinary rules which prohibit conduct prejudicial to the administration of justice.[37] We find that Crawford violated § 3-508.4(c) and (d) (dishonesty, fraud, deceit, or misrepresentation and conduct prejudicial to administration of justice) and violated her oath of office throughout the course of the investigation.

But before moving on to address the other findings of misconduct, we address some remaining procedural objections. These objections also stem from the undisclosed allegation that Crawford failed to acknowledge payment of the full $9,000 in payments from Nolan. Crawford asserts that she was prejudiced by Counsel for Discipline's failure to appoint special counsel and to inform her of the previously discussed $9,000/$5,000 allegation, because Counsel for Discipline should have been a witness at the disciplinary hearing. According to Crawford, Counsel for Discipline knew or should have known that "as the only person with first-hand knowledge of this alleged conversation [about the failure to acknowledge full receipt of Nolan's payments], he would be subject to being called as a witness, being confronted and being cross-examined."[38] Crawford also asserts that the failure to disclose the correspondence preliminary to the grievance was a discovery violation.

As a quasi-judicial proceeding, attorney disciplinary proceedings do not entitle their participants to pretrial discovery as a constitutional right—although refusal to grant a discovery request may, in certain circumstances, so prejudice the party as to amount to a denial of due process.[39] Parties derive rights to discovery from statutes or court rules.[40] Crawford did not submit any discovery requests to Counsel for Discipline. Crawford

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[37] *Id.*

[38] Brief for respondent at 21-22.

[39] See, *In the Matter of Tobin*, 417 Mass. 81, 628 N.E.2d 1268 (1994); *In re Herndon*, 596 A.2d 592 (D.C. 1991); *In re Wireman*, 270 Ind. 344, 367 N.E.2d 1368 (1977).

[40] See *In the Matter of Tobin, supra* note 39.

does not point out what statute or rules were allegedly violated in this case, other than the "grievances" argument we have already discussed. Preliminary correspondence is the unavoidable consequence of the fact that Counsel for Discipline is required to both investigate and prosecute attorney misconduct. And technicalities cannot be invoked to defeat charges where there is evidence showing that the conduct alleged against the attorney is ethically wrong.[41] The referee denied a motion for continuance and for mistrial. But the referee did grant Crawford's request that the record remain open for 14 days while Crawford reviewed the entire investigatory file which Counsel for Discipline provided to her. Because of the negligible evidentiary value of the undisclosed documents and of any examination of Counsel for Discipline as a witness to the discarded $9,000/$5,000 allegation, we find no merit to these procedural objections.

2. Underlying Charges

Finally, we turn to the remaining charges of misconduct. We find clear and convincing evidence of Crawford's failure to provide a monthly accounting as agreed to, of misappropriating client funds, and of lying in order to cover up the misconduct. As Crawford points out, the evidence is largely circumstantial, disputed, and complicated. We find the evidence nonetheless clear and convincing.

(a) Billing Cheatams

We begin with the relatively simple matter of the billing. We find by clear and convincing evidence that Crawford failed to provide Nolan or Cheatams with detailed monthly statements reflecting work performed, contrary to her agreement and their repeated demands.

Crawford testified that the fee agreement providing for the detailed monthly statements was just a standard form she used. It was part of the alleged verbal agreement to never leave any documents at Douglas County Correctional Center. Crawford explained that sometimes jailers raid the jail cell

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[41] *State ex rel. NSBA v. Rhodes*, 234 Neb. 799, 453 N.W.2d 73 (1990).

of the inmates and that inmates can then forcibly take papers from other inmates. Crawford testified in her deposition and at trial that she met with Cheatams at least monthly at the jail and showed him a handwritten billing, which she discussed with him and which showed the work done and how much of the retainer had been spent. She explained that she did not send a copy of the billing to Nolan because Nolan was not her client.

Nolan, however, testified that Crawford had agreed to send Nolan detailed monthly billing statements, with Cheatams' permission, which he gave. Nolan testified that she repeatedly left messages asking Crawford to send billing statements that would show what they owed. Nolan testified that she directed Cheatams to also ask Crawford about the billing statements whenever he saw Crawford. When Nolan was able to speak to Crawford on the telephone and ask for the billing statements, Crawford would tell her, "'Oh, that's no problem. That's the least of our worries. We got a real thing that we're trying to get done. But you'll get that.'"

Cheatams similarly testified that he asked for billing statements but that Crawford did not provide him or Nolan with such statements. Cheatams explained:

> She told me that she couldn't give it to my mom [Nolan] because [she] wasn't her client, so I would have to need it or want it, so — and that's — But she said that she didn't want to give it to me because she didn't know about, like, I guess, inmates stealing, you know, other — stealing paperwork or however. But I had paperwork there, so, you know, I figured that wasn't the reason. I just figured that she was just lack of time or she just, you know, just was doing it on her own.

Cheatams testified that the first time Crawford went over any billing statement or discussed money with him at all was when Crawford told him the $2,500 "was down" and that they "needed to come up with some more money" because they were going to trial. The only other time he saw a billing statement was at the withdrawal hearing.

Cheatams' visitation history from September 24, 2009, to January 27, 2011, showed only three visits from Crawford on

February 17, March 15, and June 28, 2010. In addition, there were court hearings on October 21 and November 30, 2009, in which Crawford was present.

Section 3-501.5(f) (fees) states:

> Upon reasonable and timely request by the client, a lawyer shall provide, without charge, an accounting for fees and costs claimed or previously collected. Such an accounting shall include at least the following information:
>
> (1) Itemization of all hourly charges, costs, interest assessments, and past due balances.
>
> (2) For hourly rate charges, a description of the services performed and a notation of the person who performed those services. The description shall be of sufficient detail to generally apprise the client of the nature of the work performed.

While certainly there were irreconcilable versions of the facts, in disciplinary proceedings, findings made by the referee are given special consideration on matters that are in irreconcilable conflict.[42] We consider and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[43] We find clear and convincing evidence that Crawford violated § 3-501.5.

(b) Misappropriation and Lying

We also find clear and convincing evidence that Crawford misappropriated $3,500 in client funds. Indisputably, Crawford took $3,500 in unearned client funds in cash into her possession. Indisputably, that cash was not deposited into the trust account, and Crawford knew or should have known it was not properly deposited for at least 5 weeks. Then, according to Crawford, through further negligence, she thought the cash had already been deposited and left the money in her safe undiscovered for a year. She looked in her safe for the cash only after repeated requests by Counsel for Discipline for proof of the deposit and a threat of temporary suspension prompted further investigation.

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[42] *State ex rel. Nebraska State Bar Association v. Walsh, supra* note 3.

[43] *State ex rel. Special Counsel for Dis. v. Fellman, supra* note 1.

Even accepting Crawford's version of events, this is a serious violation of § 3-501.15, which mandates that client funds "shall be kept in a separate account" and that a "lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."[44] Under the disciplinary rules, keeping unearned fees in an office safe is not safekeeping of client funds. Crawford admits to this "mishandling" of client funds, but not "misappropriation."

[19,20] 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.[45] Advance fees are payments made by a client for the performance of legal services and belong to the client until earned by the attorney.[46]

Crawford argues that under the standard of clear and convincing proof to which we hold disciplinary violations, we cannot disbelieve her testimony that the $3,500 cash was sitting unused in a client safe for more than a year. She points out that there was no affirmative evidence to the contrary. According to Crawford, there is no "objective evidence" or "inferences strong enough" for Counsel for Discipline to sustain his burden of proof that she lied.[47] By demanding that she prove her explanation was credible, Crawford claims Counsel for Discipline impermissibly shifted to her the burden of proof.

We conclude that once it was established that the unearned funds were cashed out and not deposited in a trust account as the rules require, the burden properly shifted to Crawford to explain where those funds were. And we agree with the referee that Crawford's explanation was unsatisfactory.

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[44] § 3-501.15(a) and (c).

[45] *State ex rel. Counsel for Dis. v. Beltzer*, 284 Neb. 28, 815 N.W.2d 862 (2012).

[46] *State ex rel. Special Counsel for Dis. v. Fellman, supra* note 1.

[47] Brief for respondent at 18.

Crawford could not explain why she negotiated the $6,500 cashier's check in her personal savings account at Centris and withdrew the $3,500 unearned client funds in cash to deposit in the trust account later. Counsel for Discipline pointed out that Crawford could have negotiated the check at Bank of the West, depositing the advance fee cashier's check directly into her trust account, and could have then withdrawn the $3,000 earned amount as cash or through writing a check from her trust account. Crawford testified at the disciplinary hearing, "I think I could have done either. . . . And I don't think it mattered which I did. . . . I didn't have any particular reason for choosing one over the other."

Crawford likewise could give no particular reason why she took the unearned $3,500 out in cash rather than asking for a cashier's check or other more traceable and secure form. According to Crawford, she took the $3,500 cash back to her office that same day. According to Crawford, it was her intention to get to the bank and deposit the cash in her trust account "as soon as it was practical for me to do so."

A branch office of Bank of the West was located approximately 1½ blocks from Crawford's law office in downtown Omaha. Crawford gave no explanation as to why she did not immediately pass by the Bank of the West on her way to her office. She testified that she went back to her office the same day she negotiated the $6,500 cashier's check.

Crawford testified at her deposition that when she arrived at her office from the bank, she placed the envelope of $3,500 cash inside a larger manila envelope with a trust account deposit slip that she had prepared from her book of deposit slips. Crawford testified in her deposition that she had a book of trust account checks, four to a page, with stubs, in her desk drawer. When asked whether there was anything else in the manila envelope with the cash, Crawford replied that, no, she "wouldn't have put anything else in that manila envelope with that cash."

Crawford testified that she placed the manila envelope in a safe located under her desk. The safe was not very large. Crawford explained that the height of the safe was such that the 2-inch deposition transcript would not have fit inside. The

width was such that a letter-sized envelope could fit in the safe. Crawford described that the safe opened up from the front. There was no shelf inside the safe or any other type of divider. Crawford stated that when she put the manila envelope containing the $3,500 into the safe, there were other items already in the safe. Crawford testified that she laid the envelope on top of those items.

Crawford could not say when she might have opened the safe between January 8 and February 10, 2010, or if she did at all, but she admitted that whenever she next opened the safe, the manila envelope containing the $3,500 would have been the first thing visible on the pile. Whenever that occurred, Crawford claims she did not notice it.

Crawford claims that, for a while, she simply forgot about the $3,500 cash. When asked how that could have occurred, Crawford explained:

> I can tell you in retrospect. After I put it inside of [the] safe I made a mental note to myself that this task had been accomplished, so there was really nothing that was drawing my attention to it, although I knew I had done that. There was nothing that was drawing my attention to it.

Sometime after February 10, 2010, Crawford put another manila envelope into the safe. That envelope contained two checks to be deposited into her trust account. One check was a $9,000 bond refund check that a client had assigned to Crawford, dated February 10, 2010. The other check was a $4,121 personal injury settlement, dated February 5, 2010. The February 5 check was made out to both Crawford and the client, so her client had to endorse it before it could be deposited in the trust account.

Crawford explained that she placed the two checks together into the manila envelope whenever she had them both in her possession. The fact that the other check was dated February 10, 2010, would indicate it would not have been before that date.

The next day, on February 11, 2010, when Crawford reached into her safe again to remove that second manila envelope and deposit those checks, she purportedly became cognizant of the

$3,500 of unearned funds cashed from Nolan's cashier's check. And, having forgotten about the carefully prepared separate envelope, Crawford thought the $3,500 cash was inside the envelope with the two checks. We note that this explanation is not entirely consistent with a previous explanation in her letter received on March 24, 2011, that she "must have" just grabbed one of the envelopes instead of both.

On February 11, 2010, at 6:17 p.m., Crawford took the manila envelope with the two checks to a grocery store branch of Bank of the West on West Fort Street. Crawford testified that at Bank of the West, she handed the teller the manila envelope and directed the teller to deposit the contents. She claims she never discovered during this transaction that she was wrong in her purported belief that the $3,500 was inside that envelope with the two checks. Crawford explained, "Because of my relationship with the bank, I could on occasion, and sometimes many occasions, go in and hand them either cash, checks, envelope, whatever the case may be, and indicate to them which account I needed it to go into." Crawford explained that when she handed the teller the envelope, "in my mind," the envelope contained one check and the $3,500 cash.

When Counsel for Discipline asked whether Crawford checked the February 11, 2010, deposit slip at the time of the deposit, to make sure it accurately reflected the total amount she had intended to deposit that day, she indicated that she only checked to confirm a total deposit amount of $13,121. When asked why she would have thought that the $3,500 was in that manila envelope and part of the February 11 deposit, Crawford said, "Because I knew there were two deposits in there, and in my mind the two deposits meant checks and cash."

Because Crawford was already sure "in [her] mind" that the $13,121 included the $3,500, she only requested verification that a $13,121 deposit had been made—despite Counsel for Discipline's repeated requests for an itemized deposit slip. Only after the March 15, 2011, letter from Counsel for Discipline, threatening Crawford with temporary suspension of her license to practice law, did Crawford go to her bank to ask them "to

check before and after to look for exactly what happened with this deposit."

Crawford testified that after discovering that the $3,500 was not part of that $13,121 deposit, she decided to look in her safe. According to Crawford, she found the cash just as she had left it—in the manila envelope with the original trust fund deposit slip she had filled out on January 8, 2010.

Crawford testified in her deposition that she took the $3,500 cash to Bank of the West within a day or two of discovering it in her safe. She deposited it into her trust account, even though it would have been earned funds by that time. She thought it "prudent" to do so, "since there was an inquiry." But Crawford did not use the old deposit slip she had originally dated and placed in the manila envelope with the cash, and she did not keep track of where that old deposit slip went after the discovery of the envelope in her safe. Crawford explained why Bank of the West would not have accepted the original deposit slip. But Crawford was unclear as to whether she had asked the bank to utilize the old deposit slip—and the bank refused to do so—or whether she had determined that she could not use it and never tried to.

By the time Counsel for Discipline learned of these alleged events and asked to see the safe, a month had passed and the safe was gone. Crawford explained that she had given her safe away, because she "didn't want this type of incident to occur in my office again."

Crawford originally told Counsel for Discipline that the safe was "in Minnesota." After Counsel for Discipline subpoenaed more specific information, Crawford's brother came forward with an affidavit in which he averred that Crawford had given him the safe in late February 2011, while he was visiting Omaha from his home in Minnesota. He averred that the last time he saw the safe was sometime in March 2011. He stated that the safe "was left in my unlocked vehicle and my guess is it was stolen."

At the disciplinary hearing, Crawford testified that although she could not locate the original deposit slip, she had recently found its carbon. The carbon was hidden behind her desk

drawer. Crawford explained that rather than tearing out only the original deposit slip and leaving the carbon copy in the deposit slip book, she "must have" torn both the original and the carbon out when she wrote the deposit slip. Then she must have put both the deposit-slip book and the loose carbon back in her desk drawer. She stated that the carbon must have subsequently fallen behind her desk drawer.

Crawford offered into evidence a carbon copy of a deposit slip for $3,500 cash dated January 8, 2010. The referee found that the carbon is "nearly pristine, showing no sign of being bent, folded, or marred in any fashion." We agree with that assessment.

Counsel for Discipline presented evidence that the same day Crawford deposited the $3,500 into her trust account, Crawford had negotiated an $8,380.20 check through her personal savings account. She had deposited only $2,380.20 and had taken the remainder in cash. At the disciplinary hearing, Crawford provided documentation that $1,500 of that $6,000 in cash was deposited into another checking account. She then testified as to where the remaining cash had been spent. Crawford testified that it was not unusual for her to transact most of her business in cash.

We agree with the referee that this is a convoluted story. We observe that the story has morphed throughout the course of Counsel for Discipline's investigation to meet the questions being raised. There being no credible explanation as to what happened to the $3,500 in client funds, we conclude that it was misappropriated. Crawford violated § 3-501.15(a) and (c) (failure to deposit unearned fees into trust account and withdraw only as earned), and her oath of office. In addition, the evidence is clear and convincing that Crawford has lied throughout the investigation, before the referee, and to this court, about the whereabouts of the $3,500. Because she intentionally evaded inquiry and lied about it, she violated § 3-508.4(c) and (d), and her oath of office.

3. Disbarment and Proportionality

[21,22] We conclude that disbarment is the proper discipline for Crawford's cumulative acts of misconduct. The license to

practice law in this state is a continuing proclamation by this court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and as an officer of the court. It is the duty of every recipient of the conditional privilege to practice law to conduct himself or herself at all times, both professionally and personally, in conformity with the standards imposed upon members as conditions for that privilege.[48]

[23-25] Misappropriation of client funds is one of the most serious violations of duty an attorney owes to clients, the public, and the courts.[49] Misappropriation by an attorney violates basic notions of honesty and endangers public confidence in the legal profession.[50] Misappropriation, as the result of a serious, inexcusable violation of a duty to oversee entrusted funds, is deemed willful, even in the absence of improper intent or deliberate wrongdoing.[51]

[26,27] Thus, misappropriation of client funds, including paying oneself a retainer before earning it, typically results in disbarment.[52] And a lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.[53] The fact that the client did not suffer any financial loss also does not excuse an attorney's misappropriation of client funds and does not provide a reason for imposing a less severe sanction.[54]

[28] Absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or

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[48] Neb. Ct. R. § 3-303(A).

[49] See *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

[50] See *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991).

[51] *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004); *State ex rel. NSBA v. Veith, supra* note 50.

[52] See *State ex rel. Counsel for Dis. v. Jones, supra* note 49.

[53] *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997).

[54] *State ex rel. Counsel for Dis. v. Beltzer, supra* note 45. See, also, *State ex rel. Counsel for Dis. v. Carter*, 282 Neb. 596, 808 N.W.2d 342 (2011).

commingling of client funds.[55] In fact, we have observed that, generally, an attorney who has misappropriated client funds will be disbarred absent "extraordinary" mitigating factors.[56]

Examples of extraordinary mitigating factors include *State ex rel. Counsel for Dis. v. Davis*.[57] In *Davis*, we suspended, but did not disbar, an attorney who had used her attorney trust account as both a business account and a personal checking account and had failed to promptly deliver trust account funds to a client's health care provider.[58] As mitigating factors, she had cooperated with Counsel for Discipline; was seeking treatment for depression, anxiety, and alcoholism; and had entered into a monitoring contract with the Nebraska Lawyers Assistance Program. She had no aggravating factors.

In *State ex rel. Counsel for Dis. v. Beltzer*,[59] we likewise only suspended the attorney for misappropriation, noting the attorney's "extremely cooperative dealings with the Counsel for Discipline," the staggering number of letters submitted in the attorney's support, and the fact that the attorney had "made no attempt to conceal what had occurred from the Counsel for Discipline during its investigation and that he accepted full responsibility for his egregious error in judgment."

Crawford submitted several letters in support of her qualifications as a lawyer and her good character. A juvenile court

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[55] See *State ex rel. Counsel for Dis. v. Beltzer, supra* note 45. See, also, *State ex rel. Counsel for Dis. v. Carter, supra* note 54; *State ex rel. Counsel for Dis. v. Samuelson*, 280 Neb. 125, 783 N.W.2d 779 (2010).

[56] *State ex rel. Counsel for Dis. v. Carter, supra* note 54, 282 Neb. at 607, 808 N.W.2d at 351.

[57] *State ex rel. Counsel for Dis. v. Davis*, 276 Neb. 158, 760 N.W.2d 928 (2008).

[58] *Id.*

[59] *State ex rel. Counsel for Dis. v. Beltzer, supra* note 45, 284 Neb. at 32-33, 815 N.W.2d at 867. See, also, e.g., *State ex rel. Counsel for Dis. v. Gase*, 283 Neb. 479, 811 N.W.2d 169 (2012); *State ex rel. Counsel for Dis. v. Lindmeier*, 280 Neb. 620, 788 N.W.2d 555 (2010); *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006); *State ex rel. Counsel for Dis. v. Monjarez*, 267 Neb. 980, 679 N.W.2d 226 (2004); *State ex rel. Counsel for Dis. v. Wintroub, supra* note 51; *State ex rel. Special Counsel for Dis. v. Fellman, supra* note 1.

judge was very complimentary of Crawford's zealous representation of her clients and commitment to her community. The director of transportation for the Omaha Public Schools wrote about Crawford as an advocate and community leader who, among other things, often spoke to high school students about their legal rights, the importance of planning for their futures, and their career aspirations. Akintunde wrote of Crawford's service to the community and her qualifications as legal counsel, as a professor in the Department of Black Studies at the University of Nebraska at Omaha, and as a personal friend whose friendship has "meant as much to me as any human bond I have ever formed."

But, in and of themselves, this handful of letters of support are not extraordinary mitigating factors. And, unfortunately, we are presented with several aggravating factors in this case. Crawford has not taken full responsibility for her actions. She has not cooperated with Counsel for Discipline. She has made repeated attempts, through dishonesty, to conceal her misconduct.

This court does not look kindly upon acts which call into question an attorney's honesty and trustworthiness. The essential eligibility requirements for admission to the practice of law in Nebraska include "[t]he ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations."[60] With or without misappropriation, acts of dishonesty can result in disbarment.[61]

The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[62] In *State ex rel. NSBA v. Howze*,[63] we disbarred an attorney who similarly misappropriated client funds and failed to cooperate with Counsel for Discipline. The attorney had retained

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[60] § 3-103(A).

[61] See, e.g., *State ex. rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006); *State ex rel. Counsel for Dis. v. Swanson*, 267 Neb. 540, 675 N.W.2d 674 (2004).

[62] *Id.*

[63] *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000).

approximately $300 of settlement funds to pay a medical bill and did not pay the bill until a complaint was filed with Counsel for Discipline. At that time, he paid the bill with a cashier's check instead of a trust account check. For another client, that attorney had delayed paying approximately $2,000 in medical bills out of client funds retained for the purpose, until a complaint was filed. During the investigation, despite Counsel for Discipline's repeated requests, the attorney failed to provide an explanation regarding that client's funds or any trust account records. The mitigating factors were not significant.[64]

In *State ex rel. Counsel for Dis. v. Rasmussen*,[65] we disbarred an attorney who waited several months to return the $300 unearned portion of a retainer to one client and paid himself another client's retainer of $3,000 before he had earned it. The attorney also, like Crawford, failed to provide those clients with monthly itemized statements as the written fee agreements provided for, eventually providing only a cumulative statement. The attorney gave delayed and incomplete responses to Counsel for Discipline's requests for information during the course of investigation. The attorney originally testified at the disciplinary hearing that the $3,000 was for fees he had earned working for another client. But when he was confronted with evidence that those other fees had already been withdrawn in a separate transaction, the attorney claimed he simply did not remember why he had withdrawn the $3,000. We observed that the confusion over the $3,000 was compounded by the attorney's mismanagement of his trust account. But that was no excuse. The attorney also was neglectful in his handling of two clients. In disbarring the attorney, we noted that the attorney had "failed to demonstrate any sincere regret for his behavior."[66]

Despite such cases, Crawford suggests that disbarment in this case would be indicative of racial bias by this court.

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[64] See *id.*

[65] *State ex. rel. Counsel for Dis. v. Rasmussen*, 266 Neb. 100, 662 N.W.2d 556 (2003).

[66] *Id.* at 113, 662 N.W.2d at 566.

She argues that some similar cases involving nonminorities resulted in more lenient sanctions. We do not note in our disciplinary opinions the race of the attorney under discipline, because that is not relevant. As discussed above, disbarment is frequently the sanction in any case involving misappropriation of client funds, failure to cooperate with Counsel for Discipline, and lying during a disciplinary investigation. This is true regardless of an attorney's gender, race, ethnicity, or religion. Comparing Crawford's conduct to other attorneys disciplined by this court, we conclude that disbarment is the appropriate sanction.

VI. CONCLUSION

It is the judgment of this court that Crawford should be and hereby is disbarred from the practice of law in the State of Nebraska, effective immediately. Crawford is directed to comply with Neb. Ct. R. § 3-316, and upon failure to do so, she shall be subject to punishment for contempt of this court. Crawford is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. § 3-323(B). We overrule the miscellaneous motions made by Crawford's attorney at oral arguments.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
AUTUMN EAGLE BULL, APPELLANT.
827 N.W.2d 466

Filed March 1, 2013. No. S-11-1072.

1. **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.
2. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential

element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

3. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
4. **Trial: Presumptions.** Triers of fact may apply to the subject before them that general knowledge which any person must be presumed to have.
5. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
6. **Jury Instructions: Appeal and Error.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.

Appeal from the District Court for Sheridan County, TRAVIS P. O'GORMAN, Judge, on appeal thereto from the County Court for Sheridan County, CHARLES PLANTZ, Judge. Judgment of District Court affirmed.

Michael T. Varn for appellant.

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

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

STEPHAN, J.

Autumn Eagle Bull was convicted in the Sheridan County Court of misdemeanor child abuse as the result of an incident in which she left her three children unattended in her home. The Sheridan County District Court affirmed her conviction. She appeals, contending the evidence at trial was insufficient to support a conviction for the charged offense. We affirm.

FACTS

On April 19, 2011, Eagle Bull was living in Gordon, Nebraska, with three of her children: Rayhan C., who was 10 years old and in the fourth grade; Toby C., who was almost 8 years old and in the second grade; and Petra P., who was 6 weeks old.

At approximately 5 p.m., Toby telephoned her grandfather, who lived in Pine Ridge, South Dakota, and told him she needed an adult to accompany her to a school event that evening. The grandfather was concerned because Toby seemed excited and nervous, and he thought someone should go to Eagle Bull's home. At some point between 5 and 5:30 p.m., the grandfather called his wife, Lynnell Eagle Bull (Lynnell), at her workplace in Pine Ridge to tell her about Toby's call.

Lynnell called Susan Kaplan, who lived across the street from Eagle Bull and sometimes stayed with Eagle Bull's children. Lynnell asked Kaplan to check on the children. Lynnell then drove to Gordon and arrived at Eagle Bull's home 35 or 40 minutes later. When Lynnell arrived, Toby was in the front yard riding her bike and Eagle Bull's car was in the driveway. Lynnell entered the home and found Eagle Bull, Kaplan, Rayhan, and Petra.

Lynnell asked Eagle Bull whether she had left the children alone. Eagle Bull said she had not, but when asked, she did not identify any adult who had been with them. Lynnell noticed that Eagle Bull was "kind of swaying" and smelled of alcohol. Lynnell called the police, and when an officer arrived, Lynnell insisted that Eagle Bull be arrested. Lynnell admitted that she and Eagle Bull did not get along well. Although the children wanted to stay in Gordon with Eagle Bull, Lynnell took them home with her that night.

Approximately 2 weeks prior to April 19, 2011, Petra had been hospitalized for 2 or 3 days with a respiratory disorder. Petra was discharged without any medication, but Eagle Bull was given a "breathing machine" to treat Petra at home "when she needed it."

Kaplan testified that after Lynnell called her, she went to Eagle Bull's home and found the children home with no adult in the house. The two older children were sitting on the couch, and the baby, Petra, was awake and lying on the couch by her siblings. About 30 minutes after Kaplan arrived, Eagle Bull came home. Lynnell arrived within 5 or 10 minutes, and she and Eagle Bull argued.

Officer Clay Heath of the Gordon Police Department was dispatched to the Eagle Bull residence at 6:50 p.m. He met

Lynnell on the porch and followed her into the house. He described both Eagle Bull and Lynnell as "emotional," and he testified that it "appeared that they had been arguing." He talked with Eagle Bull and observed that her speech was slurred, her eyes were bloodshot and watery, she smelled of alcohol, and she was having trouble standing. Eagle Bull submitted to a preliminary breath test administered by Heath at the home. The test indicated she was intoxicated.

Eagle Bull told Heath she left the residence about 5 p.m. She said that she was driving around and drinking with friends and that their car got stuck on a dirt road. She assured Heath that someone had been watching her children. Eagle Bull initially said Kaplan was watching them, but when Heath told her Kaplan was not present until 6 p.m., Eagle Bull said Mindy Janis, her roommate at the time, had been watching the children.

Heath walked through the house with Eagle Bull. He saw that there was food in the cupboards and refrigerator; that the house was clean; and that the children appeared healthy, clean, and appropriately clothed. He saw no dangerous conditions in the home, such as loose wires or firearms, and testified that he had no concerns with the children's environment. Ultimately, however, he issued a citation to Eagle Bull for child neglect because she left baby Petra for "one hour unattended."

Janis testified that she was living with Eagle Bull on April 19, 2011. On that day, Janis went to work at 11 a.m. and returned home about 6:30 p.m. Janis said Eagle Bull had not asked her to babysit the children, but did call her at approximately 3 p.m. and asked whether Janis could go and open the house for the children. Janis told Eagle Bull that she could not leave work. She did not open the house. Janis did not know how the children got into the home on April 19.

Eagle Bull was charged with misdemeanor child abuse and tried by a jury. After the State presented its evidence, Eagle Bull moved for a directed verdict, arguing the State failed to present sufficient evidence to prove the charge against her. Her motion was overruled. Eagle Bull presented no evidence and then renewed her motion for directed verdict, which was again

overruled. The jury returned a verdict of guilty, and the county court sentenced Eagle Bull to 30 days in jail. She appealed to the district court, which affirmed the conviction and sentence. The district court reasoned the evidence was sufficient to establish that Eagle Bull acted negligently, because she left the children home alone for a period of more than 1 hour while she went drinking with friends. And it found the evidence was sufficient to support a finding that she denied Petra necessary care under Neb. Rev. Stat. § 28-707(1)(c) (Cum. Supp. 2010), because

> [Eagle Bull] left unattended her 45 day old, 10 year old and eight year old children with no supervision for at least one hour. The 45 day old child was two weeks removed from a hospital stay for RSV. Although the child was no longer on medication, a breathing machine was in the home in the event breathing trouble recurred. A reasonable jury could conclude that the infant was not being watched over or provided for during this period of time sufficient for conviction.

In reaching this conclusion, the district court relied on the dictionary definition of "care" as "'to pay attention to, watch over, take care of; look after; provide for.'" It concluded that there was "no question" that Eagle Bull did not "'pay attention to, watch over, take care of or look after'" her children while she was away from home. It concluded that because the evidence was sufficient to show a denial of necessary care under § 28-707(1)(c), it did not have to resolve whether the evidence was also sufficient to show endangerment under § 28-707(1)(a).

Eagle Bull perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Eagle Bull assigns, restated, that the district court erred in concluding (1) that the county court did not err in overruling

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

her motion for directed verdict and (2) that the evidence was sufficient to support her conviction.

STANDARD OF REVIEW

[1] 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.[2] 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]

[2,3] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.[4] If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.[5]

ANALYSIS

Eagle Bull's assignments of error have merit only if no rational trier of fact could have found on the evidence presented by the State that the essential elements of the crime she was charged with were met.[6] We therefore must examine both the charge against her and the evidence presented by the State.

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[2] *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012); *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[3] *Id.*

[4] *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002).

[5] *Id.*

[6] See, *State v. Kitt, supra* note 2; *State v. Freemont, supra* note 2; *State v. Segura, supra* note 4; *State v. Canady, supra* note 4.

Eagle Bull was charged with negligent child abuse pursuant to § 28-707(1), which provides:

> A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or physical or mental health; [or]
>
> . . . .
>
> (c) Deprived of necessary food, clothing, shelter, or care.

Because the offense was alleged to have been committed negligently and there was no allegation that it resulted in serious bodily injury or death, the charge against Eagle Bull was a Class I misdemeanor punishable by a jail sentence of up to 1 year, a fine of up to $1,000, or both.[7] The jury was instructed that it could find Eagle Bull guilty if it found beyond a reasonable doubt she violated either subsection (1)(a) or (1)(c) of § 28-707 and that it was required to find her not guilty if the State failed to prove the elements of both subsections. Eagle Bull was thus charged in alternative ways with committing the act of negligent child abuse. The jury could convict if it found there was sufficient evidence of either, and thus the judgment of conviction must be affirmed if the evidence is sufficient to support either of the State's alternative theories of guilt.

In analyzing whether there is sufficient evidence in the record to support the conviction, we view the evidence in the light most favorable to the State.[8] The district court reasoned the evidence was sufficient to support a finding that the children, and in particular Petra, were denied necessary care under § 28-707(1)(c) because Eagle Bull did not "'watch over, take care of or look after'" them while she was absent from the home. We begin our analysis by reviewing this determination.

Section 28-707(1)(c) criminalizes the failure to provide *necessary* care. We addressed the meaning of necessary as used

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[7] § 28-707(3); Neb. Rev. Stat. § 28-106(1) (Reissue 2008).

[8] *State v. Kitt*, *supra* note 2; *State v. Freemont*, *supra* note 2.

in § 28-707(1)(c) in *State v. Crowdell*.[9] In that case, we held the term "necessary" was not vague, because its "ordinary meaning . . . supplies a constitutionally sufficient standard."[10] We specifically noted that the dictionary definition of "necessary" is

> "items (as of food, clothing, shelter, medical care, equipment or furnishing) that cannot be done without: things that must be had (as for the preservation and reasonable enjoyment of life [and items] that cannot be done without: that must be done or had: absolutely required."[11]

We also cited with approval cases from other jurisdictions finding that the term "necessary" used in similar statutes "'relates to [a] minimum standard'" of the quality of care.[12] Thus, under *Crowdell*, the State had the burden to show that Petra was denied some aspect of care that she reasonably could not do without as a result of Eagle Bull's actions.

The evidence, in particular Janis' testimony, supports a reasonable inference that Eagle Bull left her children, who were 10 years old, almost 8 years old, and 6 weeks old, unattended from 3 p.m. until she returned to her home at approximately 6:30 p.m. There was thus a 3½-hour time period during which the children were subject to no direct adult supervision. Although a 10-year-old and an 8-year-old are not inherently unable to provide necessary care for themselves for a certain amount of time, their ability to so provide necessarily correlates at least to some degree with the amount of time they are unsupervised.

[4] And here, the older children were not simply left alone, but were left in charge of a 6-week-old infant. Triers of fact may apply to the subject before them that general knowledge

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[9] *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990).

[10] *Id.* at 479, 451 N.W.2d at 702.

[11] *Id.* at 477, 451 N.W.2d at 701, citing Webster's Third New International Dictionary, Unabridged 1510-11 (1981).

[12] *Id.* at 478, 451 N.W.2d at 701, citing *Caby v. State*, 249 Ga. 32, 287 S.E.2d 200 (1982); *State v. Joyce*, 361 So. 2d 406 (Fla. 1978); and *State v. Brown*, 52 Wash. 2d 92, 323 P.2d 239 (1958).

which any person must be presumed to have.[13] It is within the general knowledge of triers of fact that infants necessarily require regular, special care in the form of supervision, diaper changing, and feeding. Although there is no specific evidence as to whether the elder siblings were capable of providing this care to Petra, a reasonable juror could properly infer from the totality of the circumstances that they were not.

The evidence also supports a reasonable inference that Petra required additional specialized care, because she had recently been hospitalized for a respiratory disorder and was discharged with a breathing machine to be used as needed. A rational trier of fact could conclude the infant's 8- and 10-year-old siblings were not capable of determining when the infant would need the breathing machine or of utilizing the machine if the need arose.

Moreover, from the fact that the 8-year-old called her grandfather in another state when she needed an adult, a rational trier of fact could reasonably infer that Eagle Bull was not only absent but was also unreachable by her children. Eagle Bull's admission to Heath that she had been out drinking with friends and her inebriated state upon her eventual return home further support a reasonable inference that she would have been of little assistance to the children in an emergency even if they had been able to reach her. And although a trusted neighbor lived directly across the street, it is clear that the neighbor was unaware that the children were unsupervised until she was advised by Lynnell. Thus, a finder of fact could reasonably conclude that Eagle Bull left her children unattended and without any means of contacting her or a nearby responsible adult if the need arose.

Based upon all of these facts, a rational finder of fact applying common knowledge could have concluded that Eagle Bull denied Petra necessary care. Because we conclude that the evidence, when viewed in a light most favorable to the State,

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[13] *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996), *overruled on other grounds, Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006), and *abrogated on other grounds, Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

is sufficient to support a verdict that Eagle Bull was guilty of negligent child abuse as defined by § 28-707(1)(c), we need not determine whether it was also sufficient to support a guilty verdict under § 28-707(1)(a).

[5,6] For the sake of completeness, we note that Eagle Bull argues that the county court should not have instructed the jury on the alternative means of committing negligent child abuse, because there was insufficient evidence to support either alternative means. However, Eagle Bull did not object to the jury instruction before it was given and did not assign error with respect to the giving of the instruction in either her appeal to the district court or the current appeal to this court. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[14] The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.[15] We find no such error here.

CONCLUSION

For the reasons discussed, we conclude the district court sitting as an intermediate appellate court correctly concluded that the county court did not err in denying Eagle Bull's motion for directed verdict and that the evidence was sufficient to support her conviction. We therefore affirm the judgment of the district court.

AFFIRMED.

CASSEL, J., not participating.

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[14] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

[15] *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. James G. Lisonbee, respondent.

826 N.W.2d 874

Filed March 1, 2013. No. S-12-185.

Original action. Judgment of suspension.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Per Curiam.

INTRODUCTION

Respondent, James G. Lisonbee, was admitted to the practice of law in the State of Nebraska on June 4, 2010. At all relevant times, he was engaged in the private practice of law in Lincoln, Nebraska. Respondent has been on temporary suspension since April 11, 2012. On August 23, 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 2012); Neb. Ct. R. §§ 3-303(B) and 3-309(E) (rev. 2011) of the disciplinary rules; and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-501.16(a) and (d) (declining or terminating representation), 3-508.1(b) (bar admission and disciplinary matters), and 3-508.4(a) and (d) (misconduct).

On January 2, 2013, 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 suspension for 3 years and, following reinstatement, 2 years 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 of by the Counsel for Discipline. 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, the last type and date of work completed on file (pleading, correspondence, document preparation, discovery, or court hearing), the next type of work and date that work should be completed on the case, any applicable statutes of limitations and their dates, and the financial terms of the relationship (hourly, contingency, et cetera). 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 with 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 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 a 3-year suspension and, following reinstatement, 2 years of probation "appears to be appropriate under the facts of this case and will adequately protect the public."

Upon due consideration, we approve the conditional admission, and we order a 3-year suspension effective immediately and, following reinstatement, 2 years of probation and monitoring.

FACTS

Count I.

With respect to count I, the formal charges state that in late June 2010, an individual referred to as "the first client" filed suit, pro se, in the district court for Lancaster County seeking

to dissolve his marriage. Thereafter, he contacted the Volunteer Lawyers Project at the Nebraska State Bar Association seeking legal counsel for his divorce. The Volunteer Lawyers Project referred him to respondent. He and respondent met, and respondent agreed to represent him. According to the first client, at first, the communication between him and respondent was good. Initially, the first client's wife was difficult to serve with summons; however, she was eventually served in person by the sheriff on July 27, 2010.

As time went on, it became more difficult for the first client to contact respondent. Nothing appears to have happened in the case from the time the first client's wife was served until November 15, 2010, when the district court judge issued a show cause order to respondent advising that the case would be dismissed for lack of prosecution. In response, on December 6, respondent filed a motion for default judgment that failed to comply with the rules of the district court for the Third Judicial District. A week later, on December 14, respondent filed a notice of hearing on a form provided by the clerk of the district court's office advising of a hearing scheduled for December 22.

A hearing was held on December 22, 2010, at which respondent appeared with the first client and the opposing party appeared pro se. Respondent came to the hearing on December 22 unprepared, and the judge continued the hearing so that respondent could prepare. The judge directed that respondent was to schedule the resumption of the hearing.

By February 15, 2011, respondent had not scheduled the conclusion of the hearing, so the judge again issued a show cause order to respondent. On March 9, respondent filed another motion for default judgment, again failing to comply with the local rules because respondent failed to include a notice of hearing and a certificate of service.

A hearing was held on March 30, 2011, at which respondent appeared, but again was unprepared. The judge again continued the hearing, noting, "'Due to incompleteness of evidence presented, hearing continued to be rescheduled by counsel. If case is not resolved within thirty days, it will be dismissed.'"

On April 28, 2011, respondent filed another motion for default judgment, but again, the motion did not comply with the local rules because it failed to contain a notice of hearing and a certificate of service. On May 2, the judge dismissed the case for lack of prosecution, noting:

> "As of the date of this order, no further hearing has been held in this case. (The court notes that, on April 28, the plaintiff again filed a motion for default judgment; however, contrary to Local Rule 3-2(B), no hearing date was secured from the court's staff and, like with the motion filed on March 9, no notice of hearing was filed.)"

Upon dismissal of the case, respondent failed to advise the first client of the dismissal and took no steps to reinstate the case.

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, 3-501.4, and 3-508.4(a) and (d).

Count II.

With respect to count II, the formal charges state that sometime prior to January 5, 2011, respondent began representing an individual referred to as "the second client" with regard to a custody and child support matter pending before the district court for Lancaster County. On January 5, the intervenor's counsel filed a motion to compel responses to discovery and sent it to respondent as the second client's counsel. The intervenor's counsel filed additional motions and notices throughout the summer and fall of 2011 and indicated in the certificates of service that copies were sent to respondent.

According to the formal charges, apparently the second client became dissatisfied with the representation being provided by respondent and hired new counsel. On November 7, 2011, the second client, through his new counsel, sent written notice to respondent advising that he was terminating the attorney-client relationship and directed that his file be sent to his new counsel. The new counsel and her staff made repeated

attempts to obtain the file from respondent, but respondent never responded or provided the file to either the second client or his new counsel.

On November 23, 2011, the new counsel filed a grievance against respondent alleging that respondent was withholding the second client's file from the new counsel. The Counsel for Discipline was initially unsuccessful in serving the grievance on respondent, but it was served upon respondent by the sheriff of Lancaster County on January 11, 2012, at respondent's address in Lincoln.

Respondent initially failed to respond to the grievance, but after an application for his temporary suspension was served upon him, he called the Counsel for Discipline on March 6, 2012, and stated that he would forward the second client's file to the new counsel. As of the date of the formal charges, respondent had not delivered the file to either the second client or his new counsel.

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, 3-501.4, 3-501.16(a) and (d), and 3-508.4(a) and (d).

Count III.

With respect to count III, the formal charges state that on August 29, 2011, the Counsel for Discipline received a grievance from the first client, generally alleging that respondent incompetently represented him in a custody and child support proceeding and was unprepared for trial. On August 29, a copy of the first client's letter was sent to respondent by certified mail along with a letter from the Counsel for Discipline advising respondent that the Counsel for Discipline was conducting an investigation into the allegations and that respondent should submit an appropriate written response addressing the issues raised in the first client's letter. The letter was sent to respondent's address on Garfield Street in Lincoln, which was respondent's address on file with the Nebraska State Bar Association. The letter was returned by the postal service unclaimed on September 19. The letter was sent

again on September 19, and it was again returned unclaimed on October 11. An attorney with the Counsel for Discipline left his business card in respondent's door on December 13. Approximately a week later, he left another business card under the wiper blade on what was believed to be respondent's car.

On November 23, 2011, the Counsel for Discipline received a grievance letter against respondent from the new counsel, noted in count II, alleging that respondent had refused to return records to the second client that were necessary for the new counsel to complete the second client's representation. The grievance was filed after many unsuccessful attempts by the new counsel to contact respondent by leaving messages on respondent's voice mail.

The Counsel for Discipline sent a copy of this grievance to respondent at an address on Surfside Drive in Lincoln, which address respondent had used in a recent filing in the county court for Lancaster County. A copy of the letter was also sent to respondent's address on Garfield Street. Both letters were returned by the postal service.

On January 11, 2012, copies of the letters from the first client and the second client's new counsel, along with copies of the letters from the Counsel for Discipline, were personally served on respondent at his address on Garfield Street by a deputy from the Lancaster County sheriff's office. Respondent had not submitted responses to either the first client's grievance or the second client's new counsel's grievance by February 6, so a reminder letter was sent to respondent at his address on Garfield Street, further advising him that failure to respond could be a separate ground for discipline. Except for a telephone call from respondent on or about March 6, the Counsel for Discipline has yet to receive a response from respondent to either grievance.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104, disciplinary rules §§ 3-303(B) and 3-309(E), and professional conduct rules §§ 3-508.1(b) and 3-508.4(a) and (d).

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 disciplinary rules §§ 3-303(B) and 3-309(E) and professional conduct rules §§ 3-501.1, 3-501.3, 3-501.4, 3-501.16(a) and (d), 3-508.1(b), and 3-508.4(a) and (d), 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 suspended from the practice of law for a period of 3 years, effective immediately. Should respondent apply for reinstatement, his reinstatement shall be conditioned

upon respondent's being on probation for a period of 2 years, including monitoring, following reinstatement, subject to the terms agreed to by respondent in the conditional admission and outlined above. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and 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 SUSPENSION.

KLAUS P. LINDNER, APPELLANT, V. DOUGLAS KINDIG, MAYOR OF THE CITY OF LA VISTA, ET AL., APPELLEES.

826 N.W.2d 868

Filed March 1, 2013. No. S-12-294.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
2. **Limitations of Actions.** Which statute of limitations applies is a question of law.
3. **Judgments: Appeal and Error.** An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.
4. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
5. **Constitutional Law: Appeal and Error.** Generally, a constitutional issue not passed upon by the trial court is not appropriate for consideration on appeal.
6. **Constitutional Law: Limitations of Actions.** A constitutional claim can become time barred just as any other claim can.
7. **Constitutional Law: Statutes: Proof.** A plaintiff can succeed in a facial challenge only 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.
8. **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.
9. ____. The time at which a cause of action accrues will differ depending on the facts of the case.

10. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.
11. **Limitations of Actions: Pleadings: Proof.** Where a complaint does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense, and, in that event, the defendant has the burden to prove that defense. If, however, the complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

K.C. Engdahl for appellant.

Gerald L. Friedrichsen and William M. Bradshaw, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellees.

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

CASSEL, J.

INTRODUCTION

This appeal involves a declaratory judgment action challenging the constitutionality of a municipal ordinance creating an offstreet parking district adjoining a Cabela's store. The district court found that the action was barred by the general 4-year statute of limitations, because it was commenced more than 4 years after the ordinance was adopted. The primary question presented is when the statute began to run. Because we cannot tell from the face of the complaint when the taxpayer suffered harm and, thus, had the right to institute and maintain suit, we reverse, and remand for further proceedings.

BACKGROUND

On January 17, 2006, the City of La Vista, Nebraska (City), passed and approved ordinance No. 979. The ordinance provided for "the creation of vehicle offstreet parking

District No. 1 of the City" as authorized under Neb. Rev. Stat. § 19-3301 et seq. (Reissue 2012). According to the ordinance, the costs of the offstreet parking facilities—estimated by the city engineer to be $9 million—would be paid for from general taxes, special property taxes or assessments on property within the offstreet parking district, and/or general property taxes, with financing by issuance of the City's general obligation bonds.

On December 16, 2011, Klaus P. Lindner, a resident of the City, filed a complaint against the City and its mayor and city council members (collectively appellees). Lindner sought declaratory judgment and a declaration of the unconstitutionality of the ordinance.

Lindner alleged that the ordinance violated the Nebraska Constitution in two ways: first, by paying for the costs through a general property tax levy in violation of article VIII, § 6, and second, by granting a Cabela's store a special benefit in violation of article III, § 18. According to Lindner, appellees previously held a commercial enterprise responsible for payment of costs associated with installation of parking facilities that benefited the enterprise. But he alleged that under the ordinance, appellees had agreed to pay for and bear the entire cost of the parking facilities directly benefiting the Cabela's store. Lindner believed that the cost was paid with sales tax revenues drawn from municipal general funds. He also believed that no other business or individual doing business in the City had been provided with a similar special benefit. Lindner alleged that as a resident of the City, he was "aggrieved as a consequence of municipal revenues having been applied in an unconstitutional manner for the peculiar benefit of a private enterprise and in a manner which contravenes the constitutional prohibition on granting or establishment of special privileges and immunities."

Lindner therefore asked the district court to order and declare that "any and all agreements or practices as above detailed are null, void and unconstitutional" and to issue an order restraining and enjoining ongoing enforcement of or adherence to the ordinance. He also requested that appellees be

ordered to impose and levy any necessary special assessments upon the property which was specially benefited by the parking facilities.

Appellees filed a motion to dismiss the complaint under Neb. Ct. R. Pldg. § 6-1112(b)(6). They alleged that the claim was barred by the "applicable time periods" for challenging the ordinance.

The district court granted appellees' motion to dismiss and dismissed the complaint with prejudice. The court reasoned that the complaint was subject to the 4-year catchall statute of limitations set forth in Neb. Rev. Stat. § 25-212 (Cum. Supp. 2012). The court determined that the limitations period began to run on the date that the ordinance was passed and approved—January 17, 2006—giving Lindner until January 17, 2010, to bring the current action. Because Lindner did not file the complaint until December 16, 2011, the court concluded that the complaint was barred by the statute of limitations.

Lindner timely appealed, and we moved the case to our docket pursuant to statutory authority.[1]

ASSIGNMENTS OF ERROR

Lindner alleges that the district court erred in (1) concluding that his complaint failed to state a claim upon which relief could be granted, (2) dismissing his complaint with prejudice, and (3) determining that the complaint was barred by a 4-year statute of limitations. Lindner also asserts that it was error as a matter of law to determine that a 4-year statute of limitations can operate to bar claims of unconstitutionality directed to a municipal ordinance.

STANDARD OF REVIEW

[1] An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law

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

and fact which may be drawn therefrom, but not the pleader's conclusions.[2]

[2,3] Which statute of limitations applies is a question of law.[3] An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.[4]

ANALYSIS

[4,5] The question of the ordinance's constitutionality is not properly before us for two reasons. First, Lindner's brief did not assign error in this regard. Although Lindner filed a notice of a constitutional question,[5] which asserted that "a question of state unconstitutionality of the complained of city ordinances will necessarily be presented," his brief did not specifically assign that an ordinance was unconstitutional. To be considered by this court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[6] Second, the district court did not reach the issue. Generally, a constitutional issue not passed upon by the trial court is not appropriate for consideration on appeal.[7] Here, the district court did not reach any constitutional issue, because it dismissed the complaint under § 6-1112(b)(6) for being filed outside the statute of limitations. Because Lindner failed to specifically assign that the challenged ordinance was unconstitutional and because the district court did not consider the issue, we decline to address the constitutionality of the ordinance.

Nonetheless, the constitutionality of the ordinance is at the center of Lindner's claim. We assume without deciding that the two constitutional provisions identified in Lindner's complaint—article VIII, § 6, and article III, § 18—apply to the

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[2] *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 282 Neb. 762, 810 N.W.2d 144 (2011).

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

[4] *Id.*

[5] See Neb. Ct. R. App. P. § 2-109(E) (rev. 2012).

[6] *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

[7] See *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007).

ordinance. However, in so doing, we express no opinion on the constitutionality of the ordinance or on its continued viability. Thus, we turn to the issue that is properly before us—whether Lindner's claim that the ordinance is unconstitutional is barred by a statute of limitations.

Lindner argues that a claim of unconstitutionality is not the type of claim which is subject to the bar of a statute of limitations. He argues that because a constitutionally infirm enactment is wholly void ab initio, "[e]ach day of unconstitutional subsistence is tantamount to a new and continuing wrong which may be challenged at any time . . . ."[8]

[6] But the U.S. Supreme Court has stated that a "constitutional claim can become time-barred just as any other claim can."[9] Statutes of limitations rest on a common understanding that wrongs for which the law grants a remedy are subject to a requirement that, in fairness, the party wronged must pursue the remedy in a timely fashion.[10] This understanding, in turn, addresses three concerns: first, for stale claims, where memories fade and witnesses and records may be missing; second, for repose—that after some period of time, claims should not continue unresolved; and third, that a plaintiff cannot sleep on his or her rights and then suddenly demand a remedy, without creating a greater wrong against the party charged and a wrong against the peace of the community.[11]

[7] At oral argument, Lindner clarified that his challenge to the constitutionality of the ordinance was a facial challenge. A plaintiff can succeed in a facial challenge only 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.[12] But the distinction between a facial as opposed to an "as-applied" challenge is not of great import for statute of

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[8] Brief for appellant at 8.

[9] *Block v. North Dakota*, 461 U.S. 273, 292, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983).

[10] See *Hair v. U.S.*, 350 F.3d 1253 (Fed. Cir. 2003).

[11] See *id.*

[12] See *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012).

limitations purposes. "[A] case alleging facial unconstitutionality is ripe not simply when the law is passed but, just like an as-applied challenge, when the government acts pursuant to that law and adversely affects the plaintiff's rights."[13] "There is simply no categorical rule that a law becomes insulated from facial challenge by the mere passage of time."[14]

[8,9] 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.[15] "The time at which a cause of action accrues will differ depending on the facts of the case, but it will come whenever the plaintiff's rights are finally and clearly affected pursuant to the law that [he or] she believes is unconstitutional."[16]

Lindner's claim of harm ultimately depends upon the funding mechanism actually employed by appellees. According to the ordinance, the costs of the offstreet parking facilities would be paid for from general taxes, special property taxes or assessments on property within the offstreet parking district, and/or general property taxes, with financing by issuance of the City's general obligation bonds. In other words, the language of the ordinance was broad enough to allow for payment of the costs through a special assessment on Cabela's. And if that had occurred, Lindner's allegations of unconstitutionality would seem to disappear, because his complaint appears to concede that a special assessment would have been constitutional.

But instead, accepting as we must at this stage the truth of Lindner's allegations, appellees opted to pay for the costs of the offstreet parking district through a general property tax levy or sales tax revenues drawn from municipal general funds. It was this decision or its implementation that adversely affected Lindner's rights and allegedly gave rise to his right to institute suit.

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[13] Timothy Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. 51, 61 (2010). See *Gillmor v. Summit County*, 246 P.3d 102 (Utah 2010).

[14] Sandefur, *supra* note 13 at 61. Accord *Gillmor, supra* note 13.

[15] *Behrens v. Blunk*, 284 Neb. 454, 822 N.W.2d 344 (2012).

[16] Sandefur, *supra* note 13 at 61.

[10] However, from the face of Lindner's complaint, we cannot tell *when* appellees made the decision choosing the specific funding mechanism to be used or implemented that decision. At this stage, we must accept all of the factual allegations in the complaint as true and draw all reasonable inferences in Lindner's favor. To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.[17] It is certainly plausible that the decision to use general funding sources or the implementation of that decision was made within 4 years immediately before the filing of Lindner's complaint. The existing allegations are sufficient to raise a reasonable expectation that discovery will reveal the date at issue.[18]

[11] At this point, we need not—and indeed, we cannot—determine precisely when Lindner's claim accrued. The general rule is that where a complaint does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense, and, in that event, the defendant has the burden to prove that defense. If, however, the complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts.[19] Because the complaint does not allege when appellees decided to pay the costs from general sources or when it implemented the decision, the complaint does not disclose on its face that it is time barred. And in the absence of such allegations, we cannot determine with specificity when the claim accrued.

Although we agree with the district court that the 4-year catchall limitations period set forth in § 25-212 potentially applies, we disagree with the court's conclusion that the limitations period began to run when the ordinance was passed. Because we cannot determine when Lindner's cause of action

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[17] *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

[18] See *id.*

[19] See *Eisenhart v. Lobb*, 11 Neb. App. 124, 647 N.W.2d 96 (2002).

accrued in this case, we reverse the judgment and remand the cause for further proceedings.

CONCLUSION

We do not reach the constitutionality of the ordinance in this appeal. The harm to Lindner's rights allegedly occurred when appellees declined to pay for the offstreet parking facilities through special assessments and instead paid for the costs through a general property tax levy or sales tax revenues drawn from municipal general funds. Because we cannot tell from the face of Lindner's complaint when that decision was made or when it was implemented and, thus, when Lindner's cause of action accrued for purposes of the running of the statute of limitations, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
EDWARD ROBINSON, JR., APPELLANT.
827 N.W.2d 292

Filed March 8, 2013. No. S-12-135.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel.** A petitioner's claim that his or her defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Constitutional Law: Effectiveness of Counsel.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
4. **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.
5. **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.

6. **Motions for New Trial: Juror Misconduct: Proof.** In order for a new trial to be granted because of a juror's use of extraneous information, the party claiming the misconduct has the burden to show by a preponderance of the evidence that prejudice has occurred.
7. **Jury Misconduct: Proof.** Extraneous material or information considered by a jury can be prejudicial without proof of actual prejudice if (1) the material or information relates to an issue submitted to the jury and (2) there is a reasonable possibility that it affected the jury's verdict to the challenger's prejudice.
8. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.
9. **Effectiveness of Counsel.** A counsel's duty to investigate is the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
10. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.
11. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Sarah M. Mooney, of Mooney Law Office, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ., and MOORE, Judge.

WRIGHT, J.

I. NATURE OF CASE

Edward Robinson, Jr., was charged with and convicted of first degree murder and use of a deadly weapon to commit a

felony. He was sentenced to life in prison on the first degree murder conviction and, as a habitual criminal, to 10 years' imprisonment on the conviction of the use of a deadly weapon to commit a felony, with the sentences to be served consecutively. He appealed the convictions and sentences to this court, and we affirmed. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006) (*Robinson I*), *abrogated, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). Robinson brought this action for postconviction relief based upon his claims relating to ineffective assistance of his trial and appellate counsel. After an evidentiary hearing, the district court denied postconviction relief. He now appeals from the order denying postconviction relief.

II. SCOPE OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

[2] A petitioner's claim that his or her defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012). We review factual findings for clear error. *Id*. Whether the defense counsel's performance was deficient and whether the petitioner was prejudiced by that performance are questions of law that we review independently of the lower court's decision. *Id*.

III. FACTS

The facts underlying Robinson's convictions are set forth in detail in our opinion resolving his direct appeal and need not be fully reiterated here. We summarize only those facts from *Robinson I* and the record which relate directly to this postconviction proceeding.

1. Death of Herbert Fant

Herbert Fant is the victim in this case, and his wife and Robinson's wife are cousins. On February 24, 2003, Fant became agitated with his domestic situation. After an argument with his wife, Fant attempted to contact Robinson's wife.

He went to Robinson's wife's house, argued with her, and then left.

Robinson was informed that his wife and Fant had been in an argument, and he began looking for Fant. Both men ended up at a fast-food restaurant around 10 p.m. They were fighting in the parking lot when Robinson, who had obtained a gun, shot Fant. Fant tried to get into his vehicle, but Robinson followed him and continued shooting. Police apprehended Robinson a few hours later at an automobile body shop. Robinson's nephew was also found at the shop. His nephew was wearing "a black leather type coat with a hood on it" lined with a synthetic fur, which matched eyewitness descriptions of apparel worn by the individuals who were present at the scene of the shooting.

2. Murder Trial

An amended information charged Robinson with one count of first degree murder, one count of use of a deadly weapon to commit a felony, and being a habitual criminal.

Testimony was offered by both sides regarding the vehicles driven by Fant and Robinson. Fant's vehicle was a green Chevrolet Caprice that had been painted orange. However, it was identified by a State witness as a Chevrolet Impala. Robinson's vehicle was a cream-colored GMC Yukon Denali, but an eyewitness testified that it was a white Cadillac Escalade.

Robinson filed a pretrial motion in limine to exclude the use of cellular telephone evidence, which motion the court overruled. At trial, numerous objections to the cellular telephone evidence were overruled. During closing argument, the State referred to cellular telephone evidence in an attempt to show when and where Robinson used his cellular telephone on the night of the murder. This evidence was used to place him in certain locations based on the cellular telephone tower utilized to make the call.

The State made several comments during closing argument, informing the jury that the cellular telephone records were unimpeachable third-party independent evidence that pinpointed a person's exact location and time. Robinson claims the State also made generalizations that were not in evidence

or supported by the evidence. Robinson's counsel objected on several occasions but did not move for mistrial.

During the trial, two jurors were dismissed. Juror No. 3 knew Fant's wife, who had waved at juror No. 3. Later, juror No. 3 informed the court she felt uncomfortable serving on the jury because she knew Fant's wife, and when asked to be dismissed, she was excused. Juror No. 22 was excused after being given a general admonishment because he was sleeping during key witness testimony.

The State had offered in evidence a coat that matched the description given by witnesses as the coat worn by the shooter the night Fant was killed. Robinson's nephew had been wearing this coat when the two were arrested. During deliberations, the bailiff was called into the jury room and informed that the jury had found a marijuana cigarette in a pocket of the coat. The marijuana cigarette had not been offered into evidence by either party, and presumably neither party knew it was there. There was conflicting evidence as to what persons the bailiff informed of the discovery, but both parties' attorneys were notified. The jury continued to deliberate and shortly thereafter announced its guilty verdict.

Robinson was found guilty of first degree murder and use of a deadly weapon to commit a felony. His motion for new trial was overruled. He was sentenced to life in prison on the conviction of first degree murder and, as a habitual criminal, to 10 years' imprisonment on the conviction of the use of a deadly weapon to commit a felony, with the sentences to be served consecutively.

3. Direct Appeal

Robinson appealed, and we affirmed his convictions and sentences. See *Robinson I*. He was represented by the same counsel during trial and his direct appeal.

In his direct appeal, Robinson claimed, among other things, that the trial court erred when it (1) admitted the evidence of the cellular telephone records, (2) overruled his objection to the coat found in the possession of his nephew, (3) failed to find that the State committed misconduct during closing argument in regard to the cellular telephone evidence and

the identification of Fant's and Robinson's vehicles, and (4) delayed the removal of the juror who knew Fant's wife and the juror who slept during the trial.

We held that the cellular telephone records were properly admitted under the business records exception to the hearsay rule and that Robinson had the opportunity to cross-examine all the communication company witnesses.

The State offered the fur-lined leather coat because it matched the descriptions given by witnesses and was found on Robinson's nephew at the time of the arrests that occurred only a few hours after the shooting. We concluded that the evidence regarding the coat was relevant and that this evidence was not unfairly prejudicial.

Robinson claimed that certain statements made by the State during closing argument constituted prosecutorial misconduct. After reviewing the State's closing argument, we determined that the State did not misstate the law, did not act improperly, and did not mislead the jury.

As to the two jurors who were removed, we found the trial court did not abuse its discretion in removing jurors Nos. 3 and 22.

4. Postconviction Evidentiary Hearing

Robinson's motion for postconviction relief alleged that he was denied effective assistance of counsel when counsel failed to (1) request a mistrial after she was informed that the jury found a marijuana cigarette in an exhibit, (2) call a witness to establish an alibi defense, (3) enter evidence regarding the makes and models of Fant's and Robinson's vehicles, (4) investigate a Crimestoppers telephone call, (5) challenge the cellular telephone evidence, (6) move for mistrial during the State's closing argument or the conduct of two jurors, and (7) timely move for rehearing in Robinson's direct appeal.

At the evidentiary hearing on postconviction, the court took judicial notice of the bill of exceptions, the exhibits, and the entire file, including our opinion in *Robinson I*. Robinson also offered the deposition testimony of the trial judge's bailiff and Robinson's trial counsel, in addition to Robinson's testimony.

(a) Marijuana Cigarette

In analyzing the claim regarding the marijuana cigarette found in the coat, the court concluded that both the prosecution and the defense had argued that the coat belonged to Robinson's nephew. It found there was "no evidence that the jury could have reasonably presumed that the coat belonged to [Robinson]" or that he "had anything to do with the improper extrinsic evidence discovered by" the jury. Robinson's trial counsel testified that she had not moved for mistrial because she did not think it would have affected the outcome of the trial. Based on the totality of the evidence presented to the jury regarding guilt, the court concluded that Robinson failed to show there was a reasonable probability the outcome of the trial would have been different but for trial counsel's failure to move for mistrial or to include this issue in a motion for new trial.

(b) Identification of Vehicles

The court determined that Robinson failed to show why the outcome of his trial would have been different had his counsel obtained copies of the registrations of the vehicles identified inconsistently at trial.

(c) Crimestoppers Tip and Witness

The court determined that Robinson failed to show the result would have been different if a Crimestoppers tip would have been pursued or why he was prejudiced because counsel did not call a particular witness for the defense.

(d) Cellular Telephone Records

The court concluded that Robinson did not show prejudice from his counsel's failure to challenge cellular telephone records as irrelevant and unduly prejudicial, or why counsel should have offered an alternative expert opinion to refute the cellular telephone evidence.

(e) Closing Argument, Removal of Jurors, and Rehearing

The court determined that Robinson failed to show he was prejudiced by his counsel's failure to move for mistrial regarding the prosecution's closing argument, to move for removal

of the two jurors, or to timely move for rehearing on direct appeal.

Because Robinson could not show deficient performance, prejudice, or a reasonable probability that the outcome of his trial would have been different, the court denied postconviction relief.

IV. ASSIGNMENTS OF ERROR

Robinson claims, restated, that the postconviction court erred when it ruled that his counsel was not ineffective because she (1) did not request a mistrial or inform Robinson that the jury had discovered a marijuana cigarette in an exhibit, (2) failed to call a specific defense witness or investigate a Crimestoppers telephone call, (3) did not properly handle the cellular telephone evidence, (4) failed to establish the importance of the vehicle identification, and (5) did not move for mistrial or timely file a motion for rehearing in Robinson's direct appeal.

V. ANALYSIS

All of Robinson's postconviction claims are based upon alleged ineffective assistance of counsel. Because Robinson's trial counsel was also his appellate counsel, this is his first opportunity to assert his claims relating to ineffective assistance of his trial and appellate counsel. See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[3,4] Whether the defense counsel's performance was deficient and whether the petitioner was prejudiced by that performance are questions of law that we review independently of the lower court's decision. *Id.* An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *Id.* To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *Id.* An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id.*

[5] We address whether Robinson was prejudiced by his counsel's performance at trial and on direct appeal. 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. *Id*. To show prejudice under the prejudice component of the *Strickland* test, 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. *Id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.

1. Marijuana Cigarette Found in Coat Pocket of Exhibit

[6] Robinson claims his trial counsel should have moved for mistrial when the jury found a marijuana cigarette in the coat pocket. In order for a new trial to be granted because of a juror's use of extraneous information, the party claiming the misconduct has the burden to show by a preponderance of the evidence that prejudice has occurred. *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997).

During jury deliberations, at least one juror, and probably all the jurors, became aware of the marijuana cigarette in the pocket of the coat worn by someone at the scene on the night of Fant's death. The juror alerted the bailiff, who informed the attorneys of the discovery. Shortly thereafter, the jury returned a guilty verdict. Robinson's trial counsel did not include the discovery of the marijuana cigarette in a motion for mistrial or motion for new trial and did not include this claim on direct appeal.

[7] Extraneous material or information considered by a jury can be prejudicial without proof of actual prejudice if (1) the material or information relates to an issue submitted to the jury and (2) there is a reasonable possibility that it affected the jury's verdict to the challenger's prejudice. *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). The extraneous information was a marijuana cigarette found in a pocket of a coat matching the description of a coat worn by someone at the scene of

the shooting on the night of the murder. Robinson was on trial for first degree murder. He was not on trial for possession of illegal drugs. The extraneous information found by the jury was not related to the charges Robinson was facing. Therefore, prejudice cannot be presumed in this situation.

The postconviction court found that a verdict was announced shortly after the bailiff was alerted to the discovery of the marijuana cigarette, which indicated that "a verdict had been determined by the jury prior to the question of the juror regarding the contents of the coat." It concluded that based on the totality of the evidence presented to the jury on Robinson's guilt, Robinson had failed to show that there was a reasonable probability that the outcome of his trial would have been any different had his attorney moved for mistrial or made the extrinsic evidence part of a motion for new trial.

Robinson has the burden to prove prejudice, which means that but for his counsel's ineffective assistance, the outcome of the trial would have been different. There were numerous facts in evidence that pointed toward his guilt. Robinson had a motivation for the killing, he pursued Fant, and they were arguing at the time of the shooting. And one eyewitness identified Robinson as the killer.

Robinson did not show there was a reasonable probability that the discovery of the marijuana cigarette affected the jury's determination of his guilt of first degree murder. And we agree with the district court's determination that Robinson has not shown the discovery of the marijuana cigarette was prejudicial. Robinson failed to carry his burden to show the outcome would have been different but for his attorney's failure to move for mistrial. The court did not err in rejecting Robinson's ineffective assistance of counsel claim on this issue.

2. Trial Counsel Did Not Inform Robinson of Discovery of Marijuana Cigarette Until After Direct Appeal

Because we have concluded there was no error regarding the discovery of the marijuana cigarette, there can be no error in not informing Robinson of the discovery until after his appeal.

Robinson cannot prove that but for the failure to inform him of the discovery of the marijuana cigarette, the outcome of the trial or appeal would have been different.

3. Calling Specific Witness

Robinson claimed that trial counsel was ineffective for not calling Shamika Brown as a witness. Brown was Robinson's brother's fiance. She would have testified that she was not at the murder scene the night Fant was shot. She stated that she was with Robinson's brother at his house on the night Fant died. This would have disputed the testimony of the prosecution eyewitness who testified that Brown was present at the shooting of Fant. Brown would have testified that this witness was upset with the Robinson family and that in her opinion, the witness "pretty much had it out for them."

Brown was arrested for witness tampering in connection with the case. Those charges were eventually dropped against her, but they may have been pending during Robinson's trial. Robinson's trial counsel testified that she did not call Brown as a witness because she did not think her testimony would have added anything.

[8] The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel. *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009). Robinson has not shown that calling Brown as a witness would have changed the result.

4. Investigation of Crimestoppers Telephone Call

The court concluded that Robinson had not set forth specific allegations regarding the testimony of a witness who should have been called or how the information from a Crimestoppers tip might have been received in evidence at his trial.

[9] A counsel's duty to investigate is the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. See *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999). In any ineffectiveness case, a particular decision not to investigate

must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id*.

The record indicates that the Crimestoppers telephone call was an anonymous call, in which the caller claimed to have overheard a young girl on a schoolbus say that her mother's boyfriend had killed Fant. No other information was provided to prove the accuracy or credibility of the statements, and no other reports came in through the hotline. At the hearing, Robinson did not produce any evidence regarding the girl on the schoolbus or what course of investigation trial counsel could have pursued. Under these circumstances, Robinson cannot show that the testimony from an unknown person would have changed the result.

5. Assignments of Error Addressed on Direct Appeal

[10] Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief. *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010). Robinson had the same attorney for his trial and direct appeal. Therefore, his postconviction motion is his first opportunity to raise some of his claims of ineffective assistance of counsel. However, we will not readdress issues we have already decided on his direct appeal. He raises four such claims in his postconviction motion. We address each in turn.

(a) Cellular Telephone Evidence at Trial

At the trial, the State introduced evidence related to the use of cellular telephones in an attempt to place Robinson and Fant in the same area at the time of the murder by using signals from different cellular telephone towers. On direct appeal, we concluded that the records were properly admitted, because nothing indicated the cellular telephone records were

not trustworthy. Thus, this part of the claim was previously decided on direct appeal.

Counsel also claimed the records should have been excluded as irrelevant and unduly prejudicial. However, on direct appeal, we refused to consider the argument because counsel had not properly preserved it by objection at trial.

[11] Trial counsel is afforded due deference to formulate trial strategy and tactics. See *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011). Robinson's trial counsel objected to the cellular telephone evidence on numerous occasions and on different grounds, and the objections were overruled. Robinson claims that because counsel did not object to the evidence as irrelevant and unduly prejudicial, he was prejudiced. However, he has not shown that the evidence was not relevant or that it was unfairly prejudicial. He has not shown that the outcome of the trial would have been different if trial counsel had objected to the admission of the telephone records as irrelevant and unduly prejudicial.

(b) Identification of Vehicles

On direct appeal, we did not specifically address the importance of vehicle identification. We discussed the identification of the vehicles in the context of the prosecutor's comments made during closing argument. Although the prosecutor went beyond the facts in his closing argument by mentioning that Robinson's vehicle was customized, we did not find that a miscarriage of justice occurred as a result of the State's objectionable references to the customization of Robinson's vehicle. We concluded that because there was no miscarriage of justice and because Robinson did not make a timely motion for mistrial based on prosecutorial misconduct, his assignment of error was without merit.

We are left to determine whether Robinson was unfairly prejudiced because his counsel did not offer certified copies of the titles or registrations of the vehicles at issue in trial so that counsel could then object when witnesses misidentified the vehicles as a Chevrolet Impala instead of a Caprice and a Cadillac Escalade instead of a GMC Yukon Denali. Robinson argues that his trial counsel should have offered certified copies

of the titles or registrations of Fant's and Robinson's vehicles so as to prevent the State from referring to the vehicles as different models. Robinson has not shown how the outcome of his trial could have been different if the makes and models of the vehicles were in evidence. He has failed to show how he was prejudiced because his trial counsel did not offer the vehicle registrations.

(c) Motions for Mistrial During Closing Argument

Robinson's trial counsel objected to parts of the prosecution's closing argument, and two of those objections were overruled. On direct appeal, we rejected Robinson's claim of prosecutorial misconduct. We concluded that the prosecutor did not misstate the law and did not mislead the jury. Because trial counsel did not move for mistrial after these statements were made, absent plain error, we would not consider the assignments on direct appeal. *Robinson I*. In his postconviction claim, Robinson argues that because counsel did not make a motion for mistrial, he was prejudiced. This assignment has been decided on direct appeal.

Robinson's trial counsel objected to certain parts of the prosecutor's closing argument and did not object to other parts. Trial counsel did not make any motions for mistrial after the prosecution's closing argument. We rejected Robinson's claim of prosecutorial misconduct on direct appeal. Therefore, Robinson's claim on this issue is procedurally barred.

(d) No Motion for Mistrial for Jury Misconduct

There were separate issues regarding two jurors during the course of the trial. Juror No. 3 knew Fant's wife through church, eventually told the trial court she felt uncomfortable serving on the jury, and said she wanted to be removed from the jury. Her request was granted. Juror No. 22 fell asleep during portions of the trial. The jury was given a general admonishment, but the juror continued to fall asleep and was removed from the jury. Both jurors were removed from the jury before the case was submitted to the jury.

On direct appeal, we concluded that in respect to juror No. 3, the record did not suggest that there was any misconduct on the juror's part, much less prejudicial misconduct. We concluded the record did not suggest Robinson was prejudiced by the removal of the juror who slept during parts of the testimony.

On direct appeal, we concluded the court did not abuse its discretion in removing the two jurors. Robinson is procedurally barred from reasserting this claim.

6. Motion for Rehearing on Direct Appeal

Robinson claims his counsel was ineffective by not timely filing a motion for rehearing after we affirmed Robinson's convictions and sentences on direct appeal. Motions for rehearing are discretionary with this court. On postconviction, Robinson has not shown that we would have granted his motion for rehearing or that if the motion had been granted, we would have changed our opinion and granted him redress.

VI. CONCLUSION

Because Robinson cannot establish that he was prejudiced by his counsel's representation, we find no merit to his assignments of error. We affirm the district court's denial of Robinson's motion for postconviction relief.

Affirmed.

Heavican, C.J., not participating.

Butler County Dairy, L.L.C., appellant, v. Butler County, Nebraska, and Township of Read, Butler County, Nebraska, appellees, and Township of Summit, Butler County, Nebraska, intervenor-appellee.

827 N.W.2d 267

Filed March 8, 2013. No. S-12-173.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.

2. **Constitutional Law: Statutes: Political Subdivisions.** The determination of the proper scope of the powers vested in the subordinate divisions of the state, and the lawfulness of the exercise thereof by the statutory agencies concerned, necessitates recourse to the terms of the state Constitution and the language of the statutes relating thereto.
3. **Courts: Statutes: Ordinances.** When reviewing preemption claims, a court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.
4. **Statutes.** The interpretation of statutes and regulations presents questions of law.
5. **Jurisdiction.** The question of jurisdiction is a question of law.
6. **Counties: Statutes.** A board of supervisors has all the powers applicable to county boards as provided by the general laws of this state.
7. **Political Subdivisions: Words and Phrases.** A township is a subdivision of state territory, convenient in area, for the purpose of carrying into effect limited powers governmental in their nature.
8. **Political Subdivisions.** Every town shall have corporate capacity to exercise the powers granted thereto, or necessarily implied, and no others.
9. **Political Subdivisions: Statutes.** The powers conferred upon a township by statute are limited and confined to those which properly belong to the government of the state as a whole and which are merely devolved upon the township as a portion of the state government.
10. ____: ____. The statutes granting a township certain powers must be strictly construed.
11. **Counties: Highways.** General supervision and control of the public roads of each county is vested in the county board.
12. **Political Subdivisions: Highways.** All township road and culvert work shall be under the general supervision of the township board.
13. **Counties: Political Subdivisions: Highways.** A county board and a township board are both vested with general supervisory authority over a township road.
14. ____: ____: ____. The exercise of a county's authority over township roads can supersede a township's authority over those same roads.
15. **Political Subdivisions: Public Officers and Employees.** Under Neb. Rev. Stat. § 23-224(6) (Reissue 2012), the electors of a township have the power to prevent the exposure or deposit of offensive or injurious substances within the limits of the town.
16. **Constitutional Law: Political Subdivisions: Proof.** When a party challenges the validity of a township regulation without arguing that a particular application of the regulation is improper, a court will consider that to be a facial challenge that can succeed only by establishing that no set of circumstances exists under which the regulation would be valid.
17. **Statutes: Ordinances.** Preemption of municipal ordinances by state law is based on the fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state.
18. ____: ____. In the case of a direct conflict between a statute and a city ordinance, the statute is the superior law.
19. **Political Subdivisions: Statutes.** Any laws enacted pursuant to a township's limited statutory authority necessarily are subordinate to the laws of the state from which the township's powers derived.

20. **Municipal Corporations: Political Subdivisions.** The same preemption doctrines apply to the laws of both municipalities and townships.
21. **Statutes.** There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.
22. **Political Subdivisions: Statutes: Legislature: Intent.** Express preemption occurs when the Legislature has expressly declared in explicit statutory language its intent to preempt local laws.
23. **Legislature: Statutes.** The mere fact that the Legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.
24. **Statutes: Political Subdivisions.** Where the state has occupied the field of prohibitory legislation on a particular subject, there is no room left for local laws in that area and a political subdivision lacks authority to legislate with respect to it.
25. **Statutes: Ordinances: Legislature.** That which is allowed by the general laws of the state cannot be prohibited by ordinance, without express grant on the part of the state. Conversely, without express legislative grant, an ordinance cannot authorize what the statutes forbid.
26. **Political Subdivisions: Statutes.** The fact that a local law is more stringent than state law does not by itself lead to conflict preemption.
27. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
28. **Jurisdiction: Parties.** The presence of necessary parties is jurisdictional.

Appeal from the District Court for Butler County: MARY C. GILBRIDE, Judge. Affirmed.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Jarrod S. Boitnott, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Township of Read.

Gregory D. Barton, of Harding & Shultz, P.C., L.L.O., for intervenor-appellee.

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

CASSEL, J.

I. INTRODUCTION

Butler County Dairy, L.L.C. (BCD), challenged two regulations adopted by Read Township, Butler County, Nebraska, governing livestock confinement facilities after those regulations were cited by Read Township and Butler County in

denying BCD's request for a permit to install a liquid livestock manure pipeline under a public road. The district court ruled that Read Township had the statutory authority to enact the regulations and that they were not preempted by the Livestock Waste Management Act (LWMA)[1] or Nebraska's Department of Environmental Quality (DEQ) livestock waste control regulations in title 130 of the Nebraska Administrative Code (Title 130). Because Read Township had the statutory authority to enact the pertinent regulations and the regulations are not preempted by state statute or regulation, we affirm.

II. BACKGROUND

BCD applied for and received a permit from DEQ for the construction and operation of a livestock waste control facility pursuant to LWMA. As part of the operation of the facility, BCD planned to pipe liquid livestock manure to crop ground, where the livestock waste would then be applied through a pivot irrigation system. For this purpose, BCD wished to install a pipeline under road No. 27, a section line road in Butler County. The southern portion of road No. 27 lies within Read Township. This action addresses only the southern portion of the road.

BCD applied for a permit from Read Township to install the pipeline, but the permit was denied due to the existence of a township regulation prohibiting the placement of any pipeline carrying liquid livestock waste "on, over or under town property, including town roads, right-of-ways and ditches." This specific township regulation was adopted by the electors at the annual townhall meeting for Read Township on September 13, 2007, and became effective September 20. BCD's application for a permit was denied at a regular Read Township board meeting on September 20.

BCD also applied for a permit from Butler County to install the pipeline. When Read Township denied BCD's application, the Butler County Board of Supervisors refused to override the township's decision and on February 17, 2009, voted to deny the permit.

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[1] Neb. Rev. Stat. §§ 54-2416 to 54-2438 (Reissue 2010).

In March 2009, BCD filed a complaint against Read Township alleging that the pipeline regulation was invalid because it "exceed[ed] the scope of Read Township's authority" and was preempted by LWMA, Title 130, and zoning laws. BCD also challenged as invalid a second township regulation adopted on September 13, 2007, pertaining to large livestock confinement facilities. This second regulation implemented minimum setback requirements for large livestock confinement facilities from churches, public use areas, and dwelling units "not of the same ownership and on the same premises as the operation"; required owners and operators of such facilities to demonstrate that livestock waste would not be carried onto township property in the event of a 25-year storm; and prohibited the spillage of livestock waste onto township roads, ditches, or property from such facilities or during transport. BCD prayed for declaratory and injunctive relief along with damages for additional expenses incurred in managing its livestock waste without a pipeline.

Shortly after the filing of BCD's complaint, Summit Township, Butler County, intervened. Summit Township had regulations identical to those of Read Township and wished the court to declare both sets of regulations valid and enforceable.

BCD, Read Township, and Summit Township subsequently filed three separate motions for summary judgment. After receiving evidence, the district court denied all three motions because it determined that a necessary party was not present. The court ordered BCD to bring in Butler County as a party because it concluded that Butler County had control over road No. 27.

In accordance with the district court's order, in December 2010, BCD filed an amended complaint naming Butler County as a defendant. The amended complaint restated the causes of action and prayers for relief from the original complaint. Additionally, the amended complaint alleged that Butler County erroneously denied BCD a permit for the pipeline based on the belief that Read Township had authority over road No. 27 and asked the court to declare that the county had exclusive authority over placement of a pipeline under road No. 27. Butler

County, Read Township, and Summit Township all filed separate answers, and Summit Township made a counterclaim asking the court to hold the pertinent township regulations valid and enforceable.

Following resolution of the issue of necessary parties, which had previously prevented summary judgment, BCD, Read Township, and Summit Township again separately filed motions for summary judgment in July 2011. Butler County also filed a motion for summary judgment. At a hearing before the district court on these motions, the parties jointly offered the transcript from the previous hearing, including all exhibits received during that proceeding. The court also accepted additional evidence.

On February 7, 2012, the district court granted summary judgment for Butler County, Read Township, and Summit Township because it determined that Read Township did in fact have the authority to enact the township regulations at issue and that the regulations were not preempted by state law. The court also considered BCD's standing to challenge the Read Township regulations—a matter that is not raised on appeal.

On the issue of the scope of Read Township's regulatory authority, the district court concluded that the regulation of animal waste generated by large livestock confinement facilities was a proper exercise of the township's authority "[t]o prevent the exposure or deposit of offensive or injurious substances within the limits of the town" under Neb. Rev. Stat. § 23-224(6) (Reissue 2012). As for the prohibition against liquid livestock waste pipelines on town property, the court determined that such a regulation was authorized by Neb. Rev. Stat. § 39-1520 (Reissue 2008), which declared that "[a]ll township road and culvert work shall be under the general supervision of the township board," and § 23-224(8)(a), which granted to townships the authority to raise money "for constructing and repairing roads and bridges within the town." Thus, the court concluded that Read Township had the statutory authority to enact both regulations at issue.

The conclusion that the pipeline regulation was a valid exercise of Read Township's authority did not, however, translate

into a holding that the specific road in this case was under the control of the township and subject to the pipeline regulation. Even though BCD had specifically asked the court to determine whether Butler County or Read Township had control over road No. 27, the court refused to decide this matter, stating that there was "no issue as both entities denied the request." Despite this holding, the court did consistently refer to "County Road 27" throughout its journal entry.

The remainder of the district court's written decision—indeed, the bulk of the court's analysis—focused on the issue of preemption. After providing a thorough review of state preemption doctrine, the court first addressed the question whether Read Township's regulations governing large livestock confinement facilities are preempted by LWMA. It determined that the Legislature "has not expressly declared that regulation of livestock waste by any other governmental entity is prohibited" and "explicitly provided that [LWMA] 'shall not be construed to change the zoning authority of a county that existed prior to May 25, 1999.'" Having thus dismissed explicit preemption and field preemption, the court next turned to the possibility of conflict preemption and concluded as follows:

> Addressing this claim under this analysis, the court finds that under the provisions of [LWMA] a permit[t]ee is not automatically allowed to build or operate a livestock facility upon receipt of a permit. To the contrary, the applicant is explicitly obligated to follow local law before commencing livestock operations. The fact that local requirements may be more stringent does not create a conflict; rather, the State and local legislative provisions can coexist and be equally enforced. Therefore, there is no conflict preemption under [LWMA].

BCD's complaint alleged preemption under both LWMA and Title 130—the regulations enacted pursuant to LWMA. Although BCD made a single argument for preemption under both the statutes and the regulations, the district court did not address preemption by Title 130 in its decision.

BCD had also raised a preemption claim under zoning law. Because the district court concluded that the relevant township regulations were not zoning laws and that they had been

"enacted by the townships pursuant to clear legislative authority," the court held that there was no preemption by zoning law. It also noted that Butler County had not as yet enacted any county zoning regulations with which the township regulations would conflict.

Thus finding that BCD was not entitled to relief or damages, the district court granted summary judgment in favor of Butler County, Read Township, and Summit Township.

BCD timely appeals. Pursuant to statutory authority, we moved the case to our docket.[2]

III. ASSIGNMENTS OF ERROR

BCD alleges, restated and reordered, that the district court erred in (1) failing to find that the pertinent Read Township regulations exceeded the township's statutory authority, (2) finding that § 23-224 provided a statutory basis for these regulations, (3) failing to find that the Read Township regulations are preempted by LWMA and Title 130, (4) failing to find that the regulations are preempted by "county zoning statutes," (5) finding that Butler County properly deferred to Read Township's "invalid township authority" over the permitting of the waste pipeline, and (6) finding that Butler County was a necessary party. BCD does not attack the validity of Summit Township's regulations, and thus, our decision does not address them.

IV. STANDARD OF REVIEW

[1] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[3]

[2-5] All issues in the present appeal are questions of law and thus are governed by this standard. The determination of the proper scope of the powers vested in the subordinate divisions of the state, and the lawfulness of the exercise thereof by the statutory agencies concerned, necessitates recourse to the terms of the state Constitution and the language of the statutes

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

[3] *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

relating thereto.[4] When reviewing preemption claims, a court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.[5] The interpretation of statutes and regulations required by these two issues presents questions of law.[6] The question of jurisdiction also is a question of law.[7]

V. ANALYSIS

1. Read Township's Authority

BCD's first two assignments of error relate to the authority of Read Township to enact the regulations establishing the pipeline ban and other requirements for large livestock confinement facilities. We will consider each of BCD's arguments in turn. To do so, however, requires a solid understanding of the system of township organization and the division of powers within a county so organized.

(a) Township Organization

As this court has previously explained, in Nebraska, a county can be organized under one of two systems of government.[8] Under the commissioner system, "the government of the county at large and of its subdivisions is entrusted to a board of county commissioners, who, together with certain governmental agents subordinate to them, conduct all the affairs of the county, local and general."[9] In the alternative, a county may be organized under the township system, under which a county is further subdivided into townships and "purely local affairs are entrusted to the town meetings of the several towns, or to township officers selected by the towns, while the general

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[4] *Cheney v. County Board of Supervisors*, 123 Neb. 624, 243 N.W. 881 (1932).

[5] *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

[6] See *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

[7] See *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[8] See *Van Horn v. State*, 46 Neb. 62, 64 N.W. 365 (1895).

[9] *Id.* at 70-71, 64 N.W. at 367.

affairs of the county are conducted by a board constituted of the various township supervisors."[10]

[6] The adoption of township organization does not alter the basic powers of a county. A board of supervisors has "all the powers applicable to county boards as provided by the general laws of this state."[11] Indeed, Nebraska statutes vest the powers of a county in a "county board,"[12] which term is defined to encompass both boards of supervisors existing under township organization and boards of county commissioners in counties not under township organization.[13] As a result, the powers and duties of a county board are not altered by the adoption of township organization.

[7] As the name "township organization" suggests, the distinguishing feature of a county under township organization is the existence of smaller political subdivisions within a county called townships. A township "is a subdivision of state territory, convenient in area, for the purpose of carrying into effect limited powers governmental in their nature."[14] Its purpose is "to carry into effect with ease and facility certain powers and functions . . . which may be more readily and conveniently carried on by subdivision of the territory of the state into smaller areas."[15]

The powers of a township are exercised through direct local self-government.[16] During annual town meetings, the electors of a township exercise the corporate powers of a township[17] along with other powers provided by statute.[18] Although each

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[10] *Id*. at 71, 64 N.W. at 367.

[11] Neb. Rev. Stat. § 23-270 (Reissue 2012). See, also, Neb. Rev. Stat. § 23-208 (Reissue 2012).

[12] Neb. Rev. Stat. § 23-103 (Reissue 2012).

[13] See, *id*.; Neb. Rev. Stat. § 39-1401(1) (Reissue 2008).

[14] *State v. Bone Creek Township*, 109 Neb. 202, 204, 190 N.W. 586, 587 (1922).

[15] *Wilson v. Ulysses Township*, 72 Neb. 807, 812, 101 N.W. 986, 988 (1904).

[16] See *id*.

[17] See § 23-224(2).

[18] See § 23-224.

township also has a township board and township officers,[19] each of which has statutorily prescribed powers and duties,[20] the electors of a township, when assembled for the annual town meeting, "constitute a governing body of the township."[21] This use of town meetings to realize direct local self-government makes township organization "one of the rare examples in Nebraska of direct democracy."[22]

[8-10] A township does not have the authority to exercise any powers outside those explicitly given to it by statute. When enumerating the powers of a township, Neb. Rev. Stat. § 23-223 (Reissue 2012) explicitly states that "[e]very town shall have corporate capacity to exercise the powers granted thereto, or necessarily implied, *and no others*." (Emphasis supplied.) This statutory language has long been interpreted by this court to mean that the powers conferred upon a township by statute "are limited and confined to those which properly belong to the government of the state as a whole, and which are merely devolved upon the township as a portion of the state government."[23] The same can be said of the powers conferred upon counties.[24] In fact,

> there is but little difference between the powers, duties and liabilities of a county in this state and those of a township. The object and purpose of their organization are the same, and the results sought to be accomplished are substantially alike, except in degree and territorial extent of jurisdiction. The main point of distinction between the two systems is the more popular and democratic form of government allowed by the township; the idea

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[19] See, Neb. Rev. Stat. §§ 23-215, 23-222, and 23-228 (Reissue 2012).

[20] See, e.g., Neb. Rev. Stat. §§ 23-249 to 23-252 (Reissue 2012).

[21] *State ex rel. Newman v. Columbus Township Bd.*, 15 Neb. App. 656, 662, 735 N.W.2d 399, 406 (2007).

[22] *Id.* at 660, 735 N.W.2d at 404.

[23] *Wilson v. Ulysses Township, supra* note 15, 72 Neb. at 812, 101 N.W. at 988.

[24] See, *Enterprise Partners v. County of Perkins*, 260 Neb. 650, 619 N.W.2d 464 (2000); *Morton v. Carlin*, 51 Neb. 202, 70 N.W. 966 (1897).

> of local self-government being the essence of the township system.[25]

Because a township is a political subdivision of the state, the statutes granting a township certain powers must be strictly construed.[26]

In the instant case, BCD argues that Read Township exceeded its limited statutory authority by enacting the two regulations at issue. Of these two regulations, BCD confesses that it has been harmed thus far only by the pipeline ban. Thus, we first address Read Township's authority to enact such a ban.

(b) Authority to Enact Pipeline Ban

The exact language of the Read Township regulation enacting the pipeline ban is as follows: "No person shall be allowed to place on, over or under town property, including town roads, right-of-ways and ditches, any pipeline which carries liquid livestock waste." BCD mainly objects to the ban on pipelines "on, over or under" township roads. According to BCD, Read Township did not have the authority to regulate and control the roads located within its territory through a pipeline ban because Butler County alone could exercise authority over the roads within Read Township. In the event we find that Read Township did have the authority to regulate roads within its borders, BCD argues that the authority of the electors of Read Township to regulate "offensive or injurious substances" under § 23-224(6) was not a proper statutory base for enactment of the pipeline ban.

We agree that the question whether Read Township possessed authority to regulate the placement of liquid livestock waste pipelines "on, over or under" the roads within its territory actually presents two separate questions. First, we must determine whether Read Township had the general authority to regulate roads within its territory, which roads necessarily also

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[25] *Wilson v. Ulysses Township, supra* note 15, 72 Neb. at 810-11, 101 N.W. at 988.

[26] See *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002).

lie within Butler County. Second, we must consider whether the electors of Read Township had the statutory authority to enact a regulation prohibiting liquid livestock waste pipelines. Only if Read Township had the authority both to regulate township roads and to enact a pipeline ban was the resulting regulation prohibiting pipelines "on, over or under" township roads a valid exercise of township authority.

(i) Authority Over Township Roads

Turning first to the question of Read Township's authority to regulate the roads within its territory, we note that Nebraska statutes distinguish between types of roads within a county. We mention only the designations relevant to our discussion in the instant case.

The broadest designation for a road is that of public road, which includes "all roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board of any county and traveled for more than ten years."[27] The statutes refer to public roads as county roads or township roads depending on where they are located.[28]

Any public road within a county can also be designated by the county board as a primary or secondary county road.[29] All public roads within a county are county roads in the sense that they are located within the territory of a county, but not all public roads within a county are designated as primary or secondary county roads. The kinds of roads typically designated as primary or secondary county roads are "main traveled roads," roads connecting cities, roads leading to and from schools, and mail route roads.[30] All primary and secondary county roads must be maintained at county expense.[31]

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[27] § 39-1401(2).

[28] See, e.g., Neb. Rev. Stat. §§ 39-1408 and 39-1801 (Reissue 2008).

[29] See Neb. Rev. Stat. § 39-2001(1) (Reissue 2008).

[30] *Id.*

[31] See Neb. Rev. Stat. § 39-2003 (Reissue 2008).

In the instant case, there was no evidence at trial that road No. 27 was designated as a primary or secondary county road. Thus, we treat it as a public road located wholly within Butler County and partially within Read Township.

[11,12] Under Nebraska statutes, the general supervision of public roads is vested in both county boards and township boards. Neb. Rev. Stat. § 39-1402 (Reissue 2008) states that "[g]eneral supervision and control of the public roads of each county is vested in the county board." Similarly, § 39-1520 states that "[a]ll township road and culvert work shall be under the general supervision of the township board . . . ."

In the case of a road that is located within both a county and a township, such as road No. 27, a plain reading of these statutes suggests that the county board and the township board have concurrent authority over that road. The statutory grants of power in the instant case—§§ 39-1402 and 39-1520—do not, on their face, conflict. The language of § 39-1402 only *vests* the power of general supervision in county boards—it does not require county boards to exercise that power. Neither does the language of § 39-1402 indicate that the power of general supervision vested in county boards is exclusive. Indeed, in *State, ex rel. Piercey, v. Steffen*,[32] this court explained that a county "is not required to maintain [township, precinct, or district] roads at county expense. It is merely required to see that the roads under the jurisdiction of these smaller political units are maintained and repaired." Because the power vested in county boards is neither exclusive nor mandatory, the grants of supervisory authority over public roads in §§ 39-1402 and 39-1520 do not discernibly conflict.

This court has previously found that grants of general supervisory authority over public roads to both counties and smaller political subdivisions can relate to the same public road and still be consistent with one another. In *SID No. 2 v. County of Stanton*,[33] we concluded that two political subdivisions had

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[32] *State, ex rel. Piercey, v. Steffen*, 121 Neb. 39, 42, 236 N.W. 141, 142 (1931).

[33] *SID No. 2 v. County of Stanton*, 252 Neb. 731, 567 N.W.2d 115 (1997).

concurrent authority over public roads located within both of their territories because the statutory grants of power to each of the political subdivisions did not conflict. Although that case involved the power of sanitary and improvement districts and not of townships, it stands for the proposition that two political subdivisions can possess concurrent authority over public roads provided that those powers as granted by statute do not conflict.

[13] Because §§ 39-1402 and 39-1520 do not inherently conflict, we conclude that they vest general supervisory authority over public roads located within a township in *both* the county board and the township board, respectively, and that these political subdivisions have concurrent powers over township roads. In other words, a county board and a township board are both vested with general supervisory authority over a township road. Such concurrent authority is consistent with other Nebraska statutes relating to public roads. Neb. Rev. Stat. § 39-1524 (Reissue 2008) provides that a township may request funds from the county "to aid in the building, constructing, or repairing" of township roads. If a township can request money for the purpose of building township roads, it must necessarily have the authority to actually build and maintain those roads. Notwithstanding § 39-1524, Neb. Rev. Stat. § 39-1907 (Reissue 2008) allows a township to appropriate money to the county "to assist in the construction or improvement" of roads within the township. Given the language of § 39-1907, a county must also have the power to build township roads. When read together, these provisions contemplate that both counties and townships may, depending on the situation, build and improve public roads within a township.

The case cited by BCD does not dissuade us from this conclusion that counties and townships have concurrent authority over public roads within a township. BCD cites to *Art-Kraft Signs, Inc. v. County of Hall*[34] for the proposition that "a township possesses no authority over what is erected on a township

[34] *Art-Kraft Signs, Inc. v. County of Hall*, 203 Neb. 523, 279 N.W.2d 159 (1979).

road"[35] and argues that this case is "directly on point."[36] This is an inaccurate statement of the holding in that case. In *Art-Kraft Signs, Inc.*, we considered whether a township's supervisory authority over public roads within its territory prevented a county from exercising its authority over those same roads. Faced with a township's attempt to enjoin a county from exercising any authority over a township road, we held specifically that the authority of a township over public roads within its territory did not override the authority of a county. We did not hold that townships possessed no authority over township roads, but that a township's authority over such roads did not *supersede* the general supervisory power of a county. These are distinct issues, the former of which the court in *Art-Kraft Signs, Inc.* simply did not reach.

Art-Kraft Signs, Inc. does, however, highlight the significant fact that a county is higher than a township in the hierarchy of political subdivisions in Nebraska. A township is created by a county from the territory of the county.[37] And a county can effectively delegate the maintenance of public roads within a township to that township so long as it ensures that "the roads under the jurisdiction of these smaller political units are maintained and repaired."[38] As such, the powers over township roads vested in both counties and townships may be concurrent, but they are not equal.

We now turn, as did the court in *Art-Kraft Signs, Inc.*, to the interrelation of the powers of a county and a township over township roads. But unlike in *Art-Kraft Signs, Inc.*, where we considered whether the exercise of authority over township roads *by a township* overrode the general supervisory power of a county over all public roads, we must determine whether the exercise of authority *by a county* over township roads supersedes the authority of a township. This latter question, not the former, is the one raised in the instant appeal.

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[35] Brief for appellant at 17.

[36] *Id.* at 16.

[37] See Neb. Rev. Stat. § 23-209 (Reissue 2012).

[38] *State, ex rel. Piercey, v. Steffen, supra* note 32, 121 Neb. at 42, 236 N.W. at 142.

[14] Consistent with the hierarchy of political subdivisions, the exercise of a county's authority over township roads can supersede a township's authority over those same roads. In *Franek v. Butler County*,[39] we considered whether a county was liable for injuries that resulted when a vehicle was driven into an open, unmarked culvert on a road within one of the county's townships. Because the county had entered into a contract to improve the township road in question, we held that the county had "assumed control under statutory power" over the road and "superseded the townships in authority."[40] We specifically explained that "[a]fter [the county] assumed control under statutory power, responsibility for the public improvement and liability to individuals for negligence resulting in damages did not continue in or shift to townships or oscillate between county and townships. Liability followed the exercise of power and the superseding of the townships."[41]

The characterization of the county's actions pertaining to the road as superseding the township is significant. To supersede commonly means "to take the place of and outmode by superiority."[42] And the court in *Franek* stated that the county superseded the township when it "exercised power to improve the [township road]."[43] Since the county superseded, or *took the place of*, the township when it began improving the township road, the township must have been in the position of improving the road prior to that time. Furthermore, the court explicitly stated that responsibility over the township road "did not continue in . . . townships" once the county "assumed control under statutory power,"[44] from which we conclude that the county's assumption of control—manifested by improving

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[39] *Franek v. Butler County*, 127 Neb. 852, 257 N.W. 235 (1934).

[40] *Id.* at 856, 257 N.W. at 236.

[41] *Id.*

[42] Webster's Third New International Dictionary of the English Language, Unabridged 2295 (1993).

[43] *Franek v. Butler County, supra* note 39, 127 Neb. at 856, 257 N.W. at 236.

[44] *Id.*

the road—caused the change in responsibility. Thus, from *Franek*, we conclude that (1) a township can exercise authority over township roads until the point in time at which a county assumes control, (2) the assumption of control by a county supersedes the authority of a township, and (3) a county can assume control by improving the road.

We note that the court in *Franek* held the county responsible for the township road despite not having formally designated the road as a primary or secondary county road. In fact, the court specifically rejected the argument that the county could not be held responsible for the road simply because it had failed to designate the road as a primary or secondary county road. Instead, the court focused on the fact that the county had "assumed control under statutory power" by grading, excavating, and generally improving the road.[45]

Turning to the road at issue in the instant case, we find that at the time the relevant regulations were adopted, Butler County had not exercised any control over road No. 27 so as to supersede Read Township in authority. Although the district court repeatedly referred to road No. 27 as "County Road 27," there was no evidence at trial that road No. 27 had been designated a primary or secondary county road or that the county was responsible for the maintenance of the road. Rather, the evidence demonstrated that it was the policy of Butler County to defer matters relating to public roads located within townships to the individual townships. The permit to bury a utility in a road right-of-way used by Butler County in 2007 stated that "[i]t is the [a]pplicant's responsibility . . . [t]o get approval from the Township Board if this utility is on township road right-of-way." This requirement of township approval continued until at least 2009, when the permit listed as the first of several "PERMIT REQUIREMENTS" that "Township Board approval must be obtained if this permit involves a township right-of-way." Both the 2007 and 2009 permits required the signature of a township board member in addition to the signature of the chairman of the Butler

[45] *Id.*

County Board of Supervisors. The Butler County Board of Supervisors enforced this requirement and denied permits if township approval was not obtained. Indeed, following the unanimous vote to deny BCD's permit because it had not obtained approval from Read Township, one of the Butler County supervisors explained that the county had a "policy of letting townships rule in permit issues," that this policy "ha[d] worked in the past," and that the board of supervisors "understood they had the authority to override townships but [it] chose not to."

Given this evidence that it was Butler County's policy to defer matters relating to township roads to townships, we find that the county had not chosen to exercise control over the township roads in Read Township prior to 2009. The electors of Read Township enacted the pipeline ban in September 2007. Therefore, because Butler County had not exercised control over township roads at the time the pipeline ban was adopted, Read Township possessed general supervisory authority over those township roads. The pipeline ban was not invalid due to a lack of authority over township roads.

BCD separately assigns error to the district court's conclusion that "Butler County properly deferred to Read Township's invalid township authority over the permitting of the waste pipeline." Given our explanation that Read Township possessed concurrent authority over public roads within its territory and the evidence that Butler County had declined to exercise its authority over township roads at the time the pipeline ban was enacted, the court committed no error in determining that Butler County had the power to defer to Read Township on any issue relating to township roads, including the placement of livestock waste pipelines.

(ii) Authority to Ban Pipeline Under § 23-224(6)

When the electors of Read Township enacted the pipeline ban, they specifically cited to their powers under § 23-224(2), (6), and (7). Because we find that § 23-224(6) vested Read Township with sufficient authority to prohibit liquid livestock waste pipelines, we do not discuss § 23-224(2) or (7).

[15] Under § 23-224(6), the electors of a township have the power "[t]o prevent the exposure or deposit of offensive or injurious substances within the limits of the town." If liquid livestock waste falls within the category of offensive or injurious substances contemplated by § 23-224(6), this subsection clearly gave Read Township the authority to enact a ban on liquid livestock waste pipelines "on, over or under" township property.

Because § 23-224 provides no definition of offensive or injurious substances and does not otherwise note that this language is subject to a special statutory meaning, we give the words in § 23-224(6) their ordinary meaning.[46] In common usage, a substance or thing is offensive if it can be described as "giving painful or unpleasant sensations."[47] A substance or thing is injurious if it "inflict[s] or tend[s] to inflict injury."[48] Even construing this language strictly, as we must do,[49] we find that liquid livestock waste is an offensive and potentially injurious substance.

By enacting LWMA and Title 130, both of which focused on the proper management, use, and disposal of livestock waste, the Legislature acknowledged that livestock waste is a potentially harmful substance that must be handled properly. Among other things, LWMA made it unlawful (1) to operate an animal feeding operation without having "an approved livestock waste control facility,"[50] which facilities are used "to control livestock waste . . . until it can be used, recycled, or disposed of in an environmentally acceptable manner,"[51] and (2) to discharge "animal excreta" and "other materials polluted by livestock waste" without obtaining the appropriate permits or an exemption.[52] These requirements indicate that livestock

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[46] See *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

[47] Webster's, *supra* note 42 at 1566.

[48] *Id.* at 1164.

[49] See *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, *supra* note 26.

[50] § 54-2432(3).

[51] § 54-2417(10).

[52] § 54-2432(4).

waste can be managed in a manner that is detrimental to the environment. Indeed, Title 130 defines "[l]ivestock wastes" as including "animal and poultry excreta and associated feed losses, bedding, spillage or overflow from watering systems, wash and flushing waters, sprinkling waters from livestock cooling, precipitation polluted by falling on or flowing onto an animal feeding operation, and other materials *polluted by livestock wastes*"[53]—a definition expressly recognizing that livestock wastes are pollutants.

Because livestock waste can be a pollutant and, under Nebraska law, must be managed in a manner that is environmentally acceptable, it can be described as both offensive and injurious. Therefore, the electors of Read Township had the authority under § 23-224(6) to "prevent the exposure or deposit of" livestock waste within the township.

Read Township's pipeline ban was a proper exercise of the authority to "prevent the exposure or deposit of" livestock waste within the township. Although BCD argues that the ability to install a pipeline would actually decrease the possibility that livestock waste would be spilled onto township roads, the electors plausibly could have reasoned that by preventing livestock waste from being physically piped "on, over or under" township roads, the potential for livestock waste to be leaked or spilled onto township property would thereby be minimized. Because a ban on liquid livestock waste pipelines reasonably could have been enacted as a means of "prevent[ing] the exposure or deposit of" livestock waste on township roads, the pipeline ban fell within one of Read Township's limited statutory powers and was not an invalid exercise of township authority.

(iii) Conclusion as to Pipeline Ban

Having concluded that Read Township (1) had concurrent authority over township roads, which authority had not been superseded by Butler County at the time of the pipeline ban's enactment, and (2) was authorized by statute to regulate offensive or injurious substances on town property, which

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[53] 130 Neb. Admin. Code, ch. 1, § 028 (2008) (emphasis supplied).

includes liquid livestock waste, we find that the township had both general authority over township roads and specific authority to enact a liquid livestock waste pipeline ban. The regulation enacting a pipeline ban was a valid exercise of Read Township's statutory authority.

(c) Authority to Regulate Large Livestock Confinement Facilities

The second Read Township regulation challenged by BCD governs large livestock confinement facilities. As noted in the background section, this regulation implemented minimum setback requirements for large livestock confinement facilities; required owners and operators of such facilities to demonstrate that livestock waste would not be carried onto township property in the event of a 25-year storm; and prohibited the spillage of livestock waste onto township roads, ditches, or property from such facilities or during transport.

[16] Because BCD had not been affected by this regulation at the time of bringing suit, we consider its complaint as bringing only a facial challenge. This court has not previously relied upon the distinction between facial and as-applied challenges in actions raising questions of statutory authority, but we believe that the distinction applies. Thus, when a party challenges the validity of a township regulation without arguing that a particular application of the regulation is improper, we will consider that to be a facial challenge that can succeed only "by establishing that no set of circumstances exists under which the [regulation] would be valid."[54] Accordingly, we apply that standard in the instant case. By considering the facial validity of the Read Township regulation here, we do not preclude a later as-applied challenge by BCD.

Like the pipeline ban, Read Township's regulation governing large livestock confinement facilities is a plausible means of preventing livestock waste from polluting township property. As stated in the preamble to the regulation, the electors of Read Township adopted this regulation because they found that "large scale livestock confinement facilities may present

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[54] See *State v. Harris*, 284 Neb. 214, 221, 817 N.W.2d 258, 268 (2012).

a threat of contamination and destruction of county roads, ditches, and property due to overflow of lagoon and impoundments during and following storms, during operation, and during transport of livestock and livestock waste." The prohibition against the spillage of livestock waste onto township property from such facilities or during transport prevents livestock waste from polluting township property by penalizing the careless handling of livestock waste. Under the regulation, any spillage of livestock waste can be punished by a fine. When faced with this penalty, large livestock confinement facilities such as BCD may exercise increased care when handling livestock waste. Similarly, the requirement that large livestock confinement facilities demonstrate that livestock waste would not be carried onto township property during a 25-year storm ensures that these facilities have taken the necessary precautions to prevent livestock waste from entering township property. Finally, by requiring large livestock confinement facilities to be located at least a minimum distance from public buildings and private homes, the setback requirements in this regulation minimize the risk of exposure to livestock waste outside of the large livestock confinement facility that could conceivably reach township property.

As we have already discussed, livestock waste is an offensive and injurious substance as contemplated by § 23-224(6). As such, under this subsection, the electors of Read Township had the authority to enact regulations that would "prevent the exposure or deposit of" livestock waste within the township. Because BCD has not established that there were no circumstances under which the regulation would be valid, we find that its facial challenge to the regulation lacks merit.

2. Preemption

In addition to arguing that Read Township's regulations were not a proper exercise of the township's statutory authority, BCD also asserts that these regulations are preempted by LWMA, Title 130, and "county zoning statutes."[55] We find no such preemption.

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[55] Brief for appellant at 14.

(a) General Principles of Preemption

[17,18] The parties have not cited nor have we found any case law in Nebraska discussing the preemption of township laws by state law. There is, however, considerable case law on the preemption of municipal law. In discussing the preemption of municipal law, this court has previously explained that "[p]reemption of municipal ordinances by state law is based on the fundamental principle that 'municipal ordinances are inferior in status and subordinate to the laws of the state.'"[56] Further, we have explained that municipal laws are inferior to state law because "a municipal corporation derives all of its powers from the state and . . . has only such powers as the Legislature has seen fit to grant to it," concluding from this fact that "in the case of a direct conflict between a statute and a city ordinance, the statute is the superior law."[57]

[19,20] Like a municipality, a township possesses only the limited powers conferred upon it by statute.[58] Consequently, any laws enacted pursuant to a township's limited statutory authority necessarily are subordinate to the laws of the state from which the township's powers derived. Due to the similar subordinate nature of municipal laws and township laws, we conclude that the same preemption doctrines apply to the laws of both municipalities and townships.

[21,22] There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.[59] In all three cases, "[t]he touchstone of preemption analysis is legislative intent."[60] Express preemption occurs when the Legislature has "expressly declare[d] in explicit statutory language its intent to preempt" local laws.[61] Field preemption and

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[56] *State ex rel. City of Alma v. Furnas Cty. Farms, supra* note 5, 266 Neb. at 567, 667 N.W.2d at 521 (quoting 5 Eugene McQuillin, The Law of Municipal Corporations § 15.20 (3d ed. 1996)).

[57] *Phelps Inc. v. City of Hastings*, 152 Neb. 651, 653, 42 N.W.2d 300, 302 (1950).

[58] See, *Wilson v. Ulysses Township, supra* note 15; § 23-223.

[59] See *State ex rel. City of Alma v. Furnas Cty. Farms, supra* note 5.

[60] *Id.* at 567, 667 N.W.2d at 521.

[61] *Id.* at 568, 667 N.W.2d at 522.

conflict preemption arise in situations where the Legislature did not explicitly express its intent to preempt local laws, but we can infer such intent from other circumstances.

[23,24] In field preemption, legislative intent to preempt local laws is "inferred from a comprehensive scheme of legislation."[62] When there is not comprehensive legislation on a subject, local laws "'may cover an authorized field of local laws not occupied by general laws, or may complement a field not exclusively occupied by the general laws.'"[63] Indeed, "'[t]he mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.'"[64] But "'where the state has occupied the field of prohibitory legislation on a particular subject,'" there is no room left for local laws in that area and a political subdivision "'lacks authority to legislate with respect to it.'"[65] Because a comprehensive scheme of legislation effectively keeps localities from legislating in that area, we infer from such a scheme that the Legislature intended to preempt local laws.

[25] In conflict preemption, legislative intent to preempt local laws is inferred "to the extent that [a local law] actually conflicts with state law."[66] As this court has previously explained, "'[t]hat which is allowed by the general laws of the state cannot be prohibited by ordinance, without express grant on the part of the state. Conversely, without express legislative grant, an ordinance cannot authorize what the statutes forbid.'"[67] Nonetheless, when a court considers preemption claims, it "is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject."[68]

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[62] *Id.*

[63] *Id.* at 569, 667 N.W.2d at 522 (quoting 5 McQuillin, *supra* note 56).

[64] *Id.* at 571, 667 N.W.2d at 524 (quoting 5 McQuillin, *supra* note 56).

[65] *Id.* at 569, 667 N.W.2d at 522 (quoting 5 McQuillin, *supra* note 56).

[66] *Id.*

[67] *Id.* (quoting 5 McQuillin, *supra* note 56).

[68] *Id.* at 568, 667 N.W.2d at 521-22.

We now apply these principles of preemption to the Read Township regulations at question in the instant case.

(b) Preemption by LWMA and Title 130

BCD alleges that the pertinent Read Township regulations are preempted by LWMA and the regulations issued pursuant thereto—Title 130. BCD does not contend that there is express preemption, but instead focuses on field preemption, arguing that "[t]he scope and breadth of Title 130 clearly indicates that [DEQ's] regulatory process has occupied the field with respect to regulating [concentrated animal feeding operations] and their waste facilities."[69] We do not agree that Read Township's regulations are preempted by LWMA and Title 130.

For the sake of completeness, we begin by agreeing that LWMA and Title 130 do not expressly preempt local laws on the subject of livestock waste management. When enacting other statutory schemes in Nebraska, the Legislature has included provisions explicitly stating in some manner (1) that the legislation preempts local laws related to the subject matter of the legislation,[70] (2) that a certain subject is governed solely by the legislation,[71] or (3) that political subdivisions are prohibited from enacting any local law conflicting with the legislation.[72] LWMA does not include any such language indicating legislative intent to preempt local laws either by the enactment of LWMA itself or by the promulgation of regulations pursuant thereto. Therefore, there is no express preemption of local laws by LWMA or Title 130.

Turning next to field preemption, we note, as did the district court, that LWMA includes language indicating that the Legislature did not intend to occupy the entire field of livestock waste management regulation. Section 54-2420 states that "[n]othing in [the permitting provisions of LWMA] shall be construed to change the zoning authority of a county that

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[69] Brief for appellant at 38.

[70] See, e.g., Neb. Rev. Stat. § 2-2625 (Reissue 2012).

[71] See, e.g., Neb. Rev. Stat. § 9-841 (Reissue 2012).

[72] See, e.g., Neb. Rev. Stat. § 69-510(2) (Reissue 2009).

existed prior to May 25, 1999." Even though LWMA and Title 130 do provide a detailed regulatory scheme for livestock waste management, § 54-2420 indicates that the state requirements were meant to coexist with local requirements.

This intent also is apparent from DEQ's enforcement of LWMA and Title 130. The application for a permit under LWMA and Title 130 states that the applicant "is responsible for compliance with all local laws, and for obtaining applicable local, county, and other permits." The permits subsequently issued by DEQ also are accompanied by a letter noting that the state permit "does not remove your responsibility to comply with any county or local zoning regulations." A supervisor from DEQ who was deposed in the instant case explained that this language on the application and permit was included to remind permittees "it's their responsibility to comply with [local or county regulations]" and that compliance with county and local zoning "is a separate issue from [DEQ's] consideration of their application." Together, § 54-2420 and these examples from DEQ's enforcement of LWMA and Title 130 indicate an intent for these state statutes and regulations to coexist with local laws, which fact precludes a finding of field preemption.

Finally, we consider whether local laws governing livestock waste management are preempted by state law according to principles of conflict preemption. In its brief, BCD only briefly addresses conflict preemption, arguing that the township regulation requiring yearly updates of 25-year storm demonstrations conflicts with LWMA and Title 130 because the state statutes and regulations do not require yearly updates. This is not a true conflict between the township regulations and state law and does not support a finding of conflict preemption.

Read Township's regulation and Title 130 both have requirements related to 25-year storms. The township regulation requires large livestock confinement facilities to demonstrate on a yearly basis that "livestock waste, liquid or solid, will not be carried or washed onto or into town roads or ditches or properties adjacent to a facility during or following a 25-year storm." Under Title 130, a livestock waste control facility

must be designed so as to "provide adequate storage capacity for all . . . runoff [or] the runoff from a 25-year, 24-hour rainfall event."[73]

Even though the Read Township regulation and Title 130 use different terms to refer to the facilities governed by each law, both laws apply to similar facilities. A large livestock confinement facility is defined by the township regulation as "a livestock operation that is over 600 animal units and where the livestock are or can be confined to areas which are roofed." A facility that meets this definition is also likely to be an animal feeding operation as defined in Title 130, which includes "a location where . . . livestock have been, are, or will be stabled or confined and fed or maintained for a total of forty-five days or more in any twelve-month period."[74] Animal feeding operations are required under certain circumstances to have livestock waste control facilities.[75] As such, operations that are large livestock confinement facilities under township law likely may be required by state law to operate livestock waste control facilities and thus will be subject to both township and state provisions relating to 25-year storms.

Read Township's 25-year storm demonstration requirement is similar to Title 130's 25-year storm requirement. An applicant for a construction and operating permit under LWMA and Title 130 must submit a "description of the methods that will be implemented to [e]nsure the facility is constructed in accordance with the applicable design criteria and these regulations."[76] The 25-year storm requirement is included within the chapter of Title 130 that enumerates "Design Criteria and Construction Requirements."[77] In other words, under LWMA and Title 130, an applicant must provide as part of his or her application some sort of demonstration that the proposed livestock waste control facility is designed and

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[73] 130 Neb. Admin. Code, ch. 8, § 002 (2008).

[74] 130 Neb. Admin. Code, ch. 1, § 002 (2008).

[75] See 130 Neb. Admin. Code, ch. 2, § 003 (2008).

[76] 130 Neb. Admin. Code, ch. 4, § 001.06 (2008).

[77] See 130 Neb. Admin. Code, ch. 8 (2008).

will be constructed so as to adequately store livestock waste in the event of a 25-year storm. Read Township's regulation requires precisely this sort of demonstration, except on a yearly basis. Substantively, therefore, the township regulation addresses the same concern as the state law—whether a facility can properly contain livestock waste even in the event of a 25-year storm.

The main difference between the requirements imposed by Read Township and the state is that the township requires more frequent demonstrations. While Title 130 requires only a demonstration of compliance with the 25-year storm requirement when applying for a construction and operating permit, Read Township's regulation requires yearly updates to the 25-year storm demonstration. In this regard, the township regulation is more stringent.

[26] The fact that a local law is more stringent than state law does not by itself lead to conflict preemption. In *Phelps Inc. v. City of Hastings*,[78] we considered whether a municipal ordinance that imposed more stringent requirements than state statute was inconsistent with state law such that it was preempted. We held that the municipal ordinance was not inconsistent with state law, citing with approval the following explanation from a legal commentary:

> "So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid

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[78] *Phelps Inc. v. City of Hastings, supra* note 57.

> what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail."[79]

Under this holding, a local law is not preempted simply because it is more stringent than state law.

BCD does not argue that the township regulation imposing the demonstration requirement is inconsistent with state law for any reason other than that it is more stringent. This fact alone is not sufficient to prove preemption. Therefore, under the precedent of *Phelps Inc.*, Read Township's demonstration requirement is not preempted based on the fact that it is more stringent than LWMA and Title 130.

Apart from Read Township's demonstration requirement relating to 25-year storms, BCD does not identify any other ways in which Read Township's regulations conflict with LWMA and Title 130. Given our finding that the demonstration requirement is not in conflict with state law and in the absence of any additional arguments for the application of conflict preemption, we do not find that Read Township's regulations are preempted because they directly conflict with LWMA and Title 130.

In conclusion, we find that none of the three types of preemption apply in the instant case. Read Township's regulations governing large livestock confinement facilities are not preempted by LWMA and Title 130. The district court did not err in so holding.

(c) Preemption by County Zoning

BCD also alleges that Read Township's regulation enacting setback requirements is preempted by "county zoning statutes."[80] But as BCD itself confesses, Butler County has not

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[79] *Id.* at 657, 42 N.W.2d at 304 (quoting 37 Am. Jur. *Municipal Corporations* § 165 (1941)).

[80] Brief for appellant at 14.

enacted any county zoning laws. Because there are no county zoning laws applicable to Read Township, there is no county zoning to preempt the township's setback requirements.

In its brief, BCD uses its argument on this assignment of error to attack Read Township's authority to enact the setback requirements. It asserts that the district court "wrongly concluded that [the township regulation imposing setback requirements] did not constitute zoning."[81] Then, over several pages, BCD argues that "[t]he plain language alone of Nebraska's zoning statutes demonstrate[s] that a township does not have the authority to enact a zoning ordinance."[82]

[27] BCD makes this argument about Read Township's lack of authority in its brief, but does not specifically assign it as error. Errors argued but not assigned will not be considered on appeal.[83] Therefore, because BCD did not assign error to the district court's failure to conclude that Read Township did not possess the authority to enact zoning laws, we do not address the issue on appeal.

Having considered only the error actually assigned by BCD in regard to zoning statutes, we conclude that Read Township's regulation imposing setback requirements was not preempted by county zoning statutes.

3. Butler County as Necessary Party

[28] BCD's final assignment of error relates to the district court's conclusion that Butler County was a necessary party to the case. Because "[t]he presence of necessary parties is jurisdictional"[84] and "[t]he question of jurisdiction is a question of law,"[85] we resolve the question whether Butler County was a necessary party independently of the district court.[86]

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[81] *Id.* at 40.

[82] *Id.*

[83] *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012).

[84] *Reed v. Reed*, 277 Neb. 391, 399, 763 N.W.2d 686, 693 (2009).

[85] *In re Estate of McKillip, supra* note 7, 284 Neb. at 369, 820 N.W.2d at 872.

[86] See *id.*

"An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest . . . ."[87] Given our holding that Butler County and Read Township had concurrent jurisdiction over township roads and that Read Township could exercise its authority over those roads only if the county had not as yet superseded the township's authority, the determination whether Read Township had the authority to enact regulations governing township roads necessarily involved a determination of the rights of Butler County—namely, whether Butler County had exercised power over township roads such that it superseded the township's otherwise concurrent authority. Therefore, Butler County was a necessary party to this action, and the district court did not err in ordering BCD to bring the county in as a party.

VI. CONCLUSION

A county and a township have concurrent authority over public roads located within a township. However, due to the superiority over townships within the hierarchy of political subdivisions within the state, the exercise of a county's authority over township roads supersedes a township's authority over those same roads. Due to this relationship, Butler County was indeed a necessary party to this action. However, because Butler County had not exercised its authority over the roads within Read Township at the time the township's electors enacted regulations governing those roads, the township had authority over township roads. Under § 23-224(6), Read Township also had the authority to enact regulations to prevent livestock wastes from polluting township property. Accordingly, Read Township did not act outside of its statutory authority when enacting the regulations in question. Finally, we conclude that Read Township's regulations governing large livestock confinement facilities are not preempted by LWMA, Title 130, or

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[87] *American Nat. Bank v. Medved*, 281 Neb. 799, 806, 801 N.W.2d 230, 237 (2011).

county zoning statutes on principles of express preemption, field preemption, or conflict preemption. Therefore, we affirm the judgment of the district court.

AFFIRMED.

CHRISTY BLACK, APPELLEE, V.
LORNA BROOKS, APPELLANT.
827 N.W.2d 256

Filed March 8, 2013. No. S-12-176.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. ____: ____. An appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Attorney Fees.** In determining a reasonable attorney fee, the court is to consider the nature of the proceeding, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
4. **Landlord and Tenant: Attorney Fees.** The attorney fee provisions of Neb. Rev. Stat. §§ 76-1416(3) and 76-1425(2) (Reissue 2009) are mandatory.
5. **Attorney Fees.** The most common purpose behind fee-shifting statutes is to encourage private litigation to enforce a particular statute or right.
6. ____. Allowing legal services organizations recovery of statutory attorney fees generally enhances their capabilities to assist those who are financially unable to obtain private counsel.
7. ____. Insofar as a statutory attorney fee provision is designed to encourage private action to vindicate the rights granted by the statutory scheme, an award of attorney fees to the pro bono organization indirectly serves the same purpose as an award directly to a fee paying litigant.
8. **Landlord and Tenant: Attorney Fees.** To limit attorney fee awards under Neb. Rev. Stat. §§ 76-1416(3) and 76-1425(2) (Reissue 2009) to pro bono attorneys would be to insert the additional term "incurred" into the statutes.
9. **Statutes: Appeal and Error.** An appellate court may not add language to the plain terms of a statute to restrict its meaning.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed as modified.

Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellant.

Catherine Mahern and Martha J. Lemar, of Milton R. Abrahams Legal Clinic, and Wesley Van Ert, Brett Wessels, and John Beauvais, Senior Certified Law Students, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The tenant in this case, Christy Black, brought this action against her landlord, Lorna Brooks, for noncompliance with the terms of two consecutive lease agreements and for failure to return her security deposit. Brooks counterclaimed for damages. After a bench trial, judgment was entered in favor of Black. The principal issue on appeal is whether statutory attorney fees can be awarded when the tenant is represented by attorneys working pro bono.

BACKGROUND

Black rented a house on South 38th Avenue in Omaha, Nebraska (38th Ave. property), pursuant to a written lease agreement with Brooks dated December 10, 2004. The lease was subject to a "Housing Assistance Payments" (HAP) contract with the Omaha Housing Authority. In 2008, a water break occurred at the house. The parties disagreed as to the promptness of Brooks' response to Black's complaint that the floors of the house were flooded and mold was "coming up on the walls." In any event, because of the damage, Black eventually moved into another of Brooks' properties.

On May 7, 2008, Black entered into an agreement with Brooks to lease a property located on Hoctor Boulevard in Omaha (Hoctor property). Brooks entered into another HAP agreement with the Omaha Housing Authority in connection with the lease of the Hoctor property.

The district court found that Brooks committed willful noncompliance with both lease agreements, in violation of Neb.

Rev. Stat. § 76-1425(2) (Reissue 2009). For both properties, Brooks charged Black additional monthly "appliance fees" in excess of the stated rent amounts in the leases and in violation of the HAP contractual addendums to the leases. Specifically, for the 38th Ave. property, Brooks demanded and received a total overpayment of $5,624.50. And for the Hoctor property, Brooks demanded and received a total overpayment of $2,050. Judgment was entered in favor of Black for those amounts. Brooks does not challenge that judgment in this appeal, and Brooks does not challenge the court's finding that Brooks' noncompliance was willful.

Deposit and Counterclaim

Brooks instead challenges on appeal the district court's judgment in favor of Black for the return of a security deposit in the amount of $647. Relatedly, Brooks asserts that the district court erred in dismissing, after trial, her counterclaim for damages to the 38th Ave. property.

The deposit was originally made in connection with the lease of the 38th Ave. property. Under the terms of the 38th Ave. property lease, release of the security deposit was subject to vacating the premises with no damage beyond normal wear and tear. The lease stated that Brooks agreed to return the security deposit to Black when she vacated, less any deduction for any of the costs, within 14 days after written demand was made. Further, if deductions were made from the deposit, Brooks would give Black a written statement of any costs for damages and/or other charges to be deducted from the security deposit. The language of the lease agreement largely mirrors Neb. Rev. Stat. § 76-1416(2) (Reissue 2009), which states:

> Upon termination of the tenancy, property or money held by the landlord as prepaid rent and security may be applied to the payment of rent and the amount of damages which the landlord has suffered by reason of the tenant's noncompliance with the rental agreement or section 76-1421. The balance, if any, and a written itemization shall be delivered or mailed to the tenant within fourteen

> days after demand and designation of the location where payment may be made or mailed.

The corresponding HAP contractual addendum did not specify that a demand by the tenant was required, but stated simply that "[w]hen the family moves out . . . , the owner . . . may use the security deposit . . . as reimbursement for any unpaid rent payable by the tenant, any damages to the unit or any other amounts that the tenant owes under the lease." But "[t]he owner must give the tenant a list of all items charged against the security deposit, and the amount of each item. After deducting the amount, if any, used to reimburse the owner, the owner must promptly refund the full amount of the unused balance to the tenant." The HAP contractual addendum provided that in case of any conflict between the provisions of the HAP contract and the provisions of the lease or any other agreement between the owner and the tenant, the requirement of the addendum shall control.

Brooks admitted that she refused to return any portion of the $647 deposit for the 38th Ave. property. Brooks claimed Black damaged the property beyond the deposit amount. The testimony relating to the alleged damages will be set forth in more detail in our analysis below. Brooks also testified that Black never demanded that deposit from her. Black admitted that she never specifically requested an itemized list of alleged damages to the 38th Ave. property. On August 14, 2009, Black mailed a demand letter to Brooks requesting that Brooks return the $647 deposit. But that letter apparently referred to the deposit having been rolled over into a deposit for the Hoctor property and sought a return of the deposit for the Hoctor property, not the 38th Ave. property. The letter itself is not in evidence.

In her complaint filed on October 15, 2009, Black alleged that the unreturned $647 security deposit for the 38th Ave. property was applied as a security deposit for the Hoctor property. She demanded return of the deposit.

At trial, Black's testimony regarding the unwritten agreement to roll over the $647 deposit into a deposit for the

Hoctor property was successfully objected to as parol evidence. Brooks testified that the lease agreement for the Hoctor property simply did not provide for a deposit. And Brooks testified that Black, accordingly, simply did not pay a deposit for that property.

The record reflects that on August 13, 2008, Brooks sent Black a "Notice to Cure or Quit" in which she stated that Black was delinquent in her appliance fee payments, as well as an unpaid deposit of $774. The Omaha Housing Authority had two versions of the Hoctor property lease in its file, and both were received into evidence. The leases were identical, except one acknowledged receipt of a security deposit of $774 and the other indicates no amount under the security deposit section.

At trial, Brooks argued that Black never demanded the deposit back from the 38th Ave. property because of the purported damage to that property. Black never paid a deposit for the Hoctor property, so there was nothing to return with respect to that lease. Brooks alternatively argued that Black's demand for the return of the $647 was deficient because Black asked for the deposit back from the Hoctor property and not the 38th Ave. property.

The court found Brooks' evidence of alleged damages relating to the 38th Ave. property was "not convincing or credible." The court found that the security deposit from the 38th Ave. property was rolled over to serve as security against damage to the Hoctor property. Regardless, the court concluded that Black had made legal demand for the $647 and that Brooks was legally required to return it.

Attorney Fees

The district court awarded Black $6,930 in attorney fees pursuant to §§ 76-1416(3) and 76-1425(2). Section 76-1416(3) states that "[i]f the landlord fails to comply with subsection (2) of this section, the tenant may recover the property and money due him or her and reasonable attorney's fees." Section 76-1425(2) states:

> Except as provided in the Uniform Residential Landlord and Tenant Act, the tenant may recover damages and

> obtain injunctive relief for any noncompliance by the landlord with the rental agreement or section 76-1419. If the landlord's noncompliance is willful the tenant may recover reasonable attorney's fees. If the landlord's noncompliance is caused by conditions or circumstances beyond his or her control, the tenant may not recover consequential damages, but retains remedies provided in section 76-1427.

Black was represented by senior certified law students operating under the supervision of an attorney who is the director of the general civil practice clinic at Creighton University School of Law and is admitted to practice law in the State of Nebraska. The attorney submitted an itemized list of the time spent on Black's case and affidavits concerning the value of that time.

Brooks argued that attorney fees could not be recovered, because Black's attorneys were representing Black pro bono. Brooks argued that Black had no legal obligation to pay the attorney fees claimed and that any award of attorney fees would be punitive damages.

The court disagreed. The court reasoned that §§ 76-1416(3) and 76-1425(2) served to encourage claims against landlords who willfully disregard their obligations. The award of statutory fees, the court reasoned, is for the benefit of society at large, as well as for the originally named plaintiff. The court applied the standards set forth in *Coral Prod. Corp. v. Central Resources*[1] for the determination of proper and reasonable fees in Black's case.

ASSIGNMENTS OF ERROR

Brooks assigns that the district court erred in granting judgment in favor of Black in the amount of $647, the amount of the security deposit, and in awarding attorney fees and costs pursuant to §§ 76-1416(3) and 76-1425(2). She also assigns that the district court erred in finding that she failed to meet her burden under her counterclaim for damages.

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[1] *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

STANDARD OF REVIEW

[1] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[2]

[2] An appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[3]

ANALYSIS

Evidence of Damages

Brooks first argues that the evidence at trial established that she incurred damages in excess of wear and tear of the 38th Ave. property for the following items: $695 in trash removal, $353.50 in pest control, $50.92 for a screen door, and more trash removal at $250, for a total of $1,349.42. Thus, Brooks argues the court erred in finding no merit to her counterclaim and in ordering the refund of Black's $647 deposit.

Brooks testified that when Black vacated the 38th Ave. property, it was dirty and Black had left a large horse tank in the backyard. Brooks testified that she paid $695 and, later, an additional $250 to haul away trash and other items left behind by Black. Brooks testified that in September 2008, before the next tenant moved in, she paid $353.50 for pest control to get rid of roaches Brooks alleged was the result of Black's leaving trash in the property. The receipt for the pest control entered into evidence, however, showed a total of only $53.50. Brooks testified that she had to replace a screen door, at a cost of $50.92, and a receipt dated August 8, 2008, reflects that expenditure. Various other receipts for repairs and work done at the 38th Ave. property were received into evidence.

The court expressed concern that many of the items reflected in the receipts, including the trash removal, were due to the

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[2] *Albert v. Heritage Admin. Servs.*, 277 Neb 404, 763 N.W.2d 373 (2009).

[3] See *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

cleanup of the water damage and not due to any alleged damage caused by Black. Brooks entered into evidence two move-out inspection lists that the court likewise viewed with skepticism. The inspection lists were allegedly filled out during an exit walk-through conducted by Brooks' granddaughter with Black. The documents have two columns. The left side was for the move-in inspection, and the right side was for the move-out inspection. The damages to the 38th Ave. property were written on both the move-in and move-out sides of the documents. One list shows the alleged signatures of both Black and Brooks' granddaughter, under the side labeled "Move-In Inspection Results Hereby Accepted." There are no signatures under "Move-Out Inspection Results Hereby Accepted." There are no signatures on the second list. The signed list is dated June 28, 2008, which is when Brooks' granddaughter claimed the exit walk-through took place, and she testified that all of the items written on the list reflected damages she personally observed on June 28.

Black denied ever participating in an exit walk-through for the 38th Ave. property. In fact, Black had moved out of the 38th Ave. property approximately 2 months before the alleged exit walk-through. Black denied having ever seen the walk-through lists before the filing of her action. Black testified that she never received any receipt from Brooks for any damages for the 38th Ave. property.

Black generally denied all of the alleged damages to the 38th Ave. property. She admitted to leaving a "NASCAR board" in a bedroom. She also admitted that she left Christmas lights on the gutter. Black explained that she was in a hurry to move out because she was concerned about the mold. Black specifically denied that any doors were damaged or that she left any trash behind. Black testified that she left the property as clean as she could in light of the flooding. Black's attorney pointed out that, according to the receipts entered into evidence by Brooks, almost all of the damage listed in the inspection documents proffered by Brooks would have been repaired or remedied well before the alleged June 28, 2008, walk-through.

The record thus reflects conflicting evidence pertaining to the alleged damage to the 38th Ave. property. We do not reweigh the evidence but consider the judgment in a light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[4] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[5] Resolving the evidentiary conflicts in favor of Black, we find that the district court was not clearly wrong in concluding that the damage claimed by Brooks was not attributable to Black.

Sufficiency of Demand of Deposit

Brooks argues that regardless of whether Black caused any damage to the 38th Ave. property, the court erred in ordering the return of the $647 deposit for that property. Brooks explains that Black failed to properly demand its return and that, therefore, Brooks' obligations under § 76-1416(2) were not triggered.

Brooks emphasizes that § 76-1416(2) states a landlord's duty to return a deposit is contingent upon a "demand and designation of the location where payment may be made or mailed" and that the statute refers to such demand being "[u]pon termination of the tenancy." In her brief, Brooks defines the terms "tenant," "tenancy," "estate of a tenant," "term or interest of a tenant," and "general tenancy."[6] The significance of these phrases and definitions as concerns Brooks' argument is somewhat unclear. In sum, Brooks argues that Black asked for her deposit back only for the Hoctor property tenancy, and not for the 38th Ave. property tenancy. And since Black did not pay a deposit for the Hoctor property tenancy, but paid a deposit only for the 38th Ave. property tenancy, Black never properly demanded the return of her deposit.

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[4] See *id.*

[5] *Albert v. Heritage Admin. Servs., supra* note 2.

[6] See brief for appellant at 9.

In *Hilliard v. Robertson*,[7] we held that the 14-day limitation language of § 76-1416(2) refers to the time allowed for the landlord to return the deposit, not the time in which a demand must be made by the vacating tenant. We held that the tenant's filing of a counterclaim to the landlord's suit was sufficient to trigger the landlord's obligation to refund the security deposit.

In this case, Black filed suit demanding the return of her $647 deposit. Regardless of which property Black believed the deposit pertained to, the demand was sufficiently clear. Brooks was on notice as to what she needed to show in order to justify keeping any of the deposit. In fact, as described above, Brooks attempted to show damage to the 38th Ave. property in order to keep the $647 deposit. We agree with the district court that nothing in the language of § 76-1416(2) precludes a judgment ordering that the $647 deposit be returned to Black.

Attorney Fees

Finally, Brooks argues that the district court erred in awarding attorney fees, because Black was represented pro bono. Section 76-1416(3) states that "[i]f the landlord fails to comply with subsection (2) of this section, the tenant may recover the property and money due him or her and reasonable attorney's fees." Section 76-1425(2) similarly states in relevant part that "[i]f the landlord's noncompliance is willful the tenant may recover reasonable attorney's fees."

We have never directly addressed whether pro bono work can qualify as "reasonable attorney's fees" under these provisions. But this is not the first time attorney fees have been awarded for pro bono work in Nebraska.[8] Furthermore, comment 4 of § 3-506.1 of the Nebraska Rules of Professional Conduct contemplates that attorneys working pro bono will be awarded statutory attorney fees. The comment explains that in

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[7] *Hilliard v. Robertson, supra* note 3.

[8] See, e.g., *Ray v. Thirty LLC*, No. A-08-1020, 2009 WL 1819288 (Neb. App. June 23, 2009) (selected for posting to court Web site).

order for work to be considered pro bono, the attorney's service must be provided without any fee or any expectation of a fee.[9] However, an attorney working pro bono can ultimately accept an award of statutory attorney fees without disqualifying the services as pro bono.[10]

The comment notes that a pro bono attorney receiving an attorney fee award is encouraged to contribute such fees to organizations or projects that benefit persons of limited means.[11] The comment does not specifically address legal services organizations, but it stands to reason that if the legal services are provided by an organization dedicated to benefiting persons of limited means, then it would be proper for that organization to keep the statutory attorney fees in order to continue providing such services.

[3] Our law is clear that the amount of statutory attorney fees is not directly tied to the amount due under a fee agreement. Instead, the district court must determine the "reasonable attorney's fees." In making this determination, the court is to consider the nature of the proceeding, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.[12]

[4] There are strong public policy reasons for statutory attorney fee awards in actions under Nebraska's Uniform Residential Landlord and Tenant Act.[13] In *Lomack v. Kohl-Watts*,[14] the Nebraska Court of Appeals explained that the attorney fee provisions of §§ 76-1416(3) and 76-1425(2) are mandatory. They are a matter of right, with broad discretion

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[9] See Neb. Ct. R. Prof. Cond. § 3-506.1, comment 4.

[10] See *id*.

[11] *Id*.

[12] *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[13] Neb. Rev. Stat. §§ 76-1401 to 76-1449 (Reissue 2009).

[14] See *Lomack v. Kohl-Watts*, 13 Neb. App. 14, 688 N.W.2d 365 (2004).

upon the judge only to determine their amount.[15] The court observed that the fee itself cannot be discretionary because, if it were, the full penalty would not be recovered and the purposes behind the attorney fee provision would be undermined.[16] Other courts have observed that the aggregate effect of individual tenant suits is the enforcement of important public rights.[17]

The Court of Appeals explained that the tenant need only present some evidence to the trial court upon which the court can make a meaningful award.[18] We have generally said that if an attorney seeks a statutory attorney fee, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.[19] We have never said a fee agreement or any other agreement showing an obligation of the client to pay the attorney fees to the attorney is part of the proof that must be proffered in order to support an award of statutory attorney fees.

Brooks points out that most courts do not allow recovery of statutory attorney fees by persons appearing pro se. This is because courts generally consider some attorney-client relationships an essential factor to the propriety of an attorney fee award.[20] But that relationship need not be bound by a fee agreement.

Courts typically allow statutory attorney fee awards when the litigant is represented by an attorney working pro bono. Numerous courts have held under a variety of statutory attorney fee provisions—including landlord-tenant laws—that unless a

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[15] *Id.*

[16] See *id.* (citing *Beckett v. Olson*, 75 Or. App. 610, 707 P.2d 635 (1985)).

[17] See, *Freeman v. Alamo Management Co.*, 221 Conn. 674, 607 A.2d 370 (1992); *McReady v. Dept. of Consumer & Reg. Aff.*, 618 A.2d 609 (D.C. 1992); *Shands v. Castrovinci*, 115 Wis. 2d 352, 340 N.W.2d 506 (1983).

[18] *Lomack v. Kohl-Watts, supra* note 14.

[19] *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). See, also, *Lomack v. Kohl-Watts, supra* note 14.

[20] See, *Hairston v. R & R Apartments*, 510 F.2d 1090 (7th Cir. 1975); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). See, also, *Lisa v. Strom*, 183 Ariz. 415, 904 P.2d 1239 (Ariz. App. 1995).

statute expressly prohibits its fee awards to pro bono attorneys, the fact that representation is pro bono is never justification for denial of fees.[21] In fact, we have not found a case in which a court has denied statutory attorney fees because the litigant's attorney worked pro bono.

[5] The most common purpose behind fee-shifting statutes is to encourage private litigation to enforce a particular statute or right.[22] Attorney fee statutes are also intended to deter improper conduct and encourage parties to comply with the law.[23] By encouraging private action, attorney fee provisions encourage compliance with and enforcement of laws serving the public interest or protecting the disadvantaged.[24] "[A] realization that the opposing party, although poor, has access to an attorney and that an attorney's fee may be awarded deters noncompliance with the law and encourages settlements."[25]

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[21] See, *Blum v. Stenson*, 465 U.S. 886, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984); *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1976); *Sellers v. Wollman*, 510 F.2d 119 (5th Cir. 1975); *Brandenburger v. Thompson, supra* note 20; *Folsom v. Butte County Ass'n of Governments*, 32 Cal. 3d 668, 652 P.2d 437, 186 Cal. Rptr. 589 (1982); *In re Marriage of Swink*, 807 P.2d 1245 (Colo. App. 1991); *Benavides v. Benavides*, 11 Conn. App. 150, 526 A.2d 536 (1987); *Lee v. Green*, 574 A.2d 857 (Del. 1990); *Martin v. Tate*, 492 A.2d 270 (D.C. 1985); *Butler v. Butler*, 376 So. 2d 287 (Fla. App. 1979); *Wiginton v. Pacific Credit Corp.*, 2 Haw. App. 435, 634 P.2d 111 (1981); *In re Marriage of Brockett*, 130 Ill. App. 3d 499, 474 N.E.2d 754, 85 Ill. Dec. 794 (1984); *Hale v. Hale*, 772 S.W.2d 628 (Ky. 1989); *Henriquez v. Henriquez*, 413 Md. 287, 992 A.2d 446 (2010); *Linthicum v. Archambault*, 379 Mass. 381, 398 N.E.2d 482 (1979), *abrogated on other grounds, Knapp Shoes, Inc. v. Sylvania Shoe Manufacturing Corporation*, 418 Mass. 737, 640 N.E.2d 1101 (1994); *In re Marriage of Gaddis*, 632 S.W.2d 326 (Mo. App. 1982); *Ferrigno v. Ferrigno*, 115 N.J. Super. 283, 279 A.2d 141 (1971); *Lewis v. Romans*, 70 Ohio App. 2d 7, 433 N.E.2d 622 (1980); *Council House, Inc. v. Hawk*, 136 Wash. App. 153, 147 P.3d 1305 (2006); *Shands v. Castrovinci, supra* note 17; 20 C.J.S. *Costs* § 138 (2007).

[22] 3 *Stein on Personal Injury Damages* § 17:55 (3d ed. 1997).

[23] *Id.*

[24] See, *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980); *Hairston v. R & R Apartments, supra* note 20.

[25] *Benavides v. Benavides, supra* note 21, 11 Conn. App. at 155, 526 A.2d at 538.

These goals are effectively furthered only when the statutory attorney fees are awarded for fee-based and pro bono work alike.

[6] Allowing legal services organizations recovery of statutory attorney fees also generally enhances their capabilities to assist those who are financially unable to obtain private counsel.[26] Courts have observed that rules of professional conduct place great emphasis on encouraging lawyers to provide pro bono services. Allowing statutory attorney fees for pro bono work increases the resources of legal services providers and increases their ability to represent indigent individuals, thus furthering this important public policy.[27]

[7] More specifically to the statutory scheme that provides for the attorney fees, if fees are not awarded for pro bono work, then the burden of costs is placed on the organization providing the services, and the organization correspondingly may decline to bring such suits and decide to concentrate its limited resources elsewhere.[28] This would "indirectly cripple[]" the legislative intent of the statute to encourage its forceful application.[29] Insofar as a statutory attorney fee provision is designed to encourage private action to vindicate the rights granted by the statutory scheme, an award of attorney fees to the pro bono organization indirectly serves the same purpose as an award directly to a fee-paying litigant.[30] On the other hand, denying attorney fees for pro bono work would undermine the Legislature's intent and the policies behind the attorney fee provision.

[8,9] The statutory provisions in issue here state that "the tenant may recover reasonable attorney's fees."[31] The court

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[26] See, *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977); *Hairston v. R & R Apartments, supra* note 20; *Lee v. Green, supra* note 21.

[27] See *Henriquez v. Henriquez, supra* note 21.

[28] *Hairston v. R & R Apartments, supra* note 20.

[29] *Id.* at 1092.

[30] *Brandenburger v. Thompson, supra* note 20. See, also, *Hairston v. R & R Apartments, supra* note 20.

[31] § 76-1425(2). See, also, § 76-1416(3).

in *Henriquez v. Henriquez*[32] observed that while Black's Law Dictionary may define "'attorney's fee'" as "'the charge to a client,'" Ballentine's Law Dictionary defines "'attorney's fee'" as "'[a]n allowance made by the court.'" Furthermore, the statute in *Henriquez* limited attorney fees to those which were "'just and proper under all the circumstances,'"[33] which is similar to the "reasonable" limitation found here. The court said that such modifiers of the term "attorney's fees" belie any argument that the statutory attorney fee depends on a billing obligation.[34] The court concluded that to limit attorney fee awards to pro bono attorneys would be to insert the additional term "'incurred'" into the statute.[35] We find that the same would be true of the statutory attorney fee provisions of §§ 76-1416(3) and 76-1425(2). Our court has said many times that we may not add language to the plain terms of a statute to restrict its meaning.[36]

Courts have said that it would be unreasonable to allow the losing party to reap the benefits of free representation to the other party.[37] As stated in *Lewis v. Romans*,[38] there is no reason why a landlord should benefit "from the fortuitous circumstance of a tenant's penury." And where the legal services entity is publicly funded, if statutory attorney fees were denied, then the taxpayer instead of the landlord would pay the costs of the tenant's action. This would be especially repugnant to the purposes of the fee-shifting statutes.[39]

Brooks argues, however, that the attorney fee award in this case would result in a windfall to Black, because there is no

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[32] See *Henriquez v. Henriquez, supra* note 21, 413 Md. at 300, 992 A.2d at 454 (emphasis omitted).

[33] *Id.* at 298, 992 A.2d at 453.

[34] See, generally, *Henriquez v. Henriquez, supra* note 21.

[35] *Id.* at 299, 992 A.2d at 454.

[36] See, e.g., *FirsTier Bank v. Triplett*, 242 Neb. 614, 497 N.W.2d 339 (1993).

[37] *Benavides v. Benavides, supra* note 21.

[38] *Lewis v. Romans, supra* note 21, 70 Ohio App. 2d at 9, 433 N.E.2d at 623.

[39] See, *Benavides v. Benavides, supra* note 21; *Ferrigno v. Ferrigno, supra* note 21.

written agreement obligating Black to pay the award over to the Creighton Legal Clinic. Brooks argues that Black would receive more than her actual damages and costs and that the judgment would constitute punitive damages, in violation of the Nebraska Constitution.[40] A number of courts have directly addressed the potential windfall to a litigant who has no written obligation to pay over a statutory attorney fee to his or her attorney. Those courts hold that the remedy is not to deny the attorney fee award altogether. Instead, the remedy is to award the statutory attorney fee directly to the entity providing pro bono legal services.[41]

While a determination of an award should not turn on the question of whether the litigant was actually required to pay an attorney, in the interest of justice, it likewise should not result in a windfall to the litigant.[42] Direct awards to pro bono organizations have been held to be proper despite the general rule that attorney fees belong to the litigant and not to the attorney[43] and despite statutory language authorizing the fee award to the "prevailing party" or similar.[44] While most courts find it self-evident that such a direct award is within the power of the courts, one court has explained that this power derives from the court's powers to give effect to the jurisdiction of the court and to enforce its judgments, orders, or decrees.[45]

We hold that because there is no dispute that Brooks acted willfully, the district court did not err in awarding attorney fees. And Brooks does not dispute that the amount ordered was "reasonable." However, in order to prevent a windfall to

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[40] See, e.g., *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960).

[41] See, *Dennis v. Chang, supra* note 24; *Hairston v. R & R Apartments, supra* note 20; *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970); *In re Stoltz*, 392 B.R. 87 (D. Vt. 2001); *Benavides v. Benavides, supra* note 21; *Lee v. Green, supra* note 21; *Shands v. Castrovinci, supra* note 17.

[42] See *In re Stoltz, supra* note 41.

[43] *Griffin v. Vandersnick*, 210 Neb. 590, 316 N.W.2d 299 (1982).

[44] See, 1 Robert L. Rossi, Attorneys' Fees § 6:12 (3d ed. 2012); *Dennis v. Chang, supra* note 24.

[45] *Lewis v. Romans, supra* note 21.

Black, we follow the reasoning of those courts that order the attorney fees be awarded directly to the legal services provider. We remand with directions for the attorney fees awarded by the district court to be awarded directly to the Creighton Legal Clinic.

CONCLUSION

We affirm the judgment in favor of Black in all respects, but modify the designee of the attorney fee award. We direct the district court to amend its order so as to award the attorney fees directly to the Creighton Legal Clinic.

AFFIRMED AS MODIFIED.

MILLER-LERMAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
THOMAS P. MERCHANT, APPELLANT.
827 N.W.2d 473

Filed March 8, 2013. No. S-12-191.

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. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **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. **Expert Witnesses: Evidence.** Expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue, and expert testimony concerning the status of the law does not tend to accomplish either of these goals.
6. ____: ____. Expert testimony concerning a question of law is generally not admissible in evidence.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

8. **Evidence.** Evidence which is not relevant is not admissible.
9. **Evidence: Words and Phrases.** Relevant evidence means evidence having 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.
10. **Criminal Law: Statutes: Legislature: Intent.** Generally, the established rule is that when construing a criminal statute, the existence of a criminal intent is regarded as essential and relevant, even though the terms of the statute do not require it, unless it clearly appears that the Legislature intended to make the act criminal without regard to the intent with which it was done.
11. **Public Policy: Words and Phrases.** Public welfare offenses are in the nature of neglect where the law requires care, or inaction where it imposes a duty.
12. **Public Policy: Negligence: Intent.** One accused of a public welfare offense, although not intending the violation, is in the position to prevent it with the exercise of reasonable due care.
13. **Criminal Law: Intent: Public Policy: Sentences.** With public welfare offenses, criminal penalties simply serve as an effective means of regulation, dispensing with the conventional mens rea requirement for criminal conduct.
14. **Motor Vehicles: Sales: Licenses and Permits: Public Policy.** The motor vehicle dealer licensing requirement found under Neb. Rev. Stat. § 60-1416 (Reissue 2010) is a public welfare offense.
15. **Motor Vehicles: Sales: Licenses and Permits: Public Policy: Legislature: Intent.** License requirements for buying, selling, and exchanging vehicles are not found in common law, but were created by the Nebraska Legislature with the intent to protect the public interest.
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 Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for a new trial.

John S. Berry, of Berry Law Firm, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Thomas P. Merchant was found guilty after a jury trial of the unlawful sale or purchase of a motor vehicle under Neb. Rev. Stat. § 60-1416 (Reissue 2010). Two issues presented by this

appeal are whether the trial court properly admitted "expert" testimony interpreting § 60-1416 and whether mens rea is a required element of that offense.

II. BACKGROUND

According to Merchant, he was in the business of automotive wholesaling. In June 2011, Merchant arranged to exchange vehicles with Nebraska Auto Auction, Inc. (NAA). NAA is an automobile auction company that facilitates sales and purchases between dealers by guaranteeing the sellers receive payment and the buyers receive clean title to the vehicles purchased.

NAA holds a valid Nebraska auction license. By law, only licensed dealers can participate in the auctions held by NAA. NAA requires all auction participants to fill out necessary paperwork and to provide a copy of their state-issued dealer's license.

On June 1, 2011, Merchant exchanged vehicles through an NAA auction. In total, he sold 9 vehicles and purchased 19 more. For the vehicles he purchased, Merchant wrote separate checks totaling approximately $338,000. The checks were written by Merchant doing business under the title "The Auto Merchant Exchange."

Merchant completed and signed the paperwork associated with these transactions but never provided NAA a copy of a dealer's license. On the NAA registration form, Merchant wrote "wholesale only" and, when requested to provide "Type of Dealer," checked a box indicating "Wholesale." He listed his dealer's license number as "NF-4711."

NAA requested a copy of Merchant's dealer's license, but never received a copy. NAA reported Merchant to the Nebraska Motor Vehicle Industry Licensing Board. After determining Merchant did not have a dealer's license, the State charged Merchant with one count of being an unlicensed dealer.

Prior to trial, the court held a hearing to determine whether Merchant's prior convictions were admissible for purposes of impeachment. The State offered a certified copy of the judgment from the clerk of the district court for Weld County, Colorado. The exhibit showed that Merchant was convicted

of theft of more than $400 in August 1996 and was sentenced to 24 years of incarceration. The exhibit does not state when Merchant was released, but does indicate that the court last modified the sentence in February 2003. Counsel for Merchant objected to the admission of the exhibit, arguing that it was "somewhat convoluted and confusing" and that it does not prove by the preponderance of the evidence that Merchant was convicted of a felony in the past 10 years. The judge overruled the objection and, without further explanation, stated that the conviction represented by the exhibit could be used for impeachment purposes.

Additionally, the State requested a motion in limine to prevent Merchant from testifying about or putting on evidence concerning his lack of knowledge of the law requiring a license to conduct sales and/or purchases of motor vehicles in the State of Nebraska. The trial court granted the motion in limine.

At trial, the State called William S. Jackson as a witness. Jackson is the executive director with the State of Nebraska Motor Vehicle Industry Licensing Board. The board is responsible for licensing and regulating the manufacturers, distributors, salespersons, dealer agents, manufacturer representatives, and finance companies for Nebraska vehicles.

Jackson testified that in order to sell or purchase a vehicle in Nebraska, a person must be a licensed motor vehicle dealer, a licensed salesperson of a licensed dealer, or a bona fide consumer. He testified that a bona fide consumer is a person who purchases a vehicle, pays all taxes on the vehicle, and registers the vehicle prior to reselling. He also testified that a bona fide consumer cannot sell more than eight vehicles during a 1-year period.

Jackson further testified that the term "wholesale" refers to any dealer-to-dealer transaction and that "wholesale" transactions require a license. Merchant's counsel objected to this portion of the testimony, stating that it was irrelevant and that it invaded the province of the jury. The objection was overruled. Additionally, Jackson testified that he searched the Nebraska Motor Vehicle Industry Licensing Board's records and found no record of either Merchant's or The Auto

Merchant Exchange's having a license to buy and sell vehicles in Nebraska.

The State also called Shane L. Fox to testify. Fox is an investigator with the Wyoming Department of Transportation. Fox's duties in that position included monitoring and enforcing various motor vehicle dealer licenses for the State of Wyoming. Fox testified that he searched for Merchant and The Auto Merchant Exchange in the Wyoming Department of Transportation records and found that neither Merchant nor his company was a licensed dealer in the State of Wyoming. He also testified that the dealer No. NF-4711 used by Merchant was not a valid license number in Wyoming.

After the testimony of Fox, the State rested. Prior to testifying, Merchant made two offers of proof for the granted motion in limine. In his first offer of proof, Merchant testified that he had contacted a Wyoming attorney who told him he could wholesale vehicles in the State of Wyoming without a license. He also testified that he had contacted dealers in Nebraska who informed him that he did not need a license in Nebraska because he was a wholesaler in Wyoming. His second offer of proof would have been the testimony of a Wyoming attorney who, according to Merchant, would have testified that the Wyoming Department of Transportation told Merchant he could legally "wholesale" vehicles between dealers without a license.

The State objected to these offers of proof on the ground that Merchant's lack of knowledge of the illegality of his actions was irrelevant to any elements of the charged crime. Both objections on both offers of proof were sustained.

Merchant then took the stand. During direct examination, Merchant testified that he transported wholesale cars with his truck and trailer for a $250-per-car transportation fee. Merchant testified that he had done previous business in Nebraska with the Husker Auto Group. Merchant also admitted during direct examination that he had been convicted of a felony within the past 10 years.

On cross-examination, Merchant testified that he was directly involved with the NAA transactions that occurred on June 1, 2011. He testified that money did exchange hands and

that he personally wrote checks for the vehicles purchased. He testified that he filled out and signed most of the paperwork for these transactions and that the paperwork "reassigned" ownership of the vehicles. He acknowledged that he was not a licensed motor vehicle dealer in Nebraska or any state and that he was not working for a licensed dealer. Merchant admitted that he did not title, register, or pay taxes on the vehicles purchased at the NAA auction on June 1.

Following Merchant's testimony, jury instructions were given to the jury. In relevant part, jury instruction No. 3 stated the following:

> Regarding the crime of Unlawful Sale or Purchase of Motor Vehicle, the State must prove beyond a reasonable doubt that:
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> (1) On the day he sold or purchased a motor vehicle described in the evidence . . . Merchant did not possess a valid Nebraska Motor Vehicle Dealer's license, Motor Vehicle Auction Dealer license, Motor Vehicle Salesperson license, or Motor Vehicle Dealer's Agent license, and
>
> (2) Any one of the following:
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> (a) . . . Merchant did not acquire the vehicle he sold or purchased for use in business or for pleasure purposes, or
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> (b) the motor vehicle sold was not titled in . . . Merchant's name, or
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> (c) the motor vehicle sold was not registered to . . . Merchant in accordance with the laws of his resident state, or
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> (d) . . . Merchant sold more than eight registered motor vehicles within a twelve month period;
>
> and
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> (3) . . . Merchant did so on or about June 1, 2011, in Lancaster County, Nebraska.

Counsel for Merchant objected to the use of this instruction and alleged that the bona fide consumer portion of the instruction was unnecessary and confusing. Merchant's proposed instruction stated:

> [R]egarding the crime of acting without a license, the State must prove beyond a reasonable doubt that:

> . . . Merchant acted as a motor vehicle dealer, an auction dealer, a motor vehicle salesperson, or dealers agent without having first obtained a license and . . . Merchant did so on or about June 1st, 2011, in Lancaster County, Nebraska.

The court overruled Merchant's objection and did not give the proposed instruction.

During the State's closing argument, the prosecutor stated: "Wholesaler is defined in Nebraska Statutes. It means any person actively and regularly engaged in the act of selling, leasing for a period of 30 or more days, or exchanging new or used motor vehicles, who buy, sell, exchange . . . ." Counsel for Merchant objected and requested permission to approach. Counsel for Merchant stated there was no definition of "wholesaler" in the statutes and that the prosecutor's statement was misleading. The trial court agreed, and counsel asked for "either mistrial or . . . per curiam Instruction." The trial court agreed to give an instruction and told the jury that "wholesaler" is not defined and that the State was simply interpreting the statutes at issue.

After closing arguments, the jury convicted Merchant of the unlawful sale or purchase of a motor vehicle. An enhancement hearing was held to determine whether Merchant was a habitual criminal. The State offered exhibit 11, and the court admitted it over the objections of Merchant. Exhibit 11 was a letter from the Colorado Department of Corrections outlining Merchant's criminal history. Merchant was classified as a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 2008) and was sentenced to 12 to 30 years' imprisonment.

III. ASSIGNMENTS OF ERROR

Merchant claims, restated and summarized, that the trial court erred when it (1) prevented Merchant from testifying about his knowledge of the licensing requirement and his lack of mens rea, (2) allowed Jackson to testify to his interpretation of the licensing requirements, (3) submitted jury instruction No. 3 to the jury, (4) allowed the prosecution to impeach Merchant with a prior conviction, (5) denied the motion for retrial after the prosecutor misstated the law during closing

arguments, (6) found the evidence to be sufficient to support the conviction, and (7) excessively sentenced Merchant.

IV. STANDARD 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 discretion a factor in determining admissibility.[1] 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.[2] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3]

[4] Whether jury instructions given by a trial court are correct is a question of law.[4] 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]

V. ANALYSIS

1. Jackson's Testimony

We begin with Merchant's second assignment of error. Merchant asserts that the trial court erred in allowing the State's witness to testify as to his interpretation of the law regarding the licensing of motor vehicle dealers in the State of Nebraska. We agree.

The Nebraska rules of evidence provide the relevant standards for the admissibility of testimony for both lay witnesses and experts. Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 2008), states:

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[1] *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[2] *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).

[3] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[4] *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012).

[5] *Id.*

> If the witness is not testifying as an expert, his testimony in the form of opinions or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Likewise, Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), allows expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." For both lay and expert witnesses, the testimony must aid the jury in either understanding the evidence or determining a fact at issue.

Specifically, Merchant challenges the following questions and answers during the direct examination of Jackson by the State. The prosecutor asked, "And in the state of Nebraska a license is required in order to be able to do that legally; is that correct?" to which Jackson replied affirmatively. The prosecutor followed with, "And that's whether it be wholesale or retail?" Counsel for Merchant objected, stating, "Objection, your Honor, that goes — first of all, relevance. Second of all, that's . . . for the jury to say." The objection was overruled, and the prosecutor restated her question: "It [d]oesn't matter whether we're talking about something that's described as wholesale or something that's described as . . . retail, in the state of Nebraska you have to have a license?" Jackson again responded in the affirmative.

[5,6] We find that Jackson's testimony interpreting the statutes was not relevant and was unfairly prejudicial to Merchant. In *Kaiser v. Western R/C Flyers*,[6] the issue at trial was whether the relevant zoning ordinance barred operation of a model airplane airfield near Springfield, Nebraska. Both parties introduced expert testimony in support of their respective interpretations of the ordinance. We held both parties' expert evidence to be irrelevant and explained:

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[6] *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991).

> [E]xpert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue[,] and . . . expert testimony concerning the status of the law does not tend to accomplish either of these goals. Expert testimony concerning a question of law is generally not admissible in evidence. . . . The interpretation of a zoning ordinance presents a question of law, and we decline to consider any expert testimony as to what constitutes a "commercial" or a "private" recreational use under the Springfield zoning ordinances.[7]

(Citations omitted.)

In *Sports Courts of Omaha v. Brower*,[8] a law professor testified, over objection, that the actions taken by an attorney serving as monitor and agent of a corporation constituted a disposition of collateral under provisions of the Nebraska Uniform Commercial Code and that appropriate notice was not given. We rejected this testimony as irrelevant, because the testimony did not help the trier of fact understand the evidence or determine a fact issue.[9] Likewise, in *Sasich v. City of Omaha*,[10] the plaintiff brought an action seeking an injunction against certain Omaha, Nebraska, zoning ordinances. In dicta, we criticized the trial court for admitting expert testimony from a legal scholar on the status of the zoning laws.[11] We stated that such evidence is irrelevant and inadmissible and noted that such scholarship "should not reach a judge's attention by way of the witness stand."[12]

Here, Jackson's testimony improperly interpreted the dealer licensing statute for the court. Much like the testimony in *Kaiser*, Jackson interpreted the actions of Merchant to be in violation of the statute. Jackson testified that Merchant's self-described job title of "wholesaler" was included in the

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[7] *Id.* at 628, 477 N.W.2d at 560.

[8] *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995).

[9] *Id.*

[10] *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984).

[11] *Id.*

[12] *Id.* at 873-74, 347 N.W.2d at 99.

definition of "[m]otor vehicle dealer" under Neb. Rev. Stat. § 60-1401.26 (Reissue 2010), which Jackson testified was subject to licensing requirements under § 60-1416. Similar to *Kaiser*, where the meaning of a zoning ordinance was considered a question of law, Jackson's interpretation of what "wholesale" means and whether "wholesaling" requires a license is a question of law and is inappropriate for expert testimony. Jackson's testimony did not aid the jury in determining the factual issues of the case and therefore was irrelevant.

The State argues that Merchant did not properly preserve this issue for appeal and that Merchant's use of the term wholesaler "opened the door"[13] to Jackson's testimony. Neither argument has merit. First, the State argues that Merchant did not properly object to the testimony during trial and that a party may not assert a different ground for an objection on appeal.[14] Although the legal proposition is correct, it is inapplicable. Merchant properly objected to Jackson's testimony as being irrelevant, and the admission of the testimony constitutes a ground for remand.

Second, the State argues that Merchant "'opened the door'"[15] by introducing evidence that he was a "wholesaler" not subject to the licensing requirements. By "'opening the door,'"[16] the State argues that irrelevant evidence becomes relevant. We disagree. Merchant's labeling himself as a "wholesaler" does not permit the State to introduce testimony that a "wholesaler" is in fact covered by the law. Such testimony is still irrelevant and impinges on the role of the judge to instruct the jury on the law.[17]

We find Jackson's testimony to be improper and the trial court's decision to admit this "expert" testimony to be an abuse of discretion. Jackson's testimony instructed the jury on how to make its decision of Merchant's guilt. Only the trial court

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[13] Brief for appellee at 27.

[14] See *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[15] See *State v. Harrold*, 256 Neb. 829, 855, 593 N.W.2d 299, 318 (1999).

[16] Brief for appellee at 27.

[17] See *Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992).

should be instructing the jury on the relevant law.[18] Thus, it is patently clear to this court that admitting Jackson's testimony was an abuse of discretion. We remand the cause for a new trial.

2. Remaining Assignments of Error

[7] An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.[19] However, we find it prudent to discuss some of the remaining assignments of error to provide guidance to the trial court on these issues which are likely to resurface on remand.

(a) Mens Rea

Merchant argues that he should have been allowed to testify regarding his knowledge of the licensing requirement, his lack of intent, or his lack of mens rea. We disagree. Such testimony is irrelevant, because § 60-1416 is a public welfare offense which does not require proof of mens rea.

[8-10] All relevant evidence normally is admissible. Evidence which is not relevant is not admissible.[20] "Relevant evidence means evidence having 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."[21] Generally, the established rule is that when construing a criminal statute, the existence of a criminal intent is regarded as essential and relevant, even though the terms of the statute do not require it, unless it clearly appears that the Legislature intended to make the act criminal without regard to the intent with which it was done.[22] As explained by the U.S. Supreme Court in *United States v. Balint*[23]:

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[18] See *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999).

[19] *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[20] See Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008).

[21] Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008).

[22] See *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

[23] *United States v. Balint*, 258 U.S. 250, 252, 42 S. Ct. 301, 66 L. Ed. 604 (1922).

> [I]n the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide "that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*.

[11-13] We have held that public welfare offenses do not fit neatly into an accepted classification of common-law offenses because they are not in the nature of positive aggressions or invasions with which the common law dealt.[24] Rather, the offenses are "'in the nature of neglect where the law requires care, or inaction where it imposes a duty.'"[25] One accused of such an offense, although not intending the violation, is in the position to prevent it with the exercise of reasonable due care.[26] With public welfare offenses, criminal penalties simply serve as an effective means of regulation, dispensing with the conventional mens rea requirement for criminal conduct.[27]

In *State v. Perina*,[28] we recently determined that misdemeanor motor vehicle homicide is a public welfare offense which does not require proof of mens rea. We noted that motor vehicle homicide was a traffic law, not found in common law, based on the negligence of the driver. The law exists not to prevent "'evil conduct,'" but, rather, to deter negligent conduct in hopes of protecting the traveling public.[29] Thus, mens rea is not a required element of misdemeanor motor vehicle homicide.

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[24] *State v. Perina, supra* note 22.

[25] *Id.* at 468, 804 N.W.2d at 169 (quoting *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952)).

[26] *State v. Perina, supra* note 22.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 473, 804 N.W.2d at 172.

Here, the Legislature has made it explicitly clear that the motor vehicle dealer licensing requirements, under which Merchant was convicted, are regulatory measures intended to protect Nebraska's public welfare. Neb. Rev. Stat. § 60-1401.01(1) (Reissue 2010) states:

> The Legislature finds and declares that the distribution and sales of motor vehicles, motorcycles, and trailers in the State of Nebraska vitally affects the general economy of the state, the public interest, the public welfare, and public safety and that in order to promote the public interest and the public welfare and in the exercise of its police power, it is necessary to regulate motor vehicle, motorcycle, and trailer dealers, manufacturers, distributors, and their representatives doing business in the State of Nebraska.

[14,15] Therefore, we find that acting without a dealer's license under § 60-1416 is a public welfare offense, which does not require proof of mens rea. License requirements for buying, selling, and exchanging vehicles are not found in common law, but were created by the Nebraska Legislature with the intent to protect the public interest. Thus, all evidence and testimony regarding Merchant's knowledge of the dealer's licensing requirement, his lack of intent, or his lack of mens rea are irrelevant.

(b) Jury Instruction No. 3

Merchant argues that jury instruction No. 3 was misleading and confusing and that it prevented the jury from determining whether his conduct of wholesaling vehicles violated the law. We agree.

First, we must compare the instruction with the motor vehicle industry licensing statutes found under chapter 60, article 14, of the Nebraska Revised Statutes. Section 60-1416 states that "[a]ny person acting as a motor vehicle dealer . . . without having first obtained the license provided in section 60-1406 is guilty of a Class IV felony . . . ." Motor vehicle dealer is defined under § 60-1401.26 as

> any person, other than a bona fide consumer, actively and regularly engaged in the act of selling, leasing for a

> period of thirty or more days, or exchanging new or used motor vehicles, trailers, and manufactured homes who buys, sells, exchanges, causes the sale of, or offers or attempts to sell new or used motor vehicles.

Under § 60-1401.26, the only exception to a person who buys and sells motor vehicles from being considered a "[m]otor vehicle dealer" is a person who is a "bona fide consumer." Bona fide consumer is defined under Neb. Rev. Stat. § 60-1401.07 (Reissue 2010) as

> an owner of a motor vehicle, motorcycle, or trailer who has acquired such vehicle for use in business or for pleasure purposes, who has been granted a certificate of title on such motor vehicle, motorcycle, or trailer, and who has registered such motor vehicle, motorcycle, or trailer, all in accordance with the laws of the residence of the owner, except that no owner who sells more than eight registered motor vehicles, motorcycles, or trailers within a twelve-month period shall qualify as a bona fide consumer.

Based on our comparison of jury instruction No. 3 to the relevant statutes, we observe that the instruction is incomplete. Summarized, the law requires a person who buys and sells vehicles either to be a bona fide consumer or to be licensed.[30] Instruction No. 3(A)(1) correctly states that in order to find Merchant guilty, the jury must find that he did not have a proper license. Instruction No. 3(A)(2) is also correct in requiring the jury to determine whether Merchant was a "bona fide consumer." But instruction No. 3(A) is incomplete because it assumes the transactions made by Merchant were sufficient to establish that he was a "motor vehicle dealer." At trial, Merchant's crucial argument was that his "wholesale" transactions were not covered under the definition of "[m]otor vehicle dealer" and, thus, that he was not subject to the licensing requirement. Therefore, a crucial, and contested, element of the crime is whether Merchant's transactions classified him as a motor vehicle dealer. This factual determination should be made by the jury and not assumed

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[30] Compare §§ 60-1416, 60-1401.26, and 60-1401.07.

by the instructions. Such an omission would be prejudicial because it withdraws from the jury an essential issue or element in the case.[31]

Therefore, we find that instruction No. 3 does not "adequately cover the issues."[32] An adequate instruction should also ask the jury to determine whether Merchant bought, sold, exchanged, caused the sale of, or offered or attempted to sell new or used motor vehicles on or around June 1, 2011. Adding such an instruction allows the jury to determine all of the elements and essential facts in this case.

(c) Prior Conviction, Closing Argument Misstatement, and Excessive Sentence

Merchant contends that the trial court erred by admitting his prior conviction, not granting his motion for new trial after the prosecutor's misstatement during closing arguments, and giving an excessive sentence. Because we have determined that the trial court committed reversible error by admitting Jackson's "expert" testimony, we do not need to address these assignments of error, as they are unlikely to occur again on remand.

The prior conviction assignment of error is unlikely to occur again. Merchant objected to the use of the certified document provided by the Weld County District Court because it did not give the date when Merchant was released from incarceration for his previous felony conviction. At trial, the trial court was able to infer from the document that Merchant was incarcerated until at least February 2003. Thus, the conviction was within 10 years of the start of the trial, making it admissible for purposes of impeachment.[33] Such an inference, however, cannot be made for a trial occurring in February 2013 or after. Therefore, this issue is unlikely to occur on remand.

Likewise, we find that the prosecutorial misstatement and excessive sentence assignments of error are unlikely to occur

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[31] See *State v. Brown, supra* note 18.

[32] See *State v. Kibbee, supra* note 2, 284 Neb. at 103, 815 N.W.2d at 897.

[33] Neb. Evid. R. 609(2), Neb. Rev. Stat. § 27-609(2) (Reissue 2008).

on remand. We need not address these three assignments of error.

(d) Sufficiency of Evidence

[16] Having found reversible error, we must determine whether the totality of the evidence admitted by the trial court was sufficient to sustain Merchant's conviction. 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.[34]

The evidence admitted showed that Merchant purchased and sold vehicles with NAA on June 1, 2011. The evidence established that Merchant did so without a valid motor vehicle dealer's license. Furthermore, there was sufficient evidence demonstrating that Merchant was a not a bona fide consumer when he purchased and sold the vehicles. Thus, all the evidence, whether properly admitted or not, was sufficient to sustain a guilty verdict on the crime charged and the Double Jeopardy Clause does not bar retrial.

VI. CONCLUSION

The trial court erred in admitting Jackson's testimony interpreting § 60-1416 to apply to the "wholesale" transactions conducted by Merchant. We remand the cause for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[34] *State v. Payne-McCoy, supra* note 4.

SUSAN C. WULF, APPELLANT, V.
SHARAD KUNNATH, M.D., APPELLEE.
827 N.W.2d 248

Filed March 8, 2013. No. S-12-307.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an

admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

3. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
4. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.
5. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
6. **Summary Judgment: Appeal and Error.** The denial of a summary judgment motion is neither appealable nor reviewable.
7. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
8. **Torts: Battery: Words and Phrases.** In Nebraska, the intentional tort of battery is defined as an actual infliction of an unconsented injury upon or unconsented contact with another.
9. ____: ____: ____. Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.
10. **Torts: Intent: Words and Phrases.** Apparent consent—words or conduct reasonably understood by another to be intended as consent—is as effective as consent in fact.
11. **Juries: Verdicts.** A jury, by its general verdict, pronounces upon all or any of the issues either in favor of the plaintiff or the defendant.
12. **Torts: Battery.** The time and place, and the circumstances under which an act is done, will necessarily affect its unpermitted character, and so will the relations between the parties.
13. ____: ____. Silence and inaction may manifest consent where a reasonable person would speak if he or she objected.
14. ____: ____. It is only when notice is given that certain conduct will no longer be tolerated that the defendant is no longer free to assume consent.

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

Terrence J. Salerno for appellant.

Christopher J. Tjaden, of Gross & Welch, P.C., L.L.O., for appellee.

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

CASSEL, J.

INTRODUCTION

While in a lighthearted work setting, a doctor used his hand to tap or strike the back of a nurse's neck. The nurse claimed that the contact caused serious injuries, and she sued the doctor for battery, among other things. After the district court denied the nurse's motions for summary judgment and directed verdict on the issue of battery, a jury returned a verdict in the doctor's favor. Because we conclude the evidence, viewed in the light most favorable to the doctor, would support a finding either that the nurse consented to the contact or that the contact did not cause the nurse's injuries, we affirm.

BACKGROUND

During the noon hour on October 23, 2007, nurses Susan C. Wulf, Paula Kehm, and Chelsea Crocker were seated at their desks in the nurse's workroom, when Sharad Kunnath, M.D., and Crystal Knight, M.D., joined them. They joked around, and the atmosphere was lighthearted. The group discussed upcoming snow removal that might occur while Kunnath was out of the country, and Wulf commented that it would be funny to see Kunnath using a snowblower. According to Kunnath, he said, "Hey, [Wulf], don't make fun of me," and tapped Wulf on the nape of her neck. He intended to make the contact at issue, but he did not intend to hurt Wulf. Wulf described the contact as "a strike on the back of [her] neck." Knight testified that Kunnath touched Wulf in the middle of the back of the head with the palm of his hand in "a playful, joking manner . . . something that you would do to a friend or a relative if they are making fun of you." Crocker testified that Kunnath "playfully tapped [Wulf] on the back of the neck." The laughing and joking in the workroom continued for a few more minutes.

Wulf's reaction to the contact is in dispute. She testified that her head moved forward rapidly a significant distance, that she dropped the telephone she was holding, and that she

said, "Oh, my God, that hurt." She immediately felt pain in the back of her head and neck and suffered nausea, dizziness, and blurred vision. Kehm also recalled Wulf saying, "Ow, that hurt." But Knight did not recall Wulf's making any comments after the contact, nor did she see any movement of Wulf's head or conduct to suggest Wulf was experiencing any discomfort. However, Knight testified that Wulf "got a dirty look on her face"—which Knight described as an angry look. Kunnath testified that Wulf's head did not move, that he did not recall her making any comments to him, and that he did not observe anything to lead him to believe that there had been an injury or that Wulf had any complaints. Crocker similarly did not notice any reaction by Wulf and did not recall Wulf's dropping the telephone or making any comments. Crocker testified that Wulf's head moved forward very little, if at all. Crocker did not notice anything different about Wulf after the contact.

Within minutes of the incident, Wulf began an initial assessment on a patient, but she began to feel dizzy and nauseated. As she left the patient's room, she encountered nurse Kathy Krussel, who saw Wulf crying and rubbing her neck. Wulf told Krussel that Kunnath hit her in the neck. Krussel took Wulf into a treatment room, and Wulf reported that her neck hurt, that she had pain going down her arm, that she was nauseated, and that she was seeing spots. Kehm brought Wulf some ice, which Wulf placed on the back of her neck. Wulf was later moved out of the treatment room to a nurse practitioner's office, where she remained for the rest of the day. As Wulf walked to her car, she got more nauseated and felt as if she were going to pass out. Wulf drove herself to an emergency room.

Wulf, who was 58 years old at the time of trial, testified that in her career, she had never been struck in a similar manner. In her 30 years as a nurse, she had never seen a doctor "swat" somebody in the back of the head, never felt that she needed to announce to doctors that she did not want to be swatted in the back of the head, and never believed that she had consented to a doctor's swatting her on the back of the head by not saying anything. Although Krussel did not recall seeing anybody "thump" or "tap" others at the office, she testified that she

would "[p]robably not" find it strange if that occurred. The office atmosphere was that of a close-knit group, who joked and teased one another. Wulf testified that the group had a familial-like relationship. Kunnath testified that he and Wulf had a very collegial and close relationship, that Wulf was like a mother to him, and that they would joke and tease. Wulf testified that prior to the incident, Kunnath had "[t]hump[ed]" her on two or three occasions while walking in the hallway. She said that they were "good-natured" thumps, as a brother would do to a sister. Wulf never complained about the thumping, never asked Kunnath not to do it again, and did not find it to be offensive conduct.

Wulf saw her physician, Anthony L. Hatcher, M.D., approximately 1 week after the incident. At that time, Wulf complained of neck pain and pain radiating down her right arm. Wulf told Hatcher that she was struck in the back of the head, but she did not say how hard she was hit. Based on the history that Wulf provided Hatcher, he opined that "her pain was related to the injury that occurred." Upon Hatcher's referral, Wulf saw Michael C.H. Longley, M.D., an orthopedic spine surgeon, on May 8, 2008, for her complaints of neck and right arm pain. Wulf informed Longley that she received a "substantial blow" to the back of the head. Longley testified that Wulf had "a tendency to magnify symptoms and exaggerate complaints." Ultimately, Wulf underwent two surgeries. When Longley was asked whether he believed it was more likely true that Wulf's pain was a result of being struck in October 2007, he answered that precise etiology for Wulf's ongoing symptoms was unclear. But he testified that the condition of the disk degeneration and spinal stenosis was clearly preexistent, so the condition itself was not caused by the October 2007 incident.

Wulf had prior neck issues, including falls in 1984, 1988, and 1994 or 1995. But according to the history given to Longley by Wulf, she denied any preexisting neck problems. Records obtained by Hatcher's office showed that Wulf had degenerative disk disease in 1994 and that Wulf was being treated for a complaint to her neck at that time. Kehm and Crocker each testified that prior to the incident, Wulf sat very

erect and would turn her body to talk to someone, rather than just turning her neck. But Krussel never noticed Wulf to have problems with turning her head or neck, and another witness who worked with Wulf until April 2007 never saw Wulf appear limited because of neck or arm pain.

At the close of all evidence, Wulf moved for a directed verdict on the issues of battery and injury. The district court overruled the motion. The jury subsequently returned a verdict for Kunnath, and the court entered judgment accordingly. Wulf timely appeals.

ASSIGNMENTS OF ERROR

Wulf assigns that the district court erred in (1) failing to grant her motion for summary judgment, (2) failing to direct a verdict for her on the issue of battery, and (3) submitting jury instructions that allowed the jury to determine whether a battery occurred or whether an injury resulted from the action. Wulf also assigns that the verdict was contrary to the law and to the evidence.

[1] Wulf further assigns that the court erred in misapplying the law to the specific facts of the incident, but her brief does not contain an argument on this error separate from the arguments touching on the other assigned errors. To be considered by this court, an alleged error must be both specifically assigned and *specifically argued* in the brief of the party asserting the error.[1]

STANDARD OF REVIEW

[2] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.[2]

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[1] *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

[2] *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012).

[3] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[3]

[4,5] A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.[4] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.[5]

ANALYSIS

Denial of Summary Judgment.

[6] Wulf first assigns that the district court erred in failing to grant her motion for summary judgment. The denial of a summary judgment motion is neither appealable nor reviewable.[6] Because a trial has been held in this case and whether a motion for summary judgment should have been granted generally becomes moot after trial,[7] we need not consider whether the district court erred in denying Wulf's motion.

Motion for Directed Verdict, Court's Jury Instructions, and Jury's Verdict.

It is undisputed that Kunnath touched Wulf and that he intended to do so. Thus, Wulf contends that the district court should have directed a verdict in her favor on the issue of battery and that the court should have instructed the jury that a battery occurred, rather than allowing the jury to determine the issue. We disagree.

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[3] *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

[4] *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

[5] *Id.*

[6] *Lesiak v. Central Valley Ag Co-op*, *supra* note 2.

[7] See *id.*

[7] Both Wulf's argument regarding a directed verdict and her argument on the jury instructions require an examination of the evidence, and we consider them together. Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.[8] At oral argument, Wulf conceded that the instructions correctly stated the law and that her argument on the instructions turned upon the evidence. And although Wulf assigned that the jury's verdict was contrary to the law and the evidence, she advanced no argument regarding a conflict with the law and barely mentioned the verdict in connection with the court's denial of a directed verdict. However, because the sufficiency of the evidence to support the verdict dovetails our analysis of her primary arguments, we discuss the evidence with all three issues in mind.

[8-10] In Nebraska, the intentional tort of "battery" is defined as an actual infliction of an unconsented injury upon or unconsented contact with another.[9] Consent ordinarily bars recovery, because it "goes to negative the existence of any tort in the first instance."[10] It does so by destroying the wrongfulness of the conduct between the consenting parties.[11] Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.[12] Apparent consent—words or conduct reasonably understood by another to be intended as consent—is as effective as consent in fact.[13] For a battery to occur, there must be either a nonconsensual contact or a nonconsensual injury.

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[8] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

[9] *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011).

[10] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 18 at 112 (5th ed. 1984).

[11] See *id.*

[12] *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008) (quoting Restatement (Second) of Torts § 892 (1979)).

[13] See *id.*

[11] The general verdict rule controls our examination of both definitions of a battery. The jury returned a general verdict in favor of Kunnath. A jury, by its general verdict, pronounces upon all or any of the issues either in favor of the plaintiff or the defendant.[14] Thus, we must treat the jury's verdict as having decided in favor of Kunnath and against Wulf on both the contact and the injury grounds. We consider each in turn.

[12-14] Viewed in the light most favorable to Kunnath, the record contains evidence to demonstrate that Wulf consented to the contact by Kunnath. "The time and place, and the circumstances under which the act is done, will necessarily affect its unpermitted character, and so will the relations between the parties."[15] Evidence established that the contact occurred over the noon hour while doctors and nurses were joking around. Further, Kunnath and Wulf had a familial-like relationship. Such evidence tends to weaken Wulf's claim that the contact was nonconsensual. Moreover, "[s]ilence and inaction may manifest consent where a reasonable person would speak if he objected."[16] Evidence showed that Kunnath had "thumped" Wulf on prior occasions at work—contact which Wulf testified was not offensive to her—and that Wulf never objected to the thumps by Kunnath. Further, Wulf never asked Kunnath not to thump her. "It is only when notice is given that all such conduct will no longer be tolerated that the defendant is no longer free to assume consent."[17] Based upon this evidence, reasonable minds could conclude that Wulf consented to Kunnath's contact and, thus, that no battery occurred. Accordingly, the district court did not err by denying Wulf's motion for directed verdict or by submitting the issue of battery to the jury, and the jury's verdict was not clearly wrong.

Evidence would also support a finding that Kunnath did not actually inflict an injury upon Wulf or that any injury suffered

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[14] *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997). See Neb. Rev. Stat. § 25-1122 (Reissue 2008).

[15] Keeton et al., *supra* note 10, § 9 at 42.

[16] *Id.*, § 18 at 113.

[17] *Id.* at 114.

by Wulf was not caused by the contact at issue. Although disputed, evidence was adduced that witnesses observed no reaction by Wulf following the contact and had no reason to believe she had been injured. Wulf obtained medical treatment following the incident, but evidence established that she suffered from neck problems prior to the incident. And coworkers testified about Wulf's erect posture and tendency to turn her chair around in order to face a coworker when communicating with that person rather than merely turning her neck. Longley testified that Wulf had a "tendency to magnify symptoms and exaggerate complaints." Further, Longley opined that Wulf's condition of disk degeneration and spinal stenosis was preexisting. The court instructed the jury that Kunnath "takes [Wulf] as he finds her." More specifically, the jury was instructed that although Wulf had degenerative changes in her neck prior to the incident, Kunnath was liable only for damages caused by his act, and that if the jury could not separate damages caused by the preexisting degenerative changes from damages caused by Kunnath's act, then Kunnath was liable for all damages. But the jury found in favor of Kunnath, and there is evidence to support its finding that Wulf was not injured by the contact. Accordingly, we find no error by the court in allowing the jury to determine whether a battery occurred based upon a nonconsensual injury as a result of the contact. For the same reason, we cannot conclude that the jury's verdict was clearly wrong.

CONCLUSION

We conclude that the district court did not err by denying Wulf's motion for directed verdict or by submitting the issue of battery to the jury, because reasonable minds could conclude that Wulf consented to the contact by Kunnath or that the contact did not cause Wulf's injuries. Because there was competent evidence presented to the jury upon which it could find for Kunnath, the verdict was not clearly wrong. Accordingly, we affirm.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

JAMES HENDERSON AND JAMIE HENDERSON, HUSBAND AND WIFE, APPELLANTS, V. CITY OF COLUMBUS, A MUNICIPAL CORPORATION, APPELLEE.

827 N.W.2d 486

Filed March 15, 2013. No. S-11-060.

1. **Constitutional Law: Appeal and Error.** Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court.
2. **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.
3. **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.
4. **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.
5. **Constitutional Law: Eminent Domain.** Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.
6. **Eminent Domain: Property: Intent.** Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings.
7. **Constitutional Law: Eminent Domain: Damages.** Because the governmental entity has the power of eminent domain, the property owner in an inverse condemnation cannot compel the return of the property taken; however, as a substitute, the property owner has a constitutional right to just compensation for what was taken.
8. **Eminent Domain: Property: Intent.** The threshold issue in an inverse condemnation case is to determine whether the property allegedly taken or damaged was taken or damaged as the result of the exercise of the governmental entity's exercise of its power of eminent domain; that is, was the taking or damaging for public use.
9. **Constitutional Law: Eminent Domain: Damages.** The words "or damaged" in Neb. Const. art. I, § 21, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property.
10. ____: ____: ____. Neb. Const. art. I, § 21, is not a source of compensation for every action or inaction by a governmental entity that causes damage to property. Instead, it provides compensation only for the taking or damaging

of property that occurs as the result of an entity's exercise of its right of eminent domain.

11. **Eminent Domain: Property: Proof.** In order to meet the initial threshold in an inverse condemnation case that the property has been taken or damaged for public use, it must be shown that there was an invasion of property rights that was intended or was the foreseeable result of authorized governmental action.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Platte County, ROBERT R. STEINKE, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

George H. Moyer, of Moyer & Moyer, for appellants.

Erik C. Klutman and Mark M. Sipple, of Sipple, Hansen, Emerson, Schumacher & Klutman, for appellee.

Renee Eveland, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for amici curiae Marlin G. Delimont et al.

William F. Austin, of Erickson & Sederstrom, P.C., for amicus curiae League of Nebraska Municipalities.

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

MILLER-LERMAN, J.

NATURE OF CASE

James Henderson and Jamie Henderson sued the City of Columbus (the City) after raw sewage flooded into their home. They claimed that the flooding damaged their home and was the result of a malfunction of the city-run sanitary sewage system. After a bench trial on liability, the district court for Platte County found in favor of the City and dismissed the Hendersons' complaint, in which they had alleged theories of recovery based on negligence, inverse condemnation, nuisance, and trespass. The Hendersons appealed to the Nebraska Court of Appeals and assigned error to the district court's rulings with respect to negligence and inverse condemnation. The Court of Appeals affirmed the district court's order with respect to negligence, but reversed the portion of the order in which

the district court had found in the City's favor with regard to inverse condemnation. The Court of Appeals remanded the cause for further proceedings with respect to damages related to the inverse condemnation claim. *Henderson v. City of Columbus*, 19 Neb. App. 668, 811 N.W.2d 699 (2012).

We granted the City's petition for further review of inverse condemnation issues. We conclude, for reasons different than those relied on by the district court, that the Hendersons did not establish an inverse condemnation claim. We therefore reverse that part of the Court of Appeals' decision regarding inverse condemnation, and we remand the cause to the Court of Appeals with directions to affirm the district court's judgment in favor of the City and against the Hendersons on all theories of recovery.

STATEMENT OF FACTS

The evidence and facts are set forth in greater detail in the Court of Appeals' published opinion, *Henderson v. City of Columbus, supra*. We provide here a brief summary of facts relevant to the issues on further review. A heavy rainstorm hit Columbus, Nebraska, in the early morning hours of July 9, 2004. Later that morning, James went to his basement and saw that water mixed with raw sewage was flooding the basement. The sewage appeared to James to be coming from the basement floor drain, which was connected to the City's sanitary sewer system.

The Hendersons filed this action against the City and alleged that the sewer backup and subsequent damage were caused by a malfunction of the city-run sanitary sewage disposal system. They further alleged that 15 other homes suffered similar property damage on July 9, 2004, and that all the other homeowners had assigned their rights to sue the City to the Hendersons. As theories of recovery, they asserted negligence, inverse condemnation under the Nebraska Constitution, nuisance, and trespass.

At trial, the City's utility supervisor testified that in the early hours of July 9, 2004, he was called to respond to a "high alarm" at the sewer system's 26th Avenue lift station. The "high alarm" meant that sewage in the lift station

had exceeded a certain level and that action was needed to avoid an overflow. Records showed that a power failure had occurred, and evidence indicated that the power failure may have been the result of lightning. The supervisor took action, including resetting circuit breakers and starting the two pumps at the site, in order to handle the high volume of sewage in the lift station. After he reactivated the power, he believed the pumps were working properly. He checked manholes upstream of the lift station and found no backup; he did not check manholes downstream because he feared that removing manhole lids would allow rainwater to flood into the system. The Hendersons' home is located downstream from the lift station.

An expert retained by the Hendersons testified that sewage backups into homes including the Hendersons' could have been avoided if the utility supervisor had checked manholes downstream of the lift station before activating the pumps. He opined that turning on the two high-volume pumps overloaded the sanitary sewer system, forcing raw sewage into homes, and that the overload would not have occurred if the supervisor had taken alternative action such as turning on only one pump or pumping the sewage toward alternate routes.

The public works environmental services director for the City testified that during a high alarm, both pumps generally should be turned on because if only one pump were turned on it could cause backups upstream from the lift station. He testified at the August 2010 trial that he had worked for the City since February 2001 and had not seen issues like those that occurred in this case either before or since.

An expert retained by the City opined that excess water may have gotten into the sewer system as a result of flooding and that activation of the pumps at the 26th Avenue lift station was not a primary cause of any major backups. He noted that records indicated that the two pumps routinely worked together without causing backups. He stated that there were "decades of history" indicating that the pumps "had not caused those kinds of problems." He further stated that "over a long period of time," the pumps had been shown to "function quite well without ever causing backups."

Following a bench trial on liability, the district court found in favor of the City on all theories of recovery and dismissed the Hendersons' complaint with prejudice. With regard to inverse condemnation, the court found that the Hendersons had failed to prove what caused the sanitary sewer system to be overloaded with floodwater. The court further noted that there "exists no evidence showing that the [Hendersons] or any of their assignors have suffered property damage as a result of reoccurring, permanent, or chronic sewer backups, or that the damage suffered was intentionally caused by the City." The court concluded that the Hendersons had failed to prove that the City's "actions or inactions were the proximate cause of their damages," and the court therefore found in favor of the City and against the Hendersons with respect to inverse condemnation.

The Hendersons appealed to the Court of Appeals and claimed that the district court erred when it rejected their theories of recovery based on negligence and inverse condemnation. The Court of Appeals found no error in the district court's finding that there was no merit to the Hendersons' negligence theory of recovery and therefore affirmed that portion of the district court's order which had rejected the negligence theory and the other theories to which the Hendersons did not assign error on appeal. However, the Court of Appeals concluded that the district court erred when it rejected the Hendersons' inverse condemnation claim.

The Court of Appeals drew attention to a portion of the district court's order in which the court stated, "'When both pumps at the 26th Avenue lift station were reactivated to address the high alarm, it caused the already overloaded downstream system to back up.'" *Henderson v. City of Columbus*, 19 Neb. App. 668, 687, 811 N.W.2d 699, 714 (2012) (emphasis omitted). The Court of Appeals determined that the finding was supported by the evidence and concluded that the City's action in reactivating the pumps caused the system which was already overloaded to back up and therefore was the proximate cause of damage to the Hendersons' property. The Court of Appeals reversed the portion of the district court's order in which it had rejected the inverse condemnation theory of

recovery and remanded the cause for a determination of damages related to inverse condemnation. *Henderson v. City of Columbus, supra*.

We granted the City's petition for further review.

ASSIGNMENTS OF ERROR

The City generally asserts that the Court of Appeals erred when it reversed the district court's order dismissing the inverse condemnation theory of recovery. The City's assignments of error focus on the district court's conclusions with regard to proximate cause.

We note that the Hendersons did not file a cross-petition seeking further review of the Court of Appeals' decision which affirmed the portion of the district court's order rejecting their theories of negligence, nuisance, and trespass.

STANDARDS OF REVIEW

[1] Constitutional interpretation is a question of law on which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

[2-4] 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. *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 816 N.W.2d 728 (2012). 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. *Id.*

ANALYSIS

A Viable Inverse Condemnation Case Requires the Exercise of the Power of Eminent Domain.

The eminent domain provision of the Nebraska Constitution is central to our disposition of this case. Neb. Const. art. I, § 21, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

We also refer to the Fifth Amendment to the U.S. Constitution, which provides: "[N]or shall private property be taken for public use, without just compensation."

[5-8] We have stated that inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings. *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings. *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977). Because the governmental entity has the power of eminent domain, the property owner cannot compel the return of the property taken; however, as a substitute, the property owner has a constitutional right to just compensation for what was taken. *Id.* As discussed below, the threshold issue in an inverse condemnation case is to determine whether the property allegedly taken or damaged was taken or damaged as the result of the exercise of the governmental entity's exercise of its power of eminent domain; that is, was the taking or damaging for "public use."

In concluding that the Hendersons had failed to prove a cause of action based on inverse condemnation, the district court determined that the Hendersons had not met "their burden to prove the City's actions or inactions were the proximate cause of their damages." The district court cited *Steuben v. City of Lincoln*, 249 Neb. 270, 543 N.W.2d 161 (1996), in which this court determined that there was no evidence that any actions or inactions on the part of the City of Lincoln were the proximate cause of the plaintiff's damages. Given the reasoning of the district court in the present case, the parties' arguments on appeal as well as the Court of Appeals' resolution of the appeal focus on proximate cause. The parties and the Court of Appeals explored whether the district court used the proper standards to determine proximate cause and

whether the evidence in this case established that the City's actions on July 9, 2004, proximately caused the damages to the Hendersons' property. Much of the argument addressed to this court also concerns proximate cause. However, we believe the focus on proximate cause is premature.

The initial question in an inverse condemnation case is not whether the actions of the governmental entity were the proximate cause of the plaintiff's damages. Instead, the initial question is whether the governmental entity's actions constituted the taking or damaging of property for public use. That is, it must first be determined whether the taking or damaging was occasioned by the governmental entity's exercise of its power of eminent domain. Only after it has been established that a compensable taking or damage has occurred should consideration be given to what damages were proximately caused by the taking or damaging for public use.

In the present case, we conclude below that regardless of whether the City's "actions or inactions" proximately caused the Hendersons' damages, given the district court's findings of fact, the Hendersons failed to establish the threshold element that their property was "taken or damaged for public use" by the City in the exercise of its power of eminent domain. See Neb. Const. art. I, § 21. Therefore, the Hendersons failed to establish that they were entitled to just compensation under the Nebraska constitutional clause regarding the taking or damage for public use. Albeit for different reasons, the district court's judgment in favor of the City on the Hendersons' inverse condemnation claim was correct and the Court of Appeals' reversal was error.

The Hendersons asserted as one of their theories of recovery that their property had been damaged for public use by the City and that they were entitled to just compensation under Neb. Const. art. I, § 21. We note that the Hendersons also advanced theories of recovery based on negligence, nuisance, and trespass. However, issues related to those theories of recovery are not presented to us on further review and we therefore do not consider the merits of any of those alternate theories. Because we consider only whether the Hendersons established that they were entitled to just compensation under Neb. Const.

art. I, § 21, we review the jurisprudence related to actions for inverse condemnation.

As we have noted, the right to bring an inverse condemnation action derives from Neb. Const. art. I, § 21, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The 5th Amendment to the U.S. Constitution, made applicable to the states through the 14th Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the takings clauses of the U.S. and Nebraska Constitutions. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994).

Nebraska's constitutional right to compensation includes just compensation where property has been "taken or damaged" in the exercise of eminent domain, whereas the federal Constitution is limited to property that has been "taken." Therefore, the Nebraska right is broader than the federal right. *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008). Notwithstanding this difference in language between the state and federal Constitutions, we have analyzed other state constitutional issues related to eminent domain—including whether there has been a compensable taking or damaging for public use—by treating federal constitutional case law and our state constitutional case law as coterminous. *Id.*

[9] We have stated that the words "or damaged" in Neb. Const. art. I, § 21, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998). The Nebraska constitutional clause broadens the entitlement for just compensation beyond property that is actually "taken" by the governmental entity and includes compensation for property that is damaged in the sense that the market value of the property has been diminished even if the property is not actually taken.

Under the Nebraska Constitution, the requirement that property was taken or damaged "for public use" means that the taking or damage must be the result of the governmental

entity's exercise of its right of eminent domain. Not all damage to property by a governmental entity in the performance of its duties occurs as a result of the exercise of eminent domain. As the Wyoming Supreme Court stated in an unsuccessful inverse condemnation case: "It certainly will not be contended that every destruction of property or injury thereto by public officers or their agents, in the discharge of governmental functions, is covered by the constitutional guaranty [in Wyoming State Constitution providing for compensation in the exercise of eminent domain]." *Chavez v. City of Laramie*, 389 P.2d 23, 25 (Wyo. 1964). Earlier in *Chavez*, the opinion states: "Certainly the accident and consequent damage [in the case] served no public purpose, and there was absent a taking or damaging of property *for public use*." *Id.* at 24 (emphasis in original). The reasoning in this Wyoming case applies in Nebraska.

[10] To summarize, Neb. Const. art. I, § 21, is not a source of compensation for every action or inaction by a governmental entity that causes damage to property. Instead, it provides compensation only for the taking or damaging of property that occurs as the result of an entity's exercise of its right of eminent domain. Therefore, a threshold issue in an inverse condemnation case seeking compensation for damage to property is whether the actions that are alleged to have caused damage to property constitute an exercise of the governmental entity's right of eminent domain.

The City Did Not Exercise Its Power of Eminent Domain.

As we explained above, because both the federal and state Constitutions involve a "public use," we analyze the state constitutional issue of whether there has been a physical taking or damage "for public use" as the result of the exercise of eminent domain, as coterminous with federal constitutional law. The U.S. Supreme Court recently reiterated requirements for determining whether there has been a taking under the Fifth Amendment to the U.S. Constitution in *Arkansas Game and Fish Com'n v. U.S.*, ___ U.S. ___, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012). As an initial matter, the Court repeated

the fundamental principles in its Takings Clause jurisprudence, noting that "[t]he Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" 133 S. Ct. at 518 (quoting *Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563, 4 L. E. 2d 1554 (1960)). The Court continued that "'[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'" *Id.* (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)). Given the issue in the case, the opinion in *Arkansas Game and Fish Com'n* focused on the duration and foreseeability of the alleged taking. The discussion of these considerations is helpful to the resolution of the present case.

At issue in *Arkansas Game and Fish Com'n* was "whether government actions that cause repeated floodings must be permanent or inevitably recurring to constitute a taking of property." 133 S. Ct. at 518. The Court concluded that government-induced "recurrent floodings, even if of a finite duration, are not categorically exempt from Takings Clause liability." 133 S. Ct. at 515. The temporary nature of the flooding at issue in *Arkansas Game and Fish Com'n* did not automatically exclude it from being a compensable event under the Takings Clause and the order of dismissal therein was reversed and the cause remanded. While time or duration was the relevant factor in determining the existence of a compensable taking at issue in *Arkansas Game and Fish Com'n*, the Court further stated that "[a]lso relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action." 133 S. Ct. at 522. This additional factor of intention or foreseeability is of particular importance in the case before us.

With regard to the intentional or foreseeable results of the acts of the governmental entity, the Court in *Arkansas Game and Fish Com'n* cited *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346, 1355 (Fed. Cir. 2003), in which the U.S. Court of Appeals for the Federal Circuit distinguished takings cases from tort cases

and stated that "a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the 'direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'" This is consistent with *Horstmann Co. v. United States*, 257 U.S. 138, 146, 42 S. Ct. 58, 66 L. Ed. 171 (1921), in which the Court stated that "it would border on the extreme to say that the Government intended a taking by that which no human knowledge could even predict."

The Court in *Arkansas Game and Fish Com'n* also cited *Matter of Chicago, Milwaukee, St. Paul and Pacific*, 799 F.2d 317, 325-26 (7th Cir. 1986), in which the U.S. Court of Appeals for the Seventh Circuit stated that "despite the contention that all torts by the government are takings . . . the [U.S.] Supreme Court has distinguished the two" and that "[a]ccidental, unintended injuries inflicted by governmental actors are treated as torts, not takings." For completeness, we note that the observation in *Matter of Chicago, Milwaukee, St. Paul and Pacific* outlining a distinction between inverse condemnation and torts is consistent with Nebraska jurisprudence. See, *Western Fertilizer v. City of Alliance*, 244 Neb. 95, 504 N.W.2d 808 (1993); *Dishman v. Nebraska Pub. Power Dist.*, 240 Neb. 452, 482 N.W.2d 580 (1992); *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985) (under certain facts, plaintiff may bring both tort action and inverse condemnation action, but not every tort action is viable inverse condemnation case).

[11] Under the federal cases referred to above, in order to meet the initial threshold in an inverse condemnation case that the property has been taken or damaged "for public use," it must be shown that there was an invasion of property rights that was intended or was the foreseeable result of authorized governmental action. The reasoning in these federal cases is applicable to the present case brought under the Nebraska Constitution.

The City refers us to cases from other states that support the foregoing principles of inverse condemnation. *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004), involved sewage

which backed up into the homeowners' property. The Texas Supreme Court rejected an argument that "any intentional act can give rise to liability for an intentional taking" and instead held that

> when a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under [the Texas Constitution's takings clause] if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action—that is, that the damage is "necessarily an incident to, or necessarily a consequential result of" the government's action.

142 S.W.3d at 313-14. Article I, § 17, of the Texas Constitution refers to property that has been "taken, damaged, or destroyed for or applied to public use." The Texas constitutional provision is broader than the federal provision but similar to the Nebraska provision, and we find *Jennings* useful.

Other states take a similar view to that of Texas under their state constitutions' takings clauses. *Electro-Jet Tool Mfg. v. Albuquerque*, 114 N.M. 676, 845 P.2d 770 (1992), involved damage resulting from drainage ditches. The New Mexico Supreme Court held that for an act to give rise to a claim under the state's just compensation clause, "the act must at least be one in which the risk of damage . . . is so obvious that its incurrence amounts to the deliberate infliction of harm for the purpose of carrying out the governmental projects." 114 N.M. at 683, 845 P.2d at 777. The New Mexico Supreme Court stated that the standard would be met where damage was intentionally caused or where the governmental entity was "acting with knowledge that the damage [from a public use] was substantially certain to result from the conduct." *Id.* Like Nebraska, article II, § 20, of the New Mexico Constitution provides for just compensation when private property is "taken or damaged for public use."

We note that our case law and that of other courts indicate that flooding may be a compensable taking when it is frequent. In *Dishman v. Nebraska Pub. Power Dist.*, 240 Neb. 452, 482 N.W.2d 580 (1992), this court determined that there

was a compensable taking when there was frequent flooding. Other states have also found viable inverse condemnation actions where there was recurring overflow onto private property. *Robinson v. City of Ashdown*, 301 Ark. 226, 783 S.W.2d 53 (1990), involved recurring sewage overflows onto the homeowners' property. The Supreme Court of Arkansas stated that the "benefit to the public in this case has been its use of the [homeowners'] home as an overflow dump for sewage" and "by failing to remedy the problem the city effectively chose to purchase the [homeowners'] property to the extent the value of that property was diminished by its actions." 301 Ark. at 232, 783 S.W.2d at 56. This is consistent with the statement in *Arkansas Game and Fish Com'n v. U.S.*, ___ U.S. ___, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012), that intention or foreseeability is a factor in determining whether there has been a taking, because the frequency of flooding could indicate that the taking or damaging of property is a known or foreseeable result of government action for public use.

In the present case, the district court determined that the Hendersons failed to establish a case for inverse condemnation by virtue of a failure of proof of proximate cause, but it also made certain findings of fact that are relevant to the factors we set forth above and important to the resolution of this case. Specifically, the court found that there "exists no evidence showing that the [Hendersons] or any of their assignors have suffered property damage as a result of reoccurring, permanent, or chronic sewer backups, or that the damage suffered was intentionally caused by the City."

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. *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 816 N.W.2d 728 (2012). The findings are supported by the evidence and are not clearly erroneous. The district court's findings support a conclusion that this was not a case where the City exercised its right of eminent domain, because when the City took action, there had not been recurring sewage backup, nor was it known or foreseeable that the action would take or damage private property.

In the present case, there was only evidence of a single event in which sewage flooded. The testimonial evidence shows that similar actions taken by the City had not caused a sewage backup at other times. The Hendersons did not present evidence that the City knew damage would occur or could have foreseen that its actions could cause damage to private property. Thus, the Hendersons did not establish that the City exercised its right of eminent domain by taking action that it knew or could foresee would result in the taking or damaging of private property. Although our reasoning differs from that of the district court, we conclude that it did not err when it concluded that the Hendersons failed to establish a claim for inverse condemnation under the Nebraska Constitution. The Court of Appeals erred when it reversed that portion of the district court's order rejecting the inverse condemnation theory of recovery.

CONCLUSION

Although our reasoning is based on the Hendersons' failure to show that the City exercised its right of eminent domain, and the district court's reasoning was based on the Hendersons' purported failure to show proximate cause, the district court correctly concluded that the Hendersons did not establish inverse condemnation. We therefore conclude that the Court of Appeals erred when it determined that the district court had erred in rejecting the Hendersons' inverse condemnation claim and reversed the district court's ruling and remanded the cause for a determination of damages for inverse condemnation.

Neither party sought further review of the Court of Appeals' decisions regarding issues other than inverse condemnation. We therefore affirm those portions of the Court of Appeals' decision in which it affirmed the district court's rejection of theories of recovery other than inverse condemnation. However, we reverse that portion of the Court of Appeals' decision in which it reversed the district court's rejection of the Hendersons' inverse condemnation claim. We remand the cause to the Court of Appeals with directions to affirm the

district court's order in which it rejected the entirety of the Hendersons' claims.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JERRY WATSON, APPELLANT.
827 N.W.2d 507

Filed March 15, 2013. No. S-11-912.

1. **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 reviews the underlying factual determinations for clear error.
2. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
4. **Criminal Law: Due Process: Time.** A criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact.
5. **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.
6. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
7. **Constitutional Law: Witnesses: Appeal and Error.** The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity for cross-examination.
8. **Criminal Law: Constitutional Law.** The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.
9. **Constitutional Law: Criminal Law: Due Process: Time.** The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable preindictment delay.

10. ____: ____: ____: ____. Dismissal under the Due Process Clause is proper only if a defendant shows (1) the prosecuting authority's delay in filing charges caused substantial prejudice to the defendant's right to a fair trial and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant.
11. **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.
12. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

In November 2010, Jerry Watson was charged with the 1978 murder of Carroll Bonnet. The prosecution was the result of an investigation by the Omaha Police Department's "cold case" homicide unit. A jury found Watson guilty of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to life imprisonment for the first degree murder conviction and 10 to 20 years' imprisonment for the conviction of use of a deadly weapon to commit a felony.

Because roughly 33 years had passed since the murder, Watson claims that he was denied his right to confront witnesses and present a complete defense. Many of the alleged original witnesses were dead or unavailable. He also claims that there was insufficient evidence to convict him and that

prosecutorial misconduct during the questioning of a witness required the district court to sustain his motion for mistrial. We affirm.

SCOPE OF REVIEW

[1] 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 reviews the underlying factual determinations for clear error. *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012).

[2,3] The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id.*

[4] A criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). When reviewing a trial court's determination of a claim of denial of due process resulting from preindictment delay, an appellate court will review determinations of historical fact for clear error, but will review de novo the trial court's ultimate determination as to whether any delay by the prosecutor in bringing charges caused substantial prejudice to the defendant's right to a fair trial. *Id.*

[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. Howell*, 284 Neb. 559, 822 N.W.2d 391 (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.*

[6] Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court

abused its discretion. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

FACTS

The victim, Bonnet, was a 61-year-old male living alone in an Omaha, Nebraska, apartment. On October 17, 1978, Bonnet had failed to report for work 2 days in a row. A friend called the manager of Bonnet's apartment complex to check on him. When Bonnet did not answer his door, the manager looked through the mailslot in the door and saw Bonnet lying on the floor. He appeared to be sick or injured. The manager called an ambulance.

The Omaha Fire Department responded to the call. They entered the apartment forcibly after they were initially unable to gain access. The fire team found Bonnet naked and lying face down in his apartment. He had suffered one stab wound to his abdomen. An autopsy revealed he died from the stab wound.

After Bonnet was discovered, Omaha police secured the area and began processing the apartment as a crime scene. The apartment was described as being "orderly and neat" before the crimes. Crime scene investigators collected evidence from the apartment and photographed the scene. They found that the telephone cord had been severed, and there were newspapers on a coffee table and on the floor. Three towels were found near the victim that contained fecal matter and hair. Beer cans were taken from a trash can and the kitchen sink. There was a note claiming to have been written by the killer that stated one piece of evidence had been left at the crime scene. The note ended with a derogatory statement to the police. Crime scene investigators were unable to find Bonnet's wallet or any cash inside the apartment.

Fingerprints and palmprints were found on the bathroom door, the medicine cabinet, beer cans, the coffee table, and the telephone. Some of those fingerprints were eventually matched to Watson. Other fingerprints found at the scene were never matched to a particular person.

On October 19, 1978, Bonnet's car was discovered abandoned in Cicero, Illinois. Stolen Illinois license plates were on

the car. On October 16, the license plates had been reported stolen. Illinois police collected evidence from inside the car, including cigarette butts. Only two fingerprints were identifiable, and one of them belonged to Bonnet. The other print was not identified.

Police conducted interviews and investigated a suspect, but in 1978, no one was charged with the crimes. In March 2009, Officer Douglas Herout of the Omaha Police Department was assigned to the case while working in the cold case homicide unit. Shortly before Herout was assigned the case, the crime laboratory had reviewed the fingerprints taken in 1978 from the crime scene. Using technology that was not available in 1978, one of the fingerprints was matched to Watson.

Herout examined the physical evidence obtained from the crime scene in 1978. Certain items were taken to the University of Nebraska Medical Center for DNA testing that was not available in 1978. These items included a beer can, cigarette butts, the contents of the living room wastebasket, the contents of the kitchen wastebasket, and the severed telephone cord. The three towels found near Bonnet that contained fecal matter attributed to Bonnet, as well as hair fibers, were also tested.

Herout's investigation disclosed that Watson grew up in Cicero and had moved many times as an adult. He had a relative who lived in Omaha that he visited sometime in the fall of 1978. After the murder, Watson lived in Missouri and in Florida under alias names.

On December 2, 2009, Herout and another officer traveled to Illinois to obtain DNA evidence, fingerprints, and palmprints from Watson. They also conducted interviews with family members, including Watson's mother.

On November 15, 2010, Watson was charged with first degree murder and use of a deadly weapon to commit a felony. An amended information was filed on July 11, 2011, charging Watson with first degree murder, either premeditated or as a felony murder during the attempt or commission of a robbery, and use of a deadly weapon to commit a felony.

A jury trial was held August 16 through 25, 2011. Because of the length of time that had passed from the commission of

the crimes in 1978 to the date of trial, only a few witnesses were available who were directly connected with the case. An Omaha firefighter who was on the rescue squad called to Bonnet's apartment had observed Bonnet lying naked on the living room floor. The rescue squad determined that Bonnet was dead, and thinking that the apartment could be a crime scene, they called the police. An Omaha Police Department crime laboratory technician photographed and recovered items at the scene, including empty beer cans, several towels, and a note taunting police that was apparently left by the killer. The technician lifted a number of fingerprints from various areas in the apartment.

The pathologist who had performed the autopsy on Bonnet's body determined that the cause of death was a single stab wound to the abdomen. The pathologist opined that at the time of the autopsy, Bonnet had been dead for over 48 hours. An evidence technician employed by the Cicero Police Department in 1978 testified that he had been assigned to collect evidence from a car recovered with stolen license plates. The car belonged to Bonnet and was found abandoned in Cicero. He collected items from the car, including several cigarette butts and fingerprints from inside the car. One fingerprint belonged to Bonnet, and the other was unidentified. It did not match the Omaha Police Department's chief suspect at the time.

The remainder of the State's evidence was circumstantial. The State called witnesses regarding the DNA and fingerprint evidence and its chain of custody. A senior crime laboratory technician with the Omaha Police Department testified that seven fingerprints were found at Bonnet's apartment and searched through the department's fingerprint system. Two belonged to Watson, while the other prints were identified as Bonnet's or remained unidentified. One of Watson's prints was on the bathroom door, and the other was on the bathroom medicine cabinet. No prints attributable to Watson were found in Bonnet's car.

A forensic DNA analyst at the University of Nebraska Medical Center testified that DNA found on some of the cigarette butts located in the apartment and in Bonnet's car

was from Watson. She also testified that a hair found on one of the towels located near Bonnet's body was from Watson. The DNA profile from the hair could be found in 1 in 37.6 million Caucasians, 1 in 87.4 million African-Americans, and 1 in 17.5 million American Hispanics. The State argued that the DNA and fingerprint evidence indicated the likelihood that Watson was in Bonnet's apartment and car at some point in time.

Herout testified that he began to investigate Watson as a suspect in 2009. A crime laboratory technician with the Omaha Police Department informed him that fingerprints from the crime scene matched Watson's prints. Herout traced Watson's background and discovered that he grew up in Illinois, lived in Mississippi in 1977, and lived in Florida in 1979 under alias names. It was stipulated that Watson's only tie to Nebraska was a relative who lived in Omaha "at some point" and that Watson had visited in the fall of 1978.

As part of the 2009 investigation, Herout reviewed all evidence assigned to the Bonnet homicide that was retained in the police property room. This included reopening and re-marking all evidence taken from Bonnet's apartment and car at the time of the murder. Herout testified about some of the problems inherent in preservation of cold case physical evidence. For example, the taunting note written by the killer left at the scene had been sent to the U.S. Secret Service for handwriting analysis. The property logs and a Secret Service report indicated that it was returned, but at the time of trial, the note was missing. Packaged with a couch cushion from Bonnet's apartment were also pieces of evidence, including sheets, a pillowcase, and a "Def Leppard" T-shirt, that were not consistent with evidence collected from the crime scene in 1978.

All the purported defense witnesses were either deceased or unavailable. Eleven police reports from witnesses who were interviewed by police in 1978 were read into evidence by defense counsel. These police reports indicated that Bonnet frequented local bars and would often bring men back to his apartment after buying them drinks. Sometimes he allowed these men to stay with him for periods of time, and he would let them use his car.

The police had several suspects in the early stages of the investigation, but no charges were filed against them. Two suspects had lived in Bonnet's apartment for a time before his death, and one of them had a key to Bonnet's car at the time of Bonnet's death. The defense argued that because these two individuals had access to Bonnet's apartment and car, there was no evidence that Watson was ever in the apartment or car at the same time as Bonnet and that Watson's DNA could have been left in the apartment or car while he was with either of the two suspects.

The jury found Watson guilty of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to life imprisonment for the first degree murder conviction and 10 to 20 years' imprisonment for the conviction of use of a deadly weapon to commit a felony.

ASSIGNMENTS OF ERROR

Watson claims, summarized and restated, that (1) the district court erred when it overruled his motion to dismiss the charges because, due to the 33-year delay in prosecuting this case, the trial violated his right to confrontation, right to present a complete defense, and right to a fair trial with due process of law; (2) there was insufficient evidence to support the verdicts as a matter of law; and (3) the district court erred by overruling his motion for mistrial based on misconduct of the prosecutor during the examination of one of the witnesses.

ANALYSIS

Confrontation Clause

[7] Watson claims the 33-year delay in bringing the charges against him violated his right to confront the witnesses against him and denied him due process and a fair trial. The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity for cross-examination. *State v. Sorensen*, 283 Neb. 932, 814 N.W.2d 371 (2012). Watson had the opportunity to cross-examine all the State's witnesses, and he did so extensively. He attempted

to bring out problems with chain of custody and credibility of the evidence. He has not shown that he was denied the right to confront the witnesses the State presented against him.

Fair Trial With Due Process of Law

[8] The federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011). The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id.*

[9,10] The Due Process Clause of the Fifth Amendment protects a criminal defendant against unreasonable preindictment delay. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). But dismissal under the Due Process Clause is proper only if a defendant shows (1) the prosecuting authority's delay in filing charges caused substantial prejudice to the defendant's right to a fair trial and (2) the delay was an intentional device to gain an unfair tactical advantage over the defendant. *State v. Glazebrook, supra.*

We have stated that a defendant bears the burden to show actual prejudice, and not just prejudice due to dimmed memories, inaccessible witnesses, and lost evidence. See *id.* Watson argues that he suffered prejudice because he was deprived of the ability to call witnesses who may have had specific facts, because those individuals are now deceased. This is not enough to show that he was actually prejudiced.

Watson has not shown that the unavailability of certain witnesses was caused by the State's not bringing the charges sooner. He read into the record police testimony from 11 witnesses interviewed shortly after the murder. Those witnesses told police Bonnet often had male visitors at his apartment, and they identified the two possible suspects discussed above. Both men were interviewed by police about their relationships with Bonnet, but no charges were brought against them. At the

time of Watson's trial, the 11 witnesses who talked to police in 1978 were either deceased or otherwise unavailable. However, they did not become unavailable due to the prosecution's delay in bringing charges after it gathered enough evidence to charge Watson with murder.

Watson's argument rests on the fact that over 30 years have passed since the time that the crimes were committed. As expected, because of the passage of time, many of the witnesses were deceased or unavailable. But the length of time before Watson was charged with murder was largely caused by the fact that the technology used to link Watson with the murder was not available in 1978 when the crimes were committed. The lack of the availability of Watson's purported witnesses was not caused by the failure of the State to timely bring the charge against Watson. Watson was permitted to read into evidence police reports from witnesses given to police shortly after the crimes. Watson cannot blame the State because of the passage of time.

Equally important, Watson cannot satisfy the second prong of the test, because he cannot show that the State intentionally caused the delay to gain a tactical advantage. The record shows that the State prosecuted Watson shortly after it gathered DNA and fingerprint evidence. Police had no evidence against Watson until DNA evidence linked him to the murder. His DNA was found on a hair in the fecal material on one of the towels next to Bonnet's naked body. The DNA evidence was tested in 2009 and determined to match Watson's DNA profile. He was charged in 2010. The time between the investigation into the DNA evidence and bringing Watson to trial was not intentionally caused by the State to gain a tactical advantage.

The defendant cites *People v. Morris*, 46 Cal. 3d 1, 756 P.2d 843, 249 Cal. Rptr. 119 (1988), *disapproved on other grounds, In re Sassounian*, 9 Cal. 4th 535, 887 P.2d 527, 37 Cal. Rptr. 2d 446 (1995), in support of his claim that a preindictment delay may violate a defendant's right to a fair trial and due process. In *Morris*, police had ample evidence linking the defendant to the murder in 1979 but did not file charges until

May 1982. The court weighed the prejudice the delay caused the defendant against the justification for the delay. The court concluded that there was no prejudice to the defendant. *Morris* does not support Watson's claim.

Watson cannot show the delay was caused intentionally by the prosecuting authority's failure to file charges. The State brought charges against Watson as soon as it had sufficient evidence. The use of DNA evidence was not available in 1978, and Watson has not shown that the State purposefully waited to bring charges in order to prevent him from calling witnesses. Because Watson cannot show the State intentionally waited to bring charges to gain an unfair tactical advantage, he cannot show his due process rights were violated. This assignment of error is without merit.

Sufficiency of Evidence

Watson claims the evidence was insufficient to sustain 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. Howell*, 284 Neb. 559, 822 N.W.2d 391 (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.*

A rational jury could find beyond a reasonable doubt that Watson murdered Bonnet either with premeditation or in the commission of a robbery. Police were unable to find Bonnet's wallet or any cash in his apartment. His body was lying on his apartment floor, naked and face down. Bonnet died from a stab wound to his abdomen, and he had been dead for at least 48 hours before the time of the autopsy performed on October 18, 1978.

Watson lived in Cicero in his youth, but stayed with a relative in Omaha for a brief time in the fall of 1978. Police recovered Bonnet's car in Cicero on October 19, 1978. The car had

a stolen license plate obtained from a local vehicle. The plate had been reported stolen on October 16.

The State's evidence showed that Watson's DNA was found on a beer can in Bonnet's kitchen wastebasket, on cigarette butts in the ashtray of Bonnet's car, and on two cigarette butts in Bonnet's living room wastebasket. Watson's palmprint and a fingerprint were found on Bonnet's medicine cabinet and bathroom door. This evidence would permit a rational trier of fact to find beyond a reasonable doubt that Watson had been in Bonnet's car and apartment. However, this evidence does not establish when Watson was in Bonnet's car or apartment.

Watson's DNA was on a hair that was on a towel next to Bonnet's body. The hair was in the fecal matter found on the towel. While the other DNA evidence and fingerprints would establish that Watson had been in Bonnet's apartment, the DNA from the hair on the towel would permit the jury to find beyond a reasonable doubt that Watson was in the apartment at the time of the murder.

The only logical explanation for the location of the hair in the fecal matter is that Watson was present at the time Bonnet was murdered. Evidence of Watson's hair placed him next to the naked body of the victim. The DNA from the hair established that only 1 in 37.6 million Caucasians would fit this DNA profile. The reasonable inference from this evidence is that Watson was in Bonnet's apartment at the time of the murder, because he left his DNA on the towel found next to Bonnet's body. This placed him next to Bonnet at the time of the murder.

An autopsy concluded that Bonnet died from a stab wound to the left upper quadrant of the abdomen, which resulted in exsanguinating hemorrhage. The stab wound had to be inflicted by a sharp object that could penetrate the abdomen. The telephone cord had been cut, which would have prevented Bonnet from calling for help. A reasonable jury could also find beyond a reasonable doubt that Watson used a deadly weapon to stab Bonnet. Giving the benefit of such reasonable inferences to the State, we conclude that a jury could have found beyond a reasonable doubt that Watson was guilty of first degree murder.

Prosecutorial Misconduct

Watson claims that the prosecutor's misconduct during Watson's cross-examination of Herout should have resulted in a mistrial. During cross-examination, Watson attempted to show problems with the integrity of the evidence based on the passage of time. An evidence bag contained a bloodstained sofa cushion from Bonnet's living room, several sheets from an Omaha area hospital, a green pillowcase and blanket, and a Def Leppard T-shirt from a 1983 concert tour. Herout admitted that other than the sofa cushion, the items were not consistent with his review of the photographs from the crime scene and the property inventory reports. And the 1983 concert clearly occurred after the 1978 murder.

On cross-examination, Herout admitted that the only explanation he had for the problem of intermingled evidence came from talking to the property room manager for the Omaha Police Department. The following colloquy occurred:

> [Defense counsel:] [D]o you know personally how it [Def Leppard T-shirt] got in there?
>
> [Herout:] Yes.
>
> [Defense counsel:] How? From whom?
>
> [Herout:] Based on the conversation with [the property room manager].
>
> [Defense counsel:] So [the property room manager] is the one that knows?
>
> [Herout:] Yes.
>
> [Defense counsel:] Not you. All you know is what [the property room manager] told you?
>
> [Herout:] Correct.
>
> [Prosecutor]: Well, I'm going to object, he says he does know.
>
> [Defense counsel]: All you know is that [the property room manager] —
>
> [Prosecutor]: He just asked do you know.
>
> [Court]: Overruled. That's what he said that's how he knows it from [the property room manager].
>
> [Prosecutor]: And he knows now.
>
> [Second prosecutor]: The question was yes or no.
>
> [Prosecutor]: That's the question.

[Defense counsel]: And he said yes. And I said —
[Prosecutor]: He just doesn't want to hear the answer.
[Court]: Just a minute, counsel.
[Defense counsel]: Wait a minute. I want to approach the bench, please.

A bench conference was then held out of the hearing of the jury. Defense counsel moved for a mistrial on the ground of prosecutorial misconduct because the prosecutor had stated that defense counsel did not want to know the answer to his question. The court strongly admonished the prosecutor about the improper comment, but overruled the motion for mistrial.

The court resumed trial but stated in the presence of the jury: "All right. The objection by [defense counsel] as to hearsay is sustained. I am asking both counsel just to make your objection as to the objection. No further comments are required nor necessary nor will be allowed by the Court."

[11] 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 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. *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012). Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole. *Id.*

[12] Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court abused its discretion. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *Id.*

Watson's trial encompassed 7 trial days from opening statements through closing arguments. Twenty-three witnesses testified or had their statements read into the record as testimony. The prosecutor's comment that defense counsel did

not "want to hear the answer" occurred in the middle of the trial. The court, once the sidebar ended, stated in the presence of the jury that counsel should not elaborate beyond making an objection and that the court would not tolerate further elaboration.

The prosecutor's comment, although inappropriate, did not require a mistrial. Watson has not shown that a substantial miscarriage of justice actually occurred or that there was a fundamental failure that prevented him from having a fair trial. The comment made by the prosecutor did not rise to the level of depriving Watson of a fair trial. The answer to the question regarding how the T-shirt printed in 1983 got into the Watson evidence bag in the property room is irrelevant to the convictions. Watson's DNA on the hair found on the towel next to Bonnet is the relevant evidence supporting Watson's convictions. The district court did not abuse its discretion when it denied the motion for mistrial based on the prosecutor's comment.

CONCLUSION

The district court did not abuse its discretion when it overruled Watson's motion to dismiss because the charges were brought 33 years after the commission of the crimes. There was sufficient evidence for a jury to find beyond a reasonable doubt that Watson was guilty of the crimes of first degree murder and use of a deadly weapon to commit a felony. The district court did not abuse its discretion in overruling Watson's motion for mistrial based on prosecutorial misconduct. We affirm the judgment and sentences of the district court.

AFFIRMED.

In re Interest of Shaquille H., a child under 18 years of age. State of Nebraska, appellee, v. Shaquille H., appellant.

827 N.W.2d 501

Filed March 15, 2013. No. S-11-953.

1. **Juvenile Courts: Child Custody: Time.** Neb. Rev. Stat. § 43-271(1)(b) (Reissue 2008) provides that the hearing as to a juvenile in custody of the probation officer or the court shall be held as soon as possible but, in all cases, within a 6-month period after the petition is filed, and as to a juvenile not in such custody as soon as practicable but, in all cases, within a 6-month period after the petition is filed.
2. **Speedy Trial: Minors.** The computation of the 6-month period provided for in Neb. Rev. Stat. § 43-271(1)(b) (Reissue 2008) shall be made as provided in Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012), as applicable.
3. ____: ____. A juvenile is entitled to a speedy adjudication, i.e., one within 6 months of the filing of a petition; but that right is subject to the calculations used when determining a criminal defendant's speedy trial rights.
4. **Juvenile Courts: Words and Phrases.** The "shall" from Neb. Rev. Stat. § 43-271 (Reissue 2008) is directory, rather than mandatory, and discharge is not required if it can be shown that it remains in the juvenile's best interests to deny discharge.
5. **Speedy Trial: Proof.** Evidence of a crowded docket alone is insufficient to support a finding of good cause for exclusion of time periods under Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012).
6. ____: ____. When ruling on a motion for absolute discharge, specific findings of all excludable periods of Neb. Rev. Stat. § 29-1207(4)(a) to (f) (Cum. Supp. 2012) are required.
7. **Juvenile Courts: Speedy Trial.** A juvenile court judge must make specific findings on the record regarding any excludable time periods as defined in Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012) before making the ultimate determination as to whether discharge would be in the best interests of a child.

Petition for further review from the Court of Appeals, Inbody, Chief Judge, and Irwin and Sievers, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, Douglas F. Johnson, Judge. Judgment of Court of Appeals affirmed.

Thomas C. Riley, Douglas County Public Defender, Christine D. Kellogg, and Christine Mori for appellant.

Donald W. Kleine, Douglas County Attorney, Malina Dobson, Debra Tighe-Dolan, and Tony Hernandez, Senior Certified Law Student, for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

Shaquille H. appealed from an order of the separate juvenile court of Douglas County, Nebraska, which denied his motion to discharge. The Nebraska Court of Appeals affirmed. We granted Shaquille's petition for further review.

II. BACKGROUND

1. FACTUAL BACKGROUND

On September 14, 2010, the State of Nebraska filed a complaint in the county court for Douglas County alleging that Shaquille, born in May 1994, had violated Neb. Rev. Stat. § 28-1202 (Cum. Supp. 2012) and Omaha Mun. Code, ch. 20, art. VII, § 20-204 (1993). On October 13, Shaquille filed a motion to transfer to juvenile court. That motion was initially denied following a hearing on November 4. On November 9, however, the motion was granted upon a motion to reconsider.

An amended petition was filed in the Douglas County Juvenile Court on November 10, 2010, alleging violations of Neb. Rev. Stat. § 43-247(1) (Reissue 2008). Specifically, the amended petition alleges that Shaquille carried a concealed weapon on his person in violation of § 28-1202(1) and possessed a "pistol, revolver or other form of short-barreled hand firearm" in violation of Neb. Rev. Stat. § 28-1204(1) (Cum. Supp. 2012). At a detention hearing held on November 10, Shaquille was ordered to be detained at the Douglas County Youth Center or post bond. Shaquille was arraigned on December 8, a written denial was entered on his behalf, and the record indicates that a request to "exonerate" the bond was filed. Though unclear, it appears from the record that Shaquille was released from custody sometime between November 10 and December 8 and has not been in custody since that time.

A pretrial conference was held on January 6, 2011, and the matter was set for adjudication on February 11. Due to the

funeral of an attorney who had practiced before the juvenile court, the court, on its own motion, rescheduled the adjudication for April 13. Shaquille's counsel indicated that Shaquille was unable to attend the hearing on April 13 because he did not have transportation. A continuance was requested, and the matter was rescheduled for July 1 in anticipation of a plea. Shaquille failed to appear at the July 1 hearing. The State requested a capias be issued, and Shaquille's counsel requested a continuance. Both motions were denied. The court then gave Shaquille until July 5 to appear.

The record shows that Shaquille eventually appeared on July 1, 2011, following the conclusion of the original hearing. At that time, it was determined that Shaquille no longer wished to enter a plea. The record provides that "by agreement of counsel," the adjudication was reset for October 14.

On October 12, 2011, Shaquille filed a motion to discharge for failure to adjudicate within the time required by Nebraska statute. The next day, the court called counsel into the courtroom to discuss a continuance so that the juvenile court judge could attend his aunt's funeral on October 14. During the October 13 hearing, the motion to discharge was discussed but not decided. The adjudication remained scheduled for the next day.

At the adjudication hearing on October 14, 2011, the parties first addressed the pending motion to discharge. The State called the juvenile court's bailiff, who testified that she did not specifically recall rescheduling Shaquille's case, but that she would have rescheduled it to the next available date that "worked around counsel's conflicts and the [c]ourt's calendar." Following the bailiff's testimony, the juvenile court judge denied the motion to discharge, stating on the record that because the purpose of the juvenile court is rehabilitative and the nature of the charges was quite serious, it was not in Shaquille's best interests to grant the motion. The judge made no specific findings with respect to Shaquille's statutory right to speedy adjudication or calculation of any possible excludable time periods.

The State then called its first adjudication witness. Shortly thereafter, the hearing was again continued, this time to

December 22, 2011. On November 8, Shaquille appealed the denial of his motion to discharge.

2. Court of Appeals' Opinion

The Court of Appeals affirmed the decision of the juvenile court.[1] In its opinion, the Court of Appeals performed the calculations related to the speedy adjudication claim that were not prepared by the juvenile court. The Court of Appeals separated the delay into four time periods: February 12 to April 13, 2011; April 14 to July 1; July 2 to October 14; and October 15 to November 8.

(a) February 12 to April 13

The Court of Appeals concluded that this period of 61 days was excludable from Shaquille's speedy adjudication calculation for good cause. Specifically, Shaquille's case was continued in this instance on the motion of the juvenile court judge so that he could attend the funeral of an attorney who had practiced before the juvenile court. The Court of Appeals, relying in part on this court's decision in *In re Interest of Brandy M. et al.*,[2] concluded that the record supported this finding and affirmatively showed the bailiff would have rescheduled Shaquille's case on the next available date.

(b) April 14 to July 1

The Court of Appeals concluded that this period of 79 days was a delay attributable to Shaquille. Because Shaquille did not appear at the April 13, 2011, hearing due to lack of transportation, the continuance was chargeable to him.

(c) July 2 to October 14

The Court of Appeals concluded this period of 105 days was also a delay attributable to Shaquille, because the record shows that the continuance was "'by agreement of counsel.'"[3]

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[1] *In re Interest of Shaquille H.*, 20 Neb. App. 141, 819 N.W.2d 741 (2012).

[2] *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996).

[3] *In re Interest of Shaquille H., supra* note 1, 20 Neb. App. at 147, 819 N.W.2d at 746.

(d) October 15 to November 8

The Court of Appeals concluded this period—between the continuance granted, following the beginning of the adjudication hearing on October 14, 2011, until the filing of Shaquille's appeal—was excludable for good cause due to the bailiff's testimony regarding how matters are rescheduled and the judge's explanation about his aunt's funeral.

We granted Shaquille's petition for further review.

III. ASSIGNMENTS OF ERROR

In his petition for further review, Shaquille assigns, restated and consolidated, that the Court of Appeals erred in affirming the juvenile court's denial of his motion to discharge.

IV. STANDARD OF REVIEW

An appellate court's review of a juvenile court's determination of whether a juvenile has been denied his or her statutory right to a prompt adjudication is made de novo on the record to determine whether there has been an abuse of discretion by the juvenile court.[4] Prompt adjudication determinations are initially entrusted to the discretion of the juvenile court and will be upheld unless they constitute an abuse of discretion.[5]

V. ANALYSIS

1. Statutory Speedy Adjudication

At issue in this petition for further review is whether the Court of Appeals erred in affirming the denial of Shaquille's motion to discharge.

[1,2] Neb. Rev. Stat. § 43-271(1)(b) (Reissue 2008) provides:

> The hearing as to a juvenile in custody of the probation officer or the court shall be held as soon as possible but, in all cases, within a six-month period after the petition is filed, and as to a juvenile not in such custody as soon as practicable but, in all cases, within a six-month period after the petition is filed. The computation of the six-month period provided for in this section shall be made as provided in section 29-1207, as applicable.

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[4] *In re Interest of Brandy M. et al.*, *supra* note 2.

[5] *Id.*

[3-5] Thus, generally speaking, a juvenile is entitled to a speedy adjudication, i.e., one within 6 months of the filing of a petition; but that right is subject to the calculations used when determining a criminal defendant's speedy trial rights. As the Court of Appeals noted in its opinion, in this case, the speedy adjudication clock began running on November 11, 2010, or the day after the petition was filed in juvenile court, so the last day upon which the court could schedule the adjudication would have been May 10, 2011.[6] But this court has held that (1) the "shall" from § 43-271 is directory, rather than mandatory, and discharge is not required if it can be shown that it remains in the juvenile's best interests to deny discharge, and (2) evidence of a crowded docket alone is insufficient to support a finding of good cause for exclusion of time periods under Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012).[7]

Shaquille does not take issue with the exclusion of the 79-day period between April 14 and July 1, 2011; nor does he take issue with the exclusion of the 25 days subsequent to the commencement of his adjudication until his appeal was filed. He does take issue, however, with the exclusion of the period between February 12 and April 13, and the exclusion of the period between July 2 and October 14. In particular, Shaquille argues that it is the State's burden to show those time periods are excludable[8] and that the State failed to meet that burden.

With respect to the first period, Shaquille acknowledges that the bailiff's testimony was presented, but argues that under *In re Interest of Brandy M. et al.*, a crowded court docket is insufficient to support a showing of good cause. With respect to the latter period, Shaquille essentially argues that the record does not support the conclusion made by the Court of Appeals that the delay until October 14, 2011, was done with Shaquille's consent. We address the latter period first.

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[6] See *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002).

[7] See *In re Interest of Brandy M. et al., supra* note 2.

[8] See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

(a) July 2 to October 14

With respect to this time period, the record includes an order of the juvenile court filed July 6, 2011, memorializing the July 1 hearing, providing that "by agreement of counsel this matter shall be **reset for an adjudication hearing for an hour and a half on October 14, 2011 at 10:30 a.m. (Counsel shall notify client of scheduled hearing date and time)**."

Shaquille argues that the notation in the record cannot mean that he or his counsel agreed to the October 14, 2011, adjudication hearing, because the record as a whole is clear that due to the court's crowded docket, "counsel are not in a position to pick and choose court dates."[9] As such, "by agreement of counsel" means that counsel agreed only to the length of time (1½ hours) of the hearing.

Upon reviewing Shaquille's argument, we find that the juvenile court did not abuse its discretion, nor did the Court of Appeals abuse its discretion, in concluding that the State met its burden to exclude this time period from Shaquille's speedy adjudication calculation. The juvenile court order clearly provides that counsel for Shaquille agreed to the delay in adjudication. Thus, we shall exclude this time period from Shaquille's calculation.

(b) February 12 to April 13

Shaquille argues this period is not attributable to good cause because this court has concluded that a crowded docket is not sufficient to show good cause, and the State did not otherwise meet its burden to show good cause. The Court of Appeals explicitly concluded that this 61-day period was excluded for good cause because the juvenile court judge continued the adjudication so that he could attend the funeral of an attorney who practiced before the juvenile court and that the attendant delay for the crowded court docket was also excludable because the bailiff testified that she rescheduled the adjudication on the next available date.

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[9] Memorandum brief for appellant in support of petition for further review at 6.

It is unnecessary for this court to analyze whether this time period is excludable in order to find that Shaquille's motion to discharge should be dismissed; thus, we decline to do so. The Court of Appeals concluded that when excluding all of the four periods of time, the State had 270 days, or until February 4, 2012, to schedule Shaquille's adjudication. If we do not exclude this 61-day period, the State would have had 209 days, or until December 5, 2011, to schedule the adjudication. Shaquille filed his motion to discharge on October 12, 2011, and, as such, it was premature. Shaquille's adjudication commenced on October 14, though it did not finish, and Shaquille does not contend that this was insufficient to comply with his speedy adjudication right. Thus, we find the Court of Appeals did not abuse its discretion in affirming the decision of the juvenile court.

2. Constitutional Speedy Trial Adjudication

Shaquille also assigns that the Court of Appeals erred in not addressing his constitutional speedy adjudication rights. Because we find that Shaquille's motion to discharge was premature and that there has been no violation of Shaquille's statutory speedy adjudication right in this case, we decline to address this assignment of error. We agree with the Court of Appeals that even if such constitutional right exists, which we do not decide here, no constitutional rights have been implicated in this case because Shaquille has time remaining on the statutory speedy trial adjudication clock.[10]

3. Lack of Specific Findings

[6,7] Finally, we address Shaquille's concern that the Court of Appeals affirmed the decision of the juvenile court, even though the juvenile court judge failed to make any specific findings regarding the excludable time periods as defined in § 29-1207. This court held in *State v. Williams*[11] that specific findings of all excludable periods of § 29-1207(4)(a) to (f) are

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[10] See *In re Interest of Brandy M. et al., supra* note 2.

[11] *State v. Williams, supra* note 8.

required. In this case, the juvenile court did not make such specific findings; the Court of Appeals did those calculations for the juvenile court. The holding in *Williams* may have escaped the notice of a juvenile court judge because *Williams* is an adult criminal case. Thus, here, we explicitly extend this requirement to the juvenile court. A juvenile court judge must make specific findings on the record regarding any excludable time periods as defined in § 29-1207 before making the ultimate determination as to whether discharge would be in the best interests of a child.

VI. CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Appeals.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
REBECCA M. BREE, APPELLANT.
827 N.W.2d 497

Filed March 15, 2013. Nos. S-12-684 through S-12-686.

1. **Sentences: Appeal and Error.** Whether a defendant is entitled to credit for time served is a question of law. An appellate court reviews questions of law independently of the lower court.

Appeals from the District Court for Platte County, ROBERT R. STEINKE, Judge, on appeal thereto from the County Court for Platte County, FRANK J. SKORUPA, Judge. Sentences vacated, and causes remanded for resentencing.

Nathan J. Sohriakoff, Deputy Platte County Public Defender, for appellant.

Jon Bruning, Attorney General, George R. Love, and Siobhan E. Duffy, Senior Certified Law Student, for appellee.

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

PER CURIAM.

NATURE OF CASE

In these three consolidated appeals, Rebecca M. Bree challenges the district court for Platte County's affirmances of orders of the county court for Platte County in which the county court rejected her requests to have credit for time served applied against her sentences. Because the county court erred when it rejected Bree's requests to grant credit, the district court erred when it affirmed these rulings. We vacate the sentences and remand the three causes for resentencing.

STATEMENT OF FACTS

On October 5, 2011, Bree appeared in county court and pled guilty to four misdemeanors in three separate cases. In case No. S-12-684, she pled guilty to one count of issuing bad checks (less than $200), a Class II misdemeanor under Neb. Rev. Stat. § 28-611(1)(d) (Cum. Supp. 2012). In case No. S-12-685, she pled guilty to one count of driving prior to reinstatement of license, a Class III misdemeanor under Neb. Rev. Stat. § 60-4,108(2) (Reissue 2010). In case No. S-12-686, she pled guilty to one count of issuing bad checks (less than $200), a Class II misdemeanor under Neb. Rev. Stat. § 28-611(1)(d) and one count of issuing no-account checks (less than $200), a Class II misdemeanor under Neb. Rev. Stat. § 28-611.01(1)(d) (Cum. Supp. 2012). Bree was ordered to appear for sentencing in each case on November 18.

Bree failed to appear for sentencing on November 18, 2011, and the court issued a bench warrant for her arrest in each of the three cases. The bench warrant in each case stated that a "complaint has been filed" charging Bree variously with the respective offenses recited above and identified those offenses by statute number. None of the statutes cited are for the crime of failure to appear. The bench warrants noted that Bree had failed to appear on November 18 and ordered that she was to be arrested and brought before the court "to answer such complaint and be further dealt with according to law." No complaint was filed charging Bree with the offense of failure to appear, and hence Bree was not convicted for failure to appear.

The record shows that Bree was arrested in Dodge County, Nebraska, on January 3, 2012, and was transported to the Platte County detention facility on January 6. On January 11, she was released after signing a $2,500 appearance bond. On April 4, she was sentenced as follows: in case No. S-12-684, 10 days in the Platte County jail; in case No. S-12-685, a fine of $150 with an order that she be committed to the Platte County jail until the fine was paid; and in case No. S-12-686, 10 days in the Platte County jail for each of the two counts. The 10-day jail sentences for the two convictions in case No. S-12-686 were ordered to be served concurrently with one another and consecutively to the 10-day jail sentence in case No. S-12-684. Bree did not receive any credit for time served.

Bree brought the failure to give credit for time previously served to the county court's attention. She sought credit for the 9 days she was in jail from January 3 through 11, 2012. The county court rejected Bree's assertion that she was entitled to time served and cited to *State v. Heckman*, 239 Neb. 25, 473 N.W.2d 416 (1991).

Bree appealed to the district court and claimed that the county court erred when it failed to give her credit for time previously served. The district court rejected Bree's assertion, also citing to *Heckman*.

Bree appeals. Cases Nos. S-12-684 through S-12-686 have been consolidated for briefing and disposition.

ASSIGNMENT OF ERROR

Bree claims that the district court erred when it affirmed the county court's rulings in which the county court rejected her requests for credit for time served.

STANDARD OF REVIEW

[1] Whether a defendant is entitled to credit for time served is a question of law. We review questions of law independently of the lower court. See *State v. Wills, ante* p. 260, 826 N.W.2d 581 (2013).

ANALYSIS

We have recently observed that "[t]he calculation and application of credit for time served is controlled by statute. Different

statutes address credit for time served based on whether the defendant is sentenced to jail or prison." *State v. Wills, ante* at 264, 826 N.W.2d at 585. See, also, Neb. Rev. Stat. §§ 47-503 (Reissue 2010) (jail sentences) and 83-1,106 (Reissue 2008) (prison sentences). The provisions are substantially the same, and the reasoning of cases involving either provision is applicable here. See *State v. Wills, supra*.

Because Bree was sentenced to jail, we look to § 47-503. Section 47-503 provides in relevant part:

> Credit against a jail term shall be given to any person sentenced to a city or county jail for time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based.

Bree claims that both the county court and the district court erred when they rejected her assertion that she should have received credit against her sentences for the time she served from January 3 through 11, 2012. We agree with Bree.

In reaching their determinations, the lower courts both relied on *State v. Heckman, supra*. Indeed, the county court stated that "[t]he situation presented here is identical to the situation in *State v. Heckman* . . . ." We find that the lower courts' reading of *Heckman* was erroneous.

State v. Heckman, supra, involved § 83-1,106. Properly read, the reasoning in *Heckman* applies to these cases. In *Heckman*, the defendant served two separate periods in jail prior to sentencing. The first period resulted from the initial criminal charges of possession of a firearm by a felon, possession of a concealed weapon, and second-offense driving while intoxicated. The defendant was later convicted and sentenced for these charges. The second period was based on a charge and arrest for the crime of failure to appear when ordered. See Neb. Rev. Stat. § 29-908 (Reissue 2008). Although charged and arrested, there was no conviction or sentence on the failure to appear charge. We concluded that the time served solely on the failure to appear charge could not be credited against the first period of detention which was attributable to the original offenses of which the defendant was convicted and sentenced.

The facts in the present cases are distinguishable from *Heckman*. The bench warrants in the present cases each recited that a "complaint has been filed" against Bree, and the offenses were listed in the bench warrants with particularity by statute number, offense description, class of offense, and date of offense. Although the narrative in each bench warrant states that Bree did not comply with an order to appear on November 18, 2011, the sheriff was ordered "to immediately arrest" Bree "to bring . . . her before this court . . . to answer such complaint." Bree's arrest on January 3, 2012, was for the four crimes contained in the complaints. She was not arrested for failure to appear. Whether or not Bree could have been charged with failure to appear, she was not so charged. See § 29-908.

In rejecting her argument regarding credit for time served, the district court stated in each of the three orders that Bree was "arrested and taken into custody . . . not as a result of the offense for which she was actually sentenced in this case." This is not factually correct.

Bree was convicted of four crimes and received four jail terms. Section 47-503 provides for credit to be given against a sentence to jail "for time spent in jail as a result of the criminal charge for which the jail term is imposed or as a result of conduct upon which such charge is based." The bench warrants in these cases show that Bree was arrested and jailed from January 3 through 11, 2012, as a result of the four criminal charges and convictions for which jail terms were ultimately imposed. This period of time Bree "spent in jail" was a "result of the criminal charge[s] for which the jail term[s]" at sentencing were imposed. See § 47-503. Under § 47-503, she is entitled to credit for time served from January 3 through 11, 2012, against the sentences imposed.

We have recently stated that "[n]o part of crediting time served requires a court to exercise discretion . . . ." *State v. Wills, ante* p. 260, 263, 826 N.W.2d 581, 585 (2013). Whether a defendant is entitled to credit for time served is a question of law. *Id*. Indeed we have even noted plain error where the sentencing court failed to calculate credit for time served to

which a defendant was entitled. *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995).

Credit for time served is not discretionary, but instead, based on the record, an absolute and objective number. See *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009). The file before the county court showed that Bree had been arrested on January 3, 2012, and released on January 11, pursuant to bench warrants related to the three underlying informations. In the absence of a presentence report which would readily reflect time served, it is especially important that time served be ascertained from a reading of the file so that credit can be given at sentencing. The district court erred as a matter of law when it affirmed the county court's rejection of Bree's requests for credit for time served.

CONCLUSION

Bree was arrested and spent time in jail from January 3 through 11, 2012, as a result of criminal charges of which she was later convicted and sentenced to jail. Under § 47-503, Bree was entitled to credit for time served from January 3 through 11. The county court erred when it denied Bree's requests for credit for time served. The district court erred as a matter of law when it affirmed these orders. We vacate the sentences imposed and remand these three causes to the district court with directions to remand them to the county court for resentencing in accordance with this opinion.

SENTENCES VACATED, AND CAUSES REMANDED FOR RESENTENCING.

MILLER-LERMAN, J., participating on briefs.

CREDIT BUREAU SERVICES, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. EXPERIAN INFORMATION SOLUTIONS, INC., AN OHIO CORPORATION, APPELLEE AND CROSS-APPELLANT.

828 N.W.2d 147

Filed March 22, 2013. No. S-12-107.

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

Appeal from the District Court for Dodge County: GEOFFREY C. HALL, Judge. Affirmed.

Jonathan L. Rubin, of Rubin, P.L.L.C., and Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy, Nick & Placek, for appellant.

Michael F. Coyle and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., and Thomas Demitrack, Brian K. Grube, Meir Feder, and David Cooper, of Jones Day, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Credit Bureau Services, Inc. (CBS), brought this case against Experian Information Solutions, Inc. (Experian), alleging that Experian sought to drive CBS out of business in violation of Neb. Rev. Stat. § 59-805 (Reissue 2010), which is a provision of Nebraska's antitrust act, known as the Junkin Act. See Neb. Rev. Stat. §§ 59-801 to 59-831 (Reissue 2010). After a jury trial, the district court for Dodge County entered judgment on a jury verdict in favor of Experian and against CBS. CBS appeals, claiming that the district court erred when it gave jury instruction No. 5 and refused CBS' competing proposed jury instruction. Experian cross-appeals, claiming

that the district court erred when it overruled Experian's motion for directed verdict. Given the elements of § 59-805 which we explain below, we determine that the district court erred when it overruled Experian's motion for directed verdict. Although our reasoning differs from that of the district court, the entry of judgment in favor of Experian was correct and we affirm.

STATEMENT OF FACTS

Experian is one of three nationwide repositories of consumer credit information. These three companies gather and store consumer credit information on a nationwide basis and sell that information either to end users, such as banks, or to resellers which sell the information to end users. CBS was a reseller of specialized credit reports to the mortgage industry and is located in Fremont, Nebraska. As a general matter, a report referred to as a "Tri-merge report," which combines data from the three companies, is required by some lenders, including federal lenders.

CBS began purchasing credit reports from Experian in the 1990's. In 2000, Experian imposed a minimum purchase requirement of $250 per month. Because CBS had a low volume of transactions, it moved its business to an Experian affiliate that did not impose a minimum purchase requirement. In 2003, Experian purchased the consumer credit operations of its affiliate and began servicing CBS again. In 2004, Experian informed CBS that it would impose a minimum purchase requirement of $1,000 per month. CBS then moved its business to another Experian affiliate. In 2007, Experian purchased the consumer credit operation of that affiliate and resumed serving CBS in February 2007. In 2011, Experian completed the buy-out of its last remaining affiliate.

As noted, CBS resumed purchasing data from Experian in February 2007 and continued to do so until October 2008, when Experian dropped CBS as a customer because of CBS' past-due balance. CBS asserted that the past-due balance arose after Experian had imposed a new minimum purchase requirement of $5,000 per month. CBS contends that the increased minimum purchase requirement by Experian was part of a plan

to "thin the ranks of smaller credit reporting agencies" and that CBS was a victim of the plan. Brief for appellant at 14. CBS asserted that the plan was successful because in 2000, there were more than 400 local and regional credit reporting resellers nationwide, and by December 2011, there were only 60 nationwide and none in Nebraska.

CBS filed this civil action against Experian in the district court under § 59-821, which provides:

> Any person who is injured in his or her business or property by any other person or persons by a violation of sections 59-801 to 59-831 . . . may bring a civil action in the district court in the county in which the defendant or defendants reside or are found . . . .

CBS alleged that Experian violated § 59-805, which provides:

> Every person, corporation, joint-stock company, limited liability company, or other association engaged in business within this state which enters into any contract, combination, or conspiracy or which gives any direction or authority to do any act for the purpose of driving out of business any other person engaged therein . . . shall be deemed guilty of a Class IV felony.

Sections 59-805 and 59-821 are part of Nebraska's antitrust act, known as the Junkin Act. See §§ 59-801 to 59-831.

A 4-day jury trial was conducted. During trial, CBS called a total of six witnesses, one of whom testified by written deposition, and two of whom appeared by video deposition. CBS submitted and the court received 37 exhibits. The video evidence is not in the record. CBS essentially attempted to prove that Experian engaged in a plan called Project Green, which had among its objectives driving out resellers. CBS points to the fact that after Experian increased the minimum purchase requirement as a part of Project Green, 160 resellers canceled their business with Experian.

After CBS rested its case, Experian moved for directed verdict, which the district court denied. Experian called one witness, and it submitted and the court received 42 exhibits. Experian attempted to establish that it increased its charges for the purpose of improving data security and compliance with the Fair Credit Reporting Act. See 15 U.S.C. § 1681 et

seq. (2006). After Experian rested its case, it again moved for directed verdict, which the district court denied.

A jury instruction conference was conducted in which the district court rejected several of CBS' proposed instructions. The district court instructed the jury in this case on its understanding of the elements of § 59-805 with its jury instruction No. 5. The court rejected CBS' proposed jury instruction No. 12. The court gave commonplace instructions on evidence, both circumstantial and direct.

On December 16, 2011, the case was submitted to the jury at 6:30 p.m. and the jury returned a verdict in favor of Experian at 7:50 p.m. On January 4, 2012, the district court entered judgment on the jury's verdict for Experian.

The district court's order filed January 19, 2012, granted, in part, Experian's motion to alter or amend judgment. In this order, the district court modified its January 4 order, stating that CBS shall pay Experian's taxable costs in the amount of $3,921.57. On February 8, the district court entered an order overruling CBS' amended motion for new trial. CBS appeals, and Experian cross-appeals.

ASSIGNMENTS OF ERROR

CBS assigns, restated, that the district court erred when it (1) gave jury instruction No. 5 and (2) failed to instruct the jury consistent with CBS' proposed jury instruction No. 12.

On cross-appeal, Experian assigns, restated, that the district court erred when it denied Experian's motion for directed verdict.

STANDARDS OF REVIEW

[1] Statutory interpretation presents a question of law. *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013).

[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

[3] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

ANALYSIS

In this case, the district court provided the jury with jury instruction No. 5, which set forth the district court's description of the elements the jury was required to find in order to find in favor of CBS on its claim under § 59-805. CBS claims on appeal that the district court prejudicially erred when it gave instruction No. 5, because it misstated the law under § 59-805. CBS' motion for new trial encompassed this claimed error, so CBS effectively contends that the district court erred when it denied CBS' motion for new trial. On cross-appeal, Experian claims that the district court erred when it denied its motion for directed verdict made at the close of the evidence. We agree with Experian that the district court erred when it denied Experian's motion for directed verdict, and therefore we do not reach CBS' assertion that instruction No. 5 misstated the law and comment only that a proper jury instruction on the elements of § 59-805 should comport with our discussion of § 59-805 in this opinion.

Elements of § 59-805.

We have not previously enumerated the elements of a cause of action based on the allegation that a defendant acted with the purpose of driving the plaintiff out of business under § 59-805. Section 59-805 provides:

> Every person, corporation, joint-stock company, limited liability company, or other association engaged in business within this state which enters into any contract, combination, or conspiracy or which gives any direction or authority to do any act for the purpose of driving out of business any other person engaged therein . . . shall be deemed guilty of a Class IV felony.

The balance of the statute is in the alternative and refers to competition and underselling, and thus it is not applicable to this case. See *Pierce Co. v. Century Indemnity Co.*, 136 Neb. 78, 285 N.W. 91 (1939).

The language of § 59-805 establishes the elements which a plaintiff such as CBS must prove. The elements relating to the form of company, engaging in business, presence in Nebraska, and contract, combination, or conspiracy are fairly obvious. However, we must determine the contours of the elements represented by the phrase in § 59-805 requiring the doing of "any act for the purpose of driving out of business any other person engaged therein." In construing § 59-805, we recognize that it is a part of the Junkin Act, and therefore we look to the Junkin Act as a whole. Section 59-829 of the Junkin Act is known as the harmonizing statute. Section 59-829 provides that when a provision of the Junkin Act is the same or similar to the language of a federal antitrust law, the courts of this state in construing such section or chapter shall follow the construction given to the federal law by federal courts. However, we note that § 59-805 is unusual among state statutes and there is no federal equivalent statute. Compare: § 59-801 equates to Sherman Act § 1 (restraint of trade), and § 59-802 equates to Sherman Act § 2 (antimonopoly). See 15 U.S.C. § 1 et seq. (2006).

In *Pierce Co. v. Century Indemnity Co., supra*, we analyzed the predecessor statute of § 59-805 in a case where the plaintiff brought an action against the defendants to recover for damages for an alleged conspiracy to drive the plaintiff out of business. In *Pierce Co.*, we noted that the predecessor statute to § 59-805 was located in article 8 and that

> Article 8 is entitled "Unlawful Restraint of Trade" and is patterned after the antitrust laws of the federal government, i.e., the Sherman [Act] and [the] Clayton [Act], with the exception that the Nebraska law is broader and provides protection against commerce (intrastate) as such, and in addition provides that any attempt to drive another person (corporation) out of business is unlawful.

136 Neb. at 80, 285 N.W. at 93-94.

Like its predecessor statute, § 59-805 is located in article 8, currently entitled "Unlawful Restraint of Trade." *Pierce Co.* is instructive because we noted therein that the Legislature patterned Nebraska's antitrust laws after the federal antitrust laws, except that Nebraska's law is broader in the sense that

it protects intrastate commerce and contains § 59-805, which makes it unlawful to drive another entity out of business. In this regard, we note that unlike certain areas of federal antitrust law which limit complaints to competitors, it has been determined that § 59-805 applies to complaints between a producer and a supplier. See *Oak Grove Farm Ltd. Partnership v. ConAgra Inc.*, 105 F. Supp. 2d 1064, 1067 (D. Neb. 2000) (interpreting § 59-805 of Nebraska law and stating that "giving the words of the statute their ordinary meaning and reading all portions of the statute together to make them consistent, . . . § 59-805 applies to contracts entered into between a producer and a supplier").

In this case, we must specifically consider the phrase in § 59-805 which prohibits the giving of "any direction or authority to do *any act* for the purpose of driving out of business any other person engaged therein." (Emphasis supplied.) Both parties agree that despite the language of § 59-805, the expression "any act" cannot mean "all acts" tending to drive another out of business, because such an interpretation would be too broad. We must give the expression "any act" a sensible construction. See *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012).

In *Hompes v. Goodrich Co.*, 137 Neb. 84, 288 N.W. 367 (1939), we stated that a person may do business with whomsoever he or she desires, and that a person may likewise refuse business relations with any person whomsoever, whether the refusal is based on reason, whim, or prejudice. In *Ploog v. Roberts Dairy Co.*, 122 Neb. 540, 543, 240 N.W. 764, 765 (1932), we stated that it is "'elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern.'" (Quoting *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 F. 46 (2d Cir. 1915).) Accordingly, despite the expression "any act" in § 59-805, the statute cannot logically include all acts of the defendant which have the effect of driving an entity out of business. As discussed below, the act must be intended to drive an entity out of business.

In determining which types of acts of a defendant are included under § 59-805, we turn to a case from the Idaho Supreme Court, which analyzed a statute similar to § 59-805. In *Woodland Furniture, LLC v. Larsen*, 142 Idaho 140, 124 P.3d 1016 (2005), the Idaho Supreme Court initially determined that Idaho's unfair competition statute which was in effect when the plaintiff filed its complaint applied to the case although it had since been repealed. Similar to Nebraska's § 59-805, the former version of the Idaho statute "prohibited any person engaged in business in Idaho from 'enter[ing] into any contract, combination or conspiracy . . . for the purpose of driving out of business any other person engaged therein.'" 142 Idaho at 146, 124 P.3d at 1022.

Construing the Idaho statute similar to Nebraska's § 59-805, the Idaho Supreme Court stated the statute requires as an element that the defendant intend to drive the plaintiff out of business. The Idaho Supreme Court reasoned that

> [the] statute requires a claimant to show a purpose to drive another out of business, reflecting the notion that unfair competition laws were enacted to protect competition, not competitors. . . . [The statute] strikes the balance between free competition and fair competition by offering relief only where a company can show *a competitor's intent to drive the company out of business*, rather than simply an intent to compete.

142 Idaho at 146, 124 P.3d at 1022 (emphasis supplied). Because of an absence of evidence to support the plaintiff's claim that the defendant had an intent to drive the plaintiff out of business, the Idaho Supreme Court affirmed the trial court's judgment in favor of the defendant under the Idaho statute.

We agree with the reasoning of the Idaho Supreme Court, and determine that the phrase in § 59-805 which prohibits a defendant from doing "any act for the purpose of driving out of business" means that the prohibited act must be done with the purpose to drive the plaintiff out of business. Section 59-805 protects competition, not competitors; it is directed at unfair competition. See *Woodland Furniture, LLC, supra*.

The statute reaches intentional predatory conduct which has no purpose other than to drive another entity out of business. In this regard, we note that we have previously considered intent and recognized that intent under the Junkin Act may be proved by circumstantial evidence. See *Hompes v. Goodrich Co.*, 137 Neb. 84, 288 N.W. 367 (1939) (stating that alleged overt acts may in themselves be lawful, but evidence as whole may show that intent of alleged wrongdoer is to accomplish result prohibited by statute). Thus, in order for the plaintiff to succeed on a claim under § 59-805, the plaintiff must show that the defendant intended to drive the plaintiff out of business.

Experian contends that for a defendant to drive a plaintiff "out of business" as that phrase is used in § 59-805, the plaintiff's business must no longer be in operation. Experian asserts, "[t]he phrase 'out of business' has a well-understood meaning: that the company no longer operates." Brief for appellee at 17. Experian argues that "out of business" cannot refer to just a portion of the plaintiff's business or a line of business, because such a definition of business would be too narrow. We generally agree.

Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011). When § 59-805 was enacted, and today, the ordinary meaning of the phrase "out of business" would be a complete cessation of business operations. Under § 59-805, for liability to attach, the plaintiff must show that the defendant acted with the purpose that plaintiff's business should cease. See *State, ex rel. Spillman v. Interstate Power Co.*, 118 Neb. 756, 226 N.W. 427 (1929) (describing concept of destroying another entity's business) (superseded by statute on other grounds as stated in *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995)). In sum, in order for a plaintiff to successfully bring a claim that a defendant drove it out of business under § 59-805, the plaintiff must show that the defendant is a person, corporation, joint-stock company, limited liability company, or other association which is engaged in business within Nebraska and that the defendant gives any

direction or authority to do any act with the intent and for the purpose of driving the plaintiff out of business.

Cross-Appeal: The District Court Erred When It Denied Experian's Motion for Directed Verdict.

In its cross-appeal, Experian argues that its motion for directed verdict made at the close of CBS' case and renewed at the close of all the evidence should have been sustained, because CBS failed to prove that Experian engaged in an "act" for the purpose of driving CBS out of business under § 59-805 and CBS failed to prove its lost profits with reasonable certainty. We find merit to Experian's assignment of error on cross-appeal regarding "driving out of business."

We have stated that a directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012) (quoting *American Central City v. Joint Antelope Valley Auth.*, 281 Neb 742, 807 N.W.2d 170 (2011)). As stated above, on a claim that a defendant drove the plaintiff out of business under § 59-805, the plaintiff must show that the defendant gave direction or authority to act with the intent and for the purpose of driving the plaintiff out of business. Also as stated above, § 59-805 applies to the business relationship at issue, which in this case involves Experian's providing data for resale by CBS. See *Oak Grove Farm Ltd. Partnership v. ConAgra Inc.*, 105 F. Supp. 2d 1064 (D. Neb. 2000).

Experian argues that CBS did not provide evidence Experian engaged in an act which violated § 59-805 and that therefore, the district court erred when it did not grant Experian's motion for directed verdict. In the present case, evidence was adduced at trial regarding Experian's Project Green. As part of Project Green, Experian increased the minimum monthly purchase requirement for mortgage-related purchases. CBS contends that Experian implemented Project Green in order to drive out of business a number of the resellers such as CBS who could be viewed collectively as competitors of Experian's

largest reseller customer, "First American." CBS explains that Experian's ultimate motivation behind Project Green was to take steps to avoid dilution of the "Tri-merge norm" in the retail market for mortgage credit reports. That is, by implementing Project Green, First American would prosper as a reseller and Experian could prevent the entry of First American or another fourth repository into the wholesale market for mortgage credit information.

Experian argues that CBS' assertions regarding Project Green are based on speculation and have no factual support in the evidence presented by both CBS and Experian. Experian presented evidence that the increased fees it charged CBS associated with Project Green were designed specifically to further secure Experian's data, reduce the risk of any mishandling of Experian data by resellers and their customers, and ensure reseller compliance with Experian's policies. Experian also contends that the evidence shows that the reduction in the number of resellers is a collateral outcome of its heightened effort to comply with various reporting statutes. Experian argues that the increased charges were not for the purpose of driving CBS out of business. Experian contends that because CBS failed to show that Experian engaged in an act in violation of § 59-805, the district court erred when it did not grant its motion for directed verdict.

Given the evidence admitted at trial, we determine that on this record, reasonable minds could not differ and there is not more than one conclusion which can be drawn from the evidence. Based on the evidence, it cannot be concluded that Experian acted with the sole intent to drive CBS out of business. We find merit to Experian's cross-appeal and determine that the trial court erred when it overruled Experian's motion for directed verdict.

CONCLUSION

We determine that the district court erred when it overruled Experian's motion for directed verdict. We need not reach the remaining assignments of error on appeal and cross-appeal, except to comment that a jury instruction on the elements of § 59-805 should comport with the analysis set forth in this

opinion. Although our reasoning differs from that of the district court, the entry of judgment in favor of Experian was not error. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DONTAVIS McCLAIN, APPELLANT.
827 N.W.2d 814

Filed March 22, 2013. No. S-12-256.

1. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
2. **Trial: Expert Witnesses: Pretrial Procedure: Notice.** A challenge to the admissibility of evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert* and *Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.
3. **Trial: Evidence: Appeal and Error.** To preserve a challenge on appeal to the admissibility of evidence on the basis of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), a litigant must object on that basis and the objection should alert the trial judge and opposing counsel as to the reasons for the objections to the evidence.
4. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, whether based on a claimed violation of the Fourth Amendment or on its alleged involuntariness, 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. Whether those facts meet constitutional standards, however, is a question of law, which the appellate court reviews independently of the court's determination.
5. **Confessions: Police Officers and Sheriffs.** Interrogation necessarily includes elements of psychological pressure which are meant to elicit a confession. The question is whether the techniques used are so coercive as to overbear the suspect's will.
6. **Jury Instructions: Appeal and Error.** Whether a court's jury instructions were correct is a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination of the court below.
7. **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 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.

8. **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.
9. **Effectiveness of Counsel: Evidence: Appeal and Error.** An appellate court will not address an ineffective assistance of counsel claim on direct appeal if it requires an evidentiary hearing.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Sean M. Conway, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

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

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

CONNOLLY, J.

I. NATURE OF THE CASE

The State charged Dontavis McClain with first degree felony murder, use of a deadly weapon to commit a felony, and conspiracy to commit robbery. These charges stemmed from the robbing and killing of a pizza delivery worker. The jury found McClain guilty on all counts. McClain argues that the court erred in receiving into evidence his confession and certain DNA reports and related testimony. McClain also argues that the court incorrectly instructed the jury, that there was insufficient evidence to support his convictions, and that he received ineffective assistance of counsel. For various reasons, we find no merit to McClain's assigned errors. We affirm.

II. BACKGROUND

1. THE CRIMES AND INVESTIGATION

On a Friday in September 2010, just after 11 p.m., the Douglas County sheriff's office received a "down[ed] party"

call at an apartment complex in Omaha, Nebraska. An officer responded to the call and saw a man lying on the ground, not breathing, with blood on his arm. The officer radioed for an ambulance and then began cardiopulmonary resuscitation. The ambulance arrived minutes later, took over the man's care, and eventually transported him to the hospital. The man, Christopher Taylor, never revived. The autopsy showed that Taylor had been stabbed twice in the back, puncturing a lung and kidney. He died from hemorrhaging and complete blood loss.

As soon as the ambulance arrived, the responding officer secured the scene, notified his supervisor, and requested a crime scene unit to process the area. The crime scene unit photographed the scene and bagged items of potential evidentiary value. The crime scene primarily included one apartment in the complex and the immediately surrounding area. The officers canvassed the area for witnesses and possible leads.

Certain items found at the scene—such as a pizza-warming bag and a receipt for pizza—led the officers to a nearby restaurant. The officers discovered that Taylor worked at that restaurant as a pizza delivery worker. The shift manager provided them with the telephone number from which the order had been placed for the delivery to the apartment complex. The officers subpoenaed the owner information and call logs for that telephone number. The resulting information showed that "M. Fountain," later identified as Michelle Fountain, owned the telephone. Followup investigation revealed that Michelle Fountain's son Larry Fountain usually used the telephone.

After speaking with Larry Fountain (hereinafter Fountain), the officers discovered that he had loaned his telephone to Bryton Gibbs, who also lived in the apartment complex, and another man, whom he referred to as "Mississippi," to order pizza. Fountain had overheard Gibbs and "Mississippi" planning to rob a pizza delivery worker. The officers then searched Gibbs' home and interviewed Gibbs' mother, who told them that her son had been "hanging out" with Marcus Robinson and that Robinson had been driving Gibbs around that day. The officers then interviewed Robinson, who confirmed that he had driven Gibbs and "Mississippi" around that day, and he

told them that he had overheard "Mississippi" tell Gibbs that "[y]ou didn't have to cut him." Both Fountain and Robinson gave the officers physical and clothing descriptions of Gibbs and "Mississippi."

On Sunday, September 12, 2010, the Douglas County sheriff's office received information that Gibbs and "Mississippi" were at a church at 31st and Lake Streets. Officers went there and arrested them, identifying both Gibbs and "Mississippi" based on prior knowledge and their descriptions. The officers then identified "Mississippi" as McClain from his Mississippi identification card and driver's license.

2. McClain's Interrogation, Trial, and Sentences

That same day, the officers placed McClain in an interrogation room. McClain signed a consent form for the officers to collect physical evidence from him. McClain also waived his *Miranda* rights and agreed to talk to the officers. After initially denying any involvement in Taylor's death, McClain confessed to planning and executing the robbery with Gibbs and said that Gibbs had stabbed Taylor. Before trial, McClain moved to suppress this evidence, but the district court denied the motion. The court concluded that the officers had probable cause to arrest McClain, that McClain's confession was voluntary, and that the interrogator had properly informed him of his *Miranda* rights.

The State charged McClain with first degree felony murder, use of a deadly weapon to commit a felony, and conspiracy to commit robbery. At trial, the State presented testimony from various officers regarding the circumstances surrounding Taylor's death, the processing of the crime scene, and the investigation which led to McClain's arrest. The State also presented testimony from DNA experts which purported to link McClain to the murder. McClain objected to this evidence under Neb. Rev. Stat. § 27-403 (Reissue 2008) and on general foundation grounds. McClain claimed that the DNA laboratory, because of a recent change in protocol, currently calculated the statistical likelihood of a DNA match, when before the change, it would have simply determined that the evidence was

inconclusive. McClain argued that there was no explanation for the change in protocol, and so the court should exclude the evidence. The court overruled the objection. The State also presented testimony from Fountain and Robinson, among others, which identified McClain as one of the people involved in the robbing and killing of Taylor.

McClain's defense rested primarily on attacking the credibility of the State's witnesses, emphasizing the relative lack of physical evidence linking McClain to Taylor's death (in contrast to the wealth of evidence linking Gibbs), and arguing that McClain's confession should be given little weight because it resulted from coercion and underhanded tactics. McClain also offered testimony from one witness which seemed to indicate that another individual might have been involved in the crimes, and not McClain. At the end of trial, the jury convicted McClain on all counts. The court sentenced McClain to life to life in prison for the murder conviction, 1 to 50 years in prison for the use of a deadly weapon conviction, and 10 to 10 years in prison for the conspiracy conviction. The court ordered McClain to serve the 10-to-10-year prison sentence concurrently with the life-to-life prison sentence, while the court ordered him to serve the 1-to-50-year prison sentence consecutively to the others.

III. ASSIGNMENTS OF ERROR

McClain alleges, consolidated and restated, that the court erred in (1) admitting certain DNA evidence, (2) overruling his motion to suppress evidence of his interrogation, (3) failing to instruct the jury regarding unlawful manslaughter, and (4) finding that there was sufficient evidence to convict him of the crimes charged. McClain also alleges that he received ineffective assistance of counsel.

IV. ANALYSIS

1. DNA Evidence

A DNA report and accompanying testimony purported to link McClain to the crimes. The DNA evidence indicated that McClain was not excluded as a partial contributor to DNA found on the back seat of the getaway car and that Taylor was

not excluded as a partial contributor to DNA from apparent blood found on McClain's shoes, though the probabilities were not definitive.

McClain objected to this evidence both before and during trial. McClain noted that under an earlier testing protocol, the DNA laboratory would not have reported the above probabilities either because they fell below a certain threshold or because the known and unknown DNA samples did not share enough DNA markers. Under the earlier protocol, the laboratory would have simply determined that the DNA analysis was inconclusive. Under the current testing protocol, however, the DNA laboratory conducted and reported the probability assessment.

McClain argues that the DNA evidence was inadmissible under the *Daubert*/*Schafersman*[1] framework. McClain argues that the State's DNA experts did not know the reason for the change in protocol and so they could not provide adequate foundation for the evidence. We conclude, however, that McClain did not adequately preserve any *Daubert*/*Schafersman* issue for appellate review and that the court did not otherwise abuse its discretion in admitting this evidence.

(a) Standard of Review

[1] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[2]

(b) Analysis

[2,3] We have explained that all specialized knowledge, including scientific knowledge, falls under the rules of *Daubert*/*Schafersman*.[3] We have also explained that, assuming timely notice of proposed testimony is given,

> [a] challenge to the admissibility of evidence under *Daubert* and *Schafersman* should take the form of a

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[2] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[3] See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

> concise pretrial motion. It should identify, *in terms of the Daubert and Schafersman factors*, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.[4]

And "to preserve a challenge on appeal to the admissibility of evidence on the basis of *Daubert*/*Schafersman*, a litigant *must object on that basis* and the objection should alert the trial judge and opposing counsel as to the reasons for the objections to the evidence."[5]

McClain did not meet these requirements. McClain filed a pretrial motion in limine to exclude the DNA evidence under Neb. Rev. Stat. §§ 27-401 through 27-403 (Reissue 2008). The motion in limine did not use the language of *Daubert*/*Schafersman* to attack the validity or reliability of the evidence, but instead used the language of § 27-403 to argue that the danger of unfair prejudice outweighed the evidence's probative value. Specifically, the motion stated in part: "That any testimony regarding this statistical likelihood that someone other than [McClain] contributed the genetic material is not probative of identification, but could mislead the jury, confuse the issues and is unduly prejudicial to [McClain] and is therefore inadmissible under Neb. Rev. Stat. §27-403." That the motion in limine contested the evidence's admissibility only under § 27-403 is made perfectly clear from the bill of exceptions, in which McClain's trial counsel stated:

> Well, Judge, I anticipate, prior to the State adducing DNA evidence, filing a motion in limine *not on a Daubert type issue at all*, but more on just a [§ 27-]403 issue based off of what I would call a change in protocol . . . from the Med Center DNA lab.

(Emphasis supplied.) Nor did McClain object under *Daubert*/*Schafersman* at trial. Instead, McClain specifically noted that his motion in limine was "just a [§ 27-]403 motion [and] not

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[4] *State v. Huff*, 282 Neb. 78, 116, 802 N.W.2d 77, 107 (2011) (emphasis supplied).

[5] *State v. King*, 269 Neb. 326, 333, 693 N.W.2d 250, 258 (2005) (emphasis supplied).

a Daubert-type objection or anything like that." And when the State offered the DNA evidence at trial, McClain's trial counsel renewed his "objection based [only] on the motion in limine previously discussed."

It is true that, as pointed out at oral argument, McClain's trial counsel did include a general foundational objection and explained that he took issue with the expert's testimony because the expert did not know the underlying reasons for the change in protocol. But we do not read this as an objection under *Daubert*/*Schafersman* for there is nothing in that objection which would have alerted the court or the State that McClain was challenging the validity or reliability of the DNA testing results. Instead, we read McClain's general foundation objection and argument in his brief as challenging whether the State's witness qualified as an expert because he did not know why the protocol had changed.[6]

On this record, we find no merit to McClain's objection to the expert's qualifications. The expert testified that the DNA laboratory changed its protocol to conform to a national DNA working group's recommendations, that such recommendations come out periodically and are from DNA experts, and that it is the DNA laboratory's general practice to discuss the recommendations and decide whether to adopt them. And the witness had lengthy qualifications and experience working with DNA and the specific processes at issue. We cannot say the court abused its discretion in determining that the witness was a qualified expert on this issue and overruling McClain's general foundation objection. And McClain's brief does not argue that the court erred in admitting the evidence over his objection under § 27-403. We find no abuse of discretion in the court's admitting this evidence.

2. Motion to Suppress

McClain argues that the court erred in admitting his confession into evidence because (1) it resulted from an illegal arrest and (2) it was not voluntary. The State rejoins that the arrest was proper because the officers had probable cause

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[6] See Neb. Rev. Stat. § 27-702 (Reissue 2008).

to arrest McClain and because McClain's confession was voluntary and not the product of any improper interrogation techniques.

(a) Standard of Review

[4] In reviewing a trial court's ruling on a motion to suppress, whether based on a claimed violation of the Fourth Amendment or on its alleged involuntariness, we apply a two-part standard of review. Regarding historical facts, we review the court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which we review independently of the court's determination.[7]

(b) Analysis

McClain first argues that the officers lacked probable cause to arrest him. And if that were the case, McClain asserts, his subsequent confession was inadmissible because they obtained it "'"by exploitation of an illegal arrest."'"[8] We conclude, however, that the officers had probable cause to arrest McClain. As such, the confession was not excludable as the product of an illegal arrest.

Both the state and the federal Constitutions protect individuals against unreasonable searches and seizures by the government.[9] An arrest is a "seizure" of a person and must be justified by probable cause.[10] Probable cause to support a warrantless arrest exists only if law enforcement has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.[11] Probable cause is a flexible, commonsense standard that depends on the totality

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[7] See, e.g., *Bauldwin, supra* note 2; *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

[8] See, e.g., *State v. Ball*, 271 Neb. 140, 153, 710 N.W.2d 592, 604 (2006).

[9] See, U.S. Const. amend. IV; Neb. Const. art. I, § 7. See, also, *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[10] See *McCave, supra* note 9.

[11] See *id*.

of the circumstances.[12] We determine whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.[13] And when a court denies a motion to suppress pretrial and again during trial on renewed objection, we consider all the evidence, both from trial and from the hearings on the motion to suppress.[14]

The court determined that McClain's arrest was proper, and we agree. Our review of the record shows that the officers had probable cause to believe that McClain, referred to at the time of the arrest only as "Mississippi," had committed a crime. The investigation revealed that Gibbs and "Mississippi" were involved in the crimes. Both Fountain and Robinson gave detailed physical and clothing descriptions for "Mississippi," as well as Gibbs, whom the officers also knew from previous incidents. Although Fountain and Robinson were initially less than truthful with the officers, the court found that the information they provided "corroborated the physical evidence at the crime scene and the events that occurred [around] the time that the robbery and homicide occurred." That implied finding of credibility was not clearly erroneous. On the morning of the arrest, the sheriff's office received word that both Gibbs and "Mississippi" were at a church and went to arrest them. The officers noted that the man with Gibbs matched the physical and clothing description of "Mississippi" and specifically that both suspects were "dressed as [the officers] had been told they would be."

In sum, the officers knew that Gibbs and "Mississippi" were involved in the crimes, that they had been together, and that they were at the church. When the officers arrived at the church, the man with Gibbs matched the physical and clothing description of "Mississippi" provided by Fountain and Robinson. Because the officers had probable cause to arrest "Mississippi," later identified as McClain, his statements during custody were not the product of an illegal arrest.

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[12] See *id.*

[13] See *id.*

[14] See *Ball, supra* note 8.

McClain also argues that his confession was inadmissible because it was involuntary. McClain asserts that the interrogation room was physically intimidating, that the interrogator was hostile and threatening, and that the interrogator impliedly promised McClain leniency if he cooperated. After viewing the interrogation, however, we conclude that McClain's will was not overborne and that his confession was voluntary.

The Due Process Clauses of both the state and the federal Constitutions preclude admitting an involuntary confession into evidence.[15] The prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion.[16] In making this determination, we apply a totality of the circumstances test.[17] Factors to consider include the interrogator's tactics, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne.[18] Coercive police activity is a necessary predicate to a finding that a confession is not voluntary.[19]

The court determined that McClain's confession was voluntary, and after our review of the interrogation, we agree. Certainly, the physical characteristics of the interrogation room, specifically that it was small and windowless, are one factor to consider.[20] But the room was a seemingly standard interrogation room, with chairs and a desk, and was not so inherently coercive as to render McClain's confession involuntary.

[5] We also do not find the interrogator's questioning techniques to be improper. The officer raised his voice, pointed his pen at McClain, shifted his chair closer to McClain during the interrogation, and repeatedly used (in various ways) the phrase

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[15] See, U.S. Const. amend. XIV; Neb. Const. art. I, § 3; *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[16] See *Goodwin, supra* note 15.

[17] See *id.*

[18] See *id.*

[19] See *id.*

[20] See, e.g., *U.S. v. Murdock*, 667 F.3d 1302 (D.C. Cir. 2012).

"cold blooded killer." But interrogation necessarily includes elements of psychological pressure which are meant to elicit a confession.[21] The question is whether the techniques used are so coercive as to overbear the suspect's will.[22] Here, they were not. Notably, the interrogation leading to the confession was relatively short, lasting just over 1½ hours. More important, the video shows that McClain was intelligent and thoughtful, that he was aware of why he was in the room, and that he too was trying to get information, specifically the extent of the interrogator's knowledge about the crimes.

Nor are we convinced that the interrogator improperly promised McClain a benefit in exchange for his confession. Such a promise may render a suspect's confession involuntary and inadmissible.[23] But for that to be the case, "'the benefit offered to a defendant must be definite and must overbear his or her free will,'" thus rendering the statement involuntary.[24] Numerous cases demonstrate this principle. For example, in *State v. Mayhew*,[25] the county attorney told the defendant that if he told the truth, the county attorney would recommend that the court sentence the defendant concurrently with the unrelated sentence the defendant was then serving. In *State v. Smith*,[26] the police officer interrogating the 15-year-old defendant told him that if he confessed, the officer would try to get the case transferred to juvenile court. In both cases, we held that the resulting confessions were involuntary.[27]

This case is notably different from those. Here, at various points, the interrogator said things like the following: "[I]t does matter who did it"; "there's a difference when you're standing up in front of the judge, who did it and didn't do it"; "there's

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[21] See *U.S. v. Astello*, 241 F.3d 965 (8th Cir. 2001).

[22] See, *Culombe v. Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961); *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993).

[23] See *Goodwin, supra* note 15.

[24] *Id.* at 961, 774 N.W.2d at 746.

[25] *State v. Mayhew*, 216 Neb. 761, 346 N.W.2d 236 (1984).

[26] *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979).

[27] See, *Mayhew, supra* note 25; *Smith, supra* note 26.

a difference between who did the killing and who was just there"; and "there's also a difference between cooperating and not cooperating." These statements do not promise any *definite* benefit which could render McClain's subsequent confession involuntary.

We agree with the court that McClain's confession was voluntary. Although the interrogator exerted pressure on McClain, the interrogator's techniques were not improper. And we conclude that the interrogator did not improperly promise McClain any definite benefit in exchange for his confession. This assigned error has no merit.

3. Jury Instructions

McClain argues that the court erred in failing to instruct the jury on unlawful act manslaughter as a lesser-included offense of felony murder. McClain's argument, essentially, is that a jury could have found McClain guilty of theft, which is not a predicate felony for felony murder, rather than robbery. And if the jury found him guilty of theft, then he could be guilty only of unlawful act manslaughter and not of felony murder.

(a) Standard of Review

[6] Whether a court's jury instructions were correct is a question of law.[28] On a question of law, we are obligated to reach a conclusion independent of the determination of the court below.[29]

(b) Analysis

We addressed this same argument in *State v. Schroeder*.[30] And like *Schroeder*, even assuming that unlawful act manslaughter is a lesser-included offense of felony murder, the evidence did not warrant such an instruction.

A court must instruct on a lesser-included offense if "(1) the elements of the lesser offense . . . are such that one cannot commit the greater offense without simultaneously committing

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

[29] See, e.g., *id.*

[30] *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

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."[31] A person commits robbery if, with the intent to steal, he or she forcibly and by violence, or by putting in fear, takes any money or personal property from another person.[32] The various crimes of theft do not contain this element of violence or fear, but are otherwise similar insofar as the perpetrator deprives the victim of his or her possessions.[33]

There is no rational basis upon which a jury could conclude that McClain committed a theft rather than a robbery, because McClain's actions contained an element of violence or fear, and most likely both. McClain admitted that he grabbed Taylor from outside the apartment, pulled him in, and threw him to the ground. McClain admitted that he heard Taylor repeatedly ask what was going on. McClain said that Gibbs turned off the lights, after which Gibbs stabbed Taylor and McClain took the money from Taylor. A rational jury could not consider this to be a simple theft. Therefore, the court correctly refused to give an unlawful act manslaughter instruction, even assuming that it was a lesser-included offense of felony murder.

4. Sufficiency of the Evidence

McClain argues that the evidence was insufficient for the jury to convict him of felony murder, use of a deadly weapon to commit a felony, and conspiracy to commit robbery. We disagree. There was ample evidence, most notably McClain's own confession, that he and Gibbs planned to and did rob Taylor and that Taylor died after Gibbs stabbed him during the robbery.

(a) Standard of Review

[7] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof,

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[31] *Id.* at 216, 777 N.W.2d at 807.

[32] See, Neb. Rev. Stat. § 28-324 (Reissue 2008); *Schroeder, supra* note 30.

[33] See, Neb. Rev. Stat. §§ 28-509 to 28-518 (Reissue 2008 & Cum. Supp. 2012); *Schroeder, supra* note 30.

the standard is the same: We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[34] The relevant question 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.[35]

(b) Analysis

The thrust of McClain's argument is that the State failed to adduce sufficient evidence to convict McClain of the relevant charges. In support of this argument, McClain attacks the credibility of the State's witnesses. He also notes the relative lack of physical evidence tying McClain to the crimes and that a witness for McClain cast doubt on his involvement in the crimes. McClain's argument essentially asks us to resolve conflicts in the evidence, pass on the credibility of witnesses, and reweigh the evidence, which we will not do.[36] We ask only whether a rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.[37] The answer is yes.

To prove felony murder, as relevant here, the State had to prove that McClain killed "another person . . . in the perpetration of or attempt to perpetrate any . . . robbery."[38] The record shows that the State prosecuted McClain under an aider or abettor theory. A person who aids or abets "another to commit any offense may be prosecuted and punished as if he were the principal offender."[39] "[A]n alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself

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[34] See *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012).

[35] See *id.*

[36] See *id.*

[37] See *id.*

[38] Neb. Rev. Stat. § 28-303 (Reissue 2008).

[39] Neb. Rev. Stat. § 28-206 (Reissue 2008).

or herself possessed such intent."[40] The required intent was the intent to commit the underlying felony—robbery—rather than the intent to kill.[41] So if there was sufficient evidence for a jury to conclude beyond a reasonable doubt that McClain intended to rob Taylor and that Taylor died "in the perpetration of or attempt to perpetrate" the robbery, then regardless who actually stabbed him,[42] the felony murder conviction must stand.

A rational trier of fact could find beyond a reasonable doubt that McClain intended to rob Taylor. A person commits robbery if, with the intent to steal, he or she forcibly and by violence, or by putting in fear, takes any money or personal property from another person.[43] McClain admitted to intending to steal from Taylor during his confession, and the record clearly demonstrates that he and Gibbs took Taylor's property through force or violence, or by putting Taylor in fear. A rational trier of fact could also infer McClain's intent from testimony demonstrating that he acted in concert with Gibbs. For example, Fountain testified that he overheard Gibbs say "we should rob this pizza man" with McClain nearby, Robinson testified that he drove Gibbs and McClain away from the crime scene, and another witness testified that McClain told him afterward that Gibbs had made a "rookie mistake." And, of course, a rational trier of fact could also find beyond a reasonable doubt that Taylor died during the perpetration of the robbery.

To prove that McClain was guilty of using a deadly weapon to commit a felony, the State had to prove that McClain used a deadly weapon, such as a knife, to commit a felony.[44] In *State*

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[40] *State v. Mantich*, 249 Neb. 311, 324, 543 N.W.2d 181, 191 (1996).

[41] See *Mantich, supra* note 40.

[42] See, e.g., *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982); *Garcia v. State*, 159 Neb. 571, 68 N.W.2d 151 (1955). See, also, *U.S. v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000).

[43] See § 28-324.

[44] See Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2012).

v. Mantich,[45] we explained that "one who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act." In *Mantich*, the defendant was one of several people who "kidnapped, robbed, and terrorized" the victim at gunpoint.[46] We noted that "using a firearm to commit these acts [was] a natural and probable consequence of the kidnapping, robbery, and terrorizing" of the victim.[47] And as the defendant was an aider and abettor of those criminal acts, he "could properly be convicted of using a firearm to commit a felony even if the jury believed that he was unarmed."[48]

The same reasoning applies here. McClain and Gibbs robbed Taylor, and Taylor died during the perpetration of the robbery. The record shows that McClain intended to rob Taylor, that Gibbs stabbed Taylor with a knife, and that Taylor later died from those wounds. As McClain was an aider and abettor of those criminal acts, a rational trier of fact could properly find beyond a reasonable doubt that McClain was guilty of using a deadly weapon to commit a felony even if McClain did not actually use the knife.

Finally, to prove McClain had conspired to commit a robbery, the State had to prove that McClain intended to promote or facilitate the robbery, that he agreed with one or more persons to commit the robbery, and that McClain, or a coconspirator, committed an overt act furthering the conspiracy.[49] McClain admitted that he agreed with Gibbs to rob Taylor, and they obviously committed an overt act furthering the conspiracy since they actually robbed Taylor. A rational jury could find these essential elements beyond a reasonable doubt. This assigned error has no merit.

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[45] *Mantich, supra* note 40, 249 Neb. at 327, 543 N.W.2d at 193.

[46] *Id.*

[47] *Id.* at 327-28, 543 N.W.2d at 193.

[48] *Id.* at 328, 543 N.W.2d at 193.

[49] See, Neb. Rev. Stat. § 28-202 (Reissue 2008); *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

5. Ineffective Assistance of Counsel

[8,9] Finally, McClain alleges several instances of ineffective assistance of counsel. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[50] The determining factor is whether the record is sufficient to adequately review the question.[51] The logical extension of that principle is that we will not address an ineffective assistance of counsel claim on direct appeal if it requires an evidentiary hearing.[52]

McClain alleges, restated, four different ineffective assistance of counsel claims as follows: Trial counsel failed to (1) adequately communicate with McClain; (2) properly attack the credibility of the State's witnesses, including that one witness was improperly coached; (3) conduct depositions of witnesses who were either codefendants or eyewitnesses; and (4) peremptorily strike a juror during voir dire when the juror expressed bias toward Taylor. We conclude that the record is insufficient to address the first three claims, but is sufficient to address the fourth.

In his fourth claim, McClain argues that one juror expressed bias toward Taylor and that his trial counsel should have struck her from the jury. McClain argues that his counsel's failure to do so prejudiced him because the juror was more likely to find him guilty and the trial would have turned out differently had a different individual been on the jury.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[53] McClain must show that his counsel's performance was deficient and that this deficient performance actually prejudiced his defense.[54] The record is sufficient to address this claim and shows neither deficient

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[50] *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[51] See *id.*

[52] See *id.*

[53] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[54] See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

performance nor prejudice from trial counsel's failure to peremptorily strike this juror.

During voir dire, the juror said that she had previously read a newspaper article explaining that "a pizza delivery person was killed, I believe, by three gentlemen in an apartment complex. I'm not sure how. That's basically all I know." When asked whether "there [was] any other information that [she] recall[ed] from that news article about what was going on or the people that allegedly were involved," she replied: "Yes. The gentleman was I believe the father [sic] and was a Christian person who gave some of his money to charities." But the juror, again in response to questioning, explained that if she were selected, she would require the State to meet its burden of proof and to provide her evidence to make a decision. She stated that she would put aside anything that she had heard in the prior weeks and months and rely on the evidence and instructions during trial. Finally, she explained that she had read only the one article, that she had never heard McClain's name in connection with the incident, and that she had not formed an opinion as to McClain's guilt or innocence. This claim has no merit.

V. CONCLUSION

We conclude that McClain did not properly preserve any alleged error under *Daubert*/*Schafersman* and that the court did not otherwise abuse its discretion in admitting the State's DNA evidence. We also conclude that the court properly admitted McClain's confession into evidence because the officers had probable cause to arrest him and because his confession was voluntary. We find no merit to McClain's arguments that the court improperly instructed the jury or that there was insufficient evidence to sustain the jury's verdicts. Though the record is insufficient to review the majority of McClain's ineffective assistance of counsel claims, the record is sufficient to conclude that his counsel was not ineffective for failing to peremptorily strike one of the jurors during voir dire. We affirm McClain's convictions and sentences.

AFFIRMED.

IN RE INTEREST OF EDWARD B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. EDWARD B., APPELLANT.

827 N.W.2d 805

Filed March 22, 2013. Nos. S-12-342 through S-12-345.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Statutes: Appeal and Error.** An appellate court independently decides questions of law, including issues of statutory interpretation, presented by an appeal.
3. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
4. **Jurisdiction: Appeal and Error.** An appellate court does not acquire jurisdiction over an appeal if a party fails to properly perfect it.
5. **Juvenile Courts: Appeal and Error.** Under the Nebraska Juvenile Code, any final order entered by a juvenile court may ordinarily be appealed to the Nebraska Court of Appeals in the same manner as an appeal from the district court.
6. **Affidavits: Fees: Appeal and Error.** The filing of a poverty affidavit, properly confirmed by oath or affirmation, serves as a substitute for the docket fee for an appeal.
7. **Jurisdiction: Notice: Affidavits: Appeal and Error.** An in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty.
8. **Minors: Juvenile Courts.** Juvenile delinquency proceedings are civil proceedings directed toward the education, treatment, and rehabilitation of the child.
9. **Minors: Juvenile Courts: Affidavits: Parties: Appeal and Error.** In a juvenile's appeal from a delinquency proceeding, the poverty affidavit of the juvenile's parent may be filed in support of the juvenile's request to proceed in forma pauperis, and a parent is a party who may state a belief that the juvenile is entitled to relief.

Appeals from the County Court for Adams County: MICHAEL OFFNER, Judge. Affirmed.

Daniel C. Pauley, of Dunmire, Fisher & Hastings, for appellant.

Alyson Keiser Roudebush, Deputy Adams County Attorney, for appellee.

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

CONNOLLY, J.

SUMMARY

In these consolidated appeals, Edward B. appeals from a disposition order of the county court sitting as a juvenile court. The court found that Edward had violated the terms of his probation in two of these cases. In all four cases, the court found that it was in Edward's best interests to be committed to the Office of Juvenile Services (OJS) with placement at the Youth Rehabilitation and Treatment Center (YRTC) at Kearney, Nebraska.

The main issue is whether we have jurisdiction. The State contends that Edward failed to perfect this appeal because he did not sign the affidavit for an in forma pauperis appeal. Instead, his mother signed the affidavit.

We conclude that we have jurisdiction. In a juvenile's in forma pauperis appeal from a delinquency proceeding, the poverty affidavit of the juvenile's parent is sufficient to vest this court with appellate jurisdiction. We further hold that the court properly determined that Edward's best interests and the safety of the community required his placement at the YRTC.

BACKGROUND

In January and May 2011, the State filed the first two juvenile petitions against Edward. It alleged that on two separate days, Edward had been in a fight and had threatened another person in a menacing manner or had caused bodily harm to the other person. The alleged conduct constituted a third degree assault. Edward pleaded no contest in one case, and the court found that the State had proved its allegations in the other case. In both cases, the court adjudicated Edward under Neb. Rev. Stat. § 43-247(1) (Reissue 2008), meaning that Edward's conduct would constitute a misdemeanor if a court treated him as an adult. The court placed Edward on supervised probation for 4 years, under specified conditions. Those conditions included the requirements that Edward not violate any laws; that he not

possess firearms, alcohol, tobacco, or controlled substances; and that he attend school.

In January 2012, the State filed two new juvenile petitions. In the first petition, the State alleged that Edward had participated in an armed robbery of a store. In the second petition, the State alleged that Edward had stolen merchandise valued over $500 from a retail store and had sold an imitation controlled substance at school. He was in the 10th grade at that time, and the school expelled him over the latter allegation. Because Edward was on probation, the State removed him from his home and placed him in a juvenile detention facility pending the court's disposition order. Edward pleaded no contest in both cases, and the court accepted the State's factual bases for the pleas. For the allegation that he had sold an imitation controlled substance, the court again adjudicated Edward under § 43-247(1). For the allegations of theft and robbery, it adjudicated Edward under § 43-247(2), meaning that Edward's conduct would constitute felonies if a court treated him as an adult. The court ordered OJS to conduct a predisposition evaluation.

On the same day that the State filed the new petitions, it also filed allegations that Edward had violated the conditions of his probation in the two earlier cases. In February 2012, the State asked the court to revoke his probation in those cases.

On March 28, 2012, the court held a disposition hearing on all four cases. Edward's biological mother was present, as was Sharon B., Edward's biological grandmother and adoptive mother. The court asked Edward's counsel whether he had reviewed OJS' evaluation, which had been submitted that day. Edward's counsel said that he had reviewed the report but that he had only 10 to 15 minutes to go over it with Edward, which he believed was inadequate. So the court summarized to the parties why OJS was recommending that the court place Edward at the YRTC.

The court explained that Edward's score on the evaluation tests placed him in the high-risk category, requiring supervised treatment in a treatment facility. OJS concluded that Edward did not appreciate the seriousness of the charges against him and posed a safety risk to the public. The court stated that

in the evaluation, Edward had expressed no remorse for his involvement in the armed robbery and had stated that his involvement was "just charges to me." Although the court recognized that Edward's attitude might be due to a low intellect, it concluded that his lack of understanding was a reason for ordering treatment at the YRTC. The court found that Edward had a history of being physically aggressive and that Edward had admitted he was likely beyond the control of both Sharon and his biological mother.

The court stated that even when Edward was in school, he had skipped school two to three times per week and had admitted to frequently using marijuana. Sharon vigorously argued that Edward had learning disabilities, that almost all the school he had missed was for court hearings, and that she did not believe he had used drugs excessively, as OJS had reported. But Edward's probation officer testified that Edward had admitted to drug use during probation, and when asked by the court, Edward admitted that at one point, he had used marijuana every day. The court stated that Edward's placement at the YRTC was in his best interests and that Edward had no ability to pay court costs or restitution.

The court revoked Edward's probation in the two earlier cases. In all four cases, it found that because of Edward's ongoing and uncontrolled criminal conduct, he could not remain in his home, and that his best interests and protection of the public required his placement at the YRTC.

On April 4, 2012, Sharon moved for appointed counsel for Edward to prosecute an appeal in each case from the court's disposition orders. On April 5, the court granted appointed counsel. On April 16, Sharon filed poverty affidavits, which she signed, providing her income and liabilities. She again requested appointed counsel and requested waivers of fees, bonds, and costs. After reviewing Edward's applications to proceed in forma pauperis on appeal, the court granted his requests.

ASSIGNMENTS OF ERROR

Edward assigns, restated, that the county court erred as follows:

(1) finding that Edward's placement at the YRTC was necessary to protect the public and in his best interests under Neb. Rev. Stat. § 43-286(1)(b) (Supp. 2011); and

(2) implicitly finding—by relying on OJS' evaluation report for its disposition—that Edward was a delinquent and habitual offender under §§ 43-247 and 43-286, without (a) giving adequate consideration to Edward's reduced intellect and ability to understand questions posed to him during OJS' evaluation and the absence of any input from Edward's guardian, or (b) giving Edward an adequate opportunity to review the OJS report so that he could object to allegations that affected his disposition.

STANDARD OF REVIEW

[1-3] We review juvenile cases de novo on the record and reach our conclusions independently of the juvenile court's findings.[1] When the evidence is in conflict, however, we may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[2] We independently decide questions of law, including issues of statutory interpretation, presented by an appeal.[3] A jurisdictional issue that does not involve a factual dispute presents a question of law.[4]

ANALYSIS

JURISDICTION

[4] As stated, the State contends that Edward has not perfected his appeals because Sharon, his adoptive mother, signed the poverty affidavits instead of Edward, as required by our court rules and by statute. We do not acquire jurisdiction over an appeal if a party fails to properly perfect it.[5]

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[1] *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[2] *Id.*

[3] See *id.*

[4] *Molczyk v. Molczyk, ante* p. 96, 825 N.W.2d 435 (2013).

[5] See, *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

The State argues that rules governing who can sign a poverty affidavit ensure that only an appellant with standing to seek redress can appeal from a court's order or judgment. It contends that in delinquency dispositional orders for juveniles adjudicated under § 43-247(1), (2), (3)(b) or (c), and (4), the juvenile's parent is not a party, and therefore cannot be a party entitled to redress. Because the poverty affidavit must state the affiant's belief that he or she is entitled to redress, the State argues that the juvenile must sign it.

Edward contends that the State did not contest Sharon's signing of the poverty affidavits at the trial level and that under *State v. Dallmann*,[6] it cannot do so now. Edward asserts that in his applications to proceed in forma pauperis, he stated that he did not have money to pay for the fees and costs of litigation and that he was entitled to redress. The State concedes this point. Edward argues that because the court granted his motions and appointed Edward counsel for the appeals, the State's questioning of his financial status is an attack on the court's previous determinations that Edward lacked the necessary resources for the appeals. Alternatively, he argues that under our previous decisions, his circumstances presented good cause for not personally signing the poverty affidavits.

In *Dallmann*, we rejected the State's argument that the defendant failed to perfect his appeal because he did not state the nature of the action and that he believed he was entitled to redress. We stated that challenges to the language in the affidavit must be made at the trial level. Because the trial court had sustained the defendant's motion to proceed in forma pauperis, we determined that we had jurisdiction over his appeal. In *State v. Ruffin*,[7] however, we clarified that *Dallmann* "does not change the requirement that the poverty affidavit must be properly signed under oath by the party, rather than the party's attorney, in order to serve as a substitute for the payment of the docket fee and to vest an appellate court with jurisdiction."

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[6] *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

[7] *State v. Ruffin, supra* note 5, 280 Neb. at 618-19, 789 N.W.2d at 25.

We agree that the State cannot now attack Edward's ability to pay court fees and costs for his appeals.[8] But the State's argument is that Edward has not perfected his appeals because he did not personally sign the poverty affidavits accompanying his requests to proceed in forma pauperis. We turn to that argument.

[5] Under the Nebraska Juvenile Code,[9] any final order entered by a juvenile court may ordinarily be appealed to the Nebraska Court of Appeals in the same manner as an appeal from the district court.[10] That is true here. Neb. Rev. Stat. § 25-1912(1) (Reissue 2008) sets out the requirements for perfecting an appeal. Together, §§ 25-1912(1) and 43-2,106.01(1) require a party appealing from a juvenile court's final order to (1) file a notice of appeal with the juvenile court, (2) deposit the docket fee for an appeal with the clerk of the juvenile court, and (3) fulfill both requirements within 30 days of the court's order.[11] These requirements are mandatory, and a party must satisfy them for an appellate court to acquire jurisdiction over an appeal.[12] But under Nebraska's in forma pauperis statutes,[13] a juvenile court can authorize a party to prosecute an appeal without paying fees and costs.[14]

[6,7] The filing of a poverty affidavit, properly confirmed by oath or affirmation, serves as a substitute for the docket fee for an appeal.[15] An in forma pauperis appeal is perfected when

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[8] See Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008).

[9] See Neb. Rev. Stat. §§ 43-245 to 43-2,127 (Reissue 2008, Cum. Supp. 2010 & Supp. 2011).

[10] See, § 43-2,106.01(1); *In re Interest of Rebecca B.*, 280 Neb. 137, 783 N.W.2d 783 (2010).

[11] See, *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996); *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990).

[12] See *id.* See, also, Neb. Ct. R. App. P. § 2-101(A) (rev. 2010).

[13] See Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Reissue 2008).

[14] *In re Interest of Noelle F. & Sara F., supra* note 11; *In re Interest of T.W. et al., supra* note 11.

[15] See *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006).

the appellant timely files a notice of appeal and an affidavit of poverty.[16]

In both civil and criminal cases, § 25-2301.01 sets out the procedures for applying to proceed in forma pauperis at trial or on appeal:

> An application to proceed in forma pauperis shall include an affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress.

In a juvenile case terminating the parents' parental rights, we held that "generally, in the absence of good cause evident in the record, it is necessary for a party appealing to personally sign the affidavit in support of her or his motion to proceed in forma pauperis."[17] In criminal cases, we have similarly held that absent good cause evident in the record, the affidavit must be signed by the party appealing—not the party's attorney.[18]

Contrary to the State's argument, however, this rule does not exist to ensure that the party appealing has standing to seek redress. Standing is jurisdictional, and we would address standing even if a party has properly perfected an in forma pauperis appeal. Instead, the rule is based on the statutory requirements for invoking an appellate court's jurisdiction. In addition, we have reasoned that an attorney's statement of a client's financial status is hearsay and puts the attorney in a position of a witness, "'thus compromising his role as an advocate.'"[19]

But appeals by a parent from a juvenile case or by an adult defendant in a criminal case are obviously distinguishable from a juvenile's appeal. When the appellant is an adult, only the

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[16] *Id*. See *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990).

[17] See *In re Interest of T.W. et al., supra* note 11, 234 Neb. at 968, 453 N.W.2d at 437.

[18] *State v. Ruffin, supra* note 5.

[19] See *id*. at 615, 789 N.W.2d at 22 (quoting *In re Interest of T.W. et al., supra* note 11).

appellant's financial resources are relevant to a finding that the appellant is unable to pay the fees and costs of an appeal. That is not true with a juvenile's appeal. Section 25-2301.01 does not literally require that the affiant declaring poverty be the party appealing. And we have never held that in a juvenile's appeal, a poverty affidavit must be signed by the juvenile. That holding would be contrary to the juvenile code's concern with a parent's financial resources.

Specifically, § 43-272(1) requires a juvenile court to consider a parent's ability to pay for an attorney in determining whether to appoint counsel for the juvenile:

> When any juvenile shall be brought without counsel before a juvenile court, the court shall advise such juvenile *and his or her parent or guardian of their right to retain counsel* and shall inquire of such juvenile and his or her parent or guardian as to whether they desire to retain counsel. The court shall inform such juvenile and his or her parent or guardian of such juvenile's right to counsel at county expense *if none of them is able to afford counsel*. If . . . the court ascertains that none of such persons are able to afford an attorney, the court shall forthwith appoint an attorney to represent such juvenile for all proceedings before the juvenile court, except that if an attorney is appointed to represent such juvenile and *the court later determines that a parent of such juvenile is able to afford an attorney, the court shall order such parent or juvenile to pay for services of the attorney* . . . . If the parent willfully refuses to pay any such sum, the court may commit him or her for contempt . . . .

(Emphasis supplied.)

A juvenile court may also order a parent to pay for other state services related to juvenile proceedings.[20] It follows from these provisions that a parent's financial status is also a necessary inquiry in determining whether a juvenile has the means of paying the fees and costs for an appeal. Obviously, the State

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[20] See § 43-290.

can object if it believes that the juvenile has other resources.[21] But in the majority of cases, the financial status of the juvenile's parent, guardian, or custodian will be the only relevant consideration. So, in many cases involving a juvenile's appeal, a court could not sensibly apply the rule that the party appealing must personally sign the poverty affidavit.

[8] We also reject the State's argument that a parent is not a party to a delinquency proceeding and, thus, cannot be an affiant with a belief that he or she is entitled to redress. Contrary to the thrust of the State's argument, juvenile delinquency proceedings are civil proceedings directed toward the education, treatment, and rehabilitation of the child.[22] The juvenile code explicitly recognizes a parent's interests in his or her child's disposition by making the parent a party.

Under § 43-2,106.01(2), an appeal from a juvenile court's final order or judgment may be taken by, among other persons, the juvenile *or* the juvenile's parent. Section 43-2,106.01 confers a statutory right of appeal without making a distinction between neglect proceedings and delinquency proceedings. And we have previously stated that § 43-2,106.01 "delineates those persons or entities which may be considered parties and therefore have standing to appeal."[23]

But the State argues that because § 43-2,106.01(2) is necessarily broad enough to apply to both neglect and delinquency proceedings, we should not interpret it to apply to delinquency disposition orders. It argues that *In re Interest of Dalton S.*[24] supports its position that the juvenile is the only party with rights at stake in a delinquency proceeding. We disagree.

In *In re Interest of Dalton S.*, the juvenile court adjudicated a 9-year-old boy under § 43-247(1) for disorderly conduct at school. When the court explained to the child his rights and

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[21] See § 25-2301.02.

[22] See *In re Interest of Laurance S.*, 274 Neb. 620, 742 N.W.2d 484 (2007).

[23] See, *In re Interest of William G.*, 256 Neb. 788, 792, 592 N.W.2d 499, 503 (1999); § 43-245(15).

[24] *In re Interest of Dalton S.*, 273 Neb. 504, 730 N.W.2d 816 (2007).

accepted his plea, he was not represented, but his mother was present and advised the boy to waive his right to counsel. At a disposition hearing the next year, the court determined that the child should be placed in a treatment foster home. The child appealed, arguing that at the adjudication, the court had failed to adequately advise him of his right to counsel.

We rejected that argument. We concluded that the court had adequately advised the juvenile as required by statute. In determining whether the child had knowingly, voluntarily, and intelligently waived his right to counsel, we noted that the mother was actively involved in the waiver and that the record did not show that she had a conflict of interest which should discount her involvement.

The facts of *In re Interest of Dalton S.* undermine the State's argument that a parent does not have an interest in delinquency proceedings. It illustrates that the State may seek to adjudicate very young children under the delinquency provisions of § 43-247 and that a parent's participation may be crucial to the child's understanding of the proceedings.

Additionally, "unless the context otherwise requires," § 43-245(15) provides that the term "[p]arties" in the juvenile code shall mean "the juvenile as described in section 43-247 and his or her parent, guardian, or custodian." Section 43-279(1) clarifies that in the context of delinquency proceedings, a parent is a party with a right of appeal:

> When the petition alleges the juvenile to be within the provisions of subdivision (1), (2), (3)(b), or (4) of section 43-247 and the juvenile or his or her parent, guardian, or custodian appears with or without counsel, the court shall *inform the parties*:
>
> (a) Of the nature of the proceedings and the possible consequences or dispositions . . . .
>
> . . . .
>
> . . . and
>
> (g) Of the right to appeal and have a transcript for such purpose.

(Emphasis supplied.)

Finally, apart from the parent's potential financial liabilities under the juvenile code, a parent obviously has a substantial

right at stake in a disposition order placing his or her child in a treatment facility. So we reject the State's argument that a parent has no interest to redress in a juvenile's appeal from a disposition order in a delinquency proceeding.

[9] We hold that in a juvenile's appeal from a delinquency proceeding, the poverty affidavit of the juvenile's parent may be filed in support of the juvenile's request to proceed in forma pauperis. We further hold that a parent is a party who may state a belief that the juvenile is entitled to relief. Because the affidavit was timely filed, the appeal was properly perfected. The State's jurisdiction argument is without merit. Having determined that we have jurisdiction, we turn to Edward's assigned errors.

Court's Disposition Order Was Correct

Section 43-286 governs a juvenile court's disposition of a juvenile when the court adjudicated the juvenile under § 43-247(1), (2), or (4). And it permitted the court to commit Edward to OJS and place him at the YRTC.[25] Also, because the court found that Edward had violated the terms of his probation, it could enter any disposition that it could have made at the time that that the original order of probation was entered.[26]

Edward contends that the court should have considered a different disposition than placing him at the YRTC, but he does not specify the disposition that he believes would have been appropriate. He also contends that the court failed to ensure that Edward's responses during the OJS evaluation were accurate because Edward lacked the requisite intellect to have knowingly answered the evaluator's questions. He also argues that Sharon was not present during the evaluation process.

The State argues that Edward's most serious offenses were committed while Edward was on probation and that the court correctly determined that Edward needed the help that he would get at the YRTC. We agree.

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[25] See § 43-286(1)(b).

[26] See § 43-286(5)(b)(v).

Edward cites no authority for his contention that a juvenile's parent must be present during the State's assessment of the juvenile's treatment needs, and the record shows that Sharon participated telephonically during a clinical evaluation. OJS included her comments in its report. Moreover, the record shows that the professionals evaluating Edward's treatment needs fully considered his psychiatric and intellectual needs during their testing. And Edward fails to identify any statements that he made during the evaluation process that were inaccurate or that would have changed the recommendation in these cases. More important, rehabilitation under any lesser disposition would depend on Edward's compliance with a probation program, which he had already failed.[27] The court did not err in concluding that probation had been inadequate and that Edward's conduct and the public's safety required his treatment in a secure facility.

AFFIRMED.

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[27] See § 43-286(1)(a).

THOMAS L. PEARSON, APPELLANT, V. ARCHER-DANIELS-MIDLAND MILLING COMPANY, APPELLEE.

828 N.W.2d 154

Filed March 22, 2013. No. S-12-729.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
2. **Evidence: Words and Phrases.** Competent evidence means evidence that tends to establish the fact in issue.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

4. **Workers' Compensation.** The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility.
5. **Workers' Compensation: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
6. **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 Workers' Compensation Court. Affirmed.

Eric B. Brown, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellant.

Brynne E. Holsten, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

CASSEL, J.

INTRODUCTION

After Thomas L. Pearson obtained a workers' compensation award that covered future medical treatment "which falls under the provisions of § 48-120" of the Nebraska Revised Statutes, he underwent knee replacement surgery and sought a further award of benefits. A single judge of the Workers' Compensation Court denied his petition, and a divided review panel affirmed. Because there was sufficient evidence to support the single judge's factual finding that the surgery did not result from the work-related injury and because the single judge properly applied the original award, we affirm.

BACKGROUND

Pearson was injured during the course of his employment at Archer-Daniels-Midland Milling Company (ADM) on October 27, 2006, and filed for workers' compensation benefits. At the hearing on Pearson's petition, the parties offered into evidence medical records containing the opinions of several different medical providers who had evaluated or treated Pearson's injuries. To the extent that it is necessary to review the evidence

presented at the various hearings, we do so in the analysis section below.

In August 2008, the Workers' Compensation Court issued an award for injuries to Pearson's lower back and right knee. There was no allegation of any injury to the left knee. The court ordered ADM to pay all of Pearson's outstanding medical bills and temporary total disability benefits for both injuries. In considering permanent disability benefits, the court focused heavily on the right knee injury, noting that

> [t]he need for the particulars surround[ing] the actual injury is driven, in part, by the fact that [Pearson] suffered an injury to that same right knee in 2001 . . . that [Pearson] was diagnosed with osteoarthritis in that knee prior to the subject accident . . . that [Pearson] complained of significant pain in his right knee in the year prior to his accident . . . and, the existence of similarities in the complaints by [Pearson] both pre[-] and post-accident . . . .

After reviewing the evidence, the court found "a causal link between [Pearson's] knee complaints and the subject accident" and that he had reached maximum medical improvement. Nonetheless, the court also concluded that this "aggravation or exacerbation of [Pearson's] pre-existing arthritic condition was not persuasively established as permanent in nature." The court did not identify any permanent restrictions or permanent medical impairment ratings resulting from the knee injury. Given these conclusions, the court awarded permanent disability benefits for the low-back injury only.

Despite finding that the evidence did not establish permanency of the right knee injury, the Workers' Compensation Court awarded Pearson future medical expenses for the injury because it was persuaded that "future medical treatment will be reasonably required." Specifically, the court ordered that "[a]ny future medical treatment received by [Pearson] which falls under the provisions of § 48-120, and which otherwise satisfies all necessary foundational elements thereto, should be provided at the expense of [ADM]."

Following the award, Pearson had further difficulties with his right knee and eventually had total knee replacement surgery. After this surgery, Pearson filed an application for

modification of the original award. He alleged that the surgery resulted in "a material and substantial change in his physical condition and an increase in disability since [the original award]." In considering Pearson's request for modification, the Workers' Compensation Court reviewed all evidence previously admitted in the case and received additional evidence as to the surgery.

After a hearing, a single judge of the Workers' Compensation Court denied Pearson's request for compensation of his right knee replacement surgery and for indemnity benefits. The court explained that "[t]he issue of [Pearson's] entitlement to knee replacement surgery was presented . . . at the time of the original trial held on June 16, 2008," and that "[w]hile [Pearson's] request for right knee replacement surgery was not expressly denied [in the original award], it most assuredly was implied." On appeal, the review panel of the compensation court affirmed.

On further appeal, however, this court reversed that part of the compensation court's decision denying Pearson's knee replacement surgery and remanded the cause "for a factual determination as to whether Pearson's knee replacement falls under the provisions of § 48-120."[1] In reaching this conclusion, we specifically considered and rejected the review panel's conclusion that the compensability of knee replacement surgery was implicitly denied in the original award, holding that "there was no basis at [the time of the original award] for the court to rule one way or the other" on the issue of knee replacement and that "a work-related injury need not result in permanent disability in order for medical treatment to be awarded."[2]

On remand, a single judge of the Workers' Compensation Court found that Pearson's right knee replacement surgery "does not fall under the provisions of § 48-120 and, thus, is not the responsibility of [ADM]." Relying upon the opinions of two doctors and rejecting that of a third, the court concluded

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[1] *Pearson v. Archer-Daniels-Midland Milling Co.*, 282 Neb. 400, 408, 803 N.W.2d 489, 495 (2011).

[2] *Id.* at 406, 803 N.W.2d at 494.

that (1) Pearson "did not sustain any permanent impairment as a result of the injury to his right knee," (2) Pearson's knee injury "is best described as a temporary exacerbation of a pre-existing knee condition," and (3) Pearson's knee replacement surgery "was not persuasively established to be the product of the subject accident but, rather, prompted by [his] pre-existing degenerative knee condition." Pearson appealed to a review panel.

On appeal, two judges of the review panel affirmed, with the third judge dissenting. In affirming, the two-judge majority reasoned:

> While it is true that there was evidence in the record which the trial judge could have relied upon in finding for [Pearson], [the single judge of the Workers' Compensation Court] found that evidence unpersuasive. When read in its entirety, the deposition of Dr. David J. Clare . . . contains numerous qualified answers which a finder of fact could reasonably question.
>
> It is the role of the trial judge to determine which, if any, expert witnesses to believe. The review panel cannot reweigh the evidence and substitute its judgment for that of the trial court.

The third judge of the review panel disagreed, citing to evidence in the record which he believed established that knee replacement surgery was causally related to the work-related accident. He explained: "The denial of [Pearson's] request for benefits for the total knee arth[r]oplasty is based upon the argument that the sole proximate cause of the need for surgery was the preexisting arthritic condition. Dr. [David] Clare's deposition, which is the only evidence on the issue, proves otherwise."

Pearson timely appeals.

ASSIGNMENTS OF ERROR

Pearson argues, restated, that the review panel erred in affirming the single judge's order finding that his knee replacement surgery was not compensable, because such finding is not supported by the medical records received into evidence and is "legally inconsistent" with the original award. Pearson

also argues that the compensation court should have awarded Pearson additional indemnity benefits stemming from the knee replacement surgery.

STANDARD OF REVIEW

[1] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.[3]

ANALYSIS

Sufficiency of Evidence

[2] Pearson's first assignment of error alleges that the medical records received into evidence did not support a finding that his right knee replacement surgery was not compensable. More specifically, he alleges that the review panel had cause to reverse the decision of the single judge of the Workers' Compensation Court under Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012). Section 48-185 allows a judgment of the compensation court to be modified, reversed, or set aside based on the ground that "there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award." Competent evidence means evidence that tends to establish the fact in issue.[4]

According to Pearson, the review panel should have reversed the trial court's finding that his knee replacement surgery did not fall under Neb. Rev. Stat. § 48-120(1)(a) (Cum. Supp. 2012) on the ground of insufficient evidence. Section 48-120(1)(a) states that medical, surgical, or hospital services are compensable if they (1) are reasonable, (2) are required by the work injury, and (3) "will relieve pain or promote and hasten the employee's restoration to health and employment." As we decided on the last appeal of this case, the compensation

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[3] *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

[4] *Ahmann v. Nebraska Dept. of Corr. Servs.*, 278 Neb. 29, 767 N.W.2d 104 (2009).

court did not rule "one way or the other" on the compensability of possible knee replacement surgery under § 48-120(1)(a) in the original award.[5]

Of the three factors in § 48-120(1)(a), only the second one was contested—whether Pearson's knee replacement surgery was required by the work-related injury. Because the trial court found that Pearson's knee surgery was *not* required by the work-related injury and therefore was not compensable under § 48-120(1)(a), the exact question before the review panel was whether there was sufficient competent evidence to conclude that Pearson's knee surgery was not required by the work-related injury to his right knee.

[3] In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.[6] In this case, ADM—the employer—was the successful party. Thus, we view the evidence in its favor and give it the benefit of all favorable inferences.

Contrary to Pearson's assertion, there was competent evidence to support the finding of the single judge of the Workers' Compensation Court that the knee replacement surgery "was not persuasively established to be the product of the subject accident but, rather, prompted by [his] preexisting degenerative knee condition." The medical records received into evidence included the expert medical opinions of Dr. D.M. Gammel, which opinions directly supported the conclusion that Pearson's knee replacement surgery was necessitated by a preexisting condition and not the work-related accident. About 1 year after the work-related accident, Gammel examined Pearson's right knee and made the following findings: (1) that Pearson "sustained a temporary exacerbation of a pre-existing knee condition," (2) that Pearson "sustained a

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[5] *Pearson v. Archer-Daniels-Midland Milling Co., supra* note 1, 282 Neb. at 406, 803 N.W.2d at 494.

[6] *Straub v. City of Scottsbluff*, 280 Neb. 163, 784 N.W.2d 886 (2010).

right knee strain as a result of the work[-]related injury on 27 October 2006 and his present condition . . . is due to the pre-existing osteoarthritis," (3) that Pearson's knee condition "is a natural progression of [t]he pre-existing condition," (4) that Pearson reached maximum medical improvement in April 2007, (5) that there were no permanent restrictions as a result of the work-related injury, (6) that "any restriction regarding the right knee is related to a pre-existing condition," and (7) that "any further right knee treatment is necessary as a result of the pre-existing condition." Given Gammel's expert medical opinions, the compensation court could reasonably conclude that Pearson's knee replacement surgery was required not by the work-related accident, but, rather, by the preexisting arthritis.

The medical records provide further support for this conclusion. Two other doctors had diagnosed Pearson with arthritis in both knees prior to the work-related injury, although the condition was worse in the right knee than in the left knee. And well after the work-related accident but prior to the knee replacement surgery, Pearson began experiencing symptoms in his left knee that were identical to the symptoms in his right knee. Because Pearson was experiencing identical symptoms in both knees and both knees were affected by arthritis but only one knee was injured in the work-related accident, the Workers' Compensation Court could reasonably infer that the bilateral symptoms persisting long after the accident and up to the time of surgery were caused by the condition affecting both knees—the arthritis—and not by the condition affecting only one of the knees—the injury at work. If the symptoms necessitating surgery were caused by arthritis and not the work-related injury, it necessarily follows that the need for surgery did not result from the work-related injury.

This evidence, when considered in the light most favorable to ADM, tends to establish that Pearson's continuing knee problems following the accident and the symptoms meant to be alleviated by knee replacement surgery were the result of preexisting arthritis and not the work-related injury. Under § 48-120(1)(a), the trial judge of the Workers' Compensation Court could find that Pearson's knee replacement surgery

was compensable only if the procedure was required by the work-related accident. Therefore, there was sufficient competent evidence to support a finding that the surgery did not fall under § 48-120(1)(a), because it was not the result of the work-related injury. The review panel did not err in so concluding.

Pearson spends much of his brief detailing the opinions of other doctors that could support a finding that his right knee replacement surgery *was* a result of the work-related injury. We do not dispute that the opinions of Drs. David Clare and Dennis Bozarth, although less definitive than that of Gammel, could support such a finding. But that is not the proper question before us. We are required to determine whether the evidence was sufficient to support the single judge's decision, not whether the judge could reasonably have decided differently. Pearson argues in effect that the review panel should have reweighed the evidence and that we should do so as well. We decline the invitation.

[4] Our case law is clear that "[t]he single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility."[7] Additionally, a trial judge of the compensation court is "entitled to accept the opinion of one expert over another"[8] and is "not required to take an expert's opinion as binding," but may "either accept or reject such an opinion."[9]

Under these well-established principles, the single judge of the Workers' Compensation Court was not required to accept the testimony of Clare and Bozarth but was free to accept Gammel's opinions. And Gammel's opinions, along with other evidence, provided sufficient competent evidence to support a finding that Pearson's knee replacement surgery was not the

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[7] *Swanson v. Park Place Automotive*, 267 Neb. 133, 141-42, 672 N.W.2d 405, 413 (2003).

[8] *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 739, 743 N.W.2d 82, 89 (2007).

[9] *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 520, 483 N.W.2d 523, 525 (1992).

result of the work-related accident. Because the court found that the surgery did not result from the work-related accident, the surgery was not compensable under § 48-120(1)(a).

[5] The review panel was bound by the well-established rule requiring its deference to the factual findings of the single judge. "If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court."[10] The review panel correctly declined to substitute its view of the evidence and did not err in affirming the trial court's order denying Pearson compensation for his knee replacement surgery.

Consistency With Original Award

Like the previous assignment of error, Pearson's second assignment of error alleges that the review panel erred in affirming the decision of the single judge of the Workers' Compensation Court that the knee replacement surgery was not compensable. Under this assignment of error, however, he argues that it was error to affirm a finding that the surgery was not compensable, because such finding is "contrary to the law in that it is legally inconsistent . . . with the findings of the original decree"[11] and "glosses over the fact that future medical care *has already been awarded*, and [cannot] be read to preclude any type of medical care based on a determination that [Pearson's] injury was a temporary exacerbation."[12]

This argument asks us to contradict the holding of this court in the previous appeal of Pearson's workers' compensation case. In that appeal, we held that Pearson's knee replacement surgery "should be provided at ADM's expense" only "if [the surgery] was due to his compensable injury."[13] In remanding

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[10] *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 783, 775 N.W.2d 179, 185 (2009).

[11] Brief for appellant at 8.

[12] *Id.* at 25 (emphasis in original).

[13] *Pearson v. Archer-Daniels-Midland Milling Co., supra* note 1, 282 Neb. at 406, 803 N.W.2d at 494.

the cause for a determination about Pearson's knee replacement surgery, we also stated:

> This is not to say that the knee replacement is necessarily compensable. Rather, the award should be enforced according to its terms—Pearson was awarded "[a]ny future medical treatment received by [Pearson] which falls under the provisions of § 48-120, and which otherwise satisfies all necessary foundational elements thereto . . . ."[14]

Given our previous holdings, the Workers' Compensation Court was not acting contrary to the original award when it determined that the knee replacement surgery was not compensable under § 48-120 but was actually enforcing the plain language of the original award. Under the original award as interpreted by this court, Pearson was entitled to compensation for future medical treatment only if the treatment met the requirements of § 48-120. Pearson has not asked us to reconsider this holding, nor could we do so under the law-of-the-case doctrine without proof of a material and substantial difference in facts.[15] Thus, it was completely consistent with the original award for the compensation court to conclude that Pearson's knee replacement surgery was not required by the work-related injury and consequently was not compensable under § 48-120.

The original award may have awarded Pearson future medical expenses, but this award was not without restriction and did not entitle Pearson to reimbursement for any expense without question, as he seems to argue. This assignment of error has no merit.

Remaining Assignment of Error

[6] Because we find that there was no error in concluding that the knee replacement surgery was not compensable under § 48-120, there is no need to address Pearson's third assignment of error, which alleges error in failing to award additional indemnity benefits for his right knee surgery in addition

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[14] *Id.* at 408, 803 N.W.2d at 495.

[15] See *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

to reimbursement for the expense of the surgery itself. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[16]

CONCLUSION

Because Gammel's opinions, along with other evidence, provided sufficient competent evidence to support a finding that Pearson's knee replacement surgery was not the result of the work-related accident, the Workers' Compensation Court did not err in finding that Pearson's surgery was not compensable under § 48-120. In so holding, the compensation court was not acting contrary to the original award but was enforcing the award's plain language. Finding no error, we affirm the order of the review panel affirming the denial of compensation for Pearson's knee replacement surgery.

AFFIRMED.

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[16] *Selma Development v. Great Western Bank, ante* p. 37, 825 N.W.2d 215 (2013).

UNITED STATES COLD STORAGE, INC., A NEW JERSEY CORPORATION, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEE AND CROSS-APPELLANT, V. CITY OF LA VISTA, A NEBRASKA MUNICIPAL CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES, AND SANITARY AND IMPROVEMENT DISTRICT NO. 59 OF SARPY COUNTY, NEBRASKA, A NEBRASKA MUNICIPAL CORPORATION, APPELLANT.

831 N.W.2d 23

Filed March 29, 2013. No. S-12-267.

1. **Annexation: Ordinances: Equity: Appeal and Error.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity. 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.
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: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
4. **Municipal Corporations: Annexation.** A municipality may not annex property for revenue purposes only.
5. **Equity: Appeal and Error.** In an equity action, when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
6. **Legislature.** The Legislature is free to create and abolish rights so long as no vested right is disturbed.
7. **Constitutional Law: Words and Phrases.** The type of right that vests can be generally described as an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice. To be considered a vested right, the right must be fixed, settled, absolute, and not contingent upon anything.
8. **Constitutional Law: Property.** With respect to property, a right is considered to be vested if it involves an immediate fixed right of present or future enjoyment and an immediate right of present enjoyment, or a present fixed right of future enjoyment.
9. **Constitutional Law: Property: Legislature.** A vested right must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property. In essence, whether the Legislature acted beyond its power in affecting a right can only be determined after examining the nature of the alleged right and the character of the change in the law.
10. **Constitutional Law: Statutes: Intent: Presumptions.** A vested right can be created by statute. But it is presumed that a statutory scheme is not intended to create vested rights, and a party claiming otherwise must overcome that presumption.
11. **Constitutional Law: Taxation.** As a general rule, exemptions from taxation do not confer vested rights.
12. **Contracts: Statutes: Legislature: Intent: Presumptions.** Although a statute can be the source of a contractual right, a contract will be found to exist only if the statutory language evinces a clear and unmistakable indication that the Legislature intends to bind itself contractually. The general rule is that rights conferred by statute are presumed not to be contractual.
13. **Appeal and Error.** An appellate court may, at its option, notice plain error.
14. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Robert J. Huck and Scott D. Jochim, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellant.

Bryan S. Hatch, of Stinson, Morrison & Hecker, L.L.P., for appellee United States Cold Storage, Inc.

Gerald L. Friedrichsen and William M. Bradshaw, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellees City of La Vista et al.

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

STEPHAN, J.

In this appeal, United States Cold Storage, Inc. (Cold Storage), and Sanitary and Improvement District No. 59 of Sarpy County (SID 59) contend that the district court for Sarpy County erred in rejecting their challenges to separate annexation ordinances enacted by the City of La Vista. We affirm the judgment of the district court.

I. BACKGROUND

Cold Storage is a New Jersey corporation that owns and operates a public refrigerator warehouse facility located in Sarpy County, Nebraska. The City of La Vista is a Nebraska municipal corporation of the first class located in Sarpy County. Doug Kindig is the mayor of La Vista, and Brenda Carlisle, Ron Sheehan, Alan Ronan, Mark Ellerbeck, Mike Crawford, Terrilyn Quick, Kelly Sell, and Anthony Gowan are members of the La Vista City Council. We shall refer to the city and its officers collectively as "La Vista."

In 1969, the owner of a contiguous 210-acre tract of land in Sarpy County petitioned the Sarpy County Board of Commissioners to designate the tract as an industrial area and the board complied.[1] Under § 13-1111, an industrial area is land "used or reserved for the location of industry." At the time of the designation, La Vista's zoning jurisdiction did not reach any part of the industrial area tract. By 1970, the industrial area had an assessed value of more than $100,000. Cold Storage acquired four lots in the industrial area in 1971 and has operated its business there since that time.

[1] See Neb. Rev. Stat. §§ 13-1111 to 13-1120 (Reissue 2012) (formerly Neb. Rev. Stat. §§ 19-2501 to 19-2508 (Cum. Supp. 1969)).

SID 59 was created in 1971 to provide utilities and services to the industrial area. The area of SID 59 is greater than, but includes, the entire industrial area.

On October 6, 2009, La Vista resolved to annex SID 59. On October 8, it sent written notices to the property owners within SID 59 of an October 22 city planning commission public hearing on the proposed annexation. On November 3, La Vista sent written notice to the property owners within SID 59 of a November 17 city council hearing also regarding the annexation of SID 59. On December 1, after conducting the public hearings, La Vista approved an ordinance (ordinance 1107) purporting to annex SID 59 in its entirety.

On December 16, 2009, Cold Storage filed a class action complaint challenging the validity of ordinance 1107 on behalf of itself and all landowners in SID 59. Named defendants were La Vista and SID 59. The complaint alleged that ordinance 1107 was invalid because (1) La Vista failed to comply with statutory notice requirements when adopting it, (2) the annexation was for revenue purposes only, and (3) state law prohibited the annexation of the industrial area within SID 59.

On January 18, 2011, while Cold Storage's challenge to the validity of ordinance 1107 was pending in district court, La Vista directed its planning commission to consider the annexation of only a portion of SID 59; specifically, that portion that did not include the industrial area. On April 19, after giving proper statutory notice of this proposed annexation, La Vista adopted an ordinance (ordinance 1142) purporting to annex the portion of SID 59 that did not include the industrial area.

On April 27, 2011, SID 59 filed a cross-claim in the original action filed by Cold Storage. The cross-claim named La Vista as defendant and challenged the validity of ordinance 1142. Specifically, the cross-claim asserted that La Vista was barred by Neb. Rev. Stat. § 31-765 (Reissue 2008) from attempting a partial annexation of SID 59 via ordinance 1142 while Cold Storage's challenge to the validity of La Vista's total annexation of SID 59 via ordinance 1107 was pending in the courts.

A bench trial on all claims was held in January 2012. On March 6, the district court entered orders finding in favor of

La Vista on all claims. Both Cold Storage and SID 59 filed timely notices of appeal, and we granted SID 59's petition to bypass the Court of Appeals. Because SID 59 filed the initial notice of appeal, Cold Storage is designated as an appellee asserting a cross-appeal pursuant to Neb. Ct. R. App. P. § 2-101(C) (rev. 2010).

II. ASSIGNMENTS OF ERROR

SID 59 assigns, restated and consolidated, that ordinance 1142 is invalid because § 31-765 prohibits a city from passing a partial annexation ordinance involving the same area already included within a prior total annexation ordinance when the validity of the prior ordinance has not been finally determined.

Cold Storage assigns that the district court, with respect to ordinance 1107, erred in (1) finding La Vista properly complied with the statutory notice provisions, (2) not finding Neb. Rev. Stat. § 19-5001(5) (Reissue 2012) unconstitutional, (3) finding La Vista could annex the industrial area without the consent of a majority in value of its property owners, (4) failing to find a 1991 amendment to § 13-1115 unconstitutional as special legislation, and (5) failing to find that La Vista annexed SID 59 for revenue purposes only.

III. STANDARD OF REVIEW

[1] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.[2] 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]

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[4]

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[2] *County of Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456 (2009); *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[3] *Id.*

[4] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012); *Engler v. State*, 283 Neb. 985, 814 N.W.2d 387 (2012).

IV. ANALYSIS

1. Ordinance 1107

In its cross-appeal, Cold Storage asserts five reasons why the district court erred in upholding the validity of ordinance 1107, by which La Vista sought to annex the entirety of SID 59. We shall address each in turn.

(a) Statutory Notice Requirements

Cold Storage contends that ordinance 1107 is invalid because La Vista failed to comply with the statutory notice requirements set forth in § 19-5001. These requirements were enacted in 2009.[5] The city's community development director testified that prior law did not require notice to landowners prior to the commencement of annexation proceedings and that this was her first attempt to comply with the new statutory requirements.

According to § 19-5001(1), "A city of the first or second class or village shall provide written notice of a proposed annexation to the owners of property within the area proposed for annexation . . . ." Section 19-5001(2) requires that notice be sent "by regular United States mail" postmarked "at least ten working days prior to the planning commission's public hearing" on the annexation and that a "certified letter" be sent to the clerk of any affected sanitary and improvement district. Section 19-5001(2) requires that such notice include "the telephone number of the pertinent city or village official and an electronic mail or Internet address if available." Section 19-5001(3) requires that a second notice be sent to the same parties "postmarked at least ten working days prior to the public hearing of the city council or village board on the annexation." This notice also must include the telephone number "and an electronic mail or Internet address if available."

It is undisputed that La Vista did not strictly comply with these notice requirements. It sent notices of the public hearing of the planning commission on October 8, 2009, which date was fewer than 10 working days prior to the hearing on October 22. It then sent notices of the city council meeting

[5] See 2009 Neb. Laws, L.B. 495.

on November 3, which date was fewer than 10 working days prior to the meeting on November 17. La Vista also sent the certified letter to an individual that was not the clerk of SID 59. In addition, the notices included the telephone number of the pertinent city official but did not also include an electronic mail or Internet address.

At trial, city officials explained that the notices were slightly late because they relied on an electronic calendar to determine the 10-day notice period and that the calendar used did not consider either the Columbus Day holiday on October 12 or the Veterans Day holiday on November 11. La Vista also presented evidence that the clerk of SID 59 had actual notice of the planning commission hearing and attended it. And the community development director testified that she misread the statute and thought it required a telephone number *or* an e-mail or Internet address.

La Vista contends that its failure to strictly comply with the requirements of § 19-5001(1) to (3) is forgiven by § 19-5001(5), which provides in part:

> Except for a willful or deliberate failure to cause notice to be given, no annexation decision made by a city of the first or second class or village to accept or reject a proposed annexation, either in whole or in part, shall be void, invalidated, or affected in any way because of any irregularity, defect, error, or failure on the part of the city or village or its employees to cause notice to be given as required by this section if a reasonable attempt to comply with this section was made.

The district court accepted this argument, finding the evidence showed that La Vista's actions were not deliberate or willful and that it made reasonable efforts to comply with the notice provisions.

Based upon our de novo review of the record, we agree. La Vista offered a reasonable explanation as to why the notices were not sent 10 working days prior to the hearings. It is also clear that the notices were sent 9 working days prior to the hearing, and thus everyone affected had reasonable notice. Although the clerk of SID 59 did not receive the proper written notice, he had actual notice of and attended the planning

commission hearing, and thus there was no prejudice to SID 59. In addition, the items that were omitted from the notices, including e-mail and Internet addresses, were relatively minor, in that a telephone number was provided and thus there was an expedient way to contact the relevant official. Although clearly La Vista made numerous errors with respect to the notices, nothing in the evidence supports any finding that it did so willfully or deliberately. The situation before us appears to be precisely the type of notice disparity meant to be resolved by § 19-5001(5). We therefore conclude that ordinance 1107 is not void for lack of notice to the affected property owners.

(b) Constitutionality of § 19-5001(5)

[3] In its brief on cross-appeal, Cold Storage argues that § 19-5001(5) is unconstitutional because it allows a city to annex an area without strictly complying with the annexation statutes. It argues that a municipal corporation has only that power provided by legislative enactment to extend its boundaries and that La Vista thus has to strictly comply with the notice statutes in order to exercise its annexation powers. We need not address this argument, as it was not presented to or decided by the district court. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[6]

(c) Annexation for Revenue Purposes

[4] Cold Storage argues that the district court erred in rejecting its claim that La Vista enacted ordinance 1107 solely for the purpose of obtaining revenue. A municipality may not annex property for revenue purposes only.[7] As the party attacking

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[6] *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011); *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008).

[7] *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved on other grounds, Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004); *S.I.D. No. 95 v. City of Omaha*, 221 Neb. 272, 376 N.W.2d 767 (1985). See, also, *United States v. City of Bellevue, Nebraska*, 334 F. Supp. 881 (D. Neb. 1971), *affirmed* 474 F.2d 473 (8th Cir. 1973).

ordinance 1107, Cold Storage had the burden of proving that La Vista acted pursuant to this impermissible purpose.[8]

Our cases recognize that the legal proscription against annexation for revenue purposes only does not mean that a municipality cannot consider potential revenues in deciding whether to proceed with an annexation. As we noted in *SID No. 57 v. City of Elkhorn*,[9] "[p]rudent annexation planning compels the City to consider any revenue to be engendered by annexation, in light of the liabilities to be incurred." In that case, we rejected a claim that the annexation was solely for revenue purposes, noting that the city would incur "substantial obligations" as a result of the annexation.[10] Similarly, in *S.I.D. No. 95 v. City of Omaha*,[11] we determined that the record did not support a claim that "the city's only objective in annexing the land . . . was to become the recipient of increased revenues, free of corresponding obligations," noting that because the sanitary and improvement district was fully developed, the city would assume all of its bonded indebtedness and the responsibility to provide "necessary improvements and services."

In this case, the record reflects that prior to enacting ordinance 1107, La Vista amended its comprehensive plan to include a new chapter entitled "Annexation Plan." The annexation plan sets forth general considerations for annexation of land within La Vista's extraterritorial jurisdiction and adopts specific annexation policies. Those policies include that La Vista will pursue an annexation program that "adds to the economic stability of the city, protects and enhances its quality of life, and protects its environmental resources." The annexation policies also include the promotion of "orderly growth and the provision of municipal services" and preservation of the city's "fiscal position." The annexation plan

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[8] See *Swedlund v. City of Hastings*, 243 Neb. 607, 501 N.W.2d 302 (1993).

[9] *SID No. 57 v. City of Elkhorn, supra* note 7, 248 Neb. at 489, 536 N.W.2d at 61.

[10] *Id.*

[11] *S.I.D. No. 95 v. City of Omaha, supra* note 7, 221 Neb. at 278-79, 376 N.W.2d at 772.

specifies an annexation study process which includes the preparation of "a plan with complete information on [La Vista's] intentions for extending city services to the land proposed for annexation."

Pursuant to this annexation plan and Neb. Rev. Stat. § 16-117(4) (Reissue 2012), the city's community development director prepared a staff report for the proposed annexation of SID 59 which was submitted to the city council on October 6, 2009. The report identified the street and sewer improvements La Vista would become responsible for in the event of annexation and estimated the maintenance expenses related to those improvements. The report also analyzed how police and fire services would be provided by La Vista to the area under consideration for annexation. It noted that with additional staff, police response time to the annexed areas would improve, and that fire service could be provided with current staff.

In a section titled "Annexation Suitability," the report noted: "[SID 59] is bordered by the City limits on several sides of its perimeter. Annexation would be a logical extension of the city." The city administrator testified that SID 59 was "a big SID" situated "sort of as an island in the city's area." She noted that this had resulted in some confusion about who was responsible for providing certain services such as law enforcement and snow removal. She also explained that annexation of SID 59 was a component of the orderly growth of the city, noting that a portion of SID 59 had been previously annexed and that the city was already providing some services to areas within SID 59.

The report included an analysis of the fiscal impact of annexation prepared by the city's finance director. She testified that upon annexation, the city would assume all debts and obligations of SID 59, including approximately $2.1 million in net bonded debt, and would incur the expense of providing public services to the annexed area. The finance director's analysis included a comparison of the revenue stream which the city would realize from annexation compared to the expense it would incur in the assumption of SID 59's indebtedness. This analysis was favorable to the city, in that it reduced its net

debt-to-valuation ratio which was beneficial to the city's ability to issue bonds.

[5] The district court concluded that Cold Storage had failed to meet its burden of proving that the annexation was solely for the purpose of obtaining revenue, noting that "[t]he evidence indicates that several factors other than revenue were considered and used by La Vista when it decided to proceed forward with the annexation of SID 59." Based upon our review of the evidence, we agree. Revenue was surely a factor, but other factors included the indebtedness which the city would assume by annexation; La Vista's objective of orderly growth; and the perception that annexation of SID 59's territory, which was already surrounded by the city, would improve the provision of services by eliminating jurisdictional issues. Cold Storage argues that the testimony of city officials was inconsistent and therefore should not be given weight. Although our review of this equity matter is de novo, when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[12] We conclude that the district court did not err in concluding that La Vista did not undertake the annexation of SID 59 solely for the purpose of obtaining revenue.

(d) Due Process

Cold Storage also argues that as the owner of property designated as an industrial area, its right to substantive due process would be violated by annexation pursuant to ordinance 1107.

(i) Applicable Statutes

The argument is premised on current and former Nebraska statutes[13] authorizing the creation of an "[i]ndustrial area," which is defined by Nebraska law as "a tract of land used or reserved for the location of industry."[14] Pursuant to § 13-1111,

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[12] See, *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011); *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

[13] See §§ 13-1111 to 13-1120 (Reissue 2012) and 13-1115 (Reissue 1987).

[14] § 13-1111.

> The owner or owners of any contiguous tract of real estate containing twenty acres or more, no part of which is within the boundaries of any incorporated city or village, except cities of the metropolitan or primary class, may file or cause to be filed with the county clerk of the county in which the greater portion of such real estate is situated if situated in more than one county, an application requesting the county board of such county to designate such contiguous tract as an industrial area.

Upon the filing of such an application, the county clerk "shall notify such municipal legislative bodies in whose area of zoning jurisdiction" the proposed industrial area is located and "request approval or disapproval" of the designation of the tract as an industrial area.[15] The approval "may be conditioned upon terms agreed to between the city and county," and if formal reply is not received within 30 days, "the county board shall construe such inaction as approval of such designation."[16]

Prior to 1991, § 13-1115 (Reissue 1987) provided that if a tract designated as an industrial area

> shall have an actual valuation of more than two hundred eighty-six thousand dollars, it shall not be subject to inclusion within the boundaries of any incorporated first- or second-class city or village unless so stipulated in the terms and conditions agreed upon between the county and the city or village in any agreement entered into pursuant to section 13-1112 or unless the owners of a majority in value of the property in such tract as shown upon the last preceding county assessment roll shall consent to such inclusion in writing or shall petition the city council or village board to annex such area.

But in 1991, § 13-1115 was amended to add a third circumstance which would permit annexation of an industrial area. The new language provided that an industrial area "regardless of actual valuation may be annexed if (1) it is located in a county with a population in excess of one hundred thousand persons and the city or village did not approve the original

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[15] § 13-1112.

[16] *Id.*

designation of such tract as an industrial area pursuant to section 13-1112."[17]

Both conditions of § 13-1115(1) are met in this case. The parties have stipulated that Sarpy County, in which the industrial area is located, had a population in excess of 100,000 in both 1990 and 2010. Section 13-1112 provides that municipal legislative bodies "in whose area of zoning jurisdiction an industrial tract is located" must be given an opportunity to approve or disapprove of the formation of an industrial area. Because the property was not within the city's zoning jurisdiction at the time that the industrial area was formed, La Vista could not and therefore did not approve of the formation within the meaning of §§ 13-1112 and 13-1115. Accordingly, we agree with the district court that § 13-1115(1) would permit the annexation contemplated by ordinance 1107 if that statute can be constitutionally applied in this case. We turn, now, to that question.

(ii) Vested Right

It is undisputed that under § 13-1115 as it was written prior to 1991, La Vista could not have annexed the industrial area within SID 59, because the area had an actual valuation of more than $286,000 and there was neither a stipulation pursuant to § 13-1112 nor consent of the owners of a majority in value of the property. But as we have noted, the 1991 amendment to § 13-1115 would permit annexation of the industrial area at issue here without either the stipulation or the consent of the property owners. Cold Storage contends that it had a vested right under pre-1991 law that its property could not be annexed without its consent and that therefore, application of the 1991 amendment to § 13-1115 to justify annexation of the industrial area would deprive it of substantive due process.

[6-10] The Legislature is free to create and abolish rights so long as no vested right is disturbed.[18] Thus, the question presented here is whether § 13-1115 as it was written prior

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[17] See 1991 Neb. Laws, L.B. 76, § 1.

[18] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006); *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989).

to the 1991 amendment created a constitutionally protected "vested right." The type of right that "vests" can be generally described as "an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice."[19] To be considered a vested right, the right must be "fixed, settled, absolute, and not contingent upon anything."[20] With respect to property, a right is considered to be "vested" if it involves "an immediate fixed right of present or future enjoyment and an immediate right of present enjoyment, or a present fixed right of future enjoyment."[21] A vested right "must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property."[22] In essence, whether the Legislature acted beyond its power in affecting a right can only be determined after examining the nature of the alleged right and the character of the change in the law.[23] A vested right can be created by statute.[24] But it is presumed that a statutory scheme is not intended to create vested rights, and a party claiming otherwise must overcome that presumption.[25]

Cold Storage argues that its claimed right to be free from annexation is analogous to a property owner's right not to have existing zoning ordinances changed in a manner that alters the permissible use of the property. We have held that a zoning ordinance cannot take away a vested property right.[26]

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[19] 16B Am. Jur. 2d *Constitutional Law* § 746 at 190 (2009).

[20] *Id*. at 191.

[21] *Id*.

[22] *Id*., § 748 at 193.

[23] See *id*., § 746.

[24] *Id*., § 747.

[25] *Id*. See, *Koster v. City of Davenport, Iowa*, 183 F.3d 762 (8th Cir. 1999); *Doe v. California Dept. of Justice*, 173 Cal. App. 4th 1095, 93 Cal. Rptr. 3d 736 (2009).

[26] *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949); *Cassel Realty Co. v. City of Omaha*, 144 Neb. 753, 14 N.W.2d 600 (1944); *Baker v. Somerville*, 138 Neb. 466, 293 N.W. 326 (1940).

Specifically, once a property owner has put property to a use authorized by existing zoning laws, the zoning laws cannot be changed to disallow that use.[27] But subjecting Cold Storage's property to annexation does not affect its use. As the district court noted, annexation would not change the permissible use of the property in question. Thus, we do not view the 1991 statutory amendment at issue here as analogous to a change in zoning laws.

The principal effect of annexation on Cold Storage is that its property would no longer be subject to taxation by SID 59, but would instead become subject to taxation by La Vista. Thus, the true nature of the vested right claimed by Cold Storage is the "benefit," specifically lower taxes, accruing from not being subject to taxation by La Vista. The question, then, is whether a right to what is in essence a partial statutory exemption from taxation is a vested right which cannot be subsequently taken away by the Legislature.

[11] As a general rule, exemptions from taxation do not confer vested rights.[28] We addressed the issue in *State, ex rel. Spelts, v. Rowe*.[29] There, at the time a landowner mortgaged his land, a 1911 statute valued his taxable interest in the land at $412.50. In 1919, the statute was amended so that his taxable interest became $16,250. He claimed that the amendment could not be applied to him, arguing in part that to do so would destroy a vested right. In rejecting this argument, this court reasoned that the power of taxation is a necessary attribute of sovereignty and that it was vested in the Legislature without limit. We further noted that in the 1911 statute, the Legislature did not contract or agree that the tax conditions would not change. We held:

> [W]here a part of the property within the state is not being taxed, in whole or in part, there is no pledge or agreement, expressed or implied, that the laws shall not be repealed or amended by a subsequent legislature to

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[27] See *id.*

[28] 16A C.J.S. *Constitutional Law* § 395 (2005).

[29] *State, ex rel. Spelts, v. Rowe*, 108 Neb. 232, 188 N.W. 107 (1922).

> meet the conditions which exempted the property from taxation and the placing of it on the tax list.[30]

We reasoned that the 1911 statute was "general in its effect, and was subject to repeal or amendment at legislative will."[31]

The Supreme Court of Iowa addressed an analogous case in *Shiner v. Jacobs et al., Township Trustees*.[32] An Iowa law provided that for every acre of forest trees planted on land, the landowner would receive a tax exemption of $100 for 10 years. After a landowner planted trees on his land, the law was amended to provide that the exemption could not exceed "'one-half of the valuation of the realty'" upon which it was claimed.[33] The landowner sued, arguing the amendment could not apply to him "because, when he accepted the terms of the original statute and complied with its requirements, his right to exemption from taxation to the extent of $100 per acre for ten years became complete."[34] The Supreme Court of Iowa rejected the argument, reasoning that the exemption was provided for in an act of general legislation that was applicable to all lands in the state. It found that the law was not in any manner a contract between the state and a landowner that availed himself of its provisions and reasoned it was "well settled" that "where an exemption from taxation is provided for by the general laws of the state, any subsequent legislature is not thereby deprived of the power to alter the law and remove the exemption."[35]

The U.S. Supreme Court has addressed a similar situation. In *Salt Company v. East Saginaw*,[36] a Michigan law passed in 1859 provided that all corporations formed for the purpose of boring for and manufacturing salt would be exempt from

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[30] *Id.* at 237, 188 N.W. at 109.

[31] *Id.*

[32] *Shiner v. Jacobs et al., Township Trustees*, 62 Iowa 392, 17 N.W. 613 (1883).

[33] *Id.* at 393, 17 N.W. at 613.

[34] *Id.*

[35] *Id.* at 393-94, 17 N.W. at 613.

[36] *Salt Company v. East Saginaw*, 80 U.S. 373, 374, 20 L. Ed. 611 (1871).

paying taxes on "'[a]ll property, real and personal'" "'for any purpose.'" The law also paid a "'bounty'" of 10 cents for each bushel of salt produced once 5,000 bushels were manufactured.[37] In 1861, the act was amended to limit the tax exemption to a period of 5 years and limited the total bounty possible to $5,000. A company that had organized and operated under the 1859 law sued, arguing the amendments could not be applied to it. The Supreme Court disagreed, reasoning the law was simply "a general law, regulative of the internal economy of the State" and, as such, subject to repeal and alteration at the whim of the legislature.[38]

We find nothing in the language of the pre-1991 version of § 13-1115 which would constitute a pledge by the Legislature that the circumstances under which property in an industrial area could be annexed would never be altered by an amendment to the statute. Accordingly, the former statute created no constitutionally protected vested right which would preclude application of the amended statute.

(iii) Impairment of Contract

[12] Cold Storage makes a related argument that the annexation would impair its contractual right arising from the pre-1991 version of § 13-1115. Although a statute can be the source of a contractual right, a contract will be found to exist only if the statutory language "evince[s] a clear and unmistakable indication that the legislature intends to bind itself contractually."[39] The general rule is that rights conferred by statute are presumed not to be contractual.[40]

For the same reason that we concluded the prior version of the statute created no vested right, we conclude it created no contractual right. We find nothing in the statutory language indicating intent on the part of the Legislature to be contractually bound with the landowners in a designated industrial

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[37] *Id.*

[38] *Id.*, 80 U.S. at 378.

[39] 16B Am. Jur. 2d, *supra* note 19, § 770 at 214.

[40] *Id.*

area, or any corresponding duty on the part of landowners in the industrial area that could be construed as the landowners' part of the contract with the state.

(iv) Retroactivity

We find no merit in Cold Storage's argument that § 13-1115 cannot be applied retroactively to authorize the annexation of its property. As noted, the Legislature had the authority to change the law in 1991 and that change applies to Cold Storage because it had no vested or contractual right prior to that change. Applying a change in the law that was made in 1991 to an annexation ordinance adopted in 2009 does not constitute a retroactive application. What Cold Storage characterizes as a retroactivity argument is subsumed within the question of whether application of § 13-1115 as amended would deprive Cold Storage of a vested or contractual right. For the reasons discussed above, we conclude that it would not.

(e) Special Legislation

On appeal, Cold Storage argues that to the extent the 1991 amendment to § 13-1115 can be read to authorize the annexation of its property without its consent, the statute is void as unconstitutional special legislation, in violation of article III, § 18, of the Nebraska Constitution. But this argument is not properly preserved for our review. In its complaint, Cold Storage did not challenge the 1991 amendment to § 13-1115 as unconstitutional special legislation. At trial, Cold Storage did not advise the court that it was challenging § 13-1115 as unconstitutional special legislation. And not surprisingly, the district court did not address any issue of special legislation in its order dismissing the complaint. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[41]

For completeness, we note that in its answer to the complaint, La Vista asserted that §§ 13-1111 to 13-1120, including § 13-1115, are special legislation. However, this claim appears

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[41] *Shepherd v. Chambers, supra* note 6; *Niemoller v. City of Papillion, supra* note 6.

to have been abandoned by the time of trial and, in any event, does not raise the specific constitutional issue which Cold Storage now asks us to decide. Accordingly, we conclude that Cold Storage, as the party which would have had the burden of proving the statute unconstitutional, did not present the question to the district court for disposition and has not preserved the issue for appeal.

[13,14] An appellate court may, at its option, notice plain error.[42] 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.[43] We find no such error in this case. Accordingly, we do not reach Cold Storage's special legislation claim.

(f) Summary

For the reasons discussed above, we find no merit in any of the assignments of error asserted by Cold Storage in its cross-appeal.

2. Ordinance 1142

The appeal of SID 59 is focused solely on ordinance 1142, by which La Vista sought to annex that portion of SID 59 that did not include the industrial area. SID 59 contends that ordinance 1142 is void because La Vista purported to adopt it while Cold Storage's challenge to ordinance 1107 was pending in the court.

The argument is premised on § 31-765, which must be read in context with other statutes relating to the annexation of sanitary and improvement districts. Neb. Rev. Stat. § 31-763 (Reissue 2008) details what is to occur "[w]henever any city or village annexes all the territory within the boundaries of any sanitary and improvement district . . . ." In that circumstance,

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[42] *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001).

[43] *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007); *Zwygart v. State*, 270 Neb. 41, 699 N.W.2d 362 (2005).

§ 31-763 provides that the sanitary and improvement district "shall merge" with the city or village. Section 31-765 then explains:

> The merger shall be effective thirty days after the effective date of the ordinance annexing the territory within the district; *Provided*, if the validity of the ordinance annexing the territory is challenged by a proceeding in a court of competent jurisdiction, the effective date of the merger shall be thirty days after the final determination of the validity of the ordinance. . . . [*T*]*he trustees or administrator of a sanitary and improvement district shall continue in possession and conduct the affairs of the district until the effective date of the merger, but shall not during such period levy any special assessments after the effective date of annexation*.

(Emphasis supplied.) Neb. Rev. Stat. § 31-766 (Reissue 2008) sets forth the procedures for dividing assets, liabilities, maintenance, and other obligations of the district and for changing the district's boundaries if "only a part of the territory within any sanitary and improvement district" "is annexed by a city or village."

SID 59 contends that in the circumstances of this case, where ordinance 1107 was pending in court, the italicized language of § 31-765 imposed an affirmative statutory limitation on La Vista's power to annex. La Vista contends that the language simply stays any proposed merger until a court can determine the validity of the challenged ordinance and does not in any way impose an additional statutory limitation on its power to annex.

The district court concluded La Vista was correct. And based on the plain language of § 31-765, read in light of that entire section and its placement in the statutes governing annexations of sanitary and improvement districts, we agree. It is quite clear that the purpose of the language in § 31-765 is simply to stay the effect of the proposed merger—here, the one effectuated by ordinance 1107—until a court can make a determination on the merits. Section 31-765 does not void ordinance 1142. Of course, because we have upheld the validity of ordinance 1107,

the validity and implementation of ordinance 1142 may be a moot point.

V. CONCLUSION

For the reasons discussed, we conclude that the district court did not err in upholding the validity of both ordinance 1107 and ordinance 1142 adopted by La Vista for the annexation of SID 59. We therefore affirm the judgments of the district court.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

VKGS, LLC, DOING BUSINESS AS VIDEO KING, A DELAWARE LIMITED LIABILITY COMPANY, APPELLANT, V. PLANET BINGO, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, AND MELANGE COMPUTER SERVICES, INC., A MICHIGAN CORPORATION, APPELLEES.

828 N.W.2d 168

Filed March 29, 2013. No. S-12-340.

1. **Judgments: Jurisdiction.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
4. **Judgments: Jurisdiction: Appeal and Error.** An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.
5. **Pleadings: Affidavits: Appeal and Error.** If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
6. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
7. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether

the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.

8. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2008), provides that a court may exercise personal jurisdiction over a person who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.
9. **Jurisdiction: States: Legislature: Intent.** It was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents under Nebraska's long-arm statute.
10. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
11. **Due Process: Jurisdiction: States.** When a state construes its long-arm statute to confer jurisdiction to the fullest extent permitted by the Due Process Clause, the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process.
12. ____: ____: ____. To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
13. ____: ____: ____. The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
14. **Jurisdiction: States.** Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.
15. **Due Process: Jurisdiction: States: Appeal and Error.** In analyzing personal jurisdiction, an appellate court considers the quality and type of the defendant's activities in deciding whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.
16. **Jurisdiction: States.** In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in continuous and systematic general business contacts with the forum state.
17. ____: ____. If a defendant's contacts are neither substantial nor continuous and systematic and instead the cause of action arises out of or is related to the defendant's contacts with the forum state, a court may assert specific jurisdiction over the defendant, depending upon the nature and quality of such contact.
18. ____: ____. If the district court finds the necessary minimum contacts to support the exercise of personal jurisdiction, the court must then weigh the facts of the case to determine whether the exercise of personal jurisdiction would comport with fair play and substantial justice.

19. ____: ____. In determining whether the exercise of personal jurisdiction would comport with fair play and substantial justice, an appellate court may consider the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.
20. ____: ____. Where a defendant, who purposefully has directed its activities at forum residents, seeks to defeat jurisdiction, that defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.
21. ____: ____. A state generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Reversed and remanded for further proceedings.

Paul J. Gardner and Kevin J. McCoy, of Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., for appellant.

Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

VKGS, LLC, doing business as Video King, filed suit against Planet Bingo, LLC, and Melange Computer Services, Inc. (Melange), in the Douglas County District Court. Planet Bingo and Melange filed a motion to dismiss for lack of personal jurisdiction, which motion was granted. Video King now appeals.

FACTS

Video King was founded in 1992 by Stuart Entertainment, a gaming conglomerate, to develop, manufacture, and distribute electronic bingo equipment. In 2005, Video King was conveyed to VKGS, LLC, in a spinoff transaction, but continued to do business under the name "Video King." Video King's principal place of business is located in Omaha, Nebraska.

Since 2000, Video King and Melange have had a business relationship. Melange is a Michigan corporation formed in 1989 and has a principal place of business in Lansing, Michigan. Melange was the developer of a software program known as EPIC. On September 1, 2005, Video King and Melange entered into an agreement regarding the use of EPIC on Video King's electronic bingo equipment. Subsequent amendments to this agreement were entered into in 2007, 2008, 2009, 2011, and 2012. Per this continuing agreement, Video King and Melange conducted day-to-day business together, including communication via telephone, e-mail, reports, face-to-face meetings, and conferences.

In 2006, Melange was acquired by Planet Bingo and became a wholly owned subsidiary of Planet Bingo (hereinafter, Melange and Planet Bingo will be collectively referred to as "Planet Bingo").

At a time not specified by the record, Video King began developing its own software for electronic bingo equipment, called OMNI. Concerned that Video King improperly used Melange's confidential information to design bingo software, Planet Bingo filed suit against Video King in the U.S. District Court for the Western District of Michigan in May 2011. Planet Bingo alleged breach of contract, unfair competition, and unjust enrichment.

On October 5, 2011, a hearing was held on a motion filed by Planet Bingo for expedited discovery. At that hearing, the magistrate judge questioned whether there was federal diversity jurisdiction and ordered the parties to show cause why the case should or should not be dismissed for lack of diversity jurisdiction. On December 21, the case was dismissed on those grounds.

However, on December 13, 2011, prior to dismissal in federal court, Video King filed an action for declaratory judgment against Planet Bingo in the Douglas County District Court. That action sought a declaration of the rights, status, and other legal obligations of the parties with respect to confidentiality agreements between the parties. Additionally, on December 20, Planet Bingo refiled its action in the Michigan state court system. The complaint noted the dismissal of the

federal case as well as the pending Nebraska action filed by Video King.

On January 13, 2012, in the district court for Douglas County, Planet Bingo filed a motion to dismiss for lack of personal jurisdiction. That motion was granted, and the action was dismissed. In dismissing the action, the district court noted that both Planet Bingo and Melange were foreign corporations with no agent for service of process in Nebraska, that neither was registered to do business in Nebraska or required to pay taxes in Nebraska, that neither maintained any bank or financial accounts or owned any real estate in Nebraska, and that neither shipped any physical product or services to Nebraska. The district court also found that the cause of action was based upon the OMNI system, which the court found was unrelated to the earlier contacts between Planet Bingo and Video King. Video King appeals.

ASSIGNMENT OF ERROR

Video King assigns as error the district court's finding that it lacked personal jurisdiction over Planet Bingo.

STANDARD OF REVIEW

[1-3] When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.[1] When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.[2]

[4,5] An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.[3] If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look

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[1] *S.L. v. Steven L.*, 274 Neb. 646, 742 N.W.2d 734 (2007).

[2] *Id.*

[3] *Id.*

at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.[4]

ANALYSIS

Video King argues that the district court erred in finding that the State of Nebraska lacked personal jurisdiction over Planet Bingo. It argues that Planet Bingo had sufficient minimum contacts with Nebraska to establish personal jurisdiction.

[6,7] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.[5] Before a Nebraska court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether our long-arm statute is satisfied and, if our long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and Nebraska for personal jurisdiction over the defendant without offending due process.[6]

Long-Arm Statute.

[8-11] Nebraska's long-arm statute provides: "A court may exercise personal jurisdiction over a person . . . [w]ho has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States."[7] It was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents under Nebraska's long-arm statute.[8] Nebraska's long-arm statute, therefore, extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.[9] "[W]hen a state construes its long-arm

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[4] *Id.*

[5] *Id.*; *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006); *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

[6] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, 269 Neb. 222, 691 N.W.2d 147 (2005).

[7] Neb. Rev. Stat. § 25-536 (Reissue 2008).

[8] *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

[9] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

statute to confer jurisdiction to the fullest extent permitted by the due process clause, . . . the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process."[10] Therefore, the issue is whether Planet Bingo had sufficient contacts with Nebraska so that the exercise of personal jurisdiction would not offend federal principles of due process.

Minimum Contacts.

[12-14] Therefore, we consider the kind and quality of Planet Bingo's activities to decide whether it has the necessary minimum contacts with Nebraska to satisfy due process. To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.[11] The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.[12] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.[13]

[15,16] In analyzing personal jurisdiction, we consider the quality and type of the defendant's activities in deciding whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.[14] A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise

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[10] *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 818 (8th Cir. 1994).

[11] See *S.L. v. Steven L., supra* note 1.

[12] *Id.*

[13] See *id.*

[14] *Id.*

directly out of the defendant's contacts with the forum state if the defendant has engaged in "'"'"continuous and systematic general business contacts'"'" with the forum state.[15]

[17] But if the defendant's contacts are neither substantial nor continuous and systematic, as Video King essentially concedes is the case here, and instead the cause of action arises out of or is related to the defendant's contacts with the forum state, a court may assert specific jurisdiction over the defendant, depending upon the nature and quality of such contact.[16]

This court was faced with a similar set of facts in *Crete Carrier Corp. v. Red Food Stores*.[17] Crete Carrier Corporation (Crete Carrier), a Nebraska corporation with its principal place of business in Nebraska, entered into a transportation contract with Red Food Stores, Inc. Red Food Stores did not own property in Nebraska, did not have any business locations in Nebraska, and had never paid taxes in Nebraska, and had never authorized an agent to accept service of process in Nebraska. The record further established that the contract between the parties was not negotiated in Nebraska and that no representative was ever sent to Nebraska to negotiate or otherwise deal with Crete Carrier.

This court noted that "[w]hen dealing with contracts, it is the prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing, that must be evaluated in determining whether a defendant purposefully established minimum contacts within the forum."[18] Thus, while the existence of a contract with a party in the forum state alone would not support the necessary contacts for a finding of specific personal jurisdiction, and the mere use of interstate facilities, such as telephone, mail, or fax machines would be insufficient to confer jurisdiction,[19]

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[15] *Id.* at 652, 742 N.W.2d at 741.

[16] *Quality Pork Internat. v. Rupari Food Servs., supra* note 8.

[17] *Crete Carrier Corp. v. Red Food Stores*, 254 Neb. 323, 576 N.W.2d 760 (1998).

[18] *Id.* at 330, 576 N.W.2d at 765-66.

[19] *Crete Carrier Corp. v. Red Food Stores, supra* note 17.

either could "count toward the minimum contacts that support jurisdiction,"[20] regardless of the absence of a party from the forum state.

We then concluded Nebraska did have personal jurisdiction over Red Food Stores, stating:

> The instant case does not present an issue where jurisdiction is sought on the basis of a single contract or a few contacts. Rather, Red Food Stores and BI-LO, both corporations, engaged in an ongoing contractual and business relationship with Crete Carrier, another corporation, over a period of years. As part of this relationship, Red Food Stores continually made contact with citizens of Nebraska in order to carry out its business with Crete Carrier. Considering the quality and nature of such contacts, these activities are far from being contacts based on the unilateral activities of someone other than Red Food Stores; neither are they random, fortuitous, or attenuated. Rather, Red Food Stores and BI-LO actively created continuing relationships and obligations with Nebraska citizens. Furthermore, Crete Carrier's cause of action arises directly out of those contacts.[21]

In reaching its decision, this court did not specify whether it was finding general or specific personal jurisdiction.

Another relevant case is *Castle Rose v. Philadelphia Bar & Grill*.[22] In that case, the predecessor of Castle Rose, Inc., was engaged in the development of food service operations and franchised various food service enterprises. Castle Rose's primary place of business was in Nebraska. Castle Rose was informed that Paul Kogel was interested in opening a franchise in Arizona. A Castle Rose representative visited Kogel in Arizona on several occasions. Kogel and an associate visited Nebraska on at least two occasions but did not meet with anyone from Castle Rose on those visits. Kogel also sent financial information to Nebraska.

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[20] *Id*. at 330, 576 N.W.2d at 765.

[21] *Id*. at 331-32, 576 N.W.2d at 766.

[22] *Castle Rose v. Philadelphia Bar & Grill*, 254 Neb. 299, 576 N.W.2d 192 (1998).

Eventually Castle Rose and Kogel entered into a franchise agreement. Castle Rose later sued Kogel and his corporation for breach of contract. We concluded that "[b]y entering into the franchise agreement, the Arizona corporation deliberately 'reached out' beyond Arizona and created a long-term relationship with and voluntarily assumed obligations with Castle Rose under a contract which has a substantial connection to Nebraska."[23] We also noted that the facts were very similar to those of the U.S. Supreme Court's decision in *Burger King Corp. v. Rudzewicz*,[24] making the result one of "little doubt."[25] Again, we did not explain whether the personal jurisdiction conferred was general or specific.

We did, however, address whether the district court had general or specific personal jurisdiction in *Quality Pork Internat. v. Rupari Food Servs*.[26] In that case, Quality Pork International (Quality Pork), a Nebraska resident, entered into an agreement (arranged by a broker) with Rupari Food Services, Inc. (Rupari), for Quality Pork to ship products to Star Food Processing, Inc. (Star). Quality Pork had previously done business with Star, but Star had failed to pay and Quality Pork discontinued the relationship. It was only Rupari's promise to pay that induced Quality Pork to recommence shipments to Star. But Rupari eventually also failed to pay, and Quality Pork sued in Nebraska.

We acknowledged that Rupari had no physical presence in Nebraska, but that our courts nevertheless had specific personal jurisdiction, because Rupari induced Quality Pork to send products to Star and Quality Pork's claim for nonpayment arose out of those contacts. We held that by purposefully conducting business with Quality Pork, Rupari could reasonably anticipate that it might be sued in Nebraska if it failed to pay for products ordered from Quality Pork.

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[23] *Id.* at 306, 576 N.W.2d at 197.

[24] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

[25] *Castle Rose v. Philadelphia Bar & Grill, supra* note 22, 254 Neb. at 306, 576 N.W.2d at 197.

[26] *Quality Pork Internat. v. Rupari Food Servs., supra* note 8.

In *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*,[27] we concluded that Nebraska did not have specific personal jurisdiction over an insurance company that insured a Wyoming resident injured in an accident in Nebraska. The insurance company was not authorized or licensed to sell insurance in Nebraska and had never sold insurance in Nebraska; did not have property, employees, bank accounts, offices, telephone listings, or an agent for service of process in Nebraska; had never advertised or solicited business in Nebraska; and did not derive income from Nebraska. The plaintiff worked in Nebraska, and her insurance agent was aware of that fact. But we concluded that any contacts the insurance company had with Nebraska were due to the unilateral actions of another and were insufficient to confer personal jurisdiction over the company in Nebraska.

Here, it is undisputed that Planet Bingo is not a Nebraska corporation, does not have a principal place of business in Nebraska, and does not have a Nebraska agent for service of process. It is also undisputed that no representative from Planet Bingo or Melange ever entered Nebraska for the purpose of negotiating the original 2005 agreement or any of its five amendments.

However, there are substantial Nebraska connections. Planet Bingo and Video King have had an ongoing business relationship since 2000 that involves seven separate contracts, amendments, and/or addendums, including one signed by the parties during the pendency of this litigation. Planet Bingo was, of course, aware that Video King was located in Nebraska and that many of its representatives contacted Video King in Nebraska in order to conduct such business. From the record, it appears that this contact consisted of day-to-day business beginning in about 2000, the negotiation of the 2005 agreement and its amendments, and the failed attempt by Video King in 2006 to acquire Melange. In fact, the affidavits indicate that these contacts involved monthly communication via telephone, e-mail, reports, face-to-face meetings, and conferences. By entering into these agreements, Planet Bingo

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[27] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 6.

has deliberately reached out beyond Michigan and created a long-term relationship. By doing so, it has voluntarily assumed obligations with Video King under a contract which has a substantial connection to Nebraska. The U.S. Supreme Court has held that "[j]urisdiction in these circumstances may not be avoided merely because the defendant did not *physically* enter the forum State."[28]

Additionally, there is evidence suggesting that Planet Bingo did have a physical presence in the State of Nebraska. The record shows that Planet Bingo's head of sales is an Omaha resident. Planet Bingo contends that he lives in, but does not do business out of, Nebraska. Rather, Planet Bingo contends that in his position, he is constantly traveling. However, the record also contains an affidavit from the president of a Nebraska distributor of bingo equipment, who avers that Planet Bingo's head of sales solicited business in Nebraska. He also avers that the president of Planet Bingo, as well as the head of sales, continued to solicit his Nebraska distributing business via e-mail and telephone.

Therefore, the district court erred in finding that Planet Bingo did not have sufficient minimum contacts with the State of Nebraska. The record establishes that Planet Bingo knowingly and deliberately created continuing relationships and obligations with Video King, a company that does business out of Nebraska. Based on these contacts, Planet Bingo should have reasonably anticipated being haled into a Nebraska court.

Fair Play and Substantial Justice.

[18-20] Having concluded that Planet Bingo had the necessary minimum contacts to support the exercise of personal jurisdiction in Nebraska over Planet Bingo, we must next weigh the facts of the case to determine whether the exercise of personal jurisdiction would comport with "'"fair play and substantial justice."'"[29] In doing so, we may consider the burden

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[28] *Burger King Corp. v. Rudzewicz*, *supra* note 24, 471 U.S. at 476 (emphasis in original).

[29] *Crete Carrier Corp. v. Red Food Stores, supra* note 17, 254 Neb. at 332, 576 N.W.2d at 767.

on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.[30] These "'other considerations'" sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.[31] In addition, where, as here, a defendant, who purposefully has directed its activities at forum residents, seeks to defeat jurisdiction, that defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.[32]

With the increasing nationalization of commerce and the ease of modern communication, defense of an action is less burdensome in a state where one engages in economic activity.[33] We recognized as early as 1987 a discernible trend toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.[34]

Planet Bingo has failed to present a compelling case that jurisdiction here would be unreasonable. The record is largely devoid of any evidence or specific argument by Planet Bingo of the burden imposed upon it if it would have to litigate this action in Nebraska, though it generally argues in its brief that it would be a burden. This is insufficient to meet its heavy burden of demonstrating an absence of fairness and a lack of substantial justice.[35]

[21] Furthermore, as was noted by the U.S. Supreme Court in *Burger King Corp. v. Rudzewicz*[36] and by this court in *S.L. v. Steven L.*,[37] Nebraska has a significant interest in adjudicating

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003).

[34] *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987).

[35] See *Crete Carrier Corp. v. Red Food Stores, supra* note 17.

[36] *Burger King Corp. v. Rudzewicz, supra* note 24.

[37] *S.L. v. Steven L., supra* note 1.

the dispute, inasmuch as a state "'generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.'"[38] Although Michigan may also have an interest in a fair and efficient resolution of this controversy, its interest does not outweigh that of Nebraska.

Considering all relevant factors, we conclude that Nebraska's exercise of specific personal jurisdiction over Planet Bingo in this action would not offend notions of fair play and substantial justice.

CONCLUSION

Based upon our independent review of the complaint and affidavits, viewed in a light most favorable to Video King, we conclude that the district court for Douglas County has specific personal jurisdiction over Planet Bingo and that it erred in granting Planet Bingo's motion to dismiss. Further, we find that Nebraska's exercise of specific personal jurisdiction over Planet Bingo in this action would not offend notions of fair play and substantial justice. Accordingly, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MILLER-LERMAN, J., participating on briefs.

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[38] *Id.* at 659, 742 N.W.2d at 745.

STATE OF NEBRASKA, APPELLEE, V.
JOE J. POLICKY, APPELLANT.
828 N.W.2d 163

Filed March 29, 2013. No. S-12-533.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below.
2. **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.

3. **Motor Vehicles: Licenses and Permits: Revocation: Sentences.** A sentence to a 15-year period of license revocation is mandatory for all persons who commit the offense of driving while their licenses are revoked.
4. **Sentences.** Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.
5. **Prior Convictions: Motor Vehicles: Sentences.** Motorists committing multiple violations should not expect a sanction equivalent to that imposed on a motorist committing a unitary violation.
6. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott 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

Neb. Rev. Stat. § 60-6,197.06 (Reissue 2010) states that when a defendant has been found guilty of operating a motor vehicle while his or her operator's license has been revoked, the court shall, as part of the judgment of conviction, revoke the operator's license "for a period of fifteen years from the date ordered by the court." Section 60-6,197.06 provides further that "[s]uch revocation and order shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked." The defendant asserts that under the plain language of § 60-6,197.06, the court cannot order commencement of the 15-year revocation for any date other than the date of sentencing, the date of final judgment upon appeal or review, or the date any probation is revoked. According to the defendant, a court cannot order a 15-year license revocation to be consecutive to the unexpired period of revocation under which the defendant

committed the offense of driving with a revoked license. We disagree.

BACKGROUND

In 2003, Joe J. Policky was convicted of driving under the influence, third offense. He was sentenced to a 15-year license revocation, which began on August 29, 2003, and is to continue until August 29, 2018. On August 25, 2011, Policky was found operating a motor vehicle. This led to the current charge and conviction of driving during revocation, first offense. Policky pleaded no contest, and pursuant to § 60-6,197.06, the court ordered that Policky's license be revoked for 15 years consecutive to the revocation that is due to come to an end in August 2018. Policky appeals the sentence.

ASSIGNMENT OF ERROR

Policky assigns that the trial court erred in ordering that the 15-year license revocation sentence be consecutive to the 15-year license revocation previously imposed against him.

STANDARD OF REVIEW

[1] The issue raised by Policky's assignment of error presents a question of law, in connection with which an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below.[1]

[2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[2]

ANALYSIS

[3,4] A sentence to a 15-year period of license revocation is mandatory for all persons who commit the offense of driving while their licenses are revoked.[3] And, generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently

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[1] See *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

[2] *State v. Castillas, ante* p. 174, 826 N.W.2d 255 (2013).

[3] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008).

or consecutively.[4] Policky argues that the plain language of § 60-6,197.06, however, serves to limit the trial court's discretion. He asserts that the trial court erred as a matter of law in ordering his mandatory 15-year license revocation to be consecutive to the 15-year license revocation imposed for a prior offense. We affirm the sentence.

Section 60-6,197.06 states in relevant part:

> [T]he court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01. Such revocation and order shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked.

Policky focuses both on the phrase "from the date ordered by the court" and on the last sentence stating that the revocation "shall be administered upon sentencing." According to Policky, this last sentence limits "the date ordered by the court" to either the date of the sentencing order, the date of the final judgment after appeal of that order, or the date that any probation is revoked.

This court and the Nebraska Court of Appeals have several times addressed the phrase "from the date ordered by the court" and concluded it plainly means the revocation period shall commence from whatever date the court, in its sound discretion, indicates in the sentencing order.[5] Our courts have explained that the phrase "ordered by the court" directly follows and modifies the word "date."[6] And the verb "ordered" in this context has an entirely different meaning from the noun "order," which is the document imposing the sentence.[7] Thus,

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[4] See *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[5] See, *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009); *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009); *State v. Richardson*, 17 Neb. App. 388, 763 N.W.2d 420 (2008); *State v. Lankford*, 17 Neb. App. 123, 756 N.W.2d 739 (2008).

[6] See, *State v. Fuller, supra* note 5; *State v. Lankford, supra* note 5.

[7] See *id.*

the date the revocation period is to begin is not necessarily the date the sentencing order is issued.[8]

In *State v. Fuller*,[9] we accordingly rejected the defendant's argument that the court could not order his 15-year license suspension to start when he was released from confinement for multiple related and unrelated offenses. We explained, "Obviously, some drivers may not be in a position to drive until they have served their sentence of incarceration. Therefore, the court is given the discretion to determine when the license revocation . . . is to begin . . . ."[10] In *State v. Heckman*,[11] we stated with regard to a similar statute that "[t]he only sensible result is that a penalty of suspending a motor vehicle operator's license be applied to individuals who have the ability to drive."

[5] Other courts have similarly noted that motorists whose operators' licenses have "been suspended in one matter and revoked in another" are not generally considered entitled to serve the penalties concurrently.[12] Motorists committing multiple violations should not expect a sanction equivalent to that imposed on a motorist committing a unitary violation.[13] We agree that a mandatory rule that the revocation period for driving with a revoked license be concurrent to the preexisting period of revocation would provide little incentive for motorists not to drive with revoked licenses.

We have never directly addressed an argument that the last sentence of § 60-6,197.06—that "[s]uch revocation and order shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked"—constrains the trial court's discretion to order when the mandatory 15-year license revocation period

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[8] See *id*.

[9] *State v. Fuller, supra* note 5.

[10] *Id*. at 590, 772 N.W.2d at 871.

[11] *State v. Heckman*, 239 Neb. 25, 30, 473 N.W.2d 416, 420 (1991).

[12] 60 C.J.S. *Motor Vehicles* § 428 at 480 (2012).

[13] See *Alabama Dept. of Public Safety v. Barbour*, 5 So. 3d 601 (Ala. Civ. App. 2008).

shall begin. But we observe that this "shall be administered" sentence was part of the relevant statutes when our courts determined that the period of revocation need not necessarily begin the same date as the sentencing order and may instead commence upon whatever date the court, in its sound discretion, directs.[14]

In *Fuller*, we implicitly rejected Policky's argument by affirming a revocation period ordered to commence when the defendant was released from prison.[15] Such commencement of revocation did not correspond to the date of sentencing, the date of the final judgment of any appeal or review, or to the date that any probation is revoked.

To the extent that the "shall be administered" sentence of § 60-6,197.06 could be read as ambiguous or in conflict with the rest of the statute, it must be construed in harmony with the entire statute and its intent.[16] When words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, or lead to some manifest absurdity or to some consequences which we see plainly could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then we may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible.[17] As explained, the clear intent of the "from the date ordered by the court" language is to allow trial courts discretion in determining when the period of revocation shall begin.

The last sentence of § 60-6,197.06 immediately follows the phrase, "the court shall . . . revoke . . . for a period . . . from the date ordered by the court," and refers directly back to "[s]uch revocation and order . . . ." We expressly conclude now what we implicitly concluded in *Fuller*: This last sentence of

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[14] See cases cited *supra* note 5.

[15] See *State v. Fuller, supra* note 5.

[16] See *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

[17] *Id.*

§ 60-6,197.06 was not intended to limit the trial court's discretion in crafting "[s]uch revocation and order . . . ."

[6] Our interpretation is consistent with sound public policy and the trial court's general discretion to order sentences consecutively or concurrently. Furthermore, the Legislature has not amended § 60-6,197.06 since our decision in *Fuller*. When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.[18]

Policky believes § 60-6,197.06 mandates that the trial court sentence him to a 15-year license revocation running concurrently with the 15-year license revocation in effect when he committed the crime of driving with a revoked license and continuing until 2018. We find no merit to this contention. Because his license was already revoked, if the court had ordered the 15-year license revocation in issue to run from the date of sentencing, a significant part of that revocation period would be meaningless. The trial court did not abuse its discretion in the date that it chose for Policky's 15-year revocation period to commence.

CONCLUSION

For the foregoing reasons, we affirm the lower court's judgment.

AFFIRMED.

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[18] *Sheldon-Zimbelman v. Bryan Memorial Hosp.*, 258 Neb. 568, 604 N.W.2d 396 (2000).

Mary C. Swift, appellant, v. Norwest Bank-Omaha West, now known as Wells Fargo, Inc., a banking corporation, appellee.

828 N.W.2d 755

Filed April 5, 2013. No. S-11-914.

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 that party the benefit of all reasonable inferences deducible from the evidence.
2. ____: ____. An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Michael J. O'Bradovich for appellant.

Scott D. Jochim and Robert M. Gonderinger, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee.

Robert J. Hallstrom, of Brandt, Horan, Hallstrom & Stilmock, for amicus curiae Nebraska Bankers Association, Inc.

Heavican, C.J., Wright, Connolly, McCormack, and Miller-Lerman, JJ., and Inbody, Chief Judge, and Pirtle, Judge.

Wright, J.

NATURE OF CASE

On November 30, 2009, Mary C. Swift filed suit against Norwest Bank-Omaha West (Norwest), seeking judgment for principal and interest allegedly due and owing on a $15,000 certificate of deposit (CD) opened by her mother on July 19, 1984. Wells Fargo, Inc., is Norwest's successor in interest. The district court sustained Wells Fargo's motion for

summary judgment, finding that Swift's claims were barred by the applicable statute of limitations. See Neb. Rev. Stat. § 25-227 (Reissue 2008). Swift appeals from the district court's order overruling her motion to alter or amend the summary judgment.

SCOPE 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. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012).

FACTS

Swift's complaint alleged that her mother, Lucille C. Decker, opened a $15,000 CD on July 19, 1984, with Norwest. Swift had no knowledge of the CD at the time it was opened. The CD listed "Lucil[l]e C. Decker or Mary C. Swift" as the depositors. The CD specified that it would mature 9 months after the date it was issued and provided that Norwest would automatically renew the CD at maturity unless Decker or Swift notified Norwest otherwise. The annual rate of interest was 10.5 percent, and interest would be paid at withdrawal "by adding to principal." In the event that the CD was automatically renewed, the renewal interest rate would be the rate then in effect for a CD of the same term and amount. Decker and Swift were joint depositors with rights of survivorship.

Decker died intestate on December 18, 1991. Swift had no knowledge of any actions taken by Decker during her lifetime regarding the CD. In this action, filed in 2009, Swift claimed that the CD was "in existence on or after July 1, 2008," because she was in possession of the original CD. Swift claimed that she has been in exclusive possession of the CD since the early part of 1985.

Swift admitted that (1) for more than 7 years prior to the filing of this lawsuit, she did not receive any written communication from any depository institution regarding the CD; (2) she did not receive any written notice of renewal of the CD from

any depository institution; (3) she did not receive any written communication from any depository institution recognizing its obligation with respect to the CD; and (4) she did not report interest income from the CD on a federal or state income tax return.

After a Wells Fargo account has been closed for more than 7 years, Wells Fargo destroys the records related to the closed account in accordance with Neb. Rev. Stat. §§ 8-170 through 8-174 (Reissue 2012). Wells Fargo cannot close an account until the depositor has been paid in full, the funds are transferred to another account at the direction of the depositor, or the funds are paid to Nebraska's State Treasurer's unclaimed property division under state escheatment laws.

For more than 7 years prior to the commencing of this action, Wells Fargo did not send any written communication, renewal notice, Internal Revenue Service Form 1099 regarding interest income earned on the CD, or any other communication to Decker or Swift regarding the CD at issue. Wells Fargo had no record of remittance of any unpaid balance on the CD to Nebraska's State Treasurer.

The treasurer's unclaimed property division confirmed that on or about December 4, 1995, Wells Fargo reportedly paid $117.37 to the treasurer, identified as a "'CD interest check'" payable to Swift and Decker. The treasurer published notice of the CD interest check in the Omaha World-Herald on March 1, 1996. Pursuant to a claim submitted by Swift 13 years later in August 2009, the treasurer paid the amount of $117.37 to Swift on or about August 24, 2009. This was the only information that the treasurer's office had with respect to Decker or Swift.

Wells Fargo allows account holders to access their money without having to present the original CD. It requires the account holder to sign a form confirming that he or she is the owner of the account and that he or she will indemnify the bank against any loss, damage, claim, or expense resulting from payment of the funds. Wells Fargo has no record of any such form signed by Decker or Swift, because any record had been destroyed pursuant to its record retention policy.

In 2009, Swift contacted Wells Fargo and requested a withdrawal of the CD funds. Because Wells Fargo had no record of the CD, it denied Swift's request. Swift then brought this action on November 30, 2009. She alleged that the CD opened in 1984 was to be renewed on a regular basis and that she is now due the money owing pursuant to such CD from the date it was opened.

In its defense, Wells Fargo asserted that the action was barred by the applicable statute of limitations. The district court determined the relevant statute of limitations was § 25-227, which provides that the holder of a CD has 7 years from the maturity date or 1 year from July 1, 2008, whichever is later, to commence an action for payment of the CD.

The district court found that Swift's action was barred by § 25-227 and sustained Wells Fargo's motion for summary judgment.

ASSIGNMENTS OF ERROR

Swift claims, summarized and restated, that the district court erred in sustaining Wells Fargo's motion for summary judgment and in overruling Swift's motion to alter or amend the judgment.

ANALYSIS

[2] The issue presented is whether Swift's cause of action is time barred by § 25-227. 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. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012).

The following facts are undisputed: Swift did not commence an action against Wells Fargo on the CD within 7 years after April 19, 1985, which was the maturity date of the CD. For more than 7 years prior to commencing this action, Swift did not receive any written communication from a depository institution regarding the CD. She did not receive written notice of renewal of the CD from any depository institution. She did not

receive any written communication from a depository institution recognizing its obligation with respect to the CD. She did not report interest income from the CD on a federal or state income tax return. Swift did not file this action within 1 year after July 1, 2008.

Wells Fargo is a federally chartered financial institution located in Nebraska and is authorized to maintain CD's. We conclude Wells Fargo is a depository institution as defined by § 25-227(1)(c).

Decker died intestate in 1991. Swift alleges that the original CD issued on July 19, 1984, has been in her possession since 1985 and that Decker never reclaimed the CD before her death. Swift asserts that because the provisions of the CD allowed for automatic renewal and the accrued interest was added to and made a part of the principal, the CD would mature every 9 months, when it would automatically be renewed for another 9 months.

We must first consider whether the CD at issue was a negotiable instrument and therefore subject to Nebraska's Uniform Commercial Code, specifically Neb. U.C.C. § 3-118(e) (Cum. Supp. 2012).

Article 3 of the Uniform Commercial Code applies to negotiable instruments. Neb. U.C.C. § 3-102(a) (Reissue 2001).

> "[N]egotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
>
> (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
>
> (2) is payable on demand or at a definite time; and
>
> (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money . . . .
>
> . . . .
>
> (d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or

> order is not negotiable or is not an instrument governed by this article.

Neb. U.C.C. § 3-104 (Cum. Supp. 2012).

Section 25-227(2) provides:

> Subject to subsection (3) of this section, an action to enforce the obligation of a depository institution to pay all or part of the balance of a certificate of deposit shall be commenced by the earlier of:
>
> (a) The time that an action to enforce an obligation under subsection (e) of section 3-118, Uniform Commercial Code, must be commenced if the certificate of deposit is subject to such section; or
>
> (b) Seven years after the later of:
>
> (i) The maturity date of the certificate of deposit;
>
> (ii) The due date of the certificate of deposit indicated in the depository institution's last written notice of renewal of the certificate of deposit, if any;
>
> (iii) The date of the last written communication from the depository institution recognizing the depository institution's obligation with respect to the certificate of deposit; or
>
> (iv) The last day of the taxable year for which a person identified in the certificate of deposit last reported interest income earned on the certificate of deposit on a federal or state income tax return.

The CD in question was not payable to bearer and also stated that "[m]y certificate is nontransferable except when: . . . pledged as collateral for a loan; . . . transferred by operation of law; or . . . transferred on your books or records." We therefore conclude that the CD was not a negotiable instrument subject to article 3 of Nebraska's Uniform Commercial Code.

The CD provided that it would mature 9 months after the date issued. It was issued July 19, 1984, and therefore matured 9 months later on April 19, 1985. Swift argues that because the CD specified that it would automatically renew unless Norwest was told otherwise, the maturity date would automatically be extended every 9 months. We disagree. "Maturity date" means the time specified in an account when a CD is first payable, without taking into account any agreement regarding

renewals. § 25-227(1)(d). The CD matured on April 19, 1985, and pursuant to § 25-227(2)(b)(i), Swift was required to file an action no later than April 19, 1992 (7 years after the maturity date of the CD). This action was commenced over 24 years from the maturity date of the CD.

Section 25-227(3) provides:

> Notwithstanding subsection (2) of this section, an action to enforce the obligation of a depository institution to pay all or part of the balance of an automatically renewing certificate of deposit in existence on July 1, 2008, shall be commenced by the later of:
>
> (a) Seven years after the later of:
>
> (i) The maturity date of the certificate of deposit;
>
> . . . .
>
> (b) One year after July 1, 2008.

Swift had to commence her action either 7 years after the maturity date of the CD or 1 year after July 1, 2008. Swift did not commence her action until November 30, 2009, and therefore, her claims are barred by § 25-227.

[3] In Swift's motion to alter or amend the judgment, she argued that § 25-227 was unconstitutional because it inhibited parties from freely contracting, in violation of Neb. Const. art. I, § 16. This claim was not raised prior to the entry of summary judgment in favor of Wells Fargo. Because the constitutional issue was not presented to the district court prior to the summary judgment, we decline to consider it on appeal. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011).

CONCLUSION

Swift's claims are barred by § 25-227, and the district court did not err in entering summary judgment for Wells Fargo. For the reasons set forth herein, the judgment of the district court is affirmed.

AFFIRMED.

STEPHAN and CASSEL, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. HECTOR MEDINA-LIBORIO, APPELLANT.

829 N.W.2d 96

Filed April 5, 2013. No. S-12-200.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
2. **Criminal Law: Pleas: Proof.** To withdraw a plea under Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), all a defendant must show is (1) that the court failed to give all or part of the advisement and (2) that the defendant faces an immigration consequence which was not included in the advisement given.
3. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
4. ____. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for further proceedings.

Matthew S. McKeever and Kathleen Koenig Rockey, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellant.

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

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

STEPHAN, J.

In 2002, the Nebraska Legislature enacted a statute which requires judges, prior to accepting a plea of guilty or nolo contendere, to administer a specific advisement regarding possible consequences of the conviction for persons who are not citizens of the United States.[1] The statute further provides that if the advisement is not given and the defendant can subsequently show that he or she may be removed from the United States

[1] 2002 Neb. Laws, L.B. 82, § 13, codified at Neb. Rev. Stat. § 29-1819.02 (Reissue 2008).

or denied naturalization as a consequence of the plea-based conviction, the court on the defendant's motion "shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty."[2] The question presented in this appeal is whether the court may deny a motion to set aside a plea under this statute upon proof by the State that a defendant who was not given the required advisement was nevertheless aware of the immigration consequences of the plea and resulting conviction.

BACKGROUND

At a hearing on November 22, 2010, Hector Medina-Liborio pled no contest to an amended information charging one count of attempted first degree sexual assault of a child and one count of kidnapping. The court subsequently sentenced him to 20 to 25 years' imprisonment on the attempted sexual assault conviction and to 20 to 25 years' imprisonment on the kidnapping charge, the sentences to run consecutively.

Medina-Liborio filed a timely direct appeal, asserting in part that the district court erred in accepting his pleas without giving him the advisement required by § 29-1819.02. That statute requires:

> (1) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:
>
> IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.
>
> (2) . . . If, on or after July 20, 2002, the court fails to advise the defendant as required by this section and the

[2] § 29-1819.02(2).

> defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

In a memorandum opinion, the Court of Appeals agreed that the district court failed to give the advisement required by this statute but denied relief, reasoning that Medina-Liborio's remedy was to file a motion to withdraw his pleas.[3] Neither party has challenged that determination.

Medina-Liborio then filed a motion to withdraw his pleas, alleging that the district court failed to give him the advisement required by § 29-1819.02 and that he faces immigration consequences as the result of his no contest plea-based convictions. At an evidentiary hearing on this motion, the district court received the bill of exceptions from the plea hearing and a detainer issued by the U.S. Department of Homeland Security advising the Nebraska Department of Correctional Services that Medina-Liborio had been ordered deported or removed from the United States, and requesting Nebraska officials to notify the Department of Homeland Security at least 30 days prior to his release. The State, over a relevance objection, offered recorded telephone conversations between Medina-Liborio and members of his family. In these conversations, which took place prior to the date Medina-Liborio entered his pleas, he discussed deportation as a consequence of conviction. The State also offered the testimony, over Medina-Liborio's relevance and attorney-client privilege objection, of the attorney who represented him prior to and at the time he entered his pleas. This attorney testified, subject to his own

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[3] See *State v. Medina-Liborio*, No. A-11-147, 2011 WL 3615572 (Neb. App. Aug. 16, 2011) (selected for posting to court Web site).

assertion of the attorney-client privilege, that he had advised Medina-Liborio that if convicted of the charges, he would be deported.

The district court ultimately denied Medina-Liborio's motion to withdraw his pleas. It reasoned that the plain language of § 29-1819.02 must be read in light of the legislative intent expressed in Neb. Rev. Stat. § 29-1819.03 (Reissue 2008), concluding:

> [Here,] the concerns of the legislature about a Defendant entering a plea without understanding the possible deportation or naturalization consequences [are] met as the State has submitted evidence that [Medina-Liborio] not only knew that he might be deported but that he in fact understood that he would be deported based on the convictions which are the subject matter of the pending motion.

The court further noted that to allow defendants who know the consequences set forth in § 29-1819.02 to withdraw the pleas

> would allow such individuals to "game" the system by hoping that the trial court would not give the admonitions set forth in the statute and then such Defendants could proceed to sentencing and if they felt the sentences were extremely harsh or excessive they could withdraw their pleas, enter pleas of not guilty and start the proceeding all over again contemplating for a different result.

Medina-Liborio filed this timely appeal. 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.[4]

ASSIGNMENTS OF ERROR

Medina-Liborio assigns, restated and consolidated, that the district court erred in (1) denying his motion to set aside his pleas, (2) admitting irrelevant evidence relating to whether he actually knew the immigration consequences of his pleas prior to entering them, and (3) admitting testimony from his former attorney that was subject to the attorney-client privilege.

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

STANDARD OF REVIEW

[1] Resolution of this appeal will require that we determine the scope and extent of the statutory remedy which Medina-Liborio seeks to employ. To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[5]

ANALYSIS

[2] We have previously held that all a defendant must show to withdraw a plea under § 29-1819.02 is (1) that the court failed to give all or part of the advisement and (2) that the defendant faces an immigration consequence which was not included in the advisement given.[6] Here, it is undisputed that the district court did not give Medina-Liborio any portion of the required statutory advisement prior to accepting his no contest pleas and that he faces the consequence of removal from the United States as a result of his plea-based convictions. Standing alone, these two facts would clearly entitle Medina-Liborio to withdraw his pleas pursuant to § 29-1819.02. But there is a third undisputed historical fact proved by the State, which is that prior to entering his pleas, Medina-Liborio was aware from other sources that conviction could result in his deportation. The issue presented is whether such knowledge constitutes a legal basis for denying the relief which Medina-Liborio seeks.

[3,4] In *State v. Mena-Rivera*,[7] the State argued that a person seeking to withdraw a plea on the ground that he or she was not given the advisement required by § 29-1819.02 is required to show prejudice. We rejected this argument, noting that our case law "has made clear that only two elements must be met before a defendant can withdraw his or her plea [pursuant to § 29-1819.02]; and prejudice is not one of them."[8] We also

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[5] *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010); *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

[6] *State v. Mena-Rivera, supra* note 5. See *State v. Yos-Chiguil, supra* note 5.

[7] *State v. Mena-Rivera, supra* note 5.

[8] *Id.* at 954, 791 N.W.2d at 619.

held that the advisement required by § 29-1819.02 must be given immediately before the entering of the plea, even if it was also given at an earlier stage of the proceeding. In this case, the State acknowledges that Medina-Liborio was not required to prove that he was prejudiced by the failure of the district court to give the advisement. But it urges us to hold as a matter of first impression that "[i]f the State establishes that a defendant knew that he would be deported by reason of his plea-based conviction and, thus, was not prejudiced by the district court's failure to give the statutory immigration advisory, a defendant should not be allowed to withdraw his plea after judgment."[9] The State's proposed limitation on the statutory mandate requiring a court to permit withdrawal of a plea in the specified circumstances is nowhere to be found in the language of § 29-1819.02. Statutory language is to be given its plain and ordinary meaning.[10] And it is well established that it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[11]

But the State contends that the district court correctly reached the construction it seeks by reading § 29-1819.02 in conjunction with § 29-1819.03, in which the Legislature expressed its intent in requiring the advisement. Section 29-1819.03 provides in relevant part:

> The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States and who is charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for removal from the United States, or denial of naturalization pursuant to the laws of the United States. Therefor, it is the intent of the Legislature in enacting this section and

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[9] Brief for appellee at 7.

[10] *State v. Graff*, 282 Neb. 746, 810 N.W.2d 140 (2011); *State v. Halverstadt*, 282 Neb. 736, 809 N.W.2d 480 (2011).

[11] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009); *State v. Stafford*, 278 Neb. 109, 767 N.W.2d 507 (2009).

> section 29-1819.02 to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea.

It is the State's position that because the Legislature intended to protect only those defendants who did not know the immigration consequences of a conviction, the remedy provided by the Legislature in § 29-1819.02 should not be available if the State demonstrates that the defendant in fact knew such consequences.

But § 29-1819.03 does not support the State's argument. The Legislature stated in § 29-1819.03 that in cases "involving an individual who is not a citizen of the United States and who is charged with an offense punishable as a crime under state law," it intended to "promote fairness to *such accused individuals* by requiring in *such cases* that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for *such a defendant* which may result from the plea." (Emphasis supplied.) While the reason was that "in many instances" these individuals did not know that "a conviction of such offense" had immigration consequences, the intent was to require the advisement for all "such" individuals, i.e., individuals who are not citizens of the United States. Thus, the State's reliance on § 29-1819.03 as expressing an intent to benefit only those defendants who are not in fact aware of the immigration consequences of their pleas is misplaced. Instead, the statute on its face states that because some noncitizens may not understand immigration consequences, all noncitizens accused of a crime must be given the advisement. And that is entirely consistent with the remedy the Legislature adopted in § 29-1819.02.

Even if § 29-1819.03 expressed an intent to promote fairness to only noncitizens who were not aware of the immigration consequences of conviction, our resolution of this appeal would not change. Simply put, § 29-1819.03 defined the problem perceived by the Legislature, but § 29-1819.02 articulated the remedy which it devised to address the problem. The Legislature could have adopted any number of remedies.

For example, it could have required that each defendant be examined by the district court to determine the extent of his or her understanding of the immigration consequences of a plea-based conviction, and then given an advisement only if such consequences were not completely understood. But it chose a different and arguably simpler and more workable remedy: requiring that each defendant be given the advisement, with a certain consequence for failure to do so, thereby ensuring that all noncitizen defendants understand the consequences of conviction before entering a plea. It is not our function to alter the remedy the Legislature chose by reading language into the statute which the Legislature could have included but did not.

Alternatively, the State cites *State v. Mindrup*[12] in support of its argument that failure to advise a defendant of certain rights may be excused by a showing that the defendant was aware of such rights. In that case, the defendant contended that her plea was not given knowingly, voluntarily, and intelligently, because the county judge failed to engage her in a dialog sufficient to determine whether (1) she knew and understood the constitutional rights which would be waived by the plea and (2) she understood the charges and potential penalties. We concluded that while there may have been some deficiencies in the manner in which the court advised the defendant, the record established she was aware of her rights, the charges against her, and the possible penalties, and that thus there was no prejudice to any of her constitutional rights.

Mindrup is distinguishable because it did not involve a statute granting a specific right to an advisement and imposing a specific statutory consequence if the advisement is not given. As noted, when a specific statutory right is at issue, we are bound by the terms of the statute as enacted by the Legislature. We are not free to create a judicial exception to an absolute statutory rule.

Finally, we do not share the district court's concern that applying § 29-1819.02 as it is written will somehow permit defendants to "game the system." The statute makes the trial

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[12] *State v. Mindrup*, 221 Neb. 773, 380 N.W.2d 637 (1986).

judge responsible for giving the advisement. The prosecutor, in the interest of securing a valid plea-based conviction, also has a role in making certain that the advisement is given. A defendant can game the system only if both the court and the prosecutor fail to ensure that the defendant is afforded his or her statutory rights, i.e., actually given the advisement. If the advisement is given as the law requires, there is no game for a defendant to play.

We conclude that Medina-Liborio established that he was not given the required statutory advisement regarding immigration consequences of conviction and that he actually faces a consequence as a result of his convictions. Under § 29-1819.02, he was entitled to have his judgments of conviction vacated and to withdraw his pleas and enter pleas of not guilty. The district court erred in not granting that relief. Because we reach this conclusion, we need not address Medina-Liborio's other assignments of error.

CONCLUSION

For the reasons discussed, we reverse, and remand to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CASSEL, J., concurring.

If this court were writing on a clean slate, I would agree with the dissenting opinion. But the court has already rejected prejudice as an element of the right to withdraw a plea conferred by Neb. Rev. Stat. § 29-1819.02 (Reissue 2008).[1] Because it is within the power of the Legislature to change the elements of the statutory right and our prior decisions have not provoked a legislative change, I am constrained to follow the court's previous interpretation.

In both *State v. Yos-Chiguil*[2] and *State v. Mena-Rivera*,[3] this court articulated only two elements for withdrawal of a plea

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[1] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[2] *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

[3] *State v. Mena-Rivera, supra* note 1.

under § 29-1819.02. The first element is that the court failed to give all or part of the advisement.[4] The second is that the defendant faces an immigration consequence which was not included in the advisement given.[5]

I agree with the dissent that Nebraska has long adhered to the principle that a conviction will not be set aside in the absence of a showing that a nonevidential error prejudiced the defendant.[6] This principle has been codified for over 90 years.[7]

But in adopting § 29-1819.02, the Legislature provided a specific procedural ground for overturning a conviction, and it did not include prejudice as an element. A rule exists to resolve any perceived conflict between § 29-1819.02 and § 29-2308. To the extent there is a conflict between two statutes, the specific statute controls over the general statute.[8] Because § 29-1819.02 is the specific statute, it would prevail over § 29-2308.

The procedure advocated by the dissent would effectively add the element of prejudice to § 29-1819.02. According to the dissent, it adheres to this court's holdings that the defendant does not need to show prejudice to vacate his or her plea. The dissent instead would allow the State to show a lack of prejudice. This parsing of procedure would not change the result—prejudice would become an element of withdrawing a plea under § 29-1819.02. I agree that it should be an element, but this court has previously held otherwise.

The Legislature could amend the statute, but its inaction thus far suggests acquiescence. In most matters, it is more important that the applicable rule of law be settled than that it be settled right.[9] This is commonly true even where the

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[4] See *id*.

[5] See *id*.

[6] See, e.g., *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

[7] See Neb. Rev. Stat. § 29-2308 (Reissue 2008).

[8] *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

[9] See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 52 S. Ct. 443, 76 L. Ed. 815 (1932) (Brandeis, J., dissenting).

error is a matter of serious concern, provided correction can be had by legislation.[10] By an amendment to § 29-1819.02, the Legislature could require a defendant to prove prejudice or permit the State to prove its absence. But no amendment has been forthcoming. Ordinarily, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.[11] While I agree that prejudice to the defendant should be an element of § 29-1819.02, I adhere to the court's previous decision that it is not. Thus, I join the majority opinion.

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[10] *Id.*

[11] *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000), *abrogated on other grounds, State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

HEAVICAN, C.J., dissenting.

I respectfully disagree with the decision of the majority reversing the decision of the district court. Specifically, I would conclude that the State's evidence showing Medina-Liborio knew he would be deported upon being convicted was relevant in this case. Ultimately, I would find that Medina-Liborio was not entitled to have his judgments of conviction vacated and to withdraw his pleas and enter pleas of not guilty.

Our case law interpreting Neb. Rev. Stat. § 29-1819.02 (Reissue 2008) has made clear that a defendant needs to establish only two elements in order to withdraw his or her plea pursuant to this statute—and prejudice is not one of them. In *State v. Yos-Chiguil*,[1] we stated that all a defendant must show to withdraw a plea under § 29-1819.02 is that (1) the court failed to give all or part of the advisement and (2) the defendant faces an immigration consequence which was not included in the advisement given. We reasserted this holding in *State v. Mena-Rivera*.[2]

In interpreting a statute essentially identical to § 29-1819.02, the California Supreme Court held that in order to prevail on

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[1] *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

[2] *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

a motion to vacate a plea due to the court's failure to inform a defendant of immigration consequences, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.[3] Such interpretation adds a third requirement in placing the burden on a defendant to show that he or she was prejudiced by the court's error.

I do not advance here, as did the California Supreme Court, that a defendant must show prejudice in order to vacate his or her plea. However, I find that the California Supreme Court's analysis in coming to this conclusion is applicable to the facts of this case. I agree with the holdings of our court that a defendant does not need to show prejudice to vacate his or her plea. But unlike the majority, I would conclude that under § 29-1819.02, *the State* may show evidence that a defendant was not prejudiced so that a defendant may not withdraw his or her plea, even though his or her burden has been satisfied. I come to this conclusion based upon the reasoning demonstrated by the California Supreme Court.

The California Supreme Court had no issue with requiring a defendant to demonstrate that he or she was prejudiced by incomplete advisements under the statute. This holding was based upon the California Legislature's express intent in enacting the statute and a long-held "legislative command that courts disregard technical errors in procedure unless they impact the substantial rights of defendants."[4] I find this analysis logical.

Our Legislature's enactment of § 29-1819.02 was accompanied by the enactment of Neb. Rev. Stat. § 29-1819.03 (Reissue 2008), similar to the California scheme, which made findings that a defendant's knowledge of the deportation

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[3] *People v. Superior Court (Zamudio)*, 23 Cal. 4th 183, 999 P.2d 686, 96 Cal. Rptr. 2d 463 (2000).

[4] *Id.* at 199, 999 P.2d at 696, 96 Cal. Rptr. 2d at 474. See Cal. Penal Code § 1404 (West 2011).

consequences of his plea is both relevant and important. Concern over the defendant's actual knowledge was the reason for enacting the statues, as provided by the legislative findings of § 29-1819.03:

> The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States and who is charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered *without the defendant knowing that a conviction of such offense is grounds for removal from the United States, or denial of naturalization pursuant to the laws of the United States*. Therefor, it is the intent of the Legislature in enacting this section and section 29-1819.02 to promote fairness to *such accused individuals* by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea.

(Emphasis supplied.)

As provided, the Legislature's purpose was to ensure that a noncitizen defendant would know of the deportation consequences of his or her plea. Thus, the fact that a defendant actually knew of the deportation consequences related to his or her plea is not irrelevant.

Furthermore, Nebraska law contains a similar statutory command to the one found in California's law—that this court must disregard nonprejudicial errors in procedure in considering overturning a criminal judgment. Neb. Rev. Stat. § 29-2308 (Reissue 2008) provides: "No judgment shall be set aside . . . in any criminal case . . . for error as to any matter of pleading or procedure if the appellate court, after an examination of the entire cause, considers that no substantial miscarriage of justice has actually occurred." Here, no substantial miscarriage of justice occurred, because the defendant actually knew he would be deported if he pled guilty.

In keeping with the intent of these statutory provisions, when a district court commits the error of failing to give the statutory advisement of § 29-1819.02, the State should be able

to present evidence that a defendant was aware of the deportation consequences of his or her plea. If the State can show that a defendant actually knew he or she would be deported by reason of his or her plea and conviction, a defendant should not be allowed to withdraw his or her plea after judgment, because a judgment cannot be set aside in this State when no substantial miscarriage of justice has occurred.

Here, the State presented evidence at the hearing on Medina-Liborio's motion to withdraw pleas establishing that he was aware he would be deported, or subject to deportation, as a result of his no contest pleas. The evidence consisted of recordings of jail telephone calls from November 15 to November 22, 2010, between Medina-Liborio and his wife and Medina-Liborio's father-in-law. Additional evidence consisted of testimony of Medina-Liborio's trial counsel concerning what he informed Medina-Liborio prior to the entry of his pleas. Medina-Liborio's no contest pleas were entered on November 22. Although Medina-Liborio contests the evidence related to his conversations with his attorney, the jail telephone call recordings on their own are sufficient to establish Medina-Liborio knew he would be deported, or subject to deportation, as a result of his no contest pleas.

Because Medina-Liborio knew he would be deported, he was not prejudiced by the district court's failure to give the statutory deportation consequences advisory. Thus, no substantial miscarriage of justice actually occurred in this case and Medina-Liborio's judgments of conviction should not be set aside. Accordingly, I would have affirmed the decision of the district court denying Medina-Liborio's motion to withdraw his pleas.

STATE OF NEBRASKA, APPELLEE, V. COREY A. BROOKS, APPELLANT.

828 N.W.2d 496

Filed April 5, 2013. No. S-12-624.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Constitutional Law: Speedy Trial: Statutes.** The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11; the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.
3. **Speedy Trial.** If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged.
4. ____. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Cum. Supp. 2012).
5. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Justin A. Quinn and Kevin A. Ryan for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

WRIGHT, J.

NATURE OF CASE

In October 2011, Corey A. Brooks was charged in Douglas County District Court with, among other crimes, first degree murder and possession with intent to deliver a controlled substance. The murder charge was docketed in case No. CR-11-2017. The drug charge was docketed in case No. CR-11-2018. The cases were not consolidated; however, both cases were set for trial in March 2012.

Brooks' counsel filed a written motion to continue in the drug case but did not file a written motion in the murder case. At a hearing in the murder case, counsel stated he would not be ready for trial by the March 2012 trial date and orally requested a continuance. The district court continued trial in both cases to July.

In June 2012, Brooks moved for discharge in the murder case, alleging that his statutory and constitutional rights to a speedy trial had been violated. The district court overruled his motion, and Brooks appealed.

SCOPE OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010).

FACTS

On October 5, 2011, an information was filed in CR-11-2017, charging Brooks with first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. That same day, an information was filed against Brooks in CR-11-2018 for manufacturing, distributing, or possessing with intent to distribute methamphetamine and possession of a deadly weapon by a prohibited person. The cases were not consolidated, but trial was scheduled in both cases for March 5, 2012. The State's amended information for CR-11-2017 included first degree murder during the commission of a kidnapping, and the amended informations in both CR-11-2017 and CR-11-2018 added habitual criminal charges.

On February 2, 2012, Brooks' counsel moved to withdraw, and his motion was sustained. (New counsel had entered his appearance in both cases on January 30.) On February 10, Brooks' new counsel filed a written motion to continue trial in CR-11-2018 but not in CR-11-2017.

At a February 22, 2012, hearing in CR-11-2017, Brooks' counsel stated he had advised Brooks that a continuance was

desirable due to "the magnitude of the case and the possible consequences and the enormous amount of discovery and now more discovery that was provided to us just a few moments ago." He also made it clear that Brooks was aware of the request for a continuance and that they had talked about it several times.

The district court asked Brooks if he had any objection to the continuance. Brooks responded, "No, I don't." After hearing Brooks' response, the court continued the trial in CR-11-2017. The court also entered an order to continue CR-11-2018. Both cases were scheduled to be tried on July 9, 2012. Brooks made no objection to the trial date of July 9.

On June 21, 2012, Brooks moved for discharge in CR-11-2017. He alleged he had not been tried within 6 months from the filing of the information, in violation of his statutory and constitutional rights to a speedy trial. Brooks claimed that he filed a written motion to continue in CR-11-2018 in conformance with Neb. Rev. Stat. § 25-1148 (Reissue 2008). He alleges that because he did not file a written motion in CR-11-2017, he did not request a continuance in CR-11-2017. However, the district court granted Brooks' motion for a continuance in CR-11-2017 based on his oral request during the February 22 hearing in CR-11-2017.

At the June 25, 2012, hearing on Brooks' motion to discharge, the State offered into evidence printed copies of the search results for both CR-11-2017 and CR-11-2018 found on the Judicial User System to Improve Court Efficiency (JUSTICE). JUSTICE is Nebraska's online trial court case management system that provides public information about cases, including a register of actions that were recorded in a particular case. Exhibit 1, the printout for CR-11-2018, includes a journal entry for February 22 written by the district court judge that reads: "[Brooks'] Motion to Continue Trial heard. Motion granted. Trial reset for July 9, 2012 at[ ]9:00 a.m." Exhibit 3, the printout for CR-11-2017, contains a similar entry from February 22 stating: "[Brooks'] Motion to Continue Trial heard. Trial set for March 5, 2012 is continued to July 9, 2012."

The district court overruled Brooks' motion for discharge. The court found it was "the intention of [Brooks'] counsel to file a written Motion for Continuance in both CR 11 - 2017 and CR 11 - 2018." It noted that at the February 22, 2012, hearing, counsel had asserted that he could not be ready for trial on March 5 because he had become Brooks' counsel only recently. And following the February 22 hearing, the court had continued both cases and rescheduled the trial date to July 9. Based on the written motion in CR-11-2018 and the oral request for a continuance in CR-11-2017, the court determined that a motion to continue had been requested and granted in both cases. Brooks 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). We affirm.

ASSIGNMENTS OF ERROR

Brooks assigns that the district court erred in failing to sustain the motion for discharge in CR-11-2017, because the State failed to bring the matter to trial within 6 months as required by Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012), and that this failure violated his constitutional right to a speedy trial guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11.

ANALYSIS

[2] Brooks alleges the State failed to bring him to trial within 6 months of filing the original information, in violation of both his statutory and constitutional rights to a speedy trial. The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11; the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other. *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004).

Statutory Right to Speedy Trial

The statutory right to a speedy trial is set forth in § 29-1207 and Neb. Rev. Stat. § 29-1208 (Cum. Supp. 2012). If a defendant has not been brought to trial within 6 months, as

computed by § 29-1207, he or she is entitled to absolute discharge from the offense charged. See § 29-1208.

[3] Nebraska's speedy trial statutes provide that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." § 29-1207(1). If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he shall be entitled to his absolute discharge from the offense charged. See *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001).

[4] To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4). *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). The State filed the information for CR-11-2017 on October 5, 2011. Excluding that day, 6 months forward would be April 6, 2012, and backing up 1 day, the speedy trial deadline for Brooks' trial was April 5.

On February 22, 2012, at a hearing in CR-11-2017, the State pointed out that there was going to be conversation about the March 5 trial date. At this time, Brooks' counsel advised the court that he was newly appointed and that "within the last couple weeks," he had received "about 30-some odd CD disks" in discovery. He advised the court that he had filed a motion to continue "a couple weeks ago" and requested that the scheduled trial date be continued. That motion was sustained by the district court at the hearing, and the court's ruling was recorded via a journal entry in the court's records that was available to the parties via JUSTICE. The court rescheduled Brooks' trials to July 9, and Brooks did not object to the July 9 trial date.

Brooks argues that because he did not file a written motion for continuance in CR-11-2017, the district court erred in not granting his absolute discharge in CR-11-2017. Section 25-1148 requires that an application for continuance by a party to the case shall be in writing. But this does not mean that a court cannot grant a continuance simply because a written motion was not filed. In the case at bar, Brooks' motion for a continuance was set forth in the record of the colloquy at the

February 22, 2012, hearing in CR-11-2017. This written record provided a factual basis upon which the court could consider Brooks' motion for discharge.

Where continuances are granted at the request of the defendant, the defendant cannot later complain that the court violated Neb. Rev. Stat. § 29-1206 (Reissue 2008) and § 25-1148 in granting his or her request. *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). Sections 29-1206 and 25-1148 do not define whether a defendant's right to a speedy trial has been violated. Rather, they guide the court and the parties in the proper standard and procedure for continuances in light of not only the parties' interests but also the public interest in a reasonably prompt disposition of the case. *State v. Turner, supra*.

As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010). The trial court determined that Brooks had requested a continuance in both CR-11-2017 and CR-11-2018. We conclude that this factual finding was not clearly erroneous.

On June 21, 2012, Brooks' motion for absolute discharge was overruled, and Brooks appealed. Thus, Brooks' speedy trial clock was tolled from the date of his motion for continuance until the resolution of this appeal from the order overruling his motion for discharge. The entire period from the filing of the motion to continue until the resolution of Brooks' appeal from the order overruling his motion to discharge is excluded from the 6-month calculation. See *State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004). When Brooks moved for discharge, the 6 months in which to bring him to trial had not expired. The court did not err in overruling Brooks' motion for discharge based upon his statutory right to a speedy trial.

Constitutional Right to Speedy Trial

[5] Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in

which the courts must approach each case on an ad hoc basis. *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007). This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Id*. None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. Rather, the factors are related and must be considered together with other circumstances as may be relevant. *Id*.

Brooks' trial counsel requested a continuance in order to properly prepare for a murder trial. Counsel stated that he encouraged Brooks to support the continuance due to "the magnitude of the case and the possible consequences and the enormous amount of discovery and now more discovery that was provided to us just a few moments ago." The district court granted a continuance on February 22, 2012. Brooks' case had been pending 4 months 17 days. All subsequent delays were the result of Brooks' motion for a continuance and his motion for absolute discharge.

Brooks has not shown that the delay prior to his motion for a continuance violated his constitutional right to a speedy trial. We stated in *State v. Jameson*, 224 Neb. 38, 43, 395 N.W.2d 744, 747 (1986): "It would be a strange anomaly if a defendant could first ask for a series of continuances and then be immune from prosecution because he had not been granted a speedy trial. Even under the most liberal view of the sixth amendment, that argument will not 'hold water.'" Our analysis under the four-factor balancing test reveals no constitutional speedy trial violation.

CONCLUSION

The district court did not err when it overruled Brooks' motion for discharge. His counsel asked for and was granted a continuance in CR-11-2017 at the February 22, 2012, hearing. All delays in the trial were the result of Brooks' motion for continuance and motion for discharge. There was no violation of Brooks' statutory or constitutional rights to a speedy trial. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN J. WATT, APPELLANT.

832 N.W.2d 459

Filed April 12, 2013. No. S-12-177.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
3. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
4. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
5. **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.
6. **Homicide: Intent: Weapons.** Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death.
7. **Prior Convictions: Right to Counsel: Waiver: Proof.** Before a prior felony conviction can be used to prove that a defendant is a felon in a felon in possession case, the State must prove either that the prior felony conviction was counseled or that counsel was waived.
8. **Trial: Convictions.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
9. **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.
10. **Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection than was offered at trial.
11. **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.
12. **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.
13. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
14. **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.

15. **Trial: Appeal and Error.** In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to improper remarks no later than at the conclusion of the argument.
16. **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.
17. ____. 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.
18. **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.
19. **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.
20. ____: ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct. Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
21. **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.
22. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
23. **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.
24. **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.
25. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance

was deficient and that this deficient performance actually prejudiced his or her defense.

26. ____: ____. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
27. ____: ____. To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
28. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
29. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
30. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
31. **Effectiveness of Counsel: Proof.** In an ineffective assistance of counsel claim, deficient performance and prejudice can be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
32. **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.
33. ____. 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.
34. **Homicide: Sentences.** When a defendant is sentenced to life imprisonment for first degree murder, the defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has maximum and minimum terms, the defendant is entitled to receive credit for time served against the consecutive sentence.
35. **Sentences.** A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed as modified.

Stuart J. Dornan and Jason E. Troia, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

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

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

STEPHAN, J.

I. NATURE OF CASE

Adrian Lessley and Jason Marion were shot during an altercation on the porch of an Omaha, Nebraska, home. Adrian was killed, and Jason was wounded. Kevin J. Watt was charged in connection with the shooting, and following a jury trial, he was convicted of first degree murder, first degree assault, two counts of use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. After sentencing, Watt perfected this direct appeal. We find no reversible error, but we modify the credit for time served as ordered by the district court and affirm as modified.

II. BACKGROUND

The shooting occurred on the evening of November 10, 2010, at the home of Patricia Marion. Several other persons lived with Patricia, including Sharonda Lewis and her 2-year-old daughter, who lived in a basement bedroom of the home. Patricia's son Jason did not live at her home, but visited regularly because his daughter often went there after school.

In early November 2010, Patricia loaned Lewis a small safe because Lewis had complained that money had been stolen from her bedroom. Lewis stored money and drugs in the safe and kept it in a locked closet in her locked bedroom. Lewis and her boyfriend, Jeromie Wade, had keys to the safe.

On November 10, 2010, Wade told Lewis that the safe was missing. Lewis believed Jason had taken the safe when he was at the house earlier that day. Lewis' keys had also been missing at the time when Jason was at the house, but were later found. Patricia called Jason and asked him to come to the house so she could ask him about the safe. But Wade had already called Jason, and he was on his way back to the house. Jason and his friend Willie Lessley (Will) arrived at the house between 10 and 10:45 p.m. En route, Jason received a call from Will's cousin, Adrian. Jason told Adrian that he and Will were going to Patricia's house because "[t]here was a situation . . . ."

When Jason and Will arrived, Patricia asked Lewis to leave so she could talk to Jason alone. Will waited on the front porch. After speaking with Jason, Patricia believed that he had not taken the safe.

As Jason and Will prepared to leave, Patricia went with them to the front door. Wade arrived in a red or maroon Ford Windstar minivan, which he parked behind Jason's vehicle in the driveway of an unoccupied house immediately east of Patricia's house. Wade called Will over to the minivan. Will told Wade that he did not believe anyone from the house had taken the safe and that Wade should talk to Jason and Patricia.

Jason and Wade then engaged in a heated discussion for approximately 5 minutes. Eventually, Wade, Jason, and Patricia all went inside and Will stayed on the porch. After another 5 minutes, Adrian and his friend Robert McCraney arrived. McCraney testified that he and Adrian went to Patricia's house because either Jason or Will had asked Adrian to come over.

Inside the house, discussion continued about the missing safe. Patricia spoke with Wade, who was still quite upset and seemed to think that Jason had taken the safe. Jason believed his brother had taken the safe, and Jason tried to talk to him about it. By this time, at least two other people had approached the front porch, but Patricia testified that it was too dark to identify them because the porch light did not work. Patricia heard male and female voices coming from the porch, including those of one of Patricia's former foster children, her twin sister, and Lewis. Patricia tried to go out on the porch, but was told she should stay inside.

While inside the house, Wade placed a call on his cellular telephone. At one point, Adrian came inside and told Jason he should tell Wade to leave because Wade was being disrespectful. Adrian and Wade then began arguing. Adrian returned to the porch, and Wade made another call on his cellular telephone. Adrian came inside again and told Jason to tell Wade "to get off his phone." Wade finished his call and then placed the telephone in his pocket.

Adrian and Wade were arguing as they went outside the house. Jason followed them out. At that point, the front of the house was illuminated only by lights in the driveway and the light coming from the windows of the front living room.

By this time, Wade, Adrian, Jason, Will, and McCraney were all on the porch, and Patricia was standing in the doorway of the house. Arguments continued about the missing safe. Will told Adrian that the situation had nothing to do with the two of them, but Adrian said he thought Wade was being disrespectful of Patricia.

As the arguing continued on the porch, a large sport utility vehicle (SUV), identified as a newer, light-colored Chevrolet Suburban, pulled into the driveway of Patricia's house at the west edge of the property. A man identified by Will, McCraney, and Lewis as Watt got out of the SUV. He was wearing a tan hooded sweatshirt, a white T-shirt, and dark-colored jeans. Lewis testified that she knew Watt because his sister is the mother of Wade's children. Will and McCraney had seen Watt around the neighborhood.

Watt came up to the porch and shook Adrian's hand. Adrian said to Watt, "What's up, man? You know me." However, Jason said there was no indication that Adrian had invited Watt to the house. When Watt arrived, Wade's demeanor changed and he became more animated, talking more loudly. After a few minutes, Watt returned to his vehicle and entered the driver's side, but he did not leave. McCraney testified that he told Adrian they should leave because he had a feeling something was going to happen, but Adrian paid no attention to McCraney.

As tensions mounted among those on the porch, a fistfight erupted between Adrian and Wade. Jason, Will, Lewis, and Patricia's former foster daughter all tried to break up the fight, to no avail. During the fight, McCraney looked toward the west driveway and saw Watt near the rear of the SUV. Watt had pulled up the hood of his sweatshirt. Watt then walked over to the driver's side of Wade's minivan in the other driveway. McCraney turned his attention back to the fight on the porch, and when he looked back toward the driveway, he saw Watt on the sidewalk in front of the minivan holding a

rifle, which McCraney believed was either an AK-47 or an SKS. McCraney turned away, knowing he needed to leave the porch, and then heard gunshots. McCraney said he tried to get Adrian to go with him, but Adrian had been shot. McCraney heard three or four shots, jumped off the porch as the gunshots continued, and ran to a building south of the house, where he called the 911 emergency dispatch service. The women who had been on the porch crawled into the house to escape the gunfire. Jason said he heard gunshots and felt a sensation in his arm and chest. He bounced up against the house and then heard rapid fire. Jason covered his face and took cover against the house.

Will testified that he heard two gunshots as he was trying to break up the fight. He ducked down the porch stairs and saw Watt standing in the yard with a rifle in his hands. Will saw Watt fire three or four shots. Will was able to identify Watt because each time a shot was fired, the gun would flash and illuminate the shooter's face. Watt was standing 10 to 15 feet from the bottom porch step. Will squatted behind the east pillar at the bottom of the porch steps to avoid the gunfire. Will covered his head and heard several more shots fired.

Lewis stated that she initially froze when she heard the gunshots, but after she saw Adrian lying on the porch, she jumped over the porch and ran behind the house. When she found the other doors to the house locked, she came around the front on the opposite side of the house and saw Watt's SUV as it left the driveway.

After the gunfire stopped, a woman who had been inside the house during the shooting walked to the front door and saw Watt get into the SUV and back it out of the driveway. A neighbor testified that she heard six or seven gunshots just before 11 p.m. She looked out her bedroom window and saw a silver SUV "flying down the street" to the east, no more than 1 minute after she heard the last gunshot.

After the SUV fled the scene, Jason called Will to come up on the porch. Will saw that Jason was bleeding heavily from a gunshot wound and that Adrian was dead. Jason was leaning against the door while trying to pull out a .45-caliber handgun from his waistband. Jason had trouble gripping the handgun

with his right hand because of his injuries. Wade went to Jason and slapped the handgun out of his hand. Jason's gun fell onto the porch, and the magazine separated from it. Will saw Wade pick up the handgun, but he did not see what Wade did with it.

Two detectives from the Omaha Police Department were patrolling nearby when they heard multiple gunshots from what they believed was a high-caliber rifle at 10:56 p.m. They arrived at Patricia's house less than 1 minute later. A group of people on the porch were yelling and screaming that someone had been shot. The officers saw Wade run across the yard to the Windstar minivan. The officers commanded him to stop, but Wade tried to back the minivan out of the driveway. Eventually, Wade stopped the minivan, exited, and was handcuffed. Wade had blood on his forehead and hands, but he did not appear to be injured. Wade told one of the officers that someone had tossed a handgun directly across the street. Jason's handgun was later located by law enforcement across the street. The magazine from Jason's handgun was located on the porch of Patricia's house, along with nine .45-caliber live rounds, which fit inside the magazine.

Jason was transported by ambulance to an Omaha hospital, where he was treated for a gunshot wound. The bullet entered between Jason's upper right shoulder and upper right triceps and exited through the right side of his chest. Jason was hospitalized for approximately 2 weeks and underwent three surgeries. He subsequently underwent physical therapy to return his right arm to full function.

The autopsy report of Adrian's body documented 14 bullet wounds, including both entrance and exit wounds. Two bullets and several bullet fragments were found in Adrian's abdominal area. The cause of death was determined to be a gunshot wound to the chest.

The Ford Windstar minivan driven by Wade on the night of the shooting was owned by Watt's sister. A search of the minivan found an empty black rifle case on the front passenger seat. Although no firearms were located in the minivan, two rifle magazines were found in a side compartment of the rifle

case. The magazines contained 7.62-mm rounds. However, the firearm used in the shooting was never located.

At the scene, five spent cartridge cases were found, and it was determined they had been fired by the same weapon. Five different firearms were identified as being capable of firing the cartridges: a B West AK-47S; a Chinese SKS; an Arsenal SLR 95; a Czechoslovakian VZ-58; and a Russian RPD. The spent cartridge cases were 7.62 × 39-mm, which is a rifle cartridge. A plastic bag located in Lewis' bedroom closet contained live rounds of that same caliber of ammunition. Lewis testified that the ammunition belonged to Wade and that she was not aware it was in her closet. The bullets and fragments removed from Adrian's body at the autopsy were determined to be either 7.62-mm or .30/30-caliber bullets.

A warrant was issued for Watt's arrest in November 2010, but law enforcement was unable to locate him in Omaha. He was apprehended in Glendale, Arizona, in December 2010, based on a Crimestoppers tip.

Two witnesses testified for Watt. His wife testified that Watt was with her the entire evening of November 10, 2010. She said he dozed off on the couch at about 11:30 p.m. She said she received a telephone call at 3 or 4 a.m. telling her that Adrian had been shot.

Jaquita Shields lived with the Watts. She testified that she worked on November 10, 2010, from 2 to 10 p.m. and arrived home at about 10:20 p.m. Shields then put together a computer desk, completing the task at about 11:15 or 11:30 p.m. She stated that Watt was present during this entire time. She went to her room at around midnight.

The State offered a rebuttal witness who worked as a customer support supervisor for Shields' employer. The witness testified that Shields worked for the company from November 4 to 11, 2010. Shields' regular schedule was the second shift, from 3:30 p.m. to midnight. The company's time records for November 10 show that Shields worked from 3:24 to 11:50 p.m.

A jury convicted Watt of first degree murder, first degree assault, and two counts of use of a deadly weapon. The court

found Watt guilty of possession of a deadly weapon by a prohibited person. Watt was sentenced to a term of life imprisonment for first degree murder and to prison terms of 15 to 30 years for each of the other convictions, for a total of life plus 60 to 120 years in prison. All sentences were ordered to be served consecutively. Watt was given credit for 448 days' time served "against the sentence imposed."

III. ASSIGNMENTS OF ERROR

Watt assigns the following errors: (1) There was insufficient evidence to convict him, (2) the district court erred by incorrectly instructing the jury, (3) the State engaged in prosecutorial misconduct by arguing facts not in evidence and by intimidating a witness into changing her testimony, (4) he received ineffective assistance of counsel at trial, (5) the district court erred in finding that exhibit 2 was sufficient to establish a prior felony conviction, and (6) the district court abused its discretion in sentencing.

IV. STANDARD OF REVIEW

[1,2] 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.[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.[2]

[3,4] Whether jury instructions given by a trial court are correct is a question of law.[3] 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]

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[1] *State v. Reinpold*, 284 Neb. 950, 824 N.W.2d 713 (2013).

[2] *Id.*

[3] *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).

[4] *Id.*

[5] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[5]

V. ANALYSIS

1. Sufficiency of Evidence

(a) Murder and Assault Convictions

Watt argues that the evidence was insufficient to support his convictions for first degree murder and first degree assault, and the corresponding convictions for use of a deadly weapon to commit a felony. Because the convictions on the weapons charges are necessarily linked to the murder and assault convictions, we consider only the elements of the latter offenses in our analysis of the sufficiency of the evidence.

Pursuant to Neb. Rev. Stat. § 28-303 (Reissue 2008), a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice. Thus, the three elements which the State must prove beyond a reasonable doubt to obtain a conviction for first degree murder are that the defendant (1) killed another person, (2) did so purposely, and (3) did so with deliberate and premeditated malice.[6] A person commits the offense of assault in the first degree if he intentionally or knowingly causes serious bodily harm to another person.[7]

Watt challenges the sufficiency of the evidence on two grounds. First, he argues that the evidence was insufficient to prove that he fired the shots which killed Adrian and seriously injured Jason. He argues that Will, the only witness who testified that he saw Watt fire the rifle, gave differing statements to the police and also testified that he had consumed alcohol and had "smoked a PCP stick" prior to arriving at the house. Watt argues that "given [Will's] criminal record, prior statements and relationship to the victims," he

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[5] *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

[6] *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.

[7] Neb. Rev. Stat. § 28-308(1) (Cum. Supp. 2012).

"was simply not credible."[8] Watt also claims that McCraney, who testified that he saw Watt holding the rifle just before the shots were fired, was not credible because he provided inconsistent statements.

Watt's argument ignores our standard of review, which does not permit us to resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.[9] The credibility of Will, McCraney, or any other witness was a question for the jury, which heard and observed the witnesses as they testified. Any conflicts in the evidence or questions concerning the credibility of witnesses were for the jury as finder of fact to resolve.[10] We conclude that there was sufficient evidence upon which the jury could have reasonably concluded that Watt was the shooter.

Watt also contends that there was insufficient evidence of premeditation to support his first degree murder conviction. He argues that at most, the evidence supports a conviction for sudden quarrel manslaughter because he was attempting to stop the fight between Adrian and Wade. This manslaughter argument is problematic for two reasons. First, Watt did not assert at trial the affirmative defense of justifiable use of force for the protection of others.[11] Rather, his defense was premised on the contention that he was not present at the scene of the shooting and therefore could not have committed the crimes. Second, at least one court has held that evidence of a sudden quarrel between the victim and a third party will not support a conviction of voluntary manslaughter and that the defendant's intentional killing of one of the parties to the quarrel constitutes the offense of murder, not manslaughter.[12] But ultimately, we need not decide whether on this record a jury could have reasonably convicted Watt of sudden quarrel manslaughter. This is so because there is evidence from which a rational trier

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[8] Brief for appellant at 28.

[9] *State v. Reinpold, supra* note 1.

[10] *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009).

[11] See Neb. Rev. Stat. §§ 28-1410 and 28-1416 (Reissue 2008).

[12] *State v. Harris*, 27 Kan. App. 2d 41, 998 P.2d 524 (2000).

of fact could have found each of the elements of first degree murder beyond a reasonable doubt.

[6] With respect to the element of "deliberate and premeditated malice," we have stated:

> "Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act. . . . The term 'premeditated' means to have formed a design to commit an act before it is done. . . . One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. . . . No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. . . . A question of premeditation is for the jury to decide."[13]

As discussed above, there is evidence from which a trier of fact could have reasonably concluded that Watt was the person who fired the fatal shots. And the act of shooting an individual in the manner described by the witnesses in this case is inherently a deliberate act.[14] Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death.[15]

There is also evidence which supports a reasonable inference that Watt planned his actions and considered their consequences before pulling the trigger. McCraney testified that before the fight began, Watt was seated in the SUV, which was parked in the driveway on the west edge of Patricia's front yard. When the fight started, McCraney observed Watt exit the SUV, pull the hood of his sweatshirt over his head, and walk across the property to where Wade had parked the Windstar

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[13] *State v. Nolan, supra* note 6, 283 Neb. at 73-74, 807 N.W.2d at 541 (quoting *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)).

[14] See *id.*

[15] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

minivan in the driveway adjacent to the east edge of the yard. McCraney testified that shortly thereafter, he observed Watt holding an assault rifle with two hands. From the fact that an empty rifle case and ammunition of the same caliber used in the shooting were subsequently found in the minivan, a trier of fact could reasonably infer that Watt left the SUV and walked to the minivan for the purpose of retrieving the weapon used in the shooting and that he, in fact, did so. Based upon McCraney's testimony that shots rang out immediately after he observed Watt holding the weapon and Will's testimony that he observed Watt standing in the front yard firing a rifle at the persons on the porch, a trier of fact could reasonably infer that Watt acted on his previously formed intent to deliberately use a deadly weapon in a manner reasonably likely to cause death. Thus, viewing the evidence in a light most favorable to the prosecution, as our standard of review requires, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Watt killed purposely and with deliberate and premeditated malice. The evidence is therefore sufficient to support the first degree murder conviction.

(b) Prior Felony Conviction

Watt waived his right to have the jury consider the charge of possession of a deadly weapon by a felon, and the district court found him guilty of this charge at the conclusion of trial. On appeal, Watt challenges the sufficiency of the evidence to support this conviction.

[7] The offense is defined by Neb. Rev. Stat. § 28-1206(1) (Cum. Supp. 2012), which provides: "Any person who possesses a firearm . . . and who has previously been convicted of a felony . . . commits the offense of possession of a deadly weapon by a prohibited person." Before a prior felony conviction can be used to prove that a defendant is a felon in a felon in possession case, the State must prove either that the prior felony conviction was counseled or that counsel was waived.[16] Watt argues on appeal that the State failed to meet its burden of proving a prior felony conviction.

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[16] *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000).

At trial, the State offered exhibit 2, a certified copy of a judgment entered by the U.S. District Court for the District of Nebraska in 2006, finding Watt guilty of the offense of being a felon in possession of a firearm as defined in 18 U.S.C. § 922(g) (2006). The judgment listed the name of Watt's attorney in that case. When exhibit 2 was offered at trial in the instant case for purposes of the felon in possession charge, Watt's trial counsel reviewed it and stated: "Judge, I have nothing foundationally to object to. And I note that [Watt] was represented by [counsel] during the process. I have no objection." The exhibit was received.

On appeal, Watt claims that receipt of this exhibit constituted plain error and that it was insufficient to establish a prior felony conviction. Specifically, he contends that exhibit 2 "did not contain documentation that Watt was represented by counsel or waived his right to counsel at the time of the conviction" but "only established that at the time that the judgment was entered, August 11, 2006, he had an attorney of record."[17]

[8] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.[18] Applying that standard of review, we conclude that exhibit 2 was sufficient to establish that Watt was counseled at the time of his prior felony conviction. And as noted above, there was evidence in this case that Watt possessed the weapon used in the shooting which is the subject of this case. The evidence was therefore sufficient to support Watt's conviction on the charge of being a felon in possession of a deadly weapon.

2. Jury Instructions

(a) Instruction No. 5

[9,10] Jury instruction No. 5 given by the trial court was a step instruction which generally followed the format of

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[17] Brief for appellant at 44.

[18] *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010); *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009).

NJI2d Crim. 3.1. On appeal, Watt argues that the district court erred by including language in instruction No. 5 which differed from that of NJI2d Crim. 3.1 and altered the meaning of the instruction. As given by the court, the instruction began, "Under Count I of the Information, depending on evidence which you find that the State has proved beyond a reasonable doubt, you may find . . . Watt . . . Guilty of . . . ." The pattern jury instruction begins, "Depending on the evidence, you may return one of several possible verdicts."[19] Watt argues that the language added by the trial court was unduly suggestive and could have been interpreted by the jury to mean that the State had in fact conclusively proved the crimes beyond a reasonable doubt. But Watt did not make this objection at trial, and the issue has therefore not been preserved for appeal. 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.[20] Although Watt objected to the instruction on another basis, this does not preserve it for our review, because on appeal, a defendant may not assert a different ground for his objection than was offered at trial.[21]

[11] We find no plain error by virtue of the slight discrepancy in the language of instruction No. 5 as given and NJI2d Crim. 3.1. 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.[22] Viewed in this light, the instruction as given was not prejudicial as it clearly instructed the jury that it was the jury's decision as to whether the State had met its burden to prove a crime beyond a reasonable doubt.

[12] Watt also contends on appeal that instruction No. 5 was improper because of the use of the word "must" instead of

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[19] NJI2d Crim. 3.1.

[20] *State v. Reinpold, supra* note 1.

[21] See *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[22] *State v. Kibbee, supra* note 3.

"may" in the section entitled "Effect of Findings." The court instructed the jury that it "must" consider the crimes separately, that it "must" decide if each element had been proved, and that it "must" proceed through the crimes in sequence until it reached its conclusion. Watt argues that the use of the word "must" exerted undue pressure on the jury to reach agreement. But again, he did not object to the instruction on this basis at trial. Thus, the issue has not been preserved on appeal and the only remaining question is whether the giving of the instruction constituted plain error.[23] It did not. The instruction was in conformity with NJI2d Crim. 3.1, which uses the term "must." And we have stated, "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."[24]

Watt also contends that instruction No. 5 did not adequately inform the jury that it could find him guilty of sudden quarrel manslaughter if it determined that he acted intentionally but under provocation of a sudden quarrel. This argument is based upon our decision in *State v. Smith*,[25] which was filed 3 days after the verdicts in this case were returned. In *Smith*, we found error in the giving of a step instruction because the instruction required the jury to convict on second degree murder if it found the killing was intentional and did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel. The step instruction in this case is similar to that in *Smith*.

We considered a post-*Smith* challenge to jury instructions in *State v. Alarcon-Chavez*,[26] an appeal from a first degree murder conviction in which the step instruction was similar to that found deficient in *Smith*. There, we concluded that the instruction could not have been prejudicial because the jury convicted the defendant of first degree murder and, therefore, the jury did

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[23] See *State v. Reinpold, supra* note 1.

[24] *State v. Freemont*, 284 Neb. 179, 202, 817 N.W.2d 277, 297 (2012).

[25] *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

[26] *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

not reach the differences between second degree murder and sudden quarrel manslaughter which we addressed in *Smith*. The same reasoning applies here. Thus, any error with respect to the manslaughter instruction was harmless beyond a reasonable doubt and could not constitute plain error.

(b) Instruction No. 6

Watt also objects to the inclusion of manslaughter in instruction No. 6, which outlined the elements necessary to find him guilty of use of a deadly weapon to commit a felony. The instruction stated that the material elements were:

> 1. That on or about November 10, 2010, in Douglas County, Nebraska, [Watt] did commit Murder in the First Degree, Murder in the Second Degree, or Manslaughter which is the subject of Count I of the Information;
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> 2. That in the commission of said Murder in the First Degree, Murder in the Second Degree, or Manslaughter, a deadly weapon, to wit: a firearm, was used; and
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> 3. That such use of a deadly weapon was intentional.

Watt's objection to the inclusion of manslaughter in this instruction was overruled by the trial court.

In arguing that the instruction was in error, Watt relies on *State v. Sepulveda*,[27] in which we noted that "[w]hen the felony which serves as the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a firearm to commit a felony." Watt argues that it was improper to include manslaughter in the elements of this instruction when there was no option for the jury to find him guilty of intentional manslaughter.

Although Watt correctly asserts that a person cannot be convicted of use of a deadly weapon to commit a felony when the underlying felony is an unintentional crime, we find no reversible error in the instruction as given here. As we have noted, when the jury convicted Watt of first degree murder, it determined that he committed the crime intentionally. The jury then ceased its deliberations and did not consider manslaughter. The conviction for use of a deadly weapon to commit a

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[27] *State v. Sepulveda*, 278 Neb. 972, 975, 775 N.W.2d 40, 44 (2009).

felony was based on the first degree murder conviction. The inclusion of manslaughter in the instruction could not have prejudiced Watt.

3. Prosecutorial Misconduct

Watt argues that the prosecutor engaged in misconduct by intimidating a witness into changing her testimony and by arguing facts not in evidence during closing argument.

(a) Alleged Witness Intimidation

Lewis testified as a witness for the prosecution. During her direct examination, she testified that she saw Watt arrive at the house in an SUV before the fistfight broke out and that he was attempting "to calm everything down" and was "basically being a peacemaker." She also testified that after the fistfight began, an armed man dressed in black who no one knew "jumped in" and tried to shoot Wade. After a break in the trial, Lewis' direct examination resumed and the State was given leave to treat her as a hostile witness over Watt's objection. Lewis then admitted that she had lied about the unknown gunman dressed in black because she was fearful for her safety and that of her daughter. She testified that she saw the SUV in which Watt had arrived as it left the scene after the shooting. Lewis did not identify Watt as the person who fired the shots.

On appeal, Watt claims that he observed a representative of the State "scolding Lewis in the hallway during the break" in the trial and that Lewis was "crying as she was being scolded."[28] He acknowledges that no record was made of this encounter, but he contends that the State intimidated Lewis into changing her testimony and thereby committed prosecutorial misconduct.

[13,14] The absence of a record regarding the claimed witness intimidation precludes our consideration of the issue. Failure to make a timely objection waives the right to assert prejudicial error on appeal.[29] When an issue is raised for the

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[28] Brief for appellant at 37.

[29] *State v. Kibbee, supra* note 3; *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

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.[30] Because the record is silent with respect to this claim of prosecutorial misconduct, we cannot determine whether prejudicial error occurred.

(b) Closing Argument

Watt also argues that the prosecutor argued facts not in evidence during the rebuttal portion of closing argument and that this constituted misconduct warranting reversal. In an apparent reference to Wade, the prosecutor argued: "Because he called his buddy, [Watt], to come to that house in an SUV armed with his AK-47, and that when things got bad to open fire on the people on the porch." Again referring to Wade, the prosecutor argued that "he got with [Watt]. And in that exchange, that rifle that was in that case in [Wade's] car went to the SUV that [Watt] was driving." Watt argues that these statements were improper because although there was evidence that Wade was talking on his cellular telephone before Watt arrived at the scene, there was no proof that he was speaking with Watt.

[15-17] But Watt's trial counsel did not object to these statements during closing argument or move for a mistrial. In order to preserve, as a ground of appeal, an opponent's misconduct during closing argument, the aggrieved party must have objected to improper remarks no later than at the conclusion of the argument.[31] Thus, Watt has waived any complaint about prosecutorial misconduct during closing arguments, and we cannot consider the issue unless we find that it constitutes 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.[32] But as we

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[30] *Id.*

[31] *State v. Robinson, supra* note 13.

[32] *State v. Alarcon-Chavez, supra* note 26.

have noted, "'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."'"[33]

[18-21] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper.[34] 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.[35] 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.[36] A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[37] Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[38] 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 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.[39]

We find no plain error with respect to the two brief segments of the prosecutor's closing argument challenged on

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[33] *Id.* at 336, 821 N.W.2d at 369 (quoting *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). See, also, *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).

[34] *State v. Alarcon-Chavez, supra* note 26.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

appeal. Although there is no direct evidence that Wade summoned Watt to the house where the shooting occurred, there was evidence that Wade was observed making a telephone call during a lull in his verbal altercation with Jason. When Watt subsequently arrived at the house, Wade's demeanor changed. Wade and Watt were friends, but others present at the house that evening did not know Watt or were only casually acquainted with him. Although Watt shook hands with Adrian when he arrived, there was no indication that Adrian had invited him to the house. From these facts, it is at least arguable that a reasonable inference could be drawn that Wade called Watt to the scene.

But even if the prosecutor's comments were improper, they were not so numerous or egregious as to constitute plain error. Watt argues that the prosecutor's statements improperly suggested that the murder was premeditated. But as we have discussed above, Watt's conduct *after* he arrived at the house was sufficient to establish that he acted with deliberate and premeditated malice in firing the fatal shots. The prosecutor's argument, whether proper or not, did not result in damage to the integrity, reputation, and fairness of the judicial process, or deprive Watt of a fair trial.

4. Ineffective Assistance of Counsel

[22] Watt was represented by different attorneys at trial and on direct appeal. Under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[40] In this appeal, Watt asserts 12 ineffective assistance claims directed at his trial counsel.

[23,24] 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

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[40] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

is sufficient to adequately review the question.[41] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[42] We conclude that the record is sufficient to address some but not all of Watt's ineffective assistance claims.

[25-31] Certain general principles govern our consideration of those claims which we are able to reach. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[43] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[44] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[45] To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[46] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.[47] Trial counsel is afforded due deference to formulate trial strategy and tactics.[48] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[49] Deficient performance and prejudice can be addressed in either order.[50] If it is more appropriate to dispose of an

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[41] *State v. Ramirez, supra* note 5.

[42] *Id.*

[43] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[44] *State v. Nolan, supra* note 6.

[45] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[46] *Id.*

[47] *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

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

[49] *Id.*

[50] *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.[51]

With these principles in mind, we turn to Watt's specific claims in the order that they are presented in his brief.

(a) Failure to Make Record Regarding Lewis' Testimony

As noted, Watt alleged in his brief that he saw a representative of the State "scolding" Lewis during a break in her testimony and that she was "crying as she was being scolded."[52] In his first claim of ineffective assistance of counsel, Watt argues that his trial counsel was ineffective in failing to "Object to the State Intimidating . . . Lewis Into Changing her Testimony After a Break."[53] Watt contends that his counsel's failure to object or make a record of the State's conduct prejudiced him because Lewis was allowed to change her testimony and testified in a way that made it look like she was originally trying to protect Watt. We conclude that the record on direct appeal is insufficient for us to resolve this claim, and we therefore do not reach it.

(b) Failure to Object to Prosecutor's Closing Argument

In his second claim, Watt contends that his trial counsel was ineffective in failing to "Move for a Mistrial or Object to the State Arguing Facts That Were not in Evidence During the Closing Argument."[54] This claim pertains to the portion of the prosecutor's closing argument discussed above in our analysis of Watt's prosecutorial misconduct claim. Because it was at least arguable that the inferences urged by the prosecutor's statements were reasonable, trial counsel may have chosen not to object as a matter of trial tactics and strategy. And even if that were not the case, we conclude that Watt was not

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[51] See *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

[52] Brief for appellant at 37.

[53] *Id.* at 38.

[54] *Id.* at 39.

prejudiced by the absence of objections to those comments for the reasons set forth in our discussion above.

(c) Failure to Depose State's Witnesses

In his third ineffectiveness claim, Watt contends that "trial counsel did not depose all of the witnesses prior to trial, and that the failure to do so prejudiced his defense."[55] We conclude that the record on direct appeal is insufficient for us to resolve this claim, and we therefore do not reach it.

(d) Delay in Interviewing Witnesses

In his fourth claim, Watt contends that his trial counsel was ineffective in failing to interview his own witnesses until 10 days before trial and that the failure to speak to them sooner prejudiced his defense. We conclude that the record on direct appeal is insufficient to reach this claim.

(e) Calling Shields as Defense Witness

In his fifth claim, Watt contends that his trial counsel provided ineffective assistance by calling Shields as an alibi witness to testify that Watt was with her at the time of the shooting. Shields' credibility was impeached when another witness testified that Shields was at work at the time of the shooting. Whether or not trial counsel performed deficiently in calling Shields, we conclude that even though her testimony was impeached at trial, there is no reasonable probability the outcome of the case would have been different had she not testified at all. Accordingly, Watt cannot establish prejudice under the second prong of the *Strickland* test.

(f) Failure to Verify Shields' Employment Hours

In his sixth claim, Watt contends that his trial counsel was ineffective in failing to discover timesheets which would have verified the hours that Shields worked on the date of the crime. We conclude that Watt cannot establish prejudice resulting from this allegedly deficient performance because there is no reasonable probability the outcome of the trial would not have

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[55] *Id.*

been different if counsel had discovered the timesheets and decided not to call Shields as a witness.

(g) Failure to Raise Juror Misconduct

In his seventh claim, Watt contends that his trial counsel was ineffective in failing to move for a new trial based upon the fact that one of the jurors was having regular contact with a member of one of the victim's family during the trial. We conclude that the record on direct appeal is insufficient to reach this claim.

(h) Failure to Call Witness to Dispute Communication Between Watt and Wade

In his eighth claim, Watt contends that his trial counsel was ineffective in failing to call witnesses who would have testified that there were no communications between Wade and Watt in the minutes and hours prior to the shooting. For the reasons discussed more fully above, we conclude that even if such witnesses had been called and so testified, there is no reasonable probability the outcome of the case would have been different. Accordingly, Watt cannot establish prejudice under the *Strickland* test.

(i) Failure to Utilize Incorrect News Story in Defense

In his ninth claim, Watt contends that his trial counsel was ineffective in failing to confront witnesses regarding a news story which "incorrectly stated that . . . Watt was linked to the murder through a phone call."[56] We conclude that the record on direct appeal is insufficient to reach this claim.

(j) Failure to Properly Address Lesser-Included Offenses

In his 10th claim, Watt contends that his trial counsel was ineffective in failing to address lesser-included offenses in his closing argument. As we have noted, Watt's defense was premised upon the assertion that he was not present at the time of the shootings, so a decision not to argue lesser-included offenses was clearly a matter of trial strategy. And because the

[56] *Id.* at 42.

jury found, based upon sufficient evidence, that Watt committed premeditated murder, trial counsel's decision not to argue for conviction of a lesser-included offense was not prejudicial. This claim is therefore without merit.

(k) Failure to Impeach Jason or Object to His Testimony

In his 11th claim, Watt contends that he "has issues with the manner in which his trial counsel cross-examined" Jason in light of Jason's deposition testimony.[57] There is no merit to this cryptic allegation. Jason did not identify Watt as the person who fired the shots or testify that he observed Watt in possession of a firearm. We conclude that the cross-examination of Jason could not have prejudiced Watt.

(l) Failure to Object to Exhibit 2

In his 12th and final claim, Watt contends that his trial counsel was ineffective in failing to object to exhibit 2, which was the record of his prior felony conviction. Because we conclude that this document was sufficient to establish that Watt had counsel on a prior conviction, we find this claim to be without merit.

(m) Summary of Ineffective Assistance of Counsel Claims

For the reasons discussed, we conclude that the record on direct appeal is insufficient to permit us to consider Watt's first, third, fourth, seventh, and ninth claims of ineffective assistance of trial counsel. But the record is sufficient to permit us to consider each of his remaining claims, and we conclude that they are without merit.

5. Sentences

Finally, Watt asserts that the trial court abused its discretion in imposing excessive sentences. As a result of the jury's verdict, Watt was found guilty of first degree murder, a Class IA felony; first degree assault, a Class II felony; and two counts of use of a deadly weapon, Class IC felonies. Also, the court found Watt guilty of possession of a deadly weapon by a prohibited

[57] *Id.* at 43.

person, which is a Class ID felony. He was sentenced to a term of life imprisonment for first degree murder, and to terms of 15 to 30 years for each of the other convictions, for a total prison term of life plus 60 to 120 years. All sentences were ordered to be served consecutively. Watt was given credit for 448 days' time served "against the sentence imposed."

[32,33] Pursuant to Neb. Rev. Stat. § 28-105 (Reissue 2008), a Class IA felony is punishable by life in prison, a Class II felony is punishable by a term of 1 to 50 years in prison, a Class IC felony is punishable by a term of 5 to 50 years in prison, and a Class ID felony is punishable by a term of 3 to 50 years in prison. All of Watt's sentences were within the statutory range. And as noted above, an appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[58] 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.[59] 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.[60]

Watt claims that the sentences were excessive because the shooting arose from an argument between Adrian and Wade and Adrian's actions toward Wade were violent and instigated the shooting. As noted earlier, Watt was not a party to the quarrel. Whether Adrian or Wade started the fight between the two of them is of no consequence to the sentences imposed on Watt for his crimes. The district court did not abuse its discretion in sentencing Watt.

[34,35] However, we find plain error in the allocation of credit for time served. All of Watt's sentences were ordered to

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[58] *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

[59] *Id.*

[60] *Id.*

be served consecutively, including the life sentence. Watt was given credit for 448 days' time served "against the sentence imposed." When a defendant is sentenced to life imprisonment for first degree murder, the defendant is not entitled to credit for time served in custodial detention pending trial and sentence; however, when the defendant receives a sentence consecutive to the life sentence that has maximum and minimum terms, the defendant is entitled to receive credit for time served against the consecutive sentence.[61] A sentencing judge must separately determine, state, and grant the amount of credit on the defendant's sentence to which the defendant is entitled.[62] Watt is entitled to receive credit for 448 days served, but the credit should be applied against the sentence for first degree assault rather than against the sentence for first degree murder. We therefore modify Watt's sentences by ordering that the credit for time served be applied against the sentence for first degree assault.

VI. CONCLUSION

For the reasons discussed, we conclude that the evidence was sufficient to support Watt's convictions, that there was no prejudicial error in the jury instructions, and that there was no prosecutorial misconduct amounting to plain error. We also conclude that seven of Watt's claims of ineffective assistance of counsel are without merit and that the record on direct appeal is insufficient to permit us to consider the other five claims. Finally, we conclude that the district court did not abuse its discretion in imposing sentences on each of the convictions. However, we conclude that the district court incorrectly granted Watt credit for time served against his life sentence. We therefore modify the credit for time served by applying it to the sentence for first degree assault. In all other respects, we affirm the judgment of the district court.

AFFIRMED AS MODIFIED.

HEAVICAN, C.J., and CASSEL, J., not participating.

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[61] *State v. Sing*, 275 Neb. 391, 746 N.W.2d 690 (2008).

[62] *Id.*

D-CO, Inc., et al., appellants, v. City of La Vista, appellee.

829 N.W.2d 105

Filed April 12, 2013. No. S-12-299.

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. **Constitutional Law: Ordinances.** The constitutionality of an ordinance presents a question of law.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Special Legislation.** A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
5. ____. A special legislation analysis focuses on a legislative body's purpose in creating a challenged class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. The prohibition aims to prevent legislation that arbitrarily benefits a special class.
6. **Special Legislation: Public Policy.** To be valid, a legislative classification must be based upon some reason of public policy, some substantial difference in circumstances, that would naturally suggest the justice or expediency of diverse legislation regarding the objects to be classified.
7. **Special Legislation.** Legislative classifications must be real and not illusive; they cannot be based on distinctions without a substantial difference. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class concerning the purpose of the act.
8. **Constitutional Law: Special Legislation.** A legislative body's distinctive treatment of a class is proper if the class has some reasonable distinction from other subjects of a like general character. And that distinction must bear some reasonable relation to the legitimate objectives and purposes of the legislative act.
9. **Special Legislation: Statutes: Ordinances: Appeal and Error.** A court may review the legislative history of a statute or ordinance when considering a special legislation challenge.
10. **Municipal Corporations: Special Legislation.** When a city's distinctive treatment of a class is based on a real difference and is reasonably related to its legitimate goal, it is not required to choose between attacking every aspect of an economic or social welfare problem or not attacking the problem at all.
11. **Municipal Corporations: Real Estate.** Because the renting of residential housing is a business, a city can reasonably require the owners of such housing to pay fees to offset the cost of regulating that business.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Christian R. Blunk, of Harris Kuhn Law Firm, L.L.P., and John C. Chatelain, of Chatelain & Maynard, for appellants.

Gerald L. Friedrichsen and William M. Bradshaw, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

SUMMARY

The appellants are rental property owners in La Vista, Nebraska. They sought a declaration that the City of La Vista's ordinance No. 1095 was unconstitutional. The ordinance establishes a rental housing licensing and inspection program. Owners of rental property must obtain a license to lease the property to others and submit to periodic building code inspections of their rental property. The appellants claim that the ordinance's application to only rental property residences—and not to owner-occupied residences—is an arbitrary and unreasonable classification that violates Nebraska's constitutional prohibition against special legislation.

The district court entered summary judgment for La Vista. We conclude that La Vista's ordinance does not violate the prohibition against special legislation. The record shows that the distinction between rental property residences and owner-occupied residences presented a real difference in circumstances. And La Vista's regulation of rental properties was reasonably related to its legitimate goal of maintaining safe rental housing and livable neighborhoods.

BACKGROUND

ORDINANCE

On October 20, 2009, La Vista adopted ordinance No. 1095. The ordinance prohibits a person (an individual or entity) from

leasing a rental dwelling without a license, which must be renewed annually. It exempts nursing care and rehabilitation facilities, assisted living facilities, and hotels and motels.

To get a license, a person must (1) pay the applicable fees for the license application and inspections; (2) satisfy inspection requirements; and (3) maintain compliance with the International Property Maintenance Code (IPMC), which the ordinance adopted, and any other applicable laws.

Upon receiving an owner's application and payment of fees, La Vista will give the owner a 10-day notice of a "primary" inspection, to be conducted by a designated building official, to determine whether the rental property complies with the IPMC and other building codes. La Vista does not charge for the primary inspection or for a followup inspection if the owner or the owner's agent is present to provide access to the property. If neither the owner nor the tenant consents to the inspection, the building official must obtain a warrant. After the primary inspection, the building official assigns one of the following classifications to the dwelling:

- Class A dwelling: The dwelling has only minor code violations, which are defined as any defect other than a major violation, unless multiple minor defects are deemed to be a major violation. The building official will conduct further inspections every 2 years. But if the owner has not corrected the minor violations after the first 2-year inspection, La Vista will not renew the owner's rental license until the corrections are made.
- Class B dwelling: The dwelling has a major code violation, defined as a defect that poses a significant risk of danger, harm, or damage to the life, health, safety, or welfare of the tenant, passersby, occupants, visitors, environment, or general public. La Vista must provide notice to the property owner of the time allowed for making corrections, depending on the number and severity of the violations. A property owner must correct a major code violation to the building official's approval in a followup inspection before La Vista will issue or renew a license. La Vista will charge the owner a fee for the followup inspection if the owner has not corrected the

defect. The building official will conduct another inspection in 1 year. If there are no further major code violations at the later inspection, the building official will change the dwelling's classification to Class A.

- Class N dwellings: These dwellings are newly constructed. The building official will conduct inspections every 3 years.

The building official can also conduct inspections at other times as he or she deems necessary, including for investigation of a complaint. If an owner fails to take corrective actions within a specified time or if the building official finds that the building is unsafe, the building official can deny, suspend, or revoke a rental license. Moreover, if an owner fails to obtain a rental license or if La Vista revokes the license for noncompliance, it can impose penalties under the IPMC or other laws. A property owner must have a local agent available to respond to emergencies on a 24-hour basis and must provide La Vista with the agent's contact information.

The mayor and city council listed several findings in the ordinance about its purpose. They found that much of La Vista's original housing was approaching 50 years of age and that a significant portion of it had become rental property. Also, they found that many apartment complexes had been constructed and that owners' failure to maintain them had put many tenants at risk. They found that La Vista's transition to rental properties could make consistent monitoring and necessary maintenance of rental housing more difficult and contribute to the deterioration of La Vista's housing and neighborhoods. The deterioration occurs because tenants may face landlords who resist performing maintenance and repairs and because tenants may be reluctant to report deficiencies to authorities. Finally, they concluded that the program would promote the public interest by keeping rental housing safe for tenants, maintaining safe and livable neighborhoods for La Vista's residents, and sustaining its property tax base.

Two months before La Vista adopted ordinance No. 1095, it had adopted ordinance No. 1128. Ordinance No. 1128 updated La Vista's existing building code to impose the same code requirements as those imposed by ordinance No. 1095. But

ordinance No. 1128 does not require property owners to pay fees or submit to regular inspections.

Procedural History

In September 2010, the appellants filed their complaint. They alleged that ordinance No. 1095 created special privileges and immunities for owner-occupied dwellings because those dwellings are not subject to the ordinance's requirements. They sought an injunction and a declaration that the ordinance was unconstitutional.

Both parties moved for summary judgment. The court sustained La Vista's motion. The court stated that La Vista's authorization of a 2000 study and its holding of public hearings were sufficient to show that the ordinance's classification of residential rental properties was neither arbitrary nor unreasonable. The court concluded that La Vista had properly exercised its police power to promote the health, safety, and welfare of its residents who rented housing. It overruled the appellants' motion for summary judgment and dismissed their complaint.

ASSIGNMENTS OF ERROR

The appellants assign, reduced and restated, that the court erred as follows:

(1) concluding that La Vista's classification of residential landlords as the only property owners subject to its ordinance was neither arbitrary nor unreasonable;

(2) concluding that La Vista's commissioning of the 2000 study and its holding of public hearings were sufficient to show that its classification of residential landlords was neither arbitrary nor capricious; and

(3) failing to sustain the appellants' motion for summary judgment.

STANDARD OF REVIEW

[1-3] We 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.[1] The constitutionality of an ordinance presents a question of law.[2] We independently review questions of law decided by a lower court.[3]

ANALYSIS

The appellants claim that La Vista's ordinance is unconstitutional because it violates the special privileges and immunities clause of Neb. Const. art. III, § 18:

> The Legislature shall not pass local or special laws in any of the following cases . . . .
>
> . . . .
>
> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

The special legislation prohibition also applies to municipal ordinances.[4]

[4] A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.[5] Here, we are only concerned with the appellants' claim that the classification is arbitrary and unreasonable. They claim that the record lacks any evidence that rental properties posed a greater risk to La Vista's older neighborhoods than owner-occupied properties. The appellants primarily contend that La Vista lacked a reasonable basis for enacting an inspection program for residential properties that applied only to rental properties.

[5] A special legislation analysis focuses on a legislative body's purpose in creating a challenged class and asks if there

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[1] *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012).

[2] *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008).

[3] *Molczyk v. Molczyk, ante* p. 96, 825 N.W.2d 435 (2013).

[4] See, *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012); *Hug, supra* note 2.

[5] *Id.*

is a substantial difference of circumstances to suggest the expediency of diverse legislation.[6] The prohibition aims to prevent legislation that arbitrarily benefits a special class.[7]

[6-8] To be valid, a legislative classification must be based upon some reason of public policy, some substantial difference in circumstances, that would naturally suggest the justice or expediency of diverse legislation regarding the objects to be classified.[8] Legislative classifications must be real and not illusive; they cannot be based on distinctions without a substantial difference.[9] And the question is always whether the things or persons classified by the act form by themselves a proper and legitimate class concerning the purpose of the act.[10] A legislative body's distinctive treatment of a class is proper if the class has some reasonable distinction from other subjects of a like general character. And that distinction must bear some reasonable relation to the legitimate objectives and purposes of the legislative act.[11]

The appellants contend that the court, in determining La Vista's classification of residential rental properties was neither arbitrary nor unreasonable, improperly relied on the 2000 study that La Vista had commissioned. They argued that the 2000 study focused on determining whether La Vista needed a neighborhood revitalization program for its older neighborhoods. They also argue that the study did not show that rental properties were a problem or that any residential properties were dilapidated.

[9] A court may review the legislative history of a statute or ordinance when considering a special legislation challenge.[12] And La Vista's 2000 study clearly played a role in its decision

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[6] See *id.*

[7] See *Hug, supra* note 2.

[8] See *Anthony, Inc., supra* note 4.

[9] See *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.

[10] See *id.*

[11] See *id.*

[12] See *Hug, supra* note 2.

to enact a rental property inspection program. Although the appellants are correct that the study did not determine that any of La Vista's rental properties were dilapidated, we believe that parts of that study supported La Vista's distinctive regulation of rental properties.

The consultant recommended that La Vista conduct further research and develop a pilot revitalization program for the older neighborhood that La Vista had targeted for analysis. The consultant based this recommendation on three characteristics of the neighborhood: declining household incomes; aging housing, with delayed maintenance and repairs; and changing household compositions, meaning "smaller families (widowed/elderly) and younger homeowners with little equity or resources for repairs." The study specifically concluded that the targeted neighborhood had a high rate of ownership, and it did not recommend any type of inspection program. Nonetheless, the consultant's recommendation that La Vista take action to prevent further deterioration of its older neighborhoods is relevant.

The study set out five stages, or five degrees of distress, in the life cycle of a neighborhood—from healthy (stage 1) to abandoned (stage 5). The consultant reported that the targeted neighborhood had signs of "incipient decline," or stage 2 distress. The study stated that research has shown the main characteristics of distressed residential areas include non-owner-occupied rental properties and poverty. Because the study showed that La Vista's targeted neighborhood already showed signs of stage 2 distress, La Vista could reasonably conclude that the number of rental properties in that neighborhood and in similar neighborhoods was likely to increase.

The study further stated that researchers generally agreed that revitalization intervention has a higher chance of success if a city takes action during stage 2 or stage 3 because neighborhood distress in stage 4 and stage 5 is so severe that simple intervention is no longer economically feasible. The record does not show whether La Vista accepted any of the study's revitalization recommendations. But taking steps to stop the deterioration of rental properties would have also been a reasonable intervention in these circumstances. The record shows

that city officials knew of longstanding maintenance problems with La Vista's rental properties.

Most of the letters written to city officials about its proposed ordinance were from owners of rental properties who complained that the ordinance would place undue financial burdens on them. Many rental property owners also complained at La Vista's public hearings. And there was evidence that some rental properties were better cared for than the surrounding owner-occupied properties.

But some residents favored the ordinance. Homeowners complained that rental properties in their neighborhoods were the worst-kept properties and that deterioration and lack of maintenance of surrounding rental properties had brought down their property values and caused homeowners to move. The record also shows city officials had long been concerned about these maintenance problems.

At one public hearing, the community development director stated that La Vista had about 2,800 rental properties and that its strategic development plan had included a rental inspection program for 10 years. A council member stated that the council had raised its concerns about the decline of rental properties to staff members for years. And La Vista had documented some of these problems.

The record includes photographs of egregious code violations that city officials had found in rental properties. One homeowner had asked city officials to do something about the rental property next to her because the management company had ignored or improperly handled water problems on the property, which, in turn, had created problems on her property. Moreover, the record supports La Vista's concern that tenants are reluctant to report maintenance problems. La Vista documented an example of a tenant who had complained to city officials about the landlord's refusal to repair serious problems, but who nonetheless asked the officials not to contact the owner until after the lease had expired and the tenant had moved.

We conclude that the record shows La Vista based its classification of rental property residences on a real distinction from other residential properties. It shows that the owners of rental

properties can neglect necessary maintenance and repairs and that tenants can be reluctant to confront landlords or consult authorities about deteriorating conditions. Tenants' reluctance to report problems would unquestionably make La Vista's monitoring of unsafe conditions in its rental housing more difficult. And protecting tenants' safety within the context of the landlord/tenant relationship creates a unique public policy concern that distinguishes rental properties from other residential properties.

[10,11] So we reject the appellants' argument that La Vista's evidence of problems with residential rental properties was insufficient to justify its distinctive treatment of these properties. La Vista's concern with unsafe conditions in rental housing and the reporting problems unique to these properties would exist even if many or most rental property owners properly maintained their properties. Moreover, although maintenance problems also existed in older owner-occupied residences, La Vista was not required to solve every problem at once. Legislative bodies often take long periods to enact laws that cover the whole of a subject.[13] When a city's distinctive treatment of a class is based on a real difference and is reasonably related to its legitimate goal, it is not required to choose between attacking every aspect of an economic or social welfare problem or not attacking the problem at all.[14] And other courts have concluded that because the renting of residential housing is a business, a city can reasonably require the owners of such housing to pay fees to offset the cost of regulating that business.[15] We agree.

Finally, based on the 2000 study, La Vista could reasonably conclude that deterioration of La Vista's rental housing would contribute to the further deterioration of La Vista's

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[13] See *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989).

[14] See *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

[15] See, e.g., *Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982, 143 Cal. Rptr. 3d 895 (2012); *Kruppa v. Warren*, No. 2009-T-0017, 2009 WL 2991569 (Ohio App. Sept. 18, 2009) (unpublished opinion).

older neighborhoods. Thus, intervention through the rental housing inspection program was clearly in the public's interest of maintaining safe housing for tenants *and* safe and livable neighborhoods for La Vista's residents. We agree with the U.S. Supreme Court that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'"[16]

CONCLUSION

The record shows that La Vista based its distinctive treatment of residential rental properties on a real difference from other residential properties and that its distinctive treatment was reasonably related to legitimate goals. Accordingly, the court was correct in granting La Vista's judgment as a matter of law. The court did not err in sustaining its motion for summary judgment.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

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[16] *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

KELLY R. PEARSON, NOW KNOWN AS KELLY R. CONNETT, APPELLANT, V. STEVEN C. PEARSON, APPELLEE.

828 N.W.2d 760

Filed April 12, 2013. No. S-12-482.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Child Support: Rules of the Supreme Court.** A deviation in the amount of child support is allowed whenever the application of the Nebraska Child Support Guidelines in an individual case would be unjust or inappropriate.
3. ____: ____. Deviations from the Nebraska Child Support Guidelines must take into consideration the best interests of the child or children.
4. **Visitation.** As with other visitation determinations, the matter of travel expenses associated with visitation is initially entrusted to the discretion of the trial court.

5. **Child Support: Rules of the Supreme Court.** All orders concerning child support, including modifications, should include the appropriate Nebraska Child Support Guidelines worksheets.
6. ____: ____. In the event of a deviation from the Nebraska Child Support Guidelines, the trial court should state the amount of support that would have been required under the guidelines absent the deviation and include the reason for the deviation in the findings portion of the decree or order, or complete and file worksheet 5 in the court file.
7. **Child Support: Rules of the Supreme Court: Records: Appeal and Error.** The record on appeal from an order imposing or modifying child support shall include any applicable Nebraska Child Support Guidelines worksheets with the trial court's order. Failure to include such worksheets in the record will result in summary remand of the trial court's order.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Remanded with directions.

Kelly T. Shattuck, of Vacanti Shattuck, for appellant.

Douglas R. Switzer and Richard P. Hathaway, of Hathaway Switzer, L.L.C., for appellee.

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

STEPHAN, J.

This is an appeal from an order of the district court for Douglas County modifying a decree of dissolution by (1) permitting the mother to move the minor children in her custody to Alaska and (2) terminating child support. The sole issue on appeal is whether the district court abused its discretion in determining that the father's child support obligation should be terminated because of the increased visitation expenses necessitated by the children's move to Alaska. The district court's order does not include a worksheet showing the methodology utilized by the court in determining that the child support obligation should be terminated. Therefore, we remand with directions.

FACTS

Kelly R. Pearson and Steven C. Pearson were married in South Dakota on May 20, 1998. They have three minor children. On February 6, 2007, while residing in Nebraska, Kelly

and Steven separated. On June 22, they entered into a marital settlement agreement. The agreement provided for joint legal custody of the children and stated that the parent with whom the children resided would control day-to-day decisions. No child support was to be paid "[d]ue to the income of each party and the number of overnights the child(ren) spend with each party . . . ," but Kelly and Steven agreed to review the child support arrangement at least every 2 years. In a dissolution proceeding in which both parties appeared pro se, the district court for Douglas County entered an order dissolving the marriage on April 4, 2008. Custody and visitation were ordered as provided in the agreement.

On July 25, 2008, the district court found there had been a material change in circumstances in that the children had begun receiving assistance from the State of Nebraska, and it entered an order modifying the decree. Steven was ordered to pay child support of $481 per month for three children, $416 per month for two children, and $282 per month for one child.

Kelly remarried in October 2010. On February 24, 2011, she filed an application to modify the decree because child support had not been reviewed for more than 3 years. Kelly also claimed it was in the best interests of the minor children that she be awarded sole legal and physical custody and asked that she be allowed to remove the minor children from Nebraska to Alaska, because her husband had a job opportunity there and the move would result in increased income for the family. Kelly requested that "child support . . . be based on a standard calculation" and that it be made retroactive to the date on which her application to modify was filed.

After a trial, the district court granted Kelly's request to remove the minor children to Alaska and found that it was in the best interests of the children that sole care, custody, and control be awarded to Kelly. The court awarded Steven visitation every summer beginning 10 days after school was dismissed and ending 10 days prior to the start of school. Steven also was awarded visitation over the school spring break and over the "Christmas and New Year school holiday." Kelly was ordered to allow the children to have reasonable and liberal contact with Steven through "webcam" access and telephone

contact. Steven was also granted visitation with the children anytime he might be in Alaska, with the provision that he give Kelly 48 hours' advance notice. The court ordered Steven to pay all costs of transportation for visitations, except that if the airlines required a chaperone, Kelly was to pay the cost.

The court terminated Steven's child support obligations "in recognition of the greatly increased costs that [Steven] will incur in order to exercise his visitation with his minor children." However, the district court's order does not include a worksheet showing the court's calculations leading to the termination of Steven's child support obligation.

ASSIGNMENT OF ERROR

Kelly appealed, assigning as error the district court's termination of Steven's child support obligation. Steven did not cross-appeal from that portion of the order permitting Kelly to remove the children to Alaska.

STANDARD OF REVIEW

[1] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.[1]

ANALYSIS

In general, child support payments should be set according to the Nebraska Child Support Guidelines,[2] which are promulgated by this court pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 2008). The guidelines "shall be applied as a rebuttable presumption," and "[a]ll orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied."[3]

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[1] *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

[2] *Id.*

[3] Neb. Ct. R. § 4-203 (rev. 2011). See, also, *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007); *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005).

[2-4] Under the guidelines, a deviation in the amount of child support is allowed whenever the application of the guidelines in an individual case would be unjust or inappropriate.[4] Deviations from the guidelines must take into consideration the best interests of the child or children.[5] The guidelines specifically address adjustments in child support related to visitation:

> [A]n adjustment in child support may be made at the discretion of the court when visitation or parenting time substantially exceeds alternating weekends and holidays and 28 days or more in any 90-day period. During visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80 percent. The amount of any reduction for extended parenting time shall be specified in the court's order and shall be presumed to apply to the months designated in the order. *Any documented substantial and reasonable long-distance transportation costs directly associated with visitation or parenting time may be considered by the court and, if appropriate, allowed as a deviation from the guidelines*.[6]

As with other visitation determinations, the matter of travel expenses associated with visitation is initially entrusted to the discretion of the trial court.[7]

[5,6] All orders concerning child support, including modifications, should include the appropriate child support worksheets.[8] In the event of a deviation from the guidelines, the trial court should state the amount of support that would have been required under the guidelines absent the deviation and include the reason for the deviation in the findings portion of

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[4] *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

[5] See, *id.*; § 4-203.

[6] Neb. Ct. R. § 4-210 (emphasis supplied).

[7] *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004); *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

[8] *Rutherford v. Rutherford, supra* note 4. See § 4-203.

the decree or order, or complete and file worksheet 5 in the court file.[9]

In this case, the only child support worksheet included in the record is one prepared by Steven's counsel, which was received "as an aid" to the court. It reflects that Steven's monthly child support obligation would be $1,149 for three children, $995 for two children, and $675 for one child. There is no worksheet attached to the district court's order, and the order makes no reference to the worksheet submitted by Steven's counsel.

[7] In *Rutherford v. Rutherford*,[10] we held that a trial court abused its discretion by failing to complete a worksheet documenting the method it used to determine the modification of child support. We reasoned that without a worksheet specifying the trial court's calculations and delineating any deviations it took into consideration, an appellate court was unable to undertake any meaningful review. We held that if a trial court fails to prepare the applicable worksheets, the parties are required to request that such worksheets be included in the trial court's order. And we concluded that effective upon the filing of the *Rutherford* opinion, "the record on appeal from an order imposing or modifying child support shall include any applicable worksheets with the trial court's order. Failure to include such worksheets in the record will result in summary remand of the trial court's order."[11] Based upon our holding in *Rutherford,* we remand this cause to the district court with directions to complete the applicable worksheets and provide evidence in the court order of the calculations used to determine child support.

In the interests of judicial efficiency, and because we have not previously written on the factors to be considered in determining whether travel expenses relating to visitation should be allowed as a deviation from the guidelines under § 4-210, we note our agreement with the principles stated in *Hokomoto*

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[9] *Rutherford v. Rutherford, supra* note 4; *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008).

[10] *Rutherford v. Rutherford, supra* note 4.

[11] *Id.* at 308, 761 N.W.2d at 927.

v. Turnbull,[12] a recent memorandum opinion of the Nebraska Court of Appeals. Only reasonable transportation expenses may reduce or abate a child support obligation. Allowing unlimited abatement of child support, to the point where the custodial parent receives substantially reduced or no child support, is contrary to the children's best interests. As other courts have noted, a custodial parent has some fixed and constant expenses in raising children, and these expenses do not decrease during extended periods of visitation with the noncustodial parent.[13] These expenses certainly do not decrease simply because transportation costs significantly increase. On remand, the court must consider the impact of the increased transportation expenses on both parents in light of the best interests of the children.

CONCLUSION

The cause is remanded with directions that the district court receive any additional evidence it deems relevant and material on the issue of child support modification and that it prepare an order of modification consistent with *Rutherford* and this opinion.

REMANDED WITH DIRECTIONS.

MCCORMACK, J., participating on briefs.

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[12] *Hokomoto v. Turnbull*, No. A-11-704, 2012 WL 2849311 (Neb. App. July 10, 2012) (selected for posting to court Web site).

[13] See, e.g., *Plymale v. Donnelly*, 157 P.3d 933 (Wyo. 2007); *Abbott v.* Abbott, 25 P.3d 291 (Okla. 2001); *Gatliff v. Gatliff*, 89 Ohio App. 3d 391, 624 N.E.2d 779 (1993).

Tonda Sue Watkins, appellee, v. Matt Daniel Watkins, appellant.

829 N.W.2d 643

Filed April 19, 2013. No. S-12-167.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
4. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
5. **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.
6. **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.
7. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
8. **Child Custody: Convicted Sex Offender: Modification of Decree.** Pursuant to the plain language of Neb. Rev. Stat. § 43-2933(1)(b) and (3) (Reissue 2008), when a person involved in a custody dispute is residing with someone who is required to register as a sex offender under the Sex Offender Registration Act as a result of a felony conviction in which the victim was a minor or as a result of an offense that would make it contrary to the best interests of the child if the person had custody, such cohabitation development shall be deemed a change in circumstances sufficient to modify a previous custody order, unless the trial court finds that there is no significant risk to the child and states its reasons in writing or on the record.
9. **Pleadings: Due Process.** A court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process.

Appeal from the District Court for Otoe County: Randall L. Rehmeier, Judge. Affirmed.

Julie E. Bear, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for appellant.

Mindy Rush Chipman, of Rush Chipman Law Office, P.C., L.L.O., guardian ad litem.

No appearance for appellee.

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

PER CURIAM.

NATURE OF CASE

Tonda Sue Watkins and Matt Daniel Watkins were divorced in March 2005. According to the decree of dissolution of their marriage, Tonda and Matt were awarded joint legal and physical custody of their minor children, Brittni Watkins and Cristian Watkins. Pursuant to the decree, the children reside with Tonda for one-half of each week and with Matt for one-half of each week. In June 2011, Matt filed an amended complaint to modify the decree, seeking full custody of the children. After a bench trial, the district court filed an order in which it found in favor of Tonda and against Matt, declined to modify the parenting plan, and dismissed the complaint.

Matt appeals, claiming that the district court erred when it denied his request to modify custody. Because we do not find error, we affirm the district court's denial of Matt's request for modification of custody.

The attorney for the minor children claims in her appellate brief that the district court erred when it determined that the issue of modifying the parenting plan was not before it. Because the district court did not err in this ruling, we affirm.

STATEMENT OF FACTS

Tonda and Matt were married on February 25, 1996. They have three children together: Ashley Watkins, born in August 1992; Brittni, born in October 1999; and Cristian, born in August 2001. Tonda and Matt were divorced in 2005. The decree of dissolution of marriage awarded joint legal and physical custody of the children to Tonda and Matt;

it further provided that Tonda and Matt are to have equal time with the children. The decree did not award child support to either Tonda or Matt. Since the entry of the decree, Ashley has become emancipated, and therefore is not legally affected by this case. Generally, Brittni and Cristian reside Sunday morning through Wednesday evening with Tonda and Wednesday evening through Sunday morning with Matt. This case involves Matt's attempt to modify the decree so that Matt has full custody of Brittni and Cristian. After a bench trial, the district court denied Matt's request to modify the custody arrangement set forth in the decree and dismissed the complaint for modification.

This case is somewhat complicated by the intertwining relationships of the persons involved. Tonda is in a relationship and residing with Corey Neumeister. At the time of trial, Tonda and Corey had been living together for approximately 1½ years. Matt is residing with his wife, Victoria Watkins, formerly Victoria Neumeister. At the time of trial, Matt and Victoria had been married for approximately 1½ years, and they have one child together, Braydon Watkins, who was 4 years old at the time of trial. Victoria was previously married to Corey, but they are now divorced. While they were married, Victoria and Corey had two children together: Joss Neumeister, who was 7 years old at the time of trial, and Conner Neumeister, who was 5 years old at the time of trial. Corey is also the father of Clayton Neumeister, who was 10 years old at the time of trial.

Matt lives in a house near Nebraska City, Nebraska, with Victoria, Joss, Conner, and Braydon, and with Brittni and Cristian from Wednesday evening to Sunday morning. Tonda lives in a house in the Nebraska City area with Corey, and with Brittni and Cristian from Sunday morning through Wednesday evening. Joss and Conner visit Tonda and Corey's house on Tuesdays and Thursdays and every other weekend. Clayton was living with Tonda and Corey at the beginning of the modification proceedings in this case; however, at the time of trial, Clayton was living with his maternal grandparents in Plattsmouth, Nebraska. There was considerable testimony regarding Clayton's behavioral issues.

On June 1, 2011, Matt filed an amended complaint to modify the decree of dissolution of Tonda and Matt's marriage, seeking full custody of Brittni and Cristian. Matt alleged that since the decree was entered, a material change occurred affecting the welfare and best interests of Brittni and Cristian in three respects: (1) Tonda was cohabitating with Corey, a registered sex offender; (2) Corey's son Clayton was under the jurisdiction of the juvenile system and posed a threat to the other members of the household, including Brittni and Cristian; and (3) Tonda had been evicted from various residences and was unable to provide the necessary level of stability for Brittni and Cristian to remain in her custody. Tonda denied these allegations in her answer to the amended complaint to modify. Tonda had also filed a cross-complaint which was later dismissed.

On June 27, 2011, the district court filed an order granting temporary relief in response to Matt's amended complaint requesting temporary relief. The court ordered that Corey's son Clayton shall not be present during any parenting time exercised by Tonda with Brittni and Cristian. The court overruled Matt's request that Corey not be present during Tonda's parenting time; the court found "no significant risk involving Brittni and Cristian residing in the same household with [Corey]."

A 2-day bench trial was held on November 30, 2011, and January 20, 2012, where testimony was heard and evidence was offered and received. After trial, the district court filed an order on February 6, described in greater detail in our analysis. The court found in favor of Tonda and against Matt on the issue of Matt's seeking full custody of Brittni and Cristian and dismissed the complaint. The court also found in favor of Tonda and against Matt with respect to restrictions on Corey's and Clayton's contact with Brittni and Cristian, and ordered that the current restrictions are to apply until further order of the court upon modification proceedings.

With respect to Corey, the court recognized in its order that Corey is a registered sex offender and that Neb. Rev. Stat. § 43-2933(1)(b) (Reissue 2008) provides:

> No person shall be granted custody of, or unsupervised parenting time, visitation, or other access with, a child if anyone residing in the person's household is required to register as a sex offender under the Sex Offender Registration Act as a result of a felony conviction in which the victim was a minor or for an offense that would make it contrary to the best interests of the child for such access unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record.

The district court followed this statute, stated extensive reasons in writing as to why there was not a significant risk to Brittni and Cristian, and concluded that

> based on the evidence for the reasons herein stated, it does not appear that there is a significant risk involving either Brittni . . . or Cristian . . . to be in the same household with [Corey], provided, as agreed to by [Tonda], that there be no unsupervised contact between Brittni . . . or Cristian . . . and [Corey].

With respect to Clayton, the court determined that it appears that Clayton does present some level of risk to Brittni and Cristian. However, the court recognized that Clayton no longer resides with Tonda and Corey. The court found,

> based upon the concerns and apparent risk[,] that there should be no contact between Brittni . . . and Cristian . . . and Clayton . . . at this time. In the event that [Tonda] continues to reside with [Corey] and/or they get married, if at some point it is the intention to have Clayton return home, a modification order will be necessary to modify this no-contact provision.

The court further determined in its order that the issue of changing the parenting plan, from splitting the week between Tonda and Matt to a week-to-week schedule, was not properly before it. The court noted that Matt clearly testified that if the court determined that Matt was not awarded sole custody, he was not requesting and did not want the current parenting time to be modified or changed. The court further stated that Tonda was not requesting any such relief through

a pending countercomplaint. Accordingly, the court did not address changing the parenting time schedule.

The court awarded attorney fees to the attorney representing Brittni and Cristian, with Tonda and Matt each being responsible for half of said fees. Tonda and Matt were ordered to pay their own attorney fees.

ASSIGNMENTS OF ERROR

Matt appeals and claims generally that the district court erred when it denied his amended complaint to modify custody and dismissed his complaint.

The attorney for the minor children contends in her appellate brief that the district court erred when it found that the issue of modifying the parenting plan and the parenting time schedule was not properly before it.

STANDARD OF REVIEW

[1,2] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. See *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011). An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2008).

[3] Statutory interpretation presents a question of law, which we review independently of the lower court's determination. *Jeremiah J. v. Dakota D., ante* p. 211, 826 N.W.2d 242 (2013).

ANALYSIS

The District Court Did Not Err When It Denied Custody Modification.

The decree awarded joint legal and physical custody of Brittni and Cristian to Tonda and Matt. Matt claims for a variety of reasons that the district court erred when it denied his amended complaint to modify in which he sought full custody. Relying on § 43-2933(1)(b) and (3), Matt primarily

argues that Tonda's cohabitation with Corey, a registered sex offender, warrants a modification of custody. We determine that the district court did not err when it determined that there is no significant risk to the children and denied modification of custody on this basis. Matt also contends that custody of Brittni and Cristian should have been modified due to (1) the presence of Clayton in Tonda's home and (2) Tonda's failure to maintain a stable residence. We find no merit to these assignments of error.

[4] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Latham v. Schwerdtfeger, supra*. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). These principles apply to the issues involving Clayton and the stability of Tonda's home. However, Matt's assignment of error based on the fact of Corey's presence in Tonda's home as grounds for modification must also be analyzed under the statutory framework found in § 43-2933 relating to a sex offender residing in the home.

In June 2011, Matt filed an amended complaint to modify custody, primarily because Tonda is cohabitating with Corey, who is a registered sex offender. Matt contends that pursuant to § 43-2933, Tonda should not have custody of Brittni and Cristian and, instead, he should have full custody of the children.

Section 43-2933(1)(b) provides:

> No person shall be granted custody of, or unsupervised parenting time, visitation, or other access with, a child if anyone residing in the person's household is required to register as a sex offender under the Sex Offender Registration Act as a result of a felony conviction in which the victim was a minor or for an offense that would make it contrary to the best interests of the child for such access unless the court finds that there is no significant

> risk to the child and states its reasons in writing or on the record.

Section 43-2933(3) provides that "[a] change in circumstances relating to [the above-quoted] section is sufficient grounds for modification of a previous order."

[5-7] We have not previously interpreted § 43-2933. 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. *Blaser v. County of Madison, ante* p. 290, 826 N.W.2d 554 (2013). 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. *Id*. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

[8] Pursuant to the plain language of § 43-2933(1)(b) and (3), when a person involved in a custody dispute is residing with someone who is required to register as a sex offender under the Sex Offender Registration Act as a result of a felony conviction in which the victim was a minor or as a result of an offense that would make it contrary to the best interests of the child if the person had custody, such cohabitation development shall be deemed a change in circumstances sufficient to modify a previous custody order, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record. Thus, in applying § 43-2933, a district court must first determine whether there is an individual residing in the household who is required to register under the Sex Offender Registration Act and, if so, whether the offense triggering the registration requirement is due to a felony conviction in which the victim was a minor, whether the offense triggering the registration would make it contrary to the best interests of the child whose custody is at issue, or whether the offense does not meet either of these two descriptions. If the district court finds the offense to be a felony involving a minor victim or an offense contrary to the best interests of the

child, § 43-2933(1)(b), there is a statutorily deemed change of circumstances, § 43-2933(3), and custody shall not be granted to the person who resides with the sex offender unless there is a finding by the district court that the circumstances present no significant risk. In sum, taken together, § 43-2933(1)(b) and (3) create a statutory presumption against custody being awarded to the person residing with a sex offender who committed the described offenses, but the presumption can be overcome by evidence. The foregoing analysis applies to this case, and the district court followed this framework.

In this case, the evidence shows that subsequent to the decree, Tonda resided with Corey, a registered sex offender. At the time of trial, Tonda had resided with Corey for approximately 1½ years and Corey was in his ninth year of a 15-year registration. The record shows that the offense triggering registration was based on Corey's having pleaded guilty to the misdemeanor of attempted rape of a 14-year-old girl when he was 21 years old. Corey's requirement that he register as a sex offender is not the result of a felony conviction in which the victim was a minor; however, in its order, the district court implicitly found that Corey is required to register as a sex offender because of an offense that would make it contrary to the best interests of the children if Tonda was allowed custody of, visitation with, or other access to the children. We find no error with respect to this finding. Because Matt established that Tonda resided with a sex offender, the statute provides that a change of circumstances sufficient for modification has occurred, and it is presumed under the statute that Tonda may not have custody, unsupervised parenting time, visitation, or other access to Brittni and Cristian. As we have noted, this presumption can be overcome if the district court finds, based on the evidence, that there is no significant risk to the children and states its reasons in writing or on the record, § 43-2933(1)(b). In this case, the district court did so find and stated its reasons in writing.

The district court stated in its order that there was no evidence that Corey had any incidents involving inappropriate sexual contact other than the offense that occurred approximately 10 years prior that resulted in Corey's being required to

register as a sex offender. The court also stated in its order that Victoria, who was previously married to Corey, was aware of Corey's conviction prior to their marriage. The court noted that Victoria and Corey had two children together and that Corey has visitation with those children.

The district court noted the parties' oldest child, Ashley, who was emancipated at the time of trial, testified that when she lived with Tonda and Corey, she did not have any issues or problems with Corey, and that Corey had made no inappropriate advances toward her. Ashley testified that she had no concerns about Corey. The district court noted Brittni testified that she generally likes Corey and that Corey has not done or suggested anything inappropriate to her. The district court noted that Tonda testified that she has not witnessed any inappropriate contact or language between Corey and Brittni or Cristian. The district court noted Tonda testified that she had not allowed unsupervised contact between Corey and the children and that she would not allow unsupervised contact in the future.

Based on these facts, the district court found that there is not a significant risk involving Brittni or Cristian being in the same household as Corey, and ordered that there continue to be no unsupervised contact between Brittni or Cristian and Corey. Thus, although there is a statutory presumption that Tonda would not have custody, unsupervised parenting time, visitation, or other access to Brittni and Cristian due to Corey's presence in Tonda's household, the district court provided sufficient reasons supported by the record that Brittni and Cristian were not at significant risk and that the best interests of Brittni and Cristian did not require modification. We believe that the district court made a thorough and careful evaluation of the evidence and did not abuse its discretion in reaching its conclusion. Upon our de novo review, we determine that the district court did not err when it denied Matt's request for a modification of custody on this basis.

Matt also asserts that Corey's son Clayton would pose a risk to Brittni and Cristian if Clayton returned to reside in Tonda and Corey's home and that the district court erred when

it denied his request for modification on this basis. When the modification proceedings began, Clayton was residing in Tonda and Corey's home. However, at the time of trial, Clayton was a ward of the state and had been removed from Tonda and Corey's home.

In its ruling, the district court determined that there was a potential risk posed by Clayton to Brittni and Cristian, and ordered that there should be no contact between Clayton and Brittni or Cristian. The district court further ordered that if Tonda and Corey intend to have Clayton live in their home in the future, a modification proceeding should be filed because an order would be necessary to modify this no-contact provision. Based on the fact that Clayton is not currently residing with Tonda and Corey, there has not been a material change in circumstances warranting modification of custody, and the district court did not err when it denied Matt's request for modification on this basis.

Matt further argues that he should have full custody of Brittni and Cristian because Tonda is unable to provide them with the proper level of stability. Matt points to the fact that Tonda has changed residences eight times since Tonda and Matt were divorced in 2005 and that several of her changes in residence were the result of eviction proceedings. The record indicates that Tonda had failed to pay rent and failed to properly maintain some of the rental properties in which she resided.

With regard to the level of stability Tonda can provide to the children, the district court stated that although the evidence creates some concern, it is not sufficient to establish a material change of circumstances warranting a change of custody. Upon our de novo review of the record, we determine that the district court did not abuse its discretion in making this determination and denying a change of custody on this basis.

Having considered the record and the bases asserted by Matt to support his request to change from joint to full custody in his favor, we cannot say that the district court erred when it denied the request and dismissed Matt's complaint to modify custody.

The Issue of Modifying the Parenting Plan Was Not Properly Before the District Court.

The attorney for the children contends in her appellate brief that the district court erred when it determined that modification of the parenting plan was not before it. The attorney for the children contends that she had standing to assert this error based on various rationales, including Neb. Rev. Stat. § 42-358(6) (Reissue 2008), which provides that "[a]ny person aggrieved by a determination of the court may appeal such decision . . . ." Because the substance of the error asserted by the attorney for the children is wholly without merit, we need not resolve the standing issue.

Neb. Rev. Stat. § 42-364(6) (Cum. Supp. 2012) pertains to modifications of parenting plans and requires that "[p]roceedings to modify a parenting plan shall be commenced by filing a complaint to modify" and states that such actions are governed by the Parenting Act. In this case, no complaint to modify the parenting plan was filed, and therefore, the issue of modifying the parenting plan was not properly raised before the district court.

For completeness, we note that Matt testified that if the custody issue he raised was not determined in his favor, he did not want the parenting plan to be modified. In his appellate brief, Matt asserts that he was not given notice, that he was not prepared to resist modification of the parenting plan at the hearing, and that if he had been made aware that the issue would be considered by the court, he may have presented additional evidence.

[9] This situation bears a similarity to *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). In *Zahl*, we held in the context of a marital dissolution action, that due process was violated when the trial court sua sponte awarded joint custody when neither of the parties had requested joint custody and did not have notice that joint custody would be an issue before the court. See, also, *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010) (extending holding in *Zahl* to paternity case where neither party requested joint custody). In *Zahl*, we stated that a "court's determination of questions

raised by the facts, but not presented in the pleadings, should not come at the expense of due process." 273 Neb. at 1053, 736 N.W.2d at 373.

In the present case, the amended complaint filed by Matt sought to modify custody and to award full custody to him. Although Brittni and Cristian expressed a preference during the custody hearing for a schedule in which they would stay with their parents by alternating 1 week at a time, no complaint to modify the parenting plan to this or other effect was filed. See § 42-364(6). The district court correctly observed that the issue of modifying the parenting plan was not properly before it.

CONCLUSION

The district court did not err when it denied Matt's amended complaint to modify custody, in which he sought full custody of the children. Furthermore, the district court did not err when it observed that the issue of modifying the parenting plan was not properly before it. Thus, we affirm.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

LOZIER CORPORATION, APPELLANT, V. DOUGLAS COUNTY BOARD OF EQUALIZATION, APPELLEE.

829 N.W.2d 652

Filed April 19, 2013. Nos. S-12-322 through S-12-324.

1. **Taxation: Judgments: Appeal and Error.** An appellate court reviews decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Taxation: Appeal and Error.** An appellate court reviews questions of law arising during appellate review of decisions by the Tax Equalization and Review Commission de novo on the record.
4. **Taxation: Statutes.** The plain language of Neb. Rev. Stat. § 77-5013(2) (Cum. Supp. 2012) focuses on whether a mailing is properly placed in the mail, rather than on whether the Tax Equalization and Review Commission receives it.

5. **Statutes: Legislature: Intent.** The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.
6. **Statutes: Notice: Intent: Words and Phrases.** The intent of the "legible postmark" requirement in Neb. Rev. Stat. § 77-5013(2) (Cum. Supp. 2012) is to act as evidence of the date an appeal is mailed. A postage meter stamp, when viewed in the context of the pertinent U.S. Postal Service regulations, satisfies this purpose and is a "postmark" within the meaning of § 77-5013(2).
7. **Statutes: Jurisdiction.** An appellate court strictly construes jurisdictional statutes.
8. **Statutes: Jurisdiction: Legislature: Intent: Appeal and Error.** If the meaning of an ambiguous jurisdictional statute is unclear, even after reviewing the legislative history, the statute's purpose, and other resources, only then would an appellate court give it its most narrow interpretation.

Appeals from the Tax Equalization and Review Commission. Reversed.

James F. Cann, of Koley Jessen, P.C., L.L.O., for appellant.

Theresia M. Urich and Malina Dobson, Deputy Douglas County Attorneys, for appellee.

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

CONNOLLY, J.

NATURE OF THE CASE

Lozier Corporation (Lozier) mailed three appeals to the Tax Equalization and Review Commission (TERC). Though Lozier mailed the appeals before the filing deadline, TERC did not receive the appeals until after the deadline had passed. A late-arriving appeal may still be timely if the mailing meets certain requirements under Neb. Rev. Stat. § 77-5013(2) (Cum. Supp. 2012). TERC determined that the mailing did not meet those requirements and dismissed the appeals as untimely. The primary issue is whether a postage meter stamp is a "postmark" under § 77-5013(2).

BACKGROUND

Lozier claimed that the Douglas County Board of Equalization (the Board) had overvalued three parcels of land.

Lozier hired an accounting firm—Marks Nelson Vohland Campbell Radetic LLC (Marks Nelson)—to prepare and file three property tax appeals. The deadline to file the appeals was September 12, 2011.

The record shows that Marks Nelson prepared the appeals, placed them in a single envelope, marked the envelope with its postage meter, and then mailed the envelope by certified mail to TERC on September 1, 2011. But the envelope did not arrive at TERC. Instead, for unknown reasons, it arrived back at Marks Nelson on September 15. At that point, Marks Nelson marked its envelope with additional postage (using its postage meter) to send the envelope certified mail, return receipt requested. Making no other changes to the envelope, Marks Nelson again mailed it to TERC. TERC received the envelope on September 20.

TERC entered an order to show cause as to why it should not dismiss the appeals as untimely. A partner with Marks Nelson testified for Lozier to the above facts. He, along with a corporate officer at Lozier, argued that they had timely filed the appeals under § 77-5013(2). That section provides, in relevant part, that an appeal is timely filed "if placed in the United States mail, postage prepaid, with a legible postmark for delivery to [TERC] on or before the date specified by law for filing the appeal."

TERC first noted that the envelope did not have a U.S. Post Office "cancel[l]ation mark" but that it did have "two different Pitney Bowes postage labels" from Marks Nelson's postage meter. TERC noted that while there was "credible evidence that the envelope was placed in the United States Mail prior to September 15, 2011, . . . that envelope was delivered to . . . Marks Nelson . . . rather than to [TERC]." So TERC concluded that the envelope was in Marks Nelson's possession on September 15, 2011, and "not appropriately placed in the United States mail for delivery to [TERC] prior to that date." Finally, TERC concluded that the envelope arrived at TERC "without a legible postmark." TERC therefore determined that the appeals were untimely and dismissed them for lack of jurisdiction.

ASSIGNMENT OF ERROR

Lozier assigns, consolidated and restated, that TERC erred in concluding that Lozier did not timely file its appeals under § 77-5013(2).

STANDARD OF REVIEW

[1-3] We review TERC decisions for errors appearing on the record.[1] When reviewing a judgment for errors appearing on the record, our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[2] We review questions of law arising during appellate review of TERC decisions de novo on the record.[3]

ANALYSIS

The issue is whether Lozier complied with the statutory requirements for a timely appeal under § 77-5013(2). Section 77-5013(2) states, in relevant part, that an appeal "is timely filed . . . if placed in the United States mail, postage prepaid, with a legible postmark for delivery to [TERC] on or before the date specified by law for filing the appeal." We previously addressed a version of this "mailbox rule" in *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*,[4] where we concluded that TERC lacked the authority to adopt the rule because it improperly expanded its jurisdiction. But the Legislature obviously has the authority to adopt such a rule, which it did in § 77-5013(2) after our decision in *Creighton St. Joseph Hosp.*[5]

At the outset, the Board argues that the September 1, 2011, mailing was irrelevant and that TERC properly focused

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[1] See, e.g., *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012).

[2] See *id.*

[3] See *id.*

[4] *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

[5] See, § 77-5013(2); 2001 Neb. Laws, L.B. 170, and 2004 Neb. Laws, L.B. 973.

on the September 15 mailing. The Board argues that this is so "because it is from this re-deposit into the U.S. mail on September 15 . . . that the envelope was eventually delivered to [TERC]."[6] In other words, because the September 15 mailing arrived at TERC and the September 1 mailing did not, the Board claims that the September 15 mailing must be the focus of our analysis.

We give statutory language its plain and ordinary meaning,[7] and we will not read into a statute a meaning that is not there.[8] Section 77-5013(2) does not provide that the mailing which arrived controls over a prior mailing which did not. Instead, § 77-5013(2) focuses only on whether the appeal was properly *placed in the mail* with sufficient postage and a legible postmark for delivery to TERC before the filing deadline. So whether the mailing actually arrived the first time has no bearing on whether TERC acquired jurisdiction. And this makes sense. If the Board's position was correct, then any time a person's appeal was returned after the last filing date, even if the person had done everything correctly and according to § 77-5013(2), the appeal would be untimely. This would be an absurd result because it would penalize taxpayers for events not under their control.

The U.S. Tax Court rejected an argument similar to the Board's in *Estate of Marguerite M. Cranor*.[9] In that case, the petitioner mailed his petition on September 3, 1999, well before the September 7 deadline. The September 3 mailing was correct in all respects, but it was returned to the petitioner on September 16. The petitioner removed the petition from the returned envelope and remailed it in a new envelope that same day. The Commissioner of Internal Revenue contended that the second mailing was the only one that mattered, that it occurred after the September 7 deadline, and that

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[6] Brief for appellee at 10.

[7] See, e.g., *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

[8] See, e.g., *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[9] *Estate of Marguerite M. Cranor*, 81 T.C.M. (CCH) 1111 (2001).

therefore, the court lacked jurisdiction to reach the merits of the petition.[10]

The court rejected the Commissioner of Internal Revenue's argument:

> [S]ection 7502(a) does not require that the qualifying envelope (i.e., the envelope which was timely mailed, properly addressed, and bore the proper postage) be the envelope in which the petition is received; nor does section 7502(a) bar application of the "timely mailing is timely filing" rule if a petition contained in a properly addressed envelope (that otherwise meets the above requirements) is returned to, and remailed by, the taxpayer.[11]

[4] The same reasoning applies here. We reject the Board's argument that the September 1, 2011, mailing is irrelevant to our inquiry. The plain language of § 77-5013(2) focuses on whether the mailing was properly placed in the mail, rather than on whether TERC received it. And because the September 15 mailing obviously occurred after the filing deadline, only the September 1 mailing could have conferred jurisdiction on TERC. It must be the focus of our analysis.

There is no dispute that Lozier placed the envelope "in the United States mail" on September 1, 2011, or that the September 1 mailing was before the September 12 filing deadline. Nor is there any dispute that the envelope had the proper postage. The only issues are whether Lozier placed the envelope in the mail "for delivery to [TERC]" and whether the mailing had "a legible postmark."

TERC seemingly concluded, and the Board now argues, that Lozier had not placed the envelope in the mail "for delivery to [TERC]" because it arrived at Marks Nelson's offices rather than at TERC. But errors are known to occur in the postal system, and the fact that Lozier's September 1, 2011, mailing did not arrive at TERC is not dispositive. And when viewed with the rest of the evidence, we conclude that both TERC's conclusion and the Board's argument are unreasonable.

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[10] See *id.*

[11] *Id.* at 1113.

There is no dispute that Lozier intended to appeal several tax valuations and that it could only do so by sending the appropriate documents to TERC. It stands to reason, then, that Lozier intended to mail the documents to TERC so its appeals could be heard. Testimony supports this conclusion. A corporate officer at Lozier testified that Marks Nelson, on behalf of Lozier, mailed the appeals to TERC for review. A partner with Marks Nelson also testified that Marks Nelson mailed Lozier's appeals to TERC for review. Additionally, the parties do not dispute that the envelope contained an accurate address for TERC. And when Marks Nelson remailed the envelope on September 15, 2011, with no changes from the September 1 mailing other than adding postage for a return receipt, it did in fact arrive at TERC. We conclude that Lozier placed the envelope in the mail "for delivery to [TERC]" on September 1 and that both TERC's conclusion and the Board's argument otherwise are unreasonable.

Still, the Board also argues that the mailing did not comply with U.S. Postal Service (USPS) regulations and so for that reason, Lozier did not place the envelope in the mail "for delivery to [TERC]." Specifically, the Board argues that the return address was not located in the top left corner of the envelope and that the Marks Nelson logo was below the delivery line of the delivery address. We find these arguments unpersuasive.

We may take judicial notice of federal agencies' regulations.[12] The USPS' Domestic Mail Manual (DMM)[13] has been incorporated by reference into the Code of Federal Regulations and has the force of law.[14] It lists the types of mail which require a return address.[15] The record shows that Marks Nelson mailed Lozier's appeals on September 1, 2011, by certified mail, without a return receipt requested. The USPS apparently

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[12] See *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003).

[13] Mailing Standards of the United States Postal Service, Domestic Mail Manual, http://about.usps.com/manuals/welcome.htm (last visited Apr. 11, 2013).

[14] See 39 C.F.R. §§ 111.1 through 111.4 (2012).

[15] See DMM, *supra* note 13, § 602.1.5.3.

does not require a return address for such a mailing.[16] And although the USPS apparently recommends not placing a logo or label below the delivery line of the delivery address,[17] we see no requirement to that effect in the DMM. So to the extent that the USPS' regulations are relevant to whether Lozier placed its appeals in the mail "for delivery to [TERC]," in this case, they do not change our conclusion.

For an appeal to be timely filed, it must contain a legible "postmark" dated before the filing deadline. The record shows that the September 1, 2011, mailing had a Pitney Bowes postage meter stamp in the top right-hand corner of the envelope for $4.13. TERC impliedly determined, and the Board argues, that such a marking does not qualify as a "postmark." Lozier, on the other hand, argues that such a marking does qualify as a "postmark." This is an issue of first impression in Nebraska.

The meaning of a statute is a question of law,[18] which we review de novo on the record.[19] The Tax Equalization and Review Commission Act[20] does not define "postmark"; in fact, it is not defined anywhere in the Nebraska statutes. Nor is it defined in our case law. TERC has, however, defined "postmark" in the Nebraska Administrative Code. There, TERC has defined "Postmark" as "[t]he cancellation mark of the [USPS]. The mark of any private delivery or courier service (such as FedEx, Airborne, UPS, etc.) is not a postmark."[21] The Board invites us to apply that definition here.

But that definition explicitly applies only when "used in the Rules and Regulations of [TERC]," and even then it does not apply if "the context of a term's use requires a different definition."[22] Nor does it purport to define the statutory

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[16] See *id*.

[17] See United States Postal Service, Business Mail 101, http://pe.usps.com/businessmail101/addressing/returnAddress.htm (last visited Apr. 11, 2013).

[18] See, e.g., *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

[19] See, e.g., *Republic Bank, supra* note 1.

[20] See Neb. Rev. Stat. § 77-5001 et seq. (Reissue 2009 & Cum. Supp. 2012).

[21] 442 Neb. Admin. Code, ch. 2, § 001.41 (2011).

[22] *Id*., § 001.

term "postmark" as used in § 77-5013(2), but only the term "postmark" as used in TERC's rules and regulations. And although specifically defined, TERC's rules and regulations never actually use the term "postmark." We reject the Board's invitation.

Again, we give statutory language its plain and ordinary meaning.[23] "The plain meaning of the term connotes a mark placed on a mailed item."[24] Definitions for the term abound. For example, the USPS defines a "postmark" as follows:

> A postal imprint made on letters, flats, and parcels that shows the name of the Post Office that accepts custody of the mail, along with the two-letter state abbreviation and ZIP Code of the Post Office, and for some types of mail the date of mailing, and the time abbreviation a.m. or p.m. The postmark is generally applied, either by machine or hand, with cancellation or killer bars to indicate that the postage cannot be reused.[25]

Black's Law Dictionary defines a "postmark" as "[a]n official mark put by the post office on an item of mail to cancel the stamp and to indicate the place and date of sending or receipt."[26] And Webster's defines a "postmark" as "an official postal marking on a piece of mail; *specif*: a mark showing the name of the post office and the date and sometimes the hour of mailing and often serving as the actual and only cancellation."[27] The first two definitions indicate that only the USPS may make a "postmark," while the last definition could arguably include a postage meter stamp because the USPS authorizes and regulates postage meters' use[28];

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[23] See, e.g., *Spady, supra* note 7.

[24] See *Chevron U.S.A. v. Department of Revenue*, 154 P.3d 331, 334 (Wyo. 2007).

[25] United States Postal Service, Glossary of Postal Terms, http://about.usps.com/publications/pub32 (last visited Apr. 11, 2013).

[26] Black's Law Dictionary 1286 (9th ed. 2009).

[27] Webster's Third New International Dictionary of the English Language, Unabridged 1772-73 (1993).

[28] See DMM, *supra* note 13, § 604.

so a postage meter stamp could be considered an "official postal marking."[29]

A statute is ambiguous if it is susceptible of more than one reasonable interpretation.[30] Based on the foregoing, we conclude that the meaning of the term "postmark" is ambiguous. It could mean only a mark made by the USPS or it could also mean marks made by postage meters, which the USPS licenses and regulates. We construe an ambiguous statute to give effect to its legislative purpose.[31] Our review of the legislative history of § 77-5013 provided no guidance as to whether the term "postmark" was intended to include postage meter stamps.

There are apparently various kinds of postmarks. For example, the USPS recognizes and defines "[e]lectronic," "local," and "philatelic" postmarks.[32] The Internal Revenue Service, in interpreting its own "'timely mailing is timely filing'" rule, recognizes both USPS postmarks and non-USPS postmarks.[33] Here, the Nebraska Legislature used only the unqualified, general term "postmark." This is noteworthy because the Legislature has in other sections qualified the term "postmark." For example, in Neb. Rev. Stat. § 77-27,125 (Reissue 2009), the Legislature used the term "United States postmark." In Neb. Rev. Stat. § 86-644 (Reissue 2008), the Legislature used the term "electronic postmark."

[5] Lozier accurately notes that the intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.[34] The Legislature knew and understood that there were various types

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[29] See *Severs v. Abrahamson*, 255 Iowa 979, 124 N.W.2d 150 (1963).

[30] See, e.g., *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012).

[31] See, e.g., *Blakely, supra* note 8.

[32] See Glossary of Postal Terms, *supra* note 25.

[33] *Estate of Marguerite M. Cranor, supra* note 9, 81 T.C.M. at 1113. See 26 C.F.R. § 301.7502-1 (2012). See, also, e.g., *Kahle v. Commissioner*, 88 T.C. 1063 (1987).

[34] See, e.g., *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999).

of postmarks, but it chose to use the general, unqualified term "postmark." Moreover, the Legislature was also presumably aware of the prevalence of postage meter use. "Federal legislation authorizing private postage meters has been in effect since 1920 and, as long ago as 1961, forty-five percent of all mail in this country and half of the business mail was processed by private meters."[35] If the Legislature meant the term "postmark" to mean only a USPS postmark, it could have said so explicitly, as it has elsewhere. It did not.

[6] We construe statutes to give effect to the underlying purpose of the statute.[36] Looking at the statute's language, the intent of the "legible postmark" requirement was to act as evidence of the date the appeal was mailed.[37] We conclude that a postage meter stamp, when viewed in the context of the pertinent USPS regulations, satisfies this purpose and is a "postmark" within the meaning of § 77-5013(2).

The USPS licenses and regulates the use of postage meters, as outlined in the DMM. Only authorized entities, such as Pitney Bowes, are able to provide postage meters, and no one but the USPS may actually own a postage meter.[38] The use of postage meters is heavily regulated. Mailers are required to place metered mail in the mail by the labeled date or correct the date using a date correction indicium.[39] Failure to do so will subject the mailer to penalties, such as loss of the postage meter.[40] Additionally, a person who misuses a postage meter runs the risk of being criminally prosecuted.[41] We believe these regulations are sufficient to qualify a postage meter stamp as satisfactory evidence of the date of mailing.

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[35] *Chevron U.S.A., supra* note 24, 154 P.3d at 338. See, also, *Severs, supra* note 29; Charles Pomeroy Collins, *The Validity of Postmarks*, 47 A.B.A. J. 371 (1961).

[36] See, e.g., *Blakely, supra* note 8.

[37] See § 77-5013(2).

[38] DMM, *supra* note 13, §§ 604.4.1.3 and 604.4.2.

[39] *Id.*, §§ 604.4.5.1 and 604.4.6.2.

[40] *Id.*, § 604.4.2.4.

[41] See, *Severs, supra* note 29; 18 U.S.C. § 1001 (2006).

Other courts have reached similar results, reasoning that a postage meter stamp is a "postmark" because heavy USPS regulation of postage meters safeguards its evidentiary value as to the date of mailing.[42] We recognize that many of those courts operated under an older version of the DMM with different regulations. Most notably, the older versions of the DMM apparently included regulations indicating that the post office would inspect metered mail to ensure the postage meter stamp's date accuracy.[43] We have not found an equivalent regulation in the current DMM; rather, the onus appears to be on the mailer to correct any mistakes in the date of the postage meter stamp.[44]

But the absence of regulations explicitly saying that the USPS performs random checks of metered mail does not mean that a postal service worker would not correct, or bring to the mailer's attention, an incorrect date. The current regulations clearly require mail to be dated accurately.[45] Furthermore, in the absence of a contrary indication, lawful conduct—that mailers comply with the regulations—is presumed.[46] Moreover, though those regulations are missing, it remains true that the USPS authorizes and heavily regulates postage meter use and that misuse of a postage meter can result in significant penalties. Under such circumstances, and in the absence of evidence showing that the mailer misused the meter, we conclude that a postage meter stamp satisfies the statute's purpose of being evidence of the mailing date and that it is a "postmark."

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[42] See, *Chevron U.S.A., supra* note 24; *Abrams v. Ohio Pacific Exp.*, 819 S.W.2d 338 (Mo. 1991); *Haynes v. Hechler*, 182 W. Va. 806, 392 S.E.2d 697 (1990); *Bowman v. Ohio Bur. of Emp. Serv.*, 30 Ohio St. 3d 87, 507 N.E.2d 342 (1987); *Severs, supra* note 29; *Frandrup v. Pine Bend Warehouse*, 531 N.W.2d 886 (Minn. App. 1995); *Gutierrez v. Industrial Claim App. Off.*, 841 P.2d 407 (Colo. App. 1992).

[43] See, e.g., *Bowman, supra* note 42.

[44] See DMM, *supra* note 13, § 604.4.6.2.

[45] See *id.*, §§ 604.4.5.1 and 604.4.6.1.

[46] See, *Coad v. Coad*, 87 Neb. 290, 127 N.W. 455 (1910); *Severs, supra* note 29.

We recognize, too, that other courts have held differently.[47] And although we agree that it is impossible for the USPS to "closely scrutinize all of the millions of meter-marked dates on the mail it processes,"[48] we believe the risk of an inspection to the mailer (and its attendant penalties) sufficiently discourages any mismarking.

[7,8] Finally, it is true, as the Board notes, that we strictly construe jurisdictional statutes.[49] But that does not mean that whenever there is a question about the meaning of a term, we automatically interpret it so as to foreclose jurisdiction. If that were the case, then there would be no "construction" at all. Instead, that principle serves to decide cases where, after further investigation, there is no ready answer. In other words, if the meaning of an ambiguous jurisdictional statute is unclear, even after reviewing the legislative history, the statute's underlying purpose, and other resources, only then would we give it its most narrow interpretation. That is not the case here. We conclude that a postage meter stamp is a "postmark" within the meaning of § 77-5013(2).

CONCLUSION

Lozier's mailing met the jurisdictional requirements under § 77-5013(2). We reverse TERC's dismissal of Lozier's appeals as untimely.

REVERSED.

MILLER-LERMAN, J., not participating.

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[47] See, *Smith v. Idaho Dept. of Labor*, 148 Idaho 72, 218 P.3d 1133 (2009); *Lin v. Unemployment Comp. Bd. of Review*, 558 Pa. 94, 735 A.2d 697 (1999); *Machado v. Florida Unemployment Appeals*, 48 So. 3d 1004 (Fla. App. 2010); *Corona v. Boeing Co.*, 111 Wash. App. 1, 46 P.3d 253 (2002).

[48] See *Smith, supra* note 47, 148 Idaho at 75, 218 P.3d at 1136.

[49] See, e.g., *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

HELEN ABDOUCH, APPELLANT, V. KEN LOPEZ, INDIVIDUALLY AS A RESIDENT OF MASSACHUSETTS AND AS OWNER AND OPERATOR OF KEN LOPEZ BOOKSELLER, A MASSACHUSETTS BUSINESS, APPELLEE.

829 N.W.2d 662

Filed April 19, 2013. No. S-12-363.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.
2. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
3. **Jurisdiction: Judgments: Appeal and Error.** An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.
4. **Pleadings: Affidavits: Appeal and Error.** If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
5. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
6. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
7. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute provides that a court may exercise personal jurisdiction over a person who has any other contact with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States.
8. **Jurisdiction: States: Legislature: Intent.** It was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents under Nebraska's long-arm statute.
9. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
10. **Due Process: Jurisdiction: States.** When a state construes its long-arm statute to confer jurisdiction to the fullest extent permitted by the Due Process Clause, the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process.

11. ____: ____: ____. To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.
12. ____: ____: ____. The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
13. **Jurisdiction: States.** Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.
14. **Due Process: Jurisdiction: States: Appeal and Error.** In analyzing personal jurisdiction, an appellate court considers the quality and type of the defendant's activities in deciding whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.
15. **Jurisdiction: States.** In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in continuous and systematic general business contacts with the forum state.
16. ____: ____. If a defendant's contacts are neither substantial nor continuous and systematic and instead the cause of action arises out of or is related to the defendant's contacts with the forum, a court may assert specific jurisdiction over the defendant, depending upon the nature and quality of such contact.
17. **Jurisdiction: Courts.** Technological advances do not render impotent the Nebraska Supreme Court's longstanding principles on personal jurisdiction.
18. **Jurisdiction: States.** The "sliding scale" test in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), considers a Web site's interactivity and the nature of the commercial activities conducted over the Internet to determine whether the courts have personal jurisdiction over nonresident defendants.
19. **Jurisdiction: States: Constitutional Law: Statutes.** The "sliding scale" test in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), does not amount to a separate framework for analyzing Internet-based jurisdiction, but, rather, relies on traditional statutory and constitutional principles.
20. **Torts: Jurisdiction: States.** For intentional tort claims, the specific jurisdiction inquiry focuses on whether the conduct underlying the claims was purposely directed at the forum state.
21. ____: ____: ____. A defendant's tortious acts can serve as a source of personal jurisdiction only where the plaintiff makes a prima facie showing that the defendant's acts (1) were intentional, (2) were uniquely or expressly aimed at the forum state, and (3) caused harm, the brunt of which was suffered—and which the defendant knew was likely to be suffered—in the forum state.
22. **Jurisdiction: States.** Under a personal jurisdiction analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.

Appeal from the District Court for Douglas County: KIMBERLY MILLER PANKONIN, Judge. Affirmed.

Mary Kay Green for appellant.

Michael C. Cox, David A. Yudelson, and Kristin M.V. Farwell, of Koley Jessen, P.C., L.L.O., for appellee.

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

McCormack, J.

I. NATURE OF CASE

Helen Abdouch filed suit against an out-of-state defendant, Ken Lopez, individually and as owner and operator of his company, Ken Lopez Bookseller (KLB), under Neb. Rev. Stat. § 20-202 (Reissue 2012) for violating her privacy rights by using an inscription in Abdouch's stolen copy of a book entitled "Revolutionary Road"[1] to advertise on the KLB rare books Web site. Although not reflected in the case title, the parties and the lower court refer to Lopez and KLB as separate defendants, and so we will treat them as such in this opinion. Lopez and KLB filed, and the district court sustained, a motion to dismiss for lack of personal jurisdiction. Abdouch now appeals.

II. BACKGROUND

Abdouch is a resident of Omaha, Nebraska. In 1960, Abdouch was the executive secretary of the Nebraska presidential campaign of John F. Kennedy. In 1963, Abdouch received a copy of the book, which was inscribed to her by the late author Richard Yates. The inscription stated: "For Helen Abdouch — with admiration and best wishes. Dick Yates. 8/19/1963."

At some time not specified by the record, Abdouch's inscribed copy of the book was stolen. Lopez and his company, KLB, bought the book in 2009 from a seller in Georgia and sold it that same year to a customer not in Nebraska. In 2011,

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[1] Richard Yates, Revolutionary Road (Boston, Little Brown 1961).

Abdouch, who does not own a computer, learned from a friend that Lopez had used the inscription in the book for advertising purposes on his Web site, http://www.lopezbooks.com. The commercial advertisement had been used with the word "SOLD" on the Web site for more than 3 years after the book was sold. The advertisement associated with a picture of the inscription stated in relevant part:

> This copy is inscribed by Yates: "For Helen Abdouch — with admiration and best wishes. Dick Yates. 8/19/63." Yates had worked as a speech writer for Robert Kennedy when Kennedy served as Attorney General; Abdouch was the executive secretary of the Nebraska (John F.) Kennedy organization when Robert Kennedy was campaign manager. The book is cocked; the boards are stained; the text is clean. A very good copy in a near fine, spine-tanned dust jacket. A scarce book, and it is extremely uncommon to find this advance issue of it signed. Given the date of the inscription — that is, during JFK's Presidency — and the connection between writer and recipient, it's reasonable to suppose this was an author's copy, presented to Abdouch by Yates. [#028096] SOLD

Lopez is the owner and sole proprietor of KLB, which is a rare book business based in Hadley, Massachusetts. KLB buys and sells rare books and manuscripts. KLB sells these books and manuscripts through published catalogs and through the Web site.

Generally, the Web site contains KLB's inventory of rare books and manuscripts. Individuals that visit the Website can browse and search the inventory. If individuals or entities choose to, they can purchase through the Web site.

In addition to selling books through catalogs and online, KLB attends and has exhibits at various antiquarian bookfairs. Over the past 25 years, Lopez and/or KLB have attended and exhibited at an estimated 300 to 400 bookfairs in various locations within the United States, as well as overseas. Lopez and KLB have never exhibited at or attended a book fair in Nebraska.

KLB has an active mailing list for its catalogs of approximately 1,000 individuals and entities. Among that list, only

two are located in Nebraska. According to Lopez' affidavit, KLB did not solicit the two Nebraska members; rather, the two individuals solicited contact with KLB and requested to be placed on the mailing list. Neither of these two individuals has any connection to the claims at issue in this lawsuit.

Neither Lopez nor KLB is registered to do business in Nebraska in any capacity. Lopez and KLB do not own or lease real estate in Nebraska, do not maintain an office in Nebraska, and have never conducted or attended meetings in Nebraska. Neither Lopez nor KLB has paid any Nebraska sales tax.

Lopez and KLB do not advertise in any publication that is published in or that otherwise originates from Nebraska. Lopez and KLB do not advertise in any publication that specifically targets potential customers in Nebraska. Beyond the two customers on the mailing list, Lopez and KLB do not target or reach out to customers or potential customers in Nebraska in any way.

The amount of contact with Nebraska and Nebraska residents is also demonstrated by KLB's sales. KLB's total sales for 2009 through 2011 were approximately $3.9 million. In 2009, KLB sold three books to a single Nebraska customer, earning a total of $76. In 2010, KLB sold three books to two Nebraska customers for $239.87. In 2011, two books were sold to a Nebraska customer for $299. All of these sales were initiated by the customers through the Web site.

Abdouch alleges that Lopez knew she was a resident of Nebraska when he violated her privacy. Lopez avers in his affidavit that he did not know that Abdouch was a resident of Nebraska until in or around June 2011, at which time he was contacted by someone and told that Abdouch lived in Nebraska. In Abdouch's affidavit, she counters that she has been informed that she can be easily found and identified as a Nebraska resident on the Internet and that there are only two people named "Helen Abdouch" in the entire United States.

After discovering Lopez and KLB's use of the inscribed book as an advertisement, Abdouch brought suit pursuant to § 20-202 against Lopez and KLB for violating her vigilantly

protected right of privacy. In a relevant part of the complaint, she alleged:

> 5. That . . . Lopez did an internet search for "Helen Abdouch" and found a brief reference to her as "executive secretary of the Nebraska (John F.) Kennedy campaign" in an October 10, 1960, Time Magazine article entitled: "DEMOCRATS: Little Brother is Watching" based on an interview with Robert F. Kennedy, campaign manager of his brother's John F. Kennedy's presidential campaign.
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> 6. That based on this article, . . . Lopez wrote an ad for the sale of Abdouch's book on his online catalogue linking [Abdouch] to Yates through the Kennedy connection . . . and placed on [the KLB Web site] at www.lopezbooks.com and which was "broadcast" or sent out over the world wide web.
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> 7. That by his own admission, . . . Lopez did not search the internet to determine whether . . . Abdouch was still alive and assumed she was dead so he made no further effort to get her permission.

Lopez and KLB filed a motion to dismiss for lack of personal jurisdiction, alleging that they do not have sufficient contacts with Nebraska for purposes of personal jurisdiction and have not purposefully availed themselves of the benefits and protections of the forum state. The district court granted the motion and dismissed the case.

III. ASSIGNMENT OF ERROR

Abdouch assigns as error the district court's finding that it lacked personal jurisdiction over Lopez and KLB.

IV. STANDARD OF REVIEW

[1,2] When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.[2] When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. Pldg.

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[2] *S.L. v. Steven L.*, 274 Neb. 646, 742 N.W.2d 734 (2007).

§ 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.[3]

[3,4] An appellate court reviews a lower court's determination regarding personal jurisdiction based on written submissions in the light most favorable to the nonmoving party.[4] If the lower court does not hold a hearing and instead relies on the pleadings and affidavits, then an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.[5]

V. ANALYSIS

Abdouch argues that the district court erred in finding that the State lacked personal jurisdiction over Lopez and KLB. Abdouch argues that Lopez and KLB's active Web site deliberately targeted Abdouch with tortious conduct. She alleges these contacts are sufficient to create the necessary minimum contacts for specific jurisdiction.

[5,6] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.[6] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[7]

1. Long-Arm Statute

[7-10] Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2008), provides: "A court may exercise personal jurisdiction over a person . . . [w]ho has any other contact

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, 269 Neb. 222, 691 N.W.2d 147 (2005).

with or maintains any other relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." It was the intention of the Legislature to provide for the broadest allowable jurisdiction over nonresidents under Nebraska's long-arm statute.[8] Nebraska's long-arm statute, therefore, extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.[9] "[W]hen a state construes its long-arm statute to confer jurisdiction to the fullest extent permitted by the due process clause, . . . the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process."[10] Therefore, the issue is whether Lopez and KLB had sufficient contacts with Nebraska so that the exercise of personal jurisdiction would not offend federal principles of due process.

2. Minimum Contacts

[11-13] Therefore, we consider the kind and quality of Lopez' and KLB's activities to decide whether they had the necessary minimum contacts with Nebraska to satisfy due process. To subject an out-of-state defendant to personal jurisdiction in a forum court, due process requires that the defendant have minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice.[11] The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.[12] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the

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[8] *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

[9] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[10] *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 818 (8th Cir. 1994).

[11] *S.L. v. Steven L., supra* note 2.

[12] *Id.*

defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.[13]

[14,15] In analyzing personal jurisdiction, we consider the quality and type of the defendant's activities in deciding whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.[14] A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction. In the exercise of general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in "'"'continuous and systematic general business contacts'"'" with the forum state.[15]

[16] But if the defendant's contacts are neither substantial nor continuous and systematic, as Abdouch concedes is the case here, and instead the cause of action arises out of or is related to the defendant's contacts with the forum, a court may assert specific jurisdiction over the defendant, depending upon the nature and quality of such contact.[16]

In favor of specific jurisdiction, Abdouch argues that Lopez and KLB's Internet advertisement deliberately targeted Abdouch and other Nebraska residents. Abdouch argues that under a U.S. Supreme Court case, Lopez' and KLB's intentional tortious actions against her create specific jurisdiction in Nebraska.[17]

(a) "Sliding Scale" Test

[17] The Internet and its interaction with personal jurisdiction over a nonresident is an issue of first impression for this court. Although other courts will help guide our decision, we take note that technological advances do not render impotent

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 652, 742 N.W.2d at 741.

[16] See *Quality Pork Internat. v. Rupari Food Servs., supra* note 8.

[17] See *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

our longstanding principles on personal jurisdiction. The U.S. Supreme Court explained:

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* v. *Neff*, 95 U. S. 714 [(1877)], to the flexible standard of *International Shoe Co*. v. *Washington*, 326 U. S. 310 [(1945)]. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.[18]

[18] With this in mind, the Eighth Circuit, as well as the majority of circuits,[19] has adopted the analytical framework set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*,[20] for internet jurisdiction cases.[21] In that case, Zippo Manufacturing Company filed a complaint in Pennsylvania against nonresident Zippo Dot Com, Inc., alleging causes of action under the federal Trademark Act of 1946. Zippo Dot Com's contact with Pennsylvania consisted of over 3,000 Pennsylvania residents subscribing to its Web site. The district court in *Zippo*

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[18] *Hanson v. Denckla*, 357 U.S. 235, 250-51, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) (citation omitted).

[19] See, *Best Van Lines, Inc. v. Walker*, 490 F.3d 239 (2d Cir. 2007); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003); *ALS Scan, Inc. v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002); *Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999); *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883 (6th Cir. 2002); *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704 (8th Cir. 2003); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997).

[20] *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

[21] *Lakin v. Prudential Securities, Inc.*, *supra* note 19.

Mfg. Co. famously created a "sliding scale" test that considers a Web site's interactivity and the nature of the commercial activities conducted over the Internet to determine whether the courts have personal jurisdiction over nonresident defendants.[22] The court in *Zippo Mfg. Co.* explained the "sliding scale" as follows:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction. . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.[23]

The district court held that Pennsylvania had personal jurisdiction over Zippo Dot Com and the causes of action. In doing so, the district court made two important findings. First, the district court found that the Zippo Dot Com Web site was a highly interactive commercial Web site. Second, and more important, the district court found that the trademark infringement causes of action were related to the business contacts with customers in Pennsylvania.

[19] Although widely recognized and accepted, most circuits use the *Zippo Mfg. Co.* sliding scale of interactivity test only as a starting point. As the Second Circuit noted, "'it does not amount to a separate framework for analyzing internet-based

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[22] *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, *supra* note 20, 952 F. Supp. at 1124.

[23] *Id.* (citations omitted).

jurisdiction'"; instead, "'traditional statutory and constitutional principles remain the touchstone of the inquiry.'"[24]

The Seventh Circuit has noted that "'[c]ourts should be careful in resolving questions about personal jurisdiction involving online contacts to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state, even if that site is "interactive."'"[25] Many courts have held that even if the defendant operates a "'highly interactive'" Web site which is accessible from, but does not target, the forum state, then the defendant may not be haled into court in that state without offending the Constitution.[26]

Our precedent states that for there to be specific personal jurisdiction, the cause of action must arise out of or be related to the defendant's contacts with the forum state.[27] This is consistent with the U.S. Supreme Court's precedent which has stated "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."[28]

In the case at hand, it is evident that the Web site is interactive under the *Zippo Mfg. Co.* sliding scale test. In his affidavit, Lopez admits that customers can browse and purchase books from the online inventory. Lopez admits that he has two customers in Nebraska who are on the mailing list for KLB's catalogs. He admits that from 2009 through 2011, a total of $614.87 in sales from the Web site was made to Nebraska residents out of an estimated $3.9 million in total sales.

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[24] *Best Van Lines, Inc. v. Walker, supra* note 19, 490 F.3d at 252.

[25] *be2 LLC v. Ivanov*, 642 F.3d 555, 558 (7th Cir. 2011).

[26] *Id.* at 559. See, also, *Carefirst of Maryland v. Carefirst Pregnancy Ctrs.*, 334 F.3d 390 (4th Cir. 2003); *Rio Properties, Inc. v. Rio Intern. Interlink*, 284 F.3d 1007 (9th Cir. 2002); *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000); *Minnesota Public Radio v. Virginia Beach Educ. Br.*, 519 F. Supp. 2d 970 (D. Minn. 2007).

[27] *Quality Pork Internat. v. Rupari Food Servs., supra* note 8.

[28] *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 418, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

But, beyond the minimal Web site sales to Nebraska residents and mailing catalogs to two Nebraska residents, Lopez' and KLB's contacts with Nebraska are nonexistent. Lopez and KLB do not own, lease, or rent land in Nebraska. They have never advertised directly in Nebraska, participated in bookfairs in Nebraska, or attended meetings in Nebraska, and neither has paid sales tax in Nebraska.

[20] Furthermore, the Seventh Circuit has recently stated that when "the plaintiff's claims are for intentional torts, the inquiry focuses on whether the conduct underlying the claims was purposely directed at the forum state."[29] The reason for requiring purposeful direction is to "'ensure that an out-of-state defendant is not bound to appear to account for merely "random, fortuitous, or attenuated contacts" with the forum state.'"[30] Here, Abdouch's cause of action is an intentional tort based on Nebraska's privacy statute. There is no evidence, as discussed in greater detail later in the opinion, that Lopez and KLB purposefully directed the advertisement at Nebraska. Further, there is no evidence that Lopez and KLB intended to invade Abdouch's privacy in the State of Nebraska. Rather, the limited Internet sales appear to be random, fortuitous, and attenuated contacts with Nebraska.

Therefore, although Lopez and KLB's Web site is highly interactive, all of the contacts created by the Web site with the State of Nebraska are unrelated to Abdouch's cause of action.

(b) *Calder* Effects Test

Abdouch argues that the effects test formulated by the U.S. Supreme Court in *Calder v. Jones*[31] creates personal jurisdiction over Lopez and KLB, because Lopez and KLB aimed their tortious conduct at Abdouch and the State of Nebraska. In *Calder*, two Florida residents participated in the publication of an article about a California resident who brought a libel action

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[29] *Tamburo v. Dworkin*, 601 F.3d 693, 702 (7th Cir. 2010).

[30] *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

[31] *Calder v. Jones, supra* note 17.

in California against the Florida residents. Both defendants asserted that as Florida residents, they were not subject to the jurisdiction of the California court in which the libel action was filed. The Supreme Court rejected the defendants' argument and noted that the defendants were

> not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner[s] wrote and . . . edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.[32]

[21] In coming to its holding, the U.S. Supreme Court created a test, now known as the *Calder* effects test, which has been explained by the Eighth Circuit:

> "[A] defendant's tortious acts can serve as a source of personal jurisdiction only where the plaintiff makes a prima facie showing that the defendant's acts (1) were intentional, (2) were uniquely or expressly aimed at the forum state, and (3) caused harm, the brunt of which was suffered—and which the defendant knew was likely to be suffered—[in the forum state]."[33]

The Third Circuit has noted that the effects test "can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity."[34] Stated another way by the Third Circuit, "the effects test asks whether the plaintiff felt the brunt of the harm in the forum state, but it also asks whether defendants *knew* that the plaintiff would suffer the

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[32] *Id.* at 789-90 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)).

[33] *Johnson v. Arden*, 614 F.3d 785, 796 (8th Cir. 2010).

[34] *IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998).

harm there and whether they *aimed* their tortious conduct at that state."[35] Similarly, the Eighth Circuit has stated that the *Calder* effects test "allows the assertion of personal jurisdiction over non-resident defendants whose acts 'are performed for the very purpose of having their consequences felt in the forum state.'"[36]

In the context of Internet intentional tort cases, the federal circuit courts have rejected the argument that posting defamatory or invasive material to the World Wide Web is sufficient to confer personal jurisdiction. In *Johnson v. Arden*,[37] the plaintiffs filed a suit as a result of allegedly defamatory statements posted on an Internet discussion board. The complaint alleged that the Internet post stated, "'[The defendants] operated from Unionville, Missouri, where they killed cats, sold infected cats and kittens, brutally killed and tortured unwanted cats and operated a "kitten mill" in Unionville Missouri.'"[38] The Eighth Circuit, accepting the allegations as true, found that the posting did not specifically target Missouri. Although Missouri was included in the posting, Missouri's inclusion was incidental and not performed for the purposes of having the consequences felt in Missouri. The Eighth Circuit held that it "construe[s] the *Calder* effects test narrowly, and hold[s] that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction."[39]

In *Young v. New Haven Advocate*,[40] two Connecticut newspapers posted Internet articles that allegedly defamed a Virginia prison warden. The Fourth Circuit held that Virginia did not have personal jurisdiction because the Connecticut defendants "did not manifest an intent to aim their websites

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[35] *Marten v. Godwin*, 499 F.3d 290, 299 (3d Cir. 2007) (emphasis in original).

[36] *Dakota Industries v. Dakota Sportswear*, 946 F.2d 1384, 1390-91 (8th Cir. 1991) (quoting *Brainerd v. Governors of the University of Alberta*, 873 F.2d 1257 (9th Cir. 1989)).

[37] *Johnson v. Arden, supra* note 33.

[38] *Id.* at 796.

[39] *Id.* at 797.

[40] *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

or the posted articles at a Virginia audience."[41] The court observed that making the articles available to Virginia residents was not enough: "The newspapers must, through the Internet postings, manifest an intent to *target* and *focus* on Virginia readers."[42]

In *Revell v. Lidov*,[43] the defendant wrote a lengthy article posted on an Internet bulletin board on the terrorist bombing of Pan Am Flight 103, in which he, in part, accused the plaintiff of complicity in conspiracy and coverup. Rejecting personal jurisdiction in the plaintiff's forum state of Texas, the Fifth Circuit held that the defendant, who is not a Texas resident, did not expressly aim the posting at Texas, but, rather, at the entire world. The Fifth Circuit went on to say that "[k]nowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test."[44]

As in *Johnson*, *Young*, and *Revell*, Lopez and KLB's placement of the advertisement online was directed at the entire world, without expressly aiming the posting at the State of Nebraska. Abdouch pleaded in her complaint that the advertisement was "'broadcast' or sent out over the world wide web," but Abdouch failed to plead facts that demonstrate that Nebraska residents were targeted with the advertisement. Although the advertisement does mention that "Abdouch was the executive secretary of the Nebraska (John F.) Kennedy organization," the advertisement does not expressly direct its offer of sale to Nebraska. As in *Johnson*, the mention of Nebraska here is incidental and was not included for the purposes of having the consequences felt in Nebraska. As in *Revell*, Lopez did not know that Abdouch was a resident of Nebraska. He assumed that she had passed away and thus had no way of knowing that the brunt of harm would be suffered in Nebraska. Abdouch's complaint fails to demonstrate

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[41] *Id.* at 258-59.

[42] *Id.* at 263 (emphasis supplied).

[43] *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002).

[44] *Id.* at 475.

that Lopez and KLB had an intent to target and focus on Nebraska residents.

[22] In response, Abdouch alleges that this court gained personal jurisdiction in June 2011, when she had a representative contact Lopez with her objection to his commercial use of her name and identity in his advertisement. Abdouch cites the Eighth Circuit for the proposition that "'[m]inimum contacts must exist either at the time the cause of action arose, the time the suit was filed, or within a reasonable period of time immediately prior to the filing of the lawsuit.'"[45] However, as stated by the U.S. Supreme Court in *Burger King Corp. v. Rudzewicz*,[46] "'it is essential in each case that there be *some act by which the defendant purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" We have held that under a personal jurisdiction analysis, the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.[47] Thus, personal jurisdiction over Lopez and KLB cannot be created by the telephone call from Abdouch's representative to Lopez. Such contact is insufficient for personal jurisdiction purposes.

Even accepting Abdouch's allegations as true and reviewing the record in a light most favorable to Abdouch, we find that Abdouch's complaint and general allegations failed to show that Lopez and KLB "'uniquely or expressly aimed'" the Internet advertisement at Nebraska.[48]

VI. CONCLUSION

We conclude that Abdouch's complaint fails to plead facts to demonstrate that Lopez and KLB have sufficient minimum

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[45] See *Johnson v. Woodcock*, 444 F.3d 953, 955 (8th Cir. 2006) (quoting *Pecoraro v. Sky Ranch for Boys, Inc.*, 340 F.3d 558 (8th Cir. 2003)).

[46] *Burger King Corp. v. Rudzewicz, supra* note 30, 471 U.S. at 475 (emphasis supplied).

[47] *Brunkhardt v. Mountain West Farm Bureau Mut. Ins., supra* note 7.

[48] See *Johnson v. Arden, supra* note 33, 614 F.3d at 796.

contacts with the State of Nebraska. Although the Web site used to post the advertisement is interactive, the contacts created by the Web site are unrelated to Abdouch's cause of action. Furthermore, under the *Calder* effects test, the pleadings fail to establish that Lopez and KLB expressly aimed their tortious conduct at the State of Nebraska. For these reasons, Lopez and KLB could not have anticipated being haled into a Nebraska court for their online advertisement.

AFFIRMED.

MILLER-LERMAN, J., not participating.

PAT ZWIENER, APPELLEE AND CROSS-APPELLANT,
v. BECTON DICKINSON-EAST, APPELLANT
AND CROSS-APPELLEE.
829 N.W.2d 113

Filed April 19, 2013. No. S-12-563.

1. **Workers' Compensation.** Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
3. **Workers' Compensation: Words and Phrases.** Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
4. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.
5. ____. The level of a worker's disability depends on the extent of diminished employability or impairment of earning capacity, and does not directly correlate to current wages.
6. ____. An employee's return to work at wages equal to those received before the injury may be considered, but it does not preclude a finding that the employee is either partially or totally disabled.
7. ____. Earning capacity determinations should not be distorted by factors such as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his or her crippling handicaps.

8. ____. If payment of wages upon an employee's return to work was intended to be in lieu of indemnity benefits for which the employer accepted responsibility, then credit for those wages is allowed.
9. **Workers' Compensation: Rules of Evidence.** As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence.
10. **Workers' Compensation: Evidence: Due Process: Appeal and Error.** Subject to the limits of constitutional due process, the admission of evidence is within the discretion of the Nebraska Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.

Appeal from the Workers' Compensation Court: THOMAS E. STINE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Abigail A. Wenninghoff, of Larson, Kuper & Wenninghoff, P.C., L.L.O., for appellant.

Ryan C. Holsten, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The employer appeals from an award of the Nebraska Workers' Compensation Court, and the employee cross-appeals. We hold that an employee who leaves a job with an employer responsible for an injury in order to pursue more desirable employment does not waive temporary total disability benefits simply because the employer responsible for the injury would have accommodated light-duty restrictions during postsurgical recovery periods necessitated by the injury.

BACKGROUND

Pat Zwiener filed a petition against Becton Dickinson-East (Becton) in the compensation court, seeking temporary total disability benefits, compensation for certain unpaid medical bills, mileage expenses, and attorney fees under Neb. Rev. Stat. § 48-125 (Reissue 2010). Zwiener had not yet reached maximum medical improvement and did not seek a permanent impairment rating.

Zwiener suffered a shoulder injury arising out of and in the course of his employment with Becton on August 20, 2009. The injury was originally diagnosed as a strain. Zwiener was treated conservatively with corticosteroid injections, anti-inflammatories, and physical therapy. Zwiener was advised that he could continue working without restrictions.

On March 12, 2010, Zwiener resigned his employment with Becton and began working for Sapp Brothers, Inc., as a driver. The choice of new employment was unrelated to the injury. Zwiener explained that he liked being outdoors and that the pay was better. According to Becton, Zwiener knew surgery for the injury might be a possibility. But Zwiener's diagnosis and prognosis were, at the time he left Becton, uncertain.

Zwiener's shoulder injury continued to bother him, and he obtained a second opinion. The injury was eventually determined to consist of a tear to the right rotator cuff and nearby tendons. After further diagnostic tests, surgery was recommended. The recovery period from the surgery would require that Zwiener not use his right arm. Sapp Brothers was unable to accommodate that restriction.

Concerned that he would be without a wage during the recovery period, Zwiener tried to postpone the surgery until August 2010. Despite a medical opinion that waiting a few months would not adversely affect the outcome of the surgery, Becton insisted that Zwiener have the surgery right away if he wanted to ensure it was compensable. The surgery took place on May 10, 2010.

On May 12, 2010, Zwiener was released to work with the restriction of not using his right arm. Because Sapp Brothers could not accommodate this restriction, Zwiener did not work during the period of the restriction. Zwiener was not released to return to work at Sapp Brothers until July 8.

Becton agreed to pay for the surgery and related medical expenses, but it denied payment of any temporary total disability benefits during the recovery period for the surgery. Becton reasoned that if Zwiener had stayed employed there, Becton would have accommodated Zwiener's recovery restrictions and he would have been able to continue to receive a wage during that period. Becton has an aggressive return-to-work policy

designed to put its injured employees back to work rather than have them remain off work collecting workers' compensation benefits.

Unfortunately, Zwiener's symptoms were not completely alleviated by the first surgery. Eventually, a second surgery was recommended and scheduled for January 9, 2012. Zwiener testified that Becton had denied compensation for the recommended magnetic resonance imaging to determine whether the first surgery had been successful and whether another surgery was necessary. Zwiener understood that Becton would not approve the second surgery, so he submitted the second surgery for payment through his personal health care insurer instead.

Anticipating Becton's denial of temporary total disability benefits, on December 22, 2011, Zwiener's counsel wrote to Becton's counsel stating that Zwiener would be able to work for Becton, with restrictions, during the recovery period of his surgery. Zwiener's counsel asked that Becton inform Zwiener whether it would allow this and how to proceed. Becton did not respond. At the workers' compensation hearing, Becton objected to the letter as hearsay. The objection was overruled.

The second surgery was performed on January 9, 2012. Zwiener's physician recommended no work until January 30. Zwiener was released to work with restrictions on January 31. But Sapp Brothers was again unable to accommodate the restrictions, which included Zwiener's not being able to use his right arm.

Zwiener's counsel again wrote to Becton's counsel, asking that Becton state whether it would allow Zwiener to work light duty at Becton during the postsurgery recovery period. Becton did not respond. At the hearing, Becton's hearsay objection to this letter was overruled.

Becton denied temporary total disability benefits for the recovery period of the second surgery. Zwiener was not able to return to work at Sapp Brothers until April 25, 2012.

At the hearing before the compensation court, the parties agreed that Becton had voluntarily paid Zwiener $8,275.37, pursuant to a permanent partial impairment rating after the first

surgery. The parties agreed that this amount should be credited against any award and that, accordingly, no waiting-time penalties should be incurred.

The compensation court awarded Zwiener temporary total disability benefits for the periods he was unable to work due to his postsurgery restrictions. The court found no merit to Becton's position that if an employee is no longer working at Becton and cannot take advantage of Becton's return-to-work policy, then that employee is not entitled to temporary total disability benefits. The court explained that an employee is not "eternally bound" to remain employed with the employer responsible for the injury in order to receive the workers' compensation benefits to which the employee is entitled by statute. Furthermore, the court explained that "[i]t is not logical to mandate an internal return-to-work policy upon someone who is no longer an employee of the entity issuing the policy."

The court found that Becton had failed to pay outstanding medical expenses of a community hospital in the amount of $2,173 and of an orthopaedic hospital in the amount of $1,222.18. In addition, Becton was ordered to reimburse Zwiener's insurer for $5,565.86 in payments it made for medical expenses related to the second surgery. The court determined that Becton owed Zwiener $26.34 in mileage.

The court awarded attorney fees to Zwiener in the amount of $5,155. This was the total amount of attorney fees Zwiener's attorney demonstrated were incurred in bringing Zwiener's workers' compensation claim against Becton. The court noted that there was no reasonable controversy as to the compensability of the temporary total disability benefits and, also, that certain medical bills and mileage expenses were paid late. The court did not calculate the attorney fee award specifically in relation to the amount of untimely paid medical bills, because it also considered attorney fees due for the denial of temporary total disability benefits. The court awarded 50 percent waiting-time penalties on all amounts of temporary total disability due and owing. No credit was given for the $8,275.37 Becton already paid. Becton appeals and Zwiener cross-appeals from the award.

ASSIGNMENTS OF ERROR

Becton assigns that the compensation court erred in (1) finding that Zwiener was entitled to temporary total disability benefits, (2) finding that Zwiener is entitled to waiting-time penalty benefits and for failing to give Becton credit for benefits paid to date, (3) awarding attorney fees of $5,155, and (4) allowing the hearsay evidence contained in the letters written by Zwiener's attorney, an exhibit pertaining to late medical bills, and the exhibit outlining attorney fees incurred in bringing Zwiener's claim.

On cross-appeal, Zwiener asserts that the court erred in failing to find that medical bills paid to OrthoWest in the total amount of $9,308 were also untimely paid.

STANDARD OF REVIEW

[1,2] Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact.[1] In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.[2]

ANALYSIS

Entitlement to Temporary Total Disability

[3,4] Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.[3] Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.[4]

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[1] *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009).

[2] See *id.*

[3] *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

[4] *Id.*

[5-7] We have explained that the level of a worker's disability depends on the extent of diminished employability or impairment of earning capacity, and does not directly correlate to current wages.[5] A return to work at wages equal to those received before the injury may be considered, but it does not preclude a finding that the employee is either partially or totally disabled.[6] Earning capacity determinations should not be distorted by factors such as "'business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.'"[7]

[8] But, if payment of wages upon a return to work was intended to be in lieu of indemnity benefits for which the employer accepted responsibility, then credit for those wages is allowed.[8] Becton did not pay wages to Zwiener during the periods he was convalescing from the two surgeries necessitated by his injury because, had Zwiener not left his employment there, Becton would have paid wages for light-duty work in lieu of temporary total disability benefits. Becton believes an employee waives temporary total disability benefits when the employee moves on from a job that could have accommodated medical restrictions. We disagree.

We have never held that an employee who ceases to work for the employer responsible for the injury somehow forfeits temporary disability benefits because the employer would have accommodated light-duty work in lieu of benefits. In fact, in *Guico v. Excel Corp*.[9] and *Manchester v. Drivers Mgmt*.,[10] we

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[5] See *Heiliger v. Walters & Heiliger Electric, Inc*., 236 Neb. 459, 461 N.W.2d 565 (1990).

[6] See *id*.

[7] *Id*. at 471, 461 N.W.2d at 574 (quoting 2 A. Larson, The Law of Workmen's Compensation § 57.51(a) (1989)).

[8] See, *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954); *Godsey v. Casey's General Stores*, 15 Neb. App. 854, 738 N.W.2d 863 (2007). See, also, 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 82.01 (2011).

[9] *Guico v. Excel Corp*., 260 Neb. 712, 619 N.W.2d 470 (2000).

[10] *Manchester v. Drivers Mgmt., supra* note 1.

held that employees who were fired for cause did not forfeit their temporary total disability benefits simply because their employers would have provided light-duty work.

In *Guico*, the employee lost his light-duty work because he was fired for safety violations associated with the injury. The employee in *Manchester* similarly was fired and lost her light-duty work because of negligence in the accident leading to her injury. Becton apparently relies on our observation in *Guico* that some jurisdictions hold that employees lose their temporary disability benefits if their employer provided them with light-duty work and if they were fired and lost that accommodation because of misconduct unrelated to the injury.[11] But we did not opine on whether we would adopt such a rule if such facts were presented, and such facts are not presented here.

In *Guico*, we noted that, generally, when determining the extent of disability, "'the fact of termination or the reason for it is irrelevant.'"[12] Our court has consistently given the Nebraska Workers' Compensation Act[13] a liberal construction to carry out justly its beneficent purpose to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.[14] Furthermore, we recognize that employer-employee relationships are generally at-will and that the employee is free to leave an employment relationship without recourse by the employer—just as the employer is free to terminate the relationship, so long as it does not act unlawfully or in breach of contract.[15]

Adopting Becton's waiver argument would not only undermine the beneficent purposes of the Nebraska Workers' Compensation Act, it would effectively bind workers to

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[11] See *Guico v. Excel Corp., supra* note 9.

[12] *Id.* at 723, 619 N.W.2d at 479 (quoting *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985)).

[13] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2010).

[14] See, *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012); *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009).

[15] See *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007).

employers responsible for the injury until full recovery, thereby limiting at-will employees' mobility and freedom to choose other work opportunities. Nothing in the language of the act or public policy supports the waiver rule proposed by Becton.

The compensation court was not clearly wrong in determining that Zwiener had a total loss of earning capacity during the time he was convalescing from the surgeries necessitated by his work-related injury. We affirm the compensation court's award of temporary total disability benefits in the amount of $11,308.05.

Credit, Attorney Fees, and Waiting-Time Penalties

But the court failed to give Becton credit against this award for $8,275.37 already paid to Zwiener. The parties had stipulated this amount should be credited against the award, and they agree on appeal that the compensation court erred in failing to give such credit. The parties agree that because the compensation court failed to give Becton credit for $8,275.37 paid, it erred in awarding waiting-time penalties. Zwiener never sought waiting-time penalties. We reverse with directions for the compensation court to give Becton credit for the $8,275.37 paid and to vacate the waiting-time penalties.

The parties further agree that because of the failure to give Becton credit for the $8,275.37 payment, the compensation court improperly calculated the attorney fee award. At oral argument, Zwiener's counsel explained that due to the $8,275.37 payment, he had not sought attorney fees as a penalty for Becton's failure to pay temporary total disability benefits. Zwiener's counsel conceded at oral argument that the only basis for an attorney fee award here is the late payment of medical bills and that the case must be remanded for a determination as to what portion of the attorney fees is properly attributable to the pursuit of the late medical bills. Because Zwiener has waived any claim to an attorney fee award unrelated to the late medical bills, we reverse, and remand the cause for a redetermination of the attorney fee award based only on the untimely payment of medical bills.

The parties agree that the compensation court should redetermine attorney fees based on the standards set forth in *Harmon v. Irby Constr. Co*.[16] In *Harmon*, an employer had conceded all points of compensability of the employee's injury except for a $30 per diem payment that the employee wished to add to his weekly wage calculation. The employee also alleged that the employer had failed to pay one $165 medical bill within 30 days after notice of the obligation for payment. We rejected the employee's argument concerning the $30 per diem payment, but found the medical bill issue meritorious. We noted, however, that this was the only delinquent bill and that the employer had made timely medical payments in excess of $50,000. Of the 36.2 hours of work documented by the employee's attorney, only a fraction could be directly attributed to collection of that one delinquent bill. Under such circumstances, we held that a court calculating attorney fees pursuant to § 48-125 must pay particular attention to the amount of the legal work performed in relation to the amount of the unpaid medical bill and the amount of the unpaid medical bill in relation to the workers' compensation award received.[17] "Allowing a claimant to recover all of his or her attorney fees based on the failure of a defendant to pay such a bill would provide the claimant with a windfall."[18]

The only dispute between Zwiener and Becton concerning attorney fees is the amount of unpaid medical bills that the court should consider in making its redetermination. Zwiener argues on cross-appeal that the compensation court erred in failing to find an additional $9,308 in late medical bills to Orthowest. Becton did not file a reply brief to Zwiener's cross-appeal, but apparently believes that the attorney fees should be calculated only on the compensation court's finding of $1,890.13 in untimely medical bills and expenses.

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[16] *Harmon v. Irby Constr. Co*., 258 Neb. 420, 604 N.W.2d 813 (1999).

[17] *Id*.

[18] *Id*. at 430, 604 N.W.2d at 821.

Although Zwiener presented evidence that $9,308 in OrthoWest medical bills were paid 79 days after treatment, the compensation court did not make any finding as to whether the OrthoWest bills were untimely paid after notice, thus falling under the mandatory attorney fee provision found in § 48-125. We direct the court to make such a determination on remand, before recalculating the attorney fee award.

Evidentiary Objections

We find no merit to Becton's remaining assignment of error relating to evidentiary objections. Becton objected to exhibit 1 as hearsay, exhibit 3 on foundation and hearsay, and exhibit 5 on relevance, foundation, and hearsay grounds.

Exhibit 1 was a letter from Zwiener's attorney stating that Zwiener was willing to work light duty while convalescing. Becton's objection to that exhibit is moot. The letter is irrelevant to our holding that Zwiener did not waive temporary total disability by leaving his employment with Becton, and it was not the basis for the compensation court's award of temporary total disability benefits.

Exhibit 3 set forth the fees Zwiener's attorney incurred in bringing the suit. Becton does not explain how the attorney's own affidavit as to his fees lacked foundation. And although exhibit 3 may include "all aspects of preparing the case,"[19] it is not thereby inadmissible. The compensation court on remand will consider the exhibit in light of *Harmon*,[20] as set forth above.

Finally, the court did not abuse its discretion in allowing approximately 200 pages of "repetitive"[21] documents pertaining to medical bills in exhibit 5. Becton's principal objection was that the demand letters in exhibit 5 contained hearsay. It can be presumed[22] that the compensation court considered the

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[19] Brief for appellant at 22.

[20] *Harmon v. Irby Constr. Co.*, *supra* note 16.

[21] Brief for appellant at 22.

[22] See, e.g., *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996).

letters as evidence of notice, rather than for the truth of the matters asserted.[23]

[9,10] As a general rule, the compensation court is not bound by the usual common-law or statutory rules of evidence.[24] Subject to the limits of constitutional due process, the admission of evidence is within the discretion of the compensation court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.[25] We find no reversible error in the admission of the exhibits complained of by Becton in this appeal.

CONCLUSION

We affirm the award of temporary total disability benefits. We reverse the failure to credit disability payments made by Becton, the award of waiting-time penalties, and the amount of the attorney fee award. Pursuant to the agreement of the parties, we remand the cause for a redetermination of the attorney fees that should be awarded in connection with untimely paid medical bills only. On remand, we also direct the court to determine whether the OrthoWest bills fall under § 48-125.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., participating on briefs.

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[23] See, *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012); *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

[24] See *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011).

[25] *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004).

MUTUAL OF OMAHA BANK, AS SUCCESSOR BY MERGER TO NEBRASKA STATE BANK OF OMAHA, APPELLEE, V. SAM MURANTE, AN INDIVIDUAL, APPELLANT.

829 N.W.2d 676

Filed April 25, 2013. No. S-11-1101.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
3. **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.
4. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
5. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
6. **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.
7. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults.
8. **Contracts: Guaranty.** A guaranty is an independent contract that imposes responsibilities different from those imposed in an agreement to which it is collateral.
9. ____: ____. A guaranty is interpreted using the same general rules as are used for other contracts.
10. ____: ____. A guaranty must be interpreted by reference to the entire document, with meaning and effect given to every part of the guaranty whenever possible.
11. **Pleadings: Appeal and Error.** Permission to amend pleadings is addressed to the discretion of the trial court; absent an abuse of discretion, the trial court's decision will be affirmed.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Steven J. Olson, of Brown & Brown, P.C., L.L.O., and Michael J. O'Bradovich for appellant.

Patrick B. Griffin and Alison M. Gutierrez, of Kutak Rock, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, and MCCORMACK, JJ., and INBODY, Chief Judge.

WRIGHT, J.

NATURE OF CASE

This case presents the question of whether a guaranty of a promissory note secured by a deed of trust is subject to the Nebraska Trust Deeds Act (Act), see Neb. Rev. Stat. § 76-1001 to § 76-1018 (Reissue 2009 & Cum. Supp. 2012). The lender made loans to the borrower which were secured by deeds of trust describing real estate owned by the borrower. As additional security for the loans to the borrower, the guarantor promised payment of the indebtedness on the notes. When the borrower defaulted, the lender sought payment of the indebtedness from the guarantor. The district court granted summary judgment in favor of the lender. The guarantor claims his obligation on the guaranty is subject to § 76-1013 of the Act. We affirm.

SCOPE OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court. *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012).

[2] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *McKinnis Roofing v. Hicks*, 282 Neb. 34, 803 N.W.2d 414 (2011).

[3,4] 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. *Zawaideh v. Nebraska Dept. of Health & Human Servs., ante* p. 48, 825 N.W.2d 204 (2013). 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*.

FACTS

Background Facts

In 2005, Sam Murante, who is a real estate broker, and a real estate agent formed Sutherlands Plaza, L.L.C. (Sutherlands), and began the development of the Sutherlands property at 29th and L Streets in Omaha. Mutual of Omaha Bank (Mutual) and its predecessor, Nebraska State Bank of Omaha, made four loans to Sutherlands. Each loan was evidenced by a promissory note, and Sutherlands executed four deeds of trust.

The first loan to Sutherlands was for $2,233,950 and was secured by two deeds of trust. The loan was later refinanced to a $2,337,078 note and remained secured by the two deeds of trust. The second loan was for $619,250 and was secured by the first deed of trust.

In November 2007, Mutual became the holder of the notes and the beneficiary of the deeds of trust. Mutual made a third loan for $122,500 and a fourth loan for $75,000 to Sutherlands, which were secured by a third and fourth deed of trust, respectively.

Murante's Guaranty Contract

As additional security for the first loan, Murante executed a commercial guaranty dated October 31, 2005. Murante unconditionally guaranteed full payment and satisfaction of Sutherlands' debt and obligations evidenced by the notes. He agreed to pay the principal amount outstanding on all debts, liabilities, and obligations Sutherlands owed to Mutual. The guaranty permitted Mutual to proceed against Murante on his obligation under the guaranty even when Mutual had not exhausted its remedies against Sutherlands. Murante waived all defenses based on suretyship or impairment of collateral except payment in full, including any defense from an antideficiency or other law which might prevent Mutual from bringing an action, including a deficiency action, against him.

Trustee's Sale

In 2010, Sutherlands defaulted and Mutual served written notice of default to Sutherlands. Sutherlands failed to cure the defaults and filed for bankruptcy on September 2, 2010. Mutual exercised its right to accelerate the debt. Murante was served with written notice of default, acceleration, and demand for payment, but did not pay the debt. As of January 1, 2011, Murante owed Mutual $3,292,839.33. On January 18, Mutual commenced an action against Murante for breach of the guaranty agreement.

After it had commenced its action on the guaranty, Mutual sold the real estate which secured the loans at a trustee's sale. On March 17, 2011, notice of the trustee's sale was published, which stated the real estate described in the deeds of trust would be sold to the highest bidder on April 26. At the trustee's sale, three parties identified themselves as having an interest in bidding. Mutual submitted the only bid of $1,658,000, and the property was conveyed to Mutual by trustee's deed.

District Court Decision

In this action to enforce the guaranty contract, the district court concluded that under the terms of the guaranty, Sutherlands' debt was not extinguished and Murante remained liable for Sutherlands' indebtedness. Murante had moved to amend his answer to assert that he was no longer liable to Mutual, because Mutual was barred by § 76-1013 from pursuing a deficiency action against Sutherlands. The district court overruled Murante's motion to amend and sustained Mutual's motion for summary judgment. It entered judgment against Murante for the full amount of Sutherlands' indebtedness, less Mutual's bid of $1,658,000.

Murante appealed, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Murante assigns, summarized and restated, that the district court erred in (1) holding that § 76-1013 did not apply to the action and that the debt was not extinguished by Mutual's failure to bring a deficiency action against Sutherlands,

(2) sustaining Mutual's motion for summary judgment and overruling his motion to amend, and (3) failing to exercise its equity authority to perform an accounting and prevent a windfall.

ANALYSIS

Effect of § 76-1013

Murante claims that the guaranty agreement is subject to the Act. Because the fair market value of the real estate sold at the trustee's sale is higher than the trustee sale price of $1,658,000, he claims he is entitled to have the fair market value of the property credited against the debt.

Our interpretation of the Act is a question of law which we determine independently of the court below. For the reasons set forth, we conclude that the Act does not apply to Mutual's action on the guaranty. We therefore affirm the judgment of the district court. Section § 76-1013 states in relevant part:

> At any time within three months after any sale of property under a trust deed, . . . an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security . . . . Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court shall not render judgment for more than the amount by which the amount of the indebtedness with interest and the costs and expenses of sale, including trustee's fees, exceeds the fair market value of the property or interest therein sold as of the date of the sale . . . .

[5,6] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning. *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012). We will not look beyond the statute to determine the legislative intent when the words are plain, direct, or unambiguous. *Id.* The Act applies to actions for deficiencies on the obligation for which a deed of trust was given as security. Section 76-1013 limits the lender's rights against the borrower if certain facts are present: the loan to the borrower is secured by a deed of trust and the lender proceeds under the Act by selling the property described in the deed of trust.

Following the nonjudicial foreclosure of the property, § 76-1013 requires that any action for a deficiency against the borrower must be commenced within 3 months of the trustee's sale. Before entering a judgment on the balance due, the court is required to find the fair market value of the property at the date of the trustee's sale. The court shall not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale exceeds the fair market value of the property. See § 76-1013.

Deeds of trust permit the lender to obtain prompt possession and sale of the real estate which the borrower has pledged as security without incurring the time and expense of judicial foreclosure. See *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003). The Act applies to actions based on obligations for which a deed of trust has been given as security. If the lender elects to sell the property at a trustee's sale, then the lender's action for a deficiency against the borrower is limited by the provisions of the Act. However, the Act does not limit the rights of a lender who proceeds against a guarantor who by separate contract has guaranteed the payment of the note.

[7,8] A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults. *NEBCO, Inc. v. Adams*, 270 Neb. 484, 704 N.W.2d 777 (2005). A bank may obtain a guaranty as security in addition to a trust deed. A guaranty is an independent contract that imposes responsibilities different from those imposed in an agreement to which it is collateral. *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008). See, also, *Mowery v. Mast*, 9 Neb. 445, 4 N.W. 69 (1880). Murante's guaranty was additional security for the loans to Sutherlands. It was a separate and distinct obligation from the promissory notes executed by Sutherlands. Because Murante did not give a deed of trust as security for his guaranty, Mutual's rights under the guaranty were not subject to the provisions of the Act.

[9,10] We examine the guaranty as an independent contract from the note and trust deed executed by the borrower. The meaning of a contract is a question of law, in connection with

which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *McKinnis Roofing v. Hicks*, 282 Neb. 34, 803 N.W.2d 414 (2011). A guaranty is interpreted using the same general rules as are used for other contracts. *Czerwinski, supra*. A guaranty must be interpreted by reference to the entire document, with meaning and effect given to every part of the guaranty whenever possible. See *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989).

Murante asserts that his liability under the guaranty is the same as Sutherlands' liability on the notes. This argument is without merit. The debt as evidenced by the notes has not been extinguished. The fact that Mutual is precluded by § 76-1013 from bringing an action against Sutherlands for the deficiency on the notes does not eliminate Murante's obligation under the guaranty.

> "If the principal obligation is not void . . . but is merely unenforceable against the debtor because of some matter of defense which is personal to the debtor, the guarantor may not successfully set up this matter to defeat an action by the creditor or obligee seeking to hold the guarantor liable on the contract of guaranty."

Department of Banking v. Keeley, 183 Neb. 370, 372, 160 N.W.2d 206, 207-08 (1968) (quoting 38 Am. Jur. 2d *Guaranty* § 52 (1968)).

Under the terms of the guaranty, Murante agreed to pay Sutherlands' debt to Mutual. He "absolutely and unconditionally guarantee[d] full and punctual payment and satisfaction of the [i]ndebtedness of [Sutherlands] to [Mutual], and the performance and discharge of all [Sutherlands'] obligations under the [n]ote and the [r]elated [d]ocuments." The guaranty permitted Mutual to enforce payment under the guaranty without first exhausting its remedies against Sutherlands. The guaranty was "a guaranty of payment and performance and not of collection, so [Mutual] can enforce this [g]uaranty against [Murante] even when [Mutual] has not exhausted [Mutual's] remedies against anyone else obligated to pay the [i]ndebtedness or against any collateral securing the [i]ndebtedness, this [g]uaranty or

any other guaranty." Murante expressly waived every defense based on suretyship or impairment of collateral except payment in full. He waived

> any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of . . . any "one action" or "anti-deficiency" law or any other law which may prevent [Mutual] from bringing any action, including a claim for deficiency, against [Murante], before or after [Mutual's] commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; . . . or . . . any defenses given to guarantors at law or in equity other than actual payment and performance of the [i]ndebtedness.

The fact that Mutual could no longer proceed against Sutherlands for payment of the deficiency did not extinguish Murante's liability to Mutual.

The guaranty also made Murante liable for the entire amount of Sutherlands' debt. The indebtedness that Murante agreed to pay included "all of the principal amount outstanding . . . arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that [Sutherlands] individually or collectively or interchangeably with others, owes or will owe [Mutual]." The guaranty applied to additional loans made to Sutherlands before the guaranty was revoked. The record does not show that Murante revoked the guaranty. Accordingly, under the terms of the guaranty, Murante was liable for payment on all four notes, less the amount received from the trustee's sale.

In Nebraska, there are two cases which have discussed the Act. In *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993), this court considered whether the lender could bring a deficiency action more than 3 months after a trustee's sale. Harry W. Meginnis, Jr., was a shareholder of Tom-Har, Inc., which purchased a sport facility for $600,000. He was a comaker of a note secured by a deed of trust to the sport facility real estate. Tom-Har failed to pay, the property was sold at a trustee's sale, and the proceeds were insufficient to pay the debt. We held that because the

lender elected to sell the property at a trustee's sale, an action for a deficiency against the borrower had to be commenced within 3 months from the date of the trustee's sale. Because the lender failed to commence a deficiency action against Meginnis within 3 months of the trustee's sale, the action on the deficiency was barred by the 3-month limitation described in § 76-1013.

The Nebraska Court of Appeals has addressed whether a lender's action on a guaranty had to be commenced within 3 months after a trustee's sale. In *Boxum v. Munce*, 16 Neb. App. 731, 751 N.W.2d 657 (2008), the borrowers, David S. Carl and Teena R. Carl, gave Richard H. Boxum a $28,500 promissory note and a deed of trust as security for a loan for the purchase and improvement of real estate. Harry J. Munce and Sherry L. Munce guaranteed the note. The Carls' obligation on the note was discharged in bankruptcy, and the property described in the deed of trust was sold at a trustee's sale.

Boxum sued the Munces on the guaranty. The trial court dismissed Boxum's claim, concluding that Boxum's action on the guaranty had not been commenced within 3 months of the trustee's sale. The Nebraska Court of Appeals reversed. It held that § 76-1013 applied only to a deficiency action on an obligation secured by a deed of trust. True, any action against the Carls on the promissory note had to have been commenced within 3 months from the date of the trustee's sale. However, since the action on the guaranty did not involve a trustee's sale pursuant to the deed of trust, the action on the guaranty was not subject to § 76-1013. Implicit in the Court of Appeals' decision was the determination that the Act did not apply to actions on a guaranty in which the guaranty was not secured by a deed of trust.

Murante argues that the Legislature did not intend to create one rule to measure the liability of the borrower and a different rule to measure the liability of the guarantor. We disagree. The plain language of the Act limits the borrower's liability when the property secured by a deed of trust has been sold at a trustee's sale, but imposes no limitations on a guarantor's liability. We will not look beyond the statute to determine the legislative intent when the words are plain, direct, or

unambiguous. *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012). The Legislature has not included guarantors within the protection of the Act, and could certainly do so if that were its intent.

Authority Holding Guarantors Protected by Antideficiency Statute

Murante relies upon *Surety Life Ins. Co. v. Smith*, 892 P.2d 1 (Utah 1995). Utah's act covering deeds of trust is similar to Nebraska's. The guarantors signed guaranty agreements regarding obligations of their partnership. When the partnership defaulted, the real estate listed in the deed of trust was sold by a nonjudicial foreclosure. The lender brought an action against the guarantors to recover a claimed deficiency.

The lender argued that the antideficiency statute did not apply to the guarantors, because no deed of trust had been given to secure the guaranties. The Utah Supreme Court disagreed. It held that the statute protected any defendant who could be the subject of an action to recover any deficiency on the indebtedness after the trustee's sale. It concluded the determining factor was not whether the lender brought the action to enforce the note or the guaranty, but whether the lender brought the action for the purpose of obtaining the balance due on the note. It held the statute's 3-month limitation of actions for a deficiency barred the lender from bringing the action against the guarantors.

Murante also cites two cases from other jurisdictions. In *First Interstate Bank v. Tatum and Bell*, 170 Ariz. 99, 821 P.2d 1384 (Ariz. App. 1991), the Arizona appellate court applied the same reasoning as the Utah Supreme Court. It concluded that the action on the guaranty was an attempt to recover the amount due on the loan. Because the loan was secured by a deed of trust, the fair market value credit provision in the statute applied to a deficiency action brought against the guarantor.

In *First Interstate Bank v. Shields*, 102 Nev. 616, 730 P.2d 429 (1986), the lender argued Nevada's antideficiency statute did not protect the guarantor. The Nevada Supreme Court held the state's antideficiency statute applied to the guarantor even

if the guarantor had no interest in the property which had been given to secure the initial obligation.

We do not find these authorities persuasive. The Utah Supreme Court focused on the note of indebtedness and concluded that the antideficiency statute applied because both the deed of trust and the guaranty secured the note. This focus ignores the fact that the note and guaranty are separate agreements involving different parties. In *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008), we recognized that a guaranty is an independent contract that imposes responsibilities different from those imposed in an agreement to which it is collateral. And implicit in *Boxum v. Munce*, 16 Neb. App. 731, 751 N.W.2d 657 (2008), was the conclusion that the Act applied to an action for a deficiency on a note secured by a deed of trust following a trustee's sale of the property, but did not apply to a guaranty that was not secured by a deed of trust.

The cases Murante cites do not give sufficient weight to the separate obligations of the borrower and the guarantor. Instead, they conclude that guarantors are protected because the guaranty and the deed of trust secure the same obligation.

Authority Holding Guarantors Not Protected by Antideficiency Statute

In contrast, Nebraska law has focused on the separate obligations created by the note and the guaranty. See *Boxum, supra*. Several other state courts have followed a similar analysis. In 1937, the California Supreme Court held that the state's antideficiency statute did not apply to guarantors. See *Bank of America etc. Assn. v. Hunter*, 8 Cal. 2d 592, 67 P.2d 99 (1937). The defendant had signed a guaranty promising payment up to $4,300 on a promissory note. The loan, evidenced by a $10,800 note, was secured by a deed of trust to real estate. The note was not paid, and the real estate was sold at a trustee's sale. A deficiency remained, and an action was brought against the guarantor to recover under the guaranty. The guarantor claimed the suit was time barred because it was not brought within 3 months of the trustee's sale. The court concluded the 3-month statute of limitations for bringing a

deficiency action following a trust deed sale did not apply to the guarantor.

In *National City Bank v. Lundgren*, 435 N.W.2d 588 (Minn. App. 1989), the court held that a guarantor who had unconditionally guaranteed a debt was not protected by the state's antideficiency statute. The court recognized that an unconditional guaranty was a separate obligation from loans secured by the guaranty.

In *Bank of Kirkwood Plaza v. Mueller*, 294 N.W.2d 640 (N.D. 1980), the North Dakota Supreme Court determined the state's antideficiency statute did not apply to guarantors. It concluded that a guaranty was a separate contract and that the legislature had not included guarantors within the protection of the statute.

In *First Sec. Bank of Idaho, N.A. v. Gaige*, 115 Idaho 172, 765 P.2d 683 (1988), the court held the antideficiency statute protected a borrower who gives the security described in the deed of trust, but did not protect guarantors. It left the issue to the legislature to extend the protection of the statute to guarantors.

Murante's Equitable Claim

In the alternative, Murante argues that because the fair market value of the property is greater than the amount from the trustee's sale, the district court could apply its equitable powers and give him credit for the fair market value. This argument is without merit. It is merely an attempt to reargue that § 76-1013 applies to Murante's guaranty.

Disposition

[11] On July 28, 2011, Murante moved to amend his answer and add an additional affirmative defense based on § 76-1013. The district court denied the motion, determining the amendment would be futile. We have concluded that § 76-1013 did not apply to the guaranty. Therefore, Murante's affirmative defense based upon § 76-1013 would be futile. Permission to amend pleadings is addressed to the discretion of the trial court; absent an abuse of discretion, the trial court's decision will be affirmed. *Postma v. B & R Stores*, 250 Neb. 466, 550

N.W.2d 34 (1996). The district court did not abuse its discretion in denying Murante's motion to amend.

The district court correctly determined that Murante was liable to Mutual under the guaranty agreement for the amount of Sutherlands' indebtedness minus the credit bid from the trustee's sale. There are no material issues of fact, and Mutual is entitled to judgment as a matter of law. Accordingly, the district court did not err in sustaining Mutual's motion for summary judgment. See *Zawaideh v. Nebraska Dept. of Health & Human Servs., ante* p. 48, 825 N.W.2d 204 (2013).

CONCLUSION

Murante's guaranty was not subject to the Act, and under the terms of the guaranty, Murante is liable for the total amount of Sutherlands' debt, less the trustee's sale price. The district court did not abuse its discretion in denying Murante's motion for leave to amend the complaint, and it did not err in sustaining Mutual's motion for summary judgment. We affirm the decision of the district court.

AFFIRMED.

STEPHAN, MILLER-LERMAN, and CASSEL, JJ., not participating.

JEANETTE CHURCHILL, APPELLANT, V. COLUMBUS COMMUNITY HOSPITAL, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

830 N.W.2d 53

Filed April 25, 2013. No. S-12-452.

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. **Limitations of Actions.** Which statute of limitations applies is a question of law.

4. **Judgments: Appeal and Error.** An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.
5. **Limitations of Actions: Negligence.** In determining whether the statute of limitations for professional negligence applies to a plaintiff's claim, the court must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services upon which the claim is based.
6. **Limitations of Actions: Damages.** Actions for damages arising out of the professional services provided by physical therapists are actions based on an alleged claim of negligence in providing professional services and are subject to the time limitations described in Neb. Rev. Stat. § 25-222 (Reissue 2008).
7. **Limitations of Actions: Negligence.** A cause of action accrues for negligence in professional services when the alleged act or omission in rendering or failure to render professional services takes place.
8. **Words and Phrases.** In determining whether a particular act or service is professional in nature, the court must look to the nature of the act or service itself and the circumstances under which it was performed.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Jon J. Puk, Kelli Anne Francis, and Lawrence J.G. Roland, Senior Certified Law Student, of Walentine, O'Toole, McQuillan & Gordon, L.L.P., for appellant.

Mark E. Novotny, John M. Walker, and Sarah F. Macdissi, of Lamson, Dugan & Murray, L.L.P., for appellees.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

WRIGHT, J.

NATURE OF CASE

In November 2007, Jeanette Churchill attended an aquatic physical therapy session at Premier Physical Therapy, an offsite clinic owned by Columbus Community Hospital, Inc. As she was descending the steps of the clinic's aboveground pool, she slipped and fell on the wet tile floor, injuring her right arm and wrist. On November 1, 2011, Churchill filed an action against Columbus Community Hospital, Inc.; Columbus Community Hospital, doing business as Premier Physical Therapy; and Premier Physical Therapy of Columbus Community Hospital (collectively the defendants). The district court granted summary judgment in favor of the defendants

because it concluded the action was subject to a 2-year statute of limitations. Churchill appeals.

SCOPE OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (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.*

[3,4] Which statute of limitations applies is a question of law. *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012). We reach a conclusion regarding questions of law independently of the trial court's conclusion. *Id.*

FACTS

Columbus Community Hospital owned Premier Physical Therapy, an offsite clinic in Columbus, Nebraska. Churchill, who suffered from chronic low-back pain, participated in aquatic physical therapy which had been prescribed by her physician.

Generally, clinic patients were not assisted in leaving the clinic's exercise pool area unless they had a problem walking. Jay Pelan was a physical therapist who provided therapy to Churchill. During his patients' initial session, he told them to be careful when going up and down the exercise pool steps and to be careful when leaving the pool area. During Churchill's first physical therapy session, Pelan evaluated her ability to walk and to go up and down steps, and he determined she did not have trouble walking.

This action arose from an aquatic physical therapy session held on November 2, 2007. Pelan led Churchill in aquatic physical therapy exercises with the help of Amy Nelson.

Nelson was studying to be a physical therapy assistant and was working as a physical therapy technician. Pelan directed the session from outside the pool. He briefly stepped out of the exercise room to check on another patient, and Nelson monitored the session. Pelan returned, and at the end of the session, he told Churchill to leave the pool and go to the locker room to change. Churchill followed his direction.

The pool was above ground, which required Churchill to navigate steps down from the pool to a tile floor in order to reach the locker room. Churchill was not assisted in walking down the steps because her evaluation did not indicate she had a problem walking. On the tile floor was a large puddle of water. As Churchill exited the pool, descended the steps, and stepped from the last step onto the puddle, she slipped and fell. She broke her right elbow and fractured her right forearm and wrist.

On November 1, 2011, Churchill filed an action in Platte County District Court, claiming the defendants had been negligent in several respects, including failure to repair or clean the floor and failure to warn. Her action was based upon a theory of premises liability that would be subject to the general 4-year statute of limitations provided in Neb. Rev. Stat. § 25-207 (Reissue 2008).

The defendants moved for summary judgment, claiming the action was barred by the statute of limitations. The district court determined that the sole issue presented was whether the 2-year statute of limitations for professional malpractice applied. There was no dispute that the lawsuit had been filed outside this 2-year statute of limitations.

The district court considered *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976), and *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989), and concluded that a professional relationship existed between Churchill and the defendants. That professional relationship led to the physical therapy session, and getting out of the pool was "an essential and integral part" of the professional services given to Churchill. The court concluded that a 2-year statute of limitations applied, citing Neb. Rev. Stat. §§ 25-208 and 25-222 (Reissue 2008). Accordingly, it determined the action was time barred, sustained the motion

for summary judgment, and dismissed Churchill's complaint with prejudice.

Churchill appealed, and this court moved the case to its docket on its own motion pursuant to its authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

Churchill assigns, restated, that the district court erred in (1) concluding that a professional relationship existed between her and the defendants; (2) concluding that the activity that was the subject of the claim of negligence was part of the professional services provided by the defendants; (3) failing to consider negligence based on premises liability; and (4) dismissing the complaint with prejudice, which denied her the opportunity to amend her complaint.

ANALYSIS

[5] In determining whether the statute of limitations for professional negligence applies to a plaintiff's claim, the court must determine whether the defendant is a professional and was acting in a professional capacity in rendering the services upon which the claim is based. See, *Parks v. Merrill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). This requires answering two questions: whether the defendants were professionals who provided professional services to Churchill and whether the activity that caused Churchill's injuries was part of those professional services.

The district court sustained the motion for summary judgment based on its conclusion that the 2-year statute of limitations set forth in § 25-208 or § 25-222 applied to this case. Which statute of limitations applies is a question of law. We reach a conclusion regarding questions of law independently of the trial court's conclusion. *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

Physical Therapy Is Profession

Churchill claims that her action is for premises liability and that this court has not determined that physical therapy is a

profession. The Legislature has not specifically stated which occupations provide professional services as the term is set forth in § 25-222. See *Parks, supra*. Section 25-222 provides in relevant part:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services 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[.]

We have previously determined that an accountant, a medical technician, and an investment advisor were professionals for purposes of the statute of limitations described in § 25-222, see *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985), but have not addressed whether a physical therapist is a professional. If a physical therapist is not a professional, § 25-222 does not apply to this action.

In *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976), the issue was whether an employee was performing professional services at the time of the alleged negligent conduct. A blood-typing test incorrectly reported the plaintiff's blood type. The test was ordered by a physician but performed by his employee. The plaintiff claimed that had the blood test been accurate, permanent injuries to one of her children could have been avoided. Any direct suit against the physician was time barred by § 25-222, but the plaintiff claimed that the physician's employee was negligent in conducting the test and that the claim against the employee was subject to a 4-year statute of limitations. If the employee could be sued for negligence in conducting the blood test, the plaintiff would claim the physician was liable under respondeat superior.

As a matter of law, this court concluded that the blood test was a professional service "because the performance of the blood test was an essential and integral part of the rendition of professional services by [the physician] to [the plaintiff]." *Swassing*, 195 Neb. at 655, 240 N.W.2d at 27. We defined a "'"professional" act or service'" as

> "one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature or a 'professional service' we must look not to the title or character of the party performing the act, but to the act itself."

Id. at 656, 240 N.W.2d at 27 (emphasis omitted) (quoting *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968)).

We held that the employee was performing professional services and that any negligence by the employee was professional negligence subject to the time limitation for commencing an action for professional negligence under § 25-222. Accordingly, we affirmed the district court's dismissal.

Churchill concedes that if the *Swassing* definition of a "professional" applies, her action would be controlled by § 25-222. She claims, however, that the term "professional" was redefined in *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987), and that summary judgment was inappropriate without a determination that physical therapists are professionals under *Tylle*.

Whether physical therapists are professionals is a question of law that we decide independently of the trial court. See, *Parks v. Merrill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004); *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). In *Tylle, supra*, this court determined that the best definition of the word "profession" was found in Webster's Third New International Dictionary, Unabridged, which defined a "profession" as

> "a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work

> which has for its prime purpose the rendering of a public service . . . .”

Tylle, 226 Neb. at 480, 412 N.W.2d at 440. This definition stressed “the long and intensive program of preparation to practice one’s chosen occupation traditionally associated only with professions.” *Id.* at 480, 412 N.W.2d at 441.

In *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998), the court recognized that an occupation was not a profession merely because it required mental rather than physical labor. We stated that a college degree embodies the “‘long and intensive program of preparation’” of a profession and that “licensing, although not dispositive, strongly indicates that an occupation is a profession.” *Id.* at 246, 583 N.W.2d at 335.

The Nebraska Court of Appeals applied *Jorgensen, supra*, to conclude that abstracters were professionals in *Cooper v. Paap*, 10 Neb. App. 243, 634 N.W.2d 266 (2001). The Abstracters Act, see Neb. Rev. Stat. § 76-535 et seq. (Reissue 2009), is meant to protect citizens and ensure that abstracters who are serving the public meet certain standards. The Abstracters Act establishes a board of examiners to enforce the provisions of the act. Abstracters have to be licensed; and to obtain a license, abstracters have to pass a written examination and prove they have a year of verified land title-related experience. Once licensed, an abstracter has to complete and certify successful completion of 3 hours of board-approved professional development credits. The term “professional development credits” has been substituted for “continuing education programs” in the statutory language. See, § 76-544; 1985 Neb. Laws, L.B. 47. The board of examiners has the authority to revoke or suspend an abstracter’s license.

Several factors are indicative of a profession. A license strongly indicates a person is a professional, but that is not the only prerequisite. See *Jorgensen*, *supra*. The preparation and training required to procure that license are also important factors. See, *Parks v. Merrill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004); *Jorgensen, supra*. A college degree indicates such preparation and training, see *id.*, but a college degree itself

is not required, see *Cooper, supra*. Work performed to render a professional service, continuing education requirements, and a professional disciplinary authority all indicate a person is a professional. See, *Parks, supra*; *Joregensen, supra*; *Cooper, supra*.

The Physical Therapy Practice Act, Neb. Rev. Stat. § 38-2901 et seq. (Reissue 2008), requires physical therapists to be licensed. Obtaining a license requires completing an approved educational program and an examination. See § 38-2921. An educational program may be approved based on the program's accreditation by the Commission on Accreditation in Physical Therapy Education or equivalent standards established by the Board of Physical Therapy. §§ 38-2926 and 38-2905. These requirements indicate that physical therapists complete the "'long and intensive program of preparation'" that is required of professionals. See *Jorgensen*, 255 Neb. at 246, 583 N.W.2d at 335.

Pursuant to § 38-2914, physical therapy includes "[e]xamining, evaluating, and testing individuals with . . . functional limitations . . . or other conditions related to health and movement and, through analysis of the evaluative process, developing a plan of therapeutic intervention and prognosis . . . ." Physical therapists must complete 20 hours of continuing education every 2 years. See, 172 Neb. Admin. Code, ch. 137, § 022.01A (2005) (currently found at 172 Neb. Admin. Code, ch. 137, § 013.01 (2012)). They are subject to disciplinary actions for ethical violations and failure to follow professional practice and can receive various sanctions, including suspension and license revocation. See, 172 Neb. Admin. Code, ch. 137, § 019.03 (2005) (currently found at 172 Neb. Admin. Code, ch. 137, §§ 015.01, 015.02, and 015.05 (2012)). Thus, physical therapists render a public service and are subject to both mandatory continuing education requirements and professional discipline.

[6] Based on the nature of the work, the educational and occupational requirements, and the factors discussed, we conclude that physical therapists are professionals. Accordingly, actions for damages arising out of the professional services

provided by physical therapists are actions based on an alleged claim of negligence in providing professional services and are subject to the time limitations described in § 25-222.

Scope of Professional Relationship

[7] We next examine whether the alleged act or omission upon which Churchill bases her claim was a part of the professional services provided to her by the defendants. A cause of action accrues for negligence in professional services when the alleged act or omission in rendering or failure to render professional services takes place. *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). In the case at bar, Churchill's cause of action accrued when she slipped while descending from the last step of the aboveground pool. If directing Churchill to get out of the pool without assistance was part of the professional services that were being provided to her at the time she slipped and fell, then the action is a claim based on professional negligence.

[8] In determining whether a particular act or service is professional in nature, the court must look to the nature of the act or service itself and the circumstances under which it was performed. *Parks v. Merrill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004). The defendants allege that leaving the pool area was an essential and integral part of providing professional services to Churchill.

In *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976), we determined that whether an action was a professional service was a question of law. A blood-typing test was essential and integral to the plaintiff's medical treatment, and we held the test was a professional service. In the case at bar, whether climbing out of the pool was essential and integral to Churchill's treatment is a question of law. We independently review questions of law decided by a lower court. See *Molczyk v. Molczyk, ante* p. 96, 825 N.W.2d 435 (2013).

In *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989), the plaintiff went to the doctor for an examination and sinus treatment. She was seated in a large antique examination chair and was injured when the doctor slammed the chair's headrest into her neck. We determined that the examination was an

integral part of the professional services given to the plaintiff and that the negligent act occurred while she was being positioned for the purpose of providing those services. We concluded that the Legislature did not intend to apply different statutes of limitations to different portions of the physician-patient relationship.

In *Stanley v. Lebetkin*, 123 A.D.2d 854, 507 N.Y.S.2d 468 (1986), the plaintiff fractured an ankle while getting off a doctor's examining table. There was no claim that the condition of the table or premises caused the injury. The basis for the plaintiff's negligence claim was the physician's duty to watch her on the table and help her on or off the table. That duty arose from the information gained through the physician-patient relationship and the doctor's knowledge as a physician. The complaint claimed the breach of a duty that arose from the physician-patient relationship and was substantially related to the treatment. The court concluded the action was a medical malpractice action barred by the statute of limitations because the plaintiff did not bring her claim within the time required for medical malpractice actions.

Churchill argues that the act of observing her climb out of the pool was not an essential and integral part of the physical therapy services she received and that her claim does not implicate the duty owed by a physician to a patient. She asserts that the action is one based upon premises liability and that *Olsen, supra*, and *Stanley, supra*, are "problematic," because those cases did not address premises liability. See brief for appellant at 14.

We disagree. In both of those cases, the patient was under the care of a physician when the injury occurred. In *Olsen, supra*, the patient was in an examination chair and the procedure was a part of the care and treatment being given by the physician. In *Stanley, supra*, the patient remained under the care of a medical professional while she was getting off an examination table.

Performing aquatic exercises in the aboveground pool was part of Churchill's physical therapy. Her physical therapist evaluated her ability to get into and out of the pool. When the physical therapist directed Churchill to get out of the

pool without assistance, he was providing professional services. Thus, at the time of her injuries, Churchill was receiving professional services from her physical therapist and her action to recover damages was based on alleged professional negligence.

Other jurisdictions have reached similar results. In *Rome v. Flower Mem. Hosp.*, 70 Ohio St. 3d 14, 635 N.E.2d 1239 (1994), the court addressed two consolidated cases. In one case, the plaintiff fell off an x-ray table when the table was lifted and alleged negligence in failing to properly secure the footboard. The court concluded that the claim for injury was a medical claim subject to a 1-year statute of limitations. The plaintiff in the second case alleged he was injured after a component of his wheelchair collapsed as he was being transported from the physical therapy department. Transport from physical therapy was inherently necessary to the physical therapy treatment. The claim was a medical claim barred by a 1-year statute of limitations.

In *Long v. Warren Gen. Hosp.*, 121 Ohio App. 3d 489, 700 N.E.2d 364 (1997), the plaintiff went to the hospital for a colonoscopy. He was told to change into a hospital gown but was advised to keep his socks on because it was cold. Later, an orderly came in and placed a gurney 5 feet from the bed where the plaintiff was sitting. The orderly told the plaintiff to walk to the gurney but offered no assistance. When the plaintiff was about halfway to the gurney, the orderly told him to bring the pillow from the bed. While turning to get the pillow, the patient fell and was injured. The court determined the plaintiff raised a medical claim subject to a 1-year statute of limitations.

In *Harris Methodist Fort Worth v. Ollie*, 342 S.W.3d 525 (Tex. 2011), the plaintiff alleged she was injured when she slipped on a wet floor while getting out of a bathtub. She claimed the hospital had a duty to properly maintain a safe environment and that the hospital breached its duty by failing to properly maintain the floor and warn her of the dangerous condition. The plaintiff's pleadings showed the claim was a safety claim directly related to services meeting fundamental needs. Hospitals necessarily provided patients services to meet

fundamental needs such as cleanliness and safety. The essence of the claim was a failure by the hospital to provide a dry floor, to warn of the hazards of a wet floor, or something similar. The court concluded the claim was a health care liability claim directly related to health care.

Churchill was receiving professional services at Premier Physical Therapy when the accident occurred. She was required to enter and leave the pool, and she was injured as she was leaving the pool at the direction of her physical therapist. Churchill's injuries arose while she was receiving professional services.

Since her claims arose from her professional relationship with her physical therapist, they are subject to the statute of limitations set forth in § 25-222. Because Churchill did not file her action within 2 years of the date of her injuries, the action is time barred.

Remaining Arguments

We find no merit to any of Churchill's remaining assignments of error, and we affirm the judgment of the district court.

CONCLUSION

Physical therapists are professionals. Because Churchill's claims arose from her professional relationship with her physical therapist, they are subject to the 2-year statute of limitations set forth in § 25-222. We affirm the district court's order of summary judgment in favor of the defendants.

Affirmed.

Heavican, C.J., and Miller-Lerman, J., participating on briefs.

Connolly, J., concurring.

Although I agree that this is a professional negligence case that is barred by Neb. Rev. Stat. § 25-222 (2008), I write separately because I disagree with the majority opinion's reasoning. As I read the opinion, § 25-222 applies to Churchill's claim merely because she was injured while receiving professional services. This is an insufficient basis for determining that Churchill has alleged professional negligence. I believe the opinion incorrectly omits the requirements of breach and causation from its analysis.

Under § 25-222,

> [a]ny action to recover damages based on *alleged professional negligence or upon alleged breach of warranty* in rendering or failure to render professional services 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[.]

(Emphasis supplied.)

Negligence, by definition, is the defendant's breach of a duty to exercise the applicable standard of care that proximately causes the plaintiff's damages.[1] Professional negligence is the failure of a person rendering professional services to exercise the standard of care that other members of the profession would ordinarily use, which failure proximately causes the plaintiff's damages.[2]

Under § 25-222, we have held that a claim of any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties sounds in professional negligence.[3] The relevant test is not the degree of skill required, but whether the defendant's negligence was an integral part of the professional services that the defendant was providing to the plaintiff.[4] And under our case law, the statute of limitations under § 25-222 applies even to a claim that the defendant's employee was negligent in performing an integral part of the professional services that caused the plaintiff's damages.[5]

I agree that the physical therapist was a professional who was rendering professional services at the time that Churchill was injured. But I disagree that the next inquiry is "whether the activity that caused the injury was part of those professional services."

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[1] See, *Blaser v. County of Madison, ante* p. 290, 826 N.W.2d 554 (2013); *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997).

[2] See, *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012); *Wolski v. Wandel*, 275 Neb. 266, 746 N.W.2d 143 (2008).

[3] See *Nuss v. Alexander*, 269 Neb. 101, 691 N.W.2d 94 (2005).

[4] See *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989).

[5] See *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976).

Obviously, not every injury that occurs during the course of receiving professional services will be caused by professional negligence.[6] Churchill clearly could have been injured by an unsafe condition of the premises that was unrelated to the breach of a professional duty. And without a causal link between the defendants' breach of a professional duty and the plaintiff's damages, there is no professional negligence claim.

So in my view, the relevant question is whether her claim depended on a finding that the therapist's unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties caused her injuries. If so, the court properly applied § 25-222 to her claim regardless of her theory of recovery.[7]

I conclude that this condition is satisfied. Churchill specifically alleged that the therapist was negligent in failing to assist her in descending the stairs from the pool onto a wet surface. Although she did not allege that the therapist was negligent in determining that she did not need assistance, her negligent assistance allegation shows that her claim depended upon a finding the therapist breached a professional duty, which breach caused her injuries. The therapist could not have been negligent in failing to assist her on wet steps unless he had improperly assessed her need for assistance or other precautions to avoid harming herself on wet surfaces while entering or exiting the pool.

Similarly, although she claims that the defendants were negligent in failing to repair or clean a condition of the flooring that presented an unreasonable risk of harm, water on the steps and flooring was not a condition that needed repairing. It was an inherent part of receiving physical therapy in a pool with other patients entering and exiting on the steps. The steps and the inherently wet conditions of the therapy created the need to assess each patient's physical abilities. So Churchill's claim could not have succeeded without a fact finder determining that the defendants should have known she would need

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[6] *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002), *modified on other grounds* 264 Neb. 818, 652 N.W.2d 574.

[7] See *Nuss, supra* note 3.

assistance or other precautions. Summed up, this is a claim that the therapist negligently assessed her abilities and needs. For this reason, I concur in the judgment that this a professional negligence claim.

In re Interest of Rylee S., a child under 18 years of age. State of Nebraska, appellee, v. Lisa S., appellant.

829 N.W.2d 445

Filed April 25, 2013. No. S-12-531.

1. **Juvenile Courts: Parental Rights.** A juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
2. ____: ____. While there is no requirement that the juvenile court must institute a plan for rehabilitation of a parent, the rehabilitation plan must be conducted under the direction of the juvenile court and must be reasonably related to the plan's objective of reuniting parent with child.
3. **Juvenile Courts: Appeal and Error.** In analyzing the reasonableness of a plan ordered by a juvenile court, the Nebraska Supreme Court has noted that the following question should be addressed: Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code? An affirmative answer to this question provides the materiality necessary in a rehabilitative plan for a parent involved in proceedings within a juvenile court's jurisdiction. Otherwise, a court-ordered plan, ostensibly rehabilitative of the conditions leading to an adjudication under the Nebraska Juvenile Code, is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures.
4. **Juvenile Courts: Parent and Child.** Similar to other areas of law, reasonableness of a rehabilitative plan for a parent depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis.
5. **Juvenile Courts: Parental Rights: Child Custody: Visitation.** Pretreatment assessments, psychiatric testing, or psychological evaluations of a parent may be required to determine the best interests of a child when issues of custody, visitation, and termination of parental rights are presented.
6. **Juvenile Courts: Parental Rights.** Juvenile courts have broad discretionary power to rehabilitate a parent, but not without limits.
7. **Juvenile Courts: Parental Rights: Child Custody: Visitation: Evidence.** If a juvenile court finds that a pretreatment assessment and/or the release of medical records are necessary for parental rehabilitation in cases not involving custody,

visitation, or termination of parental rights, the record should contain evidence sufficient to justify the need behind such order and how it will lead to correcting, eliminating, or ameliorating the issue presented.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Reversed and remanded with directions.

Lea Wroblewski, of Legal Aid of Nebraska, for appellant.

Jon Bruning, Attorney General, and Sarah E. Sujith, Special Assistant Attorney General, for appellee.

Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

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

HEAVICAN, C.J.

INTRODUCTION

On April 4, 2012, the child, Rylee S., was adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). As part of the adjudication, on May 16, appellant, Lisa S., Rylee's mother, was ordered by the juvenile court to complete a pretreatment assessment and to sign releases of information to allow the Nebraska Department of Health and Human Services (DHHS) an opportunity to access information from her therapist and treatment providers. Lisa appeals the reasonableness of the juvenile court's order. We reverse, and remand to the juvenile court with directions to amend the dispositional plan and order consistent with the findings of this opinion.

FACTUAL BACKGROUND

Lisa is the biological mother of Rylee, age 16. Rylee has always been under Lisa's care and continues to be under her care pending this appeal. Rylee is nonverbal and autistic. Rylee's father is deceased.

The juvenile petition in this case was filed because Rylee was excessively absent from school during the 2010-11 and 2011-12 school years. After the petition was filed, Lisa self-reported to Rylee's school that Rylee refused to go to school.

Both the school and DHHS observed Rylee's being physically aggressive with himself and Lisa when she attempted to get him ready for school. Upon discovering that Lisa was not at fault regarding Rylee's excessive absences, the State accordingly amended its petition, placing no fault upon Lisa. On April 4, 2012, the juvenile court entered an order finding the allegations of the amended juvenile petition to be true and adjudicating Rylee as a child as defined by § 43-247(3)(a).

Subsequently, Lisa met with special education teachers at Rylee's school, Rylee's guardian ad litem (GAL), and DHHS to create a plan for Rylee to successfully attend school. One plan was to stop having Rylee take the bus to school, as he refused to get on the bus, and have Lisa personally drive him to school. This plan, however, failed when Rylee refused to get out of the car, locked himself inside, and damaged the inside of the car. On another occasion, Rylee physically assaulted Lisa outside of the school building. Rylee is otherwise cooperative and functions properly once inside the school.

While being interviewed by DHHS related to Rylee's adjudication, Lisa stated that she suffers from anxiety and anxiety attacks and is seeing a therapist. Lisa also stated that she is on medication to treat the condition. As a result of these statements, Lisa's DHHS child and family services specialist recommended a "pretreatment assessment to identify if Lisa would benefit from other services."

At Rylee's May 4, 2012, disposition hearing, Lisa's child and family services specialist did not appear. In her place was a new specialist who had been assigned to the case just 11 days prior to the hearing. Also present at the hearing were counsel for the State, counsel for Lisa, counsel for DHHS, and Rylee's GAL. At the hearing, Lisa testified that she suffers from anxiety and posttraumatic stress disorder and is seeking mental health treatment, which she felt was working.

During Lisa's testimony, the State asked Lisa whether she would be willing to sign releases of information to allow DHHS to review her treatment records in order to identify whether Lisa would benefit from other services. Lisa agreed to sign the releases. Later, to clarify what the State had asked of Lisa, counsel for Lisa asked Lisa alternatively if she would be

willing to sign a "limited" release to confirm with her mental health professionals that additional services are not necessary in her case. Lisa answered affirmatively to this question. At the end of the hearing, counsel for Lisa explained that such "limited" release would consist of a "yes" or "no" statement from Lisa's mental health professional as to whether Lisa was in need of additional help.

At the close of the evidence, counsel for DHHS asked the juvenile court to adopt its recommendations and to order the signing of releases as a modification or addition to its written recommendations. The DHHS case plan recommendation was a permanency objective of family preservation. The State and Rylee's GAL agreed with DHHS' recommendations. During closing arguments, there was extensive discussion between the juvenile court and legal counsel regarding the need for Lisa to have a pretreatment assessment and to sign the releases of information, as well as the appropriate scope of the releases. Counsel for Lisa objected to the need for Lisa to undergo a pretreatment assessment and to sign the releases of information. Lisa's counsel argued that because Lisa is currently treating with mental health professionals, she does not need further services for her issues. Further, counsel argued this would be "a huge breach of confidentiality and her privacy, particularly, if . . . [t]here may be information there that has nothing to do with Rylee" or Lisa's parenting abilities.

The juvenile court entered its dispositional order on May 16, 2012, adopting DHHS' recommendations and rehabilitation plan:

> [Lisa] shall participate in a pretreatment assessment. [Lisa] will sign releases of information to allow [DHHS] an opportunity to access information from [Lisa's] therapist and treatment providers to assist [DHHS] in determining what services would be most helpful to the mother in the effort to maintain Rylee . . . in the family home.

ASSIGNMENTS OF ERROR

Lisa assigns, renumbered and restated, that the juvenile court erred in (1) ordering a rehabilitation plan that was

unreasonable and immaterial to the issues adjudicated as far as it ordered Lisa to (a) participate in a pretreatment assessment and (b) sign releases of information to allow DHHS an opportunity to access information from Lisa's therapist and treatment providers, and (2) violating the federal Health Insurance Portability and Accountability Act of 1996 by failing to limit the scope of the court-ordered releases of information.

STANDARD OF REVIEW

Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[1]

ANALYSIS

Pretreatment Assessment and Medical Releases.

[1,2] Lisa assigns that the dispositional plan and subsequent order in this case were unreasonable, unrelated to the issues adjudicated, and not in Rylee's best interests insofar as they order her, the parent, to submit to a pretreatment assessment and sign releases of information to allow DHHS an opportunity to access information from her therapist and treatment providers.

> A juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. [Citations omitted.] While there is no requirement that the juvenile court must institute a plan for rehabilitation of a parent . . . the rehabilitation plan must be conducted under the direction of the juvenile court and must be reasonably related to the plan's objective of reuniting parent with child.[2]

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[1] *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

[2] *In re Interest of C.D.C.*, 235 Neb. 496, 500, 455 N.W.2d 801, 805 (1990).

[3,4] In analyzing the reasonableness of a plan ordered by a juvenile court, this court has noted that the following question should be addressed:

> Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska Juvenile Code? An affirmative answer to the preceding question provides the materiality necessary in a rehabilitative plan for a parent involved in proceedings within a juvenile court's jurisdiction. Otherwise, a court-ordered plan, ostensibly rehabilitative of the conditions leading to an adjudication under the Nebraska Juvenile Code, is nothing more than a plan for the sake of a plan, devoid of corrective and remedial measures. Similar to other areas of law, reasonableness of a rehabilitative plan for a parent depends on the circumstances in a particular case and, therefore, is examined on a case-by-case basis.[3]

Lisa claims the court-ordered plan in this case is unreasonable because her statements to DHHS concerning her mental health needs were not requests for assistance. In fact, Lisa told DHHS that she felt the frequent and regular treatment she was receiving was adequate. Lisa asserts there is no evidence that her mental health is related to an adjudicated issue of this case. Therefore, she claims the juvenile court was unreasonable in ordering her to submit to a pretreatment assessment and sign releases of information to allow DHHS an opportunity to access her mental health information. Lisa further points out that she was not at fault in this case and that the court should have been concerned with whether the child's needs were being met, not with Lisa's needs. Furthermore, the evidence shows Lisa was fully cooperative with all services for Rylee and actively involved in trying to put services in place to help him get to school.

The material issue of this juvenile adjudication is Rylee's difficulty associated with getting to school, and the resulting truancy, caused by his diagnosis of nonverbal autism.

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[3] *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 268, 417 N.W.2d 147, 158 (1987).

The question this court must address is whether having Lisa release all of her mental health records to DHHS and having her undergo a pretreatment assessment will tend to correct, eliminate, or ameliorate Rylee's difficulty with getting to school. In other words, we must decide if this is a reasonable rehabilitative plan for Lisa, the parent, depending on the circumstances of this particular case. We find it is not. The court-ordered rehabilitation plan in this case is unreasonable insofar as it orders Lisa to submit to a pretreatment assessment and sign releases of information to allow DHHS an opportunity to access her mental health information.

The record establishes that Lisa is a fit mother and has been fully cooperative in attempting to get Rylee to successfully attend school. Indeed, the State amended its petition recognizing Rylee's problems arise "through no fault" of Lisa, which the court's order also recognizes. Lisa has met and coordinated with all interested parties in this matter to help Rylee get to school. While this appeal has been pending, Lisa has essentially been ready, willing, and able to assist Rylee. We find no specific findings of fault by the juvenile court supporting this parental rehabilitation plan.[4]

Further, under our de novo review, we do not find sufficient evidence in the record suggesting that having Lisa release all of her mental health records to DHHS and undergo a pretreatment assessment will eliminate or contribute to eliminating Rylee's difficulties. There is a failure of proof in this case as to the relevancy of the State's request. There is neither a showing of need for parental rehabilitation nor a specific rehabilitative plan suggested, i.e., turning over Lisa's mental health records to DHHS and a pretreatment assessment. The plan does not correct the conditions underlying the adjudication that Rylee is a juvenile within § 43-247(3)(a) of the Nebraska Juvenile Code.

[5] We have held that pretreatment assessments, psychiatric testing, or psychological evaluations of a parent may be required to determine the best interests of a child when

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[4] See *In re Interest of L.P. and R.P.*, 240 Neb. 112, 480 N.W.2d 421 (1992).

issues of custody, visitation, and termination of parental rights are presented.[5] However, this case is inherently distinct, for example, from the factual situations of cases wherein a pretreatment assessment, a psychological evaluation, or psychiatric testing for a parent was ordered by the juvenile court.[6] The circumstances of such cases encompassed instances of abuse and neglect where a child lacked proper care because of the faults and habits of the parent.[7] Here, no such issues are presented.

[6,7] Juvenile courts have broad discretionary power to rehabilitate a parent, but not without limits.[8] By deciding in the instant case that the juvenile court could not order the parent, who is not at fault, to submit to a pretreatment assessment or to release certain medical records, we are not hindering the juvenile court's discretion. If a juvenile court finds that a pretreatment assessment and/or the release of medical records are necessary for parental rehabilitation in cases not involving custody, visitation, or termination of parental rights, the record should contain evidence sufficient to justify the need behind such order and how it will lead to correcting, eliminating, or ameliorating the issue presented.

Based on the specific circumstances of this case, the juvenile court made no findings of fact sufficient to justify its order. Further, in our de novo review of the facts, we find no showing that such order tended to correct, eliminate, or ameliorate the situation on which this adjudication was obtained. Accordingly, we find that the dispositional plan and subsequent order in this case were unreasonable as far

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[5] See *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

[6] See, *In re Interest of J.S., S.C., and L.S.*, 224 Neb. 234, 397 N.W.2d 621 (1986); *In re Interest of S.P., N.P., and L.P.*, 221 Neb. 165, 375 N.W.2d 616 (1985); *In re Interest of Wood and Linden*, 209 Neb. 18, 306 N.W.2d 151 (1981).

[7] *Id.*

[8] See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

as they require Lisa, the parent, to submit to a pretreatment assessment and sign releases of information to allow DHHS an opportunity to access information from her therapist and treatment providers.

Limiting Scope of Court-Ordered Releases of Information.

In light of this finding, we do not address Lisa's second assignment of error in which she argues the juvenile court's order should be reversed because it violates the provisions of the federal Health Insurance Portability and Accountability Act of 1996.

CONCLUSION

For the foregoing reasons, we find the decision of the juvenile court ordering Lisa to submit to a pretreatment assessment and sign releases of information to allow DHHS an opportunity to access her mental health information was unreasonable. We reverse, and remand to the juvenile court with directions to amend its dispositional plan and order consistent with the findings of this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., participating on briefs.

CONNOLLY, J., concurring

I agree with the result of the majority opinion. But I disagree with the opinion's characterization of the juvenile court's disposition order as adopting a rehabilitation plan. It is true that the court adopted DHHS' recommendation to compel Rylee's mother to release her mental health records and cooperate with a "pretreatment assessment." But the order did not set out a rehabilitation plan.

Neb. Rev. Stat. § 43-288 (Reissue 2008) sets the contours of a rehabilitation plan. Under § 43-288, as a condition of a juvenile's placement in the parent's home, a court may order a parent to comply with statutorily specified requirements. The requirements that a court can impose include taking proper steps to ensure the juvenile's regular school attendance. But the "terms and conditions . . . shall relate to the acts or omissions of the juvenile, the parent, or other person responsible for the care of the juvenile *which constituted or contributed*

to the problems which led to the juvenile court action in such case." (Emphasis supplied.) Rylee's mother did not contribute to Rylee's missing school.

The State did not allege or prove that Rylee's mother was at fault for Rylee's school absences. Additionally, DHHS did not allege or prove that Rylee's mother had mental health issues that she must deal with to correct conditions leading to the adjudication. Instead, the evidence showed that Rylee's grandparents were also unable to get Rylee to school and that the mother had worked diligently to get Rylee help. The focus of DHHS' court report and the hearing was on providing services and treatment for *Rylee*.

Similarly, DHHS' court report did not recommend that the mother comply with a mental health assessment to correct conditions that led to the adjudication, such as conflicts in the home. Nor did the court's order require the mother to obtain a mental health assessment to correct conditions that led to the adjudication.

In my view, because the court did not order Rylee's mother to correct any conditions that led to the adjudication, the court did not order a rehabilitation plan. An order to release mental health records and cooperate with a pretreatment assessment, standing alone, is not a rehabilitation plan. The issue is not whether the court's rehabilitation plan was reasonable. The issue is whether the court can order a fishing expedition that is unrelated to any rehabilitation plan. The answer is no.

Additionally, the court's order requiring Rylee's mother to release her mental health records for the State's assessment raises substantial privacy concerns. A juvenile court can adjudicate a juvenile under the no-fault provision of Neb. Rev. Stat. § 43-247(3) (Reissue 2008) when a parent suffers from a diagnosed mental illness.[1] But that is not the case here. Instead, the no-fault adjudication was based solely on Rylee's mental health needs.

I cannot imagine a circumstance in which a court would properly order a parent to release his or her past mental health records in a no-fault adjudication based solely on the

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[1] See *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995).

juvenile's mental health needs. I would agree that if the State presents evidence that a parent is not properly dealing with a child's mental health issues, a court could order the parent to comply with suitable therapy and require followup reports. But an order to release past mental health records so that the State can assess them is substantially different from requiring a parent to obtain mental health or substance abuse treatment or to participate in family therapy. This court has not previously addressed the privacy concerns raised by an order like this and need not do so now. But I believe an advisory opinion that such orders are within a juvenile court's discretion is inappropriate.

BRUCE SIMON, APPELLANT, V. MARY KAY DRAKE, M.D., APPELLEE.

829 N.W.2d 686

Filed May 3, 2013. No. S-11-744.

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. **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.
3. **Expert Witnesses: Testimony: Appeal and Error.** An appellate court reviews a trial court's decision to admit or exclude expert testimony under the appropriate standards for abuse of discretion.
4. **Rules of Evidence: Expert Witnesses: Testimony.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), a trial court does not have discretion to permit a witness who has not been qualified as an expert to testify to issues that require an expert's opinion.
5. **Malpractice: Physicians and Surgeons: Proximate Cause.** In medical malpractice cases, expert testimony by a medical professional is normally required to establish causation and the standard of care under the circumstances.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the District Court for Douglas County, GARY B.

RANDALL, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Robert M. Slovek and Douglas W. Peters, of Kutak Rock, L.L.P., for appellant.

Joseph S. Daly and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellee.

HEAVICAN, C.J., CONNOLLY, and MCCORMACK, JJ., and RIEDMANN, Judge, and CHEUVRONT, District Judge, Retired.

CONNOLLY, J.

SUMMARY

The appellant, Bruce Simon, sued the appellee, Mary Kay Drake, M.D., for medical malpractice. A jury returned a verdict for Drake. Simon appeals from the district court's evidentiary rulings. During trial, the court permitted Drake to question one of Simon's treating physicians, Kevin Garvin, about his opinion of Drake's performance in treating Simon for hip pain—even though neither party had designated Garvin as an expert.

In a memorandum opinion, the Nebraska Court of Appeals concluded that the trial court erroneously admitted Garvin's testimony about the standard of care. But it concluded that the error was not prejudicial because the parties' designated experts provided similar evidence. We granted Simon's petition for further review of the Court of Appeals' conclusion that Simon was not prejudiced by the trial court's erroneous admission of Garvin's testimony. We reverse. The court's ruling denied Simon any opportunity to challenge the presumptive validity and weight that a jury would have given to Simon's own treating physician testifying as an expert against him.

BACKGROUND

HISTORICAL FACTS

In 2006, Simon's primary care physician began treating Simon for back and hip pain. In June 2007, Simon first saw Garvin, an orthopedic surgeon at the University of Nebraska

Medical Center (UNMC). Garvin ordered x rays that showed Simon had moderate arthritis in both hips, but more in his right hip. Simon knew that he would eventually need a hip replacement.

In July, Garvin ordered hip injections for Simon at UNMC's radiology department. Simon's primary care physician testified that Simon's hip pain could be treated with anti-inflammatory medication and hip injections that contained steroids and long-acting numbing medications. To guide the needle for an injection, orthopedic radiologists use a fluoroscopic-guided hip injection procedure. That is, they rely on x rays to determine the bone's location and whether they have successfully reached the joint, which is revealed by a color contrast in the injection.

Simon was warned of a risk of infection associated with the procedure and signed a consent form. The record shows that Simon is a large man. The radiology department used a 3½-inch needle to inject his hip joint. Simon described the July 2007 injection as a 10-minute procedure involving no pain and requiring only one attempt to inject his hip joint. He followed the radiology department's directions, and 3 days later, he received significant pain relief that lasted until March or April 2008.

In May 2008, Garvin ordered Simon's second hip injection at UNMC. Drake was UNMC's radiology residency director. Brad Hilger, a first-year resident physician at UNMC under Drake's supervision, performed the 2008 injections. Hilger read Simon the consent form and discussed the possible risks, including infection, which Hilger explained were usually low. Simon signed the consent.

Hilger used "CloraPrep," an antiseptic solution, to sterilize Simon's skin before attempting an injection. He did not sterilize Simon's skin again during the procedure. Before beginning, Hilger was concerned that the 2½-inch needle on the instrument tray might be too short and consulted Drake, who was watching from behind a partition screen. Hilger and Drake both testified that they normally use a 3½-inch needle. At trial, Drake admitted that she had never used a 2½-inch needle for a

hip injection. The assisting technician testified that a 2½-inch needle is sometimes referred to as a "pediatric needle." But after Drake walked around the partition and looked at Simon and the needle, she told Hilger that although the needle looked a little shorter than a 3½-inch needle, it would probably work and he should go ahead and use it.

Hilger made an unsuccessful attempt to inject Simon's hip joint with the 2½-inch needle, but he was unsure whether the needle was too short or whether he had missed the femur. Drake testified that from looking at the fluoroscopy machine, she thought that the needle had deflected off to the side of Simon's femur bone. She told Hilger to redirect and try again. On the second attempt, Hilger again failed to hit the bone. Drake determined that the needle had not hit the bone and removed it. She stated that they needed a longer needle and asked the technician to find a 5½-inch needle for her, but one was not available.

After a few minutes, the technician returned with a 7- or 7½-inch needle. By this time, Simon was nervous. He said that he would come back another day but that Drake told him to sit still and she would have the injection finished in a few minutes. On her second attempt with the 7-inch needle, Drake injected the medication into Simon's hip joint. The record shows a total of four needle penetrations: two with the 2½-inch needle and two with the 7-inch needle. Drake testified that she had not previously made more than two attempts to inject a hip joint. Hilger estimated that the procedure took 25 minutes from the time Simon was sterilized until Drake's successful injection.

After he left UNMC, Simon said that he felt overly sore but attributed it to the multiple injections. He followed Drake's directions, but the pain progressed through the weekend. Around 2:30 a.m. on the following Tuesday, Simon was in terrible pain. He was taken by ambulance to the hospital and treated for a staphylococcus aureus infection, which resulted in his admission to intensive care. Simon's primary care physician testified that the infection was life threatening. Simon underwent a debridement procedure to remove unhealthy

tissue and clean out the infection from his hip joint. When he returned home 5 days later, his infection seemed to be under control.

But the debridement procedure failed to remove all of the infection. In August, Garvin performed another debridement procedure to remove the necrotic (dead) cartilage, tissue, and bone in Simon's hip joint and femur. The infection had abscessed in his hip joint and destroyed it. Garvin had to remove Simon's femur head and replaced it with a "spacer," an artificial ball that delivers antibiotics to the joint and the femur. But the spacer was not structurally sound and rotated out of the socket easily. Simon was unable to walk and had significant pain. He required strong pain medication and nursing care until he could receive a hip replacement when the infection cleared up. In November 2008, Garvin performed a total hip replacement. Simon had extensive rehabilitation until October 2009.

Procedural History Regarding Garvin's Testimony

In November 2009, Simon sued Drake, alleging that she was negligent in her treatment and in her failure to obtain his informed consent. Drake answered that Simon had consented to the procedure knowing that there was a risk of infection and that she had performed the procedure within the standard of care.

Before trial, Simon moved in limine to exclude Garvin's opinions in a deposition and at trial regarding the standard of care and causation. Simon argued that Garvin's opinions were irrelevant because he was Simon's treating physician and neither party had retained him as an expert. The court agreed. It had previously entered a progression order requiring the parties to identify their experts, and Drake had not identified Garvin as an expert. It ruled that Garvin's opinions about the standard of care and medical causation were therefore irrelevant and inadmissible. It stated that Drake's attorney could not ask Garvin for "any opinions that don't relate to the facts having to do with the treatment that he provided to [Simon]."

Before calling Garvin, Drake's attorney sought to clarify what questions he could ask Garvin. He conceded that he had not designated Garvin as an expert but stated that he would ask Garvin only whether multiple penetrations with a needle were "a complication." Simon's counsel protested that Garvin's proposed testimony would be an opinion regarding the standard of care and that Garvin was not a designated expert. Drake's counsel, however, assured the court that he would not ask Garvin about the standard of care or whether using a 2½-inch needle violated the standard of care. The court ruled that Drake's counsel could ask Garvin about multiple needle penetrations.

Garvin testified that he had occasionally performed hip injections. Drake's attorney then asked, "Is there a standard size needle that one uses?" Simon objected, but the court overruled Simon's continuing objection to that line of questioning. Garvin testified that the needles came in a range of sizes and that the proper length depended upon the patient's size: "I would say two-and-a-half to four-and-a-half would cover most. Occasionally you might use a large needle."

In a sidebar, Simon objected that Drake's counsel had said he would not ask these questions about the standard needle size. The court agreed. But when Simon asked the court to instruct the jury to disregard Garvin's testimony about the needle size, the court stated, "I find it to be harmless error and I'm going to leave it the way it is."

Garvin further testified that infection is a recognized complication of hip injections and that based on his experience, it is not uncommon with arthritic hips to place the needle more than once to get it in the correct site. He said that he knew of no literature that correlated the length of the procedure or the number of penetrations with an increased risk of infection.

Expert Testimony at Trial

Three medical experts testified for Simon. These experts generally opined that the procedures used by Hilger and Drake fell below the standard of care for using sterile techniques to prevent infection. Between them, they opined that Simon's risk of infection had been increased by the following actions:

(1) Drake's approving Hilger's use of the wrong size needle; (2) Hilger's and Drake's failing to use the standard size needle, which is a 3½-inch needle; (3) Hilger's and Drake's making multiple needle penetrations in a nonsterile environment instead of an operating room; (4) Hilger's handing the needle to Drake; and (5) Drake's failing to sterilize Simon's skin again before attempting the third and fourth injections.

Drake countered with one expert. He opined that Simon's skin would have remained sterile during the entire procedure and that four attempts at a hip injection did not violate the standard of care. He believed that Simon's previous hip injection could have caused scar tissue that made a successful injection more difficult. Finally, he stated that a 3½-inch needle is the standard size but that its use is not always required, depending on the patient's size. He believed Drake's decision to try the injection with a 2½-inch needle was within the standard of care. But on cross-examination, Drake's expert conceded that a 2½-inch needle is normally used with children or small adults, that Simon was not small, and that he would not have used a pediatric needle on Simon.

Closing Argument

In his closing argument, Drake's attorney emphasized Garvin's testimony:

> One final witness that testified. And, again, I got kind of broken up, but we can't get into that. And I think this testimony is critical, and that's Dr. Kevin Garvin. Dr. Garvin is . . . Simon's doctor. He was . . . Simon's father's doctor. . . . I asked him this question: Doctor, is there any standard size needle? Dr. Garvin said, No, there's no standard size needle. . . . I said, Is there a standard time for the procedure? He said no. . . . And what he said was it can take as little as 10 to 15 minutes or it can take as long as 30 to 40 minutes. That was the testimony of [Simon's] own doctor. . . . And he went on to say that procedures can take longer with a patient who's had hip disease [like] Simon.
>
> He said infection is a recognized complication of the procedure. Every witness has testified to that. He said it's

> not uncommon to have to place the needle more than one time or multiple times. Not uncommon. And, remember, we started out by asking Dr. Garvin, Do you do these procedures? Is this something that you do in your practice? And he said, Yes, he does them. And we know that they're done either by radiologists such as Dr. Drake or orthopedic surgeons. And he does these procedures, and he said it's not uncommon to have to place needles more than one time, or multiple times for that matter. And then he was asked about if the risk of infection — I asked him, Does the risk of infection increase with the passage of time and with the number of sticks? And I wrote this down word for word. "I don't know that to be true. There's no literature that says that." And that's Dr. Garvin.

The jury returned a unanimous verdict for Drake. The court overruled Simon's motion for a new trial.

Court of Appeals' Decision

Simon appealed to the Court of Appeals, which affirmed. The Court of Appeals concluded that any error in the admission of Garvin's testimony was harmless because Simon could not establish prejudice:

> [S]imilar evidence was established and testimony given through the numerous experts who testified, on behalf of both Simon and Dr. Drake, about various issues which included the standard of care and the standard size of the needles utilized in similar injection procedures. The record is clear that this was a battle of the experts. Simon's experts testified that Dr. Drake violated the standard of care in numerous ways, while Dr. Drake and her expert testified that she did not violate the standard of care. Each of the experts in this case gave substantially similar and generally more specific testimony as given by Dr. Garvin regarding what was the standard size of the needle used in similar procedures. The weight to be given to that expert testimony was a determination for the jury to make as the fact finder. . . .
>
> Thus, even though we find it was error for the district court to allow the testimony, without a curative

> instruction to the jury to disregard or strike the testimony, Simon has not established that the admission constituted reversible error. . . .
>
> Simon argues that the district court erred by allowing Dr. Drake's counsel to again address the issue in closing arguments . . . . However, Simon did not object to this statement either during or immediately after closing arguments. . . . Thus, any error that occurred during closing argument by Dr. Drake's counsel was waived.

ASSIGNMENTS OF ERROR

Simon assigns that the Court of Appeals erred as follows:

(1) failing to presume prejudice from the wrongful admission of Garvin's testimony;

(2) concluding that Garvin's testimony was cumulative or substantially similar to other testimony and therefore not prejudicial, when Garvin's testimony essentially served as an admission by Simon because of Garvin's unique status and credibility as Simon's treating physician;

(3) mischaracterizing the record by stating that the issues on appeal concerned a "'battle of the experts,'" because Garvin was not testifying as an expert when he gave the wrongfully admitted testimony regarding needle length; and

(4) concluding that Simon had waived his objections to Drake's violations of the order in limine by withholding objections during closing argument.

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] 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.[2]

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[1] *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011), *cert. denied* 565 U.S. 979, 132 S. Ct. 525, 181 L. Ed. 2d 351.

[2] *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

ANALYSIS

The Court of Appeals did not explain why the trial court's admission of Garvin's testimony was error. We address that issue first because it is relevant to why we are reversing the Court of Appeals' decision with directions to vacate the district court's judgment and remand the cause for a new trial.

Neb. Evid. R. 702[3] governs the admissibility of expert testimony and provides that the witness must be qualified as an expert: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness *qualified as an expert* by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (Emphasis supplied.)

[3-5] We review a trial court's decision to admit or exclude expert testimony under the appropriate standards for abuse of discretion.[4] But under rule 702, a trial court does not have discretion to permit a witness who has not been qualified as an expert to testify to issues that require an expert's opinion. And under Neb. Evid. R. 701,[5]

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

But Garvin did not limit his testimony to his perceptions of Simon. And in medical malpractice cases, expert testimony by a medical professional is normally required to establish causation and the standard of care under the circumstances.[6]

The record shows that the trial started on May 9, 2011. Previously, on May 2, the court determined that because

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[3] Neb. Rev. Stat. § 27-702 (Reissue 2008).

[4] See *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

[5] Neb. Rev. Stat. § 27-701 (Reissue 2008).

[6] See *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

Drake had not designated Garvin as an expert, Garvin could not testify on the standard of care or medical causation. And during the sidebar at trial, Simon's counsel argued that he had never had an opportunity to depose Garvin about his expert opinions.

Yet, despite its previous ruling that Garvin could not testify to the standard of care and medical causation, the court permitted Garvin to testify, over objection, to the issues that required expert testimony. Garvin's testimony that the correct needle size can vary and that multiple injections are not uncommon was an opinion that Drake did not violate the standard of care in using a 2½-inch needle. His testimony that the medical literature failed to show a correlation between multiple needle penetrations and an increased risk of infection was an opinion that Drake's multiple injections had not increased Simon's risk of infection. So the court permitted Garvin to testify to standard of care issues that were obviously not focused on his observations of Simon.

Furthermore, the court's combined rulings permitted Garvin to testify as an expert while denying Simon any opportunity to discover facts relevant to Garvin's qualifications as an expert on hip injections or to discover the data that he had relied on for his opinion on the increased risk of infection.[7] We conclude that the trial court erred in permitting Garvin to testify about standard of care issues and in refusing to give a curative instruction to the jury.

Moreover, we disagree with the Court of Appeals that Garvin's testimony was substantially similar to the testimony of the parties' designated experts. Compared to the testimony of a hired expert, a juror was likely to give great weight to Garvin's opinion because he was Simon's treating physician and testifying as an expert against his own patient. And the court's rulings meant that Simon had no meaningful opportunity to challenge the presumptive validity and weight of Garvin's opinions.

The jurors' assumption of Simon's trust in his doctor is no small matter. Jurors know from their own experience

[7] See Neb. Ct. R. Disc. § 6-326(4).

that a treating physician carries the patient's endorsement of trust. This was amply illustrated by Drake's attorney's closing argument. And contrary to the Court of Appeals' opinion, Simon was not required to object to this argument to preserve a claim of prejudice resulting from the admission of Garvin's testimony.

Although the court refused to give a curative instruction because it concluded that the error was harmless, this statement was effectively an overruling of Simon's objections. And after the court admitted Garvin's testimony, Drake was entitled to argue its probative effect in closing. So Simon did not waive an objection to improper argument. Instead, the argument shows that the Court of Appeals erred in concluding that Garvin was just another expert in a battle of experts. Although the substance of Garvin's opinions was similar to that of Drake's expert, the weight of his opinions differed because Garvin, as Simons' treating physician, was cloaked in an aura of trust and respect.

We addressed a similar issue in *Barry v. Bohi*.[8] There, the plaintiff sued her physician for negligently failing to detect her breast cancer. During part of the time that the physician provided treatment to the plaintiff, he was qualified under the Nebraska Hospital-Medical Liability Act,[9] limiting his malpractice liability. The act required patients to submit claims against qualified providers to a medical review panel before filing suit. At that time, a claimant could not waive the review,[10] but a claimant could (and still can) select one of the experts on the panel.[11] The act also provides, then and now, that the panel's written report determining whether the standard of care was met shall be admissible in a subsequent suit.[12]

The panel found that the plaintiff's physician had met the standard of care under the circumstances. In the subsequent suit, the court received the report into evidence, so the jury

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[8] *Barry v. Bohi*, 221 Neb. 651, 380 N.W.2d 249 (1986).

[9] See Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 2010).

[10] See *Barry, supra* note 8.

[11] See § 44-2841.

[12] See § 44-2844(2).

would have reviewed the report during deliberations. It returned a verdict for the defendant physician.

On appeal, we concluded that the court improperly admitted the report for those treatment dates in which the physician was not qualified under the act. We rejected the defendant physician's argument that the error was not prejudicial because there was independent evidence to establish that he had met the requisite standard of care:

> He correctly argues that, generally, if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is harmless and that harmless error does not form a basis for the reversal of a judgment. . . . Those general rules, however, rest on the premise that the nature of the cumulative evidence is such that no prejudice results from its improper admission into evidence. That cannot be said of a written opinion rendered by a panel convened pursuant to the act *and numbering among its members an expert selected by* [*the plaintiff*]. . . . Under such circumstances prejudice must be presumed to result.[13]

As in this case, the plaintiff's selection in *Barry* of an expert physician signified her trust in his opinion. In *Barry*, because of the plaintiff's confidence in the expert's opinion, the jury would have given significant weight to it. In this case, this effect was amplified when Garvin, testifying as an "expert" against Simon, was his own treating physician. And we cannot conclude that the weight the jury likely would have given to Garvin's opinions was not the tipping point when Drake's only expert conceded that he would not have used a 2½-inch needle to inject Simon. We conclude that *Barry* controls here and that prejudice is presumed.

CONCLUSION

We conclude that the trial court erred in admitting Garvin's testimony regarding standard of care issues when he was not

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[13] *Barry, supra* note 8, 221 Neb. at 656, 380 N.W.2d at 253 (emphasis supplied).

designated as an expert. We further conclude that the Court of Appeals erred in holding that this error was not prejudicial. Finding prejudicial error, we reverse the judgment of the Court of Appeals and remand this matter with directions that it vacate the district court's judgment and remand this cause to the district court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., participating on briefs.

WRIGHT, MILLER-LERMAN, and CASSEL, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DOAN Q. AU, APPELLANT.
829 N.W.2d 695

Filed May 3, 2013. No. S-12-040.

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. **Statutes.** The interpretation of a statute presents a question of law.
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. **Police Officers and Sheriffs: Probable Cause.** Probable cause merely requires that the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense; it does not demand any showing that this belief be correct or more likely true than false.
5. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
6. ____. Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
7. **Words and Phrases.** "Practicable" generally means capable of being done, effected, or put into practice with the available means, i.e., feasible.
8. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.
9. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Under the Fourth Amendment, a policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime,

may detain that person briefly in order to investigate the circumstances that provoke suspicion.

10. **Investigative Stops.** An investigatory stop and resulting inquiry must be reasonably related in scope to the justification for their initiation.
11. **Motor Vehicles: Investigative Stops: Probable Cause.** Observation of a vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition.
12. **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 Douglas County: W. MARK ASHFORD, Judge. Reversed and remanded for further proceedings.

William J. O'Brien for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

CASSEL, J.

INTRODUCTION

In this appeal, we first determine whether evidence that a vehicle momentarily touched or crossed a lane divider line, without more, established a statutory violation and thereby provided probable cause for a traffic stop. It did not, because the controlling statute requires that a vehicle remain in a single lane only "as nearly as practicable." Second, because the arresting officer admitted that this "happens all the time" and failed to distinguish how this case differed from normal behavior, there was no reasonable suspicion of criminal activity sufficient to support an investigatory stop. We reverse the judgment of the district court and remand the cause for further proceedings.

BACKGROUND

On September 22, 2010, Officer Kristopher Peterson of the Douglas County Sheriff's Department pulled over a vehicle with out-of-state license plates heading eastbound on

Interstate 80 because it momentarily crossed over the divider line between the two eastbound lanes. Doan Q. Au was a passenger in the vehicle. Based upon the suspicions Peterson developed while issuing a warning ticket for the alleged traffic violation, he deployed a drug detection dog, searched the vehicle, and ultimately discovered numerous packets of cocaine in a hidden compartment in the trunk.

Au was charged with unlawful possession with intent to deliver a controlled substance and entered a plea of not guilty. Prior to trial, Au filed a motion to suppress any and all evidence that resulted from the traffic stop and search of the vehicle.

At the suppression hearing, the district court received evidence and heard Peterson's testimony, which established the events that transpired immediately before the initial traffic stop and leading up to Au's arrest. Peterson testified that he initiated the traffic stop at 10:08 p.m. after he observed that most of the vehicle's "left, or driver's side, tires briefly, briefly crossed over the white divider line, crossing into the inside lane for several hundred feet." He twice observed the vehicle touch the divider line in this manner. Peterson made this observation immediately after the vehicle crossed a diagonal seam or "break in the road" which made the pavement a "little bit" uneven and on a stretch of road that curved slightly to the left. Peterson admitted that it was "more difficult" for a driver to maintain his lane under such conditions.

The district court received video footage from Peterson's cruiser, showing the traffic stop and the alleged traffic offense that precipitated it, all occurring after nightfall. The video depicts the subject vehicle touching and partially crossing the divider line with its left tires in a manner and under conditions consistent with Peterson's testimony. Additionally, the video shows another vehicle preparing to merge onto the Interstate into the subject vehicle's lane just prior to the second time that it deviated from its lane and away from the merging traffic.

Referring to vehicles touching the lane divider line, Peterson admitted that "it happens commonly" and that it "happens

quite a bit." He testified that when a vehicle fails to maintain its lane, it could indicate that the driver is impaired by an illegal substance or alcohol, or that the driver is "overly tired." Peterson declined to describe what he observed in the instant case as erratic driving, but he opined that it was "definitely impaired in some manner." Peterson testified that it was his "general practice" to stop vehicles for crossing the centerline "[w]hen practical . . . ." He stated that even though such behavior is a common occurrence, it raises safety concerns for the driver of the subject vehicle and other drivers; but he did not explain how touching or crossing the line without any nearby traffic would affect safety.

Later, Peterson admitted that it "happens all the time by people [who] are driving [and who] aren't under the influence or fatigued." In the instant case, the driver of the vehicle had committed no other traffic violations aside from crossing the centerline, and there were no other vehicles in the immediate vicinity.

Because of the resolution of this appeal, we only briefly summarize the events that followed. After stopping the vehicle, Peterson questioned the driver and Au separately. After giving the driver a warning ticket, Peterson did not allow the parties to leave and deployed a drug detection dog. The dog alerted and indicated. Upon searching the vehicle, Peterson discovered cocaine. The driver and Au were arrested.

Based upon Peterson's testimony, the district court overruled Au's motion to suppress. The court stated:

> The . . . vehicle, as observed by [Peterson], did cross the center line on more than one occasion, which would be sufficient to create probable cause to stop said vehicle and make contact with the driver.
>
> In the present case, [Peterson] did have objective articulable probable cause that a violation had occurred and therefore the stop of the vehicle was lawful.

The case proceeded to a stipulated bench trial. During the trial, Au renewed his motion to suppress. The district court treated the renewal of the motion to suppress as though it were made at the commencement of the trial and overruled the motion.

The district court found Au guilty of unlawful possession with intent to deliver a controlled substance, a Class IC felony, and sentenced him to 10 to 12 years' imprisonment.

Au filed a timely appeal. Pursuant to statutory authority, we moved this case to our docket.[1]

ASSIGNMENTS OF ERROR

Au assigns, restated, that the district court erred in overruling his motion to suppress, because Peterson lacked (1) a constitutionally sufficient basis for stopping the vehicle in which Au was a passenger and (2) a reasonable suspicion to detain Au after the initial purpose of the traffic stop was completed. We reach only the first of these two issues.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[2]

[2] The interpretation of a statute presents a question of law.[3]

ANALYSIS

No Probable Cause for Traffic Stop.

[3,4] In ruling upon Au's motion to suppress, the district court relied upon the well-established principle that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.[4] Probable cause merely requires that the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense;

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

[2] *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.

[3] *State v. McCarthy*, 284 Neb. 572, 822 N.W.2d 386 (2012).

[4] *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012).

it does not demand any showing that this belief be correct or more likely true than false.[5]

The district court viewed any crossing of a lane divider as a traffic violation. The court reasoned, "The . . . vehicle . . . did cross the center line on more than one occasion, which would be sufficient to create probable cause to stop said vehicle and make contact with the driver." This reasoning mirrored Peterson's explanation. Peterson testified that he ordinarily pulls a car over when the car touches the lane divider line. The district court's statutory interpretation affords no consideration to the surrounding circumstances. The controlling statute clearly mandates otherwise.

[5,6] We first focus on the exact language of the statute and the principles that govern our reading of it. Whenever a roadway has been divided into two or more clearly marked lanes for traffic, Neb. Rev. Stat. § 60-6,139(1) (Reissue 2010) requires that "[a] vehicle shall be driven as nearly as practicable within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Statutory language is to be given its plain and ordinary meaning.[6] A similar rule applies to specific words within a statute. Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[7] We interpret this statute without deference to the meaning given to it by the district court.

Although other statutes strictly declare particular actions to be traffic violations, § 60-6,139(1) employs language expressly requiring consideration of the surrounding circumstances. We recently held that a vehicle crossing a fog line and driving on the shoulder of the highway, albeit very briefly, violated the statute prohibiting driving on a shoulder.[8] But Au correctly argues that the language of § 60-6,139(1) is significantly

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[5] *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006).

[6] *State v. Magallanes, supra* note 4.

[7] *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

[8] See *State v. Magallanes, supra* note 4.

different in that it merely requires that a vehicle be driven within a single lane "as nearly as practicable."

[7] The words "as nearly as practicable" invoke a standard inconsistent with the district court's interpretation. "Practicable" generally means capable of being done, effected, or put into practice with the available means, i.e., feasible.[9] It has also been described as meaning possible or feasible, able to be done, or capable of being put into practice.[10] A feasibility standard requires that the surrounding circumstances be considered. Further, the words "as nearly as" convey that the statutory standard does not require absolute adherence to a feasibility requirement, but, rather, something less rigorous.

Peterson's testimony failed to establish that the vehicle was not driven "as nearly as practicable" in the right-hand lane. He admitted that just before crossing the line, the vehicle crossed a "break in the road," and that the pavement there was a "little bit" uneven. He also acknowledged that the vehicle was traveling around a curve and that it is "more difficult" to maintain one's lane when driving around a curve as opposed to going straight. But he failed to explain how, in the light of these circumstances, it was still feasible for the vehicle to not touch or slightly cross the line. Instead, he evidently assumed that any touching or crossing of the lane divider line necessarily constituted a traffic infraction.

Moreover, Peterson's testimony showed that touching or crossing lane divider lines was a common occurrence, which clearly bears on the practicability of not doing so. He admitted that in the normal course of driving on the Interstate, vehicles often touch the left- or right-hand lines and that "it happens commonly." Nonetheless, he insisted that he would stop any such vehicle both because the driver would have committed a violation and in order to protect the safety of the driver and other drivers. While we discuss the matter of driver safety below, at this juncture, we consider only whether touching or

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[9] Webster's Third New International Dictionary of the English Language, Unabridged 1780 (1993).

[10] *Id.*

crossing the divider line violated the statute. And we conclude that it did not.

The district court erred in treating the mere touching or crossing of a lane divider line as a traffic violation. Consequently, the court erred in determining that probable cause existed for the stop. But our inquiry does not end here. We must also consider whether this was a permissible investigatory stop.

No Reasonable Suspicion of Criminal Activity.

[8] The State also argues that based on Peterson's observations, he had a reasonable suspicion of criminal activity and another legal standard permitted the traffic stop. Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause.[11] Au responds that whether the standard is probable cause or reasonable suspicion, the circumstances in the instant case failed to rise to that level.

Under our standard of review, we review the district court's factual findings for clear error but review the determination of reasonable suspicion independently. Upon our independent review, we find ourselves confronted by the rare case where the law enforcement officer's testimony completely undermines the existence of a reasonable suspicion of criminal activity.

[9,10] The U.S. Supreme Court has long held that under the Fourth Amendment, a police officer who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke suspicion.[12] The stop and inquiry must be reasonably related in scope to the

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[11] *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011).

[12] See, *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

justification for their initiation.[13] Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.[14]

[11] In cases involving impaired drivers, we have long held that observation of a vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition.[15] It was sufficient where the officer observed the motorist to weave only twice, once sharply from right to left within the lane and a second time a little over 1 mile later.[16] We upheld another investigatory stop where the driver gradually moved to the left toward a center island, then to the right to the right-hand lane line, then back to the left toward the center island, and finally back right to the lane divider line, even though the vehicle never touched the center island or crossed the lane divider line.[17] Another investigatory stop addressed a driver who weaved three or four times from the centerline of an extra-wide northbound lane into those areas which were free of parked cars along the curb.[18] If weaving within a lane is sufficient to support a reasonable suspicion of impaired driving, instances involving touching or crossing a lane divider line would frequently provide a similar reasonable suspicion of impairment. But in each of those cases involving weaving vehicles, we were not confronted by testimony admitting that the observed behavior "happens all the time" with unimpaired drivers.

The only evidence of a reasonable suspicion is Peterson's observation of the vehicle's crossing the white lane divider line and his bare assertion that he suspected impairment.

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[13] See *id*.

[14] *Berkemer v. McCarty, supra* note 12.

[15] See *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

[16] *Id*.

[17] *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988).

[18] *State v. Beerbohm*, 229 Neb. 439, 427 N.W.2d 75 (1988) (superseded by statute on other grounds as stated in *Smith v. State Dept. of Motor Vehicles*, 248 Neb. 360, 535 N.W.2d 694 (1995)).

The vehicle's left tires briefly crossed over the white divider line, crossing into the left-hand lane for several hundred feet. Peterson claimed that the driver might have been impaired, "whether it's with some type of illegal substance, alcohol, or it could just mean that the driver [was] impaired by being overly tired."

But Peterson's own testimony demolished his claim that he had a reasonable suspicion that the driver was intoxicated or fatigued. On cross-examination referring to vehicles touching the lane divider line, he admitted that "this happens quite a bit" and that it "happens all the time by people [who] are driving [and who] aren't under the influence or fatigued." He did not attempt to explain how the circumstances in the case before us differed from what "happens all the time" with unimpaired drivers.

We also consider the other circumstances—the break in the road with the resulting uneven pavement, the curve in the highway, the merging vehicle depicted in the video recording just prior to the second deviation from the lane, the likelihood of an out-of-state driver's being unfamiliar with the particular section of road, and the nighttime darkness. When we subtract all of these circumstances from the bare touching or crossing of the lane divider line, all that remains is an inchoate and unparticularized hunch. That is not enough.

We emphasize that this is not the typical case where a law enforcement officer testifies to evidence of impairment sufficient to establish a reasonable suspicion of criminal activity. Here, unlike the usual case, Peterson both admitted that the driver's conduct "happens all the time" by unimpaired drivers and failed to testify to any circumstances distinguishing this event from the norm. Thus, we conclude that the record does not establish a reasonable suspicion of criminal activity sufficient to justify the traffic stop.

Further Detention After Traffic Stop Was Completed.

[12] Because we conclude that the traffic stop was not supported by either probable cause or a reasonable suspicion of criminal activity, we do not reach Au's second assignment of

error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[19]

CONCLUSION

Section 60-6,139(1) requires a motor vehicle operator to remain within a traffic lane only "as nearly as practicable." Contrary to the district court's implicit interpretation, mere touching or crossing of a lane divider line, without more, is not a violation of § 60-6,139(1). Because the State failed to establish the violation of a statute, it failed to establish probable cause to justify the traffic stop.

The State also failed to establish that the officer had a reasonable suspicion of criminal activity sufficient to justify an investigatory stop. He admitted that minor touching or crossing of lane divider lines "happens all the time" by unimpaired drivers. He failed to point to any other circumstance supporting a reasonable suspicion of an impaired driver.

Because the traffic stop was not supported by either probable cause or a reasonable suspicion of criminal activity, the district court erred in failing to sustain Au's motion to suppress the evidence resulting from the traffic stop. We therefore reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MCCORMACK, J., participating on briefs.

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[19] *State v. Jiminez*, 283 Neb. 95, 808 N.W.2d 352 (2012).

DUANE E. FISHER, APPELLEE, V. PAYFLEX SYSTEMS USA, INC., APPELLANT.

JASON R. NORTON, APPELLEE, V. PAYFLEX SYSTEMS USA, INC., APPELLANT.

829 N.W.2d 703

Filed May 3, 2013. Nos. S-12-503, S-12-504.

1. **Courts: Appeal and Error.** An appellate court reviews a county court's judgment for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
4. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
5. **Statutes.** Statutory interpretation presents a question of law.
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. **Employer and Employee: Words and Phrases.** A "vacation" from work is ordinarily understood to mean a paid leave of absence granted to an employee for rest and relaxation.
9. **Employer and Employee: Wages.** Paid vacation leave is not conditioned upon anything other than the employee's rendering services for the employer. And an employee may use his or her earned vacation leave for any personal reason without conditions, including for an illness or disability.
10. **Wages: Words and Phrases.** Paid sick leave is ordinarily understood to mean an employee's paid absence from work for illness or disability.
11. **Employer and Employee: Wages.** Under Neb. Rev. Stat. § 48-1229 (Reissue 2010), upon an employee's separation of employment, an employer may withhold payment for unused sick leave, but not unused vacation leave.
12. **Employer and Employee: Employment Contracts: Wages: Appeal and Error.** Under Neb. Rev. Stat. § 48-1229 (Reissue 2010), an appellate court will consider a payment a wage subject to the Nebraska Wage Payment and Collection Act if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.
13. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain,

ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.

14. **Statutes: Intent.** In construing a statute, a court looks 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.
15. **Statutes: Appeal and Error.** An appellate court does not consider a statute's clauses and phrases as detached and isolated expressions. Instead, the whole and every part of the statute must be considered in fixing the meaning of any of its parts.
16. ____: ____. An appellate court attempts to give effect to all parts of a statute and to avoid rejecting a word, clause, or sentence as superfluous or meaningless.
17. **Statutes: Legislature: Intent.** The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.
18. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will reject a statutory interpretation that is contrary to a clear legislative intent.
19. ____: ____: ____: ____. An appellate court can examine an act's legislative history if a statute is ambiguous or requires interpretation.
20. **Statutes.** A statute is ambiguous if it is susceptible of more than one reasonable interpretation, meaning that a court could reasonably interpret the statute either way.
21. **Employer and Employee: Wages.** Under Neb. Rev. Stat. § 48-1229 (Reissue 2010), an employee's earned "paid time off" hours that the employee has an absolute right to take for any purpose must be treated as earned vacation leave.
22. **Attorney Fees: Appeal and Error.** An appellate court reviews a court's award of attorney fees under Neb. Rev. Stat. § 48-1231 (Reissue 2010) for abuse of discretion.
23. **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.
24. **Attorney Fees.** To determine proper and reasonable attorney fees, a court must consider several factors: the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

Appeals from the District Court for Douglas County, KIMBERLY MILLER PANKONIN, Judge, on appeal thereto from the County Court for Douglas County, MARCENA M. HENDRIX, Judge. Judgments of District Court affirmed.

A. Stevenson Bogue and Ruth A. Horvatich, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Richard A. Drews, of Taylor, Peters & Drews, for appellees.

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

CONNOLLY, J.

SUMMARY

PayFlex Systems USA, Inc. (PayFlex), appeals from the district court's judgments in these consolidated appeals from the county court. The district court affirmed the county court's summary judgment that required PayFlex to pay earned but unused "paid time off" (PTO) hours to the appellees, Duane E. Fisher and Jason R. Norton. The issue is whether Neb. Rev. Stat. § 48-1229 (Reissue 2010) of the Nebraska Wage Payment and Collection Act (Wage Payment Act)[1] entitles an employee, upon separation of employment, to collect earned but unused PTO hours despite a provision in an employee manual that the employer will not pay them.

We affirm. Regardless of the label that PayFlex attached to its PTO hours, they were indistinguishable from earned vacation time under § 48-1229. Like earned vacation time, the appellees had an unconditional right to use their earned PTO hours for any purpose. Because the Wage Payment Act requires an employer to pay earned but unused vacation leave to an employee upon separation of employment, the district court correctly affirmed the county court's summary judgment that ordered PayFlex to pay the appellees their unused PTO benefits.

BACKGROUND

Fisher and Norton both separated from their employment with PayFlex in July 2010. Fisher's hourly wage was $43.7019, and his PTO balance was 146.64 hours. Norton's hourly wage $32.1678, and his PTO balance was 120.14 hours. PayFlex had not agreed to pay the appellees their unused PTO hours and denied the appellees' demand for payment of these hours. PayFlex's employee manual set out its PTO rules

[1] See Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2010).

and provided that PayFlex would not pay their employees for unused PTO hours:

> PayFlex has provided Paid Time Off (PTO) as one of the many ways in which to show appreciation for loyalty and continued service. PTO is available for regular, full-time employees and may be used for absences due to illness, vacation or personal concerns.
>
> PTO will accrue in each pay period of continuous employment; however, employees are not eligible to use any accrued PTO until the completion of 90 days of full time employment.
>
> . . . .
>
> PTO may not be taken before it is earned.
>
> Employees are encouraged to take their [PTO] as an opportunity for rest, relaxation and other personal time. In the event that an employee does not utilize all of the PTO during the anniversary year, carryover is allowed into the next anniversary year with a maximum of twenty-five (25) days (200 hours).
>
> All PTO leave must be approved by the department manager or supervisor. PTO requests for one (1) week or more shall be scheduled with approval of the department manager or supervisor at least fifteen (15) days before the time taken.
>
> PTO will NOT be paid out upon separation of employment. If any unused, accumulated PTO is taken prior to the separation date, an employee must work three (3) consecutive regularly, scheduled days immediately following the PTO days, in order to be paid for those PTO days used.

(Emphasis in original.)

A chart in the employee manual sets out the number of PTO hours that employees would earn per pay period and per year, depending upon their years of employment. For example, a 1-year employee would earn 120 PTO hours (15 days) per year, while employees who had worked for PayFlex 9 or more years would earn 200 PTO hours (25 days) per year.

The payroll manager stated that in her 11 years of employment, PayFlex had never provided separate vacation leave and

sick leave benefits. The vice president of human resources testified that employees, if they wished, could use all of their accrued PTO hours for vacation time. As employees used their PTO hours, PayFlex listed their paid-out hours as part of the employee's total earnings on their paycheck. PayFlex also provided up to 3 days of funeral leave for employees, which it did not deduct from their PTO hours.

After the county court consolidated these cases, both sides moved for summary judgment. The issue was whether a 2007 amendment to § 48-1229 permitted PayFlex to refuse to pay unused PTO benefits to separating employees even though the statute required it to pay unused vacation leave. PayFlex argued that PTO hours were a hybrid benefit that did not constitute vacation leave. The county court rejected that argument and sustained the appellees' motions for summary judgment. It concluded that accepting PayFlex's argument would allow it to deprive the appellees of an earned vacation benefit, contrary to the Legislature's intention in the Wage Payment Act. It later sustained the appellees' motion for attorney fees.

PayFlex appealed to the district court, which agreed with the appellees. It concluded that because PayFlex's hybrid benefit plan had created an ambiguity under the statute, the issue should be decided in favor of employees unless and until the Legislature changed the statute. In its judgment on appeal, the court stated that PayFlex's PTO plan,

> by its own definition, includes vacation leave. There is nothing in [PayFlex's] PTO program that designates or apportions its PTO to reflect a separate determination of earned vacation leave, and [PayFlex] admits that an employee could use all of his or her earned PTO for vacation leave. The Court therefore finds that all of the earned PTO credited to [the appellees] at the time of their separation from employment with [PayFlex] should be paid to the [appellees].

The court affirmed the county court's award of attorney fees and awarded the appellees additional attorney fees on appeal.

ASSIGNMENTS OF ERROR

PayFlex assigns, restated and condensed, that the district court erred in (1) affirming the county court's summary judgment order, which determined that PayFlex's refusal to pay the appellees' unpaid PTO hours deprived them of an earned benefit that they were entitled to collect under § 48-1229(4); and (2) concluding that § 48-1229(4) did not permit PayFlex to refuse payment of accrued PTO hours because PTO is not earned but unused vacation; and (3) affirming the county court's awards of attorney fees and awarding them additional attorney fees.

STANDARD OF REVIEW

[1-5] We review a county court's judgment for errors appearing on the record.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give that party the benefit of all reasonable inferences deducible from the evidence.[4] But we independently review questions of law decided by a lower court.[5] Statutory interpretation presents a question of law.[6]

ANALYSIS

Both parties agree that the plain language of § 48-1229(4) requires employers to pay earned but unused vacation leave to a separating employee. But they disagree whether PTO hours constitute vacation leave.

Section 48-1230(3)(a) requires employers to pay unpaid wages to an employee upon the employee's separation of

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[2] See *Schinnerer v. Nebraska Diamond Sales Co.*, 278 Neb. 194, 769 N.W.2d 350 (2009).

[3] *Id.*

[4] See *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

[5] *Molczyk v. Molczyk, ante* p. 96, 825 N.W.2d 435 (2013).

[6] *Id.*

employment: "Whenever an employer, other than a political subdivision, separates an employee from the payroll, the unpaid wages shall become due on the next regular payday or within two weeks of the date of termination, whichever is sooner[.]"

Section 48-1229(4) defines "wages" to include fringe benefits: "Wages means compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis." And § 48-1229(3) defines "fringe benefits" to include "sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit plans of benefit programs regardless of whether the employee participates in such plans or programs."

In 2007, however, the Legislature amended the definition of wages under § 48-1229(4) to include a limitation that is at issue here:

> Paid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee or the employer and the collective-bargaining representative have specifically agreed otherwise.[7]

PayFlex contends that under the plain language of the amended § 48-1229(4), unused PTO hours are not unused vacation leave that must be paid to an employee upon separation of employment. It also argues that the county court's determination is contrary to the legislative history of the 2007 amendment.

The appellees contend that because an employee can use earned PTO hours the same as earned vacation hours, PTO hours are an earned benefit—not a contingent benefit—which an employer must treat as wages. They argue that the label cannot control whether an employer has a duty to pay unused

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[7] See 2007 Neb. Laws, L.B. 255.

vacation leave. And they argue that if we conclude PTO hours are not vacation leave, employers can circumvent their statutory duty to pay unused vacation leave by combining sick leave with vacation leave. Finally, they argue that the legislative history confirms that their position is correct.

[6,7] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[8] We will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.[9] So we first consider the plain language of the statute.

[8,9] Section 48-1229(4) does not define the term "vacation leave" as distinguished from other types of "paid leave." But a "vacation" from work is ordinarily understood to mean a paid leave of absence granted to an employee for rest and relaxation.[10] In distinguishing "vacation pay" from "compensatory time," we have said that vacation pay is generally regarded as "additional wages for services performed. It is not in the nature of compensation for the calendar days it covers—it is more like a contracted-for bonus for a whole year's work."[11] Paid vacation leave is not conditioned upon an event, such as a holiday, an illness, or a funeral: "[I]t is not conditioned upon anything other than the employee's rendering services for the employer."[12] Instead, an employee may use his or her earned vacation leave for any personal reason without conditions, including for an illness or disability.[13]

[10,11] In contrast to vacation leave, paid sick leave is ordinarily understood to mean an employee's paid absence

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[8] *Brook Valley Ltd. Part. v. Mutual of Omaha Bank, ante* p. 157, 825 N.W.2d 779 (2013).

[9] *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013).

[10] See Webster's Third New International Dictionary of the English Language, Unabridged 2527 (1981).

[11] *Wadkins v. Lecuona*, 274 Neb. 352, 359, 740 N.W.2d 34, 41 (2007) (emphasis omitted).

[12] *Paton v. Advanced Micro Devices, Inc.*, 197 Cal. App. 4th 1505, 1519, 129 Cal. Rptr. 3d 784, 791 (2011).

[13] See *id.* See, also, *Sloan v. Jasper County Com. Unit School*, 167 Ill. App. 3d 867, 522 N.E.2d 334, 118 Ill. Dec. 879 (1988).

from work for illness or disability.[14] We have held that under both the pre-2007 version of § 48-1229(4) and the amended version, upon an employee's separation of employment, an employer may withhold payment for unused sick leave, but not unused vacation leave. We explained that these leaves are treated differently because an employer has the right to provide sick leave that an employee can use only for illness or injury while employed.[15]

In short, the distinction between paid vacation leave and paid sick leave is that sick leave is contingent upon an occurrence and vacation leave is not. With both vacation and PayFlex's PTO hours, an employee earns the leave and has an absolute right to take this time off for any purpose, subject to the employer's approval of the timing. So the definition of vacation leave is indistinguishable from PayFlex's definition of its PTO benefit. For this reason, legal commentators advise employers subject to similar statutes to maintain separate accounts for employees' accrued vacation leave and sick leave, or to pay employees their unused PTO hours upon separation if they combine vacation leave and sick leave into a single PTO policy.[16] Moreover, in determining whether an employer has a duty to pay PTO hours upon separation of employment, courts have used the terms vacation and "paid time off" interchangeably.[17]

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[14] See Webster's, *supra* note 10 at 2111.

[15] *Loves v. World Ins. Co.*, 277 Neb. 359, 773 N.W.2d 348 (2009) (supplemental opinion).

[16] See, Mark D. Hansen, Labor and Employment Law, in Ill. Constr. Law Manual, ch. 15, § 15.32 (Ill. Prac. Ser. No. 24, 2012-13); Tamsin R. Kaplan, Employment Agreements, in Advising a Massachusetts Business, ch. 4, 4-1 (Mass. Continuing Legal Educ., 2011); Cathleen S. Yonahara, When Is Paid Time Off the Same as Vacation? in Paid Time Off, 21 No. 10 Cal. Emp. L. Letter 4 (M. Lee Smith Publishers, LLC, 2011). See, also, Jerry L. Pigsley, Neb. State Bar Assn., Payment of Vacation and Other Benefits Upon Termination: The State of Affairs After *Roseland* and L.B. 255, (Neb. Continuing Legal Educ., 2007).

[17] See, e.g., *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117 (Minn. 2007); *Sexton v. Oak Ridge Treatment Ctr.*, 167 Ohio App. 3d 593, 856 N.E.2d 280 (2006). See, also, *Paton, supra* note 12.

[12] Under § 48-1229, we will consider a payment a wage subject to the Wage Payment Act if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.[18] It is true that PayFlex required its employees to use PTO hours for absences because of illness. But this requirement is not dispositive. An employee with vacation leave and no sick leave could also use his or her vacation time for an illness. Like vacation, the appellees earned their PTO hours. And like vacation, the only stipulated condition for their accrual of PTO hours was the rendering of their services. This condition was unquestionably satisfied. The appellees had an absolute right to take this time off for any purpose they wished. Thus, under the plain meaning of the statute's terms, the appellees' PTO hours constituted earned vacation leave.

[13,14] PayFlex's argument that it is not required to pay earned but unused PTO hours is also inconsistent with statutory construction principles. In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.[19] 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.[20]

[15,16] We do not consider a statute's clauses and phrases "'as detached and isolated expressions.'"[21] Instead, "'the whole and every part of the statute must be considered in fixing the

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[18] *Loves, supra* note 15.

[19] *Jacob v. Schlichtman*, 261 Neb. 169, 622 N.W.2d 852 (2001).

[20] *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[21] *Sommerville v. Board of County Commissioners*, 116 Neb. 282, 285, 216 N.W. 815, 816 (1927) (quoting Henry Campbell Black, Handbook on the Construction and Interpretation of the Laws § 99 (2d ed. 1911)).

meaning of any of its parts.'"[22] We attempt to give effect to all parts of a statute and to avoid rejecting a word, clause, or sentence as superfluous or meaningless.[23]

[17,18] The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.[24] And we will reject a statutory interpretation that is contrary to a clear legislative intent.[25]

Applying these principles, the Legislature's clear intent in the 2007 amendment was to clarify that employers were not required to pay separating employees any unused paid leave *except* vacation leave. PayFlex does not dispute that even after the 2007 amendment, it was required to pay unused vacation. Yet, accepting its "hybrid benefit" argument would allow any employer to circumvent this requirement by claiming that its combined leave policy was not vacation leave.

We reject this interpretation. If the Legislature had intended to permit employers to avoid the payment of earned vacation leave, it would have done this directly instead of requiring them to do an end run around the statute by combining earned vacation leave with another type of paid leave. That is, it would have simply stated that employers were not required to pay any earned but unused leave upon separation of employment unless the parties have agreed otherwise. Instead, it mandated that employers must pay vacation leave. So interpreting "[p]aid leave, other than earned but unused vacation leave" to include vacation leave if the employer has combined vacation with another type of paid leave would obviously defeat a clear legislative intent. Because PayFlex's interpretation requires us to ignore a statutory mandate, it is not a reasonable

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[22] *Id*. Accord *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

[23] See *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012).

[24] See *Blakely, supra* note 20.

[25] See, e.g., *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012); *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

interpretation. The application of § 48-1229(4) cannot depend upon the employer's semantic choices.[26]

[19,20] Finally, we reject PayFlex's argument that the legislative history shows the Legislature considered PTO hours to be a paid leave other than vacation leave. We can examine an act's legislative history if a statute is ambiguous or requires interpretation.[27] But a statute is ambiguous *if* it is susceptible of more than one reasonable interpretation, meaning that a court could reasonably interpret the statute either way.[28] Here, however, we need no extrinsic aid to determine the Legislature's clear intent that employers pay earned but unused vacation leave. And we have rejected PayFlex's statutory interpretation argument as unreasonable.

[21] To sum up, PayFlex had agreed to provide PTO hours as compensation for labor or services, and the appellees had met the conditions for receiving this compensation. Because the appellees had an absolute right to take this time off for any purpose they wished, under § 48-1229, their earned but unused PTO hours must be treated the same as earned but unused vacation hours. The district court did not err in affirming the county court's summary judgments for the appellees.

PayFlex next contends that the district court erred in affirming the county court's awards of attorney fees and in awarding additional attorney fees. It acknowledges that § 48-1231 authorizes a court to award attorney fees, but it contends that there were no factors present that warranted an award in excess of the statutory minimum. The appellees contend that § 48-1231 does not set a limit on attorney fees and that the evidence supported the county court's awards.

Under § 48-1231, "[a]n employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court." If the employee has an attorney and secures a judgment, the employee "shall be entitled to recover

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

[27] *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012).

[28] See, *id.*; *State v. Halverstadt*, 282 Neb. 736, 809 N.W.2d 480 (2011).

. . . all costs of such suit and . . . an amount for attorney's fees assessed by the court, which fees *shall not be less than twenty-five percent of the unpaid wages*."[29] If an appeal is taken and the employee recovers a judgment, the appellate court shall tax as costs an additional award of attorney fees not less than 25 percent of the unpaid wages.[30]

The county court awarded Fisher $6,408.45 in unpaid wages and awarded Norton $3,864.64 in unpaid wages. Twenty-five percent of the combined judgments equaled $2,568.27. At the hearing on the appellees' motions for attorney fees, the court received their attorney's affidavits in support of the motions. The attorney stated that he had spent a total of 54 hours to research and prosecute both cases. He asked the court to apportion his time as 27 hours in each case. He stated that his normal hourly rate was $150 per hour. The court received no other evidence. The county court awarded each appellee $4,050 for attorney fees. On appeal, the district court awarded each appellee additional fees of $2,100.

[22-24] We review a court's award of attorney fees under § 48-1231 for abuse of discretion.[31] 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.[32] To determine proper and reasonable fees, a court must consider several factors: the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.[33]

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[29] § 48-1231 (emphasis supplied).

[30] See *id*.

[31] See, *Schinnerer, supra* note 2; *Roseland v. Strategic Staff Mgmt.*, 272 Neb. 434, 722 N.W.2d 499 (2006).

[32] *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012).

[33] *Id*.

PayFlex did not contest any of the above factors. On appeal, it does not argue that the awards are unsupported by these factors. Instead, its argument rests on two decisions that it interprets to show that an employer's unreasonable conduct or willful violations must be present to support a court's award of attorney fees in an amount greater than the statutory minimum. We disagree.

PayFlex first relies on *Roseland v. Strategic Staff Mgmt*.[34] There, the district court awarded the plaintiff attorney fees equal to 25 percent of the unpaid wages. On appeal, the employees argued that the court's award of the statutory minimum was erroneous. They argued only that the employer's policy of not paying unused vacation was a clear violation of the Wage Payment Act. We concluded that the court did not abuse its discretion. But we did not conclude that the award was correct because the employer's position was reasonable.

In *Moore v. Eggers Consulting Co.*,[35] the employer appealed from the district court's judgment. The court awarded the employee attorney fees equal to the statutory minimum, and the employee did not cross-appeal. We affirmed the award, but we assessed a higher percentage of the unpaid wages (33⅓ percent) for attorney fees on appeal. We concluded that the higher assessment was warranted because of the employer's near-meritless employment practices and its multiple counterclaims which the employee was required to defend.

Roseland and *Moore* show that a court has discretion to award attorney fees higher than the statutory minimum because the employer raised unreasonable defenses or vexatious counterclaims. They do not show that these factors must be present before a court can award more than the statutory minimum.

Our more recent decision in *Schinnerer v. Nebraska Diamond Sales Co*.[36] refutes PayFlex's argument. There, the county court's award of attorney fees well exceeded the

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[34] See *Roseland, supra* note 31.

[35] *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997).

[36] *Schinnerer, supra* note 2.

statutory minimum, and the district court's award of fees on appeal also exceeded the statutory minimum. We rejected the employer's claim that the fees were excessive without considering whether the employer's position was reasonable or whether it had raised multiple counterclaims unrelated to the Wage Payment Act. Instead, we focused on the abuse of discretion factors for attorney fees and found no evidence of abuse in the record:

> While [the employer] points us to other cases under the Wage Payment Act where the plaintiffs were awarded a lower percentage of fees than were awarded in this case, it does not otherwise indicate how the attorney fees awarded in this case were in error. There is nothing in the record to indicate that the county court or the district court abused its discretion in awarding a fee greater than the minimum 25 percent of the judgment, and we therefore affirm the awards of attorney fees in the county and district courts.[37]

Schinnerer controls here. PayFlex conceded in district court that the case raised a novel issue, and it presented no evidence that the fees were unreasonable. Its sole argument was that a departure from the statutory minimum was unwarranted because its position was reasonable and it had not raised multiple defenses apart from its interpretation of the Wage Payment Act. We reject that argument. Because nothing in the record shows that the lower courts abused their discretion, we affirm their awards of attorney fees.

CONCLUSION

We conclude that the appellees' earned but unused PTO hours were for vacation leave. Accordingly, the lower courts did not err in determining that PayFlex was required to pay the unused PTO hours to the appellees. Nor did the lower courts err in their awards of attorney fees to the appellees.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

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[37] *Id*. at 203, 769 N.W.2d at 357.

STEPHAN, J., dissenting.

On the surface, these seem to be relatively simple cases. The facts are largely undisputed. PayFlex offers its employees a paid time off (PTO) benefit. They may use all or any part of this paid leave for vacation, but they are not required to do so and may use it for other purposes.

Likewise, the applicable law seems straightforward enough. In *Roseland v. Strategic Staff Mgmt.*,[1] we held that under the language of the Nebraska Wage Payment and Collection Act,[2] and in particular § 48-1229(4), vacation leave provided by an employer was a fringe benefit and a wage payable to an employee upon separation. In apparent response to *Roseland*, the Legislature amended § 48-1229(4).[3] The amendment added a new sentence which states, "Paid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee . . . have specifically agreed otherwise."[4] We must presume that the Legislature, in adopting the amendment, intended to make some change in the existing law and that we must endeavor to give some effect thereto.[5] When *Roseland* was decided, the Nebraska Wage Payment and Collection Act treated all fringe benefits as wages which must be paid to an employee upon separation. The 2007 amendment changed the law by establishing a general rule that an employer is not required to pay an employee for accrued paid leave upon separation in the absence of an agreement to do so, with a single exception for "earned but unused vacation leave."[6]

The illusion of simplicity disappears when one attempts to apply the current law to the facts of these cases. The

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[1] *Roseland v. Strategic Staff Mgmt.*, 272 Neb. 434, 722 N.W.2d 499 (2006).

[2] Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1998).

[3] See 2007 Neb. Laws, L.B. 255 (now codified at Neb. Rev. Stat. § 48-1229(4) (Reissue 2010)).

[4] *Id.*

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

[6] § 48-1229(4) (Reissue 2010).

difficulty stems from two factors. First, the Legislature did not define the term "vacation leave" as used in the amended version of § 48-1229(4). Second, PayFlex's PTO policy allows employees to use PTO for both vacation and other purposes, and the reason for the use is at the sole discretion of the employee. The question is whether this type of accrued PTO falls within the general rule established by § 48-1229(4) or the exception in that statute. The problem is that it falls neatly within neither.

The majority attempts to resolve this jurisprudential dilemma by applying the following syllogism: Vacation leave is not contingent upon an event, and this employer's paid time off is not contingent upon an event; thus, this employer's paid time off is vacation leave. But the majority's major premise is flawed. While vacation leave may not be contingent upon an event, it does not logically follow that there cannot be some other type of leave that also is not contingent upon an event. And clearly, the language of § 48-1229(4) permits employers and employees to agree upon paid leave that is both not contingent upon some event and not vacation leave.

The majority reasons that its approach carries out the intent of the Legislature because unless all accrued PTO is treated as "unused vacation leave," the employer would be permitted to circumvent the requirement of § 48-1229(4) that it pay a separated employee for vacation leave. But the other side of the coin is that by treating *all* accrued PTO as vacation leave simply because vacation is one of the multiple purposes for which the leave may be used, the majority broadens the category of paid leave payable upon separation, which is directly contrary to the Legislature's intent when it amended § 48-1229(4).

In the absence of clarification by further amendment of the statute, which I would welcome and invite, there is no perfect solution to this dilemma. Nevertheless, I would resolve this case in favor of PayFlex because I believe doing so most closely carries out the Legislature's intent when it amended the Wage Payment and Collection Act in response to *Roseland*.

My analysis starts with the recognition that there is no law that requires an employer to grant its employees either vacation time or vacation leave. Instead, because the relationship between employer and employee is contractual,[7] the granting of vacation time is purely a matter of contract between the employer and the employee. The fact that PayFlex had no legal obligation to provide vacation leave, or any form of paid leave, guides my interpretation of § 48-1229(4). I agree with the majority that in amending § 48-1229(4), "the Legislature's clear intent . . . was to clarify that employers were not required to pay separating employees any unused paid leave *except* vacation leave." (Emphasis in original.) But the amended statute is ambiguous because it does not define "vacation leave." Because the Legislature clearly meant "vacation leave" to be an exception to the general rule, and because an employer has no legal obligation to provide vacation leave at all, I would define "vacation leave" in § 48-1229(4) very narrowly to mean leave that may only be used for vacation. I accept the majority's statement that "vacation" from work is generally understood to mean a paid leave of absence granted to an employee for rest and relaxation.

Utilizing this definitional framework, the PayFlex PTO is not "vacation leave" within the meaning of § 48-1229(4). Instead, it is a much broader form of paid leave which provides an employee with flexibility to use PTO for any purpose he or she chooses, including, but not limited to, taking a vacation, recovering from surgery, painting a house, repairing a vehicle, nursing a cold, caring for a parent, taking an adult education class, or looking for another job. The PayFlex policy expressly states that earned PTO will not be paid upon separation of employment. No law prevents PayFlex from structuring its PTO policy in this way. By doing so, it is not circumventing any legal obligation to pay "unused vacation leave" because it has no legal obligation to provide "vacation leave," and in my view, it has not done so. It has provided a different type of paid leave which falls within the general rule of § 48-1229(4),

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[7] See *Meyer v. State Farm Mut. Auto. Ins. Co.*, 192 Neb. 831, 224 N.W.2d 770 (1975).

not within the exception. A herd of elephants cannot be fairly characterized as a herd of zebras simply because one zebra is traveling with the elephants. By treating multi-purpose PTO as defined in the PayFlex policy as the equivalent of vacation leave simply because vacation is one of the purposes for which it can be used, the majority's reasoning permits the exception to swallow the rule.

Because I would hold that PayFlex's PTO is not vacation leave within the meaning of § 48-1229(4), I would find that the employees were not entitled to recover attorney fees under § 48-1231. For these reasons, I would reverse the judgment of the district court in each of these consolidated cases and remand the causes with directions to reverse the judgments of the county court and remand with directions to dismiss.

HEAVICAN, C.J., and CASSEL, J., join in this dissent.

WILLIAM JERRY SMITH, APPELLANT, V. MARK CHRISMAN TRUCKING, INC., APPELLEE.

829 N.W.2d 717

Filed May 3, 2013. No. S-12-754.

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. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
3. **Statutes: Legislature: Intent.** A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively are clearly disclosed.
4. **Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction or event govern, not later enacted statutes.
5. ____: ____. Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.

6. **Statutes: Words and Phrases.** A substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. A procedural amendment, on the other hand, simply changes the method by which an already existing right is exercised.

Appeal from the Workers' Compensation Court: MICHAEL K. HIGH, Judge. Affirmed.

Michael W. Meister for appellant.

Darla S. Ideus and Robert B. Seybert, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

William Jerry Smith, appellant, suffered an accident arising out of and in the course of his employment on October 23, 2007. Smith filed this action in the Workers' Compensation Court on February 28, 2012, against his employer, Mark Chrisman Trucking, Inc., appellee, seeking relief under an amended version of Neb. Rev. Stat. § 48-121 (Reissue 2010). Section 48-121(3) was amended by 2007 Neb. Laws, L.B. 588, and Smith alleged that he was entitled to benefits calculated on the basis of the loss of earning capacity pursuant to this amendment. The Legislature specified that the operative date of the L.B. 588 amendment to § 48-121(3) was January 1, 2008. The Workers' Compensation Court concluded that the amendment to § 48-121(3) was substantive rather than procedural and that because Smith's accident and injuries occurred prior to the operative date of the amendment, Smith could not recover for a loss of earning capacity thereunder. Thus, the court granted Mark Chrisman Trucking's motion for summary judgment and overruled Smith's motion for summary judgment. Smith appeals. We agree with the Workers' Compensation Court's analysis of the amendment to § 48-121(3) and, accordingly, affirm.

STATEMENT OF FACTS

The parties in this case stipulated to the following facts:

1. [Smith] suffered an accident arising out of and in the course of his employment on October 23, 2007. Said accident caused a crush injury to [Smith's] left heel, injury to his right shoulder, and fractured ribs on the right. Sufficient notice was provided to [Mark Chrisman Trucking].

2. [Smith's] average weekly wage at the time of said accident was $540.60. As a result of the foregoing accident and injuries, [Smith] was temporarily totally disabled from and including October 24, 2007, through August 12, 2008, for which [Mark Chrisman Trucking] has paid [Smith] all indemnity benefits owed.

3. As a result of the foregoing accident and injuries, [Smith] was assigned a 1% impairment to the left lower extremity and an 11% permanent impairment to the right upper extremity and no further treatment was recommended. [Smith] was assigned no additional permanent impairment due to the fractured ribs and no further treatment is recommended for the fractured ribs.

4. [Mark Chrisman Trucking] has compensated [Smith] for all permanent impairment ratings set forth above pursuant to the schedule for scheduled member injuries set forth at Neb. Rev. Stat. § 48-121(3).

5. There is vocational evidence that [Smith's] loss of earning power due to his injuries to two scheduled members is 30%. [Mark Chrisman Trucking] disputes this.

6. All medical bills incurred by [Smith] due to the foregoing accident and injuries have been paid by [Mark Chrisman Trucking].

7. Following the accident and injuries referenced herein, [Smith] returned to work for a different employer as a truck driver and is not entitled to vocational rehabilitation services.

8. The sole issue for the court's determination is whether Laws 2007, LB 588 adding the third paragraph in subsection (3) of § 48-121, set forth below, applies to the accident occurring on October 23, 2007. The relevant

> portion of § 48-121(3) provides as follows: "If, in the compensation court's discretion, compensation benefits payable for a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, resulting from the same accident or illness, do not adequately compensate the employee for such loss or loss of use and such loss or loss of use results in at least a thirty percent loss of earning capacity, the compensation court shall, upon request of the employee, determine the employee's loss of earning capacity consistent with the process for such determination under subdivision (1) or (2) of this section, and in such a case the employee shall not be entitled to compensation under this subdivision."
>
> 9. If the court finds this statutory provision applies to the accident occurring October 23, 2007, a factual issue exists as to the extent of [Smith's] loss of earning power and whether he is otherwise entitled to compensation based upon a loss of earning power. If the court finds this statutory provision does not apply to the accident occurring on October 23, 2007, an Award may be entered pursuant to the terms of this stipulation.

The statutory language in paragraph 8 of the stipulation is a part of § 48-121(3) and was added to the statute by L.B. 588. In § 6 of L.B. 588, the Legislature provided that the operative date for the section of L.B. 588 at issue was January 1, 2008.

The language under consideration was first introduced as 2007 Neb. Laws, L.B. 77, and the Introducer's Statement of Intent reads:

> LB 77 relates to the Nebraska Workers' Compensation Act and would change disability compensation provisions. Under current law, if a worker sustains an injury to multiple members, he or she is limited to the compensation provided in the schedule contained in section 48-121 of the Nebraska Workers' Compensation Act. LB 77 would give to the Nebraska Workers' Compensation Court the discretion to award a loss of earning capacity in an appropriate case involving loss of use of multiple members.

Committee on Business and Labor, 100th Leg., 1st Sess. (Feb. 12, 2007). L.B. 77 was later inserted into L.B. 588 and finally appears as part of § 48-121(3).

Other than the amendment at issue, the portions of § 48-121(3) then and now provide for compensation based on designated amounts for scheduled member injuries, but no loss of earning capacity. The amendment provides for the loss of earning capacity at the court's discretion where there is a loss or loss of use of more than one member which results in at least a 30-percent loss of earning capacity.

On February 28, 2012, Smith filed this action in the Workers' Compensation Court against his employer, Mark Chrisman Trucking, alleging that he was entitled to benefits based on his loss of earning capacity under the amendment to § 48-121(3) created by L.B. 588. The Workers' Compensation Court filed its order on July 30, 2012, which granted Mark Chrisman Trucking's motion for summary judgment and denied Smith's motion for summary judgment, thus denying Smith a loss of earning capacity recovery. The court concluded that the amendment to § 48-121(3) was substantive and that such amendment created a "right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle [Smith] to recover under this amendment to § 48-121(3)." Therefore, the court determined that because Smith's accident and injuries occurred prior to the operative date of the amendment to § 48-121(3), the amendment to § 48-121(3) did not apply to Smith.

Smith appeals.

ASSIGNMENT OF ERROR

Smith claims, restated, that the Workers' Compensation Court erred when it granted Mark Chrisman Trucking's motion for summary judgment, thus denying Smith the opportunity to seek benefits based upon a loss of earning capacity.

STANDARDS 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. *Visoso v. Cargill Meat Solutions, ante* p. 272, 826 N.W.2d 845 (2013).

[2] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

ANALYSIS

At issue in this appeal is whether the portion of § 48-121(3) amended by L.B. 588 applies to this case. Smith claims that the Workers' Compensation Court erred when it granted Mark Chrisman Trucking's motion for summary judgment, thus denying Smith the opportunity to seek recovery based on a loss of earning capacity. The Workers' Compensation Court determined that the amendment to § 48-121(3) was substantive rather than procedural and that therefore, Smith could not recover under the amendment because his accident occurred prior to the operative date of the amendment. We agree with the reasoning of the Workers' Compensation Court, and therefore, we find no merit to Smith's assignment of error.

Section 48-121(3) generally provides the manner by which a worker is compensated for the loss or loss of use of a scheduled member. The portion of § 48-121(3) at issue in this case provides:

> If, in the compensation court's discretion, compensation benefits payable for a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, resulting from the same accident or illness, do not adequately compensate the employee for such loss or loss of use and such loss or loss of use results in at least a thirty percent loss of earning capacity, the compensation court shall, upon request of the employee, determine the employee's loss of earning capacity consistent with the process for such determination under subdivision (1) or (2) of this section, and in such a case

> the employee shall not be entitled to compensation under this subdivision.

This portion of § 48-121(3) provides for the potential recovery based on a loss of earning capacity and was added to the statute by L.B. 588.

[3,4] Generally, legislation that is passed takes effect 3 calendar months after the Legislature adjourns, see Neb. Const. art. III, § 27, unless the Legislature evidences otherwise. See, *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995); *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994); *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992). We have observed that a legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively are clearly disclosed. *Id.* See, also, *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Statutes covering substantive matters in effect at the time of the transaction or event govern, not later enacted statutes. See, *Proctor v. Minnesota Mut. Fire & Cas., supra*; *No Frills Supermarket v. Nebraska Liq. Control Comm., supra*; *Young v. Dodge Cty. Bd. of Supervisors, supra*.

In *Young*, we observed that the statutory language reflecting the amendment under consideration expressly provided the operative date of the amendment, thus evidencing the legislative intent that the amendment should apply to the type of transactions at issue prospectively and not retrospectively. We reasoned that

> [q]uite apart from the [transaction date at issue], the express language of [Neb. Rev. Stat.] § 39-1716 (Reissue 1988) does not evidence an intent for retroactive application of the statute, but evidences a legislative intent that the 1982 amendment of § 39-1716 apply prospectively, that is, apply to any real estate acquired after January 1, 1982.

Young v. Dodge Cty. Bd. of Supervisors, 242 Neb. at 6, 493 N.W.2d at 164. We determined in *Young* that the amended statute did not apply to the transaction that occurred prior to the amendment.

Although the text of the particular section in the present case does not expressly identify the operative date of the amendment, the analysis from *Young v. Dodge Cty. Bd. of Supervisors, supra*, applies. There is no dispute that the operative date of the amendment to § 48-121(3) was January 1, 2008. In § 6 of L.B. 588, the Legislature specified that the section of the bill pertaining to the amendment to § 48-121(3) at issue in this case was to "become operative on January 1, 2008." The Legislature has expressed no intent that the amendment apply retroactively, and we decline to do so.

[5,6] The central issue in this appeal is the applicability of the identified amendment to § 48-121(3) to Smith's claim. As we observed in *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 984, 588 N.W.2d 565, 572 (1999): "We have often had to deal with new amendments to existing legislation in order to establish whether the amendment applied retroactively . . . ." The critical question can turn on whether the amendment was substantive or procedural. *Id.* Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). This is because a substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005). A procedural amendment, on the other hand, simply changes the method by which an already existing right is exercised. *In re Interest of Karlie D., supra.*

Before it was amended, § 48-121(3) provided that a worker could receive compensation for injuries to members based on the schedule set forth in that subsection, but a worker could not receive compensation for the loss of earning capacity attributable to scheduled member injuries. Thus, for example, in *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 385, 253 N.W.2d 30, 33-34 (1977), we stated that

> "it was clearly the intent of the Legislature to fix the amount of the benefits for loss of specific members under subdivision (3), section 48-121, R. S. Supp., 1963, without regard to the extent of the subsequent disability

> suffered with respect to the particular work or industry of the employee."

Since the amendment to § 48-121(3), however, a worker can now receive compensation for the loss of earning capacity if, in the court's discretion, compensation as set forth in § 48-121(3) would not adequately compensate the worker and where there is a loss or loss of use of more than one member resulting from the same accident which results in at least a 30-percent loss of earning capacity. Thus, the amendment to § 48-121(3) created a new remedy that did not previously exist under the statute and the amendment is substantive not procedural. Because the amendment is substantive, as a matter of law, we conclude it applies prospectively, not retrospectively. See, *Visoso v. Cargill Meat Solutions, ante* p. 272, 826 N.W.2d 845 (2013); *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992).

Because Smith's accident occurred prior to the operative date of the amendment, the amendment is inapplicable to Smith's action. The Workers' Compensation Court did not err when it reached this conclusion and granted Mark Chrisman Trucking's motion for summary judgment.

CONCLUSION

Because the amendment to § 48-121(3) created by L.B. 588 does not apply to Smith's action, he cannot recover for an alleged loss of earning capacity on this basis. We determine that the Workers' Compensation Court did not err when it granted Mark Chrisman Trucking's motion for summary judgment and denied Smith's motion for summary judgment.

AFFIRMED.

McCORMACK, J., participating on briefs.

First National Bank of Omaha, appellant, v. Scott L. Davey and Deborah A. Davey, appellees.

830 N.W.2d 63

Filed May 3, 2013. No. S-12-761.

1. **Limitations of Actions.** Which statute of limitations applies is a question of law.
2. **Statutes.** Statutory interpretation is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Trusts: Deeds: Foreclosure: Mortgages.** The Nebraska Trust Deeds Act recognizes the existence of two different methods of foreclosing a trust deed: (1) by nonjudicial foreclosure, which relies upon the exercise of the trustee's power of sale pursuant to the act, or (2) by judicial foreclosure in the manner of mortgages, which does not depend upon or use the trustee's power of sale, but, rather, results in a sheriff's sale by decree of the district court.
5. **Promissory Notes: Mortgages: Foreclosure: Equity.** A suit on a note, secured by a real estate mortgage, is a suit at law, independent, separate, and distinct from a suit in equity to foreclose and satisfy a mortgage.
6. **Trusts: Deeds: Statutes.** Because trust deeds did not exist at common law, the trust deed statutes are to be strictly construed.
7. **Statutes.** In the absence of any indication to the contrary, statutory language is to be given its plain and ordinary meaning.
8. **Trusts: Deeds: Foreclosure.** The judicial foreclosure of a trust deed does not result in the sale of property under a trust deed.
9. **Trusts: Deeds: Foreclosure: Limitations of Actions.** A deficiency action brought after the judicial foreclosure of a trust deed is not governed by the 3-month statute of limitations set forth in Neb. Rev. Stat. § 76-1013 (Reissue 2009).
10. **Statutes: Appeal and Error.** When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Reversed and remanded for further proceedings.

Donald J. Pavelka, Jr., and Patricia D. Schneider, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellant.

Thalia Downing Carroll, of Thompson Law Office, P.C., L.L.O., for appellees.

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

CASSEL, J.

INTRODUCTION

In this appeal, we must determine whether the special 3-month statute of limitations on actions for deficiency set forth in the Nebraska Trust Deeds Act (Act)[1] applies where a lender elects to judicially foreclose upon the real estate. We conclude that the special limitation applies only where the property has been sold by exercising the power of sale set forth in the trust deed. As we will explain, our conclusion follows from our previous decisions under the Act, is faithful to the plain language of the statute, avoids absurd results, and is consistent with decisions in other states. We therefore reverse the contrary decision of the district court.

BACKGROUND

In 2009, in exchange for a loan of money, Scott L. Davey and Deborah A. Davey gave a promissory note to the First National Bank of Omaha (First National) and secured the loan with a trust deed upon specific real property. When the Daveys defaulted on the note, First National initiated foreclosure proceedings in the district court for Washington County, Nebraska. Pursuant to a decree from that court, the property was sold by sheriff's sale on April 28, 2011. The district court confirmed the sale by an order entered on May 17.

Because the proceeds of the sheriff's sale were not sufficient to cover the full amount of the loan, First National filed a complaint in the district court for Douglas County to recover the deficiency. In the Daveys' answer, they raised the affirmative defense of the statute of limitations. Both parties subsequently filed motions for summary judgment.

After a hearing, the district court concluded that First National's action was governed by the statute of limitations in

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[1] Neb. Rev. Stat. §§ 76-1001 to 76-1018 (Reissue 2009 & Cum. Supp. 2010).

§ 76-1013 and not the general statute of limitations for actions on written contracts in Neb. Rev. Stat. § 25-205 (Reissue 2008). It found that the Act "is unambiguous, and therefore does not need any interpretation by this [c]ourt, in its expression of the statutory time period for when a deficiency action must be brought." In support of its conclusion, the court cited to our decision in *Sports Courts of Omaha v. Meginnis*[2] and the Nebraska Court of Appeals' decision in *Boxum v. Munce*.[3] Because First National filed its complaint 99 days after the sheriff's sale, the court held that the action was barred by the statute of limitations in § 76-1013. Accordingly, the court denied First National's motion for summary judgment and granted the Daveys' motion for summary judgment.

First National timely appeals. Pursuant to statutory authority, we moved the case to our docket.[4]

ASSIGNMENTS OF ERROR

First National makes five assignments of error, all of which essentially claim that the district court erred in applying the 3-month statute of limitations of § 76-1013 to a deficiency action following judicial foreclosure of a trust deed.

STANDARD OF REVIEW

[1-3] Which statute of limitations applies[5] and matters of statutory interpretation[6] are both questions of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

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[2] *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

[3] *Boxum v. Munce*, 16 Neb. App. 731, 751 N.W.2d 657 (2008).

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

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

[6] See *Kaapa Ethanol v. Board of Supervisors, ante* p. 112, 825 N.W.2d 761 (2013).

[7] See *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

ANALYSIS

Before we turn to the specific language of § 76-1013 setting forth the special statute of limitations, we first recall the broader statutory scheme of which it is a part. The Act authorizes a trust deed to be used as a security device in Nebraska[8] and provides that real property can be conveyed by trust deed to a trustee as a means to secure the performance of an obligation.[9] The Act includes detailed procedures that, in the event of a breach of the underlying obligation, permit the trust property to be sold without the involvement of any court.[10] Specifically, the Act allows a trust deed to expressly confer upon a trustee the power of sale.[11] Pursuant to this power of sale, a trustee can sell the property conveyed by a trust deed without any court's authorization or direction, though the trustee must comply with procedural requirements contained in the Act.[12] Because the Act allows the property securing an obligation to be sold without the judicial involvement that would be required to foreclose upon a mortgage, the proceedings surrounding a trustee's sale pursuant to the Act are sometimes referred to as "nonjudicial foreclosure"[13] or "trustee foreclosure."[14]

[4] The specific statute within the Act that authorizes the conferral of the power of sale upon the trustee is § 76-1005. According to this section, under the power of sale, "the trust property may be sold in the manner provided in [the Act] after a breach of an obligation for which the trust property is

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[8] See *Blair Co. v. American Savings Co.*, 184 Neb. 557, 169 N.W.2d 292 (1969).

[9] See § 76-1002(1).

[10] See §§ 76-1006 to 76-1011.

[11] See § 76-1005.

[12] See §§ 76-1006 to 76-1011.

[13] See *Westin Hills v. Federal Nat. Mortgage Assn.*, 283 Neb. 960, 814 N.W.2d 378 (2012).

[14] See, e.g., *PSB Credit Servs. v. Rich*, 251 Neb. 474, 558 N.W.2d 295 (1997).

conveyed as security."[15] But this section also states that a trust deed "may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property."[16] In this way, the Act recognizes the existence of two different methods of foreclosing a trust deed: (1) by nonjudicial foreclosure, which relies upon the exercise of the trustee's power of sale pursuant to the Act, or (2) by judicial foreclosure in the manner of mortgages, which does not depend upon or use the trustee's power of sale, but, rather, results in a sheriff's sale by decree of the district court.[17]

[5] If the proceeds from the sale in a judicial foreclosure are not sufficient to cover the full amount of the underlying obligation, the creditor is permitted to bring an action to recover the deficiency.[18] And we have held that "a suit on a note, secured by a real estate mortgage, is a suit at law, independent, separate[,] and distinct from a suit in equity to foreclose and satisfy a mortgage."[19] In contrast, a deficiency action is specifically authorized by § 76-1013 following the exercise of the power of sale of a trust deed under the Act. Section 76-1013 provides as follows: "At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security . . . ." We have interpreted this statute as creating a statute of limitations.[20] It necessarily follows that this statute of limitations applies only to the action created by § 76-1013 and not to the "independent, separate, and distinct"

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[15] § 76-1005.

[16] *Id.*

[17] See, e.g., *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997); *PSB Credit Servs. v. Rich, supra* note 14.

[18] See, e.g., *Carman v. Gibbs*, 220 Neb. 603, 371 N.W.2d 283 (1985).

[19] *Federal Farm Mtg. Corporation v. Thiele*, 137 Neb. 626, 632, 290 N.W. 471, 473 (1940).

[20] See, e.g., *Sports Courts of Omaha v. Meginnis, supra* note 2.

action at law upon a promissory note following the completion of a judicial foreclosure.[21]

In the instant case, First National filed an action to recover the deficiency remaining on the obligation after sale of the Daveys' property in judicial foreclosure. The action was filed more than 3 months after the sheriff's sale, and the Daveys raised the statute of limitations as an affirmative defense. Because First National foreclosed upon the relevant trust deed as if it were a mortgage instead of following the procedures for nonjudicial foreclosure provided in the Act, First National argued that the general 5-year statute of limitations for actions on written contracts applied, under which its action would have been timely.[22] Essentially, the parties disagreed as to whether the statute of limitations in § 76-1013 applied to deficiency actions brought after either kind of foreclosure allowed by the Act or only to deficiency actions filed after the sale of property pursuant to the trustee's power of sale. The district court held that the 3-month statute of limitations in § 76-1013 applied to deficiency actions filed after both types of foreclosure, thereby making First National's deficiency action untimely. We must now decide whether the court properly reached this conclusion.

[6,7] In considering this question, we interpret and apply the language of § 76-1013, specifically the language "sale of property under a trust deed, as hereinabove provided." The Act, of which this statute is a part, "authorizes the use of a security device which was not available prior to its enactment."[23] Because the Act made a change in common law, we strictly construe the statutes comprising the Act,[24] as have previous courts interpreting the Act.[25] Thus, because trust deeds did not

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[21] See *Federal Farm Mtg. Corporation v. Thiele, supra* note 19.

[22] See § 25-205.

[23] *Blair Co. v. American Savings Co., supra* note 8, 184 Neb. at 558, 169 N.W.2d at 294.

[24] See *Blaser v. County of Madison, ante* p. 290, 826 N.W.2d 554 (2013).

[25] See *State Bank of Trenton v. Lutz*, 14 Neb. App. 884, 719 N.W.2d 731 (2006).

exist at common law, the trust deed statutes are to be strictly construed.[26] In the absence of any indication to the contrary, we also give the language of § 76-1013 its plain and ordinary meaning.[27]

Although § 76-1013 includes the special statute of limitations, its language sets forth numerous requirements bearing on the determination of a deficiency after the exercise of the power of sale. Section 76-1013 provides:

> At any time within three months after any *sale of property under a trust deed*, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed and the amount for which such property was sold and the fair market value thereof at the date of sale, together with interest on such indebtedness from the date of sale, the costs and expenses of exercising the power of sale and of the sale. Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court shall not render judgment for more than the amount by which the amount of the indebtedness with interest and the costs and expenses of sale, including trustee's fees, exceeds the fair market value of the property or interest therein sold as of the date of the sale, and in no event shall the amount of said judgment, exclusive of interest from the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured thereby, including said costs and expenses of sale.

(Emphasis supplied.)

This court has already interpreted the key phrase "sale of property under a trust deed" as used in § 76-1013. In *Bank of*

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[26] *Id.*

[27] See *In re Interest of Christopher T.*, 281 Neb. 1008, 801 N.W.2d 243 (2011).

Papillion v. Nguyen,[28] we held that "[t]he phrase 'sale of property under a trust deed' contained in § 76-1013 clearly refers to the exercise of the power of sale conferred by the trust deed upon the trustee pursuant to the statutory authority contained in § 76-1005." Thus, as previously interpreted by this court, the language of § 76-1013 indicates that the 3-month statute of limitations applies only to deficiency actions filed after the sale of property pursuant to the trustee's power of sale conveyed in a trust deed.

[8,9] In judicial foreclosure, the sale of property is ordered by the court.[29] The sale does not rely upon the exercise of the trustee's power of sale, but is conducted by a sheriff or another authorized person.[30] Consequently, under the reasoning of *Bank of Papillion v. Nguyen*,[31] the judicial foreclosure of a trust deed does not result in the "sale of property under a trust deed." Because it does not fall under the statutory language in § 76-1013, a deficiency action brought after the judicial foreclosure of a trust deed is not governed by the 3-month statute of limitations. Rather, it is governed by the general statute of limitations for actions on written contracts in § 25-205.

The Daveys' arguments on appeal do not dissuade us from this conclusion. They argue that § 76-1013 should apply to deficiency actions following judicial foreclosure as well as nonjudicial foreclosure, because the phrase "as hereinabove provided" in the statute refers back to § 76-1005, which section allows for the sale of property either by trustee's sale or in the manner of a mortgage. Because § 76-1005 is before—or above—§ 76-1013 within the Act and allows for two types of sale, the Daveys contend that the statutory language referring to the sale of property "as hereinabove provided" refers to both methods of foreclosure. We find this argument unpersuasive for three reasons.

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[28] *Bank of Papillion v. Nguyen, supra* note 17, 252 Neb. at 933, 567 N.W.2d at 170.

[29] See Neb. Rev. Stat. § 25-2138 (Reissue 2008).

[30] See Neb. Rev. Stat. § 25-2144 (Cum. Supp. 2012).

[31] See *Bank of Papillion v. Nguyen, supra* note 17.

First, the language of § 76-1013 demonstrates that the statute's applicability is limited to deficiency actions brought after nonjudicial foreclosure by a trustee. As interpreted by this court in *Bank of Papillion v. Nguyen*,[32] the phrase "under a trust deed" limits the 3-month statute of limitations to actions commenced after a trustee's sale. Furthermore, § 76-1013 explicitly states that the "costs and expenses of sale" include trustee's fees. Such fees are incurred only when a trustee renders services.[33] And as noted previously, a trustee is not involved in the sale of property in a judicial foreclosure. Consequently, trustee's fees are incurred only in a nonjudicial foreclosure. Section 76-1013 also requires a court to find the fair market value of the property before rendering judgment in a deficiency action. In judicial foreclosure proceedings, this determination is implicitly made when the sale is confirmed by the court.[34] The sale confirmation statute speaks of the court's being satisfied that the property sold for "fair value."[35] Where the evidence establishes that the sale price was inadequate, it is the duty of the court to deny confirmation of the judicial sale.[36] Thus, in a judicial foreclosure, the determination of value has already been made before the commencement of any action for deficiency. The finding of fair market value required by § 76-1013 is only necessary during a deficiency action when the trust deed was nonjudicially foreclosed. Taken together, these specific provisions clearly dictate that § 76-1013 applies only to deficiency actions brought after a trustee's sale, in which case the specific phrase "as hereinabove provided" refers to the statutory procedures for trustee's sale as set forth in the Act.

[10] Second, the Daveys' interpretation of § 76-1013, if adopted, could lead to an absurd result. Unlike the trustee's sale in a nonjudicial foreclosure, a sheriff's sale must be

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[32] See *id*.

[33] See *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993).

[34] See Neb. Rev. Stat. § 25-1531 (Reissue 2008).

[35] See *id*.

[36] *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996).

confirmed by the court.[37] The debtor must be given 10 days' notice of any hearing on the confirmation of the sale.[38] And the debtor can petition the court to set aside the sale for up to 60 days after a sale is confirmed.[39] At oral argument, the Daveys contended that the 3-month statute of limitations in § 76-1013 would begin to run on the date of sale even where confirmation of sale is required. They also acknowledged that if this statute were applied to deficiency actions filed after a judicial foreclosure, the statute of limitations could run before a sale is confirmed. Although they asserted that a confirmation could be routinely obtained within the 3-month period, we do not share their conviction. As such, under the Daveys' interpretation, a debtor could deprive a creditor of the ability to bring a deficiency action simply by challenging the validity of a sale or its confirmation so as to run out the statute of limitations. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.[40] The Daveys' interpretation permits an absurd result.

Third, despite the Daveys' argument to the contrary, the cases they use to support their interpretation do not directly speak to the issue raised in this appeal. They cite to *Sports Courts of Omaha v. Meginnis*[41] and *Boxum v. Munce*[42] for the proposition that "the court must look to the obligation to determine application of §76-1013."[43] While this is an accurate statement from these cases, it must be viewed within the context of the precise issue before those courts.

In *Sports Courts of Omaha v. Meginnis*,[44] this court defined the deficiency action governed by § 76-1013 as an action

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[37] See § 25-1531.

[38] See *id.*

[39] See *id.*

[40] *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012).

[41] *Sports Courts of Omaha v. Meginnis, supra* note 2.

[42] *Boxum v. Munce, supra* note 3.

[43] Brief for appellees at 8.

[44] *Sports Courts of Omaha v. Meginnis, supra* note 2.

brought on the underlying obligation and not on the trust deed. We rejected the argument that the statute of limitations in § 76-1013 did not apply to actions brought against parties who had no interest in the property identified in the trust deed, holding that the statute of limitations in § 76-1013 applied to actions brought to recover a deficiency on the underlying obligation. Therefore, since the deficiency action was brought against an individual who was a comaker of the original promissory note, the statute of limitations in § 76-1013 applied even though he had no interest in the property that had been foreclosed.

Similarly, in *Boxum v. Munce*,[45] the Nebraska Court of Appeals clarified that § 76-1013 does not cover actions brought on a guaranty, even if it guarantees payment of the obligation that was foreclosed. In defining the specific issue before the court, the Court of Appeals stated as follows:

> The key to the issue before us is recognition that the 3-month limitation is applicable to a suit which seeks a deficiency judgment on a particular obligation that was secured by the particular trust deed that was foreclosed. The 3-month statute of limitations applies only when the suit for deficiency is on the obligation for which the foreclosed trust deed was given as security.[46]

Thus, the courts in both *Sports Courts of Omaha v. Meginnis*[47] and *Boxum v. Munce*[48] were deciding what constitutes a deficiency action as contemplated by § 76-1013. To decide this, the courts did "look to the obligation," as the Daveys argue,[49] but neither of these cases addressed the precise question at issue in the present appeal—whether § 76-1013 applies to the judicial foreclosure of a trust deed. Furthermore, the properties in both of the cases cited by the Daveys were sold by trustee's sale, further limiting the applicability of these cases to

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[45] *Boxum v. Munce, supra* note 3.

[46] *Id.* at 738, 751 N.W.2d at 662.

[47] *Sports Courts of Omaha v. Meginnis, supra* note 2.

[48] *Boxum v. Munce, supra* note 3.

[49] Brief for appellees at 8.

the instant appeal, which involves a judicial foreclosure. The cases cited by the Daveys do not affect our determination of whether § 76-1013 applies to deficiency actions brought after the judicial foreclosure of a trust deed.

The Daveys' arguments for a broader interpretation of § 76-1013 do not persuade us to depart from the interpretation previously adopted by this court in *Bank of Papillion v. Nguyen*.[50] Under that precedent, we are bound to find that the statute of limitations in § 76-1013 does not apply to deficiency actions brought following the judicial foreclosure of a trust deed, but only to deficiency actions filed after the sale of property pursuant to the trustee's power of sale. The district court erred in concluding otherwise.

We find further support for this conclusion in the decisions of other states having similar statutes. An Idaho court addressing the precise issue rejected the approach now urged by the Daveys.[51] The Supreme Court of Utah considered an analogous question of which attorney fees statute applied to a trust deed judicially foreclosed as a mortgage.[52] The Utah court observed that the Utah statute made it optional with the beneficiary of the trust deed whether to foreclose the trust property after a breach of an obligation in a manner provided for foreclosure of mortgages or to have the trustee proceed under the power of sale provided therein. The court rejected the debtors' argument that the smaller amount dictated by the attorney fee provision of their trust deed act controlled the fees for a judicial foreclosure. This reasoning is consistent with the language of the Act and bolsters our conclusion.

CONCLUSION

Based on a previous interpretation by this court, we conclude that the statute of limitations in § 76-1013 applies only to deficiency actions filed after the exercise of the power of sale provided in a trust deed. A deficiency action brought

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[50] *Bank of Papillion v. Nguyen, supra* note 17.

[51] *Thompson v. Kirsch*, 106 Idaho 177, 677 P.2d 490 (Idaho App. 1984).

[52] *Security Title Company v. Payless Builders Supply*, 17 Utah 2d 179, 407 P.2d 141 (1965).

following the judicial foreclosure of a trust deed is governed by the general 5-year statute of limitations for actions on written contracts in § 25-205. Because First National's deficiency action was brought within 5 years of the judicial sale of the real property, the district court erred in granting the Daveys' motion for summary judgment on the ground that the action was barred as untimely. Accordingly, we reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. BRYAN VAN RICHARDSON, JR., APPELLANT.

830 N.W.2d 183

Filed May 10, 2013. No. S-11-921.

1. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.
2. **Convictions: Proof.** To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly.
3. **Trial: Evidence: Juries: Verdicts: 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.
4. **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.
5. **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.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and RIEDMANN, Judges, on appeal thereto from the District Court for Hall County, JAMES D. LIVINGSTON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jerry Fogarty for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

We granted the petition for further review of the Nebraska Court of Appeals' decision in which it affirmed the conviction and sentence of Bryan Van Richardson, Jr., in the district court for Hall County for possession of a controlled substance, cocaine, with intent to distribute. The sole issue on which Richardson sought further review was whether there was sufficient foundation regarding the accuracy of a scale used to weigh the cocaine in order to admit evidence of the weight. Because we conclude that the foundation was not sufficient, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to reverse Richardson's conviction and sentence and to remand the cause to the district court for a new trial.

STATEMENT OF FACTS

Richardson was charged with possession of a controlled substance, cocaine, with intent to distribute in violation of Neb. Rev. Stat. § 28-416 (Reissue 2008). The State alleged that the quantity of cocaine involved was between 10 and 28 grams. Section 28-416(7)(c) provides that with respect to cocaine, a violation of the statute is a Class ID felony if the quantity of cocaine involved is at least 10 but less than 28 grams. The offense is a lesser or greater felony depending on the quantity of the controlled substance involved. Evidence of the weight of the cocaine involved is therefore relevant to determine the grade of the offense.

At trial, the State's witnesses included Craig Redinger, who had agreed to work with a drug task force in exchange for the dismissal of a pending burglary charge against him. Redinger testified generally that working with State Patrol investigators

in a controlled buy, he arranged to purchase cocaine from Richardson. Redinger testified that during the purchase, he watched Richardson weigh the cocaine on a digital scale and the scale showed that the cocaine and the baggie in which it was contained weighed 11.2 grams. Richardson objected to this testimony based on "accuracy of the scale" and foundation. The district court overruled Richardson's objection.

The State also called Sarah Pillard, a chemist for the Nebraska State Patrol crime laboratory, as a witness. Pillard tested the substance Redinger purchased from Richardson, and it tested positive for cocaine. She also weighed the cocaine. Pillard testified that she routinely used the crime laboratory's scale and that she had gone through the weighing procedure "[t]housands" of times. She testified that the crime laboratory had its scale calibrated by the manufacturer once a year and that laboratory personnel checked every Friday to make sure the scale was working and would calibrate if necessary. Pillard testified that she followed the usual procedure to weigh the cocaine in this case. The State asked Pillard the weight of the cocaine. The court sustained Richardson's objection to the statement regarding weight based on "lack of sufficient and proper foundation."

The State then questioned Pillard further regarding the scale. Pillard testified that the calibration was checked once a week by one of the chemists in the laboratory and that the calibration would have been checked within at least a week of the time the substance in this case was weighed. She testified that if there was an inconsistency with the calibration, the scale would be taken out of use until the manufacturer came in to repair it. She further testified that during the time she had been at the laboratory, she had never had an issue with the calibration of the scale, and that she was not aware of any issue with the calibration of the scale at the time she tested the cocaine in this case. The State again asked Pillard the weight of the cocaine, and this time, the court overruled Richardson's objection based on "lack of proper and sufficient foundation, foundation contains hearsay and confrontation." Pillard testified that the weight of the cocaine, excluding its packaging, was 10.25 grams.

The jury found Richardson guilty, and it further found that the quantity of the mixture containing cocaine was 10.25 grams. The court entered judgment based on the verdict and sentenced Richardson to imprisonment for 3 to 6 years.

Richardson appealed to the Court of Appeals and asserted that the district court erred when, inter alia, it admitted evidence as to the weight of the cocaine over his objection. Richardson does not seek further review of the Court of Appeals' disposition of his other assignments of error, so they are not detailed herein. The Court of Appeals rejected Richardson's assignments of error and affirmed his conviction and sentence. *State v. Richardson*, No. A-11-921, 2012 WL 4795684 (Neb. App. Oct. 2, 2012) (selected for posting to court Web site).

We granted Richardson's petition for further review.

ASSIGNMENT OF ERROR

Richardson claims that the Court of Appeals erred when it affirmed the district court's admission of evidence of the weight of the cocaine over his objection that there was not sufficient foundation regarding the accuracy of the scale used to weigh the cocaine.

STANDARDS OF REVIEW

[1] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion. *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).

ANALYSIS

We note as a preliminary matter that in rejecting Richardson's arguments regarding evidence of weight, the Court of Appeals noted that although Richardson mentioned both Redinger's and Pillard's testimony, his argument focused on Pillard's testimony. The Court of Appeals therefore considered only Pillard's testimony and Richardson's objections thereto. In support of further review, Richardson again mentions Redinger's testimony, but he makes no argument that the Court of Appeals

erred by failing to address Redinger's testimony. We therefore limit our analysis on further review to Pillard's testimony. However, because we remand for a new trial, we note that if the State again attempts to present testimony regarding the weight of the items shown on Richardson's digital scale, the admissibility of such evidence will be governed by the principles set forth herein with respect to Pillard's testimony regarding weight.

On further review, Richardson asserts that the Court of Appeals erred when it affirmed the district court's admission of Pillard's testimony regarding the weight of the cocaine. We conclude that the State did not present sufficient foundation regarding the accuracy of the scale used by Pillard and that therefore it was error for the district court to admit Pillard's testimony regarding weight and for the Court of Appeals to affirm such admission. We further conclude that the error was not harmless and that it requires reversal of Richardson's conviction, but that Richardson may be retried on remand.

Foundation Regarding the Accuracy of the Scale Used to Measure Weight Is Necessary Before Evidence of Weight May Be Admitted.

As urged by the State and as reflected by the Court of Appeals' opinion, it appears that there is some uncertainty whether under Nebraska law it is necessary to provide foundation regarding the accuracy of a scale before evidence of weight measured by such scale may be admitted or whether the accuracy of the scale is instead a factual issue to be determined by the jury. We conclude that the adequacy of the foundation regarding the accuracy of the scale is required to be determined by the court before evidence of weight may be admitted.

We note first that certain statutes control the admission of evidence of results obtained using some specific types of tests or measurement devices. See, Neb. Rev. Stat. § 60-6,192 (Reissue 2010) (speed measurement devices); Neb. Rev. Stat. § 60-6,201 (Reissue 2010) (tests to measure alcohol concentration in blood, breath, or urine). However, there is no statute that specifically addresses admission of evidence of weight

obtained using a measurement device such as the scale at issue in this case.

[2] This court has imposed requirements that apply generally to evidence obtained using a measurement device of any sort. See, *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002) (involving thermometer used to measure temperature of bath water); *State v. Chambers*, 233 Neb. 235, 444 N.W.2d 667 (1989) (involving stopwatch used to measure time). In *Canady*, we stated that "to sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly." 263 Neb. at 563, 641 N.W.2d at 53 (citing *State v. Chambers, supra*). Although this proposition can be read as pertaining to the sufficiency of evidence rather than the admission of evidence, in both *Canady* and *Chambers*, we treated the requirement of reasonable proof of accuracy and proper functioning of a measurement device as applying to the admissibility of evidence regarding measurements obtained using the device. In *Canady*, we concluded that "the district court erred in allowing [a witness] to testify as to the exact temperature of the water because there was no proof that the thermometer was accurate." 263 Neb. at 563, 641 N.W.2d at 53. In *Chambers*, we concluded that a trial court committed "reversible error in admitting evidence of speed calculated [in part] through information from [a] stopwatch" when there was not adequate evidence to verify the accuracy of the stopwatch. 233 Neb. at 242, 444 N.W.2d at 671.

In rejecting Richardson's argument based on *Chambers*, the Court of Appeals distinguished *Chambers* by explaining that *Chambers* involved a speeding violation and that relevant statutes contained specific requirements for verification of accuracy of speed measurement devices. The Court of Appeals erred in distinguishing *Chambers* on such basis. In *Chambers*, we determined that the stopwatch at issue was not a "speed measurement device" under the statute, because it measured only time but not distance, and that therefore the statutory requirements did not apply. Even though this court determined that admission of the evidence was not governed by the statute,

this court nevertheless required foundation regarding the accuracy and proper functioning of the stopwatch before admitting evidence obtained using the device, because the evidence was "information derived from an electronic or mechanical measuring device." The holding in *Chambers* was not based on the statute; instead, it was based on principles applicable to "information derived from an electronic or mechanical measuring device." Because the scale at issue in the present case is also an "electronic or mechanical measuring device," we conclude that the principles set forth in *Chambers* and later in *Canady* are applicable here.

The Court of Appeals found that two cases cited by the State—*State v. Smith*, 187 Neb. 152, 187 N.W.2d 753 (1971), and *State v. Infante*, 199 Neb. 601, 260 N.W.2d 323 (1977)—were more applicable precedent than *State v. Chambers*, 233 Neb. 235, 444 N.W.2d 667 (1989), and *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002). *Smith* and *Infante* both involved convictions for controlled substance violations in which testimony regarding the weight of the substance was at issue. The Court of Appeals appeared to accept the State's argument that *Smith* and *Infante* stood for the proposition that in a case where the weight of a controlled substance was at issue, "the accuracy of the scale was a matter of weight and credibility, not admissibility" and that "the credibility of the testimony and the reliability of the scale were issues for the jury." *State v. Richardson*, No. A-11-921, 2012 WL 4795684 at *5 (Neb. App. Oct. 2, 2012) (selected for posting to court Web site). Based on this understanding of precedent, the Court of Appeals concluded that the district court did not err when it rejected Richardson's foundation objection.

Both *Smith* and *Infante* predate *Chambers* and *Canady*. The posture and record of objections in *Smith* and *Infante* differ from *Chambers* and *Canady*. We do not read *Smith* and *Infante* as saying that a court should not resolve the initial evidentiary issue of whether there was sufficient foundation regarding the accuracy of the scale to admit evidence of weight measured using the scale. To the extent *Smith* and *Infante* are inconsistent with the principles in *Chambers* and *Canady*, *Smith* and *Infante* are disapproved.

We conclude that the proposition from *Chambers* and *Canady* to the effect that foundation regarding the accuracy and proper functioning of the device is required to admit evidence obtained from using the device applies when the electronic or mechanical measuring device at issue is a scale used to weigh a controlled substance. We note that our application of the proposition in this context is consistent with various other states that require foundation regarding the accuracy of a scale prior to admitting evidence regarding weight measured by using the scale. See, *Com. v. Podgurski*, 81 Mass. App. 175, 961 N.E.2d 113 (2012); *State v. Manewa*, 115 Haw. 343, 167 P.3d 336 (2007); *State v. Manning*, 184 N.C. App. 130, 646 S.E.2d 573 (2007); *State v. Taylor*, 587 N.W.2d 604 (Iowa 1998); *State v. Dampier*, 862 S.W.2d 366 (Mo. App. 1993); *People v. Payne*, 239 Ill. App. 3d 698, 607 N.E.2d 375, 180 Ill. Dec. 481 (1993).

Foundation Was Not Sufficient to Admit Pillard's Testimony Regarding Weight Under the Circumstances in This Case.

Having determined that the *Chambers/Canady* standard applies, we consider whether there was adequate foundation in this case to admit Pillard's testimony regarding the weight of the cocaine. We conclude that there was not.

As an initial matter, we note that our analysis in this case demonstrates the importance of informative foundational evidence regarding the accuracy and precision of the scale. In particular, we note that the weight to which Pillard testified was 10.25 grams, which is only .25 of a gram above the statutory minimum to make the offense a Class ID felony. In this regard, we note that the Court of Appeals of North Carolina has stated that "ordinary scales, common procedures, and reasonable steps to ensure accuracy must suffice" to establish foundation for evidence of weight of a controlled substance. *State v. Diaz*, 88 N.C. App. 699, 702, 365 S.E.2d 7, 9 (1988). See, also, *State v. Manning*, *supra*. In *Diaz*, the court concluded that the foundation provided in that case was adequate for admission of evidence of weight. However, in reaching such conclusion, the court noted that the weight of marijuana

in that case "exceeded the minimum weight charged by more than 30,000 pounds" and stated that "'the weight element . . . becomes more critical if the State's evidence of the weight approaches the minimum weight charged.'" 88 N.C. App. at 702, 365 S.E.2d at 9.

In a similar vein, the Missouri Court of Appeals in *State v. Dampier*, 862 S.W.2d at 373, concluded that it was within the trial court's discretion to admit evidence as to weight based on foundation provided by a pharmacist whose scales were used to weigh marijuana and who "merely identified the agencies which check his scales, described the frequency (or infrequency) that this is done, and related that he had observed no damage, chips or nicks in any of his weights since the last inspection" and commented that "to his knowledge, they had not malfunctioned in the past fifteen years." However, in reaching this conclusion, the court noted that only one-half of one of four bags of the controlled substance had been weighed and was found to be over the required minimum; the court stated that because the weight of all four bags was therefore clearly over the minimum, the "case did not hinge on meticulously precise weight." *Id.* at 374.

The present case differs from the North Carolina and Missouri cases described above, because Pillard's testimony was that Richardson possessed 10.25 grams, which was close to the 10-gram minimum required to make the offense a Class ID felony. Therefore, this is the type of case noted by the North Carolina and Missouri courts where the precision of the scale used to weigh the substance was of greater importance. Although the lack of foundation present in this case might conceivably have been harmless in a case where the weight was well above the minimum, in the context of the present case, we conclude that more precise foundation regarding accuracy of the scale was required.

As noted above, the trial court sustained Richardson's initial foundation objection to Pillard's testimony regarding weight. The State thereafter questioned Pillard further regarding the scale. Pillard testified that the calibration was checked once a week by one of the chemists in the laboratory and that the calibration would have been checked within at least a week of

the time the substance in this case was weighed. She testified that if there was any inconsistency with the calibration, the scale would be taken out of use until the manufacturer came in to repair it. She further testified that in the time she had been at the laboratory, she had never had any issue with the calibration of the scale, and that she was not aware of any issue with the calibration of the scale at the time she tested the cocaine in this case. The court then admitted the evidence.

A court's decision regarding sufficient foundation inevitably involves discretion, and we do not attempt to catalog the manner by which proper foundation is to be laid. However, at a minimum where accuracy is claimed based on calibration, the details of the object by which calibration is satisfied should be described. Although Pillard testified that the calibration of the scale in the laboratory was checked once a week, she did not provide further testimony regarding the procedures used to perform such calibration and whether such calibration involved testing against a known weight. We note that in *Com. v. Podgurski*, 81 Mass. App. 175, 187, 961 N.E.2d 113, 123 (2012), the Appeals Court of Massachusetts concluded that "where the record [was] silent on any comparison involving a test object of known measure," sufficient foundational evidence of accuracy had not been set forth, "thereby rendering the weights measured by the scale inadmissible." The court in *Podgurski* noted that measurement against a known quantity was consistent with the dictionary definition of "calibrate" which it stated as "'[t]o check, adjust, or determine by comparison with a standard (the graduations of a quantitative measuring instrument).'" *Id.* (citing American Heritage Dictionary of the English Language 264 (4th ed. 2006)). Although Pillard stated the calibration was checked, the accepted definition of calibration includes comparison to a standard, and thus the foundation in this case should have specifically addressed whether the scale was tested using a known reliable weight. Furthermore, Pillard spoke only of general procedures used in the laboratory without addressing the actual testing done on the specific scale used in this case. She simply stated the general procedures and indicated that there was nothing to make

her think such procedures had not been followed or that there was a problem with the scale.

We conclude that Pillard's testimony regarding general procedures used by the laboratory was not sufficient foundation to admit her testimony regarding the weight of the cocaine. The foundation needed to be more specific to the particular scale used in this case, such as the time period during which the scale was calibrated prior to the weighing of the cocaine and greater detail regarding the procedures used in the calibration, including specifically whether the scale was tested against a known weight.

We conclude that the district court abused its discretion when it determined that the foundation was sufficient in this case. The court therefore erred when it admitted Pillard's testimony regarding the weight of the cocaine. Having determined admission of the evidence was in error, we next consider whether such error was harmless.

The Admission of Evidence Regarding the Weight of the Cocaine Was Not Harmless Error.

[3,4] 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*, 284 Neb. 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.*

Pillard's testimony regarding weight was clearly crucial to determining the grade of the offense. The jury found that the weight was 10.25 grams, and Pillard's testimony was the only evidence from which this amount could be found. The jury obviously accepted the weight stated by Pillard. This finding was not only relevant to the grading of the offense; it was also relevant to Richardson's guilt for the distribution offense charged. We have stated that the quantity of a controlled

substance possessed by a defendant can be circumstantial evidence of the defendant's intent to distribute such controlled substance. See *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Therefore, Pillard's testimony regarding the weight of the cocaine could have influenced the jury's finding that Richardson possessed the cocaine with the intent to distribute it.

We conclude that the error in admitting Pillard's testimony regarding weight without sufficient foundation regarding the scale used to determine the weight was not harmless and that therefore it requires reversal of Richardson's conviction for possession of controlled substance, cocaine, with intent to distribute.

A New Trial May Be Had on Remand.

[5] Having found reversible error, we are required to determine whether all of the evidence admitted by the district court was sufficient to sustain Richardson's conviction. 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. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012).

The evidence admitted showed that Richardson possessed a substance that was determined to be cocaine. Based on the erroneously admitted testimony by Pillard, there was evidence that the quantity of cocaine involved was 10.25 grams, which, as discussed above, contributed to the jury's findings of the weight involved for the purpose of grading the offense and that Richardson had intent to distribute. The evidence admitted by the trial court, properly or not, was sufficient to sustain a guilty verdict of the crime charged, and the Double Jeopardy Clause does not bar retrial.

CONCLUSION

We conclude that the district court erred when it admitted Pillard's testimony regarding the weight of the cocaine without sufficient foundation regarding the accuracy of the scale. We further conclude that such error was not harmless. We therefore reverse the decision of the Court of Appeals which affirmed

Richardson's conviction and sentence. We remand the cause to the Court of Appeals with directions to reverse Richardson's conviction and sentence and to remand the cause to the district court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

JAMES E. ROBERTSON ET AL., APPELLANTS AND CROSS-APPELLEES, V. JACOBS CATTLE COMPANY, A PARTNERSHIP, ET AL., APPELLEES AND CROSS-APPELLANTS.

830 N.W.2d 191

Filed May 10, 2013. No. S-12-370.

1. **Partnerships: Accounting: Appeal and Error.** An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Partnerships.** The interpretation of a partnership agreement presents a question of law.
5. **Judgments: Appeal and Error.** An appellate court independently reviews a lower court's rulings on questions of law.
6. **Partnerships: Time.** The Uniform Partnership Act of 1998 applies to any Nebraska partnership, including those formed prior to January 1, 1998.
7. **Partnerships.** Under the Revised Uniform Partnership Act, the dissociation of a partner does not necessarily cause a dissolution and winding up of the partnership's business. Generally, the partnership must be dissolved and its business wound up only upon the occurrence of one of the events listed in § 801 of the Revised Uniform Partnership Act, upon which Neb. Rev. Stat. § 67-439 (Reissue 2010) is based.
8. ____. Where a court determines that the conduct of one or more partners constitutes grounds for dissociation by judicial expulsion under Neb. Rev. Stat. § 67-431(5)(c) (Reissue 2010) and dissolution under Neb. Rev. Stat. § 67-439(5)(b) (Reissue 2010), and there are no other grounds for dissolution, the court may in its discretion order either dissociation by expulsion of one or more partners or dissolution of the partnership.
9. **Statutes: Appeal and Error.** The language of a statute 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.

10. **Partnerships: Words and Phrases.** The phrase "date of dissociation" as used in Neb. Rev. Stat. § 67-434(2) (Reissue 2010) refers to the date of the event which resulted in the dissociation.

Appeal from the District Court for Valley County: KARIN L. NOAKES, Judge. Affirmed in part as modified, and in part reversed and remanded for further proceedings.

Patrick J. Nelson, of Law Office of Patrick J. Nelson, L.L.C., for appellants.

David A. Domina and Jason B. Bottlinger, of Domina Law Group, P.C., L.L.O., and Gregory G. Jensen for appellees.

CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

STEPHAN, J.

Jacobs Cattle Company is a family partnership which owns agricultural land in Valley County, Nebraska. Four of its six partners sought dissolution and liquidation of the partnership. One of the other two partners then sought a judicial dissociation of those four partners. The district court refused to dissolve and liquidate the partnership, but it dissociated the four partners and ordered that the partnership buy out their interests in the partnership. In this appeal, the four partners (collectively appellants) contend the district court erred in not dissolving the partnership and further erred in determining the proper buyout price. The other two partners and the partnership cross-appeal, contending the court erred in determining the date of asset valuation. We conclude that dissociation was proper, but reverse, and remand for recalculation of the buyout price and imposition of the proper rate of interest.

I. FACTS

Jacobs Cattle Company is a family partnership that was formally organized on January 1, 1979. The original partners were Leonard Jacobs and his wife, Ardith Jacobs; their children Dennis Jacobs, Duane Jacobs, and Patricia Robertson; and the respective spouses of those children, Debbie Jacobs, Carolyn Sue Jacobs, and James E. Robertson. At some point, Debbie withdrew from the partnership and Dennis acquired her interest.

Leonard died in March 1997. Probate proceedings determined that his capital interest in the partnership at the time of his death was 34 percent.

1. Partnership Agreement

The operative partnership agreement became effective on June 19, 1997. The partners were identified as Ardith, in her capacity as trustee of the Leonard Jacobs Family Trust and in her capacity as trustee of the Ardith Jacobs Living Revocable Trust; Duane; Carolyn; Patricia; James; and Dennis.

Pertinent provisions of the agreement include the following:

> 4. TERM
>
> . . . This Partnership shall continue until terminated by mutual agreement, operation of law or as hereinafter provided.
>
> . . . .
>
> 7. MANAGEMENT
>
> Ardith Jacobs, Trustee of the Ardith Jacobs Living Revocable Trust shall have general management authority to conduct day to day business on behalf of the Partnership, and Ardith Jacobs shall have the authority to bind the Partnership; provided however, a vote of 6 Partners shall have authority to override a decision made by Ardith Jacobs. Votes can be cast by Partners as follows: [Ardith and Dennis each have two votes; Patricia, James, Duane, and Carolyn each have one vote.]
>
> Matters that cannot be agreed upon shall be submitted to Arbitration as established hereinbelow.
>
> . . . .
>
> 11. PROFITS AND LOSSES
>
> The net profits and net losses of the Partnership shall be distributable or chargeable, as the case may be, to each of the Partners in proportion to the votes they have herein as set forth in paragraph 7. The term "net profits" and "net losses" shall mean the net profits and net losses of the Partnership as determined by generally accepted accounting principles. . . .
>
> . . . .
>
> 17. QUARTERLY MEETING

> A quarterly meeting of all Partners shall be held on the first Monday following the close of the preceding quarter. The purpose of the meeting is to discuss business operations, profits, losses, capital accounts, income accounts, and all other Partnership business. . . .
>
> . . . .
>
> 19. MISCELLANEOUS
>
> . . . .
>
> (c) . . . . The books of account shall be examined, and reviewed as of the close of a fiscal year by a Certified Public Accountant agreeable to all Partners, who shall make a report thereon.

2. Partnership Business

The partnership owns approximately 1,525 acres of land in Valley County. The land is mostly farmland and pasture and is unencumbered. A real estate appraiser valued the land as of January 1, 2011, at $4,545,000, and as of September 20, 2011, at $5,135,000. The $590,000 increase in appraisal value represented a 12.98 percent increase, which when annualized amounted to an 18.02 percent increase.

The partnership rented its land to others. Patricia and James, Dennis, and Duane and Carolyn all rented land from the partnership, although James did not sign a lease. At least some of the land was rented for less than its fair rental value.

Since June 19, 1997, the partnership has not returned a profit and there have been no distributions of net profits to the partners. Since Leonard's death, no partner has contributed new land or capital to the partnership.

3. Partnership Issues

In July 2004, the attorney for the partnership sent a letter to the partners informing them that none of the tenants had paid their rent for 2004. There were no partnership meetings after January 2005. In late 2004 or early 2005, Ardith terminated the services of Robert D. Stowell as the attorney for the partnership. In April 2005, Ardith retained a new attorney for the partnership. In 2005, Ardith terminated the services of Mick Puckett as the accountant for the partnership and hired a new

accountant. Puckett was the last certified public accountant agreeable to all of the partners, and Stowell was the last attorney agreeable to all partners.

In March 2005, Dennis and Patricia were involved in a physical altercation. As a result, Dennis pled no contest to criminal assault charges. On April 28, Patricia and James were served with a notice to quit the leased premises for nonpayment of rent. Around the same time, Duane was also notified that he needed to quit the premises he was leasing due to nonpayment of rent. Duane eventually paid his rent, but on May 4, the partnership sued Patricia and James for rents due for the years 2003 and 2004. Ardith alone made the decision to file the lawsuit. On August 11, a court entered judgment against Patricia for unpaid rent. The court did not enter judgment against James because his name was not on the lease. The land which the partnership had leased to Patricia was later rented to Dennis.

II. PROCEDURAL HISTORY

1. Pleadings

In July 2007, appellants filed the operative amended complaint for dissolution of the partnership against the partnership, Ardith, and Dennis (collectively appellees). The complaint sought a dissolution and winding up of the partnership under the Uniform Partnership Act of 1998 (1998 UPA).[1] Appellees filed an answer in September. A December 2010 amended answer and counterclaim, styled as an amended cross-claim, alleged that dissociation of appellants, not dissolution of the partnership, was the proper remedy.

2. September 20, 2011, Interlocutory Order

After conducting a bench trial, the district court entered an order on September 20, 2011. The court concluded that appellants did not prove the occurrence of events authorizing dissolution under § 67-439(5) because (1) nothing had occurred to interfere with the partnership's ability to buy, own, and rent

[1] Neb. Rev. Stat. §§ 67-401 to 67-467 (Reissue 2009).

land; (2) no partners took steps to override decisions made by Ardith and "[j]ust because a partner does not like the decision of the managing partner does not make it impracticable to continue the partnership with that partner"; and (3) Ardith had not acted beyond the partner restrictions specified in the partnership agreement. The court reasoned that nothing had occurred to make the partnership agreement difficult or impossible with which to comply, and it dismissed appellants' dissolution claims.

However, the court found that appellants' failure to pay rent in a timely manner supported appellees' request that appellants be dissociated from the partnership under § 67-431(5)(a) and (c). The court reasoned that because the primary purpose of the partnership was to rent land, appellants' delinquency in paying rent materially and adversely affected the partnership business and made it not practicable for the partnership to carry on with appellants as partners. The court thus ordered dissociation of appellants by judicial expulsion pursuant to § 67-431(5)(a) and (c) and ordered the partnership to purchase appellants' interests in the partnership as required by § 67-434. The court specifically ordered the parties to prepare buyout proposals and found that the value of partnership assets was "to be determined as of the date of the dissociation, which is the date this judgment is filed."

3. Final Judgment

On November 4, 2011, the partnership filed a buyout proposal with the district court. The proposal set out the value of the partnership based on its assets and liabilities, including the value of the appreciated land, and then proposed that each appellant be paid $275,941.96. Although the proposal did not contain mathematical calculations, it stated that this sum represented each appellant's "equal partnership fractional interest." This mathematically equates to each appellant's 5.33 percent capital account ownership.

Appellants filed written objections to the proposed buyout on December 5, 2011. One objection was that the proposed buyout did not "contain either (a) an analysis or calculation of the profits that would result from the liquidation of

the Partnership's assets on September 20, 2011, or (b) how such profits would be allocated to each of the partners in the Partnership." Another objection was that the buyout proposal did not "provide for the distribution to [appellants] of their respective portions of the profits of the Partnership to which [they] would be entitled under §§ 67-434 and 67-445." Appellants submitted an alternative buyout proposal which included the analysis and calculation they argued was missing from the partnership's proposal. The alternative proposal did not include mathematical calculations, but it generally calculated the buyout price based on the provision in paragraph 11 of the partnership agreement allocating profit percentages to the partners' income accounts. The alternative buyout proposal generally requested that each appellant receive 12.5 percent of the partnership's liquidation value.

In a January 4, 2012, journal entry, the district court found it would "not consider" the objections raised by appellants. The court granted appellants leave to submit written offers of proof in support of their objections, but ruled appellants could not present testimony on the objections. A formal hearing on the amount of the buyout was held on March 6.

At that hearing, appellants offered exhibit 118 as an offer of proof in support of their objections. The exhibit stated that if allowed to, Patricia would testify that she is a certified public accountant who is familiar with the meanings of the terms "net profits" and "net losses" as determined by generally accepted accounting principles. It further noted that Patricia had prepared a written statement of the book basis of the capital accounts of the partnership based upon a liquidation of assets on September 20, 2011, and attached her calculations. According to Patricia's calculations, the proper allocation of each partner's interest in the partnership was approximately 12.5 percent of the total value. This percentage was calculated after considering how profits from the hypothetical sale of the land required by §§ 67-434(2) and 67-445(2) would be allocated under the partnership agreement.

The partnership submitted a written objection to this offer of proof, but the district court did not rule on the objection on the record. In its final order, however, the court noted that

all "[o]bjections [had been either] taken under advisement or ruled upon on the record." It then expressly stated that "[o]bjections to all items of evidence taken under advisement are overruled."

The district court ultimately approved the partnership's proposed buyout, with minor alterations not related to appellants' stated objections. In computing the amount appellants were entitled to as a result of the required buyout, the district court arrived at a liquidation value for the partnership by subtracting the partnership's liabilities from its assets. The assets included the appreciated value of the partnership's land. The court then distributed the liquidation value to each partner based on his or her capital account, so appellants each received 5.33 percent of the total liquidation value. The court stated that if the sums were not paid by the 30th day, interest would accrue at the judgment interest rate of 2.056 percent.

III. ASSIGNMENTS OF ERROR

Appellants assign, restated and summarized, that the district court erred in (1) failing to dissolve the partnership under § 67-439(5); (2) determining that James, Duane, and Carolyn failed to pay rent to the partnership and that all appellants engaged in wrongful conduct and should be dissociated from the partnership under § 67-431(5); (3) determining the amount of the buyouts of appellants and failing to include in the buyout amount of each appellant one-eighth of the net profits which would have resulted from capital gains arising from the liquidation of the partnership's assets; (4) failing to determine that interest on all buyouts payable to appellants commenced accruing on September 20, 2011; and (5) determining that the interest rate to be paid to appellants on their respective buyouts was the judgment rate rather than a market rate of interest.

On cross-appeal, appellees assign that the district court erred in (1) holding the date of dissociation was September 20, 2011, rather than May 2005, when appellants failed to pay their rents, and (2) determining the value of the partnership assets as of September 2011 instead of May 2005.

IV. STANDARD OF REVIEW

[1,2] An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.[2] On appeal from an equity action, we resolve questions of law and fact independently of the trial court's determinations.[3] But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[4]

[3-5] Statutory interpretation presents a question of law.[5] The interpretation of a partnership agreement presents a question of law.[6] An appellate court independently reviews a lower court's rulings on questions of law.[7]

V. ANALYSIS

[6] The legal framework for our analysis is the 1998 UPA, which is Nebraska's counterpart to the model act known as the Revised Uniform Partnership Act (RUPA).[8] The 1998 UPA applies here even though the partnership was formed in 1997, because after January 1, 2001, the 1998 UPA became applicable to any Nebraska partnership, including those formed prior to January 1, 1998.[9]

The 1998 UPA replaced the original Uniform Partnership Act[10] and brought about significant changes in partnership law.

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[2] *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] See *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[8] See *Shoemaker, supra* note 2 (citing Introducer's Statement of Intent, L.B. 523, Banking, Commerce, and Insurance Committee, 95th Leg., 1st Sess. (Feb. 18, 1997); Prefatory Note, Unif. Partnership Act (1997), 6 (part I) U.L.A. 5 (2001).

[9] §§ 67-464 and 67-467; *Shoemaker, supra* note 2.

[10] See Neb. Rev. Stat. §§ 67-301 to 67-346 (Reissue 2003). See *Shoemaker, supra* note 2.

Prior law required an at-will partnership to dissolve upon any partner's expressed will to dissolve the partnership.[11] RUPA, on which the 1998 UPA is based, sought to avoid mandatory dissolution of partnerships by making a partnership a distinct entity from its partners.[12] As we noted in *Shoemaker v. Shoemaker*,[13]

> "RUPA's underlying philosophy differs radically from [the original Uniform Partnership Act], thus laying the foundation for many of its innovative measures. RUPA adopts the 'entity' theory of partnership as opposed to the 'aggregate' theory that the [original Uniform Partnership Act] espouses. Under the aggregate theory, a partnership is characterized by the collection of its individual members, with the result being that if one of the partners dies or withdraws, the partnership ceases to exist. On the other hand, RUPA's entity theory allows for the partnership to continue even with the departure of a member because it views the partnership as 'an entity distinct from its partners.'"

RUPA, as embodied by our 1998 UPA, provides gap-filling rules that control only when a question is not resolved by the parties' express provisions in an agreement.[14] The parties agree that this case must be resolved by application of the statutory principles of the 1998 UPA.

1. Dissociation or Dissolution?

The parties are in general agreement that they cannot continue in partnership with each other. They differ as to the appropriate remedy to be employed in ending their relationship. Appellants contend that the partnership should have been dissolved. Appellees argue that the district court correctly dissociated appellants from the partnership because this allows the partnership itself to continue with Ardith and Dennis as its remaining partners.

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[11] See, § 67-331; *Shoemaker, supra* note 2.

[12] *Shoemaker, supra* note 2.

[13] *Id.* at 125, 745 N.W.2d at 309-10 (citations omitted).

[14] *Shoemaker, supra* note 2.

The statutory provisions governing dissociation and dissolution are similar but not identical. Dissolution of a partnership is governed by § 67-439, which provides that "[a] partnership is dissolved, and its business must be wound up, only upon the occurrence of any of the following events," which include

> (5) On application by a partner, a judicial determination that:
>
> (a) The economic purpose of the partnership is likely to be unreasonably frustrated;
>
> (b) Another partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner; or
>
> (c) It is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement[.]

The district court concluded that none of these circumstances existed because (1) nothing had occurred which would frustrate the partnership's ability to buy, sell, or own land, and (2) Ardith, as managing partner, had authority on behalf of the partnership to take the actions with which appellants disagreed.

Dissociation is a new concept introduced by RUPA "to denote the change in the relationship caused by a partner's ceasing to be associated in the carrying on of the business."[15] Under RUPA, "the dissociation of a partner does not necessarily cause a dissolution and winding up of the business of the partnership."[16] Section 67-431 lists events which may trigger a partner's dissociation, including

> (5) On application by the partnership or another partner, the partner's expulsion by judicial determination because:
>
> (a) The partner engaged in wrongful conduct that adversely and materially affected the partnership business;

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[15] Unif. Partnership Act (1997), *supra* note 8, § 601, comment 1 at 164.

[16] *Id.*

> (b) The partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under section 67-424; or
>
> (c) The partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner.

In this case, the district court concluded that the grounds for dissociation stated in § 67-431(5)(a) and (c) were met by the failure of appellants to pay timely rent for the land leased from the partnership.

With these principles in mind, we first consider appellants' argument that the district court erred in determining that there were grounds to dissociate them from the partnership. Given that the sole business of the partnership was to own farmland which it leased to others, we have no difficulty concluding that the failure of appellants who executed leases to pay timely rents constituted wrongful conduct that adversely and materially affected the partnership business and made it not reasonably practical to carry on the partnership business with the existing partners. And we are not persuaded by the argument that James bore no responsibility for the nonpayment of rent because he had not signed a lease. Patricia initially testified that she and James had rented land from the partnership from 1997 through 2004. Later in her testimony, when shown a copy of the lease and asked if James had "ever been a tenant under a lease with Jacobs Cattle Company," she responded, "Not according to the lease agreements." But James testified that he owed money to the partnership prior to 2010. There is a reasonable inference that James knew that rent had not been paid to the partnership of which he and Patricia were both partners. Thus, regardless of whether he was legally obligated on the lease, James engaged in conduct which satisfied the grounds for dissociation stated in § 67-431(5)(a) and (c) to the same extent as the other appellants.

Next, we consider whether the district court erred in concluding that appellants failed to establish grounds for dissolution of the partnership. Appellees argue the district court

correctly decided this issue because no wrongdoing on the part of Ardith or Dennis has been proved. But even appellees acknowledge that "much acrimony exists between and among the parties."[17] At oral argument, appellees' counsel conceded that there were unspecified grounds for dissolution of the partnership, but argued that dissociation was nevertheless the appropriate remedy. We perceive this concession as agreement that the somewhat autocratic manner in which Ardith conducted the affairs of the partnership in recent years, even if not in violation of the partnership agreement, would constitute grounds for dissolution under § 67-439(5)(b), i.e., "conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner." We find no other possible grounds for dissolution. As we have noted, such conduct is also grounds for dissociation under § 67-431(5)(c), and the record supports the district court's determination that appellants engaged in such conduct. Thus, we conclude that there are grounds for dissolution of the partnership under § 67-439(5)(b) and dissociation of appellants under § 67-431(5)(a) and (c).

[7] Under the RUPA model upon which our statutes are based, the dissociation of a partner does not necessarily cause a dissolution and winding up of the partnership's business.[18] Generally, the partnership must be dissolved and its business wound up only upon the occurrence of one of the events listed in § 801 of RUPA, upon which Nebraska's § 67-439 is based.[19] The question we must resolve is whether dissolution is mandatory where the conduct of multiple partners constitutes grounds for dissolution under § 67-439(5)(b) and also constitutes grounds for dissociation pursuant to § 67-431(5)(c).

We have found no authority on this precise point. But the decision of the Supreme Court of Connecticut in *Brennan v.*

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[17] Brief for appellees at 24.

[18] See, Unif. Partnership Act (1997), *supra* note 8, § 601, comment 1; *Warnick v. Warnick*, 76 P.3d 316 (Wyo. 2003).

[19] See Unif. Partnership Act (1997), *supra* note 8, § 601, comment 1, and § 801.

Brennan Associates[20] provides helpful guidance. In that case, the court concluded that a single partner's conduct fell within Connecticut's statutory equivalents of our §§ 67-431(5)(c) and 67-439(5)(b) such that it was not practicable for the remaining partners to carry on the business of the partnership with that partner. The court rejected an argument that the conduct would justify judicial dissolution of the partnership but not dissociation of the offending partner, concluding that "an irreparable deterioration of a relationship between partners is a valid basis to order dissolution, and, therefore, is a valid basis for the alternative remedy of dissociation."[21] A Kansas appellate court in *Giles v. Giles Land Co., L.P.*[22] followed the reasoning of *Brennan* in concluding that a court did not err in dissociating a partner where the evidence established that his conduct would justify either dissociation or dissolution under that state's counterparts to our §§ 67-431(5)(c) and 67-439(5)(b).

[8] We perceive no good reason to apply a different rule where the conduct of multiple partners makes it "not reasonably practicable to carry on the business in partnership" with each other.[23] Construing the dissolution remedy as mandatory in this circumstance would be contrary to the entity theory of partnership embodied in RUPA. As we noted in *Shoemaker*,[24] a main purpose of RUPA is "to prevent mandatory dissolution" of a partnership. Accordingly, we hold that where a court determines that the conduct of one or more partners constitutes grounds for dissociation by judicial expulsion under § 67-431(5)(c) and dissolution under § 67-439(5)(b), and there are no other grounds for dissolution, the court may in its discretion order either dissociation by expulsion of one or more partners or dissolution of the partnership.

We conclude that dissociation by judicial expulsion of appellants is an appropriate remedy under the facts of this

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[20] *Brennan v. Brennan Associates*, 293 Conn. 60, 977 A.2d 107 (2009).

[21] *Id.* at 81, 977 A.2d at 120.

[22] *Giles v. Giles Land Co., L.P.*, 47 Kan. App. 2d 744, 279 P.3d 139 (2012).

[23] § 67-431(5)(c).

[24] *Shoemaker, supra* note 2, 275 Neb. at 130, 745 N.W.2d at 312.

case. Individually and in trust, Ardith and Dennis have a capital interest in the partnership of approximately 78 percent. Pursuant to the partnership agreement, Ardith has general management authority to conduct the day-to-day business on behalf of the partnership. We agree with the finding of the district court that there is no apparent reason why the partnership cannot continue to exist and function in accordance with the partnership agreement with Ardith and Dennis as its sole partners. Accordingly, we conclude that the first and second assignments of error as restated above are without merit.

2. Issues Pertaining to Buyout Price

The remaining issues pertain to the district court's calculation of the buyout price which the dissociated partners are to receive for their interests in the partnership. This price is governed by § 67-434(2), which provides:

> The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under subsection (2) of section 67-445 if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

Section 67-445(2) provides in pertinent part:

> Each partner is entitled to a settlement of all partnership accounts upon winding up the partnership business. In settling accounts among the partners, profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts. The partnership shall make a distribution to a partner in an amount equal to any excess of the credits over the charges in the partner's account. A partner shall contribute to the partnership an amount equal to any excess of the charges over the credits in the partner's account but excluding from the calculation charges attributable to an

obligation for which the partner is not personally liable under section 67-418.

(a) Date of Dissociation

The district court determined the date of dissociation was September 20, 2011, the date it entered its order that appellants were dissociated by judicial expulsion pursuant to § 67-431(5). In their cross-appeal, appellees contend that the court should have found the date of dissociation to be in May 2005, when the nonpayment of rent which the district court determined to be grounds for dissociation occurred. Due to the appreciation of the land owned by the partnership, using the earlier date to calculate the partnership's assets would result in a substantially lower buyout price.

Appellees urge us to adopt the reasoning of two pre-RUPA partnership dissolution cases from other jurisdictions, *King v. Evans*[25] and *Oliker v. Gershunoff*.[26] *King* involved a dissolution caused by the nonjudicial expulsion of a partner, while *Oliker* involved a dissolution resulting from a partner's withdrawal from the partnership. In each case, partnership assets were valued as of the date of dissolution, i.e., the partner's nonjudicial expulsion in *King* and the partner's withdrawal in *Oliker*. But we find both cases distinguishable because neither involves a dissociation of a partner by judicial expulsion under a statute based on the RUPA model.

[9,10] The language of a statute 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.[27] Clearly, the phrase "date of dissociation" as used in § 67-434(2) refers to the date of the event which resulted in the dissociation. The events which may result in dissociation are listed in § 67-431. Some of these, such as a partner's withdrawal[28] or expulsion pursuant

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[25] *King v. Evans*, 791 S.W.2d 531 (Tex. App. 1990).

[26] *Oliker v. Gershunoff*, 195 Cal. App. 3d 1288, 241 Cal. Rptr. 415 (1987).

[27] See *Pittman v. Western Engineering Co.*, 283 Neb. 913, 813 N.W.2d 487 (2012).

[28] § 67-431(1).

to the partnership agreement,[29] occur without any judicial intervention. But in this case, the dissociation occurred as a result of expulsion by judicial determination pursuant to § 67-431(5). Appellants were not dissociated from the partnership until the district court determined that they had engaged in conduct described in § 67-431(5)(a) and (c). We find nothing in § 67-431 or § 67-434 which would make the dissociation retroactive to the date of the conduct which was judicially determined to be grounds for expulsion, and we will not read into a statute a meaning that is not there.[30] Accordingly, we conclude that the district court did not err in calculating the buyout price as of September 20, 2011, the date of dissociation by judicial expulsion.

(b) Appellants' Share of Appreciated Value of Land

The land owned by the partnership is a capital asset. Under the operative partnership agreement, the partners each had a capital account. The value of the capital account was "directly proportionate to [each partner's] original Capital contributions as later adjusted for draws taken from the Partnership." At the time of dissociation, the capital account of each appellant was approximately 5.33 percent of the total capital in the partnership.

Each partner also had an income account under the partnership agreement. Net profits and net losses of the partnership were to be "credited or debited to the individual income accounts [of each partner] as soon as practicable after the close of each fiscal year." The agreement provided that the "term[s] 'net profits' and 'net losses' shall mean the net profits and net losses of the Partnership as determined by generally accepted accounting principles." It further noted that "[t]he net profits and net losses of the Partnership" were distributable or chargeable "to each of the Partners in proportion to the votes they have." Under the agreement, Ardith had two votes (one as

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[29] § 67-431(3).

[30] *Blakely v. Lancaster County, supra* note 7; *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012).

trustee for each trust), Dennis had two votes, and appellants each had one vote, for a total of eight votes. Thus, appellants each had a 12.5 percent share of net profits and losses in their income account.

The district court expressly found that appellants' "interests in the partnership shall be purchased by the partnership as required by Neb.Rev.Stat.Sec. 67-434." In its ruling, the district court considered the value of the partnership's assets, including the appreciated value of the land, less the partnership's liabilities, and arrived at a liquidation value for the partnership. It then accepted appellees' argument that the proper buyout price was calculated by applying each partner's capital account percentage to the partnership's total liquidation value.

On appeal, appellants agree the buyout was to be calculated pursuant to § 67-434 and agree with the district court's liquidation value of the partnership. But they argue the district court erred in calculating the buyout price because it did not consider how the hypothetical capital gain realized from treating the land as though it had been sold on the date of dissociation would flow to each partner based on the partnership agreement's allocation of net profits and losses. Appellants contend the proper calculation results in each of them receiving a buyout equal to 12.5 percent of the liquidation value of the partnership.

Appellants' argument rests on two premises: (1) that a capital gain would be realized upon a hypothetical selling of the partnership land pursuant to § 67-434(2), which would constitute "profits" within the meaning of § 67-445(2), and (2) that the hypothetical profit would constitute "net profits" within the meaning of paragraph 11 of the partnership agreement. Section 67-434(2) provides that the buyout price of a dissociated partner's interest is to be based on the amount that "would have been distributable to the dissociating partner" under § 67-445(2) "if, on the date of dissociation, the assets of the partnership were sold at . . . liquidation value . . . and the partnership were wound up as of that date." Section 67-445(2) then provides that "profits and losses that result from [such]

liquidation of the partnership assets must be credited and charged to the partners' accounts."

It is clear from the plain language of § 67-434(2) that the proper calculation must be based upon the assumption that the partnership assets, here the land, were sold on the date of dissociation, even though no actual sale occurs. Here, the initial question is whether selling the partnership land on the date of dissociation would result in a capital gain and "profits" in the context of § 67-445(2). We consider this to be a question of statutory interpretation.

The term "capital gain" means "profit realized when a capital asset is sold or exchanged."[31] The term "profit" is generally defined as the "excess of revenues over expenditures in a business transaction."[32] We are required to give the language of a statute its plain and ordinary meaning.[33] Accordingly, we conclude that the capital gain which would be realized upon a hypothetical liquidation of the partnership's land on the date of dissociation (as required by § 67-434(2)) would constitute "profits" within the meaning of the phrase in § 67-445(2).

The remaining question is how those "profits" should be "credited and charged to the partners' accounts"[34] in this particular situation. Appellants contend that it must be done pursuant to paragraph 11 of the partnership agreement, which specifically states how "net profits" and "net losses" "as determined by generally accepted accounting principles" are to be distributed to the partners. But there is no expert testimony equating this type of capital gain to "net profits" under "generally accepted accounting principles." Appellants attempted to introduce Patricia's testimony on this issue to explain how such a characterization would affect the ultimate distribution of the partnership assets, but the district court refused the evidence and instead allowed only an unsworn offer of proof. We

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[31] Black's Law Dictionary 237 (9th ed. 2009).

[32] *Id.* at 1329.

[33] See *Pittman v. Western Engineering Co., supra* note 27.

[34] See § 67-445(2).

conclude that the district court erred in refusing to consider evidence on this issue, and we reverse that portion of its order calculating the amount of the buyouts and remand the cause with directions for the court to reconsider the buyout calculations after receiving appellants' evidence on this issue. In this respect, we note that RUPA

> eliminates the distinction in [the original Uniform Partnership Act] between the liability owing to a partner in respect of capital and the liability owing in respect of profits. Section 807(b) [of RUPA] speaks simply of the right of a partner to a liquidating distribution. That implements the logic of RUPA Sections 401(a) and 502 under which *contributions to capital and shares in profits and losses combine to determine the right to distributions*.[35]

(c) Interest

The district court determined that the amounts due appellants for their partnership interests should be paid within 30 days of the final order entered April 18, 2012, and that if not paid within that period, interest would accrue at the judgment rate. Appellants argue that the interest actually began to accrue on September 20, 2011, the date the court determined that appellants were dissociated from the partnership. We agree. Section 67-434(2) specifically provides that interest on the buyout price of a dissociated partner's interest "must be paid from the date of dissociation to the date of payment." As we have noted, the "date of dissociation" was September 20, 2011. Appellants are entitled to interest on the buyout price from that date until the date of payment.

Appellants also contend that the district court erred in ordering that interest should be computed at the "judgment interest rate." They contend that they are instead entitled to interest at the higher "market rate."[36] We agree in part with this argument.

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[35] Unif. Partnership Act (1997), *supra* note 8, § 807, comment 3 at 207 (emphasis supplied).

[36] Brief for appellants at 15.

Neb. Rev. Stat. § 45-103 (Reissue 2010) is the source of the district court's "judgment interest rate." It specifies the interest rate to be paid on judgments for the payment of money. However, § 45-103 provides that its rate shall not apply to "(1) [a]n action in which the interest rate is specifically provided by law." Here, § 67-434 specifically provides that interest is to be paid from the date of dissociation until the date the buyout payment is made. And § 67-405 provides that "[i]f an obligation to pay interest arises under [the 1998 UPA] and the rate is not specified, the rate is that specified in section 45-104.01 . . . ." And Neb. Rev. Stat. § 45-104.01 (Reissue 2010) provides that interest be assessed at a rate of 14 percent per annum. We conclude that it is this rate, and not the judgment rate, that applies in this case.

VI. CONCLUSION

Based upon our de novo review and for the reasons discussed, we conclude that the district court did not err in dissociating appellants from the partnership by judicial expulsion as of September 20, 2011. We also conclude that the district court did not err in declining to dissolve the partnership. However, we conclude the district court erred in failing to allow appellants to introduce evidence on the proper calculation of the buyout price and further erred in its determination with respect to interest. We modify the judgment to provide that interest on the amounts due appellants should accrue at 14 percent per annum from September 20, 2011, until paid, and we reverse the judgment and remand the cause for further proceedings on the proper calculation of the buyout price.

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

HEAVICAN, C.J., and MILLER-LERMAN, J., participating on briefs.

WRIGHT, J., not participating.

MARK DURRE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DIANA DURRE, APPELLANT, V. WILKINSON DEVELOPMENT, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

830 N.W.2d 72

Filed May 10, 2013. No. S-12-627.

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 that party the benefit of all reasonable inferences deducible from the evidence.
2. ____: ____. An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.
4. **Fraud: Estoppel: Limitations of Actions: Proof.** In order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations defense, the plaintiff must show the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the misconduct.
5. **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.
6. **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.
7. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered.
8. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
9. **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.
10. **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.

11. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.
12. **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.
13. **Negligence.** If there is no duty owed, there can be no negligence.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed.

Jeffry D. Patterson and Robert F. Bartle, of Bartle & Geier Law Firm, and Douglas J. Stratton and Joel E. Carlson, of Stratton, DeLay, Doele, Carlson & Buettner, for appellant.

David D. Ernst and Lisa M. Meyer, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Love Signs of North Platte, L.L.C., doing business as Condon's House of Signs.

Jerald L. Rauterkus and Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for appellee Tri-City Sign Company.

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

WRIGHT, J.

NATURE OF CASE

Mark Durre brought suit against Wilkinson Development, Inc. (Wilkinson); Tri-City Sign Company (Tri-City); and Love Signs of North Platte, L.L.C., doing business as Condon's House of Signs (Love Signs), for personal injury and wrongful death. A sign fell onto Durre's pickup truck while it was parked in a lot owned by Wilkinson. Durre was injured, and his wife was killed. The district court sustained Tri-City's motion for summary judgment, because the action was barred by the 10-year statute of repose in Neb. Rev. Stat. § 25-223 (Reissue 2008). The court also sustained Love Signs' motion for summary judgment, because the court found there was no evidence Love Signs breached a duty of reasonable care when it performed work on the sign. We affirm.

SUMMARY JUDGMENT

[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. *Swift v. Norwest Bank-Omaha West, ante* p. 619, 828 N.W.2d 755 (2013).

FACTS

On April 3, 2009, Durre and his wife were sitting in their pickup truck, which was parked at a gas station/fast-food restaurant in North Platte, Nebraska. About 1 p.m., the restaurant's sign fell onto the cab of the truck, injuring Durre and killing his wife.

The restaurant's sign and the pole structure to which the sign was attached were designed, built, and installed by Tri-City's employees. Tri-City obtained a building permit for the installation of the sign from the city of North Platte, designating 65 feet as the height of the sign. Installation of the sign was completed on or about May 15, 1999. There was no evidence that any of the defendants measured the height of the sign after its construction was completed.

In November 2008, Love Signs was contracted by Wilkinson to replace lamps and ballasts in the sign. One of Love Signs' employees, Chad Condon, acknowledged that it was part of his job to alert the owner of a sign to any unsafe conditions noticed. There was no evidence that Condon or any employee of Love Signs was requested to, or actually did, review the construction drawings to determine the correct height or design of the sign and the pole structure.

The sign collapsed as a result of the shearing of a section of the steel pole which held the sign. After its collapse, Condon measured the length of the sign and pole and determined that the erected sign was 75 feet tall. Durre's structural engineering expert inspected the sign and determined the total height was at least 74 feet. This was 9 to 10 feet greater than the 65-foot height allowed by the permit issued by the city.

On November 13, 2009, Durre filed suit against Wilkinson for personal injury and wrongful death. He alleged that Wilkinson negligently maintained the pole and sign, and failed to warn those on its premises of the danger caused by the improper construction of the sign. Durre filed an amended

complaint on March 10, 2011, naming Wilkinson, Tri-City, and Love Signs as defendants. He alleged that Tri-City negligently designed and constructed the pole and sign, and failed to warn any person of the unreasonably dangerous condition of the pole and sign. In a second amended complaint, he alleged that Tri-City concealed the height of the sign from the general public. He also alleged that Love Signs negligently maintained and inspected the sign. Tri-City denied any action or inaction on its part that caused the pole to fail and alleged that all claims against it were barred by the applicable statutes of limitations and repose, which included § 25-223. Love Signs denied liability.

The district court sustained Tri-City's motion for summary judgment, concluding that Durre's actions were barred by the 10-year statute of repose in § 25-223. It sustained Love Signs' motion for summary judgment, because there was no evidence Love Signs breached a duty of reasonable care when it performed work on the sign in 2008. In a separate order, the claims brought against Wilkinson were dismissed without prejudice. Durre appeals the district court's order sustaining summary judgment for both Tri-City and Love Signs. 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

Durre assigns, restated, that the district court erred in concluding that (1) the statute of repose in § 25-223 barred his claims against Tri-City, (2) the doctrine of fraudulent concealment did not toll the running of the statute of repose against Tri-City, and (3) Love Signs did not owe a duty to Wilkinson to discover the inherently dangerous condition of the pole structure and sign on Wilkinson's premises and warn Wilkinson accordingly.

ANALYSIS

Statute of Repose

[2] The first issue is whether, as a matter of law, Durre's cause of action against Tri-City is time barred by § 25-223. 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. *Swift v. Norwest Bank-Omaha West, ante* p. 619, 828 N.W.2d 755 (2013).

The applicable statute, § 25-223, provides in part:

> In no event may any action be commenced to recover damages for an alleged breach of warranty on improvements to real property or deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property more than ten years beyond the time of the act giving rise to the cause of action.

Durre has alleged a claim to recover for personal injury caused by Tri-City's negligence. He argues that § 25-223 does not apply to personal injuries resulting from an inherently dangerous condition or latent defect of the property caused by a contractor's negligence. We disagree.

Our resolution of this claim is controlled by our decision in *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987). Henry Williams, a school janitor, fell 30 feet backward inside a pipe chase. His fall was caused by a missing section of concrete wall and occurred more than 10 years after construction of the school was completed in 1968. Williams argued that § 25-223 applied only to causes of action for damage to property and not to actions for personal injury. We determined that § 25-223 applied to an action in tort for personal injuries caused by the negligent construction of a building. We held the 10-year period of repose began to run when construction of the building was completed. Thus, Williams' cause of action was time barred before it accrued.

Williams asked this court to conclude that the Legislature did not intend § 25-223 to apply to actions for personal injury. We declined to do so, because we determined that the words of § 25-223 were plain, direct, and unambiguous and, therefore, required no interpretation. "The phrase '[a]ny action to recover damages' in § 25-223 [meant] any action, including an action

in tort for damages caused by the negligent construction of a building." *Williams*, 225 Neb. at 240, 404 N.W.2d at 35. We held that § 25-223 barred the personal injury negligence claim that Williams commenced in 1982.

Durre asks that we reconsider our decision in *Williams, supra*, because the plain and ordinary meaning of § 25-223 excludes claims for personal injury and wrongful death. Our analysis has not changed. We determined that the language of § 25-223 applies to all actions for damages, including causes of action for personal injury. *Williams, supra*.

[3] Since our decision in *Williams* in 1987, the Legislature has not amended § 25-223 to limit its application to actions for damages to property. If the Legislature did not agree, it could have amended § 25-223. It has not done so. When an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Trumble v. Sarpy County Bd.*, 283 Neb. 486, 810 N.W.2d 732 (2012).

Durre's action against Wilkinson was filed in November 2009, which was more than 10 years after the May 1999 completion and installation of the sign. His action against Tri-City was not commenced until March 10, 2011. The 10-year statute of repose in § 25-223 barred Durre's claim for damages against Tri-City.

Fraudulent Concealment

Having determined that Durre's action was subject to § 25-223, we consider whether there was any evidence that Tri-City fraudulently concealed a material fact which prevented Durre from filing his action within 10 years of completion of the sign's construction.

Durre argues that if § 25-223 applies to claims for personal injury, Tri-City's fraudulent concealment of the dangerous condition of the sign estopped it from asserting a statute of repose defense. But the district court found that Durre had not advanced any evidence in support of this claim and that there was no continuing fiduciary relationship between Durre and Tri-City.

[4] In order to successfully assert the doctrine of fraudulent concealment and thus estop the defendant from claiming a statute of limitations defense, the plaintiff must show the defendant has, either by deception or by a violation of a duty, concealed from the plaintiff material facts which prevent the plaintiff from discovering the misconduct. *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005). See *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997). Generally, for fraudulent concealment to estop the running of the statute of limitations, the concealment must be manifested by an affirmative act or misrepresentation. *Andres, supra*.

In *Andres*, the plaintiff contracted with McNeil Company, Inc., to design and build a house. The house was completed in January 1994. Soon after the plaintiff took possession of the house, water began to leak through the roof. Repairs were made, but the leaks continued. The plaintiff claimed McNeil Company knew of the defects but continually assured her that such defects did not exist. In 2002, the plaintiff contacted a roofing company that told her the leaks were caused by improper construction of the roof. She alleged that McNeil Company fraudulently concealed material facts that prevented her from discovering the improper construction until 2002.

The plaintiff in *Andres* presented evidence that she was repeatedly given assurances between 1995 and 2002 that the roof was being fixed. McNeil Company presented evidence specifically disputing the plaintiff's evidence regarding the claimed representations. Because the evidence was in dispute, we concluded there were genuine issues of material fact that prevented summary judgment on the statute of limitations.

[5-7] In the case at bar, the parties disagree who has the burden to provide evidence of fraudulent concealment. Durre argues that it was Tri-City's burden to provide the district court with evidence that it did not fraudulently conceal the condition of the sign. We disagree. 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. *Jeremiah J. v. Dakota D., ante* p. 211, 826 N.W.2d 242 (2013). 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. *Id*. If a genuine issue of fact exists, summary judgment may not properly be entered. *Id*.

Tri-City moved for summary judgment. It provided evidence that the sign was completed in May 1999, that Durre did not file suit until November 2009, and that Durre did not join Tri-City in the action until 2011. It made a prima facie case that Durre's claim was barred by the statute of repose. The burden then shifted to Durre to provide evidence that the statute of repose should be tolled because of Tri-City's fraudulent concealment of the defect in the sign. It was Durre's burden to provide evidence of the existence of a genuine issue of material fact regarding his claim of fraudulent concealment. It was not Tri-City's burden to provide evidence that Tri-City did not fraudulently conceal the latent defect of the sign.

In his second amended complaint, Durre alleged that Tri-City was negligent in failing to properly design and construct the sign and that Tri-City failed to warn of its dangerous condition. Durre alleged that the defect in the sign violated Tri-City's duty to him and was a danger concealed from him and that as a direct and proximate result of Tri-City's negligence, his wife sustained fatal injuries.

At the summary judgment hearing, Durre provided evidence that the plans and specifications for the sign called for it to be 65 feet high and that the invoice sent to Wilkinson after the sign's completion stated that Tri-City manufactured and installed a 65-foot pole and sign. Durre then provided evidence that the actual height of the sign was 9 or 10 feet greater than 65 feet. He argued that Tri-City's employees either knew or should have known the structure failed to conform to the design specifications and that the employees misrepresented the height to Wilkinson. He asserted that Tri-City was required to exercise a high degree of care to prevent injury and damage to the public.

However, Durre did not present any evidence that would create a material issue of fact that Tri-City fraudulently concealed information from him that prevented his timely filing of the action. Tri-City was not joined as a defendant until March 10, 2011. Tri-City's owner stated in his affidavit and deposition that Tri-City did not have any information that the sign was higher than 65 feet. Although the height of the sign was determined by the length of the steel used in the installation, the company did not have a practice of measuring a sign's height after installation. There was no indication that Tri-City attempted to hide or conceal the sign's height prior to the accident. Following the accident, both an employee from Love Signs and Durre's expert measured the height of the sign. But there is no evidence that Tri-City knew the height of the sign before it was measured by Love Signs.

Durre's argument implies that the latent defect of the sign should have been disclosed to anyone and everyone who entered the vicinity of the sign. But Durre has not provided evidence that Tri-City knew of the latent defect before measurements were taken on the sign; nor has he provided evidence that created a material issue of fact which would estop Tri-City from asserting its statute of repose defense. Durre has not provided any evidence that Tri-City fraudulently concealed the latent defect in order to prevent Durre from timely filing his action against Tri-City.

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. *Jeremiah J. v. Dakota D., ante* p. 211, 826 N.W.2d 242 (2013).

From our review of the pleadings and the evidence offered at the hearing on the motions for summary judgment, we conclude that Durre has failed to provide any evidence that created a material issue of fact whether Tri-City fraudulently concealed any material fact, either with the intention that Durre would act or refrain from acting, or which prevented Durre from timely filing his action against Tri-City. The

district court did not err in sustaining Tri-City's motion for summary judgment.

Love Signs' Duty

In his brief, Durre concedes that Love Signs had no independent duty to inspect the pole structure. However, he argues that Love Signs had a duty to exercise reasonable care when performing service work on the sign.

[8,9] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012). When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court. *Id.*

[10-13] 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. *Id.* Thus, the threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty. *Id.* A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another. *Id.* If there is no duty owed, there can be no negligence. *Id.*

Love Signs was hired by Wilkinson in 2008 to replace lamps and ballasts within the lighted portion of the sign. It was not requested to inspect, maintain, care for, or repair the pole upon which the sign was mounted. There was no evidence of an open and obvious defect in the pole or the sign that should have been discovered when Love Signs replaced the bulbs and ballasts. There was no evidence that Love Signs had a duty to inspect for latent defects.

There was no evidence that Love Signs breached a duty of reasonable care when it performed its work. It was not aware that the height of the sign exceeded the limits imposed by city code. It was not aware of any defects in the sign or any hazardous and latent defects in the sign or pole structure.

The sign collapsed as a result of the shearing of a section of the steel pole holding the sign. Durre has not established that

Love Signs had a duty to discover any latent defect in the sign that could cause the sign to collapse.

The district court concluded that Love Signs clearly had no duty to inspect, maintain, or care for the sign and pole on Wilkinson's premises. It concluded that Love Signs' obligations were to service the sign and replace lamps and ballasts within the sign. It sustained Love Signs' motion for summary judgment. The district court did not err in sustaining the motion.

CONCLUSION

Durre's claims against Tri-City are time barred by the statute of repose in § 25-223. There was no fraudulent concealment by Tri-City that prevented Durre from timely filing his claim against Tri-City. Love Signs owed Durre no duty to discover any latent defect in the sign. Therefore, we affirm the judgment of the district court.

AFFIRMED.

McCORMACK, J., participating on briefs.

J.P., A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, A.P., APPELLEE, V. MILLARD PUBLIC SCHOOLS ET AL., APPELLANTS.

830 N.W.2d 453

Filed May 17, 2013. No. S-11-777.

1. **Administrative Law: Schools and School Districts: Appeal and Error.** Appeals from the district court under the Student Discipline Act are governed by the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Constitutional Law: Schools and School Districts: Search and Seizure: Appeal and Error.** In reviewing claims of Fourth Amendment violations in connection with searches conducted by school officials, an appellate court

applies the same two-part standard of review utilized with respect to such issues in criminal cases. Regarding historical facts, the appellate court reviews the trial court's findings for clear error. But an appellate court independently reviews the trial court's determination of whether those facts violated the Fourth Amendment's protections.

5. **Constitutional Law: Warrantless Searches: Search and Seizure: Police Officers and Sheriffs.** The Fourth Amendment's prohibition against unreasonable searches and seizures generally requires a law enforcement officer to have probable cause to conduct a warrantless search without consent.
6. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications.
7. **Schools and School Districts: Search and Seizure: Proof.** There is a two-part test for determining the reasonableness of school searches. First, the search must be justified at its inception. Second, the search must be reasonably related in its scope to the circumstances which justified the interference in the first place.
8. **Schools and School Districts: Search and Seizure: Probable Cause.** Under ordinary circumstances, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.
9. ____: ____: ____. Reasonable grounds for a search exist when school officials reasonably believe that there is a moderate chance of discovering evidence of wrongdoing.
10. **Schools and School Districts: Search and Seizure.** A search is permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.
11. **Schools and School Districts: Statutes: Legislature.** A school district is a creature of statute and possesses no powers other than those granted by the Legislature.
12. **Schools and School Districts: Search and Seizure: Probable Cause.** Implicit within the school-needs exception set forth in *New Jersey v. T. L. O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985), requiring only reasonable suspicion for the search of students on school grounds, is that school officials had the authority to conduct the search.
13. **Schools and School Districts.** On school grounds, school officials have authority to regulate and control student conduct.
14. **Schools and School Districts: Search and Seizure: Motor Vehicles.** Permitting school officials to search a student's vehicle based upon a nexus to the school because a student drove the vehicle to school is overly broad and would lead to confusing inquiries into whether vehicles parked off school grounds were sufficiently connected to the school.
15. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Jeff C. Miller, Duncan A. Young, and Keith I. Kosaki, of Young & White Law Offices, for appellants.

Richard P. McGowan, of McGowan Law Firm, for appellee.

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

WRIGHT, J.

NATURE OF CASE

This case originated from a school official's search of a student's pickup truck that was parked on a public street across from the school. Without permission and in violation of school policy, the student retrieved a wallet and sweatshirt from his truck. When the student returned to school grounds, the assistant principal searched the student's person, backpack, and wallet. The search disclosed only a cellular telephone and a set of keys. Without the student's consent, the assistant principal then searched the truck. Drug paraphernalia was found, and the student, J.P., was suspended for 19 days.

The school board upheld the suspension. On appeal under the Student Discipline Act, Neb. Rev. Stat. § 79-254 et seq. (Reissue 2008 & Cum. Supp. 2012), the district court reversed the school board's decision based on the court's conclusion that the search violated the Fourth Amendment. For the reasons set forth, we affirm.

SCOPE OF REVIEW

[1] Appeals from the district court under the Student Discipline Act are governed by the Administrative Procedure Act. *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001).

[2,3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Id.* When reviewing an order of a district court under the Administrative Procedure

Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[4] In reviewing claims of Fourth Amendment violations in connection with searches conducted by school officials, an appellate court applies the same two-part standard of review utilized with respect to such issues in criminal cases. Regarding historical facts, we review the trial court's findings for clear error. But we independently review the court's determination of whether those facts violated the Fourth Amendment's protections. See *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012). The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by state officers, including public school officials. See, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995); *New Jersey v. T. L. O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (*T.L.O.*). Thus, we conclude that our two-part standard of review is also applicable to claims of Fourth Amendment violations in school search cases.

FACTS

Search

On August 18, 2010, J.P. drove his truck to Millard West High School (Millard West). The majority of students parked on school property, but about 15 percent parked along 176th Avenue, which bordered the east side of the campus. J.P. parked on 176th Avenue in front of a private residence located across the street from Millard West.

J.P. arrived at school around 7:45 a.m. and went to his first class. Afterward, he tried to leave the building. Lori Bishop, a hall monitor, saw J.P. and a classmate approach the front door. Bishop asked where they were going, and the classmate said he had to get a book. Bishop allowed the classmate to leave but told J.P. to remain in the building.

Later, a parking lot security person, Dennis Huey, saw J.P. walk from the school building with a female student. Huey drove up next to the two students and asked them where they

were going and why they were outside. They responded that they needed to get some things out of J.P.'s truck. Huey followed them to the truck and observed them until they reentered the building. J.P. testified at the disciplinary hearing that he went directly to his truck from the school building and that Huey watched him walk to the truck, get his wallet and sweatshirt, and immediately return to school.

J.P. and the female student returned through the front doors of the school at 9:46 a.m., and Bishop asked why they had been outside. J.P. took his wallet from his back pocket and said he had to go out and get it. The students said Huey had given them permission to leave the building. However, when Bishop asked Huey whether he gave J.P. permission to leave the building, Huey stated that he had not.

Around 9:50 a.m., Bishop radioed Harry Grimminger, an assistant principal, and reported the incident. Grimminger became suspicious and decided to investigate. A school security guard escorted J.P. to Grimminger's office, and J.P. spoke with Grimminger alone. Even when challenged by Grimminger, J.P. continued to claim he had permission to leave the building.

Grimminger then decided to search J.P.'s person and his truck. He told J.P. to empty his pockets and searched his backpack. J.P. removed his cellular telephone, keys, and wallet and put them on Grimminger's desk. Grimminger did not find any contraband. He returned J.P.'s wallet and cellular telephone, but told J.P. his truck would be searched. When J.P. said his father did not want the truck to be searched, Grimminger responded that J.P.'s father would not make that decision. At Grimminger's request, a school resource officer then joined Grimminger and J.P.

When Grimminger and J.P. reached the truck, J.P. stood in front of the driver's side door and refused to allow the search, but eventually, he moved away from the door. It is clear he did not give his consent to the search, which took about 10 minutes. Grimminger looked under and behind the seats, in the glove box, and in a compartment behind the front seat console. In the console, Grimminger found "a small drug pipe and zigzag papers." In the compartment in back of the console, he

found another drug pipe. He also found cigarettes and lighters in the truck. Once he had completed his search of the truck, he and J.P. returned to the school building. Grimminger searched the two students who were with J.P. earlier, but he found no drug-related contraband.

School Discipline Proceedings

J.P. and his father were informed by letter dated August 19, 2010, that he had been recommended for suspension but could request a hearing. J.P.'s father requested a hearing, and a hearing examiner was appointed. J.P. was charged with violating §§ III.A. and VI.F. of the district standards for student conduct, which were contained in the "Millard West High School 2010-2011 Student Handbook" (Student Handbook). Section III.A. prohibited "[p]ossession or use of an illegal narcotic drug, controlled substance . . . or possession or use of drug paraphernalia." Student Handbook at 47 (§ III. Violations Against Public Health and Safety). Violation of this section required a 19-day suspension if the violation occurred on school grounds, though the suspension could be reduced in certain circumstances. § III.A.1.a. Legal authorities were required to be contacted. § III.A.1.c. In general, sanctions for conduct off school grounds required a citation or admission by the student to a violation of a particular subsection of the Student Handbook. § III.A.2.a. "'Citation' shall mean a summons to appear in court issued by a law enforcement officer." Student Handbook at 58 (§ IX. Definitions).

"On school grounds" was defined as "on District property, in a vehicle owned, leased, or contracted by the District being used for a school purpose or in a vehicle being driven for a school purpose by a school employee or his or her designee, or at a school-sponsored activity or athletic event." *Id.*, § IX.Q. at 59.

Section VI.F. prohibited "[d]isruptive [b]ehavior," which was defined as "[b]ehavior or possession of any item that materially interferes with or substantially disrupts class work, school activities, or the educational process." Student Handbook at 54 (§ VI. Violations Against School Administration).

On August 24, 2010, the hearing officer found that J.P. had committed the charged offenses and that a 19-day suspension was appropriate. He determined that "[t]echnically, the search of the [truck] by the assistant principal was beyond school jurisdiction, since the school boundary, in this situation, ended at the curb." However, the hearing officer found that the search was not simply justified, but required, based on the truck's proximity to the school and the school's obligation to protect the learning environment.

He concluded that the Student Handbook extended school jurisdiction to "'any other place where the governing law permits . . . discipline . . . for prohibited conduct'" and that the truck, on a curb "immediately adjacent" to the school, was "'any other place.'" Section IX.V. of the Student Handbook defined school jurisdiction as

> on District property, in a vehicle owned, leased, or contracted by the District being used for a school purpose or in a vehicle being driven for a school purpose by a school employee or his or her designee, or at a school-sponsored activity or athletic event, or any other place where the governing law permits the District to discipline students for prohibited conduct.

Id. at 60 (§ IX. Definitions).

The director of pupil services reviewed the hearing officer's decision. On August 27, 2010, he upheld the suspension, and J.P.'s father requested an appeal. Before the September 29 hearing, J.P. completed his 19-day suspension. He returned to school on September 15. He subsequently asked a committee of the board of education of Millard Public Schools (Board) to remove the suspension from his record. The committee upheld the suspension and did not expunge the suspension from J.P.'s record.

District Court Decision

Through his father, J.P. brought an action in the district court for Douglas County under the Student Discipline Act, § 79-254 et seq. The petition alleged, summarized and restated, that the decision of the Board should be reversed because (1) the decision was based on evidence found during

a search that violated J.P.'s rights under the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution; (2) the decision was arbitrary and capricious; and (3) J.P. was charged with a violation for conduct occurring on school grounds when the truck was parked off school grounds.

The district court initially addressed whether the issue was moot because J.P. had already completed his 19-day suspension. It concluded that because J.P. claimed he was innocent of the violations charged and the suspension would be part of his permanent record, he was entitled to have the suspension reviewed on appeal and that, therefore, the issue was not moot.

In addressing the constitutionality of the search of J.P.'s truck, the district court discussed *T.L.O.* It determined that the repeated emphasis on activity occurring on school grounds distinguished *T.L.O.* from the present case, because J.P.'s truck was searched while parked off school grounds.

The district court proceeded to apply traditional Fourth Amendment jurisprudence. It noted that, generally, searches without a warrant are unreasonable under the Fourth Amendment. J.P. did not consent to the search, and Grimminger had no reason to believe contraband or evidence of a crime would be found in J.P.'s truck. There was no indication that J.P. was in possession of drugs or weapons, and school officials had not witnessed J.P. commit any illegal acts.

It recognized that Grimminger's claim that "[J.P.] skipped a class, left the school building without permission, and lied to school officials" allowed Grimminger to search J.P.'s person and belongings out of concern for school safety. However, it concluded that because no contraband was found in the search of J.P.'s person and belongings, Grimminger lacked probable cause to expand the search to the truck. The court concluded the search of J.P.'s truck violated the Fourth Amendment. It reversed the decision of the Board and ordered the offenses and the 19-day suspension removed from J.P.'s school record. The defendants, Millard Public Schools, the Board, and various school officials (collectively the District), appealed. Pursuant to our statutory authority to regulate the dockets of the appellate

courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

The District assigns, summarized and restated, that the district court erred in (1) determining that the search violated J.P.'s Fourth Amendment rights and (2) reversing the decision of the Board.

ANALYSIS

Background

[5,6] The Fourth Amendment's prohibition against unreasonable searches and seizures generally requires a law enforcement officer to have probable cause to conduct a warrantless search without consent. See *State v. Borst*, 281 Neb. 217, 221, 795 N.W.2d 262, 267 (2011) ("warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications"). Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

[7-10] But in *T.L.O.*, the U.S. Supreme Court relaxed the Fourth Amendment's reasonableness standard for school searches to balance students' legitimate privacy interests with "the substantial need of teachers and administrators for freedom to maintain order in the schools." 469 U.S. at 341. There is a two-part test for determining the reasonableness of school searches. First, the search must be justified at its inception. Second, the search must be reasonably related in its scope to the circumstances which justified the interference in the first place. *Id.*

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student

> has violated or is violating either the law or the rules of the school.

T.L.O., 469 U.S. at 341-42. Reasonable grounds for a search exist when school officials reasonably believe that there is a moderate chance of discovering evidence of wrongdoing. See *Safford Unified School Dist. #1 v. Redding*, 557 U.S. 364, 129 S. Ct. 2633, 174 L. Ed. 2d 354 (2009). A search is permissible in its scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 342.

Authority to Search

The District contends that the court erred in applying a probable cause standard to Grimminger's search of J.P.'s truck. It argues that the court should have applied the reasonable suspicion standard for school searches because a probable cause standard will unnecessarily tie its hands. J.P. asserts that the court correctly applied the probable cause standard and that even under a reasonable suspicion standard for school searches, the search violated his Fourth Amendment rights.

In our consideration of the reasonableness of the search, we examine the authority of school officials to search J.P.'s truck. The district court's determination that school officials lacked probable cause to search the truck implies that school personnel had the authority to search the truck if they had probable cause. The question is whether the school officials had the authority to conduct a search of J.P.'s truck when it was across from the school on a public street.

[11] The District is granted its powers by statute. "Every duly organized school district shall be a body corporate and possess all the usual powers of a corporation for public purposes . . . ." Neb. Rev. Stat. § 79-405 (Reissue 2008). A school district is a creature of statute and possesses no other powers other than those granted by the Legislature. *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997). The Student Discipline Act sets out the permissible disciplinary actions that schools can take against students. And it authorizes disciplinary actions against students for conduct

that occurs on school property, in school vehicles, or at school-sponsored activities.

Section 79-267 describes student conduct that

> shall constitute grounds for long-term suspension, expulsion, or mandatory reassignment, subject to the procedural provisions of the Student Discipline Act, *when such activity occurs on school grounds, in a vehicle owned, leased, or contracted by a school being used for a school purpose or in a vehicle being driven for a school purpose by a school employee or by his or her designee, or at a school-sponsored activity or athletic event*.

(Emphasis supplied.) That conduct includes "[e]ngaging in the unlawful possession . . . of a controlled substance or an imitation controlled substance . . . ." § 79-267(6). Section 79-267 sets the limits of a school's authority to discipline students for unlawfully possessing a controlled substance. A student may be expelled for unlawful possession of a controlled substance on school grounds, in a vehicle owned by the school and used for a school purpose by a school employee or their designee, or at a school-sponsored activity or athletic event.

School officials are given no specific statutory authorization to conduct searches. Such authority is implied by the provisions of the Student Discipline Act, which grants school officials the authority to discipline students. School personnel "may take actions regarding student behavior, other than those specifically provided in the Student Discipline Act which are reasonably necessary to . . . further school purposes, or prevent interference with the educational process." § 79-258. But because a school's authority to search is implied by its authority to discipline students to maintain order, its authority to search is also limited by its authority to discipline.

We recognized that many courts, including the Nebraska Court of Appeals, have expanded *T.L.O.*'s reasonable suspicion standard to a school's search of a student's vehicle parked on school grounds. See, e.g., *Bundick v. Bay City Independent School Dist.*, 140 F. Supp. 2d 735 (S.D. Texas 2001); *Anders ex rel. Anders v. Fort Wayne Commu. Schools*, 124 F. Supp. 2d 618 (N.D. Ind. 2000); *In re Interest of Michael R.*, 11 Neb. App. 903, 662 N.W.2d 632 (2003); *State v. Best*, 403 N.J.

Super. 428, 959 A.2d 243 (2008), *affirmed* 201 N.J. 100, 987 A.2d 605 (2010); *State v. Slattery*, 56 Wash. App. 820, 787 P.2d 932 (1990); *State v. Schloegel*, 319 Wis. 2d 741, 769 N.W.2d 130 (Wis. App. 2009).

The District also cites to federal cases extending the *T.L.O.* standard to school searches conducted while a student was attending a school-sponsored class or activity that was held off campus. See, *Shade v. City of Farmington, Minnesota*, 309 F.3d 1054 (8th Cir. 2002); *Hassan v. Lubbock Independent School Dist.*, 55 F.3d 1075 (5th Cir. 1995); *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987); *Rhodes v. Guarricino*, 54 F. Supp. 2d 186 (S.D.N.Y. 1999).

But none of these cases, nor any that we have found, recognize a right of school officials to conduct off-campus searches of a student's person or property which are unrelated to school-sponsored activities. To the contrary, courts have held that school officials lack authority to conduct such searches.

In *Spencer v. Omaha Pub. Sch. Dist.*, 252 Neb. 750, 566 N.W.2d 757 (1997), we stated that any action taken by a school board must be through either an express or an implied power conferred by legislative grant. An administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Id.*

In *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 488, 623 N.W.2d 672, 676 (2001), this court stated: "We have long acknowledged that school boards are creatures of statute, and their powers are limited. . . . Any action taken by a school board must be through either an express or an implied power conferred by legislative grant."

Here, the District claims its school officials have the authority to search if they reasonably suspect the student has engaged in conduct that is subject to discipline by the school. It argues that driving to and from school is a school-sponsored activity and is a nexus to the school.

We find that the District's claim of authority is too broad and exceeds the authority given to school personnel pursuant to the Student Discipline Act. In interpreting its state law, one court that has addressed the authority to search off school grounds has rejected a nexus to the school argument.

For example, in *Com. v. Williams*, 749 A.2d 957 (Pa. Super. 2000), a Pennsylvania appellate court rejected the argument that the district makes here: i.e., that a school has the authority to search a student's vehicle parked off campus because the student's conduct in driving to and from school has a nexus to controlling student conduct on campus. There, Pennsylvania law authorized school districts to obtain school police officers. Unless they were specifically granted the same powers as city police, they were limited to issuing summary citations, detaining students until law enforcement arrived, and enforcing good order on school property.

While off school grounds, an officer encountered three students in a car. They made a U-turn, gave the officer "the proverbial finger," and drove off. *Id.* at 958. As expected, the officer confronted the students in the vehicle, which was now parked off school property. After they exited the vehicle, the officer observed a sawed-off shotgun in plain view. He called the city police, but before police arrived, he and other school officers searched the vehicle and found three revolvers in addition to the shotgun. The trial court found the school officer was acting within the scope of his duties even if the incident occurred off school property.

The appellate court disagreed. It concluded that the governing statute "jurisdictionally limit[ed] the School Police Officer's authority to 'in school buildings, on school buses and on school grounds.'" *Id.* at 961. The court declined to expand that authority to include any action that had a nexus to enforcing good order on school grounds. It reasoned that if the search were upheld, city police could obtain the fruits of a search conducted without a warrant or exigent circumstances. It further reasoned that a "'nexus to the school under the totality of the circumstances of the incident' inquiry" would be "nebulous, and would certainly lead to confusion," both for school officials deciding if they had authority to search off school grounds and for courts in deciding if school officials had authority to search and whether a sufficient nexus was present. *Id.* at 962.

Similarly, in *State v. Crystal B.*, 130 N.M. 336, 24 P.3d 771 (N.M. App. 2000), a New Mexico appellate court reversed a

trial court's refusal to suppress evidence obtained by an assistant principal when he had seized a student (appellant) and her belongings off campus. A student informant told the assistant principal that appellant and two other girls had left campus and were smoking cigarettes in an alley. The principal found the girls and ordered them into his car. At his office, a search of appellant's bookbag disclosed a marijuana roach, and appellant was suspended. Appellant was charged on a delinquency petition for possession of marijuana, and the trial court denied her motion to suppress. In reversing, the New Mexico appellate court concluded the reasonableness standard for school searches applied "only in furtherance of the school's education-related goals; that is in a situation where the student is on school property or while the student is under control of the school." *Id*. at 339, 24 P.3d at 774, citing *In re Josue T.*, 128 N.M. 56, 989 P.2d 431 (N.M. App. 1999).

We agree. In *T.L.O.*, the Court recognized that students have a legitimate expectation of privacy, which must be weighed against the interest of teachers and administrators in maintaining discipline within the classroom and on the grounds of the school. The school-needs standard of reasonableness was intended to "ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *T.L.O.*, 469 U.S. at 343. It was not intended to overlap the authority of law enforcement officers to enforce order on the public streets.

We agree with the Pennsylvania Superior Court that adopting a "nexus to the school" standard would lead to confusing inquiries whether the student's off-campus conduct was sufficiently connected to maintaining school order. And it is not hard to see how a nebulous nexus standard could lead to school officials' gathering evidence for the police even when police officers could not have conducted the search. See *Com. v. Williams*, 749 A.2d 957 (Pa. Super. 2000). Under the district's argument, school officials could search a student's vehicle parked off campus whenever a student had driven the vehicle to attend school and the school had a reasonable

suspicion that a search would show the student had violated the law.

Thus, we believe that under § 76-267(6), the Legislature has wisely limited a school district's jurisdiction to discipline students for possession of a controlled substance to conduct occurring (1) on school property, (2) at a school-sponsored activity or athletic event, or (3) in a vehicle owned or used by the school for a school purpose. We conclude that the school district did not have implied authority to search a student's vehicle parked off campus.

Search of J.P.'s Truck

The District argues that *T.L.O.* permits the search of J.P.'s truck, because contraband kept in a student vehicle off school grounds still threatens the school environment and it is part of the duty of the District to maintain order and discipline in the school environment. It argues that because the initial search of J.P.'s person and backpack in Grimminger's office was authorized, it could search J.P.'s truck. It claims that because J.P. had keys to the truck, drove to school, broke school rules by accessing his truck, and lied to school officials, Grimminger had a reasonable basis to search J.P.'s truck. But the authority to search the truck is not expanded, because officials could search J.P. at the school.

In support of its claim that it could search J.P.'s truck, the District relies upon *In re Interest of Michael R.*, 11 Neb. App. 903, 662 N.W.2d 632 (2003). That case is readily distinguishable. The School Discipline Act specifically recognizes the District's authority to discipline this conduct, which occurred on school grounds. See § 79-267. Michael R.'s vehicle was located in the school parking lot on school grounds. A school official overheard slang indicating that Michael might possess illegal drugs. Michael admitted to speaking to another student about "'big bags,'" a slang term for marijuana. 11 Neb. App. at 905, 662 N.W.2d at 634. Because none of these facts are present in the case at bar, the precedential value of *In re Interest of Michael R.* is limited.

The District also relies on cases in which the search of a student vehicle was found to be reasonable after a personal search

of the student disclosed no contraband. See, *Bundick v. Bay City Independent School Dist.*, 140 F. Supp. 2d 735 (S.D. Tex. 2001); *Anders ex rel. Anders v. Fort Wayne Commu. Schools*, 124 F. Supp. 2d 618 (N.D. Ind. 2000); *State v. Best*, 403 N.J. Super. 428, 959 A.2d 243 (2008), *affirmed* 201 N.J. 100, 987 A.2d 605 (2010); *State v. Slattery*, 56 Wash. App. 820, 787 P.2d 932 (1990).

In each case, there was a link between the student and contraband allowing school officials to reasonably suspect that the student possessed contraband. More important, in each case, the student's vehicle was on school grounds when it was searched.

In the case at bar, the district court did not directly address school personnel's authority to search J.P.'s truck. Instead, it found that "Grimminger had no reason to believe contraband or evidence of a crime would be found in [J.P.'s] vehicle" and, therefore, lacked probable cause to search J.P.'s truck. Requiring that school officials have probable cause to search the truck implies that the District had authority to search if it had probable cause.

Within its claim that it had authority to search J.P.'s truck, the District argues that the location of J.P.'s truck is irrelevant because the search of his person and the truck were both reasonable. We disagree. In order for the search to be reasonable, the District must have the authority to search.

[12] Implicit within the *T.L.O.* school-needs exception, requiring only reasonable suspicion for the search of students on school grounds, is that school officials have the authority to conduct the search. It is important to point out that *T.L.O.* did not extend the District's authority to search to a student's vehicle parked off school grounds. See Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception*, 66 N.Y.U. L. Rev. 1077 (1991). The expansion of the authority to search beyond the search of a student's person has evolved from various court decisions applying the two-step analysis set forth in *T.L.O.* These courts have extended *T.L.O.*'s reasonable suspicion standard to searches of student vehicles parked on school grounds. See Annot., 31 A.L.R.5th 229 (1995), and cases cited

therein. And Nebraska law does not expressly authorize such a search.

The District cites to federal cases from the Fifth, Sixth, and Eighth Circuits as well as a New York federal district court which have recognized that the *T.L.O.* special-needs exception is not dependent solely on location. See, *Shade v. City of Farmington, Minnesota*, 309 F.3d 1054 (8th Cir. 2002); *Hassan v. Lubbock Independent School Dist.*, 55 F.3d 1075 (5th Cir. 1995); *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987); *Rhodes v. Guarricino*, 54 F. Supp. 2d 186 (S.D.N.Y. 1999). We find that those cases are distinguishable on their facts.

In those cases, the school remained in control of the student and was responsible for the safety of the student during the event. The courts did not address the specific question whether school officials had the authority to search a student vehicle parked off school grounds.

Courts have supported the logical inference that school grounds include the school parking lot. See *State v. Schloegel*, 319 Wis. 2d 741, 769 N.W.2d 130 (Wis. App. 2009), citing Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 Urb. Law. 117 (1993). They have recognized the authority of school personnel to search a student's vehicle parked in the school parking lot. See *State v. Best*, 403 N.J. Super. 428, 959 A.2d 243 (2008), *affirmed* 201 N.J. 100, 987 A.2d 605 (2010).

The District also cites examples in which courts have upheld actions by school officials on school-sponsored trips conducted off school grounds, specifically *Hassan v. Lubbock Independent School Dist., supra*, and *Webb v. McCullough, supra*. But these cases leave unanswered whether the District's authority to search a student's vehicle extends to searches of off-school-grounds vehicles.

As further support of its claim that it could search J.P.'s truck, the District relies upon *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007). We find that case readily distinguishable. The Court held that the student could not claim to be outside the school's authority. The student could not stand in the midst of his fellow students, during

school hours, at a school-sanctioned activity, and claim he was not at school.

The District argues *Morse* establishes that "students cannot claim to be beyond the reach of school authorities simply by stepping off school property . . . when such conduct occurs during school hours and is intimately connected with the school's educational environment." Brief for appellants at 25. It claims that J.P.'s truck was associated with a school-sponsored event because J.P. drove the truck to school, he was attending school under Nebraska's mandatory education law, and the search occurred during school hours.

We disagree. J.P.'s driving to school and parking off school grounds was not a school-sponsored event, nor was it associated with a school-sponsored event. *Morse v. Frederick, supra*, and *Shade v. City of Farmington, Minnesota, supra*, described school-sponsored events. At those school-sponsored events, the school created an environment for students, gave them permission to enter that environment, and took responsibility for their safety in that environment.

But under the facts of this case, parking a vehicle off school property was not a school-sponsored event. The District did not sanction J.P.'s drive to school, give him permission to travel to school in his truck, or take responsibility for his safety while he drove to school. Driving to school and parking off school property is readily distinguishable from the activities in those cases in which courts have allowed school officials to search off-school premises based upon a school-sponsored activity or event. The cases relied upon by the District are distinguishable because they all involved school officials exercising control of the students during a school-sponsored activity or event. In contrast, in *Com. v. Williams*, 749 A.2d 957 (Pa. Super. 2000), which involved the search of an off-school-grounds vehicle, the Pennsylvania Superior Court held that the search was invalid because school officials lacked statutory authority to search.

The District argues a school official's ability to search is based on the relationship between the school official and the student, rather than the location of the search. But this relationship must be examined under the facts of the case. The relevant

conduct (having contraband in the truck) occurred off school grounds. And there was no event that would tie J.P.'s conduct to a school activity. How or when the contraband was placed in the truck is unknown. There was no evidence that the contraband was ever on school property.

[13] On school grounds, school officials have authority to regulate and control student conduct. See, § 79-262; *State v. Best*, 403 N.J. Super. 428, 959 A.2d 243 (2008), *affirmed* 201 N.J. 100, 987 A.2d 605 (2010). They have the authority to discipline students for certain conduct occurring on school grounds. § 79-267. But school officials are not given express or implied authority to search on a public street, at a student's home, or on other premises off school grounds, including an off-school-grounds vehicle that is not associated with a school-sponsored event or activity.

School officials and police officers both enforce order as agents of the state. School officials regulate and control student conduct on school grounds and at school-sponsored events and activities occurring off school grounds. But school officials are not given greater authority than police officers to regulate student activity outside the school context. The court in *Com. v. Williams, supra*, refused to expand statutory authority of school officers in a way that would allow such officers to gather evidence for police that the police could not gather for themselves.

[14] The District urges us to apply an analysis similar to the nexus to the school analysis rejected by *Williams*, arguing it may search an off-school-grounds vehicle because the vehicle is sufficiently connected to the school environment. We decline to adopt this analysis. Permitting school officials to search a student's vehicle based upon a nexus to the school because a student drove the vehicle to school is overly broad and would lead to confusing inquiries into whether vehicles parked off school grounds were sufficiently connected to the school.

The District cannot create the authority to search where none is given by statute. Section 79-267 makes a clear distinction between conduct that occurs on school grounds and conduct that occurs off school grounds. The Student Handbook

recognizes the distinction between "on school grounds" and "off school grounds." But, these definitions do not extend the authority of school officials to search J.P.'s truck parked on 176th Avenue.

Lack of authority to search off school grounds does not leave school officials without a means to deal with student conduct off school grounds. Section 79-293 requires the principal or principal's designee to notify appropriate law enforcement authorities of a student's conduct or act described in § 79-267 which the principal or designee suspects is a violation of the Nebraska Criminal Code. School officials who report an alleged violation are not civilly or criminally liable for reporting such conduct unless the report is false or made with negligent disregard for the truth or falsity of the report. See § 79-293. Succinctly stated, if school officials suspect a student's conduct occurring off school grounds is a violation of the Nebraska Criminal Code, they are required to notify the appropriate law enforcement authorities.

Grimminger's personal search of J.P. disclosed no contraband, and no one claimed to have seen J.P. with contraband or overheard him talking about possessing or selling drugs. School officials had not received a student report or other information that J.P. possessed or was distributing contraband. The contraband was found in J.P.'s truck, which was not in the school environment or under the dominion and control of the school. In short, there is no evidence J.P. possessed drugs or drug paraphernalia on school grounds.

For the search of J.P.'s truck to be reasonable, the District must have authority to conduct the search. The District's authority is based upon the Student Discipline Act, which does not authorize the District to search J.P.'s truck off school grounds unassociated with a school activity or athletic event.

Contrary to the suggestion of the dissent, our recognition of this limitation upon the authority of school officials will not permit students to "violate important school rules without consequence" or "hide" from school authority, nor will it impair the ability of school officials to maintain a safe environment. The facts of this case demonstrate the fallacy of the dissent's suggested "parade of horribles." As the dissent

acknowledges, the misconduct at issue was J.P.'s act of leaving and then reentering the school building with another student without permission to do so. School officials dealt with that conduct by confronting J.P. when he reentered the building and determining that he had no contraband on his person or in his backpack. At that point, school officials had all the information they needed to impose discipline on J.P. for his unauthorized absence. And they knew that J.P. was not endangering the school environment by bringing contraband on campus.

The Legislature has not deputized school officials to act beyond the boundaries of their authority. If they still suspected that there was contraband in J.P.'s truck parked off campus, despite finding none on his person, they should have notified law enforcement authorities, who are trained in the principles of when and how to conduct a lawful warrantless vehicle search.

And *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007), relied upon by the dissent, has no application. In that case, no search took place. At a school-sponsored event, the student was disciplined for displaying a banner promoting drug use. The student could not stand in the midst of his fellow students during school hours at a school-sanctioned activity and claim he was not subject to school rules.

Remedy

The district court ordered that the offenses of possession of drug paraphernalia and disruptive behavior be removed from J.P.'s record. We review the district court's decision to determine whether it conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Busch v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 623 N.W.2d 672 (2001). The search of J.P.'s truck was invalid, and therefore, the only question remaining is whether the district court's decision ordering removal of the offenses from J.P.'s record was an appropriate remedy.

"The court may . . . reverse or modify the decision [of the board] if the substantial rights of the petitioner may have

been prejudiced because the board's decision is . . . [i]n violation of constitutional provisions." § 79-291(2)(a). The Student Discipline Act specifically grants the district court the power to reverse the Board's decision if J.P.'s constitutional rights were violated. See *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997). The district court exercised that power and reversed the decision of the Board.

Here, however, the search of J.P.'s truck was unauthorized and violated J.P.'s Fourth Amendment right to be free from unreasonable searches. J.P. had served his suspension by the time the district court issued its ruling. Removing the offenses from J.P.'s record was the only meaningful relief the court could grant. The court's decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Remaining Arguments

The district court ordered that the suspension for alleged disruptive behavior be removed from J.P.'s record. The disruptive behavior charge and suspension were based upon the intervention required by school officials and were not dependent on the search of the truck.

[15] The District claims the court erred in reversing the suspension upheld by the Board. The District has not argued the issue of suspension based upon J.P.'s disruptive behavior on appeal. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). Therefore, we do not consider whether the district court erred in ordering the offense of disruptive behavior removed from J.P.'s school record.

Based on our resolution of this case, we do not address the parties' remaining assignments of error.

CONCLUSION

For the reasons set forth herein, we affirm the district court's order which reversed the decision of the Board and ordered the suspension and offenses expunged from J.P.'s school record.

Affirmed.

HEAVICAN, C.J., dissenting.

I respectfully dissent from the majority's finding that the school district did not have authority to search J.P.'s vehicle, which was parked directly adjacent to the school. I would find that the school had the statutory authority to discipline J.P., that such disciplinary authority included the power to search both J.P.'s person and his vehicle, and that the search should be measured by the reasonable suspicion standard set out in *New Jersey v. T. L. O.*[1] I would remand this cause to the district court to determine if the school had reasonable suspicion to search J.P.'s vehicle.

FACTUAL BACKGROUND

On the day of the search at issue, J.P. arrived at school around 7:45 a.m. and went to his first class. Afterward, he tried to leave the building. Lori Bishop, a hall monitor, saw J.P. and a classmate approach the front door. Bishop asked where they were going, and the classmate said he had to get a book. Bishop allowed the classmate to leave but told J.P. to remain in the building.

Later, Dennis Huey, a parking lot security staff member, saw J.P. walk from the school building with a female student. Huey drove up next to the two students and asked them where they were going and why they were outside. They responded that they needed to get some things out of J.P.'s vehicle. Huey followed them to the vehicle and observed them until they reentered the building.

J.P. and the female student returned through the front doors of the school at 9:46 a.m., and Bishop asked why they had been outside. J.P. took his wallet from his back pocket and said he had to go out and get it. The students said Huey had given them permission to leave the building. However, when Bishop asked Huey whether he gave J.P. permission to leave the building, Huey replied that he had not.

Following these events, a school official searched J.P.'s person and extended the search to his vehicle. The search of the vehicle revealed that J.P. had marijuana in his vehicle.

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[1] *New Jersey v. T. L. O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

NEW JERSEY v. T. L. O.

The U.S. Supreme Court discussed school-related searches in the case of *T. L. O.*,[2] in which the Court fashioned the standard for assessing the legality of searches conducted by public school officials. Of course, the Fourth Amendment's prohibition against unreasonable searches and seizures generally requires a law enforcement officer to have probable cause to conduct a warrantless search without consent.[3] But in *T. L. O.*, the Court relaxed the Fourth Amendment's search-and-seizure standard for school searches in an effort to balance a student's legitimate privacy interests with the substantial need of teachers and administrators to maintain order in the schools.[4]

T. L. O. established a two-part test for determining the reasonableness of school searches. First, the search must be justified at its inception. Second, the search must be reasonably related in its scope, considering all of the circumstances which justified the interference in the first place.[5] The Court noted:

> Under ordinary circumstances, a search of a student by a teacher or school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.[6]

After establishing this school search exception to the Fourth Amendment in *T. L. O.*, the Court applied the exception to the facts of the case, and ultimately upheld the constitutionality of an assistant principal's search of a female student's purse which took place inside the school building during regular school hours.

In *T. L. O.*, the Court did not discuss the boundaries of when and where a school official may utilize his or her authority to

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[2] *Id.*

[3] *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

[4] *T. L. O.*, *supra* note 1.

[5] *Id.*

[6] *Id.*, 469 U.S. at 341-42.

conduct searches without a warrant or without having probable cause to conduct the search. The Court provided only that the reasonableness of such searches should be determined after considering all of the circumstances of the search.

The case before this court raises the question of the parameters for the use of this authority by school officials. The Nebraska Court of Appeals held in *In re Interest of Michael R.*[7] that pursuant to the U.S. Supreme Court's holding in *T. L. O.*, a school official may search a student's vehicle parked in the school parking lot. But no Nebraska court has addressed whether a school official may search a car parked adjacent to the school. This case presents that question.

MORSE v. FREDERICK

Relevant to the question presented in this case is the Court's decision in *Morse v. Frederick*.[8] Though dealing with the First Amendment, not the Fourth Amendment, the U.S. Supreme Court discussed a school's authority to discipline students. In that case, students at a school-sanctioned and school-supervised event displayed a banner stating "'BONG HiTS 4 JESUS.'"[9] The students had been allowed to gather just off campus during normal school hours to watch the Olympic Torch Relay. The event was sanctioned and supervised by the school. The school principal approved the event as a class trip or social event, and school district rules stated that district conduct rules applied to such events.

The principal interpreted the banner as promoting illegal drug use. When she directed the students to take down the banner, one of the students who had brought the banner to the event refused to do so and was suspended.

The Court held on these facts that students could not claim to be beyond the reach of school authorities simply by stepping off school property when such conduct occurs during school hours and is intimately connected with the school's educational

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[7] *In re Interest of Michael R.*, 11 Neb. App. 903, 662 N.W.2d 632 (2003).

[8] *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007).

[9] *Id.*, 551 U.S. at 397.

environment.[10] The Court concluded that the student in *Morse* could not stand in the midst of his fellow students, during school hours, at a school-sanctioned activity, and claim he was not at school or subject to school rules.[11]

FEDERAL COURT JURISPRUDENCE: SCHOOL SEARCHES AT SCHOOL-SPONSORED EVENTS OR ACTIVITIES

Although the U.S. Supreme Court has not specifically addressed whether the *T. L. O.* school search exception to the Fourth Amendment is dependent on a school official's or a student's location, various federal courts have further interpreted *T. L. O.* to conclude that a school official has authority to search a student outside of the traditional boundaries of school property.

As the majority acknowledged, the Fifth, Sixth, and Eighth Circuits, as well as a New York federal district court, have recognized that the school search exception to the Fourth Amendment is not dependent on the location of a school official or student.[12] These courts note that at events such as local school-sponsored field trips or school-sponsored out-of-state travel, school officials maintain the authority to search students pursuant to the reasonable suspicion standard of *T. L. O.*

During such events, it is incumbent upon school officials to watchfully maintain student safety in unstructured environments different from the school buildings.[13] At events that take place off school campus, but are school sponsored, the school remains in control of the students and is responsible for the safety of the students during the event.[14] Thus, at the events described in these cases, the school officials retained

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[10] *Id.*

[11] *Morse, supra* note 8.

[12] *Shade v. City of Farmington, Minnesota*, 309 F.3d 1054 (8th Cir. 2002); *Hassan v. Lubbock Independent School Dist.*, 55 F.3d 1075 (5th Cir. 1995); *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987); *Rhodes v. Guarricino*, 54 F. Supp. 2d 186 (S.D.N.Y. 1999).

[13] *Webb, supra* note 12.

[14] *Shade, supra* note 12.

their authority to search students because they maintained their authority to discipline and protect the students.

STATUTORY AUTHORITY TO SEARCH STUDENTS IN NEBRASKA

Implicit within the school search exception to the Fourth Amendment that requires only reasonable suspicion for the search of students is that school officials have the authority to conduct the search. The majority correctly analyzed where this authority comes from in Nebraska. Pursuant to Neb. Rev. Stat. § 79-267 (Cum. Supp. 2012), the Legislature circumscribed a school district's jurisdiction to discipline students. Section 79-267 describes student conduct that

> shall constitute grounds for long-term suspension, expulsion, or mandatory reassignment, subject to the procedural provisions of the Student Discipline Act, when such activity occurs on school grounds, in a vehicle owned, leased, or contracted by a school being used for a school purpose or in a vehicle being driven for a school purpose by a school employee or by his or her designee, or at a school-sponsored activity or athletic event.

Thus, a school district may discipline students for conduct occurring (1) on school property, (2) at a school-sponsored activity or athletic event, or (3) in a vehicle owned or used by the school for a school purpose.[15] School officials are given no specific statutory authorization to conduct searches under this statutory scheme. Rather, such authorization is understood to be granted pursuant to the provisions of the Student Discipline Act, which provides school officials with the authority to discipline students.[16]

APPLICATION OF § 79-267 TO THIS CASE

The majority found that the conduct in this case did not occur "on school property" and that thus, the school did not have the authority to search J.P.'s vehicle. It alternatively found

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[15] § 79-267.

[16] *Id.*

that the conduct did not occur "at a school-sponsored activity" wherein the school was exercising control of J.P. Thus, the majority found inapplicable federal case law jurisprudence extending school officials' authority to search students at off-campus, school-sponsored activities.

I disagree with the majority's conclusions and instead find that this is both a school property and a school activity case and that the school had authority to search J.P.'s vehicle. Most of the pertinent suspicious activity in this case occurred on school property. During regular school hours, students at the high school do not have permission to leave the school. The "Millard West High School 2010-2011 Student Handbook" provides, under the "Attendance Procedures" section at page 6, as follows:

> Students Leaving the Building During the School Day
>
> Any student leaving the building during the school day must be in possession of an authorized pass issued by the attendance office. Students will exit through the front door and display the pass for a security staff person when leaving.
>
> Any student choosing to leave the building without a pass from the attendance office will be subject to disciplinary action.

Here, while on school property during regular school hours, J.P. lied to school officials on multiple occasions and J.P. exited the school without authorization and reentered the school on two separate occasions. During all relevant and material times, the school maintained control over J.P. As J.P. exited the school without authorization to access his vehicle and then returned to the school, the school was responsible for J.P.'s safety and maintained the ability to discipline J.P. This is so because J.P.'s conduct occurred at the ultimate school-sponsored activity—attending school during regular school hours.

The school's responsibility for J.P. was the same as if he was at a school-sponsored activity or event held off campus.[17] Also, at all times during the suspicious conduct of this case,

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[17] See cases cited *supra* note 12.

the school remained not only in control of J.P. but also the rest of the student population affected by his conduct.[18]

This reading of the statute is compatible with the balanced approach to student discipline set out in *T. L. O.* and the federal case law jurisprudence allowing searches of students off school property while students remain under the protection and disciplinary authority of school officials. Moreover, as J.P.'s conduct occurred during school hours and was intimately connected with the school's educational environment, it is logical to conclude the school maintained its authority to discipline J.P. during his conduct.[19]

Although we think of school-sponsored activities as being basketball games, speech contests, or field trips held off school grounds, it is not a strained reading of § 79-267 to suggest that the classes and activities occurring during a regular school day are "school-sponsored activit[ies]." The majority's suggestion that "J.P.'s driving to school and parking off school grounds was not a school-sponsored event, nor was it associated with a school-sponsored event," ignores the obvious. Although it is true that J.P. drove the vehicle to school and parked it off school grounds, this is not the activity which placed J.P. under the school's control, protection, and authority. The activities of emphasis here are (1) J.P.'s act of exiting the school without permission, (2) J.P.'s decision to bring another student to his vehicle, and (3) J.P.'s reentrance into the school. It is undeniable that J.P.'s conduct occurred during regular school hours and was subject to the rules of regular school day attendance and that J.P. associated his vehicle with his conduct.

When considering the school's authority to search vehicles parked in the school parking lot versus vehicles parked off campus, location may be a determinative factor regarding student's privacy rights.[20] In this case, however, J.P. associated his vehicle with his unauthorized exit and reentrance into the

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[18] *Id.*

[19] *Morse, supra* note 8.

[20] See, e.g., *State v. Crystal B.*, 130 N.M. 336, 24 P.3d 771 (N.M. App. 2000); *Com. v. Williams*, 749 A.2d 957 (Pa. Super. 2000).

school. In turn, J.P. changed the status of privacy rights he had in his off-campus vehicle by associating it with a school-sponsored activity. As such, the fact that J.P.'s vehicle was parked adjacent to the school, rather than in the parking lot, is not the material factor in determining whether the school had authority to search the vehicle.

As the suspect conduct in this case occurred both on school property and at a school-sponsored activity, I would find that the school had authority to regulate and control J.P.'s conduct and to discipline J.P for such conduct. Thus, the school had authority to search J.P. and J.P.'s vehicle, which vehicle was inherently associated with J.P.'s conduct of exiting and reentering the school building without permission.

PUBLIC POLICY

It is a fundamental understanding and expectation of parents and citizens that schools will provide a safe environment for students to learn and develop into productive adults. In today's world, that especially means that parents and citizens expect schools will be drug free and gun-violence free. The School Disciplinary Act includes specific references of the duties of schools in regard to guns and in regard to providing a safe environment for students.[21]

The majority's opinion allows students to violate important school rules without consequence. It permits students to hide from authority simply by parking their vehicles across the street. And finally, the majority opinion lessens school officials' ability to provide students with a safe, structured environment during regular school hours.

CONCLUSION

For all of the above reasons, I would remand this cause to the district court to measure the search of J.P.'s vehicle using the reasonable suspicion standard set out in *T. L. O.*[22]

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[21] §§ 79-262 and 79-263.

[22] *T. L. O.*, *supra* note 1.

IN RE INVOLUNTARY DISSOLUTION OF WILES BROS., INC., A NEBRASKA CORPORATION. BRUCE E. WILES AND ANNETTE WILES, HUSBAND AND WIFE, APPELLANTS, V. WILES BROS., INC., A NEBRASKA CORPORATION, AND MARVIN C. WILES, APPELLEES.

830 N.W.2d 474

Filed May 17, 2013. No. S-12-769.

1. **Standing: Jurisdiction.** The defect of standing is a defect of subject matter jurisdiction.
2. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Appeal and Error.** Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) is subject to de novo review.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **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.
5. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
6. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes that are appropriately resolved through the judicial process.
7. **Standing.** Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.
8. ____. With respect to standing, the focus is on the party, not the claim itself.
9. **Standing: Jurisdiction.** Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's behalf.
10. **Standing.** To have standing, a litigant must assert the litigant's own rights and interests.
11. **Corporations: Statutes.** The statutory remedy of dissolution and liquidation is so drastic that it must be invoked with extreme caution.
12. ____: ____. Corporations are creatures of statute, and they may be dissolved only according to statute.
13. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.
14. **Statutes: Legislature: Presumptions.** The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and

> it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.

Appeal from the District Court for Cass County: DANIEL E. BRYAN, JR., Judge. Affirmed.

David A. Domina and Jason B. Bottlinger, of Domina Law Group, P.C., L.L.O., for appellants.

Brian J. Brislen, Daniel J. Waters, and Gage R. Cobb, of Lamson, Dugan & Murray, L.L.P., for appellee Wiles Bros., Inc.

Michael B. Lustgarten and Britt Carlson, Senior Certified Law Student, of Lustgarten & Roberts, P.C., L.L.O., for appellee Marvin C. Wiles.

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

MILLER-LERMAN, J.

NATURE OF CASE

Husband and wife, Bruce E. Wiles and Annette Wiles, the appellants, filed a complaint in the district court for Cass County against Wiles Bros., Inc. (WBI), and Bruce's brother Marvin C. Wiles, the appellees, seeking the judicial dissolution of WBI. Bruce and Annette founded their complaint on Neb. Rev. Stat. § 21-20,162(2)(a) (Reissue 2012), which authorizes a shareholder to bring a proceeding to dissolve a corporation. The district court concluded that Bruce was not a shareholder of WBI and that Bruce and Annette lacked standing to seek the judicial dissolution of WBI. The district court granted WBI's and Marvin's motions to dismiss the complaint. Bruce and Annette appeal. Given the undisputed facts, we determine that for purposes of dissolution of a corporation, Bruce is not a statutory shareholder who can bring an action for judicial dissolution. In addition, given the controlling facts, the district court did not abuse its discretion when it did not receive certain exhibits into evidence. Accordingly, we affirm the order of the district court which dismissed the complaint.

STATEMENT OF FACTS

Formed in 1978, WBI is a Nebraska corporation that conducts farming operations. Bruce, Marvin, their brother Glenn Wiles, and their father were the directors of WBI at all relevant times. Bruce, Marvin, and Glenn were also the officers of WBI at all relevant times. Prior to 1999, Bruce, Marvin, Glenn, and other members of the Wiles family owned shares of WBI stock.

In 1999, the shareholders of WBI formed Wiles Enterprises, Ltd. (WE), a Nebraska limited partnership. Bruce, Marvin, Glenn, and their father became the general partners of WE. The WBI shareholders transferred their ownership of WBI stock to WE, and WE was named as the sole registered shareholder of all WBI stock. With regard to the potential existence of other shareholders, there is no nominee certificate on file with WBI.

On February 17, 2012, Bruce and Annette filed a complaint against WBI and Marvin for the judicial dissolution of WBI. Bruce and Annette relied on § 21-20,162(2)(a), which authorizes a shareholder to bring a proceeding to dissolve a corporation. Bruce and Annette alleged that WBI's assets were being misapplied or wasted and that a majority of the directors of WBI acted, were acting, or would act in a manner that is illegal, oppressive, or fraudulent. They further alleged that Bruce was a shareholder of WBI and that Annette had an inchoate interest in Bruce's shares and was joined for that reason alone.

WBI and Marvin each moved to dismiss the complaint, citing to Neb. Ct. R. Pldg. § 6-1112(b)(6) (Rule 12(b)(6)) (failure to state claim). WBI and Marvin asserted that Bruce was not a shareholder of WBI and therefore lacked standing to seek the judicial dissolution of WBI. Because a defect in standing is a defect in subject matter jurisdiction, the district court treated the motion as a motion to dismiss for lack of subject matter jurisdiction brought under Neb. Ct. R. Pldg. § 6-1112(b)(1) (Rule 12(b)(1)) (lack of subject matter jurisdiction), for which receipt of evidence pertaining to the motion is permitted. See *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007) (stating that

evidentiary hearing is permitted where Rule 12(b)(1) motion raises factual challenge).

A hearing was held on the motions to dismiss. At the hearing, WBI offered one exhibit, which was the affidavit of WBI's attorney. The exhibit was received without objection. Marvin did not submit any further evidence on his motion to dismiss. Bruce and Annette offered 26 exhibits. The district court reserved ruling on these exhibits subject to WBI's written objections, which were to be submitted to the court after the hearing. Bruce and Annette's exhibits generally included affidavits, interrogatory answers, responses to requests for admissions, and business records.

In a subsequent order, the district court entered rulings regarding Bruce and Annette's submitted exhibits. The district court received 5 exhibits and excluded 21 exhibits. Some of the excluded exhibits were WBI's and Marvin's interrogatory answers and responses to requests for admissions and WBI's and WE's federal tax returns.

In its order filed July 30, 2012, the district court determined that Bruce and Annette lacked standing to bring the action and granted the motions to dismiss the complaint. In its decision, the district court stated that in order for Bruce and Annette to bring an action for involuntary judicial dissolution of WBI pursuant to § 21-20,162(2)(a), Bruce must be a shareholder of WBI. The district court noted that Neb. Rev. Stat. § 21-2014(21) (Reissue 2012) defines "shareholder" as the "person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation."

The district court stated that the undisputed evidence was that all the shares of WBI were registered in the name of WE and that none of the shares were registered in the name of Bruce or Annette. The district court noted that there was no evidence submitted that a nominee certificate was on file with WBI; on appeal, the parties agree that there is no nominee certificate on file. Although Bruce and Annette did not meet the statutory definition of a shareholder entitled to seek judicial dissolution, the district court nevertheless considered

whether Bruce and Annette were beneficial owners of shares of WBI under some equitable principle which would accord them standing.

Bruce and Annette generally contended that the district court should adopt a "substance over form" approach. Bruce and Annette urged the district court to determine that WE is a shell used only for estate purposes and that the original owners of the WBI stock who transferred the stock into WE are the "beneficial owners" of WBI shares, notwithstanding the fact that there is no nominee certificate on file with WBI. The district court determined that in order for it to find that Bruce and Annette had standing, it "would have to ignore the strict clear language *of* [§] *21-20,162* and [§] *21-2014(21)*." The district court rejected Bruce and Annette's argument and determined that Bruce and Annette were not beneficial owners of WBI stock for purposes of these statutes and that thus, Bruce and Annette did not have standing to seek a judicial dissolution. The district court granted WBI's and Marvin's motions to dismiss.

Bruce and Annette appeal.

ASSIGNMENTS OF ERROR

Bruce and Annette generally claim that the district court erred when it determined that they lacked standing and dismissed the complaint. They specifically claim that the district court erred when it (1) declined to ignore the statutory definition of shareholder in § 21-2014(21) and (2) refused to receive evidence consisting of interrogatory answers and responses to requests for admission of WBI and Marvin (exhibits 19, 20, 22, and 23) and WBI's and WE's federal tax returns (exhibits 24, 25, 26, and 27).

STANDARDS OF REVIEW

[1,2] The defect of standing is a defect of subject matter jurisdiction. *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009). Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) is subject to de novo review. *Id.*

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *United States Cold Storage v. City of La Vista, ante* p. 579, 831 N.W.2d 23 (2013).

[4,5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011). A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

ANALYSIS

Bruce and Annette claim that the district court erred when it concluded that they lacked standing to bring this action to judicially dissolve WBI and granted the motions to dismiss filed by WBI and Marvin. The court based its ruling on its correct understanding that the motions were based on Rule 12(b)(1), lack of subject matter jurisdiction. We conclude that the district court did not err when it determined that Bruce and Annette do not have standing because Bruce is not a shareholder under the statutory definition, and thus cannot bring an action for judicial dissolution based on § 21-20,162(2)(a).

[6-10] Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes that are appropriately resolved through the judicial process. *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012). Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011). The focus is on the party, not the claim itself. *Id.* Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's

behalf. *Butler Cty. Sch. Dist. v. Freeholder Petitioners, supra*; *Latham v. Schwerdtfeger, supra*. To have standing, a litigant must assert the litigant's own rights and interests. *Id.* A defect of standing is a defect of subject matter jurisdiction. *State ex rel. Reed v. State, supra*.

This case is governed by the Business Corporation Act, Neb. Rev. Stat. § 21-2001 et seq. (Reissue 2012). Under § 21-20,162(2)(a) of the Business Corporation Act, a shareholder as defined in § 21-2014(21) has standing to bring a proceeding for the judicial dissolution of a corporation. Section 21-20,162(2)(a) provides that the court may dissolve a corporation

> [i]n a proceeding by a shareholder if it is established that:
>
> (i) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally because of the deadlock;
>
> (ii) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;
>
> (iii) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired; or
>
> (iv) The corporate assets are being misapplied or wasted.

To proceed under § 21-20,162(2)(a), the plaintiff must be a "shareholder." Indeed, we have noted that in a judicial dissolution proceeding pursuant to § 21-20,162, "the court's jurisdiction to dissolve the corporation is premised upon the petitioner's being a shareholder of the corporation." *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 393, 618 N.W.2d 145, 152 (2000). For purposes of the Business Corporation Act, § 21-2014 defines terms including "shareholder." For the purposes of the act, unless otherwise specified, a shareholder is

defined in § 21-2014(21) as the "person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation." We apply the statutory definition of "shareholder" found in § 21-2014(21) to this case brought as a proceeding for judicial dissolution.

[11,12] It has been widely observed that courts are reluctant to apply the drastic remedy of statutory dissolution, especially in proceedings by a shareholder. 16A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 8080 (perm. ed., rev. vol. 2012). In Nebraska, we have previously noted that the statutory remedy of dissolution and liquidation is so drastic that it must be invoked with extreme caution. See, *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001); *Hockenberger v. Curry*, 191 Neb. 404, 215 N.W.2d 627 (1974). See, also, 16A Fletcher, *supra*, § 8035 at 94 (stating "judicial dissolution of a corporation is viewed by the courts as an extreme remedy that should be granted with great caution and only when the facts of the case clearly warrant it"). We have also stated that corporations are creatures of statute, and they may be dissolved only according to statute. *Floral Lawns Memorial Gardens Assn. v. Becker*, 284 Neb. 532, 822 N.W.2d 692 (2012). Given the foregoing principles, statutory provisions for judicial dissolution of corporations are strictly construed. See 16A Fletcher, *supra*, § 8035.

To pursue the remedy of judicial dissolution of the corporation under § 21-20,162(2)(a), Bruce must strictly fit the statutory definition of a "shareholder" as defined in § 21-2014(21). It is undisputed that Bruce and Annette are not shareholders of record. It is also undisputed that there is no nominee certificate on file with WBI. Given these undisputed facts, Bruce does not meet the definition of a shareholder under § 21-2014(21), and therefore Bruce and Annette lack standing under § 21-20,162(2)(a) to bring an action for the judicial dissolution of WBI.

Bruce and Annette acknowledge that WE is the registered shareholder of all the shares of WBI and that there is no nominee certificate on file which might reflect beneficial

ownership. Notwithstanding these facts, Bruce and Annette bring to our attention the fact that § 21-2014(21) accords shareholder status to the "beneficial owners" of corporate shares, and they assert that under equitable principles, they should be allowed to proceed with their action for judicial dissolution because Bruce is a beneficial owner of shares of WBI. They contend that WE is a shell organization used only for estate purposes and that because Bruce and the other original owners of the shares of WBI transferred their shares into WE, they are the beneficial owners of the shares as contemplated under § 21-2014(21).

We reject Bruce and Annette's equitable argument that Bruce is a beneficial owner of shares of WBI under § 21-2014(21). To the contrary, under this provision, an individual claiming to be a "shareholder" is a beneficial shareholder only "to the extent of the rights granted by a nominee certificate on file with a corporation." Because there is no nominee certificate on file with WBI, Bruce is not a beneficial shareholder under the plain language of § 21-2014(21).

[13,14] As we consider the definition of shareholder, we note that it is the Legislature's function through the enactment of statutes to declare what is the law and public policy. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008). We have observed that the "Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation." *Id.* at 694, 757 N.W.2d at 201-02. In this instance, the inclusion of the phrase "to the extent of the rights granted by a nominee certificate on file with a corporation" in § 21-2014(21) indicates that the Legislature granted standing to "shareholders" who were not merely "beneficial owners," but only such beneficial owners as are reflected in the books and records of the corporation by virtue of a nominee certificate on file. Because Bruce is not a shareholder under § 21-2014(21), the district court did not err when it determined that Bruce and Annette lacked standing to bring this action under § 21-20,162(2)(a) for the judicial dissolution of WBI.

We note for completeness that in certain contexts, the Business Corporation Act provides for different definitions of the term "shareholder." See Neb. Rev. Stat. § 21-2070(2) (Reissue 2012) (defining shareholder for purpose of derivative proceedings). See, also, Neb. Rev. Stat. § 21-20,183 (Reissue 2012) (defining shareholder for purpose of inspecting corporate records by shareholders). In these contexts, the specifically provided definition of "shareholder" applies rather than the generally applied statutory definition found in § 21-2014(21). We make no comment whether Bruce and Annette qualify as "shareholders" in these or other contexts. In the instant case, as we have determined, the statutory definition of a shareholder found at § 21-2014(21) applies to this action for judicial dissolution brought by those individuals claiming to be shareholders.

In their second assignment of error, Bruce and Annette claim that the district court erred when it did not receive into evidence WBI's and Marvin's interrogatory answers and responses to requests for admission (exhibits 19, 20, 22, and 23) and WBI's and WE's federal tax returns (exhibits 24, 25, 26, and 27). Bruce and Annette assert such evidence is relevant to support their arguments, inter alia, that WE is an inactive entity and that Bruce is actually a beneficial owner of shares of WBI.

A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009). Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008), provides that "[a]ll relevant evidence is admissible" and that "[e]vidence which is not relevant is not admissible." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), provides that "[r]elevant evidence means evidence having 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."

In this case, the fact that is of consequence is whether Bruce qualifies as a shareholder under the definition provided for

in § 21-2014(21). For evidence to be relevant to the standing issue in this case, the evidence must show whether shares of WBI were registered in Bruce's name or whether Bruce was a beneficial owner of shares to the extent of rights granted by a nominee certificate on file with WBI. The exhibits at issue do not contain information regarding these facts. Thus, we determine that the district court did not abuse its discretion when it did not receive these exhibits into evidence.

CONCLUSION

The district court did not err when it determined that Bruce and Annette lacked standing to bring this action for the judicial dissolution of WBI. The district court did not abuse its discretion when it did not admit exhibits 19, 20, and 22 through 27 into evidence. Accordingly, we affirm the order of the district court which dismissed the complaint.

AFFIRMED.

McCORMACK, J., participating on briefs.
WRIGHT, J., not participating.

CYNTHIA RAE CANIGLIA, APPELLANT, V.
JASON ARTHUR CANIGLIA, APPELLEE.
830 N.W.2d 207

Filed May 17, 2013. No. S-12-794.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
3. **Parent and Child: Child Support.** Support of one's children is a fundamental obligation which takes precedence over almost everything else.
4. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
5. **Modification of Decree: Minors.** A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed.
6. **Statutes.** Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.

7. ____. All statutes relating to the same subject are considered as parts of a homogeneous system, and later statutes are considered as supplementary to preceding enactments.
8. **Modification of Decree: Child Support: Proof.** A party's responsibility under Neb. Rev. Stat. § 42-364.17 (Reissue 2008) for reasonable and necessary medical, dental, and eye care; medical reimbursements; daycare; extracurricular activity; education; and other extraordinary expenses of the child to be made in the future may be modified if the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.
9. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give great weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Margaret M. Zarbano for appellant.

Kristina B. Murphree and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellee.

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

CASSEL, J.

INTRODUCTION

In this appeal from an order modifying a dissolution decree's financial arrangements for a child, the primary question is whether Nebraska law allows the allocation of a child's extraordinary expenses, based on Neb. Rev. Stat. § 42-364.17 (Reissue 2008), to be modified. Because extraordinary expenses are merely an incident of the parents' responsibility to support their child, these expenses can be modified. And considering the modifications ordered by the district court in light of the evidence, we find no abuse of discretion. We affirm the modification of the parties' dissolution decree.

BACKGROUND

The marriage of Cynthia Rae Caniglia and Jason Arthur Caniglia was dissolved by consent decree in June 2010. This decree required Jason to pay child support for the parties' minor child in the amount of $722 per month and to be

responsible for half of "extra curricular [sic] activities, education . . . and other extraordinary expenses of the minor child," pursuant to § 42-364.17. A subsequent order nunc pro tunc ordered each party to pay 50 percent of work-related childcare expenses.

After entry of the divorce decree, Jason became unemployed. He filed a petition to modify the decree, requesting, among other things, modification of child support and of his responsibility for extraordinary expenses and childcare expenses.

Following a hearing on Jason's petition for modification, the district court entered a modification order finding that there had been a material change in circumstances warranting a change in child support and some of Jason's other financial obligations to the child. The court reduced Jason's child support obligation to $375 per month and his responsibility for work-related daycare expenses to 36 percent. The court left Jason responsible for 50 percent of extracurricular activities, education, and other extraordinary expenses, but modified the provision addressing these expenses "to the extent that the custodial parent may not incur extra expenses not currently being paid, without the approval of the non-custodial parent."

Cynthia timely appeals. Pursuant to statutory authority, we moved the case to our docket.[1]

ASSIGNMENTS OF ERROR

Cynthia alleges, reordered and restated, that the district court erred in (1) modifying the extraordinary expenses provision arising under § 42-364.17, (2) determining that there was a change in circumstances warranting a reduction in Jason's child support and childcare contribution percentage, and (3) modifying the decree of dissolution to require Jason to contribute only to expenses of which he approves.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[2]

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

[2] *United States Cold Storage v. City of La Vista, ante* p. 579, 831 N.W.2d 23 (2013).

[2] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.[3] The same standard applies to the modification of child support.[4]

ANALYSIS

Modification of Extraordinary Expenses Provision

We begin by quoting the pertinent language of § 42-364.17, which states that "[a] decree of dissolution . . . shall incorporate financial arrangements for each party's responsibility for reasonable and necessary medical, dental, and eye care, medical reimbursements, day care, extracurricular activity, education, and other extraordinary expenses of the child and calculation of child support obligations."

Cynthia rather tersely argues that modification of child support is addressed in Neb. Rev. Stat. § 42-364(6) (Cum. Supp. 2012) and Neb. Ct. R. § 4-217 and that "[t]here is nothing in statute that allows for modification of the provisions under §42-364.17."[5] Although she does not amplify the connection, we understand her argument on brief as asserting that neither § 42-364(6) nor § 4-217 expressly refers to extraordinary expenses or § 42-364.17. At oral argument, Cynthia simply adhered to a straightforward argument that expenses allocated under § 42-364.17 are not subject to modification.

[3,4] Contrary to Cynthia's argument on brief, the language of § 42-364(6) is broad enough to encompass extraordinary expenses of a child. The first sentence of § 42-364(6) permits "[m]odification proceedings relating to *support*, custody, parenting time, visitation, other access, or removal of children from the jurisdiction . . . ." (Emphasis supplied.) Cynthia provides no authority for the proposition that "support" under § 42-364(6) does not include the items listed in § 42-364.17.

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[3] *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009).

[4] See *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

[5] Brief for appellant at 9.

Support of one's children is a fundamental obligation which takes precedence over almost everything else.[6] Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[7] "Support" is commonly defined as "a means of livelihood, sustenance, or existence."[8] The common meaning of "support" clearly includes all of the incidents of a child's needs. Of course, one incident of "support" is the regular monthly payment established under the guidelines.[9] But the guidelines recognize other incidents of "support" that are wholly[10] or partly[11] outside of the monthly installment. The expenses stated in § 42-364.17—including, among others, extracurricular, education, and other extraordinary expenses—merely represent other incidents of "support" to be addressed in a dissolution decree.

The omission of the words "extraordinary expenses" in § 4-217 provides no support for Cynthia's argument. Section 4-217 merely provides a formula permitting a rebuttable presumption of a material change in circumstances. Elsewhere, the child support guidelines contemplate that extraordinary or unusual expenses will be addressed outside the guidelines' framework.[12]

[5] Under our case law, provisions of a divorce decree relating to children can always be modified. As we have stated, "A decree in a divorce case, insofar as minor children are concerned, is never final in the sense that it cannot be changed."[13] Consistent with this principle, Nebraska courts have ordered

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[6] *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[7] *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

[8] Webster's Third New International Dictionary of the English Language, Unabridged 2297 (1993).

[9] See Neb. Ct. R. § 4-207.

[10] See Neb. Ct. R. § 4-214.

[11] See Neb. Ct. R. § 4-215(B) (rev. 2011).

[12] See Neb. Ct. R. § 4-203 (rev. 2011).

[13] *Wulff v. Wulff*, 243 Neb. 616, 619, 500 N.W.2d 845, 849 (1993).

modification of child custody,[14] child support,[15] visitation,[16] supervised parenting time,[17] responsibility for childcare expenses,[18] and uninsured medical expenses.[19]

[6,7] Extraordinary expenses are no different than these other, clearly modifiable issues relating to children. Although § 42-364.17 was enacted much later than the original statutory scheme governing child support,[20] § 42-364.17 is now part of this same statutory scheme. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.[21] All statutes relating to the same subject are considered as parts of a homogeneous system, and later statutes are considered as supplementary to preceding enactments.[22] Considering that Neb. Rev. Stat. §§ 42-364 to 42-364.16 (Reissue 2008 & Cum. Supp. 2012) explicitly govern child support, which is undoubtedly modifiable,[23] we see no reason why provisions based on § 42-364.17 should not be treated as a subset of child support and thus be subject to modification as well.

An appellate court will not look beyond a statute to determine legislative intent when the words are plain, direct, or unambiguous.[24] The words of § 42-364.17 are plain, direct, and unambiguous—the financial matters it governs are part of the

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[14] See, e.g., *Capaldi v. Capaldi*, 235 Neb. 892, 457 N.W.2d 821 (1990); *Schnell v. Schnell*, 12 Neb. App. 321, 673 N.W.2d 578 (2003).

[15] See, e.g., *Incontro v. Jacobs, supra* note 4.

[16] See, e.g., *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997).

[17] See, e.g., *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001).

[18] See, e.g., *Mace v. Mace*, 9 Neb. App. 270, 610 N.W.2d 436 (2000).

[19] See, e.g., *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

[20] Compare Neb. Rev. Stat. § 42-353 (Cum. Supp. 2012).

[21] *Mahnke v. State*, 276 Neb. 57, 751 N.W.2d 635 (2008).

[22] *Id.*

[23] See *Incontro v. Jacobs, supra* note 4.

[24] *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013).

support that parents must provide to their children. Thus, we do not consider the legislative history of § 42-364.17.

[8] We view § 42-364.17 in the context of the statutory scheme governing child support. In this context, it is clear that there is no persuasive reason for treating extraordinary expenses any differently from other issues relating to children. Thus, we hold that a party's responsibility under § 42-364.17 for reasonable and necessary medical, dental, and eye care; medical reimbursements; daycare; extracurricular activity; education; and other extraordinary expenses of the child to be made in the future may be modified if the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification.

Our conclusion is consistent with the approach taken by other states. We have found no state that prohibits the modification of extraordinary expenses provisions in divorce decrees. To the contrary, numerous states actively allow such modification.[25] In the interest of brevity, we have cited only a small but representative selection of court opinions upholding the modification of extraordinary expenses provisions.

The district court did not err in determining that it had the power to modify the extraordinary expenses provision of the parties' divorce decree.

Change in Circumstances

Cynthia also assigns error to the district court's determination that there was a change in circumstances warranting reduction in Jason's child support and childcare contribution. Essentially, she argues that he was at fault for his unemployment and should not have been granted a reduction in his financial obligations to the minor child.

At the time of the divorce decree, Jason was employed by Kellogg USA Inc. (Kellogg). Prior to entry of the decree, he

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[25] See, e.g., *Chauvin v. Chauvin*, 69 So. 3d 1192 (La. App. 2011); *Pratt v. Ferber*, 335 S.W.3d 90 (Mo. App. 2011); *Schorr v. Schorr*, 96 A.D.3d 583, 948 N.Y.S.2d 14 (2012); *Kaplan v. Bugalla*, 188 S.W.3d 632 (Tenn. 2006); *Bjelland v. Bjelland*, Nos. 2008-CA-000523-MR, 2008-CA-001852-MR, 2010 WL 2573879 (Ky. App. June 25, 2010) (unpublished opinion).

was convicted of third degree domestic assault and sentenced to 130 days in jail. So as not to lose his job, he served much of his jail sentence on the weekends. He began doing so prior to entry of the decree. In September 2010, Jason took a 2-month leave from work at the advice of his psychiatrist, during which time he addressed his mental health issues and alcoholism and completed his jail sentence. Kellogg did not reinstate Jason after his leave, and in February 2011, it terminated his benefits.

Based on the evidence presented before the district court, there are two plausible explanations why Kellogg did not recall Jason and ultimately terminated his employment. We review the evidence in support of each explanation in turn.

Cynthia focuses on the evidence that termination of Jason's employment was caused by his conviction for third degree domestic assault and his absenteeism. She cites solely to Jason's testimony at an earlier hearing—over 1 year prior to the modification hearing—during which he stated that Kellogg "terminated" his employment "[b]ecause [he] had to serve some jail time, and it was an attendance policy out at Kellogg's, they have a strict attendance policy and [he] went over the attendance points."

At the modification hearing, however, there was no testimony that Jason's employment was terminated due to his conviction or alleged "absenteeism." Much to the contrary, Jason denied losing his job for employee misconduct, absenteeism, or other fault of his own and stated that he believed his employment was terminated due to his mental health issues. As for Jason's leave from work, his psychiatrist testified that she gave him a medical release from work for 2 months. According to Jason, because of this medical release, he believed he had medical authorization to be absent from work. Consistent with this belief, once Jason's condition improved and he received authorization to return to work, he immediately informed Kellogg that he could return to work on October 25, 2010. Yet Kellogg did not reinstate him. From that date through January 2011, Kellogg neither recalled Jason to work nor gave notice that his employment was terminated. In fact, Jason testified

that Kellogg records showed his status during those months as varying from "suspended indefinitely" to "illness with medical documentation." It was not until February 11 that Jason received notice that his employment had been terminated, at which time he found alternative employment. In Jason's new employment, his gross yearly income was $25,971, as compared to $44,344 at the time of the divorce decree.

[9] Although the evidence adduced at the modification hearing supports two conflicting explanations for Jason's loss of employment, we give weight to the version accepted by the district court. Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give great weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.[26] In the order of modification, the district court explicitly accepted the evidence that Jason's employment was not terminated due to fault of his own, noting that "the loss of [Jason's] job at Kellogg's was not willful on his part." The district court did not abuse its discretion in concluding that Jason was not responsible for his loss of employment and consequent reduction in income. Likewise, the district court did not abuse its discretion in finding a change in circumstances sufficient to reduce Jason's child support and childcare contribution percentage. This assignment of error lacks merit.

Modification of Custodial Parent's Decisionmaking Authority

In Cynthia's final assignment of error, she argues that the district court abused its discretion in modifying the divorce decree so that Jason would be responsible for a portion of extraordinary expenses, including extracurricular activities, only if he agreed to the expenses. She contends that this deprives her of a custodial parent's right and responsibility "to make decisions regarding the welfare of the minor child including extracurricular activities."[27] It is important to note that the

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[26] *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004).

[27] Brief for appellant at 12.

court's change applied only to "extra expenses not currently being paid." Thus, the court's order did not affect ongoing expenses already in place.

At the modification hearing, Jason presented evidence that Cynthia incurred educational and extracurricular expenses for the minor child "just to make everything as expensive as possible for [him]." While Cynthia denied doing so, it was within the province of the district court to assess her credibility and to accept or reject this testimony. By modifying the extraordinary expenses provision so as to require Jason's approval for additional expenses, the court obviously adopted the view that Cynthia had used her decisionmaking authority in a vindictive manner. We accord weight to the district court's acceptance of this evidence.

In light of the evidence that Cynthia incurred extraordinary expenses solely to create financial strain for Jason, we cannot say that it was an abuse of discretion to modify the extraordinary expenses provision to require Jason's approval. We affirm the modification of the divorce decree as ordered by the district court.

CONCLUSION

In the absence of any persuasive reason why extraordinary expenses should be treated differently than any other issue regarding children, we hold that a party's responsibility under § 42-364.17 for reasonable and necessary medical, dental, and eye care; medical reimbursements; daycare; extracurricular activity; education; and other extraordinary expenses of the child to be made in the future may be modified if the applicant proves that a material change in circumstances has occurred since entry of the decree or a previous modification. Giving weight to the district court's acceptance of the evidence that Jason's employment was not terminated due to his own misconduct and that Cynthia incurred extracurricular expenses so as to financially burden Jason, we find no abuse of discretion in the determination that there was a change in circumstances warranting modification of the parties' divorce decree. We affirm the order of modification.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALMA RAMIREZ GONZALEZ, APPELLANT.
830 N.W.2d 504

Filed May 24, 2013. No. S-10-1097.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. On motion for rehearing, reargument granted. See 283 Neb. 1, 807 N.W.2d 759 (2012), for original opinion. Original opinion withdrawn. Appeal dismissed.

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

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

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

PER CURIAM.

INTRODUCTION

In 2008, Alma Ramirez Gonzalez pled no contest to a charge of fraudulently obtaining public assistance benefits. Before accepting her plea, the district court advised her of the possible immigration consequences of her conviction.[1] Gonzalez was later sentenced to 5 years' probation. On July 14, 2010, she filed a motion to withdraw her plea, alleging she received ineffective assistance of counsel because her counsel had not told her that her conviction would result in automatic deportation. We conclude that Gonzalez' sole remedy was to file for postconviction relief pursuant to the Nebraska Postconviction Act[2] and that because she did not do so, both the district court and this court lack jurisdiction over her motion. We therefore dismiss Gonzalez' appeal.

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[1] See Neb. Rev. Stat. § 29-1819.02 (Reissue 2008).

[2] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2008 & Cum. Supp. 2012).

BACKGROUND

In December 2006, Gonzalez was detained by the federal government for living in the United States illegally. Deportation proceedings were commenced. The deportation proceedings were ongoing as of August 31, 2010.

In 2007, Gonzalez was arrested for fraudulently obtaining public assistance benefits in an amount greater than $500, a Class IV felony punishable by up to 5 years' imprisonment, a $10,000 fine, or both.[3] She was charged with this offense by an information filed on January 2, 2008.

On March 20, 2008, pursuant to a plea agreement, Gonzalez withdrew her initial plea of not guilty and pled no contest to the charge. In return for her no contest plea, the State agreed to recommend a term of probation. Before accepting Gonzalez' plea, the district court advised her that conviction of the offense could result in her deportation or a denial of her naturalization request. Gonzalez indicated that she understood these possible consequences. The court found Gonzalez guilty and subsequently sentenced her to a term of 5 years' probation. As a result of the conviction, Gonzalez became ineligible to remain in the United States.

On July 14, 2010, Gonzalez filed a "Motion to Withdraw Plea and Vacate Judgment" in the district court on the ground that she had received ineffective assistance of counsel. The motion was based on the U.S. Supreme Court's decision in *Padilla v. Kentucky*,[4] which was issued on March 31, 2010. *Padilla* held that defense counsel had a duty to advise clients of the risk of deportation arising from a guilty plea.

The district court held an evidentiary hearing on Gonzalez' motion. Gonzalez testified that she had not discussed the immigration consequences of her plea and conviction with her criminal trial counsel prior to the time she entered her plea. She testified that her trial counsel knew at the time she

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[3] See Neb. Rev. Stat. §§ 28-105(1) (Reissue 2008) and 68-1017(2) (Reissue 2003).

[4] *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

entered her plea that Gonzalez was not a U.S. citizen, but that he did not know of her ongoing immigration proceedings. Gonzalez testified that if she had known of the immigration consequences of her conviction, she "would have looked for another solution" and not entered a plea. But Gonzalez also admitted that while the immigration consequences of a conviction were very important to her, she never asked her trial counsel whether there could be such consequences. Gonzalez testified that the immigration rights advisement given to her by the district court was done "very rapidly through the interpreter" and that she "didn't understand much." Gonzalez testified that she did not learn of the immigration consequences of her conviction until she consulted with her immigration attorney approximately 5 months before the hearing on her motion to withdraw.

The district court denied Gonzalez' motion to withdraw her plea. The court generally agreed that trial counsel performed deficiently in not advising Gonzalez that she would be deported as a result of her plea and conviction. But it concluded that Gonzalez was not entitled to relief, because she had failed to demonstrate that her counsel's deficient performance prejudiced her.[5] In other words, Gonzalez had not demonstrated a reasonable probability that she would not have entered the plea had counsel properly informed her of the immigration consequences of her plea and conviction. Gonzalez appealed.

After hearing oral arguments, this court issued an opinion on January 13, 2012.[6] In it, we concluded that Gonzalez' motion to withdraw her plea was procedurally proper based on common-law principles and that this court thus had jurisdiction over Gonzalez' appeal. We also assumed that the holding in *Padilla* would apply retroactively to Gonzalez. However, we concluded that Gonzalez failed to show that she would suffer a manifest injustice if she was unable to withdraw her

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[5] See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[6] See *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012).

plea, and accordingly, we affirmed the decision of the district court.

After our opinion was released, the State filed a motion for rehearing. The motion questioned our conclusion that Gonzalez' motion was procedurally proper—specifically, our conclusion that there is a common-law procedure under which a defendant whose conviction has become final may bring a motion to withdraw a plea. We granted the State's motion for rehearing.

After the motion for rehearing was granted and while the appeal was again pending before this court, the U.S. Supreme Court decided *Chaidez v. U.S.*[7] *Chaidez* held that the holding in *Padilla* requiring defense counsel to advise clients of the risk of deportation arising from a guilty plea did not apply retroactively to a defendant whose conviction became final before *Padilla* was decided. Based on *Chaidez*, it is now clear that Gonzalez' ineffective assistance of counsel claim is entirely without merit.[8]

But we granted rehearing in this case not to determine the merits of her claim, but instead to determine whether it was procedurally proper. We now withdraw the opinion issued on January 13, 2012, and substitute this opinion. We conclude that although a very limited common-law procedure exists, it was unavailable to Gonzalez because she could have raised an ineffective assistance of counsel claim under the Nebraska Postconviction Act (hereinafter the Act).[9] We therefore conclude that the district court lacked jurisdiction to hear Gonzalez' motion and that we similarly lack jurisdiction over this appeal.

ASSIGNMENT OF ERROR

Gonzalez assigns, consolidated and restated, that the district court erred in denying her motion to withdraw her plea because she was denied the effective assistance of counsel.

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[7] *Chaidez v. U.S.*, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

[8] See *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002).

[9] §§ 29-3001 to 29-3004.

STANDARD OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.[10]

ANALYSIS

The issue presented by this appeal is whether a court has jurisdiction to consider a motion to withdraw a plea based on an allegation of ineffective assistance of counsel when the motion is filed after the underlying conviction is final. In such a case, the motion is a collateral attack upon the conviction.

There are two statutory avenues available to a defendant seeking to withdraw a plea after his or her conviction has become final. One is a purely statutory remedy, and the other is a statutory means of vindicating a constitutional right. In addition, as will be explained in more detail below, a limited common-law right to withdraw a plea also exists.

The first avenue is § 29-1819.02,[11] which requires district courts to advise defendants of the possible immigration consequences of a no contest or guilty plea and the resulting conviction before the district court can accept the plea. If the advisement prescribed by § 29-1819.02 is not given and an immigration consequence results from the conviction, § 29-1819.02 allows a convicted person to move to withdraw the plea and set aside the conviction. We have held that the motion to withdraw may be filed even if the conviction has become final so long as the defendant is still serving his or her sentence.[12] We have not yet addressed whether the motion may be filed after the sentence is served.[13] Here, the rights advisory required by § 29-1819.02 was read to Gonzalez, and thus, she does not and cannot move to withdraw her plea pursuant to § 29-1819.02.

The second statutory avenue available to a defendant seeking to withdraw a plea after his or her conviction has become

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[10] *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012).

[11] See *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

[12] *Id.*

[13] See *id.*

final is the Act. The Act is enacted to protect constitutional rights. Specifically, § 29-3001 currently provides:

> (1) A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion, in the court which imposed such sentence, stating the grounds relied upon and asking the court to vacate or set aside the sentence.

Such motion must be filed within 1 year of the triggering event.[14] Gonzalez' ineffective assistance of counsel claim is rooted in her rights under the 6th and 14th Amendments to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thus falls within the purview of § 29-3001. And Gonzalez filed her motion within 1 year of the U.S. Supreme Court's decision in *Padilla*,[15] which, as noted, was the alleged basis for her claim that her trial counsel provided constitutionally ineffective assistance by failing to advise her that she would be deported if she entered a plea and was convicted. But Gonzalez' motion to withdraw her plea was not verified as is required by § 29-3001. Nor does the motion itself suggest that it was brought under the Act.

Indeed, Gonzalez does not argue that her motion was brought pursuant to the Act. Instead, she contends that the Act was not available to her because she was not "'in custody'" within the meaning of that Act.[16] And this court has held that a prisoner is "in custody" for purposes of the Act when on paro1e[17] or when sentenced to a term of court-ordered probation,[18] as well as when serving a term of incarceration. As such, Gonzalez was "in custody" under § 29-3001 during her 5-year term of

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[14] § 29-3001(4).

[15] *Padilla, supra* note 4.

[16] Supplemental brief for appellant at 13.

[17] *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990).

[18] *Zarate, supra* note 8; *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992).

probation. Gonzalez even acknowledges in her briefs that she was still serving her sentence at the time she filed her motion to withdraw her plea.

But Gonzalez argues that she was in federal custody at the time she filed her motion to withdraw her plea and that thus, the Act was unavailable to her.[19] Assuming without deciding that a postconviction action cannot be brought during the time a defendant otherwise serving a Nebraska sentence is in federal custody, Gonzalez has neither pled nor proved that she was in federal custody for the entire 1-year period following the U.S. Supreme Court's decision in *Padilla*.[20]

We therefore conclude that on the record before us, Gonzalez has not shown that she could not have raised her ineffective assistance of counsel claim and sought to withdraw her plea under the Act. As such, we presume that the Act was available to her. As we noted above, Gonzalez did not file such an action.

The remaining question is whether a common-law procedure also authorized Gonzalez' motion to withdraw her plea after her conviction had become final. The State argues quite strenuously that there is no common-law procedure authorizing withdrawal of a plea after a conviction has become final and that our initial opinion incorrectly recognized one. In our initial opinion, we cited to nine cases holding that when a motion to withdraw a plea is filed after sentencing, withdrawal is proper only when the motion is timely and the defendant establishes by clear and convincing evidence that withdrawal is necessary to correct a manifest injustice.[21] Every one of the cited cases involved a motion to withdraw a plea that was filed after sentencing but before the judgment became final for purposes of collateral attack. We agree with the State that these cases do not support a finding that there is a common-law procedure whereby a defendant may move to withdraw a plea after the conviction has become final.

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[19] See, generally, *State v. Whitmore*, 234 Neb. 557, 452 N.W.2d 31 (1990).

[20] See § 29-3001(4).

[21] *Gonzalez, supra* note 6 (citing cases).

But we did not cite those cases for just that proposition. Indeed, in the very next sentence, we stated, "That [manifest injustice] standard applies even where a motion to withdraw a plea has been made after the sentencing court's judgment has become final."[22] We cited two cases for this proposition—*State v. Holtan*[23] and *State v. Kluge*.[24] Upon further examination, we agree that *Holtan* does not support this proposition as strongly as our original opinion might have implied, as the motion to withdraw in that case was made in the context of a remand on federal habeas review. But *Kluge* does support our stated proposition.

In *Kluge*, the motion to withdraw the guilty plea was filed after the defendant pled guilty, was sentenced to a term of incarceration, and unsuccessfully filed a direct appeal. The motion was therefore a collateral attack on his conviction. And even though a concurring opinion challenged the procedural validity of the motion,[25] we addressed it on the merits. In doing so, we cited to the American Bar Association Standards Relating to Pleas of Guilty. We noted that standard 14-2.1(b) allowed a defendant to withdraw a guilty plea "'whenever'" he or she, "'upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.'"[26] We further noted that a manifest injustice occurs, among other things, "whenever the defendant proves that he was denied the effective assistance of counsel."[27]

In addition, we have more recently alluded to a common-law procedure authorizing the withdrawal of a plea after a conviction has become final.[28] In *State v. Yos-Chiguil*,[29] the

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[22] *Id.* at 7, 807 N.W.2d at 765.

[23] *State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984).

[24] *State v. Kluge*, 198 Neb. 115, 251 N.W.2d 737 (1977), *disapproved on other grounds, State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987).

[25] *Kluge, supra* note 24 (Clinton, J., concurring).

[26] *Id.* at 118, 251 N.W.2d at 739.

[27] *Id.* at 119, 251 N.W.2d at 739.

[28] *Yos-Chiguil, supra* note 11.

[29] *Id.*

defendant pled guilty. Prior to accepting the guilty plea, the district court advised him of the immigration consequences of conviction, but did not follow the exact language of § 29-1819.02. The defendant was subsequently sentenced and then filed an unsuccessful direct appeal.

After the appeal mandate issued, the defendant filed a motion to withdraw his plea on the ground that the immigration advisement given by the district court was inadequate. The State argued that the district court lacked jurisdiction to decide the issue because we had held in *State v. Rodriguez-Torres*[30] that § 29-1819.02 did not create a procedure for setting aside a plea after a conviction based upon such plea has become final. We noted in *Yos-Chiguil* that the State's argument "both overstate[d] our holding in *Rodriguez-Torres* and overlook[ed] a critical difference between it" and *Yos-Chiguil*.[31] We explained that the issue in *Rodriguez-Torres* was whether the language of § 29-1819.02 created a statutory procedure, not whether any procedure at all existed. We expressly stated that "[b]ecause the issue was not presented to us [in *Rodriguez-Torres*,] we did not address whether a common-law remedy existed for withdrawal of the plea in that circumstance."[32]

The issue is now presented to us, and we conclude that *Kluge* and *Yos-Chiguil* recognize a common-law procedure for withdrawing a plea after a conviction has become final. Because neither of those cases explains the scope and parameters of that procedure, we do so now.

The procedure is civil, not criminal.[33] And it is available in extremely limited circumstances. The Legislature played a role in limiting those circumstances by providing that the Act "is not intended to be concurrent with any other remedy existing in the courts of the state. Any proceeding filed under the

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[30] *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

[31] *Yos-Chiguil, supra* note 11, 278 Neb. at 595, 772 N.W.2d at 578.

[32] *Id.*

[33] See, *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

provisions of sections 29-3001 to 29-3004 which states facts which if true would constitute grounds for relief under another remedy shall be dismissed with prejudice."[34] We construe this to be the Legislature's statement of intent that the Act is the primary procedure for bringing collateral attacks based upon constitutional principles. In fact, this has been the way we have interpreted the Act for the last 48 years. Thus, if a defendant has a collateral attack that could be asserted under the Act, that Act is his or her sole remedy. Only if a defendant does not and never could have asserted the basis of his or her collateral attack under the Act may he or she invoke the common-law procedure and move to withdraw a plea after the conviction has become final.

Moreover, the common-law procedure is available only when the collateral attack is based upon a constitutional principle. On at least two occasions, this court has refused to create or recognize a nonstatutory procedure whereby defendants can raise claims related to criminal cases.[35] But in doing so, we noted that the procedures at issue were not "constitutionally mandated."[36] The situation before us is different. The right Gonzalez and similarly situated defendants seek to vindicate is a right to the effective assistance of counsel, which is a right granted by the Sixth Amendment to the U.S. Constitution. When such a right is at issue and there is no other means of vindicating it, we refuse to deny a defendant due process of law.[37]

We therefore hold that there is a Nebraska common-law procedure under which a defendant may move to withdraw a plea after his or her conviction has become final. This procedure is available only when (1) the Act is not, and never was, available as a means of asserting the ground or grounds

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[34] § 29-3003.

[35] See, *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000); *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

[36] *Louthan, supra* note 35, 257 Neb. at 186, 595 N.W.2d at 925. See *El-Tabech, supra* note 35.

[37] See, *El-Tabech, supra* note 35; *Louthan, supra* note 35. See, also, *Case v. Nebraska*, 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965).

justifying withdrawing the plea and (2) a constitutional right is at issue. In sum, this common-law procedure exists to safeguard a defendant's rights in the very rare circumstance where due process principles require a forum for the vindication of a constitutional right and no other forum is provided by Nebraska law.[38]

In this case, Gonzalez was "in custody" within the meaning of the Act during her 5-year term of probation. *Padilla* was decided during this time period, and it was that decision upon which Gonzalez' ineffective assistance of counsel claim depended. There is no showing in the record that the Act was unavailable to Gonzalez during the 1-year period following *Padilla*. We therefore conclude that Gonzalez' sole remedy was to move to withdraw her plea pursuant to the Act. Because she had an opportunity to do so under that Act, the common-law procedure for withdrawing her plea was unavailable to her. We find that the district court lacked jurisdiction to consider the motion and that we lack jurisdiction over Gonzalez' appeal.

CONCLUSION

For the reasons discussed herein, we withdraw our prior opinion in *Gonzales*[39] and substitute this opinion in which we conclude that the district court lacked jurisdiction over Gonzalez' motion. We similarly lack jurisdiction over her appeal, and as such, the appeal is dismissed.

APPEAL DISMISSED.

CASSEL, J., not participating.

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[38] *Id*.

[39] *Gonzalez, supra* note 6.

STATE OF NEBRASKA, APPELLEE, V.
DARRELL E. WHITE, APPELLANT.
830 N.W.2d 215

Filed May 24, 2013. No. S-11-515.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and SIEVERS, Judges, on appeal thereto from the District Court for Sarpy County, MAX KELCH, Judge. Judgment of Court of Appeals affirmed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Mandy M. Gruhlkey for appellant.

Jon Bruning, Attorney General, and James D. Smith 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. White*, 20 Neb. App. 116, 819 N.W.2d 473 (2012), is correct. Accordingly, we affirm the decision of the Court of Appeals, which reversed the judgment of the district court and remanded the cause for a new trial.

AFFIRMED.

CASSEL, J., not participating.

GIBBS CATTLE CO., A NEBRASKA CORPORATION, APPELLEE, V. EDNA F. BIXLER ET AL., APPELLEES, AND MARGARET BIXLER AND EDWARD STEPHEN CASSELLS, APPELLANTS.

831 N.W.2d 696

Filed May 24, 2013. No. S-12-687.

1. **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.
2. **Mines and Minerals: Decedents' Estates: Title.** The "record owner" of mineral interests, as used in Neb. Rev. Stat. § 57-229 (Reissue 2010), may be determined not only from the register of deeds, but also from probate records in the county where the interests are located.
3. **Statutes: Pleadings: Parties.** Neb. Rev. Stat. § 25-201.02(2) (Reissue 2008) applies only to an amendment that "changes the party or the name of the party" and that refers to a substitution, rather than to an addition, of parties.

Appeal from the District Court for Sioux County: TRAVIS P. O'GORMAN, Judge. Reversed.

John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellants.

Steven C. Smith and Lindsay R. Snyder, of Smith, Snyder & Petitt, G.P., for appellee Gibbs Cattle Co.

WRIGHT, CONNOLLY, STEPHAN, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

SUMMARY

Gibbs Cattle Co. is the surface owner of various tracts of land in Sioux County, Nebraska. Gibbs sued the owners of severed mineral interests in those tracts under Nebraska's dormant mineral statutes[1] to reacquire their allegedly abandoned interests. Mineral interests are deemed abandoned unless the "record owner" has taken certain steps to publicly exercise his or her ownership rights during the 23 years preceding the surface owner's suit.[2] This case primarily involves two issues:

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[1] See Neb. Rev. Stat. §§ 57-228 to 57-231 (Reissue 2010).

[2] See § 57-229.

(1) whether the "record owner" may be determined only from the register of deeds in the county where the interests are located or also from other public records, such as probate records in the county; and (2) whether an amended complaint adding, rather than changing (i.e., substituting), a new party defendant may relate back to the original complaint.

In interpreting the relevant statutes, we conclude that the "record owner" of mineral interests, as used in § 57-229, includes an individual identified by probate records in the county where the interests are located. We also conclude that Neb. Rev. Stat. § 25-201.02(2) (Reissue 2008) applies only to an amendment that "changes the party or the name of the party" and that refers to a substitution, rather than to an addition, of parties. We reverse the district court's contrary rulings.

BACKGROUND

Although there are numerous defendants, only two are involved in this appeal: appellant Margaret Bixler and appellant Edward Stephen Cassells. The facts are undisputed and set forth below.

Margaret

Gibbs filed its initial complaint on December 21, 2010. Thereafter, Gibbs discovered that the register of deeds listed John H. Bixler as an owner of mineral interests in some of Gibbs' land. So on March 18, 2011, Gibbs amended its complaint to add John as a defendant. But John had died in 1996, and Margaret, as John's widow and personal representative of his estate, had completed the probate process. Margaret filed an answer, as John's personal representative, requesting the court to order that all title to John's mineral interests remain in John. Margaret then filed an amended answer stating that through John's will she had a life estate in the mineral interests, and she requested the court to order all title to the mineral interests remain in her. The probate records confirmed Margaret's factual assertions, though none of the records (such as the inventory sheets, deed of distribution, or inheritance tax determinations) specifically mentioned the mineral interests.

Both Gibbs and Margaret moved for summary judgment. Gibbs argued that John, the record owner, had not publicly exercised his ownership rights in the mineral interests in the 23 years prior to Gibbs' complaint. As such, Gibbs argued that John had abandoned those rights and that the mineral interests should vest with Gibbs, the surface owner. Margaret argued that John's conveyance of the mineral interests to her through his will was a public exercise of ownership. Margaret also argued that based on the probate records, she was the "record owner" of the mineral interests, and that her 23 years had not yet elapsed.

The court found for Gibbs. The court reasoned that John was the record owner of the mineral interests because he was the person listed in the register of deeds. And the court determined that although John's mineral interests transferred through his will,[3] this was not a public exercise of ownership because that occurred by operation of law rather than by John's action. Margaret does not challenge this latter determination on appeal.

Furthermore, the court concluded that Margaret was not a "record owner" of the mineral interests and so it was immaterial whether she had exhausted the 23-year statutory period. The court noted that the dormant mineral statutes did not define the term "record owner," but that it was defined in Neb. Rev. Stat. § 19-4017.01 (Reissue 2012) as being "'the fee owner of real property as shown in the records of the register of deeds office in the county in which the business area is located.'" The court concluded that to satisfy the dormant mineral statutes' purpose, "record owner" could only mean the person listed in the register of deeds in the county where the property was located. The court vested title to the disputed mineral interests in Gibbs.

Edward

Gibbs' initial complaint also named Virginia Audrey Cassells as one of the defendants. On January 8, 2011, Gibbs received a letter from Edward, Virginia's son, which impliedly

[3] See, Neb. Rev. Stat. § 30-2401 (Reissue 2008); *Wheelock v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978).

asserted that he and Virginia both owned the disputed mineral interests. On January 14, Edward filed a verified claim of interest with the Sioux County register of deeds. And on February 22, Edward moved to intervene, which the court allowed. On March 18, Gibbs amended its complaint to add Edward as a defendant. In his answer, Edward claimed that he owned a portion of the disputed mineral interests and requested the court to order all title to his mineral interests remain in him.

Following Gibbs' motion for summary judgment, Edward likewise moved for summary judgment. There was no dispute that Edward and Virginia were the record owners of the mineral interests. Rather, the sole issue before the court was whether Gibbs' amended complaint adding Edward as a defendant related back to the original complaint. This was because Edward had filed a verified claim of interest with the Sioux County register of deeds in January 2011, after Gibbs' original complaint in December 2010, but before Gibbs' amended complaint in March 2011. And § 57-229 requires a public exercise of ownership rights within 23 years of the operative complaint to preserve the record owner's mineral interests.

The record showed the reason for Gibbs' failure to include Edward in the original complaint. The deed conveying the mineral interests listed the grantors as "Virginia Audrey Cassells & Edward Cassells, her husband," and the grantees as "Virginia Audrey Cassells & Edward Stephen Cassells" as joint tenants. The title examiner, after reviewing the deed, concluded that the two Edwards were the same person. And the title examiner, "knowing that Virginia's husband, Edward Cassells" had died, concluded that Virginia was the sole owner of the mineral interests. So Gibbs named only Virginia as a defendant, rather than Virginia and Edward. This was incorrect, as the two Edwards in the deed were distinct individuals and Edward was still alive and a joint owner of the mineral interests.

The court found that under § 25-201.02(2), Gibbs' amended complaint related back to the original complaint's date of filing. That section provides, in relevant part:

> If the amendment [to a pleading] changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, and (b) within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[4]

The court concluded that Gibbs had met the first requirement because the amended complaint simply added Edward as the other owner for property already described in the original complaint. The court also found that Edward had proper notice of the action, based on his letter to Gibbs, and that he would not be prejudiced on the merits by having the amendment relate back. And the court concluded that Edward "knew he should have been included" because "his letter indicated his belief that [Gibbs] 'had sued us,'" meaning him and Virginia.

Edward argued that the relation-back doctrine did not apply because Gibbs did not "change[] the party or the name of the party"[5] but instead *added* an entirely new party. The court rejected that argument, and concluded that the word "change" should be liberally construed to include adding a new party. The court reasoned that modern pleading rules were more relaxed and that such a construction fell squarely within the remedial nature of the relation-back doctrine. Moreover, the court found that Gibbs' mistake in failing to name Edward as a defendant was "made despite [Gibbs'] due diligence." Finally, the court rejected Edward's argument that the relation-back doctrine could not apply because the 23-year period under § 57-229 was not a statute of limitations. So the

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[4] § 25-201.02(2).

[5] *Id.*

court concluded that Edward's verified claim of interest was too late. The court then vested title to the disputed mineral interests in Gibbs.

ASSIGNMENTS OF ERROR

Margaret alleges, consolidated and restated, that the court erred in (1) concluding that she was not the "record owner" of the disputed mineral interests and (2) terminating her rights to the mineral interests and vesting them in Gibbs.

Edward alleges, consolidated and restated, that the court erred in (1) allowing Gibbs' amended complaint to relate back to the filing date of the original complaint under § 25-201.02(2) and (2) terminating his rights to the mineral interests and vesting them in Gibbs.

STANDARD OF REVIEW

[1] 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.[6]

ANALYSIS

"Record Owner"

Section 57-229 sets forth various ways that the "record owner" of mineral interests may exercise his or her ownership rights and thereby avoid abandonment of his or her interests:

> A severed mineral interest shall be abandoned unless the record owner of such mineral interest has within the twenty-three years immediately prior to the filing of the action provided for in sections 57-228 to 57-231, exercised publicly the right of ownership by (1) acquiring, selling, leasing, pooling, utilizing, mortgaging, encumbering, or transferring such interest or any part thereof by an instrument which is properly recorded in the county where the land from which such interest was severed is located; or (2) drilling or mining for, removing, producing, or withdrawing minerals from under the lands or

[6] *Peterson v. Sanders*, 282 Neb. 711, 806 N.W.2d 566 (2011).

> using the geological formations, or spaces or cavities below the surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which creates the severed mineral interest; or (3) recording a verified claim of interest in the county where the lands from which such interest is severed are located. . . . The interest of any such owner shall be extended for a period of twenty-three years from the date of any such acts[.]

Gibbs argues that the "record owner" of mineral interests may be determined only from the register of deeds in the county where the interests are located. Margaret disagrees. She argues that the "record owner" may also be determined from other public records, and in this case, Sioux County's probate records. If Gibbs is correct, then the record owner of the mineral interests was John, who did not publicly exercise his ownership rights in the 23 years before Gibbs filed its complaint. As such, the interests would be abandoned and title to them would vest with Gibbs. But if Margaret is correct, then she became the record owner in 1996, when John died and his interests passed to her through his will. If that is the case, then Margaret could not have abandoned her interests, because 23 years had not yet passed from her acquisition of the interests.[7]

The meaning of statutory language is a question of law,[8] which we resolve independently from the lower court.[9] The district court noted that the dormant mineral statutes did not define the term "record owner." The court noted, however, that § 19-4017.01, a part of the Business Improvement District Act, defined "record owner" as "the fee owner of real property as shown in the records of the register of deeds office in the county in which the business area is located." The court applied that definition to § 57-229. But § 19-4017.01 is a separate statutory section unrelated to § 57-229, and it does not

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[7] See § 57-229.

[8] *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010).

[9] *Peterson, supra* note 6.

purport to define "record owner" as used in § 57-229. Instead, § 19-4017.01 explicitly defines the term only "[a]s used in [the Business Improvement District Act]." That definition does not control here.[10]

We give statutory language its plain and ordinary meaning.[11] Black's Law Dictionary, which we have relied on in the past to define the term,[12] defines "record owner" as "[a] property owner in whose name the title appears in the public records."[13] That does not resolve the issue because it could be read to support either of the parties' positions. We must construe the term to give effect to the Legislature's intent.[14] We have reviewed the legislative history of the dormant mineral statutes, but it is scant and of little help in resolving the issue. And although a few courts from other jurisdictions have discussed the meaning of "record owner" in various contexts,[15] they are not controlling.

Gibbs argues against construing the term "record owner" to include an individual or entity identified by probate records. Specifically, Gibbs argues that other words in § 57-229 (which follow "record owner" and seemingly refer to recording instruments in the register of deeds) indicate that "record owner" means only the individual or entity listed in the register of deeds.

Gibbs' argument has some appeal, but we are unconvinced. Section 57-229 sets forth various ways that the "record owner" may publicly exercise his or her rights of ownership in certain mineral interests. One way is by taking various actions with

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[10] See *Lozier Corp. v. Douglas Cty. Bd. of Equal., ante* p. 705, 829 N.W.2d 652 (2013).

[11] See, e.g., *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

[12] See *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998).

[13] Black's Law Dictionary 1215 (9th ed. 2009).

[14] See, e.g., *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[15] See, e.g., *Bembery v. District of Columbia*, 852 A.2d 935, 940 n.5 (D.C. 2004); *State ex rel. Forestry, Fire v. Tooele Co.*, 44 P.3d 680 (Utah 2002); *Okanogan Power & Irrigation Co. v. Quackenbush*, 107 Wash. 651, 182 P. 618 (1919).

the interests through "an instrument which is properly recorded in the county where the land from which such interest was severed is located." Another way is by "recording a verified claim of interest in the county where the lands from which such interest is severed are located." These are certainly different avenues of publicly exercising ownership, but as Margaret noted in her reply brief, that "language describes what a record owner can do to protect [his or] her interest from being deemed abandoned. [But i]t does *not* purport to tell us *who the record owner is*."[16]

The answer is not obvious. But we conclude that "record owner" should be construed to include an owner identified through the probate records of the county in which the mineral interests are located. We reach this conclusion for several reasons. Most notably, the Legislature narrowly defined the term "record owner" in § 19-4017.01 as "the fee owner of real property as shown in the records of the register of deeds office in the county in which the business area is located." While that definition does not control here, it does shed light on the issue—the intent of the Legislature may be derived from both the words that it used in a statute and those that it did not.[17] That the Legislature narrowly defined "record owner" in § 19-4017.01 indicates that it is not the ordinary meaning of the term. And because the Legislature *did not* similarly define the term in the dormant mineral statutes, it seems likely that the Legislature intended a different and broader meaning for the term in § 57-229.

Though our case law has not specifically addressed this issue, *State v. $1,947*[18] provides some support for our conclusion. In that case, the statute included the phrase "owner of record," which we equated to "record owner." Applying Black's Law Dictionary definition, we stated that "the second paragraph of [the statute] would apply only to persons whose

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[16] Reply brief for appellant Margaret at 4 (emphasis in original).

[17] See *Lozier Corp., supra* note 10.

[18] *$1,947, supra* note 12.

ownership of seized property is *a matter of public record*."[19] Margaret was identified as an owner through probate records in the county where the interests were located. Those qualify as public records, and so *$1,947* supports the conclusion that Margaret was a "record owner."

Moreover, unlike the district court, we believe that this construction is consistent with the language and purpose of the dormant mineral statutes. It is consistent with the statutes' language because the Legislature did not see fit to narrowly define the term as it had in § 19-4017.01. As to being consistent with the statutes' purpose, we acknowledge that the purpose of the dormant mineral statutes was "to address title problems that developed after mineral estates were fractured."[20] But the text of the dormant mineral statutes also demonstrates that the Legislature balanced this purpose with protecting owners' property rights.

This balancing is evident from the statutes themselves. Abandonment does not automatically occur after a set time, but only if and when a surface owner files suit; it is relatively easy for a record owner to publicly exercise his or her ownership rights; and the statutes provide for a fairly lengthy 23-year period of nonuse before a record owner's rights may be deemed abandoned.[21] Construing "record owner" to include an owner identified through probate records in the county where the interests are located is consistent with the dormant mineral statutes' purpose—it still allows for clearing title records. But that construction also protects identifiable property rights. In other words, much like the statutes themselves, this construction of "record owner" balances the desire to clear title records with protecting identifiable property rights.

Finally, we note that the parties take opposite stances on whether we should apply a liberal or strict construction to "record owner." Gibbs argues that the dormant mineral statutes

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[19] *Id.* at 296, 583 N.W.2d at 616 (emphasis supplied).

[20] *Peterson, supra* note 6, 282 Neb. at 715, 806 N.W.2d 569.

[21] See §§ 57-228 to 57-231.

are remedial statutes and that therefore, we must construe them liberally to fulfill their intended purpose.[22] Margaret, on the other hand, notes that the dormant mineral statutes abrogate the common law against abandonment of real property and that such statutes must be strictly construed.[23] Here, we do not find these interpretative canons helpful. But the dormant mineral statutes result in a forfeiture of property, and "'equity abhors forfeitures.'"[24] As this is an equitable case,[25] if any doubt remains as to the meaning of "record owner," it should be construed against forfeiture.[26]

[2] We hold that the "record owner" of mineral interests, as used in § 57-229, may be determined not only from the register of deeds, but also from probate records in the county where the interests are located. Margaret therefore qualified as a "record owner" within the meaning of § 57-229. And because she acquired her interest in 1996, her 23-year statutory period has not elapsed and her property cannot be deemed abandoned.

Relation Back

Before addressing the relation-back issue, we first address Gibbs' argument that Edward did not properly verify his claim of interest. As such, Gibbs argues that regardless whether the amended complaint relates back, Edward never publicly exercised his ownership rights within 23 years of the amended complaint.

We will not consider an issue on appeal that was not presented to or passed upon by the trial court.[27] Gibbs' counsel

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[22] See, e.g., *Securities Investment Corporation v. Indiana Truck Corporation*, 129 Neb. 31, 260 N.W. 691 (1935).

[23] See, e.g., *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[24] See, e.g., *Miller v. Radtke*, 230 Neb. 561, 567, 432 N.W.2d 542, 547 (1988).

[25] See § 57-228.

[26] See 36 Am. Jur. 2d *Forfeitures and Penalties* § 8 (2011).

[27] See, e.g., *Weber v. Gas 'N Shop, Inc.*, 278 Neb. 49, 767 N.W.2d 746 (2009).

acknowledged at oral argument that he did not raise this issue before the trial court. And the trial court clearly did not pass upon the issue because it noted in its order that the "sole issue" before it was whether Gibbs' amended complaint related back. We decline to address the merits of this argument.

We turn now to the relation-back issue. The district court allowed Gibbs' amended complaint adding Edward as a defendant to relate back to Gibbs' original complaint. Edward argues this was error because § 25-201.02(2), which governs whether amendments relate back, applies only when the amendment "*changes* the party or the name of the party," rather than when the amendment *adds* a new party. (Emphasis supplied.) Gibbs argues that "change" should be construed to include adding a new defendant.

Section 25-201.02(2) provides, in relevant part:

> If the amendment [to a pleading] changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, and (b) within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

We must determine the meaning of the phrase "changes the party or the name of the party." This is a question of law,[28] which we resolve independently from the lower court.[29]

Section § 25-201.02(2) essentially codified our decision in *Zyburo v. Board of Education*.[30] *Zyburo* explicitly adopted

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[28] *Ricks, supra* note 8.

[29] *Peterson, supra* note 6.

[30] *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991). See John P. Lenich, Nebraska Civil Procedure § 15:10 (2008).

the then-existing Fed. R. Civ. P. 15(c) regarding relation back, as explained in *Schiavone v. Fortune*.[31] In *Zyburo*, we acknowledged that "[a]lthough Nebraska does not have a rule similar to rule 15(c), this court has nevertheless acknowledged the similarity between rule 15(c) and its case law, and has looked to federal decisions for guidance."[32] Though rule 15(c) has since been amended, the amended version contains substantially the same requirements as § 25-201.02(2), with the primary difference being the amount of time during which the amended party may receive notice.[33] We may still look to federal decisions for guidance regarding our interpretation of § 25-201.02(2). And because our case law does not specifically address this issue, we look to the federal courts for that guidance.

The federal courts are seemingly split on whether an amendment adding a new defendant, rather than substituting a new defendant, may relate back to the original pleading under rule 15(c)(1)(C). The only circuit court of appeals, that we have found, which has squarely addressed the change/add distinction is the Fourth Circuit in *Goodman v. Praxair, Inc*.[34] It concluded that changing a party should be construed to include adding a party.[35] Other circuits, though not expressly addressing the change/add distinction, have made conflicting statements in allowing or disallowing the addition of parties to relate back. For example, the Sixth Circuit recently reiterated its long-standing rule that "'"an amendment which adds a new party creates a new cause of action and there is no relation back to the original filing . . . ."'"[36] And the Seventh Circuit, in a case

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[31] See, *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986); *Zyburo, supra* note 30.

[32] *Zyburo, supra* note 30, 239 Neb. at 169, 474 N.W.2d at 676.

[33] Compare § 25-201.02(2) with 28 U.S.C. app. rule 15(c)(1)(C) (Supp. V 2011). See, also, *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007) (Miller-Lerman, J., concurring; McCormack, J., joins); Lenich, *supra* note 30.

[34] See *Goodman v. Praxair, Inc.*, 494 F.3d 458 (4th Cir. 2007).

[35] See *id*.

[36] *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313, 318 (6th Cir. 2010).

involving only the substitution of the proper defendant for an improper defendant, stated that

> [t]he only two inquiries . . . in deciding whether an amended complaint relates back . . . are, first, whether the defendant who is sought to be added by the amendment knew or should have known that the plaintiff, had it not been for a mistake, would have sued him instead *or in addition to suing the named defendant*[.][37]

A difference of opinion also exists in other, lower federal courts as to the scope of rule 15(c)(1)(C),[38] and among state courts with similar relation-back rules.[39]

Erdman Co. v. Phoenix Land & Acquisition, LLC[40] is a good example of a court's allowing the addition of parties, rather than just the substitution of parties, by construing "change" to include "add." In *Erdman Co.*, the plaintiffs initially sued the subcontractor of a project, Erdman Architecture and Engineering Company, and then later amended their complaint to also sue the general contractor, Erdman Company. The issue was whether the amended complaint which added Erdman Company as a defendant related back to the initial complaint.

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[37] *Joseph v. Elan Motorsports Technologies Racing*, 638 F.3d 555, 559-60 (7th Cir. 2011).

[38] Compare *Erdman Co. v. Phoenix Land & Acquisition, LLC*, Nos. 2:10-CV-2045, 2:11-CV-2067, 2013 U.S. Dist. LEXIS 26440 (W.D. Ark. Feb. 25, 2013) (unpublished order denying partial summary judgment), and *In re Greater Southeast Community Hosp. Corp. I*, 341 B.R. 91 (D.C. 2006), with *Telesaurus VPC, LLC v. Power*, No. CV 07-01311-PHX-NVW, 2011 U.S. Dist. LEXIS 122623 (D. Ariz. Oct. 21, 2011) (unpublished order granting motion to dismiss), and *In re Hechinger Investment Co. of Delaware, Inc.*, 297 B.R. 390 (D. Del. 2003).

[39] Compare, e.g., *Brooks v. Isinghood*, 213 W. Va. 675, 584 S.E.2d 531 (2003); *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258 (Del. 1993); *Cobb v. Stephens*, 186 Ga. App. 648, 368 S.E.2d 341 (1988); and *Boudreau v. Gavel*, No. CV-91-123, 1992 Me. Super. LEXIS 163 (Me. Super. July 13, 1992) (unpublished order denying motion to amend), with *Kraly v. Vannewkirk*, 69 Ohio St. 3d 627, 635 N.E.2d 323 (1994); *Ray v. Alexandria Mall*, 434 So. 2d 1083 (La. 1983); *Windscheffel v. Benoit*, 646 S.W.2d 354 (Mo. 1983); and *Gause v. Smithers*, 384 S.C. 130, 681 S.E.2d 607 (S.C. App. 2009).

[40] *Erdman Co., supra* note 38.

The federal district court addressed whether rule 15(c)(1)(C) allowed adding parties or only changing (i.e., substituting) parties. The court noted that although some courts took a narrow view of the rule's language and concluded that adding parties was not allowed, such a result was "contrary to the general thrust of the rule: keeping parties from being drug into suits late in the game without having had notice of the claims against them."[41] The court relied on the Federal Practice and Procedure treatise[42] to conclude that interpretation of the rule should be governed "by the general purpose of *Rule 15(c)* notice, rather than a stilted and technical reading."[43] The court referenced the 4th Circuit's decision in *Goodman*, along with the 11th Circuit's decision in *Makro Capital of America, Inc. v. UBS AG*,[44] and Judge Becker's partial concurrence and partial dissent in *Lundy v. Adamar of New Jersey, Inc.*,[45] as support for construing the rule's language to include the addition of parties.[46] The court also emphasized that the 1991 amendments to the relation-back rule encouraged a liberal construction.[47] The court concluded that "'[t]he lynchpin is notice'" and that the other provisions of the rule provided the requisite notice protection.[48] The court concluded that rule 15(c)(1)(C) allowed both addition and substitution of parties to relate back.[49]

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[41] *Id.* at *10.

[42] 6A Charles Alan Wright et al., Federal Practice and Procedure § 1498.2 (3d ed. 2010).

[43] *Erdman Co., supra* note 38, 2013 U.S. Dist. LEXIS 26440 at *10.

[44] *Makro Capital of America, Inc. v. UBS AG*, 543 F.3d 1254 (11th Cir. 2008).

[45] *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173 (3d Cir. 1994) (Becker, Circuit Judge, concurring in part, and in part dissenting).

[46] See *Erdman Co., supra* note 38.

[47] *Id.* (citing advisory committee note on 1991 amendments to federal rule 15(c)).

[48] *Id.* at *12.

[49] *Id.*

Telesaurus VPC, LLC v. Power[50] illustrates the reasoning behind construing rule 15(c)(1)(C) to allow the substitution of parties, but not the addition of parties, to relate back. Telesaurus VPC, LLC (Telesaurus), sued RadioLink Corporation and Randy Power for alleged violations of the Federal Communications Act. After the expiration of the statute of limitations, Telesaurus filed an amended complaint adding Patricia Power, Randy's ex-wife, as a defendant. Telesaurus then later filed a second amended complaint and served it on Patricia. The issue was whether Telesaurus' second amended complaint related back to its original complaint.

The federal district court noted that the issue turned on whether Telesaurus' amended pleading changed the party or the naming of the party against whom a claim was asserted.[51] The court noted that "[o]n its face, this language permits only substitution, not addition, of parties."[52] Nevertheless, the court recognized that courts were split over the scope of the rule 15(c)(1)(C)'s application. Finding no controlling precedent, the court determined that Patricia's interpretation prevailed because hers was "the only reading supported by both the language and the expressed purpose of the rule."[53] Regarding the language, the court noted that rule 15(c)(1)(C)(ii) allows relation back only where there was a "mistake concerning the proper party's identity," which "necessarily implies an 'improper party,' [and] not simply some other party."[54] In other words, the originally named defendant had to be an improper party, and the new party had to be substituted in as the proper party.

The court then undertook a lengthy analysis of rule 15(c)(1)(C)'s purpose, referencing the rules advisory committee's commentary to the 1966 amendment. The court noted that the main driver behind the amendment, which allowed

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[50] *Telesaurus VPC, LLC*, *supra* note 38.

[51] See *id.*

[52] *Id.* at *7.

[53] *Id.* at *8.

[54] *Id.* at *9.

amendments of parties, was lawsuits against the federal government where the "plaintiff mistakenly named . . . the wrong officer or agency."[55] The amendment was meant to correct that problem by "allowing the plaintiff to substitute the proper party."[56] Thus, the amendment struck a "balance between letting stale claims die and enforcing such claims against a defendant whom the plaintiff failed to timely sue because the plaintiff mistakenly believed that some other party caused the alleged injury."[57] The court concluded that rule 15(c)(1)(C)'s "placement of the proper defendant into the improper defendant's shoes has no relation to a scenario where the plaintiff wants to bring in an additional party."[58]

The *Telesaurus VPC, LLC* court recognized that other authorities had concluded that the addition of parties was permissible under the rule, but the court found those authorities unpersuasive. For example, Moore's Federal Practice[59] (without acknowledging the split in authority) stated that the rule "expressly allows amended pleadings that change or add parties to relate back."[60] But the court countered that the rule "'expressly'" referred only to "change" and that taken in context, "change" did not include "'add.'"[61] Federal Practice and Procedure also favored relation back of an added party. But the court noted that many of the cases cited in the treatise did "not support its position, or [did] so only in dictum," and that a "fair number of [those] cases involve[d] pure substitution without mention of addition."[62] Some of the cases, while allowing the

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[55] *Id.* (citing advisory committee note on 1966 amendments to federal rule 15(c)).

[56] *Id.* at *10.

[57] *Id.*

[58] *Id.* at *11.

[59] 3 James Wm. Moore, Moore's Federal Practice (3d ed. 2009).

[60] *Id.*, § 15.19[3][a] at 15-103.

[61] *Telesaurus VPC, LLC, supra* note 38, 2011 U.S. Dist. LEXIS 122623 at *12 n.2.

[62] *Id.* at *14 (citing *Joseph, supra* note 37; *Marks v. Prattco, Inc.*, 607 F.2d 1153 (5th Cir. 1979); and *Bush v. Sumitomo Bank and Trust Co., Ltd.*, 513 F. Supp. 1051 (E.D. Tex. 1981)).

addition of parties, took that position without addressing the change/add distinction,[63] and one case simply disposed of the issue summarily by referring to Federal Practice and Procedure in a footnote.[64]

The *Telesaurus VPC, LLC* court acknowledged that the Fourth Circuit's decision in *Goodman* was consistent with Federal Practice and Procedure's position. But the court noted that *Goodman*'s resolution of the issue was unnecessary to the case and disagreed with the Fourth Circuit's reasoning. The court reasoned that rule 15(c)(1)(C) "is not a set of factors to balance, with the most weight placed on the notice requirement,"[65] but instead "establishes elements which are either satisfied or not."[66] The court reasoned that the liberal policy in favor of amendments could not trump the language of the rule.

Finally, the court took issue with those authorities which had concluded that adding a party was "'essentially no different from changing a party.'"[67] While the court recognized that might be true in a vacuum, the change required by the rule "is a change that takes an already 'asserted' claim and reassigns it to a party that 'knew or should have known' it was 'the proper party.'"[68] As such, the court concluded that the rule referred to a substitution, rather than an addition.

We find the reasoning of *Telesaurus VPC, LLC* persuasive. The court's analysis of the federal commentators (and the decisions cited in support of their position) is on point. Most important, the language of the rule controls, and

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[63] See *Telesaurus VPC, LLC, supra* note 38 (citing *Abdell v. City of New York*, 759 F. Supp. 2d 450 (S.D.N.Y. 2010); *Colombo v. S.C. Dept. of Social Services*, 221 F.R.D. 374 (E.D.N.Y. 2004); and *Gabriel v. Kent General Hosp. Inc.*, 95 F.R.D 391 (D. Del. 1982)).

[64] See *id.* (citing *Advanced Power Systems v. Hi-Tech Systems*, 801 F. Supp. 1450 (E.D. Pa. 1992)).

[65] *Id.* at *17.

[66] *Id.* at *17-18.

[67] *Id.* at *18 (quoting *Lundy, supra* note 45 (Becker, Circuit Judge, concurring in part, and in part dissenting)).

[68] *Id.* at *18.

§ 25-201.02(2) expressly applies only to amendments which "change[] the party or the name of the party against whom a claim is asserted." The meaning of "change[]" is not interpreted in a vacuum, but in relation to the words around it. Reading the language as a whole indicates that it refers to the substitution of parties, rather than the wholesale addition of parties. Though certain courts and commentators advocate for a different approach—premised on the overriding importance of notice—that approach ignores that the relation-back rule "plainly sets forth an exclusive list of *requirements*,"[69] rather than factors to be weighed.

[3] Moreover, we do not read the U.S. Supreme Court's recent decision in *Krupski v. Costa Crociere S. p. A.*,[70] a case Gibbs relies on in its brief, as requiring a different conclusion. The *Krupski* decision focused on the nature of "mistake" as used in rule 15(c)(1)(C)(ii), and not the nature of "change" in rule 15(c)(1)(C).[71] And importantly, *Krupski* did not address a situation where the plaintiff was attempting to add a party; rather, the plaintiff was attempting to substitute the proper party (Costa Crociere) for an improper party (Costa Cruise).[72] That is not the case here. We hold that § 25-201.02(2) applies only to an amendment that "changes the party or the name of the party" and that refers to a substitution, rather than to an addition, of parties.

CONCLUSION

For the foregoing reasons, we reverse the decision of the district court.

REVERSED.

McCORMACK, J., participating on briefs.

HEAVICAN, C.J., not participating.

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[69] *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 553, 130 S. Ct. 2485, 177 L. Ed. 2d 48 (2010) (emphasis supplied).

[70] *Krupski, supra* note 69.

[71] See, *id.*; *DeBois v. Pickoff*, No. 3:09cv230, 2011 U.S. Dist. LEXIS 39041 (S.D. Ohio Mar. 28, 2011) (unpublished decision).

[72] See, *Krupski, supra* note 69; *DeBois, supra* note 71.

WTJ Skavdahl Land LLC, a Nebraska limited liability company, appellee, v. Sandra Elliott, Personal Representative of the Estate of Evelyn Elliott, deceased, and Sandra Elliott, appellants, and Lynn Elliott et al., appellees.

830 N.W.2d 488

Filed May 24, 2013. No. S-12-688.

1. **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.

Appeal from the District Court for Sioux County: Travis P. O'Gorman, Judge. Reversed.

John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellants.

Steven C. Smith, of Smith, Snyder & Petitt, G.P., for appellee WTJ Skavdahl Land LLC.

Wright, Connolly, Stephan, Miller-Lerman, and Cassel, JJ.

Connolly, J.

WTJ Skavdahl Land LLC is the surface owner of land in Sioux County, Nebraska. Skavdahl sued the owners of severed mineral interests in that land under Nebraska's dormant mineral statutes[1] to reacquire their allegedly abandoned interests. Mineral interests are deemed abandoned unless the "record owner" has taken certain steps to publicly exercise his or her ownership rights during the 23 years preceding the surface owner's suit.[2] This case presents the same issue that we confronted in *Gibbs Cattle Co. v. Bixler*[3]: whether the "record owner" may be determined only from the register of deeds in the county where the interests are located or also from other

[1] See Neb. Rev. Stat. §§ 57-228 to 57-231 (Reissue 2010).

[2] See § 57-229.

[3] *Gibbs Cattle Co. v. Bixler, ante* p. 952, 831 N.W.2d 696 (2013).

public records, such as probate records in the county. For the reasons set forth in *Gibbs Cattle Co.*, we conclude that the "record owner" of mineral interests, as used in § 57-229, includes an individual identified by probate records in the county where the interests are located. We reverse the district court's contrary ruling.

BACKGROUND

In its complaint, Skavdahl named Sandra Elliott, both personally and as the personal representative of the estate of Evelyn Elliott, as one of the people allegedly having mineral interests in the land. Skavdahl alleged that under Nebraska's dormant mineral statutes, Sandra had abandoned her interests and that those interests should be vested in Skavdahl.

Although Evelyn had died in 1999, the register of deeds still listed her as the owner of the disputed mineral interests. Sandra, as the personal representative of Evelyn's estate, took charge of the probate process, though it had not been completed. That said, none of the probate records (such as the inventory sheets, deed of distribution, or inheritance tax determinations) specifically mentioned Evelyn's mineral interests. But Evelyn's will devised all of her property to the cotrustees of the "S&G Living Trust," and Sandra was the last surviving trustee. As such, Sandra filed an answer claiming that she owned the disputed mineral interests through Evelyn's will and that she had publicly exercised her ownership rights. She requested that the court order all title to the mineral interests to remain in her.

Skavdahl moved for summary judgment, which the court granted. The court first determined that Sandra's only interest in the mineral interests was as the last surviving trustee of the S&G Living Trust. The court then concluded that Evelyn was the record owner of the mineral interests because she was the person listed in the register of deeds. And the court determined that although Evelyn's mineral interests transferred through her will,[4] this was not a public exercise

[4] See, Neb. Rev. Stat. § 30-2401 (Reissue 2008); *Wheelock v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978).

of ownership because it occurred by operation of law rather than by Evelyn's action. Sandra does not challenge this latter determination on appeal.

Furthermore, the court concluded that Sandra was not a "record owner" of the mineral interests, and so it was immaterial whether she had exhausted the 23-year statutory period. The court noted that the dormant mineral statutes did not define the term "record owner," but that it was defined in Neb. Rev. Stat. § 19-4017.01 (Reissue 2012) as being "the fee owner of real property as shown in the records of the register of deeds office in the county in which the business area is located." The court concluded that to satisfy the dormant mineral statutes' purpose, "record owner" could only mean the person listed in the register of deeds in the county where the property was located. The court vested title to the disputed mineral interests in Skavdahl.

ASSIGNMENTS OF ERROR

Sandra alleges, reordered and restated, that the court erred in (1) concluding that she was not the "record owner" of the disputed mineral interests and (2) terminating her rights to the mineral interests and vesting them in Skavdahl.

STANDARD OF REVIEW

[1] 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.[5]

ANALYSIS AND CONCLUSION

For the reasons set forth in *Gibbs Cattle Co.*,[6] we conclude that the "record owner" of mineral interests, as used in § 57-229, includes an individual identified by probate records in the county where the interests are located. We reverse.

REVERSED.

McCORMACK, J., participating on briefs.

HEAVICAN, C.J., not participating.

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[5] *Peterson v. Sanders*, 282 Neb. 711, 806 N.W.2d 566 (2011).

[6] *Gibbs Cattle Co., supra* note 3.

DMK Biodiesel, LLC, a Nebraska limited liability company, and Lanoha RVBF, LLC, a Nebraska limited liability company, appellants, v. John McCoy et al., appellees.

830 N.W.2d 490

Filed May 24, 2013. No. S-12-699.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
4. **Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Because a motion pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss.
5. **Rules of the Supreme Court: Pleadings.** Dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.
6. **Motions to Dismiss: Rules of the Supreme Court: Summary Judgment: Pleadings.** Neb. Ct. R. Pldg. § 6-1112(b) provides that when matters outside the pleading are presented by the parties and accepted by the trial court with respect to a motion to dismiss under § 6-1112(b)(6), the motion shall be treated as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008) and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.
7. **Judicial Notice: Motions to Dismiss: Rules of the Supreme Court: Summary Judgment: Pleadings.** A court may take judicial notice of matters of public record without converting a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6) into a motion for summary judgment.
8. **Rules of the Supreme Court: Pleadings: Appeal and Error.** Because Nebraska's current notice pleading rules are modeled after the Federal Rules of Civil Procedure, appellate courts look to federal decisions for guidance.
9. **Motions to Dismiss: Pleadings.** For purposes of a motion to dismiss, a trial court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings.
10. **Complaints: Pleadings.** Documents embraced by the complaint are not considered matters outside the pleading.

11. ____: ____. Documents embraced by the pleadings are materials alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.
12. **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.
13. **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.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded with directions.

David A. Domina and Brandon B. Hanson, of Domina Law Group, P.C., L.L.O., for appellants.

Daniel L. Lindstrom and Justin R. Herrmann, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellees John McCoy et al.

Steve Grasz and Andrew Weeks, of Husch Blackwell, L.L.P., for appellee Renewable Fuels Technology, LLC.

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

HEAVICAN, C.J.

NATURE OF CASE

DMK Biodiesel, LLC (DMK), and Lanoha RVBF, LLC (Lanoha), filed suit against Renewable Fuels Technology, LLC (Renewable Fuels), John McCoy, John Hanson, Phil High, and Jason Anderson in the Buffalo County District Court alleging fraudulent inducement. Renewable Fuels and the individual defendants filed a motion to dismiss for failure to state a claim and a motion to take judicial notice of the private placement memorandum and the subscription agreements. Both motions were granted, and DMK and Lanoha now appeal. Because the private placement memorandum and the subscription agreements are properly considered "matters outside the pleading," an evidentiary hearing was required. Accordingly, we reverse the judgment of the district court and remand the cause with directions.

BACKGROUND

Republican Valley Biofuels, LLC (RVBF), issued a confidential private placement memorandum with an effective date of May 7, 2007, seeking investors in a biodiesel production facility. DMK and Lanoha invested $600,000 and $400,000 respectively in RVBF, which was being promoted by McCoy, Hanson, High, and Anderson. Renewable Fuels is listed with the Nebraska Secretary of State as the manager of RVBF.

On August 17 and August 28, 2007, DMK and Lanoha, respectively, entered into and executed separate subscription agreements with RVBF. Paragraph 1 of the subscription agreements states, "Subscriber understands that the offering of limited liability company units . . . of the Company to which this Subscription Agreement relates is being made only pursuant to the Company's Confidential Private Placement Memorandum dated May 7, 2007, including the exhibits attached and any supplements thereto . . . ." It further states in paragraph 4.c. that "[s]ubscriber has relied solely upon the information furnished in the Memorandum and Subscriber has not relied on any oral or written representation or statement, except as contained in the Memorandum, in making this investment." The private placement memorandum itself states that "[n]o person has been authorized to make any representation or warranty, or give any information, with respect to RVBF or the units offered hereby except for the information contained herein."

On January 5, 2009, DMK and Lanoha filed a complaint against Renewable Fuels, McCoy, Hanson, High, and Anderson in Buffalo County District Court alleging that each defendant fraudulently induced them to invest funds in RVBF. The original complaint had three claims: (1) violations of the Securities Act of Nebraska, see Neb. Rev. Stat. § 8-1101 et seq. (Reissue 2012), due to alleged misrepresentations and omissions by the defendants; (2) violations of fiduciary duties; and (3) for an accounting at law.

Renewable Fuels promptly filed a motion to dismiss and a motion to take judicial notice. Shortly thereafter, the individual defendants filed similar motions. The motion to take judicial

notice requested the district court to take judicial notice of the confidential private placement memorandum for RVBF and the subscription agreements executed between RVBF and DMK and Lanoha, respectively. All three documents were attached as exhibits to the motion to dismiss.

In response, DMK and Lanoha filed a motion to continue hearing on the defendants' Neb. Ct. R. Pldg. § 6-1112 (rule 12) motions to allow discovery. The motion stated, first, that "[j]udicial notice is not permitted by *Neb Rev Stat* § 27-201 et seq." Second, the motion primarily argued that taking judicial notice would convert the rule 12 motion into a summary judgment motion.[1] DMK and Lanoha argued that if the motion converted, then they were entitled to conduct discovery pursuant to Neb. Rev. Stat. § 25-1335 (Reissue 2008).[2]

The district court granted the motion to dismiss and the motion to take judicial notice. The court noted that the private placement memorandum and the subscription agreements were "an intricate part of the pleadings whether they are set forth by [DMK and Lanoha] or not." The district court thereafter received the exhibits and considered the exhibits for purposes of the motion to dismiss. On the motion to dismiss, the district court found "as a matter of law that [DMK and Lanoha] are not allowed to proceed with their causes of action for fraud, deception and misrepresentation arising from events occurring prior to the execution of the subscription agreements." The court sustained the motion to dismiss, but allowed DMK and Lanoha to file an amended complaint based on actions of RVBF and the individual defendants after the entry of the subscription agreement that violated the subscription agreement, private placement memorandum, or the fiduciary obligations created by those documents.

DMK and Lanoha filed an amended complaint that asserted postsale fiduciary duties were owed and breached, while also seeking derivative relief. Litigation continued on the derivative claims until 2012, when the district court dismissed the

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[1] See *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[2] See *id.*

amended complaint at the request of all parties. DMK and Lanoha now appeal the September 29, 2009, dismissal of the direct claims.

ASSIGNMENTS OF ERROR

DMK and Lanoha allege, restated and summarized, that the district court erred by taking judicial notice, entering judgment without a proper summary judgment hearing, and dismissing the claims, because the dismissal resulted in the defendants' benefiting from the illegal sale of securities under § 8-1118(5) of the Securities Act of Nebraska.

STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo.[3] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[4]

[3] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[5]

ANALYSIS

Conversion of Motion to Dismiss

DMK and Lanoha's main argument, found both in their motion to continue hearing on the defendants' rule 12 motions to allow discovery and in their brief, is that by taking judicial notice of the private placement memorandum and the subscription agreements, the motion to dismiss transformed into a motion for summary judgment, which required the district court to hold a hearing. We agree.

[4-6] Because a rule 12(b)(6) motion tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint

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[3] *Walentine, O'Toole v. Midwest Neurosurgery, ante* p. 80, 825 N.W.2d 425 (2013).

[4] *Id.*

[5] *State v. Ramirez, ante* p. 203, 825 N.W.2d 801 (2013).

to decide a motion to dismiss.[6] Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.[7] However, rule 12(b) provides that when matters outside the pleading are presented by the parties and accepted by the trial court with respect to a motion to dismiss under rule 12(b)(6), the motion "shall be treated" as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008) and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.[8]

As a threshold matter, we must determine whether the district court's decision to judicially notice the private placement memorandum and the subscription agreements transformed the motion to dismiss into a motion for summary judgment. Specifically, we must determine whether these documents are considered to be "matters outside the pleading."

[7,8] We have previously held that a court may take judicial notice of matters of public record without converting a rule 12(b)(6) motion to dismiss into a motion for summary judgment.[9] We have not addressed, however, whether underlying written agreements can be judicially noticed without converting the motion. Because Nebraska's current notice pleading rules are modeled after the Federal Rules of Civil Procedure, we look to federal decisions for guidance.[10]

The Eighth Circuit has held that rule 12(b) is not permissive, because it mandates that "'[t]he motion *shall* be treated as one for summary judgment . . . .'"[11] According to the Eighth Circuit,

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[6] *Doe v. Omaha Pub. Sch. Dist.*, *supra* note 1.

[7] *Id.*

[8] *Id.*

[9] *Id.*; *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007); *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006).

[10] *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

[11] *BJC Health System v. Columbia Cas. Co.*, 348 F.3d 685, 687 (8th Cir. 2003) (emphasis in original).

"'[m]ost courts . . . view "matters outside the pleading" as including any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings.'"[12] This interpretation of the rule by the Eighth Circuit is "'appropriate in light of our prior decisions indicating a 12(b)(6) motion will succeed or fail based upon the allegations contained in the face of the complaint.'"[13]

[9-11] For purposes of a motion to dismiss, "'the court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings.'"[14] These documents embraced by the complaint are not considered matters outside the pleading.[15] Documents embraced by the pleadings are materials "'alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading.'"[16] The majority of circuits appear to agree that the document must be referred to in the complaint and must be central to the plaintiff's claim.[17] A prime example of

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[12] *Gibb v. Scott*, 958 F.2d 814, 816 (8th Cir. 1992) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1366 (1969)).

[13] *BJC Health System v. Columbia Cas. Co., supra* note 11, 348 F.3d at 687-88.

[14] *Miller v. Redwood Toxicology Laboratory, Inc.*, 688 F.3d 928, 931 (8th Cir. 2012).

[15] *Enervations, Inc. v. Minnesota Mining*, 380 F.3d 1066 (8th Cir. 2004).

[16] *Ashanti v. City of Golden Valley*, 666 F.3d 1148, 1151 (8th Cir. 2012).

[17] See, *Romani v. Shearson Lehman Hutton*, 929 F.2d 875 (1st Cir. 1991) (superseded by statute on other grounds as stated in *Greebel v. FTP Software, Inc.*, 194 F.3d 185 (1st Cir. 1999)); *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2d Cir. 1991); *Pension Ben. Guar. Corp. v. White Consol. Ind.*, 998 F.2d 1192 (3d Cir. 1993); *New Beckley Min. v. International Union, UMWA*, 18 F.3d 1161 (4th Cir. 1994); *Weiner v. Klais and Co., Inc.*, 108 F.3d 86 (6th Cir. 1997); *Venture Associates v. Zenith Data Systems*, 987 F.2d 429 (7th Cir. 1993); *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994), *overruled on other grounds, Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381 (10th Cir. 1997); *Brooks v. Blue Cross and Blue Shield of Florida*, 116 F.3d 1364 (11th Cir. 1997).

documents "'necessarily embraced'" by a pleading is a written contract in a case that involves a dispute over the terms of the contract.[18]

RVBF and the individual defendants argue that the private placement memorandum and the subscription agreements are integral to and embraced by the complaint. Specifically, they contend that when a securities offering is made pursuant to written memorandum, a plaintiff investor "is not permitted to assert a securities action without reference to the offering memorandum."[19]

In support of their argument, RVBF and the individual defendants cite the Second Circuit's decision in *Cortec Industries, Inc. v. Sum Holding L.P.*[20] In *Cortec Industries, Inc.*, Cortec Acquisitions, Inc., entered into a stock purchase agreement with the defendants. The stock purchase agreement contained certain representations and warranties, as well as certain conditions precedent to the purchase. Cortec Acquisitions brought a complaint alleging repeated fraudulent or negligent misrepresentations and omissions. All of the defendants moved for a motion to dismiss the complaint for failure to state a claim, and the motions were granted. Attached to the motions were paper copies of the warrant, the offering memorandum, and the stock purchase agreement.

The sole issue decided by the Second Circuit was whether the warrant, the offering memorandum, and the stock purchase agreement could be considered when ruling on the motion to dismiss the complaint for failure to state a claim. The Second Circuit held that the district court could rely on the documents without converting the motion to dismiss into a motion for summary judgment. In support, the Second Circuit stated that

> when a plaintiff chooses not to attach to the complaint or incorporate by reference *a prospectus upon which it solely relies and which is integral to the complaint*, the

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[18] See *Young v. Principal Financial Group, Inc.*, 547 F. Supp. 2d 965, 974 (S.D. Iowa 2008).

[19] Brief for appellees McCoy et al. at 29.

[20] *Cortec Industries, Inc. v. Sum Holding L.P., supra* note 17.

> defendant may produce the prospectus when attacking the complaint for its failure to state a claim, because plaintiff should not so easily be allowed to escape the consequences of its own failure.[21]

The Second Circuit concluded:

> Despite the fact that the documents attached to [a defendant's] motion to dismiss were neither public disclosure documents required by law to be filed with the SEC, nor documents actually filed with the SEC, nor attached as exhibits to the complaint or incorporated by reference in it, the district court was entitled to consider them in deciding the motion to dismiss. *The stock purchase agreement,* [*the*] *offering memorandum, and the warrant were documents* plaintiffs had either in its possession or had knowledge of and *upon which they relied in bringing suit*.[22]

The Second Circuit acknowledged that "in drafting their complaint plaintiffs relied upon documents transmitted to them by defendants, though they neglected to attach these papers to, or incorporate them by reference in, the complaint."[23]

In contrast, in *BJC Health System v. Columbia Cas. Co.*,[24] the Eighth Circuit addressed whether underlying contractual documents were considered matters outside the pleading. Columbia Casualty Company (Columbia) provided reinsurance to a subsidiary of BJC Health System (BJC) and executed contracts for 2 years. BJC filed a complaint alleging that Columbia was obligated to fix the premium for a third year because of a separate premium-guarantee contract. BJC alleged that Columbia breached the premium-guarantee contract. Columbia moved to dismiss for failure to state a claim. Attached to the motion to dismiss by Columbia were three documents, two of which were the reinsurance documents and a third which was a reinsurance quotation letter from Columbia. The district court

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[21] *Id.* at 47 (emphasis supplied).

[22] *Id.* at 48 (emphasis supplied).

[23] *Id.* at 44.

[24] *BJC Health System v. Columbia Cas. Co., supra* note 11.

accepted the documents and used them to dismiss BJC's claim. BJC appealed.

The Eighth Circuit concluded that the three documents provided by Columbia with the motion to dismiss constituted matters outside the pleading.[25] The Eighth Circuit found that although BJC had alleged the existence of a contract, it did not allege a specific document and the documents provided by Columbia were neither undisputed nor the sole basis of the complaint.[26] The court noted that the documents were provided in opposition to the complaint and that the purpose of the documents was to discredit and contradict BJC's allegations.[27] Therefore, the court concluded the documents were not embraced by the complaint and constituted matters outside the pleading.[28]

Here, our independent review of the complaint reveals that DMK and Lanoha did not rely on the private placement memorandum and the subscription agreements in drafting the complaint. In fact, the complaint never mentions either the private placement memorandum or the subscription agreements. Nor does the complaint rely on the rights or obligations outlined by the documents. This is not the paradigmatic case of a party's seeking to enforce a contract and not attaching the contract to the complaint. *Cortec Industries, Inc.* is unhelpful in our analysis, because that was a case in which "[p]laintiffs sought damages and rescission of a stock purchase agreement allegedly entered into in violation of the securities laws, civil RICO, and the common law."[29]

Here, the fraud and misrepresentations relied upon by DMK and Lanoha were oral statements made before the execution of the subscription agreements. The complaint does not allege that the documents themselves were fraudulently or negligently misrepresented.

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Cortec Industries, Inc. v. Sum Holding L.P., supra* note 17, 949 F.2d at 44.

RVBF and the individual defendants argue that we should not allow plaintiffs to artfully draft a complaint so as to avoid referencing a document on which the lawsuit hinges. In this instance, the plaintiffs may have purposefully avoided referencing the private placement memorandum and the subscription agreements. However, their choice not to reference the documents and, more important, their choice to not embrace the documents were not improper. Even if DMK and Lanoha had chosen to reference the private placement memorandum and the subscription agreements in the complaint, it would not have changed the outcome of this case. Mere reference, without more, to the private placement memorandum and the subscription agreements would not be enough to establish that the complaint embraces those documents.

Because both the private placement memorandum and the subscription agreements are not clearly embraced by DMK and Lanoha's complaint, when the district court accepted and took into consideration the private placement memorandum and the subscription agreements, the court took into consideration matters outside the pleading. This transformed the motion to dismiss into a motion for summary judgment. Pursuant to § 25-1332, DMK and Lanoha were entitled to a summary judgment hearing and no hearing was held.[30] This error requires reversal.

Remaining Assignments of Error

[12] DMK and Lanoha also argue in their brief that the private placement memorandum and the subscription agreements were not properly the subject of judicial notice. But, whether taking judicial notice was proper is not necessary to our adjudication. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[31]

[13] Finally, DMK and Lanoha argue that the Securities Act of Nebraska prevents a securities seller who engages in fraud

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[30] See *Doe v. Omaha Pub. Sch. Dist.*, *supra* note 1.

[31] *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011).

from using a written contract to effectuate the fraud committed. In other words, DMK and Lanoha contend that the substantive law protects securities purchasers from sellers by refusing to enforce exculpatory clauses in prospectuses, private placement memorandums, or subscription agreements. This issue was not addressed by the district court. An issue not presented to or decided on by the trial court is not an appropriate issue for consideration on appeal.[32] Furthermore, determining this issue is not necessary to our adjudication.

CONCLUSION

The district erred by granting the motion to dismiss. When the district court took judicial notice of the private placement memorandum and the subscription agreements, the motion to dismiss transformed into a motion for summary judgment, which requires an evidentiary hearing. No such hearing was held.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., participating on briefs.

WRIGHT, J., not participating.

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[32] *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012).

KIMBERLY L. HYNES, APPELLEE, V. GOOD SAMARITAN HOSPITAL, A NEBRASKA NONPROFIT CORPORATION, APPELLANT.

830 N.W.2d 499

Filed May 24, 2013. No. S-12-810.

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. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate

court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.

3. **Records: Appeal and Error.** As a general rule, 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. But when a record is deficient through no fault of the appellant, the general rule does not apply.
4. **Records: New Trial: Appeal and Error.** An appellate court will remand for a new trial if a deficiency in the record, which is not attributable to the appellant, prevents meaningful appellate review.
5. **Judgments: Records: Appeal and Error.** Meaningful appellate review requires a record that elucidates the factors contributing to the lower court's decision.

Appeal from the Workers' Compensation Court: MICHAEL K. HIGH, Judge. Judgment vacated, and cause remanded for a new trial.

Thomas D. Wulff, of Wulff & Freeman, L.L.C., for appellant.

John C. Fowles, of Fowles Law Office, P.C., L.L.O., for appellee.

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

STEPHAN, J.

The Nebraska Workers' Compensation Court determined that Kimberly L. Hynes was injured during the course and scope of her employment with Good Samaritan Hospital (Good Samaritan) and awarded her workers' compensation benefits. Good Samaritan filed a timely appeal. However, during the preparation of the record on appeal, it was discovered that the testimony of several witnesses could not be transcribed because of a malfunction in equipment used by the court reporter. Because the existing record is insufficient for meaningful appellate review, we vacate the award and remand for a new trial.

BACKGROUND

In April 2009, Hynes commenced this action for workers' compensation benefits, alleging that at all relevant times, she was employed as a registered nurse by Good Samaritan. Hynes

alleged that while she was working as a nurse in the mental health unit of the hospital on April 16, 2008, a patient whipped her with the cord from a vacuum cleaner, causing bruises on her body. Hynes further alleged that on June 2, she was bitten and kicked by a patient, and that in early July, she was sexually assaulted by one or more patients. She alleged that as a result of these incidents, she suffered from posttraumatic stress disorder and depression. Good Samaritan's answer admitted the April 16 incident but denied the later incidents. It also contested the nature and extent of Hynes' injuries.

After trial, the Workers' Compensation Court found that all three incidents occurred. It held that the April 16, 2008, injury caused Hynes to suffer depression and posttraumatic stress disorder "which was made worse by the latter two incidents." It concluded that Hynes was permanently and totally disabled, and it awarded benefits accordingly. Good Samaritan filed this timely appeal. But, as we shall discuss in further detail, the record on appeal is incomplete.

ASSIGNMENTS OF ERROR

Good Samaritan assigns that this court does not have a complete record of the trial proceedings and argues that we must reverse, and remand for a new trial. In the alternative, it contends that the trial court erred in (1) finding that the second and third incidents occurred or that Hynes suffered a physical injury as a result of those incidents, (2) tying the three incidents together and finding Hynes' psychiatric issues resulted from some combination of those incidents, (3) overruling its objections to the medical reports of Hynes' expert witness, and (4) awarding Hynes certain medical expenses.

STANDARD OF REVIEW

[1,2] 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.[1] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.[2]

ANALYSIS

On the same day that it filed its notice of appeal, Good Samaritan filed a praecipe for bill of exceptions. The praecipe requested all testimony presented and all exhibits offered at trial. While preparing the requested record, the court reporter discovered that certain testimony could not be transcribed. In an affidavit filed in the compensation court, the court reporter averred that the transcribed testimony of Hynes and another witness who testified in Hynes' case in chief was complete. But the reporter averred that the testimony of five other witnesses, including all of the witnesses who testified on behalf of Good Samaritan, could not be transcribed due to a failure of electronic equipment used by the court reporter. This failure was not discovered until after the trial.

Upon learning of the problem with the record, Good Samaritan's counsel filed a motion with this court seeking additional time to prepare, file, and settle the bill of exceptions. This motion stated that approximately two-thirds of the trial testimony had been "'lost,'" and noted that the trial judge had suggested a conference to determine whether the lost testimony could be recovered. It is not clear from the record whether that conference was held, although Good Samaritan's brief states it was and Hynes does not refute that statement. In any event, it is clear that the bill of exceptions filed in the appeal includes

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[1] *Visoso v. Cargill Meat Solutions, ante* p. 272, 826 N.W.2d 845 (2013); *VanKirk v. Central Community College, ante* p. 231, 826 N.W.2d 277 (2013).

[2] *Pearson v. Archer-Daniels-Midland Milling Co., ante* p. 568, 828 N.W.2d 154 (2013); *Lovelace v. City of Lincoln*, 283 Neb. 12, 809 N.W.2d 505 (2012).

only the testimony of Hynes and the witness who testified on her behalf, as well as the trial exhibits.

The parties agree that the bill of exceptions before us is incomplete and that neither of them is at fault for the incompleteness. But they disagree as to how the lack of a complete appellate record should affect our resolution of this appeal. Good Samaritan contends that it requires remand for a new trial, while Hynes contends the record, though incomplete, is nevertheless sufficient to affirm the compensation court's award. Due to the nature of the missing testimony, we agree with Good Samaritan.

[3] It is true that as a general rule, 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.[3] But we have applied this general rule only when the record deficiency is attributable to the appellant.[4]

[4,5] When a record is deficient through no fault of the appellant, the general rule does not apply.[5] Instead, we will remand for a new trial if the deficiency in the record prevents us from providing the appellant meaningful appellate review of the assignments of error.[6] Generally, meaningful appellate review requires a record that elucidates the factors contributing to the lower court's decision.[7]

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[3] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012); *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994).

[4] See, *Huddleson v. Abramson*, 252 Neb. 286, 561 N.W.2d 580 (1997); *Latenser v. Intercessors of the Lamb, Inc., supra* note 3; *Sanwick v. Jenson*, 244 Neb. 607, 508 N.W.2d 267 (1993); *Rhodes v. Johnstone*, 191 Neb. 552, 216 N.W.2d 168 (1974); *Jones v. City of Chadron*, 156 Neb. 150, 55 N.W.2d 495 (1952).

[5] See, *Richmond v. Case*, 264 Neb. 319, 647 N.W.2d 90 (2002); *Terry v. Duff*, 246 Neb. 11, 516 N.W.2d 591 (1994); *State v. Slezak*, 230 Neb. 197, 430 N.W.2d 533 (1988); *State v. Benson*, 199 Neb. 549, 260 N.W.2d 208 (1977).

[6] See *Richmond v. Case, supra* note 5.

[7] *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001).

Here, the incompleteness of the record clearly prevents us from conducting a meaningful appellate review. All of the testimony from Good Samaritan's witnesses is unavailable. Although the standard of review in a workers' compensation case is quite limited, it requires us, at a minimum, to examine whether there is "sufficient competent evidence in the record" to warrant the award appealed from.[8] And to determine whether there is "sufficient competent evidence," we necessarily have to review all of the evidence presented at trial. Indeed, our court rules require the production of the complete bill of exceptions in such a situation. Specifically, "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the bill of exceptions must include all evidence relevant to the finding or conclusion."[9]

It is unfortunate that the parties will be subjected to the expense and delay of retrial. But deciding this appeal on the existing record would do greater systemic harm. Under our adversary system of justice, we cannot simply disregard the fact that *none* of the testimony offered by Good Samaritan was preserved for our review. Without knowing both sides of the case, we cannot reach a principled determination of which side should prevail on appeal.

CONCLUSION

For the foregoing reasons, we conclude that under the circumstances of this case, where the testimony of all of Good Samaritan's witnesses has been lost due to no fault of either party, we cannot undertake a meaningful appellate review of the assignments of error. Accordingly, we vacate the judgment of the trial court and remand the cause for a new trial.

JUDGMENT VACATED, AND CAUSE REMANDED FOR A NEW TRIAL.

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[8] Neb. Rev. Stat. § 48-185 (Reissue 2010). See, also, *Visoso v. Cargill Meat Solutions, supra* note 1; *VanKirk v. Central Community College, supra* note 1.

[9] Neb. Ct. R. App. P. § 2-105(2)(B)(1)(b) (rev. 2010).

Reid Beveridge, appellant, v. John Savage and Jill Savage, appellees.

830 N.W.2d 482

Filed May 24, 2013. No. S-12-1007.

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. **Contracts.** Contract interpretation presents a question of law.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Contracts: Insurance: Subrogation: Presumptions: Landlord and Tenant: Negligence.** Absent an agreement to the contrary, the law presumes that a tenant is coinsured under a landlord's fire insurance policy and that, therefore, a landlord's insurer cannot maintain a subrogation action against a tenant for damage to the insured property that is caused by the tenant's negligence.
5. **Contracts: Insurance: Landlord and Tenant.** When fire insurance is provided for a dwelling, it protects the insurable interests of all joint owners, including the possessory interests of a tenant absent an express agreement by the latter to the contrary.
6. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
7. **Contracts.** Ambiguous contracts are construed against the drafter.

Appeal from the District Court for Cass County: Randall L. Rehmeier, Judge. Affirmed.

Christopher A. Sievers and Joseph F. Gross, Jr., of Timmermier, Gross & Prentiss, for appellant.

T. Cody Farrens and Douglas Phillips, of Klass Law Firm, L.L.P., for appellees.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Wright, J.

NATURE OF CASE

This case presents the question whether the terms of a lease between a landlord and tenant permit an action by the

landlord's insurer against the tenant for fire damages allegedly caused by the tenant's negligence.

Reid Beveridge, a landlord, and John Savage, a tenant, signed a lease agreement for a rental property that required him to obtain a "liability and renter[']s insurance [policy] ($100,000) at Tenant's expense." The house was damaged by fire caused by a child using a lighter. Beveridge's insurer paid for the loss.

This subrogation action was brought against John Savage and Jill Savage in Beveridge's name. The district court concluded the Savages were coinsureds under Beveridge's fire insurance policy and that neither Beveridge nor the insurer could bring a subrogation action against the Savages. It dismissed the action, and Beveridge appeals. We affirm.

SCOPE 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. *Swift v. Norwest Bank-Omaha West, ante* p. 619, 828 N.W.2d 755 (2013).

[2,3] Contract interpretation presents a question of law. *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012). We independently review questions of law decided by a lower court. *Id.*

FACTS

Beveridge owned a house in Plattsmouth, Nebraska. Beveridge and John Savage executed a residential lease for the property. The lease provided:

> [5.]a. Tenant agrees to promptly repair at Tenant's expense any damage to the property which may occur by reason of his/her negligence . . . .
>
> b. Specifically, but not by the way of limitation damage caused by failure to properly operate or monitor the operation of heating and/or air conditioning system and appliance is the responsibility of the Tenant.

> 6. Tenant is responsible to maintain the entire property . . . . The Tenant will pay the first fifty dollars ($50.00) of all repairs. The maximum amount that may be charged to the tenant during one anniversary year is $200.00 unless the repairs were needed due to Tenant negligence. . . .
>
> . . . .
>
> 13. The Tenant shall provide a liability and renter[']s insurance [policy] ($100,000) at Tenant's expense.

(Emphasis in original.) The Savages obtained a renter's protection policy of insurance. Beveridge was insured by a separate policy on the property.

The Savages lived in the house with Jill Savage's 6-year-old son. While left unattended in the basement, the child used a lighter to set a couch on fire, which caused significant damage to the house. Beveridge's insurer paid $161,545.01 to cover the full cost of reconstruction, plus $7,824.18 for lost rent. This subrogation action was brought against the Savages in Beveridge's name.

Both parties moved for summary judgment. In entering summary judgment in favor of the Savages, the district court relied upon *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004). The court concluded that the lease provision requiring the tenant to obtain $100,000 in liability and renter's insurance did not permit Beveridge or his insurer to bring a subrogation action against the Savages. It concluded that the Savages were coinsureds under Beveridge's fire insurance policy and that the insurer could not subrogate against its coinsureds. The court sustained the Savages' motion for summary judgment and dismissed the action.

Beveridge moved to alter or amend the judgment, the district court overruled the motion, and Beveridge appealed. Pursuant to statutory authority, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106 (Reissue 2008).

ASSIGNMENT OF ERROR

Beveridge assigns, restated and summarized, that the district court erred in granting the Savages' motion for summary judgment, because the court incorrectly concluded the lease did not

contain an express provision allowing the landlord's insurer to bring a subrogation action against the tenant.

ANALYSIS

The issue is whether the terms of the lease expressly rebut the presumption that the landlord and tenant are coinsureds under the landlord's fire insurance policy.

Beveridge claims that John Savage agreed to be held responsible for damages caused by negligence and expressly agreed to purchase insurance to protect against "those perils." See brief for appellant at 8. He asserts that the language of the lease stating that "[t]he Tenant shall provide a liability and renter[']s insurance [policy] ($100,000) at Tenant's expense" required Savage to purchase insurance for fire and other perils.

He claims that paragraphs 5, 6, and 13 of the lease agreement dispense with any uncertainty by specifically outlining that the tenant is responsible for damage caused by the tenant's negligence. And more important, the lease requires the tenant to purchase separate insurance. Because the tenant was required to obtain separate insurance, Beveridge claims the tenant is not a coinsured under his policy.

The Savages assert that whether a right of subrogation exists turns on whether the lease contains "an 'express agreement' transferring the risk of loss in the event of a fire to the Tenants." See brief for appellees at 3. They claim the lease does not meet this requirement because it does not specifically mention or address a right of subrogation. They argue that the lease does not contain an express agreement transferring the risk of loss to the tenant in the event of a fire.

Our decision in *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004), is controlling. In *Tri-Par Investments*, the landlord's insurer brought a subrogation action against the tenant for negligence and breach of lease, seeking to recover for damages caused by fire and loss of rent. At the time of the fire, Colette Sousa was renting a house from Tri-Par Investments, L.L.C. (Tri-Par), which maintained a homeowner's policy of insurance on the house. Its insurer paid for most

of the fire damage to the home and, thereafter, initiated a subrogation action in the name of Tri-Par against Sousa. The petition alleged that Sousa was negligent in failing to supervise several minor children and prevent one of the minor children from playing with or using matches or a lighter. It also alleged that Sousa breached the lease by failing to pay for or repair the fire damage and by failing to take care of the buildings and premises and keep them safe from danger of fire. The district court determined that for subrogation purposes, Sousa and Tri-Par were coinsureds, and because an insurer has no subrogation rights against its own insured, the court granted Sousa's motion for summary judgment to the extent of the insurer's claim for subrogation.

[4,5] In affirming the district court's order, we formally adopted the rule from *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975): "[A]bsent an agreement to the contrary, the law presumes that a tenant is coinsured under a landlord's fire insurance policy and that therefore, a landlord's insurer cannot maintain a subrogation action against a tenant for damage to the insured property that is caused by the tenant's negligence." *Tri-Par Investments*, 268 Neb. at 124, 680 N.W.2d at 195 (citing *Sutton, supra*). When fire insurance is provided for a dwelling, it protects the insurable interests of all joint owners, including the possessory interests of a tenant absent an express agreement by the latter to the contrary. *Tri-Par Investments, supra*; *Sutton, supra*.

We pointed out that the *Sutton* rule prevents landlords from engaging in gamesmanship when drafting leases by providing them the necessary incentive, if they so desire, to place express subrogation provisions in their leases. The lease required Sousa to repair all damages done to the premises or pay for the same, keep the buildings free from danger of fire, and return the property in a condition as good as it was when received. But there was no express provision in the lease that placed the tenants on notice that they must obtain insurance coverage for the realty if they wished to protect themselves from personal liability in the event they negligently started a fire. We held that Sousa and her landlord were implied

coinsureds for purposes of subrogation and that the landlord could not maintain a subrogation action against Sousa on behalf of the insurer.

If there is a clear provision in a lease requiring the tenants to obtain fire insurance for the realty, tenants will be on notice that they must obtain insurance coverage for the realty if they wish to protect themselves from personal liability in the event they negligently start a fire. See *Buckeye State Mut. Ins. Co. v. Humlicek*, 284 Neb. 463, 822 N.W.2d 351 (2012). 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. *Id.*

With these principles set forth, we examine the lease in the case at bar to determine if it expressly provided that for purposes of fire insurance covering the premises, Beveridge and the Savages were not coinsureds under Beveridge's fire insurance policy. The interpretation of a lease is a question of law that we decide independently of the district court. See *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012). To rebut the presumption, the lease must expressly require the tenant to obtain fire insurance on the realty.

[6,7] The lease required Savage to obtain a "liability and renter[']s insurance [policy] ($100,000) at Tenant's expense." "Liability insurance describes a wide variety of different insurance coverages." 1 Steven Plitt et al., Couch on Insurance 3d § 1:34 at 1-68 (2009). The lease does not state what "liability" is to be covered. Therefore, it is not clear as to the tenant's obligations and what liability the tenant is to insure. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). The requirement that the tenant obtain liability insurance is ambiguous as to whether the tenant is to obtain fire insurance or is a coinsured under the landlord's fire insurance policy. Ambiguous contracts are construed against the drafter. See *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992). Accordingly, the lease's requirement that the tenant obtain liability insurance is insufficient to

overcome the presumption that the tenant is a coinsured under the landlord's fire insurance policy.

The lease also required the tenant to obtain renter's insurance. "Renter's insurance is a 'contents' policy which covers tenant's possessions, such as furniture, appliances, personal belongings, and household goods." Aleatra P. Williams, *Insurers' Rights of Subrogation Against Tenants: The Begotten Union Between Equity and Her Beloved*, 55 Drake L. Rev. 541, 571 (2007). "However, renter's insurance does not typically cover the structure of the leased premises." *Id.* at 572.

The lease provision requiring the tenant to obtain renter's insurance did not require the tenant to insure the building against loss by fire. The lease's requirement that the tenant obtain renter's insurance is insufficient to overcome the presumption that a tenant is a coinsured under the landlord's fire insurance policy.

Finally, there is no lease provision stating that Beveridge or his insurer had a right of subrogation against the Savages for damages caused by fire as a result of negligence. There was no provision which gave the tenant notice that he must obtain insurance coverage for the realty in the event his negligence caused damage to the house by fire. Tenants reasonably expect that the owner of the building will provide fire insurance protection for the realty on both of their behalves. See *Buckeye State Mut. Ins. Co. v. Humlicek*, 284 Neb. 463, 822 N.W.2d 351 (2012).

In the case at bar, the provisions of the lease were insufficient to overcome the presumption that the Savages were coinsureds under Beveridge's fire insurance policy. Because the Savages were coinsureds, Beveridge and his insurer cannot bring a subrogation action against them.

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. *Swift v. Norwest Bank-Omaha West, ante* p. 619, 828 N.W.2d 755 (2013). There is no issue of material fact, and the

Savages are entitled to judgment as a matter of law. There is no merit to any of Beveridge's assigned errors.

CONCLUSION

Because the terms of the lease do not overcome the presumption that the tenant is coinsured under the landlord's fire insurance policy, Beveridge and his insurer cannot bring a subrogation action against the Savages. The district court did not err in sustaining the Savages' motion for summary judgment. We affirm the judgment of the district court.

AFFIRMED.

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