THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

JULY 2, 2013 and MAY 5, 2014

IN THE

Nebraska Court of Appeals

NEBRASKA APPELLATE REPORTS

VOLUME XXI

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

For the benefit of the State of Nebraska

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No. A-13-473: **State v. Rainey**. Affirmed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

†No. A-13-475: **In re Interest of Lisette M**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-13-476: **City of Hastings v. Hughes**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Riedmann, Judge.

No. A-13-484: **Gdowski v. Pothuloori**. Reversed. Bishop, Irwin, and Riedmann, Judges.

†No. A-13-487: **In re Interest of Nathaniel M. et al**. Affirmed. Irwin, Moore, and Bishop, Judges.

No. A-13-500: **State v. Trujillo**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

No. A-13-507: **In re Interest of Korri F**. Affirmed. Bishop, Irwin, and Moore, Judges.

†No. A-13-509: **State v. Meints**. Affirmed. Irwin, Moore, and Bishop, Judges.

No. A-13-510: **Johnson v. DHS Drilling Co**. Affirmed in part, and in part reversed and remanded for further proceedings. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-13-514: **State v. Stevens**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-13-517: **In re Interest of Jewel J**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-13-520: **Vanderwerf v. Ray Martin Co**. Affirmed. Bishop, Irwin, and Moore, Judges.

No. A-13-534: **In re Interest of Nyajok P. et al**. Affirmed. Irwin, Moore, and Bishop, Judges.

†No. A-13-536: **Herbolsheimer v. Koenig**. Affirmed in part, and in part reversed and remanded for further proceedings. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-13-540: **In re Interest of Austin W. & Linda W**. Affirmed. Inbody, Chief Judge, and Pirtle and Riedmann, Judges.

No. A-13-549: **LVNV Funding v. Castinado**. Affirmed. Riedmann, Moore, and Pirtle, Judges.

No. A-13-550: **Koch v. City of Sargent**. Appeal dismissed in part, and in part affirmed. Irwin, Riedmann, and Bishop, Judges.

†No. A-13-564: **State v. Lawless**. Reversed and remanded with directions. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-13-567: **In re Interest of Quintel C. et al**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

No. A-13-580: **McKeag v. McKeag**. Affirmed. Bishop, Irwin, and Moore, Judges.

†No. A-13-583: **State v. Smith**. Affirmed. Bishop, Irwin, and Moore, Judges.

†No. A-13-584: **In re Interest of Anthony P. & Dakota P**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-13-599: **Boger v. Magnus Company**. Affirmed. Bishop, Irwin, and Moore, Judges.

†No. A-13-600: **In re Interest of Buay J**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Riedmann, Judge.

No. A-13-601: **In re Interest of Ayodele F**. Reversed in part and affirmed in part. Moore, Irwin, and Bishop, Judges.

No. A-13-608: **State v. Neemeyer**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-13-610: **State v. Neemeyer**. Affirmed. Riedmann, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-13-614: **State v. Schmer**. Affirmed. Moore, Judge (1-judge).

No. A-13-628: **Nelson v. Nelson**. Affirmed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

No. A-13-634: **In re Interest of Allen M. et al**. Affirmed. Moore, Irwin, and Bishop, Judges.

No. A-13-636: **In re Interest of Symon S**. Affirmed. Bishop, Irwin, and Moore, Judges.

No. A-13-646: **Schrader v. Schrader**. Affirmed. Inbody, Chief Judge, and Pirtle and Riedmann, Judges.

†No. A-13-653: **State v. Hansen**. Affirmed in part, and in part reversed and vacated, and cause remanded with directions to dismiss. Bishop, Irwin, and Riedmann, Judges.

†No. A-13-669: **Cervantes v. Omaha Steel Castings Co**. Reversed and remanded with directions. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-13-672: **In re Interest of Aletha K**. Affirmed. Bishop, Irwin, and Moore, Judges.

No. A-13-678: **In re Interest of Malachi W. et al**. Affirmed. Moore, Irwin, and Bishop, Judges.

No. A-13-679: **Suhr v. Bruns**. Affirmed. Bishop, Irwin, and Moore, Judges.

No. A-13-686: **In re Interest of Alyssa B**. Affirmed. Inbody, Chief Judge, and Pirtle and Riedmann, Judges.

No. A-13-695: **State v. Jensen**. Affirmed. Bishop, Irwin, and Riedmann, Judges.

No. A-13-701: **Kaufman v. Reganis Auto Group**. Reversed and remanded. Bishop, Irwin, and Riedmann, Judges.

No. A-13-706: **State v. Nannen**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-13-715: **State v. Saenz**. Affirmed. Moore, Irwin, and Bishop, Judges.

No. A-13-722: **State v. Peery**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

†No. A-13-727: **State v. Garcia**. Affirmed. Inbody, Chief Judge, and Moore and Riedmann, Judges.

†No. A-13-735: **State v. Ellis**. Affirmed. Irwin, Riedmann, and Bishop, Judges.

No. A-13-736: **State v. Smallfoot**. Affirmed. Moore, Irwin, and Bishop, Judges.

†No. A-13-746: **In re Interest of Hayden N**. Affirmed. Moore, Irwin, and Bishop, Judges.

†No. A-13-747: **State v. Foltz**. Affirmed. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-13-767: **Tucker v. Adams Industries**. Affirmed. Bishop, Irwin, and Riedmann, Judges.

No. A-13-774: **State v. Sanders**. Affirmed. Moore, Irwin, and Bishop, Judges.

Nos. A-13-818, A-13-819: **State v. Knight**. Reversed and remanded for further proceedings. Inbody, Chief Judge, and Pirtle and Riedmann, Judges.

No. A-13-842: **In re Interest of Keylen E. & Ty Onna J**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

†No. A-13-843: **In re Interest of Avery S. & Izabel S**. Reversed and remanded for further proceedings. Pirtle, Judge, and Inbody, Chief Judge, and Moore, Judge.

No. A-13-851: **State v. Tate**. Affirmed. Bishop, Irwin, and Moore, Judges.

No. A-13-864: **In re Interest of Trentity D. & Surenity D**. Affirmed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

No. A-13-873: **In re Interest of Charlie B**. Affirmed. Riedmann, Irwin, and Bishop, Judges.

No. A-13-877: **State v. Tuttle**. Affirmed. Inbody, Chief Judge, and Pirtle and Riedmann, Judges.

†No. A-13-999: **In re Interest of Nery V. et al**. Appeal dismissed. Inbody, Chief Judge, and Moore and Pirtle, Judges.

No. A-13-1028: **In re Interest of Aaliyah C**. Affirmed. Moore, Judge, and Inbody, Chief Judge, and Pirtle, Judge.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-95-036: **Lincoln Lumber Co. v. Elston**. Stipulation allowed; appeal dismissed.

No. A-12-714: **Daniel H. on behalf of Gina G. v. Norma G**. Appeal dismissed. See, § 2-107(A)(2); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

No. A-12-804: **Harris v. Frazier**. Affirmed. See § 2-107(A)(1).

No. A-12-852: **Jacobs v. Kernick**. Appeal dismissed as moot. See, § 2-107(A)(2); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

No. A-12-929: **Gonzales v. Shaw**. Appeal dismissed. See, § 2-107(A)(2); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

No. A-12-933: **Austin v. Timperley**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-12-986: **State v. Diers**. Reversed and remanded with directions. See *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

No. A-12-1005: **HSBC Bank USA v. Matulka**. Affirmed. See § 2-107(A)(1). See, also, Neb. Rev. Stat. § 25-2124 (Reissue 2008); *K & K Farming v. Federal Intermediate Credit Bank*, 237 Neb. 846, 468 N.W.2d 99 (1991).

No. A-12-1009: **HSBC Bank USA v. Matulka**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1046: **McIntosh v. Union Pacific RR. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1081: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012); *State v. Derr*, 19 Neb. App. 326, 809 N.W.2d 520 (2011).

No. A-12-1126: **Holloway v. Poole**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-12-1133: **In re Interest of Presley C**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *In re Interest of Shaleia M.*, 283 Neb. 609, 812 N.W.2d 277 (2012).

No. A-12-1158: **State v. Robbins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-12-1178: **Patti v. Patti**. Affirmed. See, § 2-107(A)(1); *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).

No. A-12-1217: **State v. Singer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-12-1229: **Smart Invest. v. Ministry of Health Life Style Ctr**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-13-013: **State v. Claussen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

No. A-13-028: **State v. Kalina**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-043: **State v. Moreno**. Reversed and remanded with directions. See *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

No. A-13-061: **Gray v. Gray**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-064: **Hynes v. Good Samaritan Hospital**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-080: **Malone v. Cunningham**. Motion of appellee to dismiss appeal with prejudice on basis of mootness sustained; appeal dismissed with prejudice at cost of appellant. See *In re Interest of Shaleia M.*, 283 Neb. 609, 812 N.W.2d 277 (2012).

No. A-13-104: **Midland Properties v. Yah**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-107: **Sossan v. Auch**. Motion of appellee for summary affirmance granted.

No. A-13-125: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-128: **Stucky v. Pfizer, Inc**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-136: **State v. Randolph**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-13-147: **Tournor v. Maloley**. Appeal dismissed. See, § 2-107(A)(2); *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Hron v. Donlan*, 259 Neb. 259, 609 N.W.2d 379 (2000).

No. A-13-176: **State v. Machado**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-177: **State v. Reyes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-180: **State v. Kortum**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-186: **State v. Decoteau**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2012).

No. A-13-188: **Reyes v. Cargill Meat Solutions Corp**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-13-199: **In re Interest of Jordan B. et al**. Affirmed. See, § 2-107(A)(1); *In re Interest of G.G. et al.*, 237 Neb. 306, 465 N.W.2d 752 (1991).

No. A-13-200: **Vitolo v. Vitolo**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-208: **Nebraska Bankshares v. Mladek**. Appeal dismissed for appellant's failure to file brief. See § 2-109.

No. A-13-217: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

No. A-13-220: **State v. Miller**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-223: **State v. Dee**. Sentence of restitution vacated, and cause remanded for further proceedings. See, Neb. Rev. Stat. § 29-2281 (Reissue 2008); *State v. Mick*, 19 Neb. App. 521, 808 N.W.2d 663 (2012).

No. A-13-226: **State v. Orvis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003). See, also, *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

No. A-13-231: **State v. Xorxe-Perez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-232: **State v. Wabashaw**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. § 29-3001 et seq. (2008); *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002).

No. A-13-234: **State v. Vargas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-238: **State v. Murta**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-247: **State v. Dickerson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See Neb. Rev. Stat. § 28-707(1)(e) (Cum. Supp. 2012). See, also, *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001); *State v. Thielen*, 216 Neb. 119, 342 N.W.2d 186 (1983); *State v. Simnick*, 17 Neb. App. 766, 771 N.W.2d 196 (2009).

No. A-13-248: **Tschetter v. Tschetter**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-249: **State v. Bowen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-252: **State v. Rahaman**. Reversed and remanded with directions.

No. A-13-260: **State v. Jenkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-262: **State v. Purdie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. § 29-4120 (Reissue 2008); *State v. Lotter*, 266 Neb. 758, 669 N.W.2d 438 (2003).

No. A-13-272: **State v. Spigner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-274: **State v. Munoz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-13-279: **Wagner Oil Co. v. Wagner-Mentzer, L.L.C**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-13-282: **State v. Wallace**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-289: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-291: **State v. Rasmussen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-293: **Onuachi v. Meylan Enters**. Affirmed. See, § 2-107(A)(1); *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002).

No. A-13-294: **Onuachi v. Western Waterproofing Co**. Affirmed. See, § 2-107(A)(1); *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002).

No. A-13-298: **State v. Almansori**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-299: **State v. Fees**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000); *State v. Hosack*, 12 Neb. App. 168, 668 N.W.2d 707 (2003).

Nos. A-13-303, A-13-304: **State v. Stevens**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

Nos. A-13-308, A-13-309: **State v. Coyle**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

No. A-13-311: **Reed v. Reinke Management Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-312: **Collura v. Collura**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-320: **State v. Nash**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-324: **State v. Savery**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-327: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-328: **Paitz v. Buffalo County**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-336: **State v. Gadson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

No. A-13-348: **State v. Moncebaiz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Policky*, 285 Neb. 612, 828 N.W.2d 163 (2013).

Nos. A-13-349, A-13-350: **State v. Ogle**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-351: **Nordmeier v. Chavez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-358: **State v. Howley**. Stipulation allowed; appeal dismissed.

No. A-13-361: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-13-363: **State v. Wizinsky**. Stipulation allowed; appeal dismissed.

No. A-13-365: **Anderson Excavating Co. v. White Lotus Dev**. Motion of appellee for summary dismissal sustained; appeal dismissed as moot. See *Hormandl v. Lecher Constr. Co*., 231 Neb. 355, 436 N.W.2d 188 (1989).

No. A-13-366: **Phillips v. Douglas County**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. A-13-367: **State v. Pochop**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-371: **State v. Childers**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-374: **Mathew v. Nich**. Reversed and remanded. See § 2-107(A)(3).

No. A-13-385: **State v. Gatto**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-396: **In re Interest of Dalon T. et al**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-13-396: **In re Interest of Dalon T. et al**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-13-397: **Mehuron v. City of Lincoln**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-13-399: **Homefield Investments v. Donner**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-400: **Sdieg v. Ibrahimmohamed**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009).

No. A-13-402: **State v. Laughlin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-403: **State v. Daniels**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-407: **Goossen v. Goossen**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-409: **Bank of America v. Madej**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-13-410: **State v. Henry**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-416: **Miller v. Miller**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-424: **State v. Carson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-425: **State v. Essex**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-427: **Hansen v. Hansen**. Motion of appellants to dismiss appeal sustained; appeal dismissed.

No. A-13-430: **State v. Gustafson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-431: **Olson v. Olson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-434: **State v. Jefferson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-437: **State v. Boyce**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-439: **State v. Allison**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-440: **State v. Simental**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-441: **State v. Determan**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-442: **Owens v. Owens**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-443: **Owens v. Head**. By order of the court, appeal dismissed for failure to file briefs.

Nos. A-13-448, A-13-449: **State v. Loredon**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-13-450: **State v. Marks**. Stipulation allowed; appeal dismissed.

No. A-13-451: **State v. Kirby**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-452: **State v. Diaz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-460: **Wiles v. Wiles Bros., Inc**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-13-468: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

No. A-13-470: **Maldanado v. JBS Swift & Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-472: **State v. Cymbalista**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-474: **State v. Amerson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-477: **Sibley v. Union Pacific RR. Co**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-479: **State v. Hopkins**. Stipulation allowed; appeal dismissed.

No. A-13-481: **Barnett v. Molloy**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-483: **State v. Falco**. Stipulation allowed; appeal dismissed.

No. A-13-485: **In re Interest of Iguan R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-486: **In re Interest of Iguan R**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-489: **State v. Munoz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-490: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-13-496: **State v. Rouse**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-498: **Blankenbecler v. Rogers**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-499: **State v. Nyffler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-503: **State v. Jackson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-505: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013); *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013); *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

No. A-13-511: **Unger v. Olsen's Agricultural Laboratory**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-13-512: **State v. Dorcey**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 29-117 and 29-825 (Reissue 2008); *State v. Ruiz-Medina*, 8 Neb. App. 529, 597 N.W.2d 403 (1999).

No. A-13-515: **State v. Firmanik**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-519: **State v. Stanko**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-523: **State v. Hoit**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-524: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

Nos. A-13-525, A-13-526: **State v. Chillingworth**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-13-527: **State v. Muhammad**. Appeal dismissed. See, § 2-107(A)(2); *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996).

No. A-13-531: **Kerrey v. Nelson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-537: **State v. Shelhamer**. Stipulation allowed; appeal dismissed.

No. A-13-546: **State v. Bautista-Lucas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-548: **State v. Sukovaty**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-554: **State v. Cash**. Motion of appellee for summary affirmance pursuant to § 2-107(B)(2) granted.

No. A-13-556: **State v. Turrentine-Sims**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912 (Reissue 2008).

No. A-13-560: **Keup v. Lindemeier**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-565: **State on behalf of Aunre T. v. Henry P**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008).

No. A-13-566: **State v. Torpy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-13-569: **Himmelrick v. Bass**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-571: **Robinson v. Department of Corrections**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-573: **In re Guardianship of Matthew N**. Affirmed. See, § 2-107(A)(1); *In re Guardianship & Conservatorship of Karin P.*, 271 Neb. 917, 716 N.W.2d 681 (2006).

No. A-13-574: **Balames v. Ginn**. Appeal dismissed. See § 2-107(A)(2). Trial court's ruling on motion for new trial vacated. See, e.g., *Wicker v. Vogel*, 246 Neb. 601, 521 N.W.2d 907 (1994).

No. A-13-576: **State v. Taliaferro**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-578: **State v. Agok**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-579: **State v. Agok**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-586: **Tyler v. Stacy**. Affirmed. See § 2-107(A)(1). See, also, *Wagner v. Pope*, 247 Neb. 951, 531 N.W.2d 234 (1995).

No. A-13-587: **Tyler v. Omaha Police Dept**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-590: **State v. Majors**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-13-591, A-13-592: **State v. Walker**. Motions of appellee for summary affirmance sustained; judgments affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-593: **Savich v. City of Omaha**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-596: **State v. Hoover**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-598: **Kaufman v. Reganis Auto Group**. Appeal dismissed. See, § 2-107(A)(2); *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012).

No. A-13-612: **State v. Stanko**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, §§ 1-104 and 2-105; *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011); *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007).

No. A-13-613: **State v. Harrod**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-615: **State v. Dufour**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-617: **Prayer Center v. Nuckolls Cty. Bd. of Equal**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-624: **Todd v. Nolte**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

Nos. A-13-630, A-13-631: **State v. Lewis**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-632: **State v. Simnick**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1301 (Reissue 2008). See, also, *Crawford v. Crawford*, 18 Neb. App. 890, 794 N.W.2d 198 (2011).

No. A-13-637: **State v. Newburn**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-638: **State v. Newburn**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-641: **In re Interest of Kena J**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

No. A-13-642: **Myers v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-649: **State v. Keller**. Stipulation allowed; appeal dismissed.

No. A-13-652: **State v. Neemeyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-654: **State v. Borton**. Summarily affirmed. See § 2-107(A)(1).

No. A-13-657: **State v. White**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-662: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-13-665: **In re Interest of Christina M. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-667: **Benish v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, Neb. Rev. Stat. § 29-2801 (Reissue 2008); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. A-13-674: **State v. Wallace**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-676: **State v. Baker**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-682: **Thaden v. Carlisle Insulation**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-684: **State v. Allen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-685: **State v. Shaw**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

No. A-13-693: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-694: **Peterson Farms v. Spalding Co-op Elev. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-697: **State v. Kingery**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-705: **State v. Holliday**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

No. A-13-707: **State v. Pratt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-13-708: **State v. Martinez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-710: **Chamberlain v. Village of Craig**. Stipulation allowed; appeal dismissed.

No. A-13-713: **State v. Whitlock**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-714: **State v. Ironbear**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-718: **Owens v. Owens**. Appeal dismissed.

No. A-13-719: **State v. Stewart**. Stipulation allowed; appeal dismissed.

No. A-13-723: **State v. Collins**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

Nos. A-13-728, A-13-729: **State v. Wilson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-731: **State v. Penn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-733: **Huntington v. Pedersen**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-737: **Robinson v. Department of Corrections**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); Neb. Rev. Stat. §§ 84-901 (Reissue 2008) and 84-917 (Cum. Supp. 2012). See, also, *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994).

No. A-13-739: **James v. James**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. A-13-743: **Bank of America v. Madej**. Motion of appellee for summary dismissal sustained; appeal dismissed. See Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

Nos. A-13-744, A-13-745: **State v. Wooten**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-748: **Macias v. Bader**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-751: **In re Conservatorship of Walker**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-13-752: **Clarkson Regional Health Servs. v. Carlisle**. Stipulation allowed; appeal dismissed.

No. A-13-757: **State v. Hendrickson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-758: **State v. Lee**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Finnegan*, 232 Neb. 75, 439 N.W.2d 496 (1989).

No. A-13-763: **Keating-Manzitto v. Manzitto**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-13-768, A-13-770: **State v. Robinson**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-772: **Henry v. Williams**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-13-776: **Pierson v. Bredthauer**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-13-782: **State v. Wright**. Appeal dismissed as moot.

No. A-13-786: **Costello v. Costello**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. A-13-787: **Wilson v. Bruning**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-788: **State v. Rinehart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-13-789: **State v. Witmer**. Affirmed. See § 2-107(A)(1).

No. A-13-791: **Moore v. Equal Opportunity Commission**. Motion of appellee for summary dismissal granted.

No. A-13-794: **McLaughlin v. Crete Carrier Corp**. Summarily reversed and remanded for further proceedings. See § 2-107(C)(1).

No. A-13-795: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-13-800: **State v. Robertson**. Stipulation allowed; appeal dismissed.

No. A-13-801: **McCullough v. Magos**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-804: **State v. O'Shea**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-810: **In re Trust of Looby**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-812: **In re Interest of Laresa M. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

No. A-13-813: **Sims v. Sims**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-820: **County of Nance v. Prokop**. Appeal dismissed. See, § 2-107(A)(2); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

No. A-13-820: **County of Nance v. Prokop**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-13-822: **State v. Grandel**. Motion of appellee for summary affirmance sustained. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-825: **State v. Trudell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-827: **Schilling v. Schilling**. Stipulation allowed; appeal dismissed.

No. A-13-832: **Barrera v. Riverside Golf Club**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-836: **State Farm Fire & Cas. Co. v. Crane Grain Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-838: **Johnson v. Lower Big Blue NRD**. Appeal dismissed. See, § 2-107(A)(2); *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007); *Qwest Bus. Resources v. Headliners–1299 Farnam*, 15 Neb. App. 405, 727 N.W.2d 724 (2007).

No. A-13-839: **State v. Draper**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-840: **Essman v. Department of Health & Human Servs**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008).

No. A-13-840: **Essman v. Department of Health & Human Servs**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-13-845: **State v. Capehart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-849: **McReynolds v. RIU Resorts and Hotels**. Stipulation considered; appeal dismissed.

No. A-13-852: **Yah v. Jackson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-853: **State v. Lopez**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

Nos. A-13-854 through A-13-856: **State v. Renshaw**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-13-857: **Ragone v. Ragone**. Stipulation allowed; appeal dismissed.

No. A-13-858: **Schroeder v. Schroeder**. Appeal dismissed. See, § 2-107(A)(2); *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008).

No. A-13-861: **City of Long Pine v. Voss**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-862: **Evans v. Thatcher**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-866: **State v. Barber**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-13-867: **State v. Bossaller**. Motion of appellee for summary affirmance sustained. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-869: **State v. Matthies**. Stipulation allowed; appeal dismissed.

No. A-13-872: **State v. Johnson**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

No. A-13-874: **State v. Miller**. Appellee's suggestion of remand sustained; sentence vacated, and cause remanded for resentencing.

No. A-13-882: **State v. Johnson**. Reversed and remanded. See § 2-107(A)(3).

No. A-13-888: **Goodwin v. Goodwin**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-890: **Pierce v. Landmark Mgmt. Group**. Appeal dismissed. See, § 2-107(A)(2); *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013).

No. A-13-898: **Briggs v. City of Omaha**. Appeal dismissed. See, § 2-107(A)(2); *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

No. A-13-902: **State v. Ross**. Motion of appellee for summary affirmance sustained. See *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

No. A-13-905: **State v. Bland**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-909: **Lincoln Firefighters Assn. v. City of Lincoln**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-910: **Rietz v. Gichema**. Appeal dismissed. See, § 2-107(A)(2); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

No. A-13-914: **Bell v. Bell**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-13-919: **R.G.M. Corp. v. Cheyenne County**. Stipulation allowed; appeal dismissed.

No. A-13-920: **Brown v. Northport Irrigation Dist**. Appeal dismissed for failure to file briefs.

No. A-13-923: **State v. Baker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-924: **State v. Preister**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-926: **State v. Wortham**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-13-927: **Goings v. Goings**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-13-932: **Rowe v. Rowe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-933: **State v. Garcia**. Stipulation allowed; appeal dismissed.

No. A-13-934: **State v. Malesker**. Reversed and remanded. See § 2-107(A)(3).

No. A-13-935: **State v. Daugherty**. Appeal dismissed, see § 2-107(A)(2), and cause remanded with directions.

No. A-13-937: **State v. Wizinsky**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-940: **State v. Voter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Pratt*, 287 Neb. 455, 842 N.W.2d 800 (2014).

No. A-13-943: **State v. Olson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-948: **State v. Cavanaugh**. Appeal dismissed. See, §§ 2-107(A)(2) and 2-101(B)(4); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. A-13-949: **Kroksh v. Hill**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-13-951: **Osuna v. West Point Implement & Design**. Motion of appellee for summary affirmance sustained. See, § 2-107(B)(2); *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979).

No. A-13-952: **Moore v. Babin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-953: **State v. Sherrod**. Appeal dismissed. See § 2-107(A)(2). See, e.g., *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-13-954: **Pineda v. Rick's Knockout Carpet**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-957: **State v. Mundhenke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-961: **Payne v. Hopkins**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-13-965: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-966: **State v. Clausen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-969: **Wilson v. Wiese**. Appeal dismissed. See, § 2-107(A)(2); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-13-970: **Geiser Construction v. Nickman**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-971: **State v. Ginther**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009).

No. A-13-974: **Wilson v. Bruning**. Appeal dismissed. See, § 2-107(A)(2); *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

No. A-13-976: **State v. Wissler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-979: **State v. Iron Bear**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012).

No. A-13-986: **State v. Utterback**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-987: **State v. Kuhn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-988: **State v. Kuhn**. Motion of appellee for summary affirmance granted.

No. A-13-989: **State v. Muldoon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-994: **Bank of America v. Madej**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-1007: **Close v. Close**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-13-1016: **State v. Tyler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-1019: **In re Interest of Brianna W. et al**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-1023: **State v. Byrd**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013).

No. A-13-1024: **Kappas Enters. v. Department of Roads**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-1025: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-1027: **In re Interest of Kayreese B. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997).

No. A-13-1033: **State v. Nightingale**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-1035: **State v. Jude**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-1039: **State v. Newburn**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-1040: **Owens v. Owens**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-1041: **Beddes v. Beddes**. Appeal dismissed. See, § 2-107(A)(2); *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

No. A-13-1045: **Cattle Nat. Bank & Trust Co. v. Anthony**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. A-13-1046: **State v. Holroyd**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-1048: **Owens v. Owens**. Appeal dismissed. See § 2-107(A)(2).

Nos. A-13-1050, A-13-1051: **State v. John**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001); *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999).

No. A-13-1054: **In re Estate of Liebig**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-1055: **In re Interest of Christian A. & Brysen A**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-1055: **In re Interest of Christian A. & Brysen A**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. A-13-1055: **In re Interest of Christian A. & Brysen A**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-13-1063, A-13-1064: **State v. Salyers**. Motions of appellee for summary affirmance sustained; judgments affirmed. See, § 2-107(B)(2); *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

No. A-13-1070: **Wolfe v. Wolfe**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-1072: **State v. Ellis**. Appeal dismissed. See, § 2-107(A)(2); *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995).

No. A-13-1073: **Evans v. Thatcher**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-1074: **Lauritzen v. Wendt**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-1078: **State v. Mendoza**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 29-1817 (Reissue 2008); *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001).

No. A-13-1084: **Mumin v. Gage**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-1086: **In re Interest of Antonio J. et al**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-1089: **Benton v. Winnebago Public School**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-1090: **State v. Banks**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-13-1095: **Pinnacle Enters. v. City of Papillion**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012).

No. A-13-1096: **State v. Stanko**. Motion of appellee for summary dismissal granted.

No. A-13-1097: **State v. Wescott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Leibel*, 286 Neb. 725, 838 N.W.2d 286 (2013).

No. A-13-1100: **Hernandez-Cerda v. Tyson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-1101: **State v. Stovie**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-13-1102: **Garcia v. Bee Welder, Inc**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-1108: **State v. Denton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, *State v. Leibel*, 286 Neb. 725, 838 N.W.2d 286 (2013); *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

No. A-13-1109: **State v. Harms**. Motion of appellee for summary affirmance sustained.

No. A-13-1116: **Gray v. Gage**. By order of the court, appeal dismissed for failure to file briefs.

No. A-13-1119: **Kurz v. Floyd's Truck Center**. Stipulation allowed; appeal dismissed.

No. A-13-1120: **Frnka v. Frnka**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-13-1122: **State on behalf of Jeslynn C. v. Jeremiah E**. Appeal dismissed. See § 2-107(A)(2).

No. A-13-1127: **State v. Greve**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

No. A-13-1129: **State v. Alspaugh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

No. A-13-1132: **State v. Brown**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-1142: **State v. Thomas**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-1143: **State v. Thomas**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-13-1145: **State v. Frank**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-001: **In re Interest of Kentrell H. et al**. Appeal dismissed. See, § 2-107(A)(2); *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

No. A-14-004: **State v. Betancourt-Garcia**. Motion of appellant to dismiss and stipulation allowed; appeal dismissed.

No. A-14-006: **Liu v. State Farm Fire & Cas. Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).

No. A-14-015: **State v. Stanko**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. § 25-1902 (Reissue 2008). See, also, Neb. Rev. Stat. § 25-2728 (Cum. Supp. 2012).

No. A-14-016: **State v. Stephens**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-024: **Lang v. Wilkerson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-028: **State v. Beers**. Sentence vacated, and cause remanded for resentencing.

No. A-14-033: **Patmon v. State**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-034: **Baker v. US Bancorp**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-14-039: **State v. Watson**. Appeal dismissed. See, § 2-107(A)(2); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

No. A-14-042: **State v. Stewart**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

No. A-14-043: **Moore v. Winterer**. Motion of appellee for summary dismissal sustained; appeal dismissed. See, § 2-107(B)(1); Neb. Rev. Stat. §§ 25-1902 and 25-1315(1) (Reissue 2008).

No. A-14-045: **State v. Bahm**. Motion of appellee for summary affirmance sustained; judgment affirmed. See *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

No. A-14-059: **State v. Benedict**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-066: **State v. Bidne**. Appeal dismissed. See, § 2-107(A)(2); *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

No. A-14-071: **In re Estate of Tran**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-076: **Vlach v. Vlach**. Affirmed. See § 2-107(A)(1).

No. A-14-084: **Abraham v. Randstad North America**. Appeal dismissed. See, § 2-107(A)(2); *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *In re Interest of Marcella B. & Juan S.*, 18 Neb. App. 153, 775 N.W.2d 470 (2009).

No. A-14-093: **State v. Ekis**. Stipulation allowed; appeal dismissed.

No. A-14-103: **State v. Robertson**. Stipulation allowed; appeal dismissed.

No. A-14-121: **D'Elia v. O'Brien**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-14-127: **Central Neb. Pub. Power & Irr. Dist. v. Hixson**. Matter dismissed. See § 2-107(A)(2).

No. A-14-140: **State v. Matthies**. Stipulation allowed; appeal dismissed.

No. A-14-157: **State v. McKay**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

No. A-14-169: **Tyler v. Kirk**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Martin v. McGinn*, 267 Neb. 931, 678 N.W.2d 737 (2004).

No. A-14-171: **State v. Toney**. Motion of appellant to dismiss and stipulation allowed; appeal dismissed.

No. A-14-177: **State v. Jones**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-209: **Purdie v. Department of Corrections**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-223: **State v. Daugherty**. Appeal dismissed. See, § 2-107(A)(2); *Friedman v. Friedman*, 20 Neb. App. 135, 819 N.W.2d 732 (2012).

No. A-14-236: **Glenn v. Tie Yard of Omaha**. Appeal dismissed. See § 2-107(A)(2).

No. A-14-250: **State v. Klimantas**. Stipulation allowed; appeal dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-10-981: **State v. Nadeem**. Petition of appellant for further review denied on July 10, 2013.

No. S-11-438: **Jacobson v. Shresta**, 21 Neb. App. 102 (2013). Petition of appellant for further review sustained on December 11, 2013.

No. S-11-504: **State v. Kays**, 21 Neb. App. 376 (2013). Petition of appellant for further review sustained on April 16, 2014.

No. S-11-760: **State v. Pratt**, 20 Neb. App. 434 (2013). Petition of appellee for further review sustained on July 10, 2013.

Nos. A-11-806, A-11-974: **In re Guardianship & Conservatorship of Giventer**. Petitions of appellant for further review overruled on October 25, 2013, as premature.

No. S-12-082: **Steffy v. Steffy**, 20 Neb. App. 757 (2013). Petition of appellee for further review sustained on August 28, 2013.

No. A-12-091: **Curry v. Furby**, 20 Neb. App. 736 (2013). Petition of appellant for further review denied on July 10, 2013.

No. A-12-124: **Carper v. Carper**. Petition of appellant for further review denied on March 21, 2014, for lack of jurisdiction.

No. A-12-155: **Taylor v. City of Omaha**. Petition of appellant for further review denied on July 10, 2013.

No. A-12-196: **Rudd v. Debora**, 20 Neb. App. 850 (2013). Petition of appellant for further review denied on August 28, 2013.

No. A-12-218: **State v. Kelly**, 20 Neb. App. 871 (2013). Petition of appellant for further review denied on August 28, 2013.

No. A-12-257: **State v. Podrazo**, 21 Neb. App. 489 (2013). Petition of appellant for further review denied on February 12, 2014.

No. A-12-273: **State v. Fessler**. Petition of appellant for further review denied on September 19, 2013.

No. S-12-296: **Kuhnel v. BNSF Railway Co.**, 20 Neb. App. 884 (2013). Petition of appellee for further review sustained on August 28, 2013.

No. A-12-349: **OSC Ambassador v. Blum**. Petition of appellants for further review denied on March 12, 2014.

No. A-12-425: **Fast Ball Sports v. Metropolitan Entertainment**, 21 Neb. App. 1 (2013). Petition of appellant for further review denied on August 28, 2013.

No. S-12-454: **State v. Mortensen**. Petition of appellee for further review sustained on July 10, 2013.

No. A-12-461: **Belitz v. Belitz**, 21 Neb. App. 716 (2014). Petitions of appellant for further review denied on April 9, 2014.

No. A-12-463: **McCaulley v. Nebraska Furniture Mart**, 21 Neb. App. 125 (2013). Petition of appellee for further review denied on October 23, 2013.

No. A-12-477: **Klingelhoefer v. Parker, Grossart**, 20 Neb. App. 825 (2013). Petition of appellant for further review denied on August 28, 2013.

No. A-12-494: **State v. Sledge**. Petition of appellant for further review denied on June 26, 2013.

No. A-12-505: **Collins v. Collins**, 21 Neb. App. 161 (2013). Petition of appellant for further review denied on October 23, 2013.

No. A-12-512: **Agee v. Sabatka-Rine**. Petition of appellant for further review denied on July 10, 2013.

No. A-12-547: **Stitch Ranch v. Double B.J. Farms**, 21 Neb. App. 328 (2013). Petition of appellant for further review denied on December 11, 2013.

No. A-12-581: **State v. Quezada**, 20 Neb. App. 836 (2013). Petition of appellant for further review denied on August 28, 2013.

No. S-12-615: **State v. Dalland**, 20 Neb. App. 905 (2013). Petition of appellee for further review sustained on August 28, 2013.

No. A-12-665: **Frederick v. Merz**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-666: **Biel v. Biel**. Petition of appellant for further review denied on December 18, 2013.

No. A-12-673: **Glantz v. Daniel**, 21 Neb. App. 89 (2013). Petition of appellant for further review denied on September 25, 2013.

No. A-12-730: **McCullough v. McCullough**. Petition of appellant for further review denied on July 10, 2013.

No. A-12-742: **State v. Heath**, 21 Neb. App. 141 (2013). Petition of appellant for further review denied on September 11, 2013.

No. A-12-744: **Sweet v. Omaha Pub. Power Dist**. Petition of appellant for further review denied on December 11, 2013.

No. S-12-759: **State v. Filholm**. Petition of appellant for further review sustained on October 16, 2013.

No. A-12-766: **Lesser v. Eagle Hills Homeowners' Assn**. Petition of appellant for further review denied on July 10, 2013.

No. A-12-779: **Schlichtman v. Jacob**. Petition of appellant for further review denied on November 20, 2013.

No. A-12-790: **State v. Serr**. Petition of appellant for further review denied on October 30, 2013.

No. A-12-806: **State v. Weidenbach**. Petition of appellant for further review denied on July 10, 2013.

No. S-12-811: **In re Interest of Mya C. & Sunday C.**, 20 Neb. App. 916 (2013). Petition of appellant for further review sustained on August 28, 2013.

No. A-12-823: **Becerra v. Sulhoff**, 21 Neb. App. 178 (2013). Petition of appellee for further review denied on October 30, 2013.

No. A-12-830: **Shear v. City of Wayne Civil Serv. Comm.**, 21 Neb. App. 644 (2014). Petition of appellant for further review denied on April 16, 2014.

No. A-12-860: **In re Interest of Niko M**. Petition of appellant for further review denied on September 25, 2013.

No. A-12-861: **In re Interest of Samari M**. Petition of appellant for further review denied on September 25, 2013.

No. S-12-908: **State v. Abdullah**. Petition of appellant for further review sustained on September 19, 2013.

No. A-12-915: **Pope-Gonzalez v. Husker Concrete**, 21 Neb. App. 575 (2013). Petition of appellant for further review denied on March 12, 2014.

No. A-12-951: **State v. Welch**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-963: **Roness v. Wal-Mart Stores**, 21 Neb. App. 211 (2013). Petition of appellee for further review denied on December 11, 2013.

No. A-12-982: **Jacob v. Nebraska Dept. of Corr. Servs**. Petition of appellant for further review denied on October 16, 2013.

No. A-12-1012: **State v. Lantz**, 21 Neb. App. 679 (2014). Petition of appellant for further review denied on March 12, 2014.

No. A-12-1027: **State on behalf of Savannah E. & Catilyn E. v. Kyle E.**, 21 Neb. App. 409 (2013). Petition of appellant for further review denied on December 11, 2013.

No. S-12-1029: **In re Rolf H. Brennemann Testamentary Trust**, 21 Neb. App. 353 (2013). Petition of appellant for further review sustained on December 31, 2013.

No. A-12-1030: **Dragon v. Dragon**, 21 Neb. App. 228 (2013). Petition of appellee for further review denied on October 30, 2013.

No. S-12-1037: **Wayne G. v. Jacqueline W.**, 21 Neb. App. 551 (2013). Petition of appellant for further review granted on February 12, 2014.

No. S-12-1042: **State Farm Fire & Cas. Co. v. Dantzler**, 21 Neb. App. 564 (2013). Petition of appellee for further review sustained on February 20, 2014.

No. A-12-1043: **Horner v. Horner**. Petition of appellee for further review denied on March 26, 2014.

No. A-12-1055: **In re Interest of Landen W. et al**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-1056: **In re Interest of Talik S. et al**. Petition of appellant for further review denied on October 16, 2013.

No. A-12-1061: **State v. York**. Petition of appellant for further review denied on December 18, 2013.

No. A-12-1062: **State v. Zuck**. Petition of appellant for further review denied on August 28, 2013.

No. A-12-1072: **State v. Huff**. Petition of appellant for further review denied on April 9, 2014.

No. A-12-1074: **State v. Kirstine**. Petition of appellant for further review denied on July 22, 2013.

No. A-12-1110: **In re Interest of Gary L. & Leanna L**. Petition of appellant for further review denied on October 16, 2013.

No. A-12-1131: **First State Bank & Trust Co. v. Parkview Development**. Petition of appellant for further review denied on March 26, 2014.

No. S-12-1139: **Zapata v. Roberts**. Petition of appellant for further review sustained on August 28, 2013.

No. A-12-1149: **State v. Haynes**. Petition of appellant for further review denied on April 9, 2014.

No. A-12-1154: **State v. Pierce**. Petition of appellant for further review denied on December 16, 2013, for lack of jurisdiction.

No. A-12-1158: **State v. Robbins**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-1167: **State v. Buttercase**. Petition of appellant for further review denied on February 20, 2014.

No. A-12-1177: **Piper v. Neth**. Petition of appellant for further review denied on July 10, 2013.

No. A-12-1178: **Patti v. Patti**. Petition of appellant for further review overruled on November 14, 2013.

No. A-12-1185: **State v. Graves**. Petition of appellant for further review denied on September 25, 2013.

No. A-12-1189: **State v. Earith**. Petition of appellant for further review denied on January 15, 2014.

No. A-12-1192: **In re Interest of Thomas T**. Petition of appellant for further review denied on September 11, 2013.

No. A-12-1198: **Leon v. State**. Petition of appellant for further review denied on September 19, 2013.

No. A-12-1209: **In re Interest of Damien S**. Petition of appellee for further review denied on January 15, 2014.

No. A-13-013: **State v. Claussen**. Petition of appellant for further review denied on October 16, 2013.

No. A-13-025: **State v. Warrack**, 21 Neb. App. 604 (2014). Petition of appellant for further review denied on February 20, 2014.

No. A-13-045: **State v. Rush**. Petition of appellant for further review denied on January 30, 2014.

No. A-13-048: **In re Estate of Bowley**. Petition of appellant for further review denied on March 28, 2014, as filed out of time.

No. S-13-062: **State v. Rodriguez**. Petition of appellant for further review sustained on January 23, 2014.

No. A-13-066: **In re Interest of Danial B**. Petition of appellant for further review denied on October 16, 2013.

No. A-13-068: **State v. Seeger**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-072: **State v. Pittman**. Petition of appellant for further review denied on December 18, 2013.

No. A-13-080: **Malone v. Cunningham**. Petition of appellant for further review denied on October 16, 2013.

No. A-13-081: **State v. Gomez**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-089: **Rusty's Fertilizer v. Maloley**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-104: **Midland Properties v. Yah**. Petition of appellant for further review denied on January 7, 2014, as untimely.

No. A-13-115: **Duros v. Diversified Enters**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-125: **State v. Smith**. Petition of appellant for further review denied on September 19, 2013.

No. A-13-168: **In re Interest of Caleb A**. Petition of appellant for further review denied on October 23, 2013.

No. A-13-169: **In re Interest of Christian A**. Petition of appellant for further review denied on October 23, 2013.

No. A-13-170: **In re Interest of Raina A**. Petition of appellant for further review denied on October 23, 2013.

No. A-13-176: **State v. Machado**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-186: **State v. Decoteau**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-191: **Brown v. Brown**. Petition of appellant for further review denied on January 23, 2014.

No. A-13-205: **State on behalf of Oliver M. v. Kirk B**. Petition of appellant for further review denied on April 23, 2014.

No. A-13-227: **Becerra v. United Parcel Service**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-228: **City of Omaha v. Mobeco Indus**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-230: **City of Omaha v. Morello**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-231: **State v. Xorxe-Perez**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-232: **State v. Wabashaw**. Petition of appellant for further review denied on December 11, 2013.

No. A-13-241: **State v. Esch**. Petition of appellant for further review denied on February 20, 2014.

No. A-13-245: **State v. Camacho**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-246: **State v. Dubray**, 21 Neb. App. 782 (2014). Petition of appellant for further review denied on April 23, 2014.

No. A-13-249: **State v. Bowen**. Petition of appellant for further review denied on August 2, 2013, as untimely. See § 2-102(F)(1).

No. A-13-254: **State v. Gray**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-259: **State v. Wilson**. Petition of appellant for further review denied on September 11, 2013.

No. A-13-262: **State v. Purdie**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-291: **State v. Rasmussen**. Petition of appellant for further review denied on November 27, 2013.

No. A-13-298: **State v. Almansori**. Petition of appellant for further review denied on September 11, 2013.

No. A-13-316: **State v. Fletcher**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-324: **State v. Savery**. Petition of appellant for further review denied on August 28, 2013.

No. A-13-330: **State v. Tjaden**. Petition of appellant for further review denied on December 18, 2013.

No. A-13-332: **West Plains LLC v. Rosberg**. Petition of appellant for further review denied on October 16, 2013.

No. A-13-334: **Rosberg v. West Plains Co**. Petition of appellant for further review denied on October 16, 2013.

No. S-13-339: **In re Interest of Joseph S. et al.**, 21 Neb. App. 706 (2014). Petition of appellant for further review sustained on March 12, 2014.

No. A-13-340: **State v. Fuentes**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-342: **In re Interest of Dusti M**. Petition of appellant for further review denied on January 23, 2014.

No. A-13-352: **State v. Allen**. Petition of appellant for further review denied on June 26, 2013.

No. A-13-373: **Eyman v. Eyman**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-385: **State v. Gatto**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-391: **Busch v. Civil Service Commission**, 21 Neb. App. 789 (2014). Petition of appellant for further review denied on April 16, 2014.

No. A-13-394: **Mark J. v. Darla B.**, 21 Neb. App. 770 (2014). Petition of appellant for further review denied on April 16, 2014.

No. A-13-411: **State v. Neuberger**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-414: **State v. Rice**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-422: **State v. Patti**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-428: **In re Interest of Daniel G. et al**. Petition of appellant for further review denied on February 12, 2014.

No. A-13-438: **State v. Mohammad**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-468: **State v. Jones**. Petition of appellant for further review denied on November 14, 2013, as untimely filed. See § 2-102(F)(1).

No. A-13-474: **State v. Amerson**. Petition of appellant for further review denied on November 14, 2013.

No. A-13-475: **In re Interest of Lisette M**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-505: **State v. Brown**. Petition of appellant for further review denied on April 11, 2014.

No. A-13-515: **State v. Firmanik**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-565: **State on behalf of Aunre T. v. Henry P**. Petition of appellant for further review denied on October 30, 2013.

No. A-13-566: **State v. Torpy**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-583: **State v. Smith**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-601: **In re Interest of Ayodele F**. Petition of appellant for further review denied on April 9, 2014.

No. A-13-628: **Nelson v. Nelson**. Petition of appellant for further review denied on April 11, 2014.

No. A-13-634: **In re Interest of Allen M. et al**. Petition of appellant for further review denied on March 19, 2014.

No. A-13-641: **In re Interest of Kena J**. Petition of appellant for further review denied on November 27, 2013.

No. A-13-667: **Benish v. Houston**. Petition of appellant for further review denied on February 28, 2014, as untimely.

No. A-13-714: **State v. Ironbear**. Petition of appellant for further review denied on January 15, 2014.

No. A-13-723: **State v. Collins**. Petition of appellant for further review denied on December 11, 2013.

No. A-13-866: **State v. Barber**. Petition of appellant for further review denied on March 12, 2014.

No. A-13-940: **State v. Voter**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-966: **State v. Clausen**. Petition of appellant for further review denied on April 16, 2014.

No. A-13-1122: **State on behalf of Jeslynn C. v. Jeremiah E**. Petition of appellant for further review denied on April 23, 2014.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

FAST BALL SPORTS, LLC, APPELLANT AND CROSS-APPELLEE, V. METROPOLITAN ENTERTAINMENT & CONVENTION AUTHORITY, APPELLEE AND CROSS-APPELLANT.

835 N.W.2d 782

Filed July 2, 2013. No. A-12-425.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts, or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts.** A claim that the parties created an enforceable contract generally presents an action at law.
4. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the conclusion reached by the lower court.
5. **Breach of Contract: Proof.** To recover for breach of contract, a plaintiff must prove that a defendant made a promise, breached the promise, and caused the plaintiff damage and that any conditions precedent were satisfied.
6. **Contracts: Proof.** To establish an express contract, a party must prove a definite proposal and an unconditional and absolute acceptance of that proposal.
7. **Contracts: Words and Phrases.** An absolute proposal or offer is an expression of willingness to enter into an agreement with another, made in such a way that the other party is justified in believing that its acceptance is invited and will result in a contract.
8. **Contracts.** A communication intended only as preliminary negotiation or an expression of willingness to negotiate is not an offer.
9. ____. When a party subjects a contract to board approval, there is no contract or offer until the board approves.
10. **Contracts: Waiver.** In Nebraska, under the prevention doctrine, if a party prevents the occurrence of a condition necessary for the other party to perform an oral or written agreement, a court may waive the condition.
11. **Contracts.** The prevention doctrine does not apply to a condition precedent for the formation of a contract.

12. **Fraud.** The elements of fraud are (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 it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result.
13. ____. Fraud cannot ordinarily be predicated on unfulfilled promises or statements as to future events.
14. **Contracts: Fraud: Evidence.** If there is no signed contract, a party seeking to overcome the statute of frauds must proffer a writing, signed by the opposing party, detailing the terms and conditions of their promises. The writing can be any written evidence of an oral contract so long as the writing contains the essential terms of the contract.
15. ____: ____: ____. The written evidence necessary to overcome the statute of frauds does not need to be contained in a single document or communication, but if the terms of the contract can be collected from the correspondence of the parties, it will be a sufficient memorandum within the meaning of the statute of frauds.
16. **Contracts: Estoppel.** Under the doctrine of promissory estoppel, a court may enforce a promise made by a party if (1) that party should reasonably expect its promise to induce another party's action or forbearance, (2) its promise does induce action or forbearance, and (3) the only way to avoid injustice is to enforce the promise.
17. **Contracts: Fraud: Estoppel.** Promissory estoppel is not an exception to the statute of frauds; nor can it be used to circumvent the statute of frauds.
18. ____: ____: ____. Only where a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement will the inducing party be estopped to claim that such oral modification is invalid because not in writing.
19. **Equity: Contracts: Fraud: Partial Performance.** A court will enforce in equity an oral contract partly performed, even if the contract falls within the statute of frauds.
20. **Contracts: Fraud: Partial Performance.** The justification of the partial performance exception to the statute of frauds is that partial performance is good evidence for believing an agreement exists.
21. **Contracts: Fraud.** Ordinary business preparations are not sufficient to remove an alleged contract from the statute of frauds.
22. **Contracts: Partial Performance.** Preliminary acts or mere preparations to act do not constitute partial performance.
23. **Trial: Appeal and Error.** An appellate court reviews a trial court's determination of a request for sanctions for abuse of discretion.
24. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed.

Jason M. Bruno, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

Mark C. Laughlin and Ryan M. Sewell, of Fraser Stryker, P.C., L.L.O., for appellee.

SIEVERS and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Fast Ball Sports, LLC (FBS), appeals an order of the district court for Douglas County denying it summary judgment and granting summary judgment in favor of Metropolitan Entertainment & Convention Authority (MECA). MECA cross-appeals the trial court's denial of dismissal of the suit as a sanction. The trial court found that MECA and FBS did not form a contract and that FBS was not entitled to remedies under theories of promissory estoppel or fraud. We agree. We further determine that the trial court did not abuse its discretion in denying the requested sanction and affirm its ruling.

II. BACKGROUND

FBS is a corporation that sought to acquire a professional baseball franchise to play baseball in Omaha, Nebraska, at TD Ameritrade Park. MECA is a nonprofit group that manages and operates TD Ameritrade Park.

MECA and FBS began negotiating in August 2009 with the help of a consulting group, the Pierce Group, which acted as a "go between." In November, Roger Dixon, MECA's chief executive officer, prepared and sent a cover letter and attached "Memorandum of Understanding" (MOU) to the Pierce Group and to FBS' chief executive officer. The cover letter explained that the MOU provides "principal terms" that would be used to prepare a "definitive Lease" if agreed to by both parties. The cover letter stated that any lease agreement must be "submitted for approval to the MECA Board and thereafter mutually executed." Both parties agreed

that the letter and the MOU provided the framework for the negotiations.

The parties did not have contact again until May 2010, when FBS requested to meet with Dixon to continue negotiations. Dixon responded that MECA was involved in negotiations with another group and would resume discussions with FBS if those other negotiations failed.

In August 2010, MECA and FBS resumed discussions. At that time, Dixon advised FBS in writing that MECA would make one last attempt at negotiating a lease, but that it needed more information about the individuals in FBS' ownership group and FBS' available financial resources.

On August 19, 2010, MECA's chief financial officer, Lea French, prepared a draft lease, which the parties revised on two occasions. On September 17, MECA's attorney e-mailed FBS' attorney asking for additional information about the "Northern League" to provide to MECA's board of directors (MECA Board) in his confidential report. In his e-mail, he mentioned he would be attending a MECA Board meeting that evening but did not yet have all the information he needed to provide to the MECA Board.

On September 20, 2010, French e-mailed a revised draft lease dated September 17, 2010, to MECA and FBS representatives. As with the previous drafts, she labeled the document as a "[d]raft" and included blue editing marks. In her e-mail, she identified the draft lease as a "redline" version. The draft lease stated that MECA would lease the TD Ameritrade Park stadium to FBS for a term of approximately 5 years for the purpose of "presenting Northern League baseball games." It also contained a strict compliance clause.

Also on September 20, 2010, at the Pierce Group's request, French wrote a letter to the commissioner of the Northern League to help FBS obtain a franchise. The letter states:

> [MECA] has reached agreement with [FBS] on the major terms of a lease agreement to play Northern League baseball at the TD Ameritrade Park Omaha stadium. [FBS] was provided with a draft agreement and MECA has not received any material comments to that draft. MECA

> plans to have the final agreement approved at the October 14, 2010 meeting of the MECA Board . . . .
>
> We ask that you swiftly formalize your approval and issuance of a franchise to [FBS] so that we may finalize the lease agreement.

French sent copies of the letter to MECA and FBS representatives. In response, the Northern League awarded FBS a franchise, and FBS paid a franchise fee of $200,000 and an application fee of $10,000 and committed to paying a total of $1,010,000.

During the fall of 2010, Dixon learned from outside sources that FBS' management had changed, and based upon information from outside sources, he became concerned about the Northern League's future viability. As a result, Dixon decided not to present the proposed lease agreement to the MECA Board and no lease agreement was ever signed by both parties. The Northern League ceased operations in 2010, and one Northern League team joined the North American Baseball League. While many of the teams in the Northern League were located in the Midwest, the teams in the North American Baseball League were located much farther away from Omaha, in places such as Hawaii and Canada.

In December 2010, the chairman of the MECA Board advised FBS in writing that the MECA Board would not consider FBS' proposal. His reasoning was that FBS had represented in September that the Northern League was a solid eight-team league, but that within a few days of that representation, MECA learned from other sources that this was no longer the case.

The parties dispute whether or not certain oral statements were made during the course of negotiations. In particular, FBS asserts that during the negotiations, MECA represented that the parties had a "done deal," that Dixon had authority to bind MECA to a lease agreement, that the MECA Board would approve any agreement presented to it by Dixon, and that if FBS obtained an independent baseball franchise, the lease would be signed and approved no later than October 14, 2010. MECA denies making such representations.

In February 2011, FBS filed a complaint in the district court for Douglas County. FBS attached a purported copy of the September 17, 2010, lease agreement to its complaint. This attachment, however, was not the copy of the lease MECA sent FBS. The version attached to the complaint did not contain the blue editing marks or the word "draft" in the upper right-hand corner. Furthermore, it was initialed and signed by FBS representative Nick Grammas.

MECA moved for sanctions, including that the trial court dismiss the case with prejudice because FBS intentionally misled the trial court by attaching an altered and executed version of the draft lease. At the hearing, FBS admitted that it altered the lease, but argued that it did not intend to mislead the trial court, offering its admission at the hearing as proof. The trial court denied MECA's motion for sanctions.

Pursuant to rulings on motions to dismiss, FBS amended its complaint twice. In the second amended complaint, FBS sought remedies based on theories of breach of contract, fraud, and promissory estoppel. Both parties subsequently filed motions for summary judgment.

The court granted MECA's motion for summary judgment and denied that of FBS. The court found no valid contract existed between the parties. It explained that the MECA Board's approval was a condition precedent to the formation of a valid contract and that the evidence did not show the MECA Board approved the contract. The court further found that the statute of frauds barred consideration of any oral statements made between the parties, and it denied FBS' fraud and promissory estoppel claims.

This timely appeal followed.

III. ASSIGNMENTS OF ERROR

FBS assigns that the trial court erred in (1) denying its motion for summary judgment and (2) granting MECA's motion for summary judgment. MECA assigns on cross-appeal that the trial court erred in denying its request for dismissal of the suit as a sanction.

IV. STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts, or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law. *Mortgage Express v. Tudor Ins. Co.*, 278 Neb. 449, 771 N.W.2d 137 (2009).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006).

[3,4] A claim that the parties created an enforceable contract generally presents an action at law. *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011). An appellate court reviews questions of law independently of the conclusion reached by the lower court. See *id.*

V. ANALYSIS

1. FBS Motion for Summary Judgment

FBS argues that the trial court erred in denying its motion for summary judgment. FBS moved for summary judgment on theories of breach of contract, fraud, and promissory estoppel. The trial court found that FBS was not entitled to summary judgment on any of its claims. We agree.

(a) Breach of Contract Claims

FBS contends that MECA and FBS entered into a legally enforceable lease agreement because Dixon and FBS agreed to all material terms and the MECA Board's approval was not required. Because MECA and FBS did not form a contract, the trial court correctly denied FBS relief for its first three claims.

[5,6] To recover for breach of contract, a plaintiff must prove that a defendant made a promise, breached the promise,

and caused the plaintiff damage and that any conditions precedent were satisfied. See *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000). A contract may be express, implied, written, or oral. To establish an express contract, a party must prove a "definite proposal and an unconditional and absolute acceptance" of that proposal. *Viking Broadcasting Corp. v. Snell Publishing Co.*, 243 Neb. 92, 97, 497 N.W.2d 383, 386 (1993).

(i) Legally Enforceable Contract

[7-9] To find an express contract, we must find writings that prove there was an absolute proposal and unconditional acceptance. An absolute proposal or offer is an expression of willingness to enter into an agreement with another, made in such a way that the other party is justified in believing that its acceptance is invited and will result in a contract. The offeror is the master of the offer. See *Keller v. Bones*, 260 Neb. 202, 615 N.W.2d 883 (2000). A communication intended only as preliminary negotiation or an expression of willingness to negotiate is not an offer. See Restatement (Second) of Contracts § 26 (1981). When a party subjects a contract to board approval, there is no contract or offer until the board approves. See, *Pluhacek v. Nebraska Lutheran Outdoor Ministries*, 227 Neb. 778, 420 N.W.2d 286 (1988); Restatement (Second), *supra*.

In this case, MECA advised FBS at the outset of negotiations in the MOU and its cover letter that any lease must be approved by the MECA Board before being executed. Both parties agreed that the letter and the MOU provided the framework for the negotiations. The parties do not dispute that the MECA Board never approved the September 17, 2010, draft lease or any other lease.

In *Pluhacek, supra*, the Nebraska Supreme Court found that an agreement which contained a provision which subjected acceptance to full board approval did not constitute a contract without board approval, even though it was fully executed. In the present action, the draft lease contains less evidence of a contract than the executed agreement in *Pluhacek* because MECA did not execute the draft lease. Because the MECA

Board never approved the lease agreement, the parties never entered into a binding agreement.

(ii) Doctrine of Prevention

FBS argues that lack of the MECA Board's approval cannot be used to defeat the finding of an express contract because MECA waived the condition under the doctrine of prevention when it failed to present the lease to the board. This argument misapplies the prevention doctrine.

[10,11] In Nebraska, under the prevention doctrine, if a party prevents the occurrence of a condition necessary for the other party to perform an oral or written agreement, a court may waive the condition. But the prevention doctrine does not apply to a condition precedent for the formation of a contract. See *D & S Realty v. Markel Ins. Co.*, 284 Neb. 1, 816 N.W.2d 1 (2012) (wherein court cites to 13 Samuel Williston, A Treatise on the Law of Contracts § 39:1 at 509 (Richard A. Lord ed., 4th ed. 2000), which explains that prevention doctrine applies "where parties capable of contracting have deliberately entered into a written contract by which there is created a condition precedent to a right to performance").

In this case, the condition precedent of the MECA Board's approval was a step required to form an agreement between the parties rather than a condition to performance in an already existing contract. Because the parties did not have an agreement, Dixon was not obligated to present the potential agreement to the MECA Board and did not waive the condition by choosing not to do so. See *168th and Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945 (8th Cir. 2007) (holding that where terms are subject to board approval, board is free to withhold consent or refuse to consider terms negotiated by its officers). In December 2010, the MECA Board rejected FBS' offer to present the potential agreement based on the information it had received from Dixon regarding the instability of FBS and the Northern League. The MECA Board was within its rights to do so.

FBS argues that the failure to present the proposal constituted a breach of the duty of good faith and fair dealing. FBS, however, did not produce any evidence suggesting that

MECA did not negotiate in good faith. See *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991). The only evidence produced showed that Dixon had concerns about FBS' ownership, its financial stability, and the long-term viability of the Northern League. For that reason, Dixon decided not to present the draft lease to the MECA Board. FBS' argument that MECA breached the duty of good faith and fair dealing is without merit.

(b) Fraud

In the alternative, FBS argues that it is entitled to summary judgment because MECA made false misrepresentations upon which FBS relied. FBS claims that MECA fraudulently represented that the two parties agreed on the terms of a lease, that MECA would honor the lease, and that MECA would enter into a lease agreement with FBS if FBS acquired a professional baseball franchise. FBS argues that its reliance on these fraudulent statements caused it to suffer damages. We disagree.

[12] The elements of fraud are

> (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 it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result.

Nebraska Nutrients v. Shepherd, 261 Neb. 723, 747, 626 N.W.2d 472, 495 (2001), *abrogated on other grounds, Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013).

[13] A fraudulent statement relates to a "'present or preexisting fact.'" *Linch v. Carlson*, 156 Neb. 308, 316, 56 N.W.2d 101, 105 (1952). Fraud "'cannot ordinarily be predicated on unfulfilled promises, or statements as to future events.'" *Id.*

The MECA representatives deny having made the representations that FBS attributes to them; however, on review of a summary judgment, an appellate court reviews the evidence in a light most favorable to the party against whom judgment

was entered. We therefore address FBS' claim of fraud as though the alleged statements were made.

FBS contends that MECA represented to it that (1) MECA would enter into a lease agreement if FBS obtained a professional baseball franchise; (2) the parties had reached an agreement on all material terms; (3) MECA intended to honor the lease agreement beginning in 2011; (4) the lease agreement would be presented to the MECA Board for approval at its October 14, 2010, meeting; and (5) MECA and FBS "had a deal."

The second of the foregoing contentions is not a fraudulent statement. MECA does not deny that it had reached an agreement with FBS on all material terms; however, this does not create a binding agreement, because of the condition precedent of board approval as discussed above. The first, third, and fourth contentions are statements of unfulfilled promises or future events and therefore are not subject to a finding of fraud. As to the fifth contention, we find FBS could not have reasonably relied upon it for two reasons. First, MECA made known to FBS from the outset of negotiations that board approval was necessary. FBS does not allege that MECA ever represented to it that the lease was board approved or that board approval was not necessary. Grammas conceded that he could not have reasonably relied upon Dixon's "we ha[ve] a deal" statement when Grammas stated in his deposition that although as a businessman, he may believe someone's statement "'You got a deal,'" to have a legally enforceable agreement, "you got to see the paper." In *168th and Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 957 (8th Cir. 2007), the court, applying Nebraska law, held that sophisticated business entities could not reasonably rely upon a statement that an agreement was a "'done deal'" without execution of the required written agreement. Therefore, we find that the trial court properly rejected FBS' claim of fraud.

Furthermore, the statute of frauds prevents an oral agreement in these circumstances. FBS claims the parties agreed to a minimum 5-year lease of the TD Ameritrade Park stadium. Nebraska's statute of frauds states: "Every contract for the leasing for a longer period than one year, or for the

sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party whom the lease or sale is to be made." Neb. Rev. Stat. § 36-105 (Reissue 2008).

[14,15] If there is no signed contract, a party seeking to overcome the statute of frauds must proffer a writing, signed by the opposing party, detailing the terms and conditions of their promises. *Hansen v. Hill*, 215 Neb. 573, 340 N.W.2d 8 (1983). The writing can be any written evidence of an oral contract so long as the writing contains the essential terms of the contract. See *David v. Tucker*, 196 Neb. 575, 244 N.W.2d 197 (1976). The written evidence does not need to be contained in a single document or communication, but "[i]f the terms of the contract can be collected from the correspondence of the parties . . . it will be a sufficient memorandum within the meaning of the statute of frauds." *Collyer v. Davis*, 72 Neb. 887, 893, 101 N.W. 1001, 1003 (1904). Accord *Fowler Elevator Co. v. Cottrell*, 38 Neb. 512, 57 N.W. 19 (1893).

In this case, there is no memorandum or writing that meets the requirements of the statute of frauds. The cover letter to the MOU specifically stated that the MOU was nonbinding and subject to the MECA Board's approval. The September 17, 2010, draft lease identifies itself as a draft, contains blue editing marks, and is not signed by MECA.

As pointed out by FBS, both parties were represented by legal counsel throughout the negotiations. Furthermore, the parties were sophisticated businesspersons. Sophisticated business entities are charged with knowledge of the statute of frauds and cannot reasonably rely on oral statements. See *168th and Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945 (8th Cir. 2007). In *168th and Dodge, LP*, the Eighth Circuit, interpreting Nebraska law, found as a matter of law that because one party should have known that a lease for an interest in real estate must be in writing, it could not have reasonably relied on the other party's oral statement that the lease agreement was a "'done deal.'" 501 F.3d at 957.

We therefore find that the trial court was correct in denying summary judgment on FBS' fraudulent representation claim.

(c) Promissory Estoppel

FBS argues that in the alternative to breach of contract, it is entitled to damages on grounds of promissory estoppel because MECA induced it to suffer damages. FBS relies upon French's September 20, 2010, letter to the commissioner of the Northern League in which she requests issuance of a franchise to FBS. It claims that as a result of the letter, the Northern League issued a franchise to FBS which cost FBS $210,000 and a future commitment of $800,000. It claims on appeal that it was entitled to summary judgment for reimbursement of the $210,000 it paid for the franchise. We disagree.

[16] Under the doctrine of promissory estoppel, a court may enforce a promise made by a party if (1) that party should reasonably expect its promise to induce another party's action or forbearance, (2) its promise does induce action or forbearance, and (3) the only way to avoid injustice is to enforce the promise. See *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990).

To succeed under its promissory estoppel claim, FBS must prove that it paid $210,000 as a result of a promise made by MECA. FBS relies heavily upon French's September 20, 2010, letter to the commissioner of the Northern League which states that "MECA plans to have the final agreement approved at the October 14, 2010 meeting of the MECA Board." The letter contains no promise that the MECA Board will approve the lease, a condition precedent to any binding contract between the parties. Even considering the oral statements attributed to the individual MECA employees, none of those statements indicated that the MECA Board's approval was received or had become unnecessary. Since no promise was made regarding board approval, we find that FBS failed to prove the threshold element of promissory estoppel.

Furthermore, there is nothing in the record to prove that French should have reasonably expected FBS to make an immediate payment for the franchise. She testified in her deposition that she did not know a franchise fee was required. Dixon testified that he assumed FBS would have to pay a franchise fee, but there is nothing to indicate when that fee was due. Of the $210,000 that FBS claims as damages, the

record indicates that $10,000 was a nonrefundable application fee which FBS paid *prior* to the date of French's letter; therefore, French's letter could not have induced this payment. The evidence further reveals a draft in the amount of $198,000 dated September 16, 2010 (4 days prior to French's letter), which Grammas identified as a copy of the check paid to the Northern League for the franchise. The record indicates that a franchise agreement was entered into on September 29 and that FBS immediately paid a deposit of $200,000. There is no evidence that anyone from MECA should have reasonably expected FBS to make such a payment prior to the MECA Board's approving the lease, because board approval was a condition precedent from the outset of the parties' negotiations.

[17,18] In addition, as stated above, the statute of frauds is applicable to the alleged agreement because it involves a lease greater than 1 year. Promissory estoppel is not an exception to the statute of frauds. See *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976). Only

> [w]here a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement [will] the inducing party . . . be estopped to claim that such oral modification is invalid because not in writing.

See *id.* at 543, 244 N.W.2d at 89-90. Promissory estoppel cannot be used to circumvent the statute of frauds. *Rosnick, supra*.

FBS seeks alternative damages based on MECA's alleged failure to fulfill an obligation that is covered by the statute of frauds by artfully pleading promissory estoppel. Because the statute of frauds applies, we find that the trial court properly denied FBS' promissory estoppel claim.

2. MECA's Motion for Summary Judgment

FBS alleges that the trial court should not have granted MECA's motion for summary judgment. FBS argues that the

statute of frauds is inapplicable because the parties set forth their initial agreement in writing, FBS partially performed under the agreement, and the statute of frauds does not apply to claims of fraud and promissory estoppel.

Our discussion above regarding the insufficiency of the writings upon which FBS relies and its claims of fraud and promissory estoppel adequately addresses FBS' argument as to these claims, and we find that the trial court did not err in its determination that the statute of frauds was applicable on these bases. Therefore, we will address only FBS' claim that partial performance removes this case from the statute of frauds.

[19] A court will enforce in equity an oral contract partly performed, even if the contract falls within the statute of frauds. See *Campbell v. Kewanee Finance Co.*, 133 Neb. 887, 277 N.W. 593 (1938).

[20-22] The justification of the partial performance exception to the statute of frauds is that partial performance is good evidence for believing an agreement exists. Howard O. Hunter, Modern Law of Contracts § 7:36 (2012). Ordinary business preparations, however, are not sufficient to remove an alleged contract from the statute of frauds. *Id.* Preliminary acts or mere preparations to act do not constitute partial performance. *F.D.I.C. v. Altholtz*, 4 F. Supp. 2d 80 (D. Conn. 1998). See *Heine v. Fleischer*, 184 Neb. 379, 167 N.W.2d 572 (1969).

In *Heine*, the Nebraska Supreme Court found that paying the entire consideration for the purchase of realty was not sufficient partial performance to prevent application of the statute of frauds. Similarly, in *168th and Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945 (8th Cir. 2007), the court found that plaintiffs who spent approximately $600,000 to purchase additional land and remove a gasline to ensure the land was ready for the impending lease agreement had not partially performed the contract.

In this case, FBS argues that it partially performed the contract by taking steps to hire staff, develop a marketing scheme, and acquire a baseball franchise. FBS alleges that it spent $210,000 acquiring a franchise and other sums to pay

the salaries of staff hired to work on promoting the baseball team. But FBS did not actually perform any part of the contract through these actions.

These actions were similar to the actions of the plaintiffs in *168th and Dodge, LP, supra*, in that while the actions were substantial, they were necessary before the plaintiffs could begin performing the contract. In this case, FBS needed to acquire a franchise and create a marketing plan before it could play professional baseball in the TD Ameritrade Park stadium, which was the purpose of the proposed lease. Preparations do not constitute sufficient performance to remove the contract from the statute of frauds.

Because the parties had no express contract and the statute of frauds applies to FBS' claims of fraud and promissory estoppel, we affirm the trial court's order granting summary judgment in favor of MECA.

3. Denial of Dismissal as Sanction

MECA cross-appeals the trial court's denial of sanctions against FBS. MECA argues that the trial court should have used its inherent power to sanction FBS by dismissing its complaint because FBS materially altered evidence and attached it to its original complaint in a misleading way.

The record reveals that FBS attached to its original complaint an altered piece of documentary evidence purporting to be a lease to which the parties agreed. We note that counsel for FBS concedes he removed language indicating this was a draft, added the signature of FBS, and added initials of FBS' representative on each page. MECA moved for sanctions, including requesting that the trial court dismiss FBS' complaint with prejudice or stay discovery until the altered lease was explained. FBS filed a motion to strike MECA's motion for sanctions claiming that "[t]here has been absolutely no tampering, misrepresentations, or underhandedness of any kind and [MECA's] Motion is a red hearing [sic] intended to mislead the Court." Despite this accusation, FBS admitted to the alterations set forth above of "the removal of 'draft' from the upper right

hand corner, the signature of [FBS], and the initials of [FBS'] representative on each page."

At the hearing on the motion for sanctions, FBS' counsel confessed that one of his colleagues or FBS itself altered the document he attached to the complaint. However, he stated that the act was not "dishonest." The court addressed the seriousness of counsel's actions in the following exchange:

> THE COURT: The problem that I have is in paragraph 13 of the complaint, it says the agreement was memorialized in writing within a stadium lease agreement prepared by MECCA [sic] and its attorneys. In that case that is an agreement and is something that they sent to you. Then you say a copy of the stadium lease agreement signed by FBS is attached there to [sic] as Exhibit A, inferring Exhibit A is the same item as the stadium lease agreement allegedly sent. If you wanted to modify if [sic] and say sent [sic] a copy of the stadium lease agreement signed by FBS is attached to Exhibit A, wouldn't that solve it?
>
> [Counsel for FBS]: It would solve it.
>
> THE COURT: You don't think that's misleading?
>
> [Counsel for FBS]: I don't think so.
>
> . . . .
>
> [Counsel for FBS]: We weren't trying to be misleading.
>
> THE COURT: But it is. I don't think there's any question.

FBS' counsel then orally moved to file an amended complaint without the altered document attached. The trial court denied sanctions and granted leave to file the amended complaint.

In addition, FBS' counsel also confesses to sending a letter via e-mail to Omaha's mayor encouraging him to persuade MECA to honor the purported lease agreement. In support, counsel attached a copy of the complaint containing the lease with the deletions and alterations confessed above. Counsel represented to the mayor that the attached lease was a "true and correct" copy of the lease.

[23] We review a trial court's determination of a request for sanctions for abuse of discretion. See *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993). We note that typically, a request for sanctions arises under Neb. Ct. R. Disc. § 6-337 for violation of a court order involving discovery. In the present case, MECA requested sanctions for violation of the very foundation upon which the practice of law is built—integrity. While our court rules do not contain a specific provision imposing sanctions upon one who violates his duties as an officer of the court, such violation is no less sanctionable than violation of a discovery rule, and the courts have inherent power to impose such sanctions. In the past, this level of misconduct may have subjected the offender to the old English common law rule requiring attorneys who deceived the court to be imprisoned for a day and a year. See, West. 1, 3 Edw. I, ch. 29 (1275); Alex B. Long, *Attorney Deceit Statutes: Promoting Professionalism Through Criminal Prosecutions and Treble Damages*, 44 U.C. Davis L. Rev. 413 (2010). But, we review a trial court's order on sanctions for an abuse of discretion, and we find that the trial court did not abuse its discretion in denying MECA's requested sanction of dismissal with prejudice.

[24] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006). Applying this definition, we find that although the granting of such a sanction would have been within the trial court's discretion, its refusal to do so was not untenable; nor did it deprive MECA of a substantial right or just result. FBS omitted the altered lease when it filed its amended complaint, removing the false impression that MECA had provided a final copy for FBS' consideration. The case then proceeded without the false representation that MECA had submitted a final lease to FBS for consideration. Therefore, MECA was not deprived of a substantial right or just result. We further note that dismissing FBS' complaint

would have punished the client rather than its attorney, and the record contains no indication that FBS was aware of its counsel's actions.

This is not to say that we condone counsel's actions or that we adhere to a principle of "no harm, no foul" in a situation such as this. To the contrary, we find FBS' counsel's conduct highly offensive for an officer of the court. But our standard of review dictates this outcome, and it is not the function of an appellate court to become investigators and truth finders on issues not before it. Any potential discipline is not within our realm, but, rather, within that of the Counsel of Discipline, if appropriate. See, e.g., *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006); *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003). Thus, our finding of no abuse of discretion by the trial court in denying the particular sanction sought should not be taken for anything more than exactly that.

VI. CONCLUSION

Viewing the evidence in a light most favorable to FBS, and giving it the benefit of all reasonable inferences deducible from the evidence, we find that the trial court did not err in denying FBS' motion for summary judgment or in granting MECA's motion for summary judgment. While we do not condone the actions of FBS' counsel, we do not find that the trial court abused its discretion in refusing to dismiss FBS' complaint with prejudice. Therefore, we affirm the trial court's order in all respects.

AFFIRMED.

IRWIN, Judge, participating via the Internet.

Patricia Hadfield, appellant, v. Nebraska Medical Center and Safety National Casualty Corporation, appellees.

838 N.W.2d 310

Filed July 9, 2013. No. A-12-556.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. On appellate review, 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.
3. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
4. **Workers' Compensation.** A worker may recover under Nebraska's workers' compensation laws only for injuries caused by an accident or occupational disease.
5. **Workers' Compensation: Words and Phrases.** The definition of "accident," as used in Neb. Rev. Stat. § 48-101 (Reissue 2010), includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability.
6. **Workers' Compensation.** A workers' compensation claimant does not have to make specific election between cumulative trauma and specific injury.
7. **Final Orders.** Silence in an order on a request for relief not spoken to must be construed as a denial of such request.
8. **Workers' Compensation: Appeal and Error.** A trial judge's failure to discuss a specific request for relief may nonetheless constitute error requiring reversal or remand of the cause when the order does not comply with Workers' Comp. Ct. R. of Proc. 11 (2011) by providing a basis for a meaningful appellate review.
9. ____: ____. Workers' Comp. Ct. R. of Proc. 11 (2011) is designed to ensure that compensation court orders are sufficiently clear in addressing requests for relief in order that an appellate court can review the evidence relied upon by the trial judge in support of his or her findings.
10. **Workers' Compensation.** When a workers' compensation claimant pleads both specific injury and cumulative trauma as theories of recovery, the compensation court's order must address both theories in order to comply with Workers' Comp. Ct. R. of Proc. 11 (2011).
11. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the Workers' Compensation Court: James R. Coe, Judge. Reversed and remanded with directions.

Laura L. Pattermann and Sheldon M. Gallner, of Gallner & Pattermann, P.C., for appellant.

William J. Birkel and Noah M. Priluck, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

Patricia Hadfield appeals from the Workers' Compensation Court's order of dismissal, contending that the order of dismissal did not appropriately address her injuries as arising from cumulative, repetitive trauma. Because we find that the compensation court's order did not provide a meaningful basis for review of Hadfield's claim of cumulative, repetitive trauma, we reverse, and remand with directions.

FACTUAL BACKGROUND

Hadfield was employed at the University of Nebraska Medical Center (UNMC) as a sonographer from March 6, 2000, until her termination of employment on June 2, 2011. UNMC terminated Hadfield from her position when it could no longer accommodate her work restrictions that resulted from a left elbow injury. When UNMC disputed this injury resulted from her work as a sonographer, Hadfield filed a claim in the Nebraska Workers' Compensation Court.

Hadfield asserted her elbow injury occurred during the course of her employment as a sonographer at UNMC. In this role, Hadfield's general responsibility was to scan patients in order to provide images for a radiologist to interpret. In order to scan patients, Hadfield would often have to push the ultrasound machine cart to various locations in the hospital, including the intensive care units and the emergency room. Hadfield testified that these ultrasound machines weighed approximately 500 pounds. In addition to pushing the ultrasound cart throughout the hospital, Hadfield was also required to transport and position patients for scans, apply gel to patients, and run a computer.

Hadfield testified that on January 6, 2011, she experienced a sharp pain in her left elbow when she squeezed a

gel bottle while preparing to scan a patient. When the pain did not subside within a few days, Hadfield reported this injury to her family physician, Dr. Douglas Wheatley, on January 10. Wheatley diagnosed this injury as left lateral epicondylitis and placed Hadfield on a 10-pound pushing, grasping, and squeezing restriction. In addition to seeing Wheatley, Hadfield also notified her lead ultrasound technician that she had suffered this injury and had to follow the work restrictions.

After seeing Wheatley, Hadfield visited the UNMC employee health clinic on January 18, 2011. According to the clinic's records, Hadfield reported that "she simply went to bed one night entirely pain free and woke up with an achy, sore left elbow and every day has gotten worse." The clinic completed its own examination of Hadfield and concurred with Wheatley's initial diagnosis. However, the clinic determined Hadfield's pushing, grasping, and pulling restriction should be increased to 125 pounds. Hadfield testified she was able to complete her job duties with the 125-pound restriction as long as she received help transporting and positioning patients. Between January 10 and her termination on June 2, Hadfield was able to complete her job duties with the necessary accommodations. UNMC terminated Hadfield's employment when it was no longer able to accommodate her work restrictions.

Hadfield received a variety of medical treatments to care for her condition. This care included occupational and physical therapy, pain management, and two injections into her left elbow in attempts to alleviate the pain. None of these treatments was effective. Therefore, on September 7, 2011, Hadfield underwent a "lateral epicondyle release" performed by Dr. Edward Fehringer. This procedure was ultimately ineffective, because Hadfield continued to experience persistent pain.

As a result of continued pain and unemployment, Hadfield also began to suffer from depression. For treatment of her depression, she sought the services of both a psychologist and a psychiatrist. Eventually, Hadfield was prescribed antidepressants.

After UNMC and its workers' compensation insurance carrier, Safety National Casualty Corporation (SNCC), refused to pay continuous benefits for medical treatment or disability, Hadfield filed a petition in the Workers' Compensation Court on September 14, 2011. Hadfield alleged that she sustained personal injuries "on or about January 16 [sic], 2011," in an accident arising out of and in the course of her employment with UNMC. We note that although Hadfield's complaint stated that she suffered personal injuries on January 16, all other evidence clearly shows the alleged date of injury to have been January 6. Therefore, for purposes of this appeal, we will show the alleged date of injury to have been January 6. Paragraph 4 of her petition stated, "[T]he accident and resulting personal injuries occurred in the following manner: [Hadfield] repetitively performs approximately seven to eight sonograms per day causing injury to her left arm." UNMC and SNCC's answer to this complaint admitted Hadfield was employed by UNMC in January 2011, but denied each and every other allegation. UNMC and SNCC also affirmatively alleged that the injuries in Hadfield's petition were not causally connected to an accident within the course and scope of her employment with UNMC, but were the result of "an independent, intervening, non-compensable cause."

The Workers' Compensation Court held a hearing on April 24, 2012. At this hearing, Hadfield testified regarding her injuries and submitted medical evidence. Hadfield testified that she performed seven to eight sonograms per day, which involved having to constantly apply gel to patients, which in turn required squeezing the gel bottle. She also testified about her daily job duties of pushing patients on carts and in wheelchairs, pushing the sonogram machine to different areas, and operating the computer. Among her medical evidence, Hadfield submitted reports from both Wheatley and Fehringer, which reports concluded that her injury was secondary to her work as a sonographer. Specifically, Wheatley's January 10, 2011, notes regarding his visit with Hadfield state that she "complain[ed] of left elbow pain since January 1, 2011. This affects the lateral aspect of her elbow. This problem developed secondary to [her] repetitive use while working." Fehringer's

reports stated that Hadfield "has had problems with her left elbow related to repetitive utilization of her left upper extremity as part of her occupation." Fehringer's February 3, 2012, report concluded that Hadfield's injury caused a 7-percent permanent impairment.

Among its evidence, UNMC submitted two independent reports conducted by Dr. Dean Wampler. These reports concluded Hadfield's injury could not have been caused by her work as a sonographer at UNMC. In addition to Wampler's reports, UNMC also submitted the medical records from Hadfield's visit to the employee health clinic on January 18, 2011. Like Wampler's reports, these records also concluded Hadfield's injury was likely not work related.

On June 6, 2012, the Workers' Compensation Court issued an order of dismissal. In this order, the court admitted this case presented a close question, but placed more weight on Wampler's report and the medical records from the employee health clinic. The court concluded, "[Hadfield] has failed to prove by a preponderance of the evidence that on January 6, 2011, [she] sustained an injury that occurred in the course and scope of her employment and for this reason [her] petition should be dismissed."

Hadfield appeals from this order of dismissal.

ASSIGNMENT OF ERROR

Hadfield's sole assignment of error is that the Workers' Compensation Court erred when it failed to address the issue of cumulative, repetitive trauma as pled in her petition.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (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. *Manchester v. Drivers Mgmt.*, 278 Neb. 776,

775 N.W.2d 179 (2009); *Wissing v. Walgreen Company*, 20 Neb. App. 332, 823 N.W.2d 710 (2012). 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. *Clark v. Alegent Health Neb.*, 285 Neb. 60, 825 N.W.2d 195 (2013).

[3] 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).

ANALYSIS

Did Order of Dismissal Address Cumulative, Repetitive Trauma?

Hadfield claims that the compensation court failed to consider whether her injuries were the result of cumulative, repetitive trauma. Therefore, she claims the order of dismissal does not comport with Workers' Comp. Ct. R. of Proc. 11(A) (2011). At the time of this case, rule 11(A) provided that "[d]ecisions of the court shall provide the basis for a meaningful appellate review. The judge shall specify the evidence upon which the judge relies."

[4-6] A worker may recover under Nebraska's workers' compensation laws only for injuries caused by an accident or occupational disease. See Neb. Rev. Stat. § 48-101 (Reissue 2010). Nebraska courts have made it clear that the definition of "accident," as used in § 48-101, includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability. See, *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009); *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004); *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). Additionally, this court has found that a claimant does not have to make specific election between cumulative trauma and specific injury. *Armstrong v. Watkins Concrete Block*, 12 Neb. App. 729, 685 N.W.2d 495 (2004). Therefore, under Nebraska law, Hadfield is permitted to allege injuries and to attempt to recover for injuries under a cumulative, repetitive trauma theory in addition to the specific injury theory.

As explained in the factual background section above, Hadfield asserted that she suffered a work-related injury on January 6, 2011, and she also alleged in her petition that she suffered her injury after repetitively performing seven to eight sonograms per day. During the direct examination of Hadfield at the hearing before the workers' compensation court, there was a brief dialog between the court and Hadfield's attorney seemingly aimed at determining whether Hadfield was claiming an acute, specific injury or a cumulative, repetitive injury:

> [Hadfield's counsel:] And do you have any idea what repetitive type of motion —
>
> THE COURT: . . . [Y]ou told me in opening statement there was —
>
> [Hadfield's counsel:] Well, this is actually a combination.
>
> THE COURT: This was an acute event that occurred on January 6th.
>
> [Hadfield's counsel:] All right. . . . Hadfield, prior to January 6th, 2012, had you ever missed work because of difficulties with your left upper extremity?

Following this exchange, Hadfield did present evidence regarding the repetitive nature of her work in connection with her claim of cumulative, repetitive trauma, as set forth above.

In its order of dismissal, the court summarized Hadfield's petition as alleging that "on or about January 16 [sic], 2011," Hadfield suffered injury to her left elbow when she squeezed a bottle of gel. The court did not refer to Hadfield's allegation that she suffered this injury after repetitively performing several sonograms per day. The order goes on to note that the employee health clinic's "medical record has no mention of the *acute* injury [Hadfield] stated she sustained on January 6, 2011, while squeezing a bottle of jell [sic] with her left hand." (Emphasis supplied.) Additionally, the court stated:

> Although a close question, the Court is more persuaded by the Employee Health record of January 18, 2011, . . . and the medical opinion of Dr. Wampler . . . rather than the other medical records and opinions in this case concerning causation with the finding that

> [Hadfield] has failed to prove by a preponderance of the evidence that on January 6, 2011, [Hadfield] sustained an injury that occurred in the course and scope of her employment . . . .

Given the court's specific reference in its order of dismissal to whether Hadfield sustained an "acute" injury on a particular day in January 2011, the failure to specifically discuss whether Hadfield proved a cumulative, repetitive injury, and the court's questions of counsel during trial regarding this being an acute injury case, it is not clear from the order whether the compensation court properly considered the cumulative, repetitive trauma as pled in Hadfield's petition.

[7,8] We recognize that silence in an order on a request for relief not spoken to must be construed as a denial of such request. See *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 628, 707 N.W.2d 229 (2005). However, the Nebraska Supreme Court noted in *Dawes* that a trial judge's failure to discuss a specific request for relief may nonetheless constitute error requiring reversal or remand of the cause when the order does not comply with rule 11 by providing a basis for a meaningful appellate review.

[9] Rule 11 is designed to ensure that compensation court orders are sufficiently clear in addressing requests for relief in order that an appellate court can review the evidence relied upon by the trial judge in support of his or her findings. In *Owen v. American Hydraulics*, 254 Neb. 685, 696, 578 N.W.2d 57, 64 (1998), the Nebraska Supreme Court concluded that contradictory statements in the compensation court's order precluded meaningful appellate review because the order did not "clearly and unambiguously" state whether the employee satisfied the burden of proof or discuss the evidence relied upon in making its finding. In *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996), the court found that a general conclusion that the employee's evidence did not meet the burden of proving that the alleged injuries were caused by the employment lacked sufficient clarity for meaningful appellate review under rule 11.

[10] In *Armstrong v. Watkins Concrete Block*, 12 Neb. App. 729, 685 N.W.2d 495 (2004), the employee alleged both a specific injury date and cumulative trauma in his petition. The trial court found that pleading a specific injury date precluded consideration of cumulative trauma. As a result, there was no decision by the trial court on whether the employee proved that there had been a cumulative trauma. On appeal, this court concluded that the trial court erred in failing to consider the theory of cumulative trauma, and because there was no reasoned decision on the question of whether the claimant's injury was the result of cumulative trauma, we were unable to provide a meaningful appellate review on the issue. When a workers' compensation claimant pleads both specific injury and cumulative trauma as theories of recovery, the compensation court's order must address both theories in order to comply with rule 11. See *Armstrong, supra*.

In the present case, we cannot conclusively determine whether the compensation court considered cumulative trauma in its decision, despite Hadfield's having pled this theory for recovery and having attempted to adduce evidence at the hearing to support this theory. The trial court's order finds only that Hadfield failed to prove that she sustained an injury on January 6, 2011. While we could infer from the order's silence that the trial judge also concluded that Hadfield's injury was not the result of cumulative trauma, the order does not provide sufficient factual findings and a rationale on this issue to allow for a meaningful appellate review of this issue. Therefore, we reverse the compensation court's decision and remand the cause with directions to reconsider this matter on the record made to determine whether Hadfield has proved a cumulative trauma injury. No opinion is offered or suggested on what the outcome of that decision should be.

Sufficiency of Evidence to Prove Cumulative, Repetitive Trauma.

Hadfield also argues that the compensation court erred in concluding the evidence in the record did not support recovery under a cumulative, repetitive trauma theory. She argues that while this issue was not specifically addressed by the

compensation court, the evidence in the record supports a finding that she suffered a cumulative, repetitive trauma injury in January 2011.

[11] Although we need not address this argument in order to resolve this case, we do note that this issue was not assigned as error in Hadfield's brief. Errors argued but not assigned will not be considered on appeal. *Sheperd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011).

CONCLUSION

We conclude that the compensation court's order of dismissal did not comply with rule 11(A), because it failed to clearly address whether it had considered Hadfield's injuries under a cumulative, repetitive trauma theory. Therefore, we reverse the judgment and remand the cause to the compensation court with directions to consider this matter under a cumulative, repetitive trauma theory.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. STEWART O. NEWMAN, APPELLANT.

838 N.W.2d 317

Filed July 16, 2013. Nos. A-12-404, A-12-405.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** For the protections of the Fourth Amendment to apply, a seizure must have occurred. A seizure requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's show of authority.
3. **Search and Seizure.** Determinations as to whether a person has been seized are questions of fact.
4. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.

5. **Police Officers and Sheriffs: Search and Seizure.** In addition to situations where an officer directly tells the suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.
6. ____: ____. The question of whether a person's consent to accompany law enforcement officials was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of the circumstances.
7. ____: ____. A request to accompany law enforcement to a police station for questioning does not carry an implication of obligation so awesome for a suspect that it renders his actions involuntary.
8. **Constitutional Law: Search and Seizure: Waiver.** Both the U.S. and Nebraska Constitutions guarantee the right to be free from unreasonable searches and seizures. That right may be waived by consent.
9. **Warrantless Searches: Proof.** When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.
10. **Warrantless Searches: Police Officers and Sheriffs.** A warrantless search is valid when based upon consent of a third party whom the police, at the time of the search, reasonably believed possessed authority to consent to a search of the premises, even if it is later demonstrated that the individual did not possess such authority.
11. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012) provides that, in general, a defendant must be brought to trial within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial.
12. ____. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged.
13. **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.
14. **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.
15. **Indictments and Informations: Speedy Trial.** When determining the impact the filing of an amended information has on speedy trial considerations, it is important to determine whether the amendment charges the same or a totally different crime, and if it does not change the nature of the charge, then the time continues to run against the State for purposes of the speedy trial act.

16. **Indictments and Informations.** An amended information which charges a different crime, without charging the original crime(s), constitutes an abandonment of the first information and acts as a dismissal of the same.
17. **Sexual Assault: Words and Phrases.** Neb. Rev. Stat. § 28-319.01 (Cum. Supp. 2012) provides, in relevant part, that a person commits sexual assault of a child in the first degree when he or she subjects another person under 12 years of age to sexual penetration and the actor is at least 19 years of age or older.
18. ____: ____. Neb. Rev. Stat. § 28-318(6) (Reissue 2008) defines sexual penetration as meaning sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes.
19. **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.
20. **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.
21. **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.
22. **Sentences.** 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.
23. ____. 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.

Appeals from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Jeanine E. Tlustos for appellant.

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

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Stewart O. Newman appeals his convictions and sentences on one count of first degree sexual assault of a child and six counts of visual depiction of child pornography. On appeal, Newman challenges rulings of the district court for Douglas County overruling two motions to suppress, overruling a motion to discharge, finding sufficient evidence to support the sexual assault conviction, and imposing sentences. We find Newman's assertions on appeal to be meritless, and we affirm.

II. BACKGROUND

This case involves allegations of first degree sexual assault of a child and visual depiction of child pornography involving one young girl, who was born in March 1999 and was approximately 10 years of age at the time of the events giving rise to these criminal charges. To protect her anonymity, we will simply refer to her as "Jane" (as in "Jane Doe") throughout this opinion. In addition, inasmuch as the factual background of this case is graphic, our explanations of the testimony will be only as detailed as necessary to explain the underlying legal analysis that results in affirmance of Newman's convictions.

In February 2010, Jane sent her mother a text message indicating that Newman had been "trying to have sex with [her]." Jane's mother called the 911 emergency dispatch service and reported the allegations and then took Jane to "Project Harmony," where she was interviewed by a member of the Omaha Police Department's special victims/child sexual assault unit. After Jane's interview with law enforcement, Newman was arrested. Sometime later, Newman's wife contacted law enforcement about suspecting that there was child pornography on a laptop computer in Newman's home, and a search of that laptop revealed a variety of suspected pornographic images of children, including photographs of Jane.

1. Jane's Testimony and Interview

Jane testified at trial, recounting the history of Newman's conduct toward her. Jane testified that Newman began speaking with her about sex when she was approximately 6 years of age. She testified that when she was approximately 7 or 8 years of age, she observed Newman looking at pornography on a computer and Newman began showing her pornographic images. She testified that when she was 6 years of age, Newman began touching her "private parts" with his hands, and that when she was approximately 8 years of age, he touched her "private" with his "private." She testified that he also would sometimes "touch [her] private" with his mouth and "lick [her] private."

Jane testified that there were occasions where Newman and Jane would both be unclothed and Newman would rub his penis on her vagina, rubbing it "back and forth." She testified that Newman rubbed his penis "inside the folds" of her vagina and that he would then instruct her to lie on her stomach. She testified that after she lay on her stomach, Newman would rub his "front area" on her "bottom," with his penis "on top of [her] hole area," and that eventually "white stuff" would come out of Newman's penis, which she could feel on her back.

Jane testified that she was approximately 8 years of age when Newman first showed her what came out of his penis. She testified that Newman had told her her "opening" was too small for his penis to go inside of and that nothing ever went inside the "hole" of her vagina or the "hole" of her "butt area." She testified, however, that when Newman would lick her vaginal area, she could feel the "folds" of her vagina "coming apart."

Jane also testified that in September 2009, when she was 10 years of age, Newman took photographs of her without any clothes on. She testified that Newman "posed" her in certain positions in the photographs. At trial, six photographs were received into evidence and the parties stipulated that the photographs were of Jane. These photographs depict Jane, including her genitalia, and Newman's penis is depicted in more than one

of the photographs. In one of the photographs, Jane's hand is holding Newman's penis and pointing it at her vagina.

Det. Robert Butler testified that he interviewed Jane at Project Harmony in February 2010. Detective Butler testified that Jane had described to him that Newman had "separat[ed]" the labia of her vagina with his tongue and with his penis. He testified Jane had indicated that Newman put his tongue "inside of her" and that although Newman's licking of her vagina was sometimes on the "outside," it was "most[ly]" on the "inside."

2. Newman's Statements and Testimony

On or about February 12, 2010, after Jane reported Newman's conduct to her mother and Jane was interviewed at Project Harmony, Omaha law enforcement officers made contact with Newman at his home. Two detectives in plain clothes and two uniformed officers made contact with Newman. The detectives advised Newman that they wanted to conduct a formal interview with him at the police station, and Newman agreed to accompany them. Newman was then transported to the police station in an unmarked vehicle. According to one of the detectives, Newman never expressed any reluctance to accompanying them.

At the police station, Newman was advised of his rights from a standard rights advisory form and was interviewed. The interview lasted approximately 2 hours and was recorded, with both audio and video. During the interview, Newman never indicated that he wanted to stop the interview and never asked to speak with an attorney.

During the interview, Newman initially denied that any sexual assault had occurred. Eventually, however, he acknowledged the conduct and indicated that it had "snowballed" from touching to instances of oral sex. During the interview, Newman indicated that on at least one occasion, Jane had put her mouth on his penis.

At trial, Newman testified in his own behalf. Although he acknowledged that he had made statements during the interview about Jane's placing his penis in her mouth, he denied that such conduct ever occurred. He testified that he showed

Jane what a "blow job" was by showing her a video on the computer. He also denied ever placing his mouth on Jane's vaginal area.

Newman acknowledged that he had watched pornography with Jane and had shown her pornography on a computer. He testified that Jane had heard about sex from other girls and asked him questions about it, and he testified that he thought he could "curb [her] curiosity" by watching pornography with her. He testified that the "wors[t]" the conduct ever got between him and Jane was "showing each other" and "a little bit of touching" and "some rubbing." He testified that he did not know what had been in his mind to make him remove his pants while looking at pornography with Jane.

Newman testified that he "only ejaculated on [Jane] once," in 2009. He testified that he rubbed his penis on her "bottom" while looking at pornography with her, and he acknowledged that Jane may have rubbed her hands on his penis to make it erect.

Newman testified that there were approximately six instances of some contact in 2009, that he "probably" rubbed his penis on Jane five of those times, and that he ejaculated on one occasion. He testified that this conduct occurred with clothes on, and described that he would stand between Jane's spread legs while rubbing back and forth. He testified that initially, he was trying "to educate" Jane.

Newman acknowledged that he had posed Jane and taken pictures of her in the nude. He acknowledged that one of the photographs received into evidence depicted his erect penis with Jane's hand around it. He testified that the photographs were taken on the same occasion when he ejaculated. Newman testified that Jane "wanted" the photographs taken.

Although Newman testified that he had shown pornography to Jane, that he had viewed pornography with Jane, that he and Jane had become naked in each other's presence and had engaged in "showing each other" and "a little bit of touching" and "some rubbing," that Jane had rubbed his penis on at least one occasion, that he had ejaculated after rubbing his penis against Jane's bottom, and that he had posed Jane and taken a number of pictures of her nude genitalia and a

photograph of her hand around his penis, Newman denied that any penetration ever occurred during any of the instances with Jane.

3. Laptop Computer

Approximately 1 week after Newman was arrested, his wife (now his ex-wife) contacted law enforcement officers because, while she was using a laptop computer in their house, she discovered "inappropriate" Web sites in the computer's browser history. During a hearing on a motion to suppress, she testified that the Web sites had names that included such words as "little models" and "incest." She testified that she observed a picture (which she did not describe) and "shut it down real quick" before calling law enforcement.

Newman's wife testified that she and Newman shared expenses, had combined financial accounts, and usually made joint decisions regarding purchases. She testified that the two had purchased two computers with a joint tax refund and that although one of the computers was primarily used by her and one primarily used by Newman, she had access to both computers and had business files on the computer primarily used by Newman that she accessed frequently. She testified that the computer was owned jointly and that she gave law enforcement permission to search the computer.

Newman's wife testified that on the occasion on which she discovered the questionable content that caused her to contact law enforcement, she was not required to log onto the computer because it was already "booted up" and was on the kitchen counter in the house.

Newman's wife testified that both computers had, at one time, required the same password for logging on, because both she and Newman used both computers. She testified that Newman had changed the password on the subject computer in November or December 2009, because the couple had a teenage girl staying with them and Newman had wanted to keep her from being able to access the Internet through the computer. Newman's wife testified that she did not recall whether Newman had told her the new password; she was never actually asked whether she knew the password, but

she testified that she knew typical words that Newman used as passwords.

One of the detectives involved in the investigation of the case testified that Newman's wife contacted law enforcement approximately 1 week after Newman's arrest and indicated that she had found child pornography on a computer primarily used by Newman. The detective testified that he understood she had access to the computer and that law enforcement obtained her permission to search the computer. He testified that he believed the computer was password protected, but that Newman's wife provided law enforcement with the password. He testified that he believed the password was written on a slip of paper found inside the laptop computer's case.

After the computer was booked into property, a forensics analysis was performed. The law enforcement officer who performed the analysis testified that he believed the other officer provided him with the password for the computer, but that he did not need the password because he was able to use a forensics software program to view files on the computer without use of the password. He later testified at trial that he did not have the password for the computer.

The officer who performed the forensics analysis testified that he found evidence of child pornography on the computer and that law enforcement then decided to obtain a search warrant to make a full analysis of the computer. After a search warrant was obtained, 11 images of Jane and more than 90 images of other children were located. He testified that many of the images of other children were consistent with images in a Nebraska State Patrol repository of known child pornography and were downloaded to the computer through a peer-to-peer program called LimeWire. The officer who performed the forensics analysis also testified that he found information on the computer concerning numerous Web sites catering to people looking for images of young children and teenagers.

4. Procedural Background

On February 17, 2010, Newman was charged by information with first degree sexual assault of Jane. On March 1,

Newman was charged by information with six counts of visual depiction of child pornography.

(a) Suppression

Prior to trial, Newman sought to suppress evidence obtained from the search of the laptop computer. Newman also sought to suppress statements made during his February 12, 2010, interview.

On February 28, 2011, the district court denied Newman's motion to suppress evidence obtained from the computer. The court found that the computer was jointly purchased and owned by Newman and his wife, that his wife had mutual access to and use of the computer, and that she gave the password to law enforcement. The court also found that law enforcement was reasonable in believing Newman's wife had authority to provide consent for a search of the computer and that Newman had waived any privacy interest in the computer when he left it logged on in a common area of the house.

On June 15, 2011, the district court denied Newman's motion to suppress statements. The court found that Newman had voluntarily accompanied law enforcement to the police station and had been properly advised of his rights before he made incriminating statements.

(b) Discharge

On July 29, 2010, Newman waived his right to speedy trial concerning the then-pending first degree sexual assault of a child charge and the six visual depiction of child pornography charges.

In May 2011, a second amended information was filed concerning the child pornography charges. In the second amended information, Newman was charged with 10 counts of visual depiction of child pornography and 10 counts of possession of child pornography. In January 2012, Newman filed a motion for discharge concerning the child pornography charges, alleging that more than 6 months had elapsed since the filing of the second amended information.

In response to Newman's motion to discharge, the State filed a motion to dismiss the 14 additional charges which were

included in the second amended information. The court granted this motion, leaving Newman again charged with six counts of visual depiction of child pornography. The district court denied the motion to discharge, finding that after the State dismissed the additional charges, Newman remained in exactly the same position as he had been in when he waived his right to speedy trial in July 2010.

(c) Verdict and Sentencing

Newman waived his right to jury trial. After a trial to the bench, the district court found Newman guilty of one count of first degree sexual assault of a child and guilty of six counts of visual depiction of child pornography. The court sentenced Newman to a term of 45 to 70 years' imprisonment on the sexual assault conviction. The court sentenced Newman to concurrent sentences of 5 to 10 years' imprisonment on each of the child pornography convictions. The court ordered the concurrent child pornography sentences to be served consecutively to the sexual assault sentence. In addition, Newman was required to comply with Nebraska's Sex Offender Registration Act. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Newman challenges the district court's denial of each of his motions to suppress, the court's denial of his motion to discharge, the sufficiency of the evidence to support the sexual assault conviction, and the sentences imposed by the district court.

IV. ANALYSIS

1. Motions to Suppress

[1] Newman challenges the district court's denial of his motions to suppress statements he made to law enforcement investigating the claim of sexual assault and to suppress evidence of child pornography obtained from law enforcement's search of a laptop computer. 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. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d

882 (2010); *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009). Regarding historical facts, an appellate court reviews the trial court's findings for clear error. *Id*. 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. *Id*. We find no merit to either assertion.

(a) Statements

Newman first asserts that the district court erred in denying his motion to suppress statements made during his initial interview with law enforcement. His argument is premised on an assertion that law enforcement effected an unlawful arrest of him at his home and that the entire subsequent interview at the police station was fruit of the poisonous tree. We agree with the district court that the circumstances demonstrate that Newman made a voluntary statement, after being fully advised of his rights, and we find no merit to this assertion of error.

[2,3] It is axiomatic that for the protections of the Fourth Amendment to apply, a seizure must have occurred. *State v. Hedgcock, supra*. A seizure requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's show of authority. *Id*. Determinations as to whether a person has been seized are questions of fact. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993).

[4,5] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *State v. Casillas, supra*; *State v. Hedgcock, supra*. In addition to situations where the officer directly tells the suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *State v. Hedgcock, supra*.

[6] The question of whether a person's consent to accompany law enforcement officials was in fact voluntary or was

the product of duress or coercion, express or implied, is to be determined by the totality of the circumstances. *State v. Bronson, supra*.

In *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), the Nebraska Supreme Court addressed the admissibility of statements made after the defendant accompanied law enforcement to the police station. In that case, the defendant was suspected of being involved in a homicide and, while driving his automobile, was stopped by a police cruiser accompanied by an unmarked police vehicle. The defendant was asked to accompany law enforcement to the police station. The defendant asked whether he could leave his vehicle where it was parked, was cooperative and agreed to accompany law enforcement, and was transported in an unmarked police car. He was not handcuffed.

[7] The Nebraska Supreme Court held that the record "clearly demonstrate[d] that [the defendant] voluntarily cooperated with the police." *Id*. at 782, 457 N.W.2d at 440. The court concluded that given the totality of the circumstances, the trial court was not clearly wrong in concluding that no unlawful seizure had occurred when law enforcement stopped the defendant, asked him to accompany them to the police station, and transported him to the police station for an interview. *State v. Victor, supra*. The court specifically rejected the assertion that a request to accompany law enforcement "to a police station for questioning carries an implication of obligation so awesome for a suspect that it renders his actions involuntary." *Id*. at 782, 457 N.W.2d at 441.

Similarly, in *State v. Bronson*, 242 Neb. at 935, 496 N.W.2d at 887, police officers made contact with the defendant at his house, explained that they wanted to "'talk to him at Central Police Headquarters,'" and transported him to the police station for an interview. The defendant "was not threatened, coerced, or promised anything, was not told he was under arrest, was not handcuffed, and rode in the back seat of [an] unmarked police car with the two officers in the front." *Id*. The defendant was described as "calm and cooperative." *Id*.

In that case, the Nebraska Supreme Court again held that the defendant had voluntarily accompanied law enforcement

to the police station. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993). The court held that despite the fact that the defendant was interrogated in privacy and in unfamiliar surroundings, considered from a totality of the circumstances, the situation did not rise to the level of a custodial seizure. *Id.*

The facts of the present case are substantially similar. One of the detectives involved in the investigation testified that he, another detective, and two uniformed officers went to Newman's house and made contact with him. The detective testified that Newman "actually may have come out prior to [their] knocking on [the door]," but that he could not recall exactly. He testified they advised Newman that his name had come up in an investigation and that they wanted to conduct a formal interview at the police station. Newman "was receptive and he agreed to accompany" the officers. Newman was then transported in an unmarked vehicle with the two plainclothes detectives. The detective also testified that he did not believe Newman was handcuffed (and later testified Newman was not in handcuffs when he arrived in the interview room at the police station) and that Newman was not advised he was under arrest. He testified that Newman never became reluctant or indicated that he was unwilling to accompany law enforcement. Once in the interview room, Newman was advised of his rights from a standard rights advisory form before making any statements.

There is no indication in the record that any law enforcement officer displayed a weapon, physically touched Newman, or otherwise took action to suggest that Newman was compelled to accompany them. There is no indication that any law enforcement officers took any action to suggest that Newman was threatened or coerced into accompanying them. Rather, the totality of the circumstances indicates that Newman was asked to accompany law enforcement and that he willingly and voluntarily did so.

As in *State v. Bronson, supra*, and *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), the totality of the circumstances in this case indicates that Newman voluntarily accompanied law enforcement to the police station and was not unlawfully

seized at his home. As such, we find no merit to Newman's assertion that the district court erred in denying his motion to suppress statements.

(b) Search of Laptop

Newman next asserts that the district court erred in denying his motion to suppress evidence of child pornography found on a laptop computer. His argument is premised on an assertion that his wife lacked authority to grant consent for a search of the laptop and that she did not know the password to access the laptop. We find that the district court did not err in finding that his wife had authority to consent to the search, and we reject this assertion of error.

[8-10] The Nebraska Supreme Court recently addressed the issue of shared authority to consent to a search in *State v. Reinpold*, 284 Neb. 950, 824 N.W.2d 713 (2013). Both the U.S. and Nebraska Constitutions guarantee the right to be free from unreasonable searches and seizures. *State v. Reinpold, supra*. That right may be waived by consent. *Id.*, citing *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *Id.* Furthermore, a warrantless search is valid when based upon consent of a third party whom the police, at the time of the search, reasonably believed possessed authority to consent to a search of the premises, even if it is later demonstrated that the individual did not possess such authority. *Id.*

In *State v. Reinpold, supra*, the defendant rented one of six apartments located in a single dwelling owned by his parents. At the time, the dwelling was also occupied by the defendant's grandparents and uncle. The defendant, his grandparents, and his uncle were the only occupants of the dwelling, and all used the basement of the dwelling for storage. Both the defendant and his uncle stored property in the northeast corner of the basement. The defendant subsequently moved

from the dwelling, but left belongings in the basement storage area.

After the defendant had moved from the dwelling, his grandparents located a laptop computer in his former apartment and, while examining it, discovered images of suspected child pornography. When the defendant's uncle contacted him about the laptop computer, the defendant denied owning it. The defendant subsequently went to the dwelling to retrieve the laptop computer, and its location was unknown to the date of the Supreme Court's opinion.

During a subsequent investigation, law enforcement was informed about the images that had been viewed on the laptop computer and the defendant's grandparents and uncle informed law enforcement that the defendant had stored several computer hard drives in the basement of the dwelling. They led the investigating officer to the northeast corner of the basement, where three hard drives were located and seized. Subsequent searches of the hard drives revealed suspected child pornography.

In *State v. Reinpold, supra*, the Nebraska Supreme Court held that the district court was not clearly wrong in finding that the defendant's grandparents and uncle had actual and/or apparent authority to consent to a search of the northeast corner of the basement area. The evidence demonstrated that the defendant's grandparents and uncle had unfettered access to the basement and that the defendant's uncle stored items in the northeast corner of the basement. There was no evidence adduced to demonstrate that the investigating officer had any information to suggest that the defendant had exclusive use of the northeast corner of the basement. Thus, the Supreme Court rejected the defendant's assertion that the search was performed without valid consent.

Similarly, the evidence in the present case indicates that Newman's wife had actual and/or apparent authority to consent to a search of the laptop computer. Newman's wife testified that the laptop computer was owned jointly and that there was business information located on it that she "used frequently." She testified that the parties shared expenses, had combined checking accounts, and usually made joint decisions about

purchases. She testified that the laptop computer was purchased by the parties with a joint tax refund. She testified that they purchased two laptop computers at the same time, that the one in question was primarily used by Newman, and that both parties had access to the laptop computers.

Newman's wife testified that when she discovered the questionable content on the laptop computer in question, it had been located on the kitchen counter and it was "already booted up," so she did not need to enter a password to use it. She testified that Newman had changed the password for accessing the computer in November or December 2009 to prevent a teenager who had been staying with them from being able to access the Internet. She testified that she could not recall whether Newman had told her the new password, but that they "[t]ypically . . . used similar" passwords and that she was aware of other passwords that Newman utilized. She was never asked whether she knew the password or whether she provided the password to law enforcement.

One of the detectives testified that Newman's wife contacted law enforcement about having found possible child pornography on the laptop computer. He testified that she indicated she had found the possible child pornography "on a computer primarily used by" Newman and that it was decided law enforcement could seize the laptop computer because it was joint property. He testified that law enforcement obtained permission from Newman's wife to search the laptop computer and that she signed a standard consent-to-search form. He testified that his understanding was that Newman's wife had access to the laptop computer.

We conclude that the district court was not clearly erroneous in finding that Newman's wife had actual and/or apparent authority to consent to a search of the laptop computer. Newman's assertion of error is without merit.

2. Motion to Discharge

Newman next challenges the district court's denial of his motion to discharge the child pornography charges brought against him. His argument is premised on an assertion that the filing of a second amended information resulted in

charges different from those previously charged and to which he had waived speedy trial protections and that more than 6 months passed before he was brought to trial on the charges in the second amended information. We find no merit to Newman's assertion.

[11,12] As Newman correctly notes on appeal, Neb. Rev. Stat. § 29-1207 (Reissue 2008 & Cum. Supp. 2012) provides that, in general, a defendant must be brought to trial within 6 months after the filing of the information, unless the 6 months are extended by any period to be excluded in computing the time for trial. See *State v. Florea*, 20 Neb. App. 185, 820 N.W.2d 649 (2012). If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged. *Id.*

[13,14] 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. *Id.* 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. *Id.*

[15,16] In *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001), the Nebraska Supreme Court addressed the State's filing of an amended information and such filing's impact on speedy trial considerations. The court concluded that "[i]t is important to determine whether the amendment charges the same crime or a totally different crime" and held that "[i]f the amendment to the . . . information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act." *Id.* at 670, 633 N.W.2d at 914. An amended information which charges a different crime, without charging the original crime(s), constitutes an abandonment of the first information and acts as a dismissal of the same. See *id.*

In the present case, the initial information charging Newman with child pornography alleged that he had committed six counts of visual depiction of child pornography between February 13 and 24, 2010. With respect to those charges,

Newman specifically waived his right to speedy trial. The second amended information included 10 counts of visual depiction of child pornography and 10 counts of possession of child pornography. Certainly, the amended information charged additional crimes for which a new speedy trial clock would begin and for which Newman's prior waiver of speedy trial would not be effective.

However, at the hearing on Newman's motion to discharge, the State dismissed the 14 additional charges alleged in the second amended information. Thus, the State elected to proceed with prosecution of Newman only on the original six counts of visual depiction of child pornography with which he had been charged in the original information, and for which he had specifically waived his right to speedy trial.

The district court found that upon the State's dismissal of the additional charges in the second amended information, Newman remained in the same position as he had been at the time he waived his right to speedy trial: charged with six counts of visual depiction of child pornography. We find no error in this ruling, and we find no merit to Newman's assertion that the court erred in denying his motion for discharge of the child pornography charges.

3. Sufficiency of Evidence

Newman next asserts that the district court erred in finding sufficient evidence to sustain his conviction for first degree sexual assault of a child. His argument is premised on an assertion that the State failed to adduce sufficient evidence to demonstrate that penetration occurred. Newman's assertions on appeal amount to challenges to the credibility of the victim, and there was sufficient evidence to sustain the conviction. As such, we find no merit to this assertion of error.

[17] Neb. Rev. Stat. § 28-319.01 (Reissue 2008 & Cum. Supp. 2012) provides, in relevant part, that a person commits sexual assault of a child in the first degree when "he or she subjects another person under twelve years of age to sexual penetration and the actor is at least nineteen years of age or older." There is no issue in this case concerning the ages of Newman or the victim. Newman was born in 1971 and was

37 or 38 years of age during the relevant time period; the victim was born in 1999 and was 10 years of age during the relevant time period. Newman's assertions on appeal concern only the sufficiency of the evidence concerning "sexual penetration."

[18] Neb. Rev. Stat. § 28-318(6) (Reissue 2008) defines sexual penetration as meaning

> sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes.

Section 28-318(6) also indicates that "[s]exual penetration shall not require emission of semen."

[19] 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. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013). 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*.

In this case, the victim (Jane) testified about Newman's conduct. She testified that Newman began touching her private parts when she was approximately 6 years of age and that the conduct ended when she was 10 years of age. She testified that Newman "rubbed on" her by putting "his privates on [her] front private." She testified that Newman's touching of her happened "[t]oo many times to count."

Jane testified that when she was approximately 6 years of age, Newman primarily "touch[ed] [her] private parts with his hands" and that, although "usually [her clothes] were on, . . . sometimes they were off." She testified that when she was 7 or 8 years of age, Newman began showing her pornography and began touching "his private parts on [her]

private parts." She testified that Newman would sometimes touch her private parts with his mouth and that he would "lick [her] private."

Jane testified about Newman's touching of his private parts to her private parts. She described that both she and Newman would have their clothes off and that Newman would rub his penis on her vagina. She specifically testified that Newman would rub "inside the folds of [her] vagina." She testified that "like halfway through he'd tell [her] to get on [her] stomach" and that he would then rub "his front area on [her] bottom." She testified that Newman would rub his penis on the "inside just on top of the hole area" of "[her] butt." She testified that "a white stuff came out, and then he'd just wipe the white stuff off with like a sock or a towel." She testified that Newman ejaculated "[o]nto [her] back area."

Jane also testified that when Newman would lick her vagina, she remembered "like the folds coming apart."

On cross-examination, Jane agreed that she had told law enforcement during her interview at Project Harmony that nothing ever went inside "the hole" of her vagina or her anus. She also acknowledged that if there were differences in her memory of what happened between her testimony at trial and statements she made during the Project Harmony interview, her memory at the time of the Project Harmony interview was probably more accurate. She denied that her story of what had happened had changed, however. On redirect examination, she again testified that she remembered that she could feel that Newman was rubbing his penis inside the folds of her vagina.

Detective Butler, who conducted the interview of Jane at Project Harmony, was asked whether Jane described "any penetration" by Newman with his penis or hands, and he responded "no." Detective Butler testified, however, that his supplemental report referenced Newman's "penetrating [Jane's] vaginal area with his tongue, separating the labia minor[a] and the majora, and also rubbing her vaginal area with his penis, separating the labia minor[a] and the majora and rubbing his penis inside her butt, but not inside the hole." He testified that he did not go over the legal definition of "penetration" with

Jane. Detective Butler was asked whether Jane indicated that Newman put his tongue "inside of her" and "[u]p into the hole" and "in the hole," and he responded, "Yes. She said that she could feel it inside of her."

Newman testified in his own behalf. During his testimony, he acknowledged that the videotape of his initial interview with law enforcement revealed that he had made statements to law enforcement indicating that Jane had put her mouth on his penis, but he denied that it ever happened. He also denied ever putting his mouth on Jane's vagina. He acknowledged occasions between him and Jane of "showing each other" and occasions of "a little bit of touching" and "a little bit of some rubbing." He testified that Jane "might have rubbed her hands on [his penis] a couple of times" to help him get erect. He acknowledged ejaculating onto Jane on one occasion.

Newman's argument on appeal is that the above evidence is not sufficient to sustain a factual finding that there was sexual penetration. He argues that during her initial interview, Jane indicated there had been no penetration, and that she acknowledged at trial that her memory would have been more accurate at the time of the initial interview than at trial. According to Newman, the only evidence of penetration was statements of Jane made more recently and "[i]t is likely that these later statements were not as accurate as the statements that [Jane] made during the initial interview at Project Harmony." Brief for appellant at 28.

We find no merit to Newman's assertion of error. As recounted above, Detective Butler's report of the initial interview of Jane indicated that she had described Newman's separating the labia of her vagina with both his tongue and his penis and that she described Newman's placing his tongue "inside of her." Jane testified at trial that Newman licked her and rubbed his penis "inside the folds" of her vagina. Newman himself acknowledged having made statements to law enforcement indicating that Jane placed her mouth on his penis, although he denied at trial that any such conduct happened. Newman's argument on appeal is entirely an assertion that the testimony of Jane and Detective Butler should not be

found credible; credibility is not an issue we resolve on appellate review.

There was clearly sufficient evidence from which a rational trier of fact could find that there was "any intrusion, however slight, of any part of [Newman's] body . . . into the genital or anal openings of [Jane's] body which can be reasonably construed as being for nonmedical or nonhealth purposes." See § 28-318(6). Newman's assertion that there was insufficient evidence to sustain a conviction for first degree sexual assault of a child is meritless.

4. Excessive Sentences

Newman's final assertion of error is that the district court abused its discretion by imposing excessive sentences. Newman's argument on appeal is not that the sentences imposed were outside of the relevant statutory limits, but, rather, that the court should have given more consideration to mitigating factors and imposed less harsh sentences. We find no abuse of discretion.

[20,21] The standard for reviewing an excessive sentence claim is well established. *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013). An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *Id*. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

[22,23] 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. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

We have recounted in a fair amount of detail throughout this opinion what the evidence in this case demonstrated: Newman, while 37 or 38 years of age, engaged in a pattern of sexual conduct with a child, beginning when she was 6 years of age and continuing until she reported it at 10 years of age. The evidence indicates that the conduct included touching, licking, and rubbing of genitals and ejaculation on more than one occasion. Newman was convicted of first degree sexual assault of a child and six counts of visual depiction of child pornography related to photographs he took of the 10-year-old victim. Those photographs depict the child in the nude, posed, with her breasts and genitals exposed, and include an image of the child's hand gripping Newman's erect penis.

At trial, Newman did not dispute that he had engaged in this inappropriate conduct, except to assert that there had never been penetration. He attempted to explain his behavior by indicating that the child in this case had asked questions about sex and that he thought these actions would "curb [her] curiosity" and "educate" her. Newman acknowledged that he took photographs of Jane that included "posing" of her, but testified that the 10-year-old child wanted the photographs taken.

At sentencing, the sentencing court in this case described Newman's conduct as grooming of this victim. The court concluded that Newman had not shown any remorse or understanding of the "psychic pain" that he had caused the victim. The court found that Newman is a predator and a threat to vulnerable children and noted that he not only sexually assaulted this young child, but also photographed her, evidencing his enjoyment.

The court sentenced Newman to a term of 45 to 70 years' imprisonment for the first degree sexual assault of a child conviction, to be served consecutively with six concurrent sentences of 5 to 10 years' imprisonment on each of the visual depiction of child pornography convictions. These sentences were all within the statutory limits, and the sentences on the child pornography convictions were near the low end of the sentencing range. In light of the nature of the offenses and the circumstances of this case, there was no abuse of

discretion by the sentencing court. This assertion of error is meritless.

V. CONCLUSION

We find no merit to Newman's assertions of error. The district court did not err in denying his motions to suppress or his motion for discharge. There was sufficient evidence to sustain the convictions. The sentences imposed were not excessive. As such, we affirm.

AFFIRMED.

ABANTE, LLC, DOING BUSINESS AS ABANTE MARKETING AND ABANTE HOLDINGS, LLC, APPELLANT, V. PREMIER FIGHTER, L.L.C., ET AL., APPELLEES.

836 N.W.2d 374

Filed July 23, 2013. No. A-12-600.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
2. **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.
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. **Actions: Proof.** In order to maintain an action for money had and received, a plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff.
6. **Actions: Words and Phrases.** An action for money had and received falls under the common-law class of assumpsit and is an action at law.
7. **Actions: Contracts: Equity: Restitution: Unjust Enrichment.** An action in assumpsit for money had and received may be brought where a party has received money that in equity and good conscience should be repaid to another. In such a

circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment.

8. **Unjust Enrichment: Words and Phrases.** Unjust enrichment has been defined to mean a transfer of a benefit without adequate legal ground.
9. **Unjust Enrichment: Contracts.** One who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contractual right.
10. **Claims: Restitution: Notice.** A payee without notice who accepts funds from a third party in satisfaction of a valid claim as a creditor of another person takes free of the third party's restitution claim to which it would otherwise be subject.
11. **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.
12. **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.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

John C. Fowles, of Fowles Law Office, P.C., L.L.O., for appellant.

Steven M. Delaney, of Reagan, Melton & Delaney, L.L.P., for appellee MMAStop, Inc.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

Abante, LLC, doing business as Abante Marketing and Abante Holdings, LLC, appeals from an order of the district court for Sarpy County, Nebraska, that entered summary judgment in favor of MMAStop, Inc., one of the appellees. Abante challenges MMAStop's entitlement to retain certain funds paid to it by Abante based upon fraudulent representations from Matthew H. Anselmo. We find that because MMAStop did not have knowledge of Anselmo's fraud, acted in good faith as an innocent party, and had a valid legal basis to retain the funds it received, the district court correctly entered summary judgment in its favor.

FACTUAL BACKGROUND

This case appears before us for a second time. In its first appearance, we dismissed Abante's appeal for lack of jurisdiction because the initial order granting summary judgment on behalf of MMAStop did not dispose of all of the claims against all of the parties and did not make an express determination and direction as required under Neb. Rev. Stat. § 25-1315 (Reissue 2008). See *Abante, LLC v. Premier Fighter*, 19 Neb. App. 730, 814 N.W.2d 109 (2012). Subsequently, the district court entered an order certifying the case under § 25-1315. Abante again appeals.

Anselmo was the sole owner of M & M Marketing, L.L.C., which in turn owned Premier Fighter, L.L.C. Premier Fighter was a retail clothing line that was primarily focused on mixed martial arts apparel. MMAStop is a business engaged in the retail and Internet sale of mixed martial arts apparel and equipment. Abante is a business engaged in screen printing, embroidering, and the sale of promotional products to corporate and school clients. At the time of the summary judgment proceedings below, Anselmo was incarcerated in a federal prison as a result of a fraud conviction.

In 2008, MMAStop made two separate $80,000 loans to Premier Fighter, which it understood were for the purpose of funding a merchandise order. The terms for each loan, although unwritten, required repayment with 50-percent interest within 30 days. The first loan was made on April 14, 2008, and was repaid in full by Premier Fighter on May 9 in the amount of $120,000 ($80,000 principal plus $40,000 interest). The second loan was made by MMAStop on May 30. When the second loan was not repaid within the agreed period, Anselmo provided MMAStop with a number of excuses. At this point, MMAStop's officers began to grow concerned. At the end of July, Anselmo advised MMAStop that it would receive a $40,000 wire transfer as partial payment of the debt. MMAStop received this payment on July 22. The remaining $80,000 arrived in a separate wire transfer a week later. These wire transfers were made by Abante, as discussed further below. MMAStop applied these sums in

complete payment of Premier Fighter's debt, including both principal and interest.

In separate dealings with Anselmo, Abante was induced to enter into a financial transaction with Premier Fighter for the funding of a merchandise order from a retailer. Anselmo admitted that he altered a merchandise invoice in order to induce Abante to loan the money. In late July 2008, Abante agreed to provide Premier Fighter with the sum of $240,000 in exchange for a 100-percent return on its investment. Abante's owners did not believe this return was irregular in the retail clothing business market. After receiving instructions from Anselmo, Abante sent MMAStop a total of $120,000 through two wire transfers, which Abante believed was for the purpose of beginning production of the merchandise necessary to fill the order. Abante transferred the remaining $120,000 directly to Premier Fighter. Anselmo, as an employee and agent of Premier Fighter, executed a promissory note to Abante in the amount of $240,000, with 100-percent interest, which was to be paid on or before October 12, 2008. Abante has received only one payment of $3,500 on this note.

There is no dispute that the $120,000 that Abante wired to MMAStop was not used for the production of any merchandise, but was used to satisfy Premier Fighter's outstanding debt to MMAStop. Abante's operative complaint sought recovery from Anselmo, M & M Marketing, and Premier Fighter for the unpaid promissory note and against Anselmo for damages resulting from his alleged fraud. In its claim against MMAStop, Abante sought recovery of the wired money in the sum of $120,000 on the theory of money had and received.

MMAStop moved for summary judgment, and at the hearing, numerous depositions and exhibits were received in evidence. On February 24, 2011, the district court entered an order granting summary judgment in favor of MMAStop, finding that Abante's cause of action for money had and received against MMAStop was without merit. Following the final order entered on June 29, 2012, Abante appeals.

ASSIGNMENT OF ERROR

Abante assigns, summarized and restated, that the district court erred in granting summary judgment in favor of MMAStop.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court. *State v. Coupens*, 20 Neb. App. 485, 825 N.W.2d 808 (2013).

[2,3] 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. *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 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.*

ANALYSIS

Jurisdiction.

[4] 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. *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013). Therefore, we revisit the jurisdiction question in this case.

As we stated in our previous opinion, the first appeal in this case was dismissed because the order appealed from failed to dispose of the claims against all parties involved in the action and failed to make the necessary findings for certification under § 25-1315. See *Abante, LLC v. Premier Fighter*, 19 Neb. App. 730, 814 N.W.2d 109 (2012). After our dismissal, the district court entered an order certifying a final order on June 29, 2012. We now review that order to

determine whether it satisfies the jurisdictional requirements of a final order.

In its order certifying a final order, the district court declared that its February 24, 2011, order was a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008). The district court also specified that this final order applied only to Abante's claim against MMAStop. The court found five factors to support this order: (1) Two of the named defendants (Premier Fighter and M & M Marketing) are in bankruptcy, and the case is stayed as to those defendants and as to Anselmo; (2) MMAStop was the only defendant to file an answer in the litigation; (3) Anselmo has been incarcerated for the majority of the proceedings; (4) Abante and MMAStop were planning to proceed to trial without the other parties; and (5) the cause of action against MMAStop was distinct from the causes of action asserted against the remaining defendants.

We find that the district court's reasoning in its June 29, 2012, order satisfies the requirements of § 25-1315. See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007) (providing various factors trial court should consider when determining whether to certify final judgment). Thus, we conclude we have jurisdiction to address the present appeal.

Entry of Summary Judgment in Favor of MMAStop.

[5,6] Abante's cause of action against MMAStop is one of assumpsit, which is also referred to as an action for money had and received. In order to maintain an action for money had and received, a plaintiff must show that (1) the defendant received money, (2) the defendant retained possession of the money, and (3) the defendant in justice and fairness ought to pay the money to the plaintiff. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). Although founded on equitable principles, an action for money had and received falls under the common-law class of assumpsit and is an action at law. See *Daubman v. CBS Real Estate Co.*, 254 Neb. 904, 580 N.W.2d 552 (1998).

[7] An action in assumpsit for money had and received may be brought where a party has received money that in equity

and good conscience should be repaid to another. *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011). In such a circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment. *Id.* When a party uses an assumpsit action in this sense, it is a quasi-contract claim sounding in restitution. *Id.* Restitution is predominantly the law of unjust enrichment. *Id.*

Neither party disputes that Abante established the first two elements of its claim; namely, that MMAStop received a total of $120,000 in July 2008 and has retained possession of the money. Thus, the central issue in this case is whether justice and fairness require MMAStop to return this money to Abante. This question, in turn, depends on whether MMAStop, as payee, has been unjustly enriched by receipt of the $120,000.

[8-10] Unjust enrichment has been defined to mean a "'transfer of a benefit without adequate legal ground.'" *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. at 866, 809 N.W.2d at 743 (quoting Restatement (Third) of Restitution and Unjust Enrichment § 1, comment *b*. (2011)). One who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contractual right. *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995). The Restatement, *supra*, § 67(1)(a), provides that a payee without notice who accepts funds from a third party in satisfaction of a valid claim as a creditor of another person takes free of the third party's restitution claim to which it would otherwise be subject.

Because this case was disposed of by summary judgment, the question before us is whether there are any genuine issues of material fact regarding MMAStop's alleged unjust enrichment in retaining the money received from Abante. After reviewing the evidence in the light most favorable to Abante, and giving it the benefit of all reasonable inferences, we conclude that there are no genuine issues of material fact and that the district court was correct in determining that MMAStop was not unjustly enriched.

[11,12] 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. *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (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*.

First, there is no dispute in the facts regarding the transactions between MMAStop and Anselmo on behalf of Premier Fighter. MMAStop loaned $80,000 to Premier Fighter on April 14, 2008, with the requirement that repayment of the principal and 50-percent interest occur within 30 days. MMAStop received repayment of $120,000 on this first loan from Premier Fighter on May 9. MMAStop made a second loan under the same terms to Premier Fighter on May 30. The record shows that the second loan was not repaid within 30 days and that Anselmo provided MMAStop with a number of excuses, which caused MMAStop's officers to grow concerned. Abante did not adduce evidence to support its suggestion that MMAStop was or should have been aware of Anselmo's alleged fraudulent conduct at this point.

Next, the evidence adduced by MMAStop regarding payment of the second loan clearly shows that it received the wire transfers totaling $120,000 with the representation from Anselmo that they were in repayment of the second loan. Specifically, Anselmo advised MMAStop that funds to pay the loan would be wired to MMAStop and this in fact occurred. The evidence presented by MMAStop further indicated that MMAStop was not aware that Abante was providing these funds. In fact, Anselmo stated in his deposition that he never told MMAStop where he acquired the money to repay the second loan. In response, Abante presented some evidence that it may have verified bank account information with MMAStop prior to the wire transfer; however, no evidence

was adduced to indicate that Abante was the source of the funds being wired.

Further, and more important, the undisputed evidence in the record shows that MMAStop was not aware of Premier Fighter's dealings with Abante prior to receiving the wire transfers. The undisputed evidence also shows that MMAStop was not aware that Abante was making payment on behalf of Premier Fighter under the belief that the money was necessary for MMAStop to begin merchandise production.

Based on the foregoing undisputed facts, MMAStop argues that it has a legal basis for retaining the money received from Abante. Relying principally on the Nebraska Supreme Court's decision in *Federated Mut. Ins. Co. v. Good Samaritan Hospital*, 191 Neb. 212, 214 N.W.2d 493 (1974), MMAStop contends that it is an innocent creditor that has not been unjustly enriched by retaining this money.

In *Good Samaritan Hospital, supra*, the Nebraska Supreme Court considered whether an insurer could recover an overpayment from a hospital that was the result of the insurer's own mistake. The insurer's policy capped its insured's benefits at $12,047.30, but it paid the hospital a total of $19,822.78 on behalf of its insured. The hospital had rendered services to the insured in the amount of $13,915.20. When the insurer later requested that the hospital refund the payment exceeding policy limits, the hospital refunded only $5,816.31. The insurer filed suit to recover the additional $1,959.17 that had been applied to the insured's hospital bill but was in excess of the insured's policy limits. There was no dispute that the insurer made the mistake or that the hospital had acted in good faith and without knowledge of the mistake when it received payment. The court found for the hospital, holding that

> [a] creditor who has innocently received payment of a debt from a third party is under no duty to make restitution to the third party if it is later discovered that the third party had no responsibility to make the payment and payment was made solely because of the third party's mistake.

Id. at 217, 214 N.W.2d at 496. The court also specifically found that the hospital had not been unjustly enriched because

it had retained only the amount it was due for the services performed. *Id.*

Although there are obvious factual distinctions between this case and *Good Samaritan Hospital, supra*, we agree with MMAStop that the same principles apply in this case. After receiving Anselmo's instructions, Abante transferred $120,000 to MMAStop under the mistaken belief that MMAStop was going to produce Premier Fighter's merchandise. MMAStop was not involved in Anselmo's fraud, did not have knowledge of Abante's loan with Premier Fighter, and acted in good faith. MMAStop had previously loaned Premier Fighter $80,000, to be paid within 30 days with 50-percent interest, and had been repaid $120,000. MMAStop entered into an identical second loan with Premier Fighter and believed the wire transfers totaling $120,000 were made on behalf of Premier Fighter in repayment of its second loan. As such, MMAStop innocently received this money as payment of the debt from Premier Fighter and had a legal right to retain the money. Therefore, MMAStop presented evidence to show that it was not unjustly enriched by retaining this money, and Abante has failed to adduce evidence to show the existence of a genuine issue of material fact.

Abante also contends, without citing any evidence or authority to support the conclusion, that MMAStop would be unjustly enriched if allowed to profit from its dealings with Anselmo while other creditors are faced with substantial losses. The record contains information showing that involuntary bankruptcy petitions were filed against Premier Fighter and M & M Marketing showing creditors having total claims exceeding $1 million against Anselmo's companies. This evidence does not change the conclusion that MMAStop has not been unjustly enriched in receiving money in repayment of its loan to Premier Fighter. Contrary to Abante's argument, MMAStop did not profit from the retention of the wire transfers; rather, it received exactly what it was entitled to under the terms of the second loan to Premier Fighter. Under the law of assumpsit, which focuses on whether the payee was unjustly enriched, the district court correctly found that MMAStop was entitled to retain the money.

As stated in the above analysis, we do not find any genuine issue of material fact regarding MMAStop's alleged unjust enrichment. Therefore, we conclude the district court was correct in entering summary judgment in favor of MMAStop.

CONCLUSION

Based on our review of the record, the facts are undisputed that MMAStop acted in good faith without knowledge of Anselmo's fraud or Abante's mistake in paying MMAStop. Because MMAStop has legal justification to retain the funds it received from Abante, justice and fairness do not require it to return the money. Therefore, we affirm the decision of the district court.

AFFIRMED.

IN RE INTEREST OF AALIYAH M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RONALD M., APPELLANT.

837 N.W.2d 98

Filed July 23, 2013. No. A-12-979.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Parental Rights.** Parents have a recognized liberty interest in raising their children.
3. **Parent and Child: Due Process.** The parent-child relationship is afforded due process protection.
4. **Constitutional Law: Due Process: Appeal and Error.** The appellate courts apply a three-part test for due process protecting liberty interests: (1) Is there a protected liberty interest at stake? (2) If so, what procedural protections are required? (3) Given the facts of the case, was there a denial of the process that was due?
5. **Words and Phrases.** The word "or," when used properly, is disjunctive.
6. **Constitutional Law: Due Process: Parental Rights.** In a hearing on the termination of parental rights without a prior adjudication hearing, where such termination is sought under Neb. Rev. Stat. § 43-292(1) through (5) (Cum. Supp. 2012), such proceedings must be accompanied by due process safeguards.

Appeal from the Separate Juvenile Court of Lancaster County: ROGER J. HEIDEMAN, Judge. Affirmed.

Joseph E. Dalton, of Dalton Law Office, P.C., L.L.O., for appellant.

Daniel Zieg, Deputy Lancaster County Attorney, for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Ronald M. appeals from the order of the separate juvenile court of Lancaster County, which terminated his parental rights to his minor children. On appeal, Ronald assigns error to the court's failure to advise him of his rights pursuant to Neb. Rev. Stat. § 43-279.01 (Reissue 2008) prior to the hearing on the State's motion for termination of his parental rights. Because Ronald received the rights advisement at the time of the initial appearance hearing, his due process rights were not violated, and we affirm.

BACKGROUND

On October 1, 2009, the juvenile court held an initial appearance hearing on the State's petition alleging that the minor children were juveniles as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The children's mother appeared with her counsel, and Ronald appeared with his counsel. Before Ronald and the children's mother entered their pleas, the court advised them of their rights and the possible dispositions of the case as required by § 43-279.01. In advising them, the court stated:

> You are entitled to be represented by an attorney, counsel has been appointed for both of you in this matter, as well. You have a right to remain silent as to any questioning which might tend to prove you guilty of a criminal charge. You do have a right to a speedy adjudication hearing or a trial where the State must prove the allegations of [the adjudication petition] by a preponderance of the

> evidence. That means what is alleged is more likely true than not true. You do have a right to confront and cross-examine the State's witnesses. You also have a right to testify yourself or bring into court witnesses to testify for you. You do have a right to appeal the ruling of the Court and have a transcript of the proceedings prepared for that purpose. And you do have the right to a prompt hearing on the matter of temporary custody [i]f your children would be removed from your home.

After Ronald and the children's mother both indicated that they understood their rights, the court advised them further, stating:

> I also need to explain to you what could happen if the Court would take jurisdiction in that matter, which would happen if after a trial the State had met its burden of proof and had proven the allegations by a preponderance of the evidence, or if you admit those allegations. In those cases, we would then have a disposition hearing and the Court would enter a disposition order. That order would require you to comply with a rehabilitative plan that would be designed to correct the issues that had been adjudicate[d]. As part of that order your children could be allowed to remain in your home under the supervision of the Department of Health and Human Services. The order could provide that your children's temporary custody be placed with the Department of Health and Human Services for placement in foster care, the care of an association or institution. It could also provide that your children be placed with a relative or other suitable family member or person.
>
> I have to advise you that if the Court does adjudicate in the matter and you fail to correct the issues that had been adjudicated, at some point in time a motion to terminate your parental rights could be filed. The State statutes provide a specific time frame that a child or children remain in an out of home placement may serve as a basis for the filing of a motion to terminate parental rights. And that is if a child or children remain in an out

> of home placement fifteen out of the most recent twenty-two months.
>
> And, finally, you could be required to contribute to the cost of any out of home placement of your children.

Ronald and the children's mother then indicated that they understood the possible dispositions should the case be adjudicated.

After the juvenile court advised Ronald and the children's mother of their rights and the possible dispositions, the court entered their denials and continued the case for further adjudication and a formal hearing. Although our record does not contain the adjudication proceedings, the minor children were ultimately adjudicated under § 43-247(3)(a).

On June 12, 2012, the State filed motions for termination of the parental rights of both Ronald and the children's mother. In the motion seeking termination of Ronald's parental rights, the State alleged that termination was proper under Neb. Rev. Stat. § 43-292(1), (2), (6), (7), and (9) (Cum. Supp. 2012) and that termination of his parental rights was in the children's best interests.

On July 12, 2012, at the initial hearing on the State's motions for termination of parental rights, the juvenile court again gave an advisement of rights and explained the possible dispositions pursuant to § 43-279.01. The children's mother appeared at this hearing with her attorney and entered a denial to the allegations of the motion seeking to terminate her parental rights. Ronald did not appear at this hearing, but his counsel was present. The court entered denials to the allegations of the motions on behalf of both Ronald and the mother and set the matter for a formal contested termination hearing. Ronald was present and represented by counsel at the termination hearing on August 31, but the rights advisement was not repeated during the course of the termination hearing.

The juvenile court entered an order on September 25, 2012, terminating Ronald's parental rights. The court found that the State had proved grounds for termination under § 43-292(2), (6), and (7) by clear and convincing evidence but had not proved grounds for termination under subsections (1) and (9) of that statute. The court also found that termination of

Ronald's parental rights was in the children's best interests. Ronald subsequently perfected his appeal to this court.

ASSIGNMENT OF ERROR

Ronald asserts that the juvenile court erred when it failed to advise him of his rights pursuant to § 43-279.01, resulting in a violation of procedural due process and a lack of fundamental fairness.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

ANALYSIS

Ronald asserts that the juvenile court erred when it failed to advise him of his rights pursuant to § 43-279.01, resulting in a violation of procedural due process and a lack of fundamental fairness.

Section 43-279.01 provides:

> (1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 or when termination of parental rights is sought pursuant to subdivision (6) or (7) of section 43-247 and the parent or custodian appears with or without counsel, the court shall inform the parties of the:
>
> (a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295;
>
> (b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;
>
> (c) Right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent or custodian guilty of any crime;
>
> (d) Right to confront and cross-examine witnesses;
>
> (e) Right to testify and to compel other witnesses to attend and testify;

(f) Right to a speedy adjudication hearing; and

(g) Right to appeal and have a transcript or record of the proceedings for such purpose.

[2-4] Parents have a recognized liberty interest in raising their children. *In re Interest of Billie B.*, 8 Neb. App. 791, 601 N.W.2d 799 (1999). The parent-child relationship is afforded due process protection. *Id.* The appellate courts apply a three-part test for due process protecting liberty interests: (1) Is there a protected liberty interest at stake? (2) If so, what procedural protections are required? (3) Given the facts of the case, was there a denial of the process that was due? *Id.*

This court has stated that § 43-279.01

> protects parents' liberty interests in raising their children by ensuring that a parent who is brought into court for a juvenile proceeding knows what is going on; knows all the possible outcomes of the case, including drastic measures such as termination of parental rights; and understands the rights that may be exercised during the case.

In re Interest of Billie B., 8 Neb. App. at 796, 601 N.W.2d at 803.

The record shows that Ronald and the children's mother were both present at the October 2009 initial appearance hearing during the adjudication phase of the proceedings; that during the hearing, the juvenile court gave them the statutory rights advisement required by § 43-279.01; and that both Ronald and the children's mother acknowledged those rights. Ronald was not, however, present at the July 2012 initial hearing on the State's motion for termination of his parental rights. The children's mother was present at that hearing and was given the § 43-279.01 rights advisement again at that time. Ronald was present at the later trial on the State's motion for termination, but the rights advisement was not repeated during the actual termination trial.

Ronald argues that the juvenile court's failure to give him the rights advisement during the termination phase of the proceedings violated his due process rights and that thus, the order terminating his parental rights should be vacated. In support of his argument, Ronald cites to *In re Interest of Joelyann H.*,

6 Neb. App. 472, 574 N.W.2d 185 (1998), and *In re Interest of A.D.S. and A.D.S.*, 2 Neb. App. 469, 511 N.W.2d 208 (1994). These cases are inapplicable to the present case. In *In re Interest of Joelyann H.*, the rights advisement was never given at any stage of the juvenile court proceedings, and in *In re Interest of A.D.S. and A.D.S.*, the parent was advised of some, but not all, of the rights set forth in § 43-279.01.

In this case, the complete advisement of rights under § 43-279.01 was given to Ronald at the initial appearance hearing and he was advised of the nature of the juvenile court proceedings and the possible consequences, including the possibility of termination of his parental rights. Ronald's brief ignores the advisement that he was given during the adjudication phase and does not contain any authority to support his argument that the rights advisement should have been given a second time. The issue here is whether, after having advised Ronald of his rights during the adjudication phase of the proceedings, the court was required to repeat the advisement during the termination phase of the proceedings.

[5] The State contends that § 43-279.01 requires that the rights advisement be given only once and does not require that the advisement, if given during the adjudication phase of the proceedings, be repeated during the termination phase. The State argues that the statute is disjunctive and requires that the advisement be given either during the adjudication phase or during the termination phase. The word "or," when used properly, is disjunctive. *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011). We agree and conclude that § 43-279.01 requires that the rights advisement be given at either the adjudication phase or the termination phase, but does not require that the advisement be given at both phases.

[6] Our conclusion that the rights advisory does not need to be given at both the adjudication phase and the termination phase of the proceedings is consistent with the recognition that an action to terminate parental rights can be brought without the necessity of a prior adjudication, as long as due process safeguards are met. See, Neb. Rev. Stat. § 43-291 (Reissue 2008); *In re Interest of Joshua M. et al.*, 256 Neb.

596, 591 N.W.2d 557 (1999). In a hearing on the termination of parental rights without a prior adjudication hearing, where such termination is sought under § 43-292(1) through (5), such proceedings must be accompanied by due process safeguards. *In re Interest of Joshua M. et al., supra*. In *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001), the parents were not given the statutory rights advisement at the adjudication phase, but did not appeal from the adjudication order. On appeal following the termination of their parental rights, we found that although the adjudication was improper, the juvenile court nevertheless had jurisdiction to terminate the parental rights under § 43-292(2) and (4), regardless of the lack of prior adjudication. And, although the parents were not given their due process rights at the adjudication hearing, because the parents were given an adequate rights advisement prior to the termination hearing, their due process rights were not violated in connection with the termination of their parental rights. *In re Interest of Brook P. et al., supra*.

In this case, Ronald was advised during the adjudication phase of the proceedings of his rights listed in § 43-279.01 and he was advised of the nature of the juvenile court proceedings and the possible consequences, including the possibility that his parental rights could ultimately be terminated. While the statutory rights advisory was not given to Ronald again during the termination phase, the juvenile court was not required to do so. Ronald does not allege that he was prejudiced in any way by the court's failure to advise him again during the termination phase of the proceedings, and the record does not reflect that he was prejudiced in any way by not being advised of his rights a second time. Given the facts of this case, we find no violation of Ronald's due process rights.

CONCLUSION

Ronald's due process rights were not violated in this case. The termination of his parental rights is affirmed.

AFFIRMED.

STATE OF NEBRASKA ON BEHALF OF KEEGAN M., A MINOR CHILD, APPELLEE, V. JOSHUA M., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND AMY B., THIRD-PARTY DEFENDANT, APPELLANT.

838 N.W.2d 1

Filed July 30, 2013. No. A-12-074.

SUPPLEMENTAL OPINION ON ISSUE OF MOTION FOR ATTORNEY FEES

1. **Attorney Fees: Time: Appeal and Error.** Pursuant to Neb. Ct. R. App. P. § 2-109(F) (rev. 2012), a motion for attorney fees must be filed within 10 days of either (1) the release of the court's opinion or (2) the entry of the order of the court disposing of the appeal.
2. **Attorney Fees: Appeal and Error.** An order denying a petition for further review is not an order of the court finally disposing of an appeal as contemplated in Neb. Ct. R. App. P. § 2-109(F) (rev. 2012).

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Supplemental opinion: Motion for attorney fees denied.

Justin A. Quinn and Casey J. Quinn for appellant.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellee Joshua M.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

This matter is before the court on Joshua M.'s motion for attorney fees. Motions for attorney fees filed pursuant to Neb. Ct. R. App. P. § 2-109(F) (rev. 2012) are typically disposed of with a minute entry. A minute entry is not appropriate here, because Joshua's motion involves an issue not previously reported in our case law. The new issue presented that we must answer is whether a motion for attorney fees is timely when it is not filed within 10 days after the release of an opinion, but is filed within 10 days of the Nebraska Supreme Court's denial of a petition for further review.

Without reaching the merits of whether attorney fees are proper in a case of this nature, we deny Joshua's motion as untimely.

FACTUAL BACKGROUND

This case began as a paternity action that the State initiated, and it ended with Joshua's requesting, and being awarded, custody of the minor child. The child's mother, Amy B., appealed the trial court's order awarding Joshua custody. We affirmed the trial court's order on December 11, 2012. See *State on behalf of Keegan M. v. Joshua M.*, 20 Neb. App. 411, 824 N.W.2d 383 (2012). Amy filed a petition for further review on January 9, 2013, which the Supreme Court denied on March 13. Joshua filed a motion for attorney fees and costs 8 days later.

ANALYSIS

Section 2-109(F) governs the filing of a motion for attorney fees following an appeal. This section provides, in pertinent part, as follows:

> Such a motion must be filed no later than 10 days after the release of the opinion of the court or the entry of the order of the court disposing of the appeal, unless otherwise provided by statute. Any person filing a motion for attorney fees beyond the 10-day time limit must include within the motion a citation to the statutory authority permitting a filing beyond the time limit prescribed by this rule. For purposes of this subsection an order of the court disposing of the appeal shall include an order disposing of a motion for rehearing. A motion for attorney fees which is timely filed in the Court of Appeals shall toll the time for filing a petition for further review.

[1] Pursuant to § 2-109(F), a motion for attorney fees must be filed within 10 days of either (1) the release of the court's opinion or (2) the entry of the order of the court disposing of the appeal. Joshua did not file his motion within 10 days of the date of the release of the opinion. Therefore, his motion is untimely unless he filed it within 10 days of "the entry of the order of the court disposing of the appeal."

The phrase "the entry of the order of the court disposing of the appeal" is not specifically defined in the court rules; however, § 2-109(F) provides guidance as to its meaning. This section states that the phrase includes "an order disposing of a motion for rehearing." It does not state that the phrase includes an order disposing of a petition for further review. Motions for rehearing are governed by Neb. Ct. R. App. P. § 2-113 (rev. 2012), and neither party filed a motion for rehearing.

In addition to addressing motions for rehearing, § 2-109(F) also states that a motion for attorney fees which is timely filed in the Nebraska Court of Appeals shall toll the time for filing a petition for further review. It does not state that the filing of a petition for further review tolls the time for filing a motion for attorney fees.

We further note that the phrase "the entry of the order of the court disposing of the appeal" appears with one variation in Neb. Ct. R. App. P. § 2-102(F)(1) (rev. 2012) governing petitions for further review. This section requires the following:

> An original and one copy of 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 or the entry of the order of the Court of Appeals finally disposing of the appeal, whichever occurs later. For purposes of this subsection, an order of the Court of Appeals finally disposing of an appeal includes an order on a motion for rehearing or a motion for attorney fees.

As evidenced by the above, the phrase "an order of the Court of Appeals finally disposing of an appeal" is defined again as including an order on a motion for rehearing and is expanded to include an order on a motion for attorney fees filed with the Court of Appeals.

[2] Neb. Ct. R. App. P. §§ 2-107 (rev. 2012) and 2-108 (rev. 2008) also address disposition of appeals, but are inapplicable to the present case. We identify them solely for purposes of completeness. Neither of them, nor any other court rule, defines the phrase "an order of the court finally disposing of an appeal" to include an order on a petition for further review.

To the contrary, a careful reading of the rules leads to the conclusion that an order denying a petition for further review is not "an order of the court disposing of the appeal" as contemplated in § 2-109(F). We reach this determination because (1) § 2-109(F) specifically defines an order on a motion for rehearing as "an order of the court disposing of the appeal," but does not include an order on a petition for further review in that definition, and (2) § 2-109(F) provides that the filing of a motion for attorney fees tolls the time for filing a petition for further review, but fails to provide for the converse. Therefore, we determine that the filing of a petition for further review does not toll the 10-day period in which to file a motion for attorney fees.

In the present case, if we were to determine that Joshua's motion for attorney fees was timely, we would create an absurd result, because Amy did not file her petition for further review until 29 days after we released our opinion. Therefore, although Joshua "missed" the 10-day deadline following issuance of our opinion, he would be fortuitously timely because Amy filed a petition for further review. The following chronology depicts this absurdity:

- December 11, 2012—We release our opinion in *State on behalf of Keegan M. v. Joshua M.*, 20 Neb. App. 411, 824 N.W.2d 383 (2012).
- December 21, 2012—Ten-day period after release of *State on behalf of Keegan M. v. Joshua M.* expires.
- January 9, 2013—Amy files petition for further review.
- March 13, 2013—Supreme Court denies petition for further review.
- March 21, 2013—Joshua files motion for attorney fees.
- March 23, 2013—Ten-day period after Supreme Court rules on petition for further review expires.

As evidenced by the above, Amy's filing of the petition of further review would breathe new life into an otherwise expired time period in which to file a motion for attorney fees. While a party who is successful in an appeal does not normally file a petition for further review, there are instances where a party is successful but has not obtained all of the relief he requested. In such a situation, a party who missed the 10-day window to

file a motion for attorney fees could cure that defect by filing a petition for further review, wait for the denial, and then file a motion for attorney fees. Allowing this application would encourage parties who were successful on appeal, but who failed to timely file for attorney fees, to seek further review of the minutest issue in the Nebraska Supreme Court simply so they could request attorney fees.

CONCLUSION

Joshua failed to timely file his motion for attorney fees when he failed to file it within 10 days from the date on which we released the opinion in *State on behalf of Keegan M. v. Joshua M., supra*. We therefore deny his motion.

MOTION FOR ATTORNEY FEES DENIED.

NANCI MOLINA, INDIVIDUALLY AND AS NEXT FRIEND OF AGUSTIN BUSTAMANTE-MOLINA, APPELLEE, V. AGUSTIN SALGADO-BUSTAMANTE, APPELLANT.

837 N.W.2d 553

Filed July 30, 2013. No. A-12-607.

1. **Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
4. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
5. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
6. **Judges: Judgments: Appeal and Error: Words and Phrases.** A judicial abuse of discretion, warranting reversal of a trial court decision on appeal, requires that the reasons or rulings of a trial court be clearly untenable, unfairly depriving a litigant of a substantial right and just result.
7. **Child Support: Rules of the Supreme Court.** The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.

8. **Child Support: Judgments.** Nebraska law requires a trial court to attach the necessary child support worksheets to a child support order.
9. **Appeal and Error: Words and Phrases.** In appellate procedure, a "remand" is an appellate court's order returning a proceeding to the court from which the appeal originated for further action in accordance with the remanding order.
10. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
11. **Child Support: Stipulations.** If the court approves a stipulation which deviates from the child support guidelines, specific findings giving the reason for the deviation must be made.
12. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed in part, and in part reversed and remanded with directions.

John J. Heieck and Matthew Stuart Higgins, of Higgins Law, for appellant.

Catherine Mahern and Michael Wallace, Senior Certified Law Student, of Abrahams Legal Clinic, for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

Agustin Salgado-Bustamante (Agustin) appeals from an order of the district court for Douglas County, Nebraska, that was entered after remand from this court following a previous appeal. The new order increased the amounts of retroactive and prospective child support from those contained in the originally appealed order. The district court also retroactively amended its original award of temporary support. For the reasons set forth below, we affirm the district court's award of retroactive support. However, because the district court went beyond the mandate on remand, we reverse the district court's changes to temporary and prospective support and remand the cause for a new trial.

I. FACTUAL BACKGROUND

Nanci Molina (Nanci) and Agustin had a child together, Agustin Bustamante-Molina (Agustin Jr.), born in April 2003. The parties, who never married, later separated, and Nanci brought this paternity action. A temporary order was entered on January 6, 2010, which ordered Agustin to pay temporary support in the sum of $360 per month beginning December 1, 2009.

Trial was held on November 30, 2010. The parties stipulated that Agustin was the father of Agustin Jr., that Nanci would have physical possession of Agustin Jr. subject to Agustin's parenting time as set forth in the parties' mediated parenting plan, and that Agustin would be responsible for $360 per month in prospective child support. The only issue tried to the district court was the amount of retroactive child support Agustin owed. At trial, both Nanci and Agustin testified. The record reveals significant conflict between their two accounts regarding the date of their separation, the amount of Nanci's income, and how much Agustin contributed in past support.

Through an interpreter, Nanci testified that she started dating Agustin in 2000 or 2001 and that they broke up in June 2005. According to Nanci, after they separated, Agustin did not have Agustin Jr. with him for extended periods (more than 3 or 4 days) any more than two to three times. She stated this was the case from the time of their separation until this paternity action. Nanci also indicated that due to Agustin's work schedule, he could not have cared for Agustin Jr. during the day while she was at work. She did admit, however, that Agustin's parents would take care of Agustin Jr. before school and bring him home from school in the afternoon if needed.

Nanci also testified regarding her income from 2005 until 2010. Nanci testified that during this entire period, she was employed at a house-cleaning company. Although she did not submit any tax returns or W-2 forms in evidence, Nanci testified that her monthly income was $850 in 2005, $870 in 2006, $900 in 2007, $950 in 2008, $1,005 or $1,010 in 2009, and

$1,200 in 2010. Nanci also stated that she did not receive any additional benefits from her employer.

Nanci indicated that she received little financial assistance from Agustin, despite having asked for support. According to her testimony, she did not receive any support from Agustin in 2005, 2007, 2008, or 2009. She stated that she received $2,000 from Agustin's tax return in 2006. She also affirmatively denied receiving any money from Agustin's 2007 tax return. Nanci agreed that Agustin bought her a car using the money he received from their tax return in 2005. The car cost $2,600.

Agustin disagreed that he and Nanci separated in June 2005. He testified that he discovered Nanci was "cheating on" him in December 2005, but was adamant they did not split up until April 2006, when Nanci moved out of their home. Agustin also stated that he worked an "overnight schedule" from 2005 to September 2010 at a plastics company. Agustin testified that due to his work schedule and its overlap with Nanci's daytime work schedule, he would take care of Agustin Jr. during the day. He claimed to have provided breakfast, lunch, and a shower for the child each day. Agustin testified that this was the arrangement in place from the date of his separation from Nanci in April 2006 until August 2008.

Agustin's tax returns and W-2 forms from 2005 to 2009 were received into evidence. Agustin disputed Nanci's income during that same period. He testified that Nanci was making an average of $360 a week in 2006 and was paid in cash. Agustin also stated that Nanci did not pay taxes during this time period.

Lastly, Agustin testified that he provided far more in financial support than Nanci's testimony revealed. First, Agustin testified that he and Nanci were living together in 2005 and did not separate until April 2006. Agustin also stated that he gave Nanci about $2,500 in support in 2006. Agustin testified that for 2007, he gave Nanci approximately $300 per month ($3,600 for the year) and an additional $3,000 from his tax return. He claimed that he paid Nanci in cash because she did not have a bank account. Agustin testified that he had "no

clue" how much he gave Nanci in 2008, but later testified that he thought he gave her an average of $300 per month from January to August. According to Agustin, this monthly $300 payment was in addition to his care of Agustin Jr. during the schooldays.

Nanci offered into evidence, and the court received, exhibit 1, which consisted of child support calculation worksheets for the years 2005 through 2009, together with a summary page computing the amount of retroactive support that she was requesting from July 1, 2005, to November 30, 2009. As summarized, exhibit 1 shows as follows:

Year	**Monthly Support**	**Amount**
2005	Monthly support of $368 for 6 months (July to December)	$ 2,208
2006	Monthly support of $478 for 12 months	5,736
2007	Monthly support of $587 for 12 months	7,044
2008	Monthly support of $533 for 12 months	6,396
2009	Monthly support of $540 for 11 months (January to November)	5,940
	TOTAL	$27,324

On March 28, 2011, the district court entered an order for paternity, custody, and prospective and retroactive support. The court determined Agustin owed Nanci $25,324 in retroactive support while also awarding Agustin $2,000 in credit for his 2006 support obligation and a $3,600 credit for his 2007 obligation. After subtracting these credits from the total retroactive support owed, the court ordered Agustin to pay $19,724 to Nanci. The order required this arrearage to be paid monthly in $250 increments until satisfied. The court also accepted the parties' stipulation to $360 monthly prospective support, to commence on December 1, 2010. However, neither the order nor the record contains any further explanation to support the amount stipulated.

Only one child support worksheet was attached to the final order. This worksheet appeared to be the 2005 child support worksheet from exhibit 1. There were no other supporting worksheets for any other year relative to the retroactive support or any worksheet supporting the parties' stipulation for the amount of prospective support.

Agustin appealed from this first order, assigning error to the determination of retroactive child support. However, due to the court's failure to attach the necessary worksheets showing the calculations of support, we were not able to address the merits of Agustin's first appeal. In our remanding instructions to the district court, we stated:

> Remanded with directions that the district court prepare an order to include the applicable child support worksheets to show the calculation of retroactive child support. See, Rutherford v. Rutherford, 277 Neb. 301, 761 N.W.2d 922 (2009); Jones v. Belgum, 17 Neb. App. 750, 770 N.W.2d 667 (2009). In addition, the worksheet attached to the order does not appear to reflect the evidence concerning the parties' current income for purposes of setting the prospective child support, and therefore, the order of the district court referenced above shall include the worksheets used to set the prospective child support.

After receiving our remand, the district court revisited its calculations and issued a revised order on March 30, 2012. In that order, the court clarified that it previously determined the amount of retroactive support by using the worksheets and calculations contained in exhibit 1. However, the court discovered that it made a mathematical error in determining the total arrearage to be $25,324 instead of $27,324. Accordingly, it increased the amount of total retroactive support by $2,000 through November 30, 2009. The court further increased the child support arrearage by the amount of $1,043.77 for the temporary period from December 2009 to December 2010, which we discuss in further detail below. After applying the same credits in the original order totaling $5,600, the court determined that the total arrearage was $22,767.77.

In light of our remanding instructions, the district court also reviewed the parties' stipulation for prospective support. Finding no evidence in the record to support a deviation from the Nebraska Child Support Guidelines, the court concluded that the parties' stipulation to $360 in prospective support was not permissible. Using the parties' most recent income information (the 2009 worksheet from exhibit 1), the district

court concluded that Agustin's prospective support should be $540.29 beginning December 1, 2010.

Having concluded that the parties' stipulation to prospective support of $360 per month improperly deviated from the guidelines, the district court likewise modified the temporary child support from $360 to $540.29 per month. The district court then attempted to calculate the additional temporary child support; but, we note that it made further mathematical errors in doing so. First, it incorrectly determined the difference in the monthly amount to be $80.29 instead of $180.29. Then, it multiplied this sum by 13 months for a total of $1,043.77 in additional temporary support. However, the temporary order was in effect from December 1, 2009, through November 30, 2010 (the prospective order began December 1, 2010), which is only 12 months.

On April 6, 2012, Agustin filed a motion for new trial. At the hearing on the motion, Agustin argued that the district court did not have power to increase the amounts of retroactive and prospective support because such action conflicted with our instructions on remand. The district court overruled his motion by an order entered on June 18. Agustin now appeals from the March 30 and June 18 orders.

II. ASSIGNMENTS OF ERROR

Agustin asserts, combined and reordered, that the district court erred in (1) failing to follow this court's instructions on remand by increasing his child support arrearage and prospective support, (2) denying his motion for new trial, and (3) calculating the amount of retroactive support.

III. STANDARD OF REVIEW

[1,2] The construction of a mandate issued by an appellate court presents a question of law. *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009); *Scott v. Khan*, 18 Neb. App. 600, 790 N.W.2d 9 (2010). An appellate court reviews questions of law independently of the lower court's conclusion. *Id.*

[3,4] While a paternity action is one at law, the award of child support in such an action is equitable in nature. *Drew on behalf of Reed v. Reed*, 16 Neb. App. 905, 755 N.W.2d 420

(2008). The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Pickrel v. Pickrel*, 14 Neb. App. 792, 717 N.W.2d 479 (2006).

[5,6] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012). A judicial abuse of discretion, warranting reversal of a trial court decision on appeal, requires that the reasons or rulings of a trial court be clearly untenable, unfairly depriving a litigant of a substantial right and just result. See *Patton v. Patton*, 20 Neb. App. 51, 818 N.W.2d 624 (2012).

IV. ANALYSIS

[7] We begin our analysis of the district court's second order setting child support by noting that while a paternity action is one at law, the award of child support in such an action is equitable in nature. *Weaver v. Compton*, 8 Neb. App. 961, 605 N.W.2d 478 (2000). To direct courts in establishing and enforcing child support, the Nebraska Supreme Court has adopted the Nebraska Child Support Guidelines. See Neb. Ct. R. § 4-101(C). The main principle behind the guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. Neb. Ct. R. § 4-201; *Patton, supra*.

[8] The guidelines include various worksheets that are to be used when establishing child support obligations. Nebraska law requires a trial court to attach the necessary child support worksheets to a child support order. *Pearson v. Pearson*, 285 Neb. 686, 828 N.W.2d 760 (2013); *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009); *Jones v. Belgum*, 17 Neb. App. 750, 770 N.W.2d 667 (2009). Perhaps the most obvious purpose of this requirement is to ensure that the appellate courts are not left to speculate about the trial court's conclusions. See *Stewart v. Stewart*, 9 Neb. App. 431, 613 N.W.2d 486 (2000). These worksheets show the parties and the

appellate courts that the trial court has "'done the math.'" *Id.* at 434, 613 N.W.2d at 489.

1. Did District Court's New Order Violate Instructions on Remand?

In his first assigned error, Agustin asserts that the district court erred on remand by increasing the amount of retroactive support and prospective support in its new order. He contends that our instructions on remand specifically directed the district court to attach worksheets for retroactive and prospective child support to a new order and did not allow the district court to do anything more.

[9,10] In appellate procedure, a "remand" is an appellate court's order returning a proceeding to the court from which the appeal originated for further action in accordance with the remanding order. *Mace v. Mace*, 13 Neb. App. 896, 703 N.W.2d 624 (2005). After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010); *Scott v. Khan*, 18 Neb. App. 600, 790 N.W.2d 9 (2010). In other words, "'[w]hen a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate.'" *Mace*, 13 Neb. App. at 905, 703 N.W.2d at 633 (quoting *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998)).

In the present case, our instructions on remand directed the district court to prepare an order which included the applicable worksheets to show its calculations of retroactive and prospective child support. The resulting order contained the necessary worksheets showing these calculations. While preparing the order and worksheets, however, the district court concluded that its original awards for retroactive, temporary, and prospective support were incorrect and changed each award. We separately address each revision.

(a) Retroactive Support

In its original order setting retroactive and prospective child support, the district court concluded Agustin owed Nanci $19,724 in retroactive support through November 2009, prior to the commencement of the temporary support on December 1. The court arrived at this number after subtracting Agustin's awarded credits of $5,600 from the total arrearage of $25,324. However, upon remand, the district court, after clarifying that it was using exhibit 1 in calculating temporary support, discovered that the total arrearage should have been $27,324 instead of $25,324. The court thus corrected the amount of retroactive support by including an additional $2,000.

Considering the purpose of the worksheet attachment rule and our instructions on remand, we conclude that the district court's mathematical correction to the retroactive support did not violate our mandate. The language of the mandate pertaining to retroactive support stated that the cause was remanded "with directions that the district court prepare an order to include the applicable child support worksheets to show the calculation of retroactive child support." In attempting to comply with our mandate and show us how it "did the math," the court discovered and corrected its original mathematical error. Correcting this error ensured that the retroactive support award corresponded with the original decision in this case to adopt the worksheets and calculations in exhibit 1. In such a circumstance, this change to the retroactive support did not exceed the scope of our previous mandate. We find no error in the district court's increase in the retroactive support by the sum of $2,000 to correct its mathematical mistake.

(b) Temporary Support

We reach a different conclusion with respect to the district court's amendment of the prior temporary support award. The district court's decision to increase the amount of temporary child support from $360 to $540.29 and retroactively apply the resulting difference to Agustin's total arrearage was not a mere mathematical correction. Further, there was no assignment of error regarding the temporary child support order in

the first appeal and thus no direction to the district court to attach the supporting worksheet for the temporary child support order. It was error for the court to increase the amount of temporary support, as such order clearly exceeded the directions and scope of our mandate. Therefore, we reverse this portion of the district court's order that increased the child support arrearage by $1,043.77.

(c) Prospective Support

[11] The parties stipulated at trial to prospective child support of $360 per month, and the district court approved the stipulation in its original order. Stipulated agreements of child support are required to be reviewed against the guidelines. If the court approves a stipulation which deviates from the guidelines, specific findings giving the reason for the deviation must be made. See *Lucero v. Lucero*, 16 Neb. App. 706, 750 N.W.2d 377 (2008). Because the 2005 worksheet attached to the order did not appear to reflect the evidence concerning the parties' current incomes, we remanded the cause to the district court with directions to attach the worksheets it used to set prospective support.

When the district court received our remand, it reviewed the parties' stipulation and concluded that the stipulated support deviated from the guidelines, as it was not consistent with the parties' current incomes or the most recent worksheet contained in exhibit 1. As the parties did not adduce evidence to explain this deviation at trial, the court concluded that the deviation was impermissible and increased Agustin's prospective support from $360 per month to $540.29 per month based on exhibit 1.

We conclude this increase in prospective support also exceeded the scope of our mandate. Our mandate required the district court to include the worksheets used to set the prospective child support in its original order. It did not permit further scrutinizing of the stipulation, particularly without giving the parties an opportunity to present evidence to support any deviation from the guidelines. Therefore, we also reverse this portion of the district court's order increasing the prospective child support to $540.29 per month.

2. Should District Court Have Granted Motion for New Trial?

In his motion for new trial, Agustin argued that the district court did not have authority to make changes to its previous awards. He contended that he should have been granted a new trial to challenge the factual bases for these increases. The district court denied his motion, noting during the corresponding hearing that it had authority to make the changes that it did. Now, Agustin argues that he was deprived of the substantial right to challenge these changes.

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012). A judicial abuse of discretion, warranting reversal of a trial court decision on appeal, requires that the reasons or rulings of a trial court be clearly untenable, unfairly depriving a litigant of a substantial right and just result. See *Patton v. Patton*, 20 Neb. App. 51, 818 N.W.2d 624 (2012).

As we determined above, the district court did not exceed the scope of our mandate with respect to the mathematical correction to reflect the amount of retroactive support, through November 30, 2009, in the net sum of $21,724. As such, Agustin was not deprived of a substantial right and was not entitled to a new trial on this issue. On the other hand, the district court did exceed the scope of our mandate in increasing the amount of the temporary and prospective support. When the district court discovered on remand that the prospective and temporary support awards may have deviated from the guidelines, it modified the support without giving the parties an opportunity to present evidence regarding the deviation. Simply changing the amounts in the new order to conform to the guidelines, without giving Agustin an opportunity to address the deviation, deprived Agustin of a substantial right. Therefore, we conclude the district court abused its discretion when it denied a new trial on these issues.

3. Did District Court Err in Determining Amount of Retroactive Support?

In his remaining assignments of error, Agustin argues that the district court incorrectly determined the amount of retroactive support. Agustin first argues that the retroactive support should not have begun in June 2005. He contends that the evidence supported his testimony that he and Nanci did not separate until April 2006. We conclude that this argument is without merit.

As stated in the factual background above, Nanci and Agustin gave conflicting testimony relating to the end of their relationship and the resulting care of Agustin Jr. after their separation. Nanci testified that they separated in June 2005 and that she cared for Agustin Jr. after the separation. Agustin, on the other hand, testified that he did not separate from Nanci until April 2006. He also stated that he and Nanci jointly cared for Agustin Jr. from April 2006 until August 2008. According to Agustin's testimony, he would care for Agustin Jr. during the day while Nanci was at work and Nanci would have Agustin Jr. the remainder of the day. Nanci testified, however, that this joint care rarely occurred.

[12] Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). Given the obvious conflict in the parties' testimony regarding the issues involved in the court's determination of retroactive support, we give weight to the fact that the district court heard and observed this testimony. Therefore, we conclude the district court did not abuse its discretion when adopting Nanci's testimony that the parties separated in June 2005.

Agustin next argues that the district court failed to give him credit for all of the support he previously provided for Agustin Jr. We likewise find this argument to be without merit.

The testimony at trial demonstrates conflicting views regarding the amount of prior support Agustin contributed. Nanci testified that Agustin gave her only $2,000 in 2006 from his tax return and denied receiving any money from Agustin from his 2007 tax return. Nanci acknowledged that Agustin gave her a car that cost $2,600. However, the record is unclear whether this car was given to her in 2005 or 2006, or before or after the parties' separation. Agustin testified that he gave Nanci about $2,500 in 2006, monthly payments totaling $3,600 in 2007, and $3,000 from his tax return in 2007. Agustin testified that he had "no clue" how much money he gave Nanci in 2008, but later said he gave her $300 per month through August 2008. Nanci denied receiving monthly payments from Agustin and testified that arguments resulted whenever she would ask Agustin for child support.

In its order of March 30, 2012, the court further explained its determination of credits and indicated that it awarded credit of $2,000 for 2006 based upon Nanci's testimony and of $3,600 for 2007 based upon Agustin's testimony. Based upon our review of the record and giving weight to the fact that the trial judge heard and observed the witnesses, we can find no abuse of discretion in the amount of credit awarded to Agustin toward the retroactive support.

V. CONCLUSION

We conclude that the district court did not violate our mandate when it corrected its mathematical error related to the retroactive support through November 30, 2009, and did not err in its determination of the commencement date of or credits toward retroactive support. We affirm that portion of the order which determined that Agustin owes $21,724 in retroactive support through November 30, 2009. However, the mandate did not permit the district court to amend its determinations regarding the amounts of temporary or prospective support. Therefore, we reverse those portions of the March 30, 2012, order and remand the cause with directions that the district court conduct a new trial to allow the parties to present evidence on the issues of temporary support

from December 1, 2009, through November 30, 2010, and prospective support from December 1, 2010, to the time of the new trial.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

DIANE S. GLANTZ, APPELLANT, V.
MICHELLE DANIEL, APPELLEE.
837 N.W.2d 563

Filed July 30, 2013. No. A-12-673.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court resolves independently of the trial court.
2. **Judgments: Injunction: Appeal and Error.** A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is reviewed de novo on the record.
3. **Moot Question: Jurisdiction: Appeal and Error.** Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
4. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues.
6. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
7. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
8. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
9. **Moot Question: Appeal and Error.** Under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination.
10. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question

presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.

11. **Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
12. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.
13. **Statutes.** There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions.
14. ____. If a prescribed duty is essential to the main objective of a statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principal purpose of the statute but is designed to ensure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.
15. **Criminal Law: Time.** The 5-day time requirement specified in Neb. Rev. Stat. § 28-311.09(7) (Reissue 2008) for requesting a hearing is not essential to accomplishing the main objective of Nebraska's stalking and harassment statutes.
16. **Criminal Law: Judgments: Time.** The purpose of protecting stalking and harassment victims is accomplished by allowing a court to promptly enter an ex parte protection order upon the filing of a petition.
17. **Criminal Law: Statutes.** Nebraska's stalking and harassment statutes are given an objective construction, and the victim's experience resulting from the perpetrator's conduct should be assessed on an objective basis.
18. **Criminal Law: Judgments.** Under Nebraska's stalking and harassment statutes, the inquiry is whether a reasonable person would be seriously terrified, threatened, or intimidated by the perpetrator's conduct.

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

Mark T. Bestul, of Legal Aid of Nebraska, for appellant.

No appearance for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

Diane S. Glantz appeals after the district court for Douglas County dismissed an ex parte harassment protection order previously entered in her favor against Michelle Daniel. Although this appeal has become moot, we determine that the issue on appeal regarding statutory construction falls within

the public interest exception to the mootness doctrine. We hold that the requirement in Neb. Rev. Stat. § 28-311.09(7) (Reissue 2008) to request a hearing within 5 days of service of the ex parte protection order is directory rather than mandatory. We therefore conclude that the district court did not err when allowing the show cause hearing to proceed despite Daniel's request for hearing having been filed outside of the 5-day period. Additionally, the district court did not err in concluding the evidence was insufficient to support the issuance of the protection order. Accordingly, we affirm the dismissal of the protection order petition and ex parte harassment protection order.

FACTUAL BACKGROUND

On June 18, 2012, Glantz filed a form petition and affidavit for a harassment protection order against Daniel pursuant to § 28-311.09. Daniel is the current girlfriend of Ron Spigner, Glantz' ex-husband. In her affidavit in support of the petition, Glantz alleged that Daniel had undertaken a series of harassing acts toward her. First, Glantz stated that Daniel appeared at Glantz' divorce hearing on June 15. Glantz alerted the bailiff to Daniel's presence, and the sheriff accompanied Glantz to her car at the conclusion of the hearing. Next, Glantz alleged that she suspected Daniel had "dumped" sugar into Glantz' car's gas tank on June 14 to prevent Glantz from attending upcoming court hearings. Glantz also alleged that on or about May 19, Spigner strangled her and then Daniel drove Spigner away before the police arrived. Glantz claimed that in another incident about a week earlier, she encountered Spigner and Daniel together in a parking lot. During this encounter, Glantz observed Daniel trying to "aggressively get out of [Daniel's] car" and was afraid Daniel was going to hurt her. Glantz also alleged that she and Daniel exchanged a series of text messages and that some of the later messages became offensive. Finally, Glantz alleged that she believed Daniel had keys to her apartment and car.

On June 18, 2012, the district court entered an ex parte harassment protection order. On that same day, the Lancaster County sheriff's office personally served Daniel with the

petition and affidavit. Daniel filed a request for hearing on June 27. On June 28, the district court ordered that a show cause hearing be held on July 10.

At the July 10, 2012, hearing, Glantz appeared with counsel while Daniel appeared pro se. At the outset of the hearing, Glantz' attorney objected to the hearing's proceeding as scheduled. Glantz' attorney argued that § 28-311.09(7) required the request for hearing to be filed within 5 days of service and that Daniel's request, filed 9 days after service, was not timely. Because Daniel filed her request for hearing outside the 5-day period, Glantz argued that the court should have concluded the hearing at that point, affirming the ex parte order.

When considering this argument, the district court questioned whether Glantz was prejudiced by the hearing's proceeding as scheduled. Glantz' attorney claimed that parties are entitled to rely on the rules, but conceded that his client was not otherwise prejudiced. Finding that Glantz suffered no prejudice from a time extension, the district court overruled the objection. In so ruling, the district court also noted that judicial discretion allowed granting additional time for requesting the hearing.

Thereafter, Glantz testified regarding the allegations in her petition. While the majority of Glantz' testimony was essentially a restatement of the allegations contained in her petition, she gave an expanded account of her text message conversation with Daniel. Glantz testified that over a series of approximately 80 text messages, Daniel stated that she had been in a relationship with Spigner for a year, that she was 4 weeks pregnant, and that Spigner was using Glantz only for a place to live. Glantz also testified that some name calling occurred during this text message conversation. However, she stated that the messaging was not violent or threatening.

Glantz also testified about other suspicious activity that occurred after she petitioned the court for a protection order. Glantz could not confirm that Daniel was involved in this activity, but believed that strange events were taking place around her apartment. Daniel declined to conduct any cross-examination.

After Glantz' testimony, Daniel was sworn and testified. During her brief testimony, Daniel stated that she did not want to be involved with Glantz and that she had straightened out her life after being released from prison on parole. Daniel admitted to attending the divorce hearing, but stated that she attended only because Spigner was unable to attend due to his incarceration. Daniel also testified that Glantz had initiated contact with her on various occasions and had even contacted Daniel's parole officer. Daniel denied "dump[ing]" sugar in Glantz' car's gas tank and denied ever threatening Glantz.

At the conclusion of the parties' testimony, the district court determined that it would not issue a harassment protection order or continue the ex parte order. While explaining its ruling, the court emphasized that issuing a protection order could have serious consequences on Daniel's parole status.

Glantz appeals the district court's dismissal of the ex parte protection order.

ASSIGNMENTS OF ERROR

Glantz assigns, summarized and restated, that the district court erred in allowing the show cause hearing to proceed after Daniel failed to request the hearing within the 5-day period specified in § 28-311.09(7). Glantz also contends that the evidence adduced at the hearing supported the affirmance of the ex parte protection order.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court resolves independently of the trial court. See *State v. Graff*, 282 Neb. 746, 810 N.W.2d 140 (2011).

[2] A protection order is analogous to an injunction. *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). Accordingly, the grant or denial of a protection order is reviewed de novo on the record. *Id.*

[3,4] Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions. *Dowd Grain Co. v.*

County of Sarpy, 19 Neb. App. 550, 810 N.W.2d 182 (2012). When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *Id.*

ANALYSIS

Mootness.

[5,6] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues. *Muzzey v. Ragone*, 20 Neb. App. 669, 831 N.W.2d 38 (2013). In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200, 803 N.W.2d 17 (2011). Therefore, we must first determine whether the expiration of the time that the protection order would have been in effect, had it been extended, renders this appeal moot.

[7,8] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Muzzey v. Ragone, supra.* As a general rule, a moot case is subject to summary dismissal. *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

[9] The ex parte protection order in the present case was entered on June 18, 2012, and, had it been extended, would have been effective until June 18, 2013. Thus, the issues presented in this appeal have ceased to exist. However, under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination. *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000); *Gernstein v. Allen*, 10 Neb. App. 214, 630 N.W.2d 672 (2001).

[10] When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem. *Id*. Applying these factors to this case, we conclude this matter falls within the public interest exception. Because this case involves the interpretation of statute, it is undoubtedly a public question. Additionally, the fact that there is no previous interpretation of the statute's time limitation for requesting a hearing leads us to conclude that this decision will provide valuable guidance to the lower courts. Finally, due to the multitude of harassment protection order cases filed in Nebraska, we believe a similar situation is likely to arise in the future.

Thus, although we recognize that the issue of whether the ex parte harassment protection order should have been extended is now moot, we find the public interest exception to the mootness doctrine applies, permitting us to address the merits of this case.

Timeframe for Requesting Hearing Under § 28-311.09(7).

On appeal, Glantz renews her argument that the plain language of § 28-311.09(7) requires a respondent to an ex parte protection order to request a hearing no later than 5 days after receiving service. Section 28-311.09(7) provides in pertinent part:

> Any order issued under subsection (1) of this section may be issued ex parte without notice to the respondent if it reasonably appears from the specific facts shown by affidavit of the petitioner that irreparable harm, loss, or damage will result before the matter can be heard on notice. . . . If the respondent wishes to appear and show cause why the order should not remain in effect for a period of one year, he or she shall affix his or her current address, telephone number, and signature to the form and

> return it to the clerk of the district court within five days after service upon him or her.

Based on her reading of this statute, Glantz contends that the word "shall" mandates that any hearing request be made within 5 days.

[11-14] In addressing this argument, we begin by reviewing various principles of statutory construction. As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008); *Hendrix v. Sivick*, 19 Neb. App. 140, 803 N.W.2d 525 (2011). See, also, Neb. Rev. Stat. § 49-802(1) (Reissue 2010) (when word "shall" appears, mandatory or ministerial action is presumed). Nonetheless, while the word "shall" may render a particular statutory provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *Hendrix v. Sivick, supra*. There is no universal test by which directory provisions of a statute may be distinguished from mandatory provisions. *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005); *State v. Donner*, 13 Neb. App. 85, 690 N.W.2d 181 (2004). To aid in these situations, the Nebraska Supreme Court has provided the following direction:

> "'If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principal purpose of the statute but is designed to [en]sure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.'"

State v. $1,947, 255 Neb. 290, 297, 583 N.W.2d 611, 616-17 (1998) (quoting *Matter of Sopoci*, 467 N.W.2d 799 (Iowa 1991)).

In applying the above principles, Nebraska appellate courts have found certain statutory time limitations to be directory. For example, in *State v. $1,947, supra*, the Nebraska Supreme Court found the time limitations in the forfeiture statute, Neb.

Rev. Stat. § 28-431(4) (Reissue 1995), to be directory. Finding that the purpose of the statute was to ensure that forfeiture of property or money used in drug transactions was consistent with the requirements of due process, the court concluded that the statute's time limitations were not central to this purpose. *State v. $1,947, supra*.

In *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006), this court determined that the time limitation set by Neb. Rev. Stat. § 60-498.01(2) (Supp. 2003) was directory. Section 60-498.01(2) stated that an arresting officer "shall within ten days" forward a sworn report to the director of the Department of Motor Vehicles. We concluded that the statute's language was directory because the failure to strictly adhere to that time limitation did not interfere with the statute's purpose of protecting the public by quickly removing drunk driving offenders from the road. *Forgey v. Nebraska Dept. of Motor Vehicles, supra*. We also based that decision on the fact that § 60-498.01(2) did not attach any sanction to an officer's failure to file a report within the 10-day period. *Forgey v. Nebraska Dept. of Motor Vehicles, supra*. In *Thomsen v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 44, 741 N.W.2d 682 (2007), we similarly concluded that the time limitation in § 60-498.01(3) (Reissue 2004) was also directory.

Similar reasoning has also been applied to time limitations in juvenile cases and mental health proceedings. In *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996), the Nebraska Supreme Court determined that absolute discharge from a delinquency petition is not statutorily mandated when a juvenile is not adjudicated within the required time period. In *In re Interest of Brandy M. et al.*, the court concluded that the essence of the juvenile statutes was to protect the children's best interests and that failure to comply with the time limitations did not interfere with this purpose. In *In re Interest of E.M.*, 13 Neb. App. 287, 691 N.W.2d 550 (2005), this court concluded that statutory language requiring a mental health hearing within 7 days for any person held in custody was directory.

For the sake of a complete discussion, we are also mindful of decisions adopting the opposite result. For example, in *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000), the Nebraska Supreme Court found mandatory the provision of the Nebraska Fair Housing Act directing the Attorney General to file an action within 30 days of election by a complainant, respondent, or aggrieved person to have the claim decided in a civil action. See Neb. Rev. Stat. § 20-340(1) (Reissue 2012). The court analyzed various sections of the act establishing deadlines for certain actions, some of which provided for procedures to allow action beyond the statutorily established deadline. The court determined that no such exception or procedure was provided in § 20-340. The court found that the time limitation in § 20-340(1) was essential to accomplishing one of the principal purposes of the act, which is to "promptly advance the determination of claims, and ensure that all parties are advised of the posture of the case and the steps necessary for them to protect their own interests." *State on behalf of Minter v. Jensen*, 259 Neb. at 281, 609 N.W.2d at 367. The court further concluded that because the 30-day limitation is essential to the purpose of the statute, it does not fall within the exception to the general rule that the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Id.*

In *Stoetzel v. Neth*, 16 Neb. App. 348, 744 N.W.2d 465 (2008), this court considered the 10-day time period for submitting a sworn report under § 60-498.01(5)(a) and concluded the time period was mandatory. In that decision, we distinguished our prior cases *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006), and *Thomsen v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 44, 741 N.W.2d 682 (2007), wherein we held that similar time provisions for submitting a sworn report under § 60-498.01(2) and (3) were directory. First, § 60-498.01(5)(a) differs from the other sections in that it provides the procedure in cases where the results of a chemical test are not available to the arresting officer while the arrested person is in custody and the notice of revocation has not been served. In these situations, the arrested person does not receive notice of the revocation

until after the Department of Motor Vehicles has received a sworn report from the arresting officer. Section 60-498.01(2) and (3), in contrast, provides that verbal notice be given to the arrested person of the intention to immediately confiscate and revoke the operator's license. Next, § 60-498.01(5)(a) contains explicit language that "[i]f the sworn report is not received within ten days [after receipt of the results of the chemical test], the revocation shall not take effect." This additional language is not contained in § 60-498.01(2) and (3). We concluded that this additional, explicit statutory language and the need for prompt notice of license revocation proceedings when the chemical test results are not available at the time of arrest required the time provision of § 60-498.01(5)(a) to be mandatory. *Stoetzel v. Neth, supra*.

[15,16] Based on our review of the statutory construction principles and the cases cited above, we conclude that the 5-day time requirement specified in § 28-311.09(7) for requesting a hearing is not essential to accomplishing the main objective of Nebraska's stalking and harassment statutes. Neb. Rev. Stat. § 8-311.02(1) (Reissue 2008) provides the purpose of those laws:

> It is the intent of the Legislature to enact laws dealing with stalking offenses which will protect victims from being willfully harassed, intentionally terrified, threatened, or intimidated by individuals who intentionally follow, detain, stalk, or harass them or impose any restraint on their personal liberty and which will not prohibit constitutionally protected activities.

The purpose of protecting stalking and harassment victims is accomplished by allowing a court to promptly enter an ex parte protection order upon the filing of the petition. See § 28-311.09(7). Upon the entry and service of the ex parte order, the respondent is prohibited from interacting with the petitioner and remains so restrained through the time prior to any requested hearing. Consequently, the time limit for filing a request for hearing does not affect the immediate protections afforded to stalking or harassment victims. Further, § 28-311.09 does not impose any sanction for failing to request a hearing within the period. For these reasons, we

conclude that the requirement in § 28-311.09(7) to request a hearing within 5 days of service of the ex parte order is directory rather than mandatory.

Having found the time limitation in § 28-311.09(7) to be directory, we turn to the particular facts of this case and a consideration of whether Glantz was prejudiced by the delay. See *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998). Here, we observe that Glantz received the protections provided under the ex parte order throughout the time preceding the hearing. Further, Daniel's request for a hearing was filed 9 days after service, and thus, the delay was only 4 days. Finally, Glantz' attorney stated that Glantz was not prejudiced by the late request. Glantz was given full opportunity to present evidence in support of her request for the protection order and did so. Therefore, we conclude that even though Daniel did not timely request a hearing, Glantz suffered no prejudice thereby and the district court did not err in ordering and holding a show cause hearing.

Sufficiency of Evidence.

Glantz also contends that she adduced sufficient evidence to establish that Daniel engaged in an intimidating course of conduct. Glantz argues that the court ignored the evidence presented at the hearing and improperly based its dismissal on the collateral consequences that a protection order might have on Daniel's parole.

[17,18] In order to satisfy the definition of harassment, Glantz must prove a course of conduct. Section 28-311.02(2) provides in relevant part:

> (a) Harass means to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose;
>
> (b) Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including a series of acts of following, detaining, restraining the personal liberty of, or stalking the person or

> telephoning, contacting, or otherwise communicating with the person.

In analyzing § 28-311.02, the Nebraska Supreme Court has concluded that Nebraska's stalking and harassment statutes are given an objective construction and that the victim's experience resulting from the perpetrator's conduct should be assessed on an objective basis. *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007). Thus, the inquiry is whether a reasonable person would be seriously terrified, threatened, or intimidated by the perpetrator's conduct. *Id.*

Our review of the record shows that Glantz testified that Daniel committed a series of acts that Glantz found intimidating. However, some of Glantz' testimony related to her suspicions and belief that Daniel had taken certain action against her, but Glantz was unable to adduce any confirming evidence that Daniel was in fact the actor. While Daniel was present at Glantz' divorce hearing, Glantz did not testify to any other conduct by Daniel at that time that would amount to harassment under the statute. Further, the incident involving Daniel's "aggressively get[ting] out of [Daniel's] car" did not involve any threat made by Daniel against Glantz. Finally, Glantz' own testimony revealed that she did not consider the text message conversation with Daniel to be threatening.

As stated above, we review the issuance or dismissal of a protection order de novo on the record. Additionally, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012); *Cloeter v. Cloeter*, 17 Neb. App. 741, 770 N.W.2d 660 (2009). Although the district court was mindful of the collateral consequences an adverse ruling could potentially have on Daniel's parole status, we do not agree that the possibility of collateral consequences was the sole impetus for the court's decision in the case. The court discussed the conflicting testimony of the parties and concluded that continuation of the protection order was not necessary.

After our de novo review of the record, and giving weight to the district court's observation of the conflicting testimony, we conclude that the district court's decision to dismiss the protection order petition was not in error.

CONCLUSION

Because of our conclusion that the time requirement specified in § 28-311.09(7) is directory, the district court did not err in holding a show cause hearing despite Daniel's untimely filing. Additionally, the district court did not err in dismissing Glantz' protection order petition and the ex parte order.

AFFIRMED.

MICHAEL L. JACOBSON, SPECIAL ADMINISTRATOR OF THE ESTATE OF VIRGINIA A. JACOBSON, DECEASED, AND MYRON J. JACOBSON, APPELLANTS, V. SHERRY K. SHRESTA, M.D., AND GASTON CORNU-LABAT, M.D., APPELLEES.

838 N.W.2d 19

Filed August 13, 2013. No. A-11-438.

1. **Appeal and Error.** In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
2. **Judgments: Evidence: Appeal and Error.** An appellate court reviews the sufficiency of the evidence to sustain a judgment by resolving every controverted fact in favor of the successful party and giving such party the benefit of every inference that can reasonably be deduced from the evidence.
3. **Trial: Judges.** A trial judge has broad discretion over the conduct of a trial, and absent abuse, that discretion should be respected.
4. **Trial: Parties.** Bifurcation of a trial may be appropriate where separate proceedings will do justice, avoid prejudice, and further the convenience of the parties and the court.
5. **Trial.** Bifurcation is particularly proper where a potentially dispositive issue may be decided in such a way as to eliminate the need to try other issues.
6. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
7. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
8. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate

political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.

9. **Independent Contractor: Words and Phrases.** An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used.
10. **Employer and Employee: Independent Contractor: Master and Servant.** Ordinarily, when a court is presented with a dispute regarding a party's status as an employee or an independent contractor, the party's status is a question of fact which must be determined after consideration of all the evidence in the case. However, where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.
11. **Employment Contracts: Master and Servant: Words and Phrases.** The phrase "where the inference is clear," in the context of whether a master and servant relationship exists, means that there can be no dispute as to pertinent facts pertaining to the contract between and the relationship of the parties involved and that only one reasonable inference can be drawn therefrom.
12. **Employer and Employee: Independent Contractor.** There is no single test for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.
13. **Contracts.** A writing which merely denominates a relationship may not be used to conceal the true arrangement.
14. **Employer and Employee: Independent Contractor.** The right of control is the chief factor distinguishing an employment relationship from that of an independent contractor.
15. ____: ____. The less skill required by a job, the greater the indication that the worker is an employee and not an independent contractor.
16. **Physicians and Surgeons.** The occupation of a physician is a skilled profession.
17. **Employer and Employee.** An ongoing relationship not limited to a specific duration or task is suggestive of an employment relationship.
18. **Employer and Employee: Wages.** The payment of wages, specifically limited wages, argues for an employment relationship.
19. **Employer and Employee: Taxes: Social Security.** The deduction of Social Security taxes and the withholding of income tax tend to indicate an employer-employee relationship, while the failure to do so is a contrary indication.

20. **Health Care Providers: Physicians and Surgeons.** The provision of medical services by physicians on staff at a hospital has been found to be part of the regular business of the hospital.
21. **Employer and Employee: Claims: Political Subdivisions Tort Claims Act.** Where an employee is not acting within the scope of his or her employment when the employee causes an injury, the injured party may pursue a claim against the employee individually without complying with the requisites of the Political Subdivisions Tort Claims Act.
22. **Negligence: Health Care Providers: Limitations of Actions.** Neb. Rev. Stat. § 44-2828 (Reissue 2010) provides for the filing of claims against health care providers within 2 years from the date of the negligent treatment.
23. **Health Care Providers: Claims: Political Subdivisions Tort Claims Act.** The operation of the Nebraska Hospital-Medical Liability Act does not excuse a plaintiff from compliance with the requirement under the Political Subdivisions Tort Claims Act that the claim be presented to the political subdivision prior to filing suit.
24. **Health Care Providers: Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act provides for interaction between the Political Subdivisions Tort Claims Act and the Nebraska Hospital-Medical Liability Act.

Appeal from the District Court for Sheridan County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Christopher P. Welsh and James R. Welsh, of Welsh & Welsh, P.C., L.L.O., for appellants.

Mark A. Christensen, Tracy A. Oldemeyer, Cristin McGarry Berkhausen, and Elizabeth A. Tiarks, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

SIEVERS, PIRTLE, and RIEDMANN, Judges.

PIRTLE, Judge.

INTRODUCTION

Michael L. Jacobson, special administrator of the estate of Virginia A. Jacobson, and Myron J. Jacobson, Virginia's husband, filed a wrongful death action, predicated upon medical malpractice, in the district court for Sheridan County, Nebraska, against Sherry K. Shresta, M.D., and Gaston Cornu-Labat, M.D. (collectively the defendants). The district court entered judgment in favor of the defendants, determining that they were employees of Gordon Memorial Hospital (the Hospital), a political subdivision, and that they were acting within the scope of their employment at the time of the alleged

negligence. The court dismissed the Jacobsons' claims, determining that they failed to comply with the 1-year presentment requirement of the Political Subdivisions Tort Claims Act (Tort Claims Act). Finding no merit to the Jacobsons' assignments of error, we affirm.

BACKGROUND

On March 28, 2005, the Jacobsons filed a wrongful death lawsuit against the defendants in the district court for Sheridan County. The Jacobsons alleged that on March 29, 2003, Shresta admitted Virginia to the Hospital after Virginia began coughing while eating roast beef. After Virginia's admission, Cornu-Labat performed an esophagogastroscopy on Virginia. Postoperatively, Virginia "coded." A piece of meat was found at the level of her vocal cords and suctioned out. A subsequent x ray showed aspiration pneumonia. Virginia remained under the medical care of the defendants until March 31, when she died due to complications.

The Jacobsons alleged that the defendants were "negligent and/or committed malpractice in failing to exercise within the skill and care ordinarily required of medical care providers in Gordon, Sheridan County, Nebraska or similar communities" and set forth specific allegations of negligence against each of the defendants. The Jacobsons also asserted in their complaint that at all relevant times, the defendants were qualified under the Nebraska Hospital-Medical Liability Act (NHMLA), Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 2010), and that the Jacobsons, pursuant to § 44-2840, waived their right to a panel review and elected to proceed with their complaint in the district court.

On July 22, 2005, the defendants filed a joint answer denying that either party was negligent. They also alleged that the defendants were employees of the Hospital, a political subdivision, and that because the Jacobsons failed to comply with the notice requirement set forth in the Tort Claims Act, see Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012), their action was barred.

The defendants subsequently filed a motion for summary judgment, requesting dismissal of the case because the

Jacobsons allegedly failed to comply with the requirements of the Tort Claims Act. On September 20, 2005, the trial court granted summary judgment in favor of the defendants. The Jacobsons appealed, and in a June 18, 2007, memorandum opinion in case No. A-05-1292, this court reversed the trial court's decision on the ground that there was a genuine issue of material fact as to whether the defendants were employees or independent contractors. The matter was remanded for further proceedings.

On November 13, 2007, the defendants filed a motion asking the court to bifurcate the issue of whether they were employees of the Hospital, a political subdivision, from other issues in the medical malpractice case and to hold a bench trial on that issue. The motion alleged that a verdict based on a finding that the defendants were employees of a political subdivision acting within the scope of their employment at the time of the alleged negligence would result in the complaint's being dismissed in its entirety due to the Jacobsons' failure to comply with the 1-year presentment requirement of the Tort Claims Act set forth at § 13-920(1). The record before us does not contain any objection by the Jacobsons at the time the motion was filed or at the hearing on the motion.

The trial court sustained the motion to bifurcate. The Jacobsons subsequently filed a motion asking the court to reconsider its decision to sustain the defendants' motion to bifurcate. The trial court affirmed its decision to bifurcate the issue of the defendants' employment status.

A bench trial was held on February 26, 2009, on the sole issue of whether the defendants were employees of the Hospital. Prior to the beginning of trial, the Jacobsons "renewed" their objection to the bench trial, stating that Neb. Rev. Stat. § 25-221 (Reissue 2008) entitled them to a jury trial on the bifurcated issue. The trial court overruled the objection.

At the start of trial, the parties stipulated that the Hospital is a political subdivision subject to the Tort Claims Act. The parties also stipulated that the Jacobsons did not serve notice of the claim pursuant to the Tort Claims Act at any time prior to the date the lawsuit was filed.

Two witnesses testified at trial, Cornu-Labat and Mehdi Merred, the former chief executive officer and administrator of the Hospital. Shresta did not testify. Other evidence included the defendants' employment agreements with the Hospital.

Shresta was hired by the Hospital pursuant to a "Physician Employment Agreement" executed on May 6, 2002. The agreement provided that it would go into effect on June 28 and was for a term of 1 year. The agreement provided that the Hospital would establish, maintain, and manage medical clinics in Gordon, Nebraska, and its "surrounding service area." The agreement stated that the Hospital would provide at the clinics "all equipment, services, facilities and supplies necessary for the range of medical services customarily provided by private medical practitioners in the field of family practice." The Hospital also agreed to provide all "nursing, technical, and office staff" as needed.

The agreement required Shresta to relocate to and maintain her personal residence within 10 miles of the Hospital. The agreement also required Shresta to provide "the full range of medical services customarily provided by private practitioners specializing in family practice within the region and consistent with the physician's training and privileges" at the clinics maintained by the Hospital and in "area hospitals." It further required Shresta to maintain office hours at the clinics that were customary for physicians in similar communities and as reasonably established by the Hospital and required her to be "on-call" pursuant to a reasonable schedule created by the Hospital. Shresta was obligated under the agreement to comply with all reasonable personnel and administrative policies of the Hospital.

The agreement did not require Shresta to make referrals to or admit patients to any facility controlled by the Hospital. It specified that it was the intent of the parties that Shresta "shall make referral and admission decisions solely in the best medical interests of patients." The parties agreed that the Hospital "shall neither have nor exercise any control over the professional medical judgment or methods used by [Shresta] in the performance of services" under the terms of the agreement. However, Shresta agreed to "perform the duties and functions"

under those terms "in conformance with currently approved practices in the field of family practice and in a competent and professional manner."

The agreement provided that all nonphysician personnel at the clinics would be under the administrative and executive control of the Hospital and under the technical and medical supervision of Shresta when providing services under Shresta's supervision and direction. The agreement granted Shresta the right to approve any physician assistant whom she was asked to supervise. Shresta agreed to provide professional medical supervision and training to employees at the clinics, assist the medical director in the preparation of an annual budget, and give input on types of supplies and equipment to be used. The Hospital was to maintain all patient records, charts, x-ray films, and files, which were the property of the Hospital.

The Hospital, after consulting with Shresta, was to have the "sole right to establish reasonable billing rates" for professional medical services provided by Shresta while she worked in the clinics, hospitals, or nursing homes. The Hospital was also authorized to "bill for and receive any and all professional fees for [Shresta's] professional medical services." Shresta agreed that all fees and other compensation for her medical services would belong to the Hospital. Shresta was not permitted to moonlight at other facilities without the Hospital's approval. All outside activities engaged in by Shresta were not to interfere with her primary position.

The agreement provided that Shresta would receive a salary payable in accordance with the Hospital's regular payroll periods and payroll practices. The agreement provided that the Hospital, as the "employer of [Shresta]," would withhold from Shresta's salary deductions for income taxes, employment taxes, and any other withholdings required by law. The agreement provided that Shresta would be entitled to participate in employee benefit programs. The Hospital agreed to carry and pay for malpractice insurance with respect to services performed by Shresta on behalf of the Hospital.

Cornu-Labat entered into a "Physician Employment Agreement" with the Hospital on April 9, 2002. The agreement

was to take effect no later than July 1 and was for a 3-year term. The terms and conditions set forth in Cornu-Labat's agreement with the Hospital were very similar to those set forth in Shresta's agreement. Cornu-Labat's agreement with the Hospital stated that the Hospital would provide "appropriate office space and staff to conduct normal business functions of a surgical practice." The agreement stated that the Hospital would furnish and pay for all facilities, equipment, supplies, and services reasonably needed by Cornu-Labat. The agreement required Cornu-Labat to relocate to and maintain his personal residence within 10 miles of the Hospital. The agreement required Cornu-Labat to work for the Hospital on a full-time basis, a minimum of 40 hours per week; to provide in the area clinics and hospitals "the full range of medical services customarily provided by private practitioners specializing in general surgery within the region and consistent with [Cornu-Labat's] training and privileges"; and to establish clinic hours to examine patients. Cornu-Labat was also obligated under the agreement to be "on-call" pursuant to a schedule established by the Hospital. The agreement required Cornu-Labat to comply with all reasonable personnel and administrative policies of the Hospital.

The agreement did not require Cornu-Labat to make referrals to or admit patients to any facility controlled by the Hospital. Instead, the agreement stated that Cornu-Labat should make referral and admission decisions "solely in the best medical interests of patients." It also stated, "[The Hospital] shall neither have nor exercise any control over the professional medical judgment or methods used by [Cornu-Labat] in the performance of services hereunder." Cornu-Labat agreed to "perform the duties and functions" under the terms of the agreement "in conformance with currently approved practices in the field of general surgery and in a competent and professional manner."

The Hospital, after consulting with Cornu-Labat, was to have the sole right to "establish reasonable billing rates for all professional medical services provided by [Cornu-Labat] while [he worked] at the hospital or during clinic visits, and to bill for and receive any and all professional fees for

[Cornu-Labat's] professional medical services." Cornu-Labat agreed that all fees and other compensation for his services at the Hospital and clinic belonged to the Hospital. The agreement also provided that all patient records, charts, and x-ray films were the property of the Hospital.

The agreement provided that Cornu-Labat was to receive a salary, payable in accordance with the Hospital's regular payroll periods and practices, subject to deductions for taxes withheld by the Hospital as the "employer of [Cornu-Labat], pursuant to applicable law." The agreement also provided that Cornu-Labat would be entitled to a monthly bonus of "gross professional billings in excess of $30,000 per month." The agreement provided that Cornu-Labat would be entitled to participate in employee benefit programs. The Hospital agreed to carry and pay for malpractice insurance with respect to services performed by Cornu-Labat on behalf of the Hospital.

Merred testified in regard to many of the provisions in the agreements set forth above. His testimony showed that the parties were bound by and abided by the provisions. For example, he testified that the Hospital did the billing for the defendants' services and that the Hospital received the revenue from those services. He testified that each of the defendants was paid a salary by the Hospital and that the Hospital deducted state and federal income taxes and other withholdings required by law from their salaries. Merred testified that the Hospital provided each of the defendants with an office and with equipment and supplies. It also paid for the defendants' medical malpractice insurance. Merred testified that the Hospital set the benefits and vacation time available to Shresta.

Merred testified that the defendants were employees of the Hospital and that both were providing services for the Hospital at the time of the alleged negligence. He also testified that their medical services were an integral part of the Hospital's business of providing medical care to patients.

Cornu-Labat testified that at the time he signed the employment agreement, he was working in the United States on a work "Visa." He testified that his immigration status required him to be employed by an entity that would "sponsor" him as

a surgeon. He testified that based on the requirement that he be employed, he believed he was an employee of the Hospital when he signed the agreement with the Hospital. He testified that his immigration status also precluded him from having other business relationships outside of his sponsored employment and precluded him from having his own business.

Cornu-Labat testified that while there was no one supervising him while he was performing surgery, he had to get permission from the chief of the Hospital's medical staff before performing any procedure. He testified that there was at least one occasion when the chief of the Hospital's medical staff denied his request for a certain procedure.

Following trial, the trial court found that the employment agreements described an employer-employee relationship; that based on the terms of the agreements, the Hospital had the right to control the manner and means of the work and the details of the defendants' performance of duties; that the parties to the agreements intended to create an employer-employee relationship; that the Hospital exercised actual control over the means and methods of the work and details of the defendants' performance of duties; and that the defendants were acting within the scope of their employment when they treated Virginia. The trial court concluded that the defendants were employees of the Hospital and that therefore, the Jacobsons' claim against the defendants was barred for failure to comply with the Tort Claims Act as set forth at § 13-920(1). The court entered judgment in favor of the defendants.

ASSIGNMENTS OF ERROR

The Jacobsons assign, restated, that the trial court erred in (1) granting the defendants' motion to bifurcate the issue of whether the defendants were employees of the Hospital, thereby denying the Jacobsons a jury trial on that issue; (2) finding that the employment agreements describe an employer-employee relationship; (3) finding that the employment agreements give the Hospital the right to control the manner and means of the defendants' work and the details of the performance of their duties; (4) finding that the parties believed they were creating an employer-employee relationship, i.e., an

agency relationship, when they negotiated the agreements; (5) failing to consider and weigh 10 recognized factors used to determine the defendants' employment status; (6) finding that Shresta was acting within the scope of her employment when treating Virginia; and (7) failing to find that the defendants, by electing coverage under the NHMLA, are barred from asserting the 1-year notice provision of the Tort Claims Act based on the doctrines of waiver and equitable estoppel.

STANDARD OF REVIEW

[1,2] In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000). An appellate court reviews the sufficiency of the evidence to sustain a judgment by resolving every controverted fact in favor of the successful party and giving such party the benefit of every inference that can reasonably be deduced from the evidence. See *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000).

ANALYSIS

Motion to Bifurcate.

The Jacobsons first assign that the trial court erred in granting the defendants' motion to bifurcate the issue of whether the defendants were employees of the Hospital. The Jacobsons do not contest the bifurcation itself, but, rather, they argue that the court erred in granting the defendants' request that the employment issue be decided by the court, thereby denying the Jacobsons a jury trial on that issue.

[3-5] A trial judge has broad discretion over the conduct of a trial, and absent abuse, that discretion should be respected. *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009). Bifurcation of a trial may be appropriate where separate proceedings will do justice, avoid prejudice, and further the convenience of the parties and the court. *Id.* Bifurcation is particularly proper where a potentially dispositive issue may be decided in such a way as to eliminate the need to try other issues. *Id.*

[6] Based on the record before us, we find no objection by the Jacobsons to the defendants' motion to bifurcate before the trial court ruled on it. The defendants filed their motion to bifurcate, and a hearing was subsequently held on the motion. The record does not contain any objection by the Jacobsons until after the motion was sustained and the Jacobsons filed a motion to reconsider. Although the Jacobsons state in their brief that they objected to the motion, there is nothing in the record before us to support that contention. We recognize that the Jacobsons "renewed" their objection to the bench trial before trial began, but there is no original objection in the record. Therefore, we are unable to determine whether an original objection was made at all, whether it was timely made, and on what grounds it was made. 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. *Gengenbach v. Hawkins Mfg.*, 18 Neb. App. 488, 785 N.W.2d 853 (2010).

[7] The defendants' motion to bifurcate the employment issue specifically stated that they were requesting a bench trial on the issue. If the Jacobsons believed they were entitled to a jury trial on that issue, they had an opportunity to object and, based on the record before us, did not. Generally, failure to make a timely objection waives the right to assert prejudicial error on appeal. *Wilson v. Neth*, 18 Neb. App. 41, 773 N.W.2d 183 (2009). By failing to object to the motion to bifurcate, the Jacobsons cannot now challenge the court's ruling.

Employment Status.

The Jacobsons' next four assignments of error relate to the same issue—whether the trial court erred in determining that the defendants were employees of the Hospital, rather than independent contractors.

Section 13-902 provides:

> [N]o political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and . . . no suit shall be maintained against such political

> subdivision or its officers, agents, or employees on any tort claim except to the extent, and only to the extent, provided by the . . . Tort Claims Act.

Section 13-920(1) states:

> No suit shall be commenced against any employee of a political subdivision for money on account of . . . personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment . . . unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued . . . .

[8] It is undisputed that the Hospital is a political subdivision. While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Tort Claims Act. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). The parties in the instant case stipulated that the Jacobsons failed to submit a claim as required by the Tort Claims Act. However, they are bound by the requirements of the Tort Claims Act only if the defendants were "officers, agents, or employees" of the Hospital. See § 13-902.

[9] "Employee shall not be construed to include any contractor with a political subdivision." § 13-903(3). An independent contractor is one who, in the course of an independent occupation or employment, undertakes work subject to the will or control of the person for whom the work is done only as to the result of the work and not as to the methods or means used. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995).

[10,11] Ordinarily, when a court is presented with a dispute regarding a party's status as an employee or an independent contractor, the party's status is a question of fact which must be determined after consideration of all the evidence in the case. *Id.* However, where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law. *Id.* The phrase "where the inference is clear" means that there can be no dispute as to pertinent facts pertaining to the contract between and the relationship of the

parties involved and that only one reasonable inference can be drawn therefrom. See *Kime v. Hobbs*, 252 Neb. 407, 562 N.W.2d 705 (1997).

[12] There is no single test for determining whether one performs services for another as an employee or as an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. *Keller v. Tavarone, supra*.

In regard to the defendants' employment status, the Jacobsons first argue that the trial court erred in finding that the employment agreements described an employer-employee relationship. The Jacobsons argue that the agreements contain no language specifically stating that the defendants are considered employees, rather than independent contractors. Contrary to their argument, the agreements contain several references to the defendants' being employees. For instance, the agreements contain a provision allowing the defendants to participate in employee benefit programs "in the same manner as other physician employees of [the Hospital]." The agreements also provided that the defendants "shall cooperate fully with [the Hospital] in applying for, obtaining, and maintaining eligibility for [medical malpractice] insurance coverage." The agreements further state that the defendants must use all space, facilities, supplies, equipment, services, and personnel furnished by the Hospital exclusively for the discharge of duties "as . . . employee[s]" under the agreements.

[13] However, labels alone do not resolve the issue of whether the defendants were employees or independent contractors. A writing which merely denominates the relationship may not be used to conceal the true arrangement. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995). Accordingly, we must consider the provisions of the agreements to discern what control the Hospital had over the defendants' work. This leads us to the Jacobsons' next assignment of error.

[14] The Jacobsons argue that the provisions in the employment agreements do not give the Hospital the right to control the manner and means of the defendants' work and the details of the performance of their duties, as the trial court found. As set forth above, the extent of control which, by the agreement, the employer may exercise over the details of the work is one of the factors used to determine whether an employer-employee relationship exists. In fact, the right of control is the chief factor distinguishing an employment relationship from that of an independent contractor. *Hemmerling v. Happy Cab Co., supra*.

The Jacobsons contend that the employment agreements contain provisions that give the defendants control over certain aspects of their jobs. For instance, the agreements did not require the defendants to make referrals to or admit patients to any facility controlled by the Hospital. Rather, the defendants were allowed to make referral and admission decisions solely in the best medical interests of patients. The defendants also agreed, pursuant to the agreements, that the Hospital would not have any control over the professional medical judgment or methods used by the defendants in their performance of services. The provision that allowed the defendants to make referral and admission decisions solely in the best medical interests of patients is a provision that must be included to prevent the agreements from running afoul of the federal "Stark" law. See 42 U.S.C. § 1395nn (2006 & Supp. V 2011). The Stark law regulates a physician's referral of patients to entities in which the physician has a financial interest, even through a structured compensation agreement.

Despite the existence of provisions that give the defendants control over some aspects of their jobs, there are numerous provisions in the agreements that give the Hospital control over the performance of the defendants' duties. Pursuant to the agreements, the Hospital maintained and owned all medical records and patient files. The Hospital took care of billing patients for the defendants' services and had the sole right to establish billing rates for the services they provided. The Hospital received all revenue from the defendants' medical services.

The agreements require the defendants to comply with all personnel and administrative policies, including those contained in the Hospital's personnel manual. The defendants, pursuant to the agreements, were also required to abide by the medical staff bylaws, rules, and regulations and the administrative policies of the Hospital. As previously stated, the agreements provided that all space, facilities, supplies, equipment, services, and personnel furnished by the Hospital must be used exclusively for the discharge of duties "as an employee" under the agreements.

The agreements provided that the defendants would receive a salary payable in accordance with the Hospital's regular payroll periods and payroll practices. The agreements stated that the Hospital would withhold from the defendants' salaries deductions for income taxes, employment taxes, and any other withholdings required by law. The agreements provided that the defendants could participate in employee benefit programs. The Hospital agreed to carry and pay for malpractice insurance with respect to services performed by the defendants on behalf of the Hospital. The agreements required the defendants to maintain a personal residence within 10 miles of the Hospital.

Shresta's agreement with the Hospital specified that the Hospital was responsible for its own management, and maintained executive and administrative control over all nonphysician personnel. Shresta was required to maintain office hours at the clinics established by the Hospital, and she was required to be "on-call" based on a schedule created by the Hospital.

Finally, the Hospital limited Shresta's outside activities, specifying that "[a]ny moonlighting at another facility will need the approval of the [Hospital]."

Cornu-Labat's agreement required him to work for the hospital on a full-time basis and obligated him to be "on-call" pursuant to a schedule established by the Hospital.

While the agreements did not require the defendants to make referrals to or admit patients to any facility controlled by the Hospital—which would have been contrary to federal law—and gave the defendants authority to use their professional medical judgment, the agreements contain many provisions showing that the defendants were under the control and supervision of the Hospital in most aspects of their employment. The testimony of Merred and Cornu-Labat confirmed that the Hospital exercised its right to control the means and methods of the defendants' services as set forth in the agreements. Both testified as to how various provisions were carried out. Accordingly, we cannot conclude that the district court erred in finding that the agreements described an employer-employee relationship under which the Hospital had the right to control the manner and means of the defendants' work.

The Jacobsons next assign that the trial court erred in finding that the parties believed they were creating an employer-employee relationship or, in other words, an agency relationship when they entered into the agreements. Whether the parties believe they are creating an agency relationship is one of the factors to consider in determining one's employment status. See *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001).

We determine that based on the terms of the agreements themselves, it is reasonable to conclude that the parties believed they were creating an agency relationship. In addition to the language in the agreements, Cornu-Labat testified that when he entered into the agreement with the Hospital, he believed he was entering into an employment relationship with the Hospital. Merred testified that although he did not know what the intent of the parties to the agreements was at the time they were signed, based on the provisions of the agreements, the defendants were employees of the Hospital. We cannot say that

the trial court erred in finding that the parties believed they were creating an agency relationship.

The Jacobsons also argue that the trial court erred in failing to consider and weigh all 10 factors used to determine whether one performs services as an employee or as an independent contractor, as previously set forth. The trial court made findings in regard to two of the above factors—the first factor involving the extent of control by the employer and the ninth factor involving an agency relationship—but did not mention others. Although the court did not specifically mention all of the factors in its order, it does not follow that the court failed to consider the factors not mentioned. While it would be helpful and more complete if the trial court had discussed all 10 factors used to determine the defendants' employment status, there is no reversible error on the part of the trial court in failing to do so.

In considering the factors not discussed by the trial court, we conclude that the trial court's finding that the defendants were employees of the Hospital is supported by the other factors. We will discuss in turn each factor that the trial court did not mention, starting with the second factor.

The second factor to consider is whether the defendants were engaged in distinct occupations. Cornu-Labat testified that he did not engage in the practice of medicine for any facilities not run by the Hospital. Shresta was authorized to practice at an outside facility only if she first received approval from the Hospital. There is no evidence that she ever asked for or obtained approval to offer services to other entities. Because the evidence indicates that the defendants did not offer their services to entities outside the Hospital, this factor weighs in favor of a finding that the defendants were employees.

The third factor is whether the defendants worked under the direction of the Hospital or were specialists without supervision. The employment agreements do not indicate that either of the defendants was under the direct supervision of the Hospital's officials. However, Merred testified that the defendants were supervised by Merred and the chief of the Hospital's medical staff. Cornu-Labat testified that he had to get approval

from the chief of the Hospital's medical staff before performing any procedure, but that there was no one supervising him while he was performing procedures. Given that there is some evidence that the defendants were supervised by the Hospital, the extent of their supervision is not clear. This factor does not support a conclusion that the defendants were either employees or independent contractors.

[15,16] The fourth factor concerns the skill required by the defendants' occupations. The less skill required by a job, the greater the indication that the worker is an employee and not an independent contractor. *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996). The occupation of a physician is a skilled profession. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). This factor weighs in favor of a finding that the defendants were independent contractors.

The fifth factor considers who supplied the instrumentalities, tools, and place of work. The employment agreements show that the Hospital provided all of the facilities and supplies, which weighs in favor of a finding that the defendants were employees of the Hospital.

[17] The sixth factor concerns the length of time each of the defendants was employed by the Hospital. An ongoing relationship not limited to a specific duration or task is suggestive of an employment relationship. *Reeder v. State*, 11 Neb. App. 215, 649 N.W.2d 504 (2002). There is nothing in the record to indicate that either of the defendants was hired to complete a specific task, but both were hired for specific durations. That factor, therefore, does not weigh in favor of a finding that the defendants were employees or independent contractors.

[18,19] The seventh factor deals with the method of payment used to compensate the defendants. The payment of wages, specifically limited wages, argues for an employment relationship. *Id.* Also, the deduction of Social Security taxes and the withholding of income tax tend to indicate an employer-employee relationship, while the failure to do so is a contrary indication. *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997). The defendants contracted to receive fixed salaries, with the possibility of Cornu-Labat's earning a bonus, and the agreements provided that taxes

would be withheld from their salaries, suggesting that they were employees.

[20] The eighth factor is whether the work was part of the regular business of the employer. Both agreements provide that the Hospital was in need of the services of physicians to provide professional medical services at the Hospital's clinics. This indicates that the work which the defendants were hired to do was part of the regular business conducted by the Hospital. Also, based on the agreements, the defendants were on staff at the Hospital. The provision of medical services by physicians on staff at a hospital has been found to be part of the regular business of the hospital. *Reeder v. State, supra*. Merred also testified that the services the defendants provided were integral to the business of the Hospital. This factor weighs in favor of a finding that the defendants were employees.

The final factor is whether the Hospital was or was not in business. The record shows that the Hospital was in the business of providing medical services at its facilities. This factor weighs in favor of a finding that the defendants were employees.

In summary, there are a few factors that weigh in favor of an independent contractor status or that are neutral factors, but there is also substantial evidence of the Hospital's control over the defendants in performing medical services and multiple factors that support the trial court's finding that the defendants were employees of the Hospital. Given the reasonable inferences that can be drawn from the record, this was a question of fact for the trial court to determine. See *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). The trial court's determination that the defendants were employees was not clearly wrong.

Scope of Employment.

[21] The Jacobsons assign that the trial court erred in finding that Shresta was acting within the scope of her employment when she treated Virginia. Section 13-920(1) specifies that no claim may be made against an employee of a political subdivision "acting in the scope of his or her office or employment" unless a claim has been submitted to the governing

body of the political subdivision within 1 year of the claim's accrual. Where an employee is not acting within the scope of his or her employment when the employee causes an injury, the injured party may pursue a claim against the employee individually without complying with the requisites of the Tort Claims Act. *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997).

The Jacobsons contend that based on Shresta's employment agreement, she was hired to provide medical services to patients at the Hospital's clinics, not at the Hospital itself, where Virginia was treated. Shresta's employment agreement stated that the Hospital needed to procure the services of a physician to provide medical services at its medical clinics. The agreement further states that the Hospital "shall establish and maintain medical clinics in Gordon . . . and its surrounding service area" and that Shresta shall provide medical services "to the Clinic[s'] patients, both at the Clinics and in area hospitals." The Jacobsons argue that Shresta was not acting within the scope of her employment when she treated Virginia, because Virginia was treated at the Hospital and was not a patient of a clinic.

Although Shresta was hired to provide services at the Hospital's medical clinics, Shresta's employment agreement was with the Hospital, and the clinics were established and maintained by the Hospital. Shresta's agreement stated that she was required to provide services to patients at the Hospital's clinics and area hospitals and to be on call to provide emergency services. She was also a member of the Hospital's medical staff.

Further, Merred testified that at the time of the alleged malpractice, Shresta was acting within the scope of her employment and performing services for the Hospital.

The evidence indicates that Shresta was acting within the scope of her employment when she treated Virginia. This assignment is without merit.

NHMLA.

The Jacobsons next assign that the trial court erred in failing to find that the defendants, by electing coverage under the

NHMLA, are barred from asserting the 1-year notice provision of the Tort Claims Act based on the doctrines of waiver and equitable estoppel. The Jacobsons contend that the NHMLA provides that it is the exclusive remedy against physicians who elect to come under the system. Section 44-2821(2) provides in relevant part:

> If a health care provider shall qualify under the [NHMLA], the patient's exclusive remedy against the health care provider or his or her partner, limited liability company member, employer, or employees for alleged malpractice, professional negligence, failure to provide care, breach of contract relating to providing medical care, or other claim based upon failure to obtain informed consent for an operation or treatment shall be as provided by the [NHMLA] unless the patient shall have elected not to come under the provisions of the [NHMLA].

[22] Section 44-2828 provides for the filing of claims against health care providers within 2 years from the date of the negligent treatment. The Jacobsons argue that the defendants' act of electing coverage under the NHMLA constitutes a waiver of the provisions of the Tort Claims Act or, in the alternative, that the defendants should be equitably estopped from relying on the notice provision of the Tort Claims Act.

[23,24] The Nebraska Supreme Court addressed this issue in *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). The court found that the operation of the NHMLA does not excuse a plaintiff from compliance with the requirement under the Tort Claims Act that the claim be presented to the political subdivision prior to filing suit. The court pointed out that the Tort Claims Act provides for interaction between the Tort Claims Act and the NHMLA. Section 13-919(4) provides:

> If a claim is brought under the [NHMLA], the filing of a request for review under section 44-2840 shall extend the time to begin suit under the . . . Tort Claims Act an additional ninety days following the issuance of the opinion by the medical review panel if the time to begin suit under the . . . Tort Claims Act would otherwise expire before the end of such ninety-day period.

The court found that this section clearly contemplates that litigants would be required to comply with both the NHMLA and the Tort Claims Act. "Section 13-919(4) evinces the Legislature's intent to harmonize the operation of the two acts in question and, thus, contradicts [the plaintiff's] claim that the acts operate exclusive[ly] of one another." *Keller v. Tavarone*, 262 Neb. at 13, 628 N.W.2d at 231.

The court found that if the plaintiff's argument about the exclusivity of the NHMLA was correct, then § 13-919(4) would have been unnecessary. Section 13-919(4) extends the time for filing suit under the Tort Claims Act after the completion of a panel review under the NHMLA. If a suit pursuant to the NHMLA excused a litigant from the requirements of the Tort Claims Act, then the extension provided by § 13-919(4) would not have been needed. Instead, the Legislature amended the statute to harmonize the NHMLA and the Tort Claims Act, signaling its intent that both the NHMLA and the Tort Claims Act were to apply to medical malpractice claims against qualifying political subdivisions. See *Keller v. Tavarone, supra*.

In the instant case, the operation of the NHMLA did not excuse the Jacobsons from compliance with the Tort Claims Act, and the defendants did not waive and are not equitably estopped from asserting the Jacobsons' failure to comply with the 1-year notice provision of the Tort Claims Act. Because the Jacobsons admit that no claim was filed with the Hospital prior to their filing suit, this assignment of error is without merit.

CONCLUSION

We conclude that the trial court did not err in finding that the defendants were employees of the Hospital, a political subdivision, and were acting within the scope of their employment at the time of the alleged negligence. Accordingly, the district court did not err in dismissing the Jacobsons' claims for failure to comply with the 1-year presentment requirement of the Tort Claims Act. The judgment of the district court is affirmed.

AFFIRMED.

RICHARD McCAULLEY AND MICHELLE McCAULLEY, HUSBAND AND WIFE, APPELLANTS, V. NEBRASKA FURNITURE MART, INC., A NEBRASKA CORPORATION, APPELLEE.

838 N.W.2d 38

Filed August 13, 2013. No. A-12-463.

1. **Uniform Commercial Code: Contracts: Sales.** Neb. U.C.C. § 2-201 (Reissue 2001) provides that a contract for the sale of goods for the price of $500 or more is not enforceable unless there is a writing sufficient to indicate that a contract for sale has been made between the parties.
2. **Uniform Commercial Code: Contracts.** Under the Uniform Commercial Code, a writing is not insufficient because it incorrectly states a term agreed upon.
3. ____: ____. Neb. U.C.C. § 2-207(1) (Reissue 2001) provides that a written confirmation sent within a reasonable time after oral negotiations operates as an acceptance even though it states terms additional to those agreed upon, unless acceptance is expressly made conditional on assent to the additional terms.
4. ____: ____. Neb. U.C.C. § 2-207(2) (Reissue 2001) provides that when the contract being entered into is not between two merchants, the additional terms are to be construed as proposals for addition to the contract.
5. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute.
6. ____: ____. In construing statutory language, an appellate court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.
7. **Statutes.** It is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
8. **Uniform Commercial Code: Contracts: Notice.** Neb. U.C.C. § 2-207(2) (Reissue 2001) specifically indicates that between merchants, proposed additional terms become part of the contract unless notification of objection to them is given within a reasonable time after notice of them is received.
9. **Waiver.** When a judicial admission is invoked, the language constitutes a waiver of all controversy and renders indisputable the facts admitted, constituting a limitation of the issues.
10. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission and is a judicial admission, constituting a waiver of all controversy so far as the adverse party takes advantage of it, limiting the issues.
11. **Contracts: Rescission.** Rescission of a contract means to abrogate, annul, avoid, or cancel it and may be effected by one of the parties declaring rescission without the consent of the other if a legally sufficient ground therefor exists.
12. ____: ____. In determining whether a rescission took place, courts look not only to the language of the parties, but to all of the circumstances.

13. **Accord and Satisfaction: Words and Phrases.** An accord and satisfaction is an agreement to discharge an existing indebtedness by rendering some performance different from that which was claimed due.
14. **Accord and Satisfaction.** To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance.
15. ____. The principle questions in determining whether a discharge by accord and satisfaction has taken place include whether the parties in fact agreed that the performance rendered should operate as a final discharge and satisfaction and whether that performance constitutes a sufficient consideration for a return promise or for a discharge.
16. ____. The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered in full satisfaction is a question of fact.

Appeal from the District Court for Douglas County: TIMOTHY P. BURNS, Judge. Reversed and remanded for further proceedings.

Jason R. Fendrick, John G. Liakos, and Michael J. Matukewicz, of Liakos & Matukewicz, L.L.P., for appellants.

Brian T. McKernan, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

The primary dispute in this case is whether a pricing error clause became an effective part of a contract to purchase furniture entered into between Richard McCaulley and Michelle McCaulley, husband and wife, and Nebraska Furniture Mart, Inc. (NFM). There is no dispute that the parties orally agreed on terms of the contract, and there is no dispute that the pricing error clause was never discussed by the parties. There is no dispute that the pricing error clause was included in every written confirmation sent to the McCaulleys by NFM. After considering the possible ways in which the McCaulleys could be held to have agreed to the pricing error clause's inclusion in the contract, we conclude that the McCaulleys never assented

to the clause's inclusion in the contract and that the district court erred in finding otherwise.

II. BACKGROUND

The McCaulleys appeal an order of the district court for Douglas County, Nebraska, finding in favor of NFM in this breach of contract action. On appeal, the McCaulleys challenge the district court's finding that their contract with NFM included a pricing error clause, that the clause was not ambiguous, that the clause applied to the facts of the present case, and that judgment in favor of NFM was appropriate. We find that the district court erred in finding that the pricing error clause was a part of the parties' contract, and we reverse, and remand for further proceedings.

The events giving rise to this cause of action began in April 2008, when the McCaulleys went to NFM to purchase furniture for their home. The McCaulleys sought to purchase a bed, two bed chests, and a dresser, all of which were to be special ordered by NFM on their behalf. A NFM sales associate performed an in-home consultation, determined the availability and cost of ordering the furniture for the McCaulleys, and subsequently called them with a price quote. According to Michelle, the associate quoted her a price of $4,195.20 for the bed, a price of $2,470 total for the bed chests (i.e., $1,235 each), and a price of $4,105.50 for the dresser; the total for all four pieces was $10,770.70. The McCaulleys accepted the prices quoted to them over the telephone, and were not asked to sign any document to finalize the sale. The McCaulleys paid a deposit on the furniture, for which NFM charged the McCaulleys' credit card $3,500.

Michelle testified that when the McCaulleys spoke with the sales associate on the telephone, the associate did not mention any other terms or conditions of the sale and did not mention anything about NFM's ability to revise or alter the parties' agreement because of pricing errors.

NFM sent the McCaulleys an invoice for the purchase, indicating an order date of May 6, 2008, and reflecting a total price for the four pieces of furniture of $13,240.70. The invoice indicated that the bed chests were priced at $2,470 each. Michelle

testified that the price for the bed chests agreed to during the McCaulleys' telephone conversation with the sales associate was $2,470 total (i.e., $1,235 each). Michelle testified that she called the sales associate, that the associate apologized and indicated NFM would fix the error, and that NFM then sent a revised invoice.

The revised invoice reflected a total price for the furniture of $10,840.70. Michelle testified that the price was still slightly different than what the parties had agreed to during the initial telephone conversations, but that it was close enough that the McCaulleys did not seek any additional changes. For this purchase totaling nearly $11,000, the total difference between the price orally agreed to and the price reflected on the revised invoice was $70.

Both the initial invoice and the revised invoice were two-page documents. The second page of both included a paragraph that provided as follows:

> 9. MISCELLANEOUS
>
> a. Pricing or mathematical errors are subject to revision by NFM upon written notice to Buyer.

Michelle testified that the additional terms on the second page of the invoices had never been mentioned to her by the sales associate and that the McCaulleys had not taken action to notify NFM that they were accepting any additional terms to the telephone order.

The McCaulleys' furniture had not yet arrived by August, and they contacted NFM. At that time, NFM informed the McCaulleys that "there was an issue with the pricing." Michelle testified that NFM informed them that they would need to pay a price higher than that originally agreed upon for the furniture. NFM subsequently sent another invoice to reflect the additional price, and that invoice indicated a total price of $14,550. That invoice did not include a breakdown of price for individual items and included only the total figure.

Richard testified that he received a telephone call from NFM's president in August 2008 concerning the pricing of the furniture. He testified that NFM's president told him that NFM could not complete the sale without the change in pricing and that NFM did not need to honor the original agreement of

the parties because NFM could claim there had been a pricing error.

NFM's president testified that the sales associate had made a pricing error in her original price quote to the McCaulleys because the price quoted was actually below the cost of NFM's securing the furniture from the manufacturer. He testified that the invoices sent to the McCaulleys were standard form contracts that NFM uses and that the contracts include a pricing error clause. He testified that he informed the McCaulleys that they were not under an obligation to buy the furniture at the adjusted price and that NFM would refund their deposit if they elected not to proceed.

Michelle testified that the McCaulleys then contacted a furniture store in Maryland about receiving a price quote for purchasing the furniture from them. Michelle testified that the Maryland furniture store quoted them a price of $15,789 for all of the furniture. She testified that they learned that the manufacturer was discontinuing the model of bed they were trying to purchase, so they purchased the bed from the other furniture store for $7,460, which was slightly more than $3,250 higher than the price NFM had originally quoted for the bed.

Michelle testified that NFM refunded the McCaulleys' deposit by crediting the deposit back to the McCaulleys' credit card. She testified that the McCaulleys did not take any affirmative steps to receive the refund, but also acknowledged that the McCaulleys did not take any steps to retender the deposit to NFM.

On September 26, 2008, the McCaulleys filed a complaint seeking declaratory relief. The McCaulleys alleged that they had a written purchase agreement with NFM, that they had tendered a downpayment to NFM, that NFM refused to honor the price set forth in the written purchase agreement, and that they were ready, willing, and able to honor the purchase agreement. The McCaulleys attached to the complaint a copy of the second two-page invoice that they had received from NFM as the written purchase agreement between the parties. They sought declaratory relief, damages, and/or specific performance.

On October 24, 2008, NFM answered the complaint. NFM alleged that the written purchase agreement of the parties included a pricing error provision that barred the McCaulleys' breach of contract action, and NFM set forth a variety of other alternative defenses.

On April 27, 2012, the district court entered an order rendering judgment in favor of NFM. The court found that disposition of the case was governed by the Uniform Commercial Code, that the parties initially had an oral agreement, that the written invoices contained additional terms being offered, and that the McCaulleys' notification to NFM of an error on the first written invoice and then receipt of a second written invoice containing the pricing error provision resulted in such provision's becoming part of the written contract between the parties. The court found that there was evidence a pricing error had occurred and that, accordingly, NFM had not breached its contract with the McCaulleys by providing notice of a price adjustment. This appeal followed.

III. ASSIGNMENTS OF ERROR

The McCaulleys have alleged several errors related to the court's judgment in favor of NFM. The McCaulleys allege that the district court erred in finding that the pricing error clause was a part of the parties' contract, in finding that the clause was not ambiguous, in finding that there had actually been a pricing error, and in rendering judgment in favor of NFM.

IV. ANALYSIS

The primary dispute in this case is whether the pricing error clause became an effective part of the contract entered into between the McCaulleys and NFM. There is no dispute that the parties orally agreed on terms of the contract, and there is no dispute that the pricing error clause was never discussed by the parties. There is no dispute that the pricing error clause was included in every written confirmation sent to the McCaulleys by NFM. After considering the possible ways in which the McCaulleys could be held to have agreed to the pricing error clause's inclusion in the contract, we conclude that the McCaulleys never assented to the clause's

inclusion in the contract and that the district court erred in finding otherwise.

As noted, there is no dispute in this case that the McCaulleys orally agreed to purchase a bed, two bed chests, and a dresser from NFM. During the parties' oral discussions, they agreed to prices for each piece of furniture, totaling more than $10,000. The McCaulleys paid a deposit on the furniture.

[1] Neb. U.C.C. § 2-201 (Reissue 2001) provides that a contract for the sale of goods for the price of $500 or more is not enforceable unless there is a writing sufficient to indicate that a contract for sale has been made between the parties. As such, although the McCaulleys agreed to purchase, and NFM agreed to sell, and the parties agreed on the price of the furniture, a writing was required in order to create an enforceable contract. As such, NFM sent the McCaulleys a written confirmation in the form of an invoice.

[2] The first invoice indicated the order date, listed each piece of furniture the parties had agreed the McCaulleys would purchase from NFM, and included prices for each of the pieces of furniture. The invoice, however, indicated a price for the two bed chests that was double what the parties had agreed upon during the oral discussions. At this point in time, an enforceable contract was created between the McCaulleys and NFM, because the invoice served as a writing confirming the oral agreement, even though the pricing term was incorrectly stated. See § 2-201(1) (writing is not insufficient because it incorrectly states term agreed upon).

In addition to the specific terms that the parties had agreed upon during their oral discussions, the first invoice included a second page of additional terms. There is no dispute in this case that the additional terms included on the second page of the invoice were never discussed between the parties.

The McCaulleys contacted NFM and notified NFM that the pricing reflected on the invoice was not consistent with what the parties had orally agreed to. Upon being notified that the pricing reflected on the first invoice did not accurately set forth the terms of the parties' oral agreement, NFM agreed to revise the pricing portions of the invoice and issue a revised invoice to the McCaulleys. The revised invoice reflected a total price

for the furniture that was $70 more than the total orally agreed to by the parties, and Michelle testified that although the pricing set forth on the revised invoice still did not match what the parties had orally agreed to, it was close enough that the McCaulleys were willing to accept the prices set forth on the revised invoice. There is no assertion by the parties that the McCaulleys took any affirmative action to represent to NFM they were agreeing to any change in the price or they were aware of or agreeable to any additional terms. Our review of the record does not reveal any evidence that any affirmative action or representation was made, either. The parties continued to have an enforceable contract. See § 2-201(1).

In addition to the specific terms that the parties had agreed upon during their oral discussions, the revised invoice included a second page of additional terms that was identical to the second page of additional terms included in the first invoice. There is no dispute in this case that the additional terms included on the second page of the invoice were never discussed between the parties. The crux of the issue in this case is whether those additional terms, or more specifically, one of those additional terms (the pricing error clause), became a part of the contract.

[3] Neb. U.C.C. § 2-207(1) (Reissue 2001) provides that a written confirmation sent within a reasonable time after oral negotiations operates as an acceptance even though it states terms additional to those agreed upon, unless acceptance is expressly made conditional on assent to the additional terms. As such, the written invoices sent from NFM to the McCaulleys were effective to serve as acceptance and written confirmation of the oral agreement of the parties, regardless of NFM's inclusion of a page of additional terms that had not been discussed between the parties.

[4] Section 2-207(2) provides that when the contract being entered into is not between two merchants, the additional terms are to be construed as proposals for addition to the contract. Because the McCaulleys are not merchants, the additional terms that NFM included on the second page of the invoices, including the pricing error clause, are to be construed as proposals for addition to the contract. As proposals, the additional

terms would not be considered part of the contract unless some action on the part of the McCaulleys could reasonably be construed as assent to inclusion of the terms.

There is no assertion in this case that the McCaulleys ever made an express representation that they were aware of the additional terms proposed by NFM and that they were assenting to inclusion of those additional terms in the contract. As such, the pricing error clause cannot be considered to have become part of the contract by way of express acceptance.

1. McCaulleys' Failure to Object to Additional Terms

NFM asserts on appeal that the McCaulleys were placed on notice of the additional terms with each invoice sent by NFM and that because the McCaulleys never objected to the additional terms, the terms should be considered part of the contract. NFM has cited this court to no authority that would hold that a merchant's proposals for additional terms included in a written confirmation to a nonmerchant should become part of the contract unless the nonmerchant objects to the additional terms. We conclude that such an interpretation would require us to disregard the specific language of § 2-207(2) and would be contrary to basic principles of statutory construction.

[5-7] The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute. *Amen v. Astrue*, 284 Neb. 691, 822 N.W.2d 419 (2012). See, also, *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012); *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011); *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). The court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence. *Amen v. Astrue, supra*; *Butler Cty. Sch. Dist. v. Freeholder Petitioners, supra*; *City of North Platte v. Tilgner, supra*; *Pfizer v. Lancaster Cty. Bd. of Equal., supra*. It is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Pfizer v. Lancaster Cty. Bd. of Equal., supra*.

[8] The plain language of the Legislature in § 2-207(2) makes a distinction between contracts entered into between two merchants and contracts entered into where at least one of the parties is a nonmerchant. Section 2-207(2) specifically indicates that "[*b*]*etween merchants* [proposed additional] terms become part of the contract unless . . . notification of objection to them . . . is given within a reasonable time after notice of them is received." (Emphasis supplied.) This provision would be rendered essentially meaningless if we accepted NFM's assertion that the McCaulleys' failure to object should have the effect of making the additional terms a part of the contract. Such an interpretation would obviate the need to indicate that such is true between merchants, and the Legislature's inclusion of those words indicates that the rule should not be the same when at least one of the parties is not a merchant. It is not within the province of this court to read the words "between merchants" out of the statute, and we find no merit to NFM's assertion that the McCaulleys' failure to object was sufficient to make the additional terms a part of the contract.

2. Judicial Admission

NFM also asserts that the McCaulleys should be held to have assented to inclusion of the additional terms in the contract as a result of judicial admissions made in the course of these proceedings. We find this assertion to be meritless.

[9,10] NFM notes that when a judicial admission is invoked, the language constitutes a waiver of all controversy and renders indisputable the facts admitted, constituting a limitation of the issues. See *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 313 N.W.2d 645 (1981). NFM also notes that an admission made in a pleading on which the trial is had is more than an ordinary admission and is a judicial admission, constituting a waiver of all controversy so far as the adverse party takes advantage of it, limiting the issues. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998).

In *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc., supra*, the Nebraska Supreme Court was presented

with a breach of contract action wherein one of the primary disputes was whether the defendant corporation had been a party to the contracts sued upon. In its answer, the defendant corporation admitted that "the same contract sued upon by the plaintiff existed between the plaintiff and the defendant corporation." *Id.* at 204, 313 N.W.2d at 647 (emphasis omitted). The Supreme Court held this to be a judicial admission sufficient to raise a legitimate fact question as to the liability of the defendant corporation.

In *Radecki v. Mutual of Omaha Ins. Co., supra*, the Nebraska Supreme Court was presented with claims brought by an insured alleging that an insurance company had denied a claim in bad faith and had breached a contract. One of the issues in the case concerned the period of time that the plaintiff had been employed by a university. In its answer, the defendant insurance company had admitted that the plaintiff was "'employed at [the university] as a professor of computer science until August 31, 1991,'" and had admitted that the plaintiff "'was among the eligible class persons to receive benefits under [a] disability contract . . . until August 31, 1991.'" *Id.* at 239, 583 N.W.2d at 330. The Supreme Court noted that there was evidence to suggest the plaintiff's active employment ended in May 1991, but concluded that the defendant insurance company had made a judicial admission that he was employed by the university through August 31.

The alleged judicial admissions in the present case are entirely distinguishable from the situations presented in either authority cited by NFM in support of the assertion that the McCaulleys judicially admitted that the pricing error clause was part of the contract. NFM alleges that the McCaulleys judicially admitted the clause was part of the contract by asserting in their complaint that there was a written contract and by attaching a copy of the two-page written invoice to the complaint, by answering in response to a request for admissions that the two-page written invoice attached to their complaint was the controlling agreement between themselves and NFM, and by testifying at trial that the two-page written invoice was a true and correct copy of the written contract between themselves and NFM.

Unlike the clear and specific admissions of the particular facts at issue in the authorities cited by NFM, the statements of the McCaulleys do not constitute admissions that the pricing error clause or any other additional terms were assented to and became part of the contract. The McCaulleys' statements—in the complaint, in the response to the request for admissions, and during testimony at trial—merely indicate that the written invoices sent by NFM to the McCaulleys served as the written confirmation necessary to create a contract and that the invoices contained two pages. There was never a statement by the McCaulleys to indicate that the additional terms proposed by NFM on the second page were actually accepted or agreed upon. Indeed, the entire basis of the McCaulleys' complaint and cause of action in this case was the assertion that the additional terms (and specifically the pricing error clause) were *not* ever agreed to and made a part of the contract. The statements that the exhibit (which included both pages) was a true and accurate copy of the contract do not amount to an admission that the additional terms proposed by NFM were accepted by the McCaulleys.

To accept NFM's assertion that the statements of the McCaulleys in this case and the attaching of both pages of the invoice to the complaint amount to a judicial admission that the McCaulleys assented to the additional terms proposed by NFM would essentially encourage a plaintiff in the position of the McCaulleys to attach only part of the invoice sent by NFM to the complaint, instead of providing the court with the complete document and provisions at issue. Accepting NFM's assertion would also result in the absurd conclusion that the McCaulleys filed a lawsuit alleging that the pricing error clause on the second page of the invoice was not ever agreed to or part of the contract and simultaneously admitting that it was part of the contract merely by attaching it to the complaint.

We find no merit to NFM's assertion that the McCaulleys judicially admitted that the pricing error provision was agreed to and made a part of the contract.

3. District Court's Rationale

In finding judgment in favor of NFM in this case, the district court recognized that the statutory provisions discussed above governed the outcome of this case, recognized that the additional terms NFM placed on the invoices were merely proposals for addition to the contract, and acknowledged that the McCaulleys never explicitly agreed to the additional terms becoming part of the contract.

The district court concluded that the additional terms did not become part of the contract upon the McCaulleys' receipt of the first invoice. However, the court concluded that after the McCaulleys contacted NFM to point out that the pricing term set forth on the first invoice was not consistent with the parties' oral agreement and NFM sent a revised invoice containing all of the same proposed additional terms, then the proposed additional terms did become part of the contract. The court did not explain why a second proposal to add previously undiscussed terms to the contract somehow became part of the contract without any actual assent on behalf of the McCaulleys and did not otherwise explain how the McCaulleys had assented to inclusion of the additional terms. We determine the district court erred in finding that notice to the McCaulleys that NFM was proposing additional terms, without an act of assent by the McCaulleys, was sufficient to add the proposed additional terms to the parties' contract for all of the reasons discussed above.

4. Rescission

NFM also asserts that this court should find that the McCaulleys rescinded the contract because they "accepted" a refund of the deposit paid to NFM. Because the McCaulleys did not take any action regarding the refund of their deposit, we find no merit to this assertion.

The evidence in this case indicates that the McCaulleys initially paid a deposit toward the purchase of the furniture, prior to any invoice's being sent by NFM as written confirmation of the parties' contract. The McCaulleys paid that deposit by authorizing a charge on a credit card. Subsequently, after NFM

notified the McCaulleys that it would not provide the furniture for the previously agreed-to price, NFM unilaterally refunded the McCaulleys' deposit by crediting the amount of the deposit back to the McCaulleys' credit card. There is no evidence to indicate that NFM discussed this with the McCaulleys, that NFM informed the McCaulleys that it was going to be done, or that the McCaulleys wanted the deposit refunded. The evidence indicates that the McCaulleys did not attempt to tender the amount of the deposit back to NFM. NFM asserts that refunding the deposit under these circumstances should constitute a rescission of the contract by the McCaulleys.

We initially note that NFM has cited this court to no Nebraska authority for its assertion that these circumstances demonstrate a rescission of the contract by the McCaulleys. Instead, NFM indicates that "[m]any courts have held that the acceptance of a refund amounts to rescission of a contract" and cites us to two cases from other jurisdictions. Brief for appellee at 11. We find neither case supports NFM's assertion.

NFM cites us to *Brooks v. Boykin*, 194 Ga. App. 854, 392 S.E.2d 46 (1990), and *Gondolfo v. New York Life Insurance Company*, 68 Misc. 2d 961, 328 N.Y.S.2d 457 (1971), in support of its assertion that the circumstances of this case demonstrate rescission by the McCaulleys. It is true that in both of those cases one party to a contract tendered a refund of a deposit and the court held that the other party's acceptance of that refund constituted rescission or accord and satisfaction. The circumstances of both cases, however, are markedly different than the present case in the most important of ways. In both cases, the party tendering the refund issued a check and the other party took affirmative action to negotiate the check and accept a refund. See *id*. In both cases, the appellate court stressed the act of cashing the check as important to a determination of rescission or accord and satisfaction.

There was no issuance of a refund check or cashing of a refund check in the present case. Instead, NFM unilaterally credited money back to the McCaulleys' credit card, requiring no affirmative action on the part of the McCaulleys to demonstrate any intention to rescind the contract or to accept the refund as an accord and satisfaction. NFM has also not cited

this court to any authority that would require a party to reject a credited refund or tender the deposit back under circumstances such as these.

[11,12] The Nebraska Supreme Court has noted that rescission of a contract means to abrogate, annul, avoid, or cancel it. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995). The court noted that rescission may be effected by one of the parties declaring rescission without the consent of the other if a legally sufficient ground therefor exists. *Id.* In determining whether a rescission took place, courts look not only to the language of the parties, but to all of the circumstances. *Id.*

In *Hoeft v. Five Points Bank, supra*, the Nebraska Supreme Court concluded that rescission of a contract had not been demonstrated. In that case, the parties had engaged in oral negotiations that a jury concluded had resulted in the formation of an oral contract. Subsequent to the oral discussions, one of the parties authored a letter explaining what the parties had agreed upon. Several years later, the same party sent another letter in which he indicated that it had "'become necessary to make the terms of [his prior] letter null and void.'" *Id.* at 781, 539 N.W.2d at 644. He specifically indicated in the second letter that the prior letter was "'hereby rescinded and in no further effect.'" *Id.* However, because the author of the letter had indicated that the other party could call to discuss the matter further and because the other party had responded by claiming that the author had no right to declare the agreement void, the Supreme Court concluded that there was no rescission of the agreement.

[13-16] With regard to accord and satisfaction, the Nebraska Supreme Court has held that an accord and satisfaction is an agreement to discharge an existing indebtedness by rendering some performance different from that which was claimed due. *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994). To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance. *Id.* The principle questions in determining whether a discharge by accord and satisfaction has

taken place include whether the parties in fact agreed that the performance rendered should operate as a final discharge and satisfaction and whether that performance constitutes a sufficient consideration for a return promise or for a discharge. *Id.* The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered in full satisfaction is a question of fact. *Id.*

In this case, as NFM recognizes on appeal, the district court did not rule on any assertion of rescission or accord and satisfaction. Our review of the record reveals that there was no evidence or testimony to indicate that the McCaulleys and NFM discussed the refund, that NFM indicated that it was tendering the refund back in satisfaction of any obligations under the parties' contract, that the McCaulleys understood the credit to be an attempt to fulfill the contract, or that the McCaulleys accepted the refund as satisfaction of the contract. We cannot find this, on appeal, to be an alternative basis for affirming the trial court's judgment.

5. Resolution

The parties in this case did have an enforceable contract for the purchase of furniture. They engaged in oral discussions, they came to an agreement concerning the furniture to be purchased and the price to be paid, and the McCaulleys paid a deposit. Their oral agreement would not have been enforceable as a contract because the total price of the furniture far exceeded the $500 limitation for oral contracts for the purchase of goods set forth in § 2-201(1). The contract became enforceable when NFM sent a written confirmation of the agreed-upon terms to the McCaulleys.

The written confirmation, in the form of multiple invoices, included a number of terms that without dispute were never discussed by the parties during their oral discussions. According to § 2-207(2), the additional terms, which included the pricing error clause at issue in this case, became proposals by NFM for inclusion in the contract. Those proposals, to become a part of the contract, had to be assented to by the McCaulleys. There is no evidence that the McCaulleys ever expressly assented

to the additional terms. The McCaulleys were not required to object to the additional terms to prevent them from becoming part of the contract. The McCaulleys did not judicially admit that the additional terms were agreed to. The McCaulleys also did not rescind the contract by failing to retender the deposit to NFM.

Based on the record presented to us, the parties did have an enforceable contract, but the additional terms proposed by NFM, including the pricing error clause, were not ever accepted and made a part of the contract. The district court erred in concluding otherwise. As such, we reverse, and remand for further proceedings.

V. CONCLUSION

The district court erred in finding that the pricing error clause was a part of the contract between the McCaulleys and NFM. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
MATHEW J. HEATH, APPELLANT.
838 N.W.2d 4

Filed August 13, 2013. No. A-12-742.

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 where the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Hearsay: Words and Phrases.** Under the Nebraska Evidence Rules, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
3. **Rules of Evidence: Hearsay.** With certain exceptions, hearsay is generally not admissible.
4. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.

5. **Rules of Evidence: Hearsay: Words and Phrases.** A "statement," for purposes of the Nebraska Evidence Rules, is an oral or written assertion or nonverbal conduct of a person, if it is intended by him or her as an assertion.
6. **Rules of Evidence: Hearsay.** Even if proffered testimony concerns a "statement" under Neb. Rev. Stat. § 27-801(1) (Reissue 2008), it is not excluded as hearsay unless the statement is being offered to prove the truth of the matter asserted. Thus, if there is a nonhearsay purpose for admitting the statement, it is not inadmissible as hearsay.
7. **Constitutional Law: Criminal Law: Trial: Witnesses.** The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part, that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her.
8. **Constitutional Law: Trial: Hearsay.** Where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.
9. **Constitutional Law: Hearsay.** The Confrontation Clause applies only to testimonial hearsay, because it applies only to witnesses who bear testimony against an accused.
10. ____: ____. The initial step in a Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. If the statements are nontestimonial, then no further Confrontation Clause analysis is required.
11. **Trial: Hearsay.** Generally speaking, testimonial statements include ex parte in-court testimony or its functional equivalent (affidavits, custodial examinations, prior testimony); extrajudicial statements contained in formalized testimonial materials (affidavits, depositions, prior testimony, confessions); or those statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.
12. **Constitutional Law: Witnesses: Testimony: Words and Phrases.** The text of the Confrontation Clause applies to those who bear testimony, and testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact.
13. **Constitutional Law: Hearsay.** The primary objective of the Confrontation Clause is concerned with testimonial hearsay.
14. **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.
15. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence.
16. **Assault: Police Officers and Sheriffs: Words and Phrases.** A person commits the offense of third degree assault on an officer if (1) he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer and (2) the

offense is committed while such officer is engaged in the performance of his or her official duties.

17. **Arrests: Police Officers and Sheriffs: Words and Phrases.** A person commits the offense of resisting arrest if he or she uses or threatens physical force or violence against a peace officer while intentionally preventing or attempting to prevent the peace officer from effecting an arrest of the actor or another.
18. **Arrests: Words and Phrases.** An arrest is taking custody of another person for the purpose of holding or detaining him or her to answer a criminal charge, and to effect an arrest, there must be actual or constructive seizure or detention of the person arrested.
19. **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.
20. **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.
21. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

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

Dennis R. Keefe, Lancaster County Public Defender, and Christopher Eickholt for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Mathew J. Heath appeals his convictions and sentences on charges of third degree assault on a law enforcement officer and second-offense resisting arrest. The charges arose out of an altercation occurring when a police officer responded to a disturbance call at Heath's residence. Heath asserts that the district court erred in allowing testimony that his mother asked the officer whether the officer was alone, and also challenges the sufficiency of the evidence to support the convictions and the sentences imposed by the court. We find that his mother's

question was not excludable as hearsay and find sufficient evidence to support the convictions. The sentences imposed were not excessive. As such, we find no merit to Heath's appeal, and we affirm.

II. BACKGROUND

The events giving rise to this action occurred on or about January 13, 2012. On that date, Officer Alan Grell of the Lincoln Police Department was on duty and heard a dispatch concerning a "'[d]isturbance, nature unknown,'" at a residence near where he was on patrol. Because he was in the area, he responded to the dispatch and went to the residence.

Officer Grell testified that he approached the residence, looked in the window to see whether he could observe anything going on, and, either before or after he knocked on the door, heard a male voice from inside the residence say, "'Go away. We're cleaning.'" At that point, Officer Grell could not see in any windows, did not hear any loud disturbance, and was unaware of how many people were inside the residence.

Officer Grell testified that he knocked on the door and that a female answered the door. The female asked Officer Grell whether he was alone. Officer Grell was alone, and the female allowed him to enter the residence.

Upon entering the residence, Officer Grell was met by Heath, who immediately directed him to leave the residence and poked him in the chest. Officer Grell testified that Heath was holding a cigarette in the same hand that he used to poke Officer Grell in the chest. Officer Grell directed Heath to stop and to "'get back,'" but Heath ignored the direction. Officer Grell then reached out to grab Heath's hand, and a physical altercation between the two ensued.

1. Officer Grell's Description of Altercation

According to Officer Grell's description of the altercation, Heath was "[o]bviously agitated, [and his] voice inflection was kind of high, kind of raised," as Heath told Officer Grell to leave the residence "several times." Heath reached out and pushed him in the chest area, causing Officer Grell to

take "a side step." Officer Grell testified that he then tried to gain control of Heath's hands and pushed Heath, attempting to knock Heath off balance. As the two were "shoving each other back and forth" and trying to gain control, Heath at one point "reached down with his left hand and [put] his hand on [Officer Grell's] service weapon."

Officer Grell testified that "things escalate[d] quite dramatically" when Heath reached for the service weapon. Officer Grell then continued trying to gain control, while also keeping a hand on his service weapon to try "to keep it in the holster." Heath eventually shoved Officer Grell, and the two tripped over "some large tires and some large rims in the living room of the residence." The two ended up on the ground, with Heath on top of Officer Grell.

Officer Grell testified that the two eventually returned to their feet, still struggling with one another. Eventually, Officer Grell was able to utilize a "strength technique" to gain control, and he "basically grabb[ed Heath] by the throat or the upper neck area . . . and [shoved] him as hard as [Officer Grell could], to knock [Heath] off balance." This was successful in knocking Heath off his feet, causing him to stumble backward and fall. As he fell, Heath's head broke a hole into the drywall on the wall.

Officer Grell got on top of Heath and held him until additional officers arrived. As Officer Grell attempted to hold Heath, Heath kicked him several times in an attempt to knock Officer Grell off. Officer Grell testified that the two were still actively struggling when other officers arrived to assist him. The other officers helped Officer Grell off Heath and took Heath into custody.

Officer Grell testified that during the struggle, he became aware of the presence of two other males in the residence. He also testified that he gave Heath commands to "'[s]top'" or to "'[c]alm down'" or to "'[g]et away'" throughout the altercation. Finally, he testified that by the end of the altercation, he had been approaching exhaustion and nearing his physical limits of where he would have been unable to continue struggling with Heath, at which point the use of deadly force would have been authorized.

Officer Grell testified that as the adrenaline of the altercation wore off, he began to notice pain and discomfort. His leg hurt "pretty significantly." He testified to pain in his upper thigh, hamstring, and knee. This pain lasted for several days.

2. Heath's Description of Altercation

After the State rested, Heath decided that he was not satisfied with the job his defense counsel was doing on his behalf. After being advised against it, Heath indicated a desire to "fire" his attorney and have him appointed as standby counsel, and a desire to represent himself for the remainder of the trial. The court granted this request.

Heath waived his right not to testify and took the stand in his own behalf. Because he was now representing himself, he provided his testimony in the form of a narrative.

Heath testified that on the night in question, he had gone to his mother's house for dinner and had observed "somebody peeking through the window." Heath testified that he told the person, "'Go away. We're cleaning.'"

According to Heath, his mother opened the door. Heath had not expected the person "to be a cop at all," and he began laughing. According to Heath, the officer "barge[d] in the house and he grab[bed] at [Heath] on [Heath's] throat."

Heath testified that he "[w]oke up with [his] head in the wall" and that he did not remember anything. According to Heath, when he awoke, the officer was "on top of [Heath] with his hands around [Heath's] throat." Heath did not know how long the altercation lasted.

Heath testified that the other officers who arrived on the scene placed handcuffs on him and that he told them what had happened. According to Heath, the other officers "ma[d]e little jokes" and put him into a police car. He testified that one of the officers said that Heath was "lucky [he was] not dead."

During cross-examination, Heath denied poking Officer Grell in the chest and denied asking Officer Grell to leave. He also testified that he did not recall ever putting his hand

on Officer Grell's service weapon. According to Heath, he was "submissive."

3. Trial, Verdicts, and Sentences

At trial, Officer Grell testified about the altercation and about his injuries as set forth above. The State also adduced testimony from one of the other officers who arrived to assist Officer Grell and from one of the other males who was present in the residence during the altercation.

Heath's counsel objected on the basis of both hearsay and confrontation grounds when Officer Grell testified that Heath's mother, when responding to his knock on the door, asked whether he was alone. When Heath's counsel cross-examined Officer Grell, he asked Officer Grell whether the female asked "something to the effect of, 'Are you alone[?]'" Then, on redirect examination, the prosecutor again asked Officer Grell whether "[a]ll she said to [him] was, 'Are you alone?'" There was no objection to the testimony this time.

Heath testified in his own behalf, in narrative, as set forth above. He also recalled Officer Grell in an attempt to demonstrate discrepancies between the sequence of some of the events as described in Officer Grell's report and his testimony in court. Heath ultimately moved for a dismissal on the basis of Officer Grell's "lying on the stand." The court overruled this motion.

The jury returned verdicts of guilty on both the charge of third degree assault on an officer and on the charge of resisting arrest. The court sentenced Heath to a term of 4 to 5 years' imprisonment on each conviction, to be served concurrently. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Heath has assigned three errors. First, he challenges the court's admission of testimony about his mother's asking Officer Grell whether he was alone. Second, he asserts that there was insufficient evidence adduced to support the verdicts. Third, he asserts that the sentences imposed were excessive.

IV. ANALYSIS

1. Admission of Testimony

Heath first challenges the district court's admission of testimony that when Officer Grell approached the house, Heath's mother asked, "Are you alone?" Heath asserts that this testimony was inadmissible pursuant to the hearsay rule and pursuant to the Confrontation Clause of the U.S. Constitution. We find that Heath's mother's utterance was not a "statement," was not offered for any truth of any matter, and was therefore not hearsay. It also was not testimonial in nature, and its admission was therefore not a violation of Heath's right to confrontation.

As noted above, Officer Grell testified that he responded to the disturbance call and went to the house. He testified that he approached the house and knocked on the door and that a female (who was later identified as Heath's mother) inquired, "Are you alone?" Heath objected to this testimony on the grounds of hearsay and confrontation. Both objections were overruled.

(a) Hearsay

Heath first asserts that the testimony was inadmissible as hearsay. He argues that the testimony was of an out-of-court statement and was offered for the truth of the matter asserted, that the State argued "the substance of the statement" at trial, and that the State argued it in its closing argument. Brief for appellant at 13. We find that Heath's mother did not make a "statement" for purposes of the hearsay rule, that there was no truth or falsity in her utterance, and that the testimony was not inadmissible as hearsay.

[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 where the rules make such discretion a factor in determining admissibility. *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012). Under the Nebraska Evidence Rules, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801(3) (Reissue 2008).

With certain exceptions, hearsay is generally not admissible. See Neb. Rev. Stat. § 27-802 (Reissue 2008).

[4] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection. *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

[5,6] Section 27-801(1) defines a "statement," for purposes of the Nebraska Evidence Rules, as "an oral or written *assertion*" or "nonverbal conduct of a person, if it is intended by him as an *assertion*." (Emphasis supplied.) Even if proffered testimony concerns a "statement" under § 27-801(1), however, it is not excluded as hearsay unless the "statement" is being offered to prove the truth of the matter asserted. See *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). Thus, if there is a nonhearsay purpose for admitting the "statement," it is not inadmissible as hearsay. See *id*.

In the present case, the challenged testimony fails to satisfy either of the key characteristics of inadmissible hearsay. What Heath's mother said when Officer Grell knocked on the door was not a "statement," because it was not an assertion or declaration; it was an interrogatory seeking information and not asserting any particular fact. In addition, the testimony that Heath's mother asked Officer Grell whether he was alone was not offered to prove the "truth" of any matter being asserted by her—it was not offered to prove he was, in fact, alone, and there was nothing else "asserted" that could be considered true or false.

Although the Nebraska appellate courts have never specifically addressed the subject of whether questions are considered statements for purposes of the hearsay rule, a variety of other courts have done so. See *Harris v. Com.*, 384 S.W.3d 117 (Ky. 2012) (reviewing variety of precedents addressing whether questions are or can be considered statements for hearsay).

In *Harris v. Com., supra*, the Supreme Court of Kentucky recently iterated the various lines of reasoning concerning questions and the hearsay rule. The court noted that other

courts that have considered the issue have reached one of three conclusions: (1) A question can be hearsay if it contains an assertion, (2) a question can be hearsay if the declarant intended to make an assertion, or (3) questions can never be hearsay because they are inherently nonassertive. *Id.*

In *Harris v. Com., supra*, the court noted that courts following the first approach, which finds that questions can be hearsay if they contain an assertion, examine the content of the question and the circumstances surrounding its utterance to determine whether the question contains an explicit or implicit assertion. The court cited a variety of examples of other courts that have used this approach. See, e.g., *U.S. v. Wright*, 343 F.3d 849 (6th Cir. 2003); *Ex parte Hunt*, 744 So. 2d 851 (Ala. 1999); *Powell v. State*, 714 N.E.2d 624 (Ind. 1999); *State v. Rawlings*, 402 N.W.2d 406 (Iowa 1987); *Carlton v. State*, 111 Md. App. 436, 681 A.2d 1181 (1996); *State v. Saunders*, 23 Ohio App. 3d 69, 491 N.E.2d 313 (1984); *Brown v. Com.*, 25 Va. App. 171, 487 S.E.2d 248 (1997); *Kolb v. State*, 930 P.2d 1238 (Wyo. 1996). The court noted that the majority of courts taking this approach are state courts. *Harris v. Com., supra.*

In *Harris v. Com., supra*, the court noted that courts following the second approach, which finds that questions can be hearsay if the declarant intended to make an assertion, focus not on the content of the question, but on the intention of the declarant. Those courts focus on the advisory committee's note to rule 801(a) of the Federal Rules of Evidence in support of the notion that the definition of "statement" is intended to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, that is not intended to be assertive. The court cited a variety of other courts that have used this approach. See, e.g., *U.S. v. Summers*, 414 F.3d 1287 (10th Cir. 2005); *U.S. v. Long*, 905 F.2d 1572 (D.C. Cir. 1990); *U.S. v. Lewis*, 902 F.2d 1176 (5th Cir. 1990). The court noted that the majority of courts taking this approach are federal courts. *Harris v. Com., supra.*

In *Harris v. Com., supra*, the court noted that courts following the third approach simply impose a blanket rule that precludes any out-of-court question from being hearsay on the

ground that inquiries are inherently nonassertive. The court cited a variety of other courts that have used this approach. See, e.g., *U.S. v. Oguns*, 921 F.2d 442 (2d Cir. 1990); *State v. Carter*, 72 Ohio St. 3d 545, 651 N.E.2d 965 (1995); *State v. Collins*, 76 Wash. App. 496, 886 P.2d 243 (1995).

The Kentucky Supreme Court declined to follow the third approach, reasoning that there was no logical reason why the grammatical form of an utterance should conclusively determine whether an utterance is an assertion. Indeed, it seems axiomatic that some utterances not in the form of a declarative sentence may contain an assertion. See *Powell v. State, supra* (recognizing inquiry can in substance contain assertion of fact). The classic example of this line of thinking is illustrated by the following inquiry: "Joe, why did you stab Bill?" See *id*. Such an utterance clearly carries a factual allegation within it, despite being presented in the grammatical form of an interrogatory. See *id*.

In the present case, we need not resolve the ultimate question of what approach the Nebraska appellate courts should take. On the facts of the present case, the utterance by Heath's mother would not be considered hearsay under any of the three approaches. There is no factual content in the question, "Are you alone?" See *Powell v. State, supra* (noting some questions—such as "What is your name?"—have no factual content). It was a request for information, not an assertion of any factual matter.

In addition, the utterance was not being offered for the truth of any matter being asserted in the utterance. As noted, there was no factual content in the utterance that could be considered true or false. The only portion of the utterance that could be assessed for truthfulness is the notion of Officer Grell's being alone, which he was, but the utterance was not being offered for purposes of demonstrating that he was alone. Rather, the statement was offered to present the factual context in which Officer Grell approached the house and eventually engaged in the confrontation with Heath.

The utterance was not inadmissible as hearsay, and the district court did not err in allowing its admission over the hearsay objection. Heath's assertion to the contrary is without merit.

(b) Confrontation Clause

Heath also asserts that testimony that his mother asked Officer Grell whether the officer was alone should not have been admitted because of Heath's right to confrontation. Heath's mother did not testify in court and was not subject to cross-examination about her utterance to Officer Grell. We find that her utterance was not testimonial in nature and that its admission did not violate Heath's right to confrontation.

[7-9] "The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .'" *State v. Fischer*, 272 Neb. 963, 968, 726 N.W.2d 176, 181 (2007). In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held that where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. *State v. Fischer, supra*. In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the U.S. Supreme Court expressly held that the Confrontation Clause applies only to testimonial hearsay, because it applies only to witnesses who bear testimony against an accused. *State v. Fischer, supra*.

[10,11] The initial step in a Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. If the statements are nontestimonial, then no further Confrontation Clause analysis is required. *State v. Fischer, supra*. Generally speaking, testimonial statements include ex parte in-court testimony or its functional equivalent (affidavits, custodial examinations, prior testimony); extrajudicial statements contained in formalized testimonial materials (affidavits, depositions, prior testimony, confessions); or those statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.*; *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

[12,13] In *Crawford v. Washington*, 541 U.S. at 51, quoting 2 N. Webster, An American Dictionary of the English Language (1828), the U.S. Supreme Court expressly recognized that the text of the Confrontation Clause applies to those who "'bear testimony,'" and noted that "'[t]estimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" The Court also noted that the primary objective of the Confrontation Clause is concerned with testimonial hearsay. *Crawford v. Washington, supra*. As already discussed above, the utterance at issue in this case was not hearsay and was not a declaration or affirmation of any fact—it was an inquiry, seeking information.

The utterance in this case, in addition to not being hearsay and not being a declaration or affirmation of fact to make it testimonial in nature, was not comparable to the other types of out-of-court utterances that the U.S. Supreme Court recognized as testimonial statements in *Crawford v. Washington, supra*, and *Davis v. Washington, supra*. The utterance was not ex parte in-court testimony or its functional equivalent (affidavits, custodial examinations, prior testimony); extrajudicial statements contained in formalized testimonial materials (affidavits, depositions, prior testimony, confessions); or those statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. There was no interrogation occurring, and there was no investigation into the crimes for which Heath was ultimately charged. Indeed, those crimes did not even occur until after the utterance at issue.

Heath's mother's inquiry of whether Officer Grell was alone was not the functional equivalent of testimonial hearsay. As such, its admission into evidence was not prohibited by the Confrontation Clause. Heath's assertions to the contrary are without merit.

(c) Closing Arguments

Heath also asserts that it amounted to prosecutorial misconduct for the prosecuting attorney to refer during closing

arguments to the inquiry of whether Officer Grell was alone. We find no merit to this assertion.

As we have already noted, the utterance was properly admitted into evidence. It was not hearsay. It was not testimonial. Its admission violated neither the hearsay rule nor the Confrontation Clause. As such, it was not prosecutorial misconduct to argue the utterance as part of the closing arguments. Heath's assertion to the contrary is meritless.

2. Sufficiency of Evidence

Heath next asserts that the State adduced insufficient evidence to support his convictions. He challenges the sufficiency of the evidence on both counts. Heath's arguments on this assignment of error amount to assertions that there was not "enough" evidence or to credibility questions, rather than clear assertions that any particular element of the crimes was not proven. We find sufficient evidence to support a finding of each required element of the crimes beyond a reasonable doubt, and find this assigned error to lack merit.

[14,15] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence. *Id*.

(a) Third Degree Assault on Officer

Heath first asserts that there was insufficient evidence to support the conviction for third degree assault on an officer. He argues that Officer Grell was the aggressor, that Officer Grell was not able to describe exactly how he was injured, and that he did not seek medical treatment or miss work as a result of the injury. We find that the evidence adduced was sufficient for a rational trier of fact to conclude that Heath intentionally,

knowingly, or recklessly caused bodily injury to Officer Grell while the officer was engaged in the performance of his official duties.

[16] Pursuant to Neb. Rev. Stat. § 28-931 (Cum. Supp. 2010), a person commits the offense of third degree assault on an officer if (1) he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer and (2) the offense is committed while such officer is engaged in the performance of his or her official duties. There is no dispute in this case that Officer Grell was a peace officer and that he was engaged in the performance of his official duties, investigating a reported disturbance, when the events in this case occurred. As such, Heath is challenging the sufficiency of the evidence to support a finding that Heath intentionally, knowingly, or recklessly caused bodily injury to Officer Grell.

Viewing the evidence in a light most favorable to the State, we find the evidence indicates that Officer Grell responded to a disturbance call, was permitted to enter the house, and was immediately confronted by Heath instructing him to leave and poking Officer Grell in the chest with a finger. Despite directions from Officer Grell for Heath to stop and to get back, Heath continued his position and continued to direct Officer Grell to leave. When Officer Grell attempted to remove Heath's hand from the officer's chest area, Heath engaged Officer Grell in a physical altercation. This altercation escalated when Heath placed his hand upon Officer Grell's holstered service weapon. Throughout the altercation, Heath shoved and kicked Officer Grell on a number of occasions, resisting Officer Grell's attempts to gain control.

During the altercation, Heath and Officer Grell tripped over tires and rims in the house, and Officer Grell eventually took Heath to the ground and got on top of him, holding him until other officers arrived to assist. Officer Grell testified to nearing the point of physical exhaustion during the altercation. Officer Grell testified that as the adrenaline of the altercation wore off, he noticed pain and discomfort in his leg and knee and discovered that his knee had been scraped. His leg hurt "pretty significantly." He testified to pain in his upper thigh, hamstring, and knee. This pain lasted for several days.

This evidence, when viewed in a light most favorable to the State, supports a finding beyond a reasonable doubt that Heath intentionally, knowingly, or recklessly caused bodily injury to Officer Grell while the officer was engaged in the performance of his official duties. Heath's arguments that Officer Grell could not precisely identify the moment, during the altercation, when the injuries occurred or that Officer Grell did not seek medical attention or that Heath's own testimony demonstrated that Officer Grell was actually the aggressor amount to challenges to the credibility of Officer Grell that we do not resolve. Indeed, the jury was instructed on self-defense and rejected Heath's defense when finding him guilty of assault. There was sufficient evidence to support the jury's finding of guilt, and Heath's assertions to the contrary are meritless.

(b) Resisting Arrest

Heath next asserts that the evidence was insufficient to support his conviction for resisting arrest. Heath argues that there was no evidence to indicate what he was "being arrested" for during the altercation or when the attempted arrest began, and he also argues that his own testimony indicated that he was unconscious during the altercation and could not have resisted any arrest. We find that the evidence adduced was sufficient for a rational trier of fact to conclude that Heath used or threatened physical force or violence against Officer Grell while intentionally attempting to prevent the officer from arresting Heath.

[17,18] Pursuant to Neb. Rev. Stat. § 28-904(1)(a) (Reissue 2008), a person commits the offense of resisting arrest if he or she uses or threatens physical force or violence against a peace officer while intentionally preventing or attempting to prevent the peace officer from effecting an arrest of the actor or another. An arrest is taking custody of another person for the purpose of holding or detaining him or her to answer a criminal charge, and to effect an arrest, there must be actual or constructive seizure or detention of the person arrested. See *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981).

Viewing the evidence in a light most favorable to the State, we find the evidence indicates that Heath engaged Officer

Grell in a substantial physical altercation. During the altercation, Heath physically resisted Officer Grell's attempts to gain control, actively attempted to gain physical control of Officer Grell, and placed his hand upon Officer Grell's holstered service weapon. During this altercation, Officer Grell suffered physical injury to his person. Officer Grell testified that during the course of this physical altercation, he felt as if he was physically reaching the point of exhaustion, at which time he believed the use of deadly force would have been appropriate.

Officer Grell acknowledged that he did not, in the midst of this rigorous physical altercation, verbally advise Heath that he was under arrest or that Officer Grell was attempting to arrest him. He testified, however, that once Heath had engaged him in a physical fight, assaulted him, failed to comply with requests to stop, and continued to resist Officer Grell's control, the situation evolved to an arrest situation. He testified that at some point during the altercation, Heath was under arrest.

Heath cites us to no authority, from any jurisdiction, that would require a verbal advisement of an attempted arrest before physical resistance such as that described in the present record could be considered resisting arrest. Indeed, in *State v. Ellingson*, 13 Neb. App. 931, 939, 703 N.W.2d 273, 281 (2005), this court noted that although an officer "did not verbally announce an arrest," by ordering the defendant to exit a vehicle, the officer had "begun to take actions to effectuate physical control over [the defendant], which actions constituted an attempt to arrest." Officer Grell's actions during the altercation in this case similarly evidenced actions to effectuate physical control over Heath and an attempt to arrest.

Heath also argues that "even if Officer Grell had been attempting to arrest . . . Heath at some point in the struggle, . . . Heath explained that he was knocked unconscious after being grabbed by the throat and shoved into the drywall" and that he therefore could not have possessed the requisite mental capacity to resist arrest. Brief for appellant at 20. This argument is another assertion about credibility of the witnesses, which we do not resolve.

Although Heath testified in his narrative that he did nothing wrong and that Officer Grell grabbed him by the throat and pushed his head into the drywall, knocking him unconscious, Officer Grell's testimony was in stark contrast. Officer Grell specifically testified that Heath was never unconscious during the altercation. Additionally, although he acknowledged that Heath's head did strike the drywall and cause a hole in it during the altercation, Officer Grell's description of the events indicated that this occurred only after an already protracted physical struggle between the two.

The evidence adduced, when viewed in a light most favorable to the State, was sufficient to support a rational trier of fact's concluding that Officer Grell attempted to effect an arrest of Heath and that while intentionally attempting to prevent the arrest, Heath used physical force or violence against Officer Grell. Heath's arguments to the contrary are meritless.

3. Excessive Sentences

Finally, Heath asserts that the sentences imposed in this case were excessive. Heath argues that "[d]espite an array of mitigating circumstances," the district court imposed excessive sentences. Brief for appellant at 23. The sentences imposed were well within the statutory range of permissible sentences, and in light of the circumstances of the present offense and Heath's criminal history, the district court committed no abuse of discretion.

Third degree assault on an officer is a Class IIIA felony offense. § 28-931(2). Resisting arrest, second or subsequent offense, is a Class IIIA felony offense. § 28-904(3). The statutory range of permissible sentences for a Class IIIA felony offense is up to 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2012).

[19] In the present case, Heath was sentenced to concurrent terms of 4 to 5 years' imprisonment for each conviction. This is within the permissible statutory range, and Heath does not assert otherwise. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[20,21] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

The record indicates that the trial court, at the time of sentencing, indicated that it "considers a number of factors," including all the comments of Heath and his attorney and all of the information in the presentence report on his behalf. The court also noted that it had "regard for the nature and circumstances of the crimes and the history, character and condition of [Heath]" in determining the appropriate sentences to impose. The court did not specifically enumerate each and every factor that should be considered, but there is no requirement for the court to do so.

Moreover, the nature of the present offenses indicated crimes involving substantial physical force being used against a police officer—Heath's placing his hand on the officer's holstered service weapon, injury to the officer, and testimony from Officer Grell that during the altercation, he felt he was nearing the point of physical exhaustion. Heath's criminal history comprises five pages in the presentence investigation report and includes several prior convictions for assault, resisting arrest, and hindering arrest.

In 2003, Heath was charged with two counts of third degree assault on an officer, although the charges were subsequently amended to third degree assault charges. The presentence investigation report indicates that, on that occasion, an officer responded to a disturbance call at a house, that the officer encountered Heath smoking a cigarette, that Heath began swinging the cigarette around in a reckless manner, and that Heath then engaged the officer in a physical altercation, during which he struck the officer with knees and elbows. In

2006, Heath was convicted of third degree assault on an officer and sentenced to 18 months' to 2 years' imprisonment. He was convicted of a separate assault charge in 2006. In 2008, he was convicted of third degree sexual assault and resisting arrest.

In 2009, Heath was convicted of resisting arrest, subsequent offense. The presentence investigation report indicates that, on that occasion, officers responded to a reported shoplifting and encountered Heath as a suspect. When advised that an officer was going to conduct a pat-down search to make sure Heath did not have any weapons, Heath placed his hands in his pockets and was visibly holding onto something but refused numerous commands to take his hands out of his pockets. In 2011, Heath was convicted of hindering, delaying, or interrupting an arrest.

There was no abuse of discretion by the district court in imposing the sentences in this case. Heath's assertions to the contrary are meritless.

V. CONCLUSION

We find no merit to Heath's assertions on appeal. His mother's inquiry as to whether the responding officer knocking on her door was alone was not hearsay and was not testimonial, and its admission over Heath's objections did not violate either the hearsay rule or the Confrontation Clause. There was sufficient evidence adduced to demonstrate that Heath committed third degree assault on an officer and resisted arrest. The sentences imposed within statutory limits were not an abuse of discretion and were not excessive. We affirm.

AFFIRMED.

DANELLE KAY COLLINS, APPELLANT, V. COLBY REE COLLINS, APPELLEE.

837 N.W.2d 573

Filed August 20, 2013. No. A-12-505.

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. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Divorce: Child Custody.** When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests.
4. **Child Custody.** Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2012) provides that in determining custody and parenting arrangements, the court shall consider the best interests of the minor child.
5. ____. The Nebraska Supreme Court has held that in determining a child's best interests, courts may consider a variety of factors.
6. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
7. **Child Custody: Armed Forces.** Neb. Rev. Stat. § 43-2929.01(1) (Cum. Supp. 2012) provides that for children of military parents, it is in the best interests of the child to maintain the parent-child bond during the military parent's mobilization or deployment.
8. **Child Custody: Visitation: Armed Forces.** Neb. Rev. Stat. § 43-2929.01(3) (Cum. Supp. 2012) provides that a military parent's military membership, mobilization, deployment, absence, relocation, or failure to comply with custody, parenting time, visitation, or other access orders because of military duty shall not, by itself, be sufficient to justify an order or modification of an order involving custody, parenting time, visitation, or other access.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

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

Nancy S. Johnson, of Conway, Pauley & Johnson, P.C., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Danelle Kay Collins appeals an order of the district court for Hall County, Nebraska, dissolving her marriage to Colby Ree Collins and awarding custody of the parties' two minor children to Colby. On appeal, Danelle challenges the court's custody award. She also asserts that the district court's custody award was in violation of Neb. Rev. Stat. § 43-2929.01(3) (Cum. Supp. 2012), concerning custody awards involving military parents. We find no abuse of discretion in the court's award of custody to Colby, and we find that the court's order was not in violation of the statute.

II. BACKGROUND

Danelle and Colby were married in August 2003 and resided in Grand Island, Nebraska, throughout the duration of their marriage. Two children were born during the marriage: Callie, born in 2005, and Tyler, born in 2008.

The primary issue litigated by the parties was custody of the two children. The parties reached an agreement related to other issues, and nearly all of the testimony adduced at trial concerned the issue of custody.

Prior to trial, the parties submitted a joint proposal for a temporary parenting plan. That proposal provided for joint legal and physical custody, including parenting time of more than 145 days per year for Colby. The court approved the temporary parenting plan.

1. PARTIES' EMPLOYMENT HISTORIES

Both parties were employed outside of the home throughout the marriage. Danelle has a degree in construction management, and she was employed in various jobs throughout the marriage. At the time of separation, she was working for a restoration company that provided services restoring homes damaged by fire or water. She testified that the job required travel across the state and was not "strictly an eight-to-five position." Danelle left that employer between the time of separation and the time of trial, and at the time of trial, she was working for

an insulation company in Kearney, Nebraska, and was starting a pesticide business.

Danelle testified that her new employment was flexible to accommodate her children. She testified that she is "able to take Tyler to work with [her] virtually all day," that she is able to go to Callie's school and volunteer to help in her classroom, and that she is able to take the children to appointments. She testified that the job also pays better than her previous employment.

Colby was employed throughout the marriage as a branch manager and loan officer at a bank. He testified that he had been with the same employer for 17½ years. Colby's typical work schedule was 8 a.m. to 5 p.m., Monday through Friday.

2. Danelle's Military Service

In addition to her various employments, Danelle was a member of the Air National Guard throughout the marriage, serving as a jet engine mechanic. She testified that she had been in the Air National Guard for approximately 12 years at the time of trial and that she was planning to serve for 20 years. She testified that her service in the Air National Guard required her to travel to Lincoln, Nebraska, for weekend drills once per month and that she is subject to deployment at any time.

Danelle testified that when she was required to travel to Lincoln for weekend drills, she typically took the children with her. She testified that the parties' teenage babysitter, Sadie C. (Sadie), accompanied her and the children to Lincoln and took care of the children while she was at the drills. Danelle testified that she did not prevent Colby from keeping the children in Grand Island, but that she did not feel he was supportive of her military career and that there would have been "a huge fight if [she] would ask him to watch the children on the weekend [she] had drill." She testified that Colby accompanied them to Lincoln on one or two occasions.

Colby, on the other hand, testified that Danelle usually did not tell him about her weekend drills until the Friday she was leaving to travel to Lincoln and that although she "[o]ccasionally" gave him the opportunity to keep the children in Grand

Island, she gave him an ultimatum of either joining them all in Lincoln or not. He testified that he did not accompany them to Lincoln because it would have meant spending the weekend at a hotel with the female teenage babysitter, Sadie, and he did not feel that would have been appropriate.

Danelle testified that, in addition to the weekend drills once per month, the other primary time commitment related to being in the Air National Guard involved 2-week training sessions held once per year. She testified that she had been serving in the Air National Guard long enough her attendance at these training sessions was no longer mandatory and that she had opted not to attend on some occasions. On cross-examination, she acknowledged that in 2010, she had told Colby she was going to be in Virginia for the 2-week drill, but she was actually in Texas. Colby testified that he was confused about why Danelle would lie about the location of her drill, and the record reveals no other explanation.

In addition to her regular service and training commitments, Danelle had been deployed on three occasions during the marriage. Danelle testified that her first deployment was in 2006, before Tyler was born. She was deployed for approximately 2 weeks to Turkey. Danelle testified that she took Callie to North Dakota to be cared for by her parents during this deployment. Colby, however, disputed Danelle's testimony that Callie was cared for in North Dakota by Danelle's parents during that deployment.

Danelle testified that her second deployment was in 2007, again before Tyler was born. She was deployed for approximately 2 weeks to Guam. Danelle testified that she again took Callie to North Dakota to be cared for by her parents during this deployment. Colby again disputed Danelle's testimony and testified that although Callie spent part of the deployment time visiting Danelle's parents in North Dakota, she spent part of the deployment time with him.

At the conclusion of the trial, the parties agreed to a stipulation concerning the first two deployments and Callie's care. The parties stipulated that Colby had provided care for Callie during "part of" the 2006 and 2007 deployments.

Danelle testified that her third deployment was in 2009, after Tyler was born. She was deployed for more than 40 days, although the record does not reflect the location of this deployment. Danelle testified that Callie and Tyler were primarily cared for by the teenage babysitter, Sadie, during this deployment. Sadie testified that she attended school during the day and cared for Callie and Tyler in the evening and on weekends, that when Colby arrived home from work he would make dinner for everyone, and that she then took care of getting the children ready for bed.

The evidence adduced at trial indicated that Danelle's military service was one of the primary sources of contention between the parties. Danelle testified that Colby "hated the military and would not support [her] in it at all." She testified that she could not ask Colby to care for the children during her weekend drills because "it was a huge fight" if she would do so. She testified that she "could not ask him to take care of [the] children while [she] was on military because it would end up in a fight" and that "to save peace and have a nonargumentative house in front of the children, [she] would just make other arrangements . . . with [her] family." She also testified that when she was notified about being deployed, she told her family before telling Colby because she "knew the kind of fight [she] would have on [her] hands when . . . talking to Colby about it."

Colby disputed Danelle's testimony. He testified that his father was in the Air Force and that he had "a lot of respect for the military." He testified that his concern with Danelle's military service centered around dishonesty on Danelle's part concerning her military service. Danelle lied to Colby and to her family in 2006, when she told them that she had been "retained" and she had, in fact, chosen to reenlist. Colby testified that the parties had had a prior discussion about her not continuing with her military service once they had children, that Danelle had "assured [him] she would get out when her enlistment time was up," and that he did not discover for more than 2 years that she had lied about voluntarily reenlisting. In addition, Danelle lied to Colby about the location of a

2-week training session in 2010, when she told him she was going to Virginia but was, in fact, going to Texas.

Colby also testified that he had concerns about her military service, because she could be deployed at any time and could be taken "overseas for months to years." He testified that he was concerned about her safety if she was deployed and about the "uncertainty all over the world."

3. Primary Caregiving

Danelle testified that when the children were in daycare, Colby took the children to daycare and Danelle picked them up. She testified that in a typical evening during the marriage, she would take the children home from daycare and would play with them while she was making supper, cleaning, and doing laundry. She testified that after eating, she would clean up the kitchen, bathe the children, "[g]et jammies on" the children, and rock the children to sleep.

Danelle testified that she made sure the children had all the clothing they needed, she did the grocery shopping, she did the cleaning of the house, she did the laundry, she took care of the children's health and medical needs, she made the appointments and took them to doctors and dentists, and she arranged for birthday parties for the children. She testified that if the children got sick, the babysitter would call her. She testified that if the children needed a hug or fell down and hurt themselves, they went to her.

Danelle testified that Colby was "[t]ypically . . . either at a community service event . . . or out playing golf or otherwise he was just at home and usually on the couch in front of the T.V." Danelle adduced testimony from her mother and from the teenage babysitter, Sadie, to support her assertion that Colby was not involved with caring for the children.

Colby disputed Danelle's testimony and evidence about his participation in caring for the children. He testified that the parties shared the responsibilities of getting the children ready in the mornings, that he took the children to daycare, and that he picked the children up from daycare approximately half of the time. He adduced testimony from the daycare provider, and she testified that he dropped the children off and that

either Danelle, Colby, or Sadie picked the children up. Colby testified that the parties shared responsibilities of feeding and bathing the children. He testified that Sadie was typically present in their home in the evenings and that she also participated in caring for the children. The witnesses who testified on Colby's behalf also testified that when the children have needed him, Colby has stopped doing business or work and left to care for them.

Colby testified that since the separation, when the children were in his care, he was responsible and able to get the children up in the morning, dressed, fed, and to school. He testified that he was responsible and able to get the children picked up after school, and that he got them home, cooked them supper, played with them, read and told stories to them, bathed them, and got them to bed. He testified that he did this on his own, without the assistance of Sadie.

Colby adduced testimony from family friends and former neighbors in support of his assertion that he had been actively involved with parenting the children. Those witnesses testified, based on their observations of the parties during the marriage, that the children were a high priority for Colby, that he shared in the responsibilities of caring for the children, and that both parties were generally working together with the children and household duties. The witnesses testified that they had witnessed Colby taking care of the children on his own, but that Danelle typically had assistance caring for the children, either from Colby or from Sadie.

4. Other Legal Matters

In 2011, Danelle was convicted of driving under the influence. She lost her operator's license for 90 days, was fined, and was required to attend classes. She testified that by the time of trial, her operator's license had been reinstated.

During the course of the proceedings, a restraining order was entered against Colby. There was very little testimony or evidence adduced concerning the circumstances of the order, but it appears to have arisen out of an altercation that occurred between Colby and another man whom Danelle had begun dating. It appears that the incident resulted in a domestic assault

charge being brought against Colby, but he was found not guilty by a jury. The parties apparently agreed prior to the dissolution trial that the details of the incident would not be discussed, and there was very little testimony about it.

5. Miscellaneous Testimony

Danelle testified that she believed it was in the best interests of the children for her to be awarded custody. She testified that the children had "only always been with [her]" and that she "primarily [took] care of them."

Danelle testified that she was planning to move to Kearney. She testified that since the separation, she had begun dating her new boss, and she acknowledged that the residence she had planned to move to in Kearney was owned by him. There was evidence adduced that Danelle had begun to date within 30 days after leaving Colby. Danelle testified that she and her boss were not living together and that he had not spent the night at her residence. She acknowledged, however, that she and the children had spent the night at his home prior to the dissolution trial.

Danelle testified that when she and the children have stayed at her boss' home, the children each have their own room "upstairs" and that she also stays upstairs. She testified that this usually happens on weekends, although there had also been occasions during the week when she had an early appointment or they had been involved in activities that ended late at night. The evidence adduced at trial indicated that the teenage babysitter, Sadie, had also stayed at Danelle's boss' home with Danelle and the children. Sadie testified that she had done so on probably more than 10 occasions.

There was also evidence adduced that Danelle had taken Sadie with her to various social events, including a bachelorette party, a "tanking" trip, and parties for the Fourth of July and New Year's Eve. Sadie testified that on these occasions, when she was 18 years of age or younger, there was alcohol made available to her, and that on some of the occasions, she had consumed alcohol with Danelle and in the presence of the children.

Colby testified that he believed he could provide the most stable and loving environment for the children. He testified that he was going to continue living in the marital home, which was the home the children had known since birth, and that he could provide consistency for Callie in attending the same school. He adduced evidence from a counselor who had treated Callie, and the counselor testified that Callie had expressed being sad about the possibility of having to move. The counselor testified that she would expect that there would be some regression in Callie's behavior if she were required to move.

Colby testified that he felt it was important for the children to know that both he and Danelle loved them and were supportive of them. He testified that he believed that he and Danelle needed to "get past all of this garbage" and find a way to "co-parent these children together." He testified that their relationship was broken, that Danelle had already moved on to a new relationship, and that he would do so once the parties were divorced, but that they needed "to be there for the benefit of [the children] and be a supportive structure for them."

6. Decree and Rulings

In the decree dissolving the parties' marriage, the court recognized that the primary issue at trial had concerned custody of the children. The court specifically indicated that, in making its decision on custody, it had

> considered the factors statutorily listed in Neb. Rev. Stat. §42-364 which is the relationship of the children to each parent prior to the commencement of the action; the desires and wishes of the minor children if of such an age of comprehension to base such desires and wishes on sound reasoning; the general health, welfare, and social behavior of the children; and any credible evidence of abuse inflicted on any members of the family.

The court also specifically noted that it had

> also considered from the evidence the moral fitness of the parents; the respective environments offered by each

> parent; the emotional relationship between child and parent; the age, sex and health of the parties and children; the effect on the children as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the children; children's preferential desire; and the general health, welfare and social behavior of the child.

The court found both parents to be fit and proper, and recognized that both expressed love and concern for the children. The court pointed to testimony from Callie's counselor as indicative of the interest both parents have in helping the children to cope with the normal difficulties associated with the dissolution of the familial circumstances.

The court specifically recognized that Danelle's military service had resulted in a great deal of stress in the marriage, not only because of the actual military obligations, "but also [because of] the manner in which the military career has been addressed by the parties." The court recognized the conflict in the testimony, wherein Danelle asserted that the problem was Colby's lack of support and Colby asserted that the problem was Danelle's "being deceitful and putting her own interests above that of her family." The court recognized the specific untruths evident in the record concerning Danelle's reenlistment and "perplexing" representation that she was going to Virginia instead of Texas for training.

The court also recognized the issues related to Danelle's weekend training drills. The court found that they "turned into a circumstance of [Danelle's] taking the children and a teenage babysitter to Lincoln" instead of leaving the children "at their home with [Colby]." The court recognized Colby's testimony that Danelle would schedule the weekends without notifying him and leaving him with the choice of either staying in Grand Island or accompanying Danelle, the children, and the teenage babysitter to Lincoln and staying at the motel with the teenage babysitter, which Colby felt was "inappropriate."

The court found that Danelle had chosen throughout the marriage to "rely upon the teenage babysitter to assist her with

the children as opposed to giving [Colby] every opportunity to do so."

The court specifically noted that it had reviewed the testimony of the witnesses and had been present for and viewed their testimony. The court specifically indicated that its decision "does include the Court's weighing the credibility of the witnesses' testimony." The court specifically indicated that it was "concerned about the credibility of [Danelle and her] portrayal of the parties' involvement with the children." The court specifically "question[ed] the credibility of [Danelle's] testimony concerning [the] amount of involvement of [Colby] with the children" and noted the evidence adduced by Colby and "the inconsistencies in the evidence concerning [Danelle] and her propensities to be truthful in the relationship involving her family."

The court noted Danelle's dating relationship with her boss and her plans to move to Kearney. The court compared Colby's plans to remain in the marital home and his consistent employment situation.

The court specifically questioned Danelle's reliance on the teenage babysitter to help her care for the children. The court also recognized that Danelle's military service and decision to reenlist, with the uncertainty of deployment, impacted her ability to provide a stable environment for children of this age.

The court concluded that Colby could provide the more stable environment for the children. Thus, the court awarded custody of the children to Colby.

Danelle filed a motion for new trial or to alter or amend the decree. She alleged that the court had overlooked her role as primary caregiver and that the court erred in disregarding her assertions Colby had chosen not to be involved with the children and in disregarding Colby's attitude toward child rearing.

Danelle then filed an amended motion for new trial or to alter or amend the decree. In the amended motion, she made the same assertions as in the initial motion, but also added assertions that the court had erred in disregarding § 43-2929.01(3). Danelle asserted in her amended motion that

the statute "precludes the Court from considering" her military service in making its custody determination.

In response to Danelle's amended motion, the district court entered a journal entry denying her relief. In the journal entry, the court made specific findings that it had not failed to consider the statute and that Danelle's military service was not, by itself, the basis for the court's custody determination. The court specifically held that the bulk of the evidence adduced at trial had been the testimony of the parties and that credibility was a significant factor in the court's decision. The court specifically noted that each party's testimony had been in stark contrast to the other's and that the court's finding Danelle lacked credibility had been a significant factor in the court's decision.

This appeal followed.

III. ASSIGNMENTS OF ERROR

Danelle asserts on appeal that the district court abused its discretion in awarding custody of the parties' minor children to Colby and in violating § 43-2929.01(3).

IV. ANALYSIS

On appeal, Danelle challenges the court's award of custody to Colby. She asserts that she was the primary caregiver for the children throughout the marriage and that awarding Colby custody will result in instability for the children. She also asserts that the district court's custody award was based on her military service, in violation of § 43-2929.01(3). We find no merit to these assertions.

1. Award of Custody to Colby

Danelle first asserts that the district court abused its discretion in awarding custody to Colby. She argues that the evidence adduced at trial demonstrates that she was the primary caregiver to the children throughout the marriage, that she was the primary caregiver after the parties separated, and that awarding custody to Colby will result in instability for the children. Our review of the record reveals substantially conflicting testimony, credibility issues related to Danelle, and sufficient evidence such that we cannot find the

district court's custody award to be untenable or an abuse of discretion.

[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 *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

[3] When custody of a minor child is an issue in a proceeding to dissolve the marriage of the child's parents, child custody is determined by parental fitness and the child's best interests. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). In this case, the court found that both parties are fit and proper to have custody. Neither party disputes this conclusion. Thus, the focus of this appeal is on the best interests of the children.

[4,5] Neb. Rev. Stat. § 43-2923(6) (Cum. Supp. 2012) provides that in determining custody and parenting arrangements:

> [T]he court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of . . . :
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning; [and]
>
> (c) The general health, welfare, and social behavior of the minor child.

See *Pohlmann v. Pohlmann, supra*. In addition to these factors, the Nebraska Supreme Court has previously held that in determining a child's best interests, courts

> "'may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each

> parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.'"

Davidson v. Davidson, 254 Neb. 357, 368, 576 N.W.2d 779, 785 (1998).

The present case is, in essence, one where the parties have presented conflicting evidence concerning the best interests of the children. Both parties were found to be fit and proper. As set forth in more detail above in the factual background portion of this opinion, the parties provided substantially conflicting evidence concerning their parenting strengths and weaknesses and about which party would better serve the children's interests as physical custodian.

Although Danelle asserted that she was essentially the only caregiver for the children and that Colby was uninvolved, Colby testified that responsibilities were shared and adduced testimony from other witnesses to support his assertions. Although Danelle asserted that her parents cared for Callie during the first two deployments, Colby testified that he provided care; the parties eventually stipulated that he provided care for part of the time. Although Danelle testified that her participation in the military was resented by Colby and led to fights, Colby testified that the fights were caused by her lying to him about her service. Danelle acknowledged lying to him.

[6] Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). In fact, in contested custody cases, where material issues of fact are in dispute, the standard of review and the

amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal. *Id*.

In this case, there was sufficient evidence to support the court's custody determination. The court specifically indicated, both in the decree and in its journal entry overruling the motion for new trial or to alter or amend the decree, that it was heavily influenced in this case by the credibility of the witnesses and that it did not find Danelle to be credible. In a case such as this one, where the testimony of the parties was substantially in conflict and where the court made specific findings that it found one party to lack credibility—especially where the record includes that party's acknowledgement of lying to the other party on multiple occasions—given our standard of review and deference to the trial court's determinations about credibility, we cannot say that the court's decision to award custody to Colby was clearly untenable or an abuse of discretion.

2. § 43-2929.01(3)

Danelle also asserts that the district court's custody award was based on her military service and that, as a result, it was in violation of § 43-2929.01(3). We find that even if we assume that § 43-2929.01(3), which took effect during the pendency of this action, is applicable in this case, the record demonstrates that Danelle's military service was not the only consideration in the court's custody award and, as a result, § 43-2929.01(3) was not violated.

[7] Section 43-2929.01(1) provides: "The Legislature finds that for children of military parents it is in the best interests of the child to maintain the parent-child bond during the military parent's mobilization or deployment." The remainder of § 43-2929.01 then includes a variety of provisions designed to carry out that recognition.

[8] Section 43-2929.01(3) provides:

> A military parent's military membership, mobilization, deployment, absence, relocation, or failure to comply with custody, parenting time, visitation, or other access orders

> because of military duty *shall not, by itself, be sufficient to justify an order* or modification of an order involving custody, parenting time, visitation, or other access.

(Emphasis supplied.)

Danelle asserts on appeal that the district court disregarded § 43-2929.01(3) in considering her military service in its custody order. She also argues that in cases involving military parents, the district court should be required to issue specific findings about § 43-2929.01(3) as a matter of public policy.

Colby argues that it is not clear that § 43-2929.01 is even applicable to this proceeding, as it did not take effect until after the complaint seeking dissolution had been filed. He also argues that even if it is applicable, it was not violated in this case because the district court did not base its custody decision solely on Danelle's military service.

We decline to specifically determine whether § 43-2929.01 is applicable to actions in which the complaint was filed prior to its effective date but the decree was issued after its effective date. In this case, even if we assume that it is applicable, we find that the district court clearly did not violate the terms of § 43-2929.01(3).

The plain language of § 43-2929.01(3) provides that military service "shall not, *by itself*, be" the basis for a custody order. (Emphasis supplied.) The statute provides that military service alone cannot be the basis for the court's custody order—it does not provide, as Danelle attempted to assert to the district court in her motion for new trial or to alter or amend the decree, that the court is precluded from considering military service in making its custody order.

Danelle asserts on appeal that although the district court indicated in its order denying her motion for new trial or to alter or amend the decree that her military service was not the only consideration in the court's order, it did so "without disclosing what the other reasons might have been." Brief for appellant at 13. We disagree.

In the decree, the district court specifically indicated that it had given consideration to all of the relevant statutory and common-law factors set forth above concerning a determination as to the best interests of the children in custody

determinations. The court specifically listed all of those considerations. Although the court did not make specific and individual factual findings with respect to each consideration, the court did make specific findings about the conflicting evidence concerning the parenting of the children, made specific findings about the parties' relative employment and proposed living situations, made specific findings about Danelle's relationship with her boss, and made a specific finding about which parent the court felt could provide the more stable environment for the children.

Perhaps most important, the court went to some lengths to set forth specific findings about the credibility of the witnesses. As discussed above, the parties presented substantially conflicting testimony about the primary care of the children and the reasons for various parenting decisions during the marriage. Danelle acknowledged—and the court specifically found, emphasized, and relied upon—the fact that she had lied to Colby about her reenlistment in the military and about the location of her training. The court specifically indicated, both in the decree and in its ruling denying Danelle's motion for new trial or to alter or amend the decree, that it did not find Danelle to be credible and that its credibility determination was a significant factor in its custody award. There is nothing in the statute that would require any more specific findings than the court actually made.

On appeal, Danelle relies heavily on her own testimony and representations about the respective parenting roles during the marriage, about Colby's attitude toward her and the children, and about why awarding her custody would be in the best interests of the children. The district court made specific findings that it did not find her to be credible. We are in no position to disregard the court's findings or emphasis on the credibility of the parties and the witnesses.

A review of both the decree and the court's journal entry denying Danelle's motion for new trial or to alter or amend the decree demonstrates that the court did reference Danelle's military service in its award of custody. It did so, however, partly in reference to the difficulties that led to the breakdown of the marriage, partly in reference to the impact it

would have on future stability for the children, and partly in reference to Danelle's deceits and the impacts those had on her credibility. The court, however, also considered all of the relevant factors for a custody determination, and Colby presented sufficient evidence, as set forth above, to support the court's ultimate conclusion that the best interests of the children would be served by awarding him custody. The court's custody award was not based on Danelle's military service, on its own.

V. CONCLUSION

We find no merit to Danelle's assertions on appeal. The court's custody award was supported by sufficient evidence, including credibility concerns related to Danelle, and was not an abuse of discretion. The court also did not base its decision on Danelle's military service, on its own. We affirm.

AFFIRMED.

MARY BECERRA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIO E. BECERRA III, APPELLANT, V. MICHAEL SULHOFF, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIO E. BECERRA, SR., AND UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEES.

837 N.W.2d 104

Filed August 20, 2013. No. A-12-823.

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. **Railroads: Motor Vehicles: Negligence.** A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains, and failure to do so without a reasonable excuse constitutes negligence.

4. **Railroads: Motor Vehicles: Right-of-Way.** Although railroad trains do not have an absolute right-of-way at grade crossings under all conditions, an engineer operating a train has no duty to yield the right-of-way until it appears to a reasonably prudent person that to proceed would probably result in a collision. At that time, it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way.
5. **Motor Vehicles: Negligence.** Regardless of whether a road is icy, a motorist is expected to retain control of his or her vehicle and abide by his or her duties.
6. **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.
7. **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.
8. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
9. **Negligence: Proximate Cause.** Under Nebraska negligence law, proximate cause consists of three elements: that (1) but for the negligence, the injury would not have occurred, (2) the injury is the natural and probable result of the negligence, and (3) there is no efficient intervening cause.
10. ____: ____. The foreseeability of an injury that results from a negligent act determines whether that injury is the natural and probable result of the act.
11. ____: ____. To constitute proximate cause, an injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person could have known, or would or ought to have foreseen, might probably occur as the result.
12. ____: ____. Regarding proximate cause, the law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen.
13. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence, unaccompanied by an efficient intervening cause, and without which the result would not have occurred.
14. ____: ____. An efficient intervening cause is a new and independent act, itself a proximate cause of a result, which breaks the causal connection between the original wrong and the result.
15. **Negligence.** A person is not legally responsible for a result if it would not have resulted but for the interposition of an efficient intervening cause, which he or she should not have reasonably anticipated or reasonably foreseen.
16. **Negligence: Proximate Cause.** The question of whether an act is a proximate cause, or simply a nonactionable condition, is determined by whether it was

foreseeable that the initial act could join with the intervening act to cause the alleged injuries.

17. **Summary Judgment: Affidavits.** Neb. Rev. Stat. § 25-1335 (Reissue 2008) prescribes a prerequisite for a continuance, or additional time or other relief under the statute, namely, an affidavit stating a reasonable excuse or good cause for a party's inability to oppose a summary judgment motion.
18. ____: ____. Without the appropriate affidavit required by Neb. Rev. Stat. § 25-1335 (Reissue 2008), a party is not entitled to a continuance or additional time to obtain affidavits or discovery to counteract an opposing party's motion for summary judgment.
19. **Motor Vehicles: Negligence.** The Nebraska guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue 2008), states that the owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such vehicle.
20. **Motor Vehicles: Negligence: Parent and Child.** Under the Nebraska guest statute, relationship by consanguinity or affinity within the second degree includes children.
21. **Motor Vehicles: Negligence: Words and Phrases.** Gross negligence, within the meaning of the Nebraska guest statute, means gross and excessive negligence or negligence in a very high degree, the absence of slight care in the performance of duty, an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
22. **Negligence.** Negligence that is purely momentary in nature generally does not constitute gross negligence.
23. **Motor Vehicles: Negligence: Proof.** Gross negligence on the part of a driver must be proved by the plaintiff.

Appeal from the District Court for Douglas County: TIMOTHY P. BURNS, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

E. Terry Sibbernsen and Andrew D. Sibbernsen, of Sibbernsen, Strigenz & Sibbernsen, P.C., for appellant.

Karen Weinhold and Angela D. Jensen-Blackford, of Engles, Ketcham, Olson & Keith, P.C., for appellee Michael Sulhoff.

William M. Lamson, Jr., Anne Marie O'Brien, and JoAnna S. Thomas, of Lamson, Dugan & Murray, L.L.P., for appellee Union Pacific Railroad Company.

PIRTLE and RIEDMANN, Judges, and MULLEN, District Judge, Retired.

MULLEN, District Judge, Retired.

I. INTRODUCTION

Mario E. Becerra III (Mario III) was a passenger in a motor vehicle operated by his father, Mario E. Becerra, Sr. (Mario Sr.). Mario III and Mario Sr. were killed when their vehicle collided with a train owned and operated by Union Pacific Railroad Company (Union Pacific). Mario III's mother, Mary Becerra (Becerra), individually and as the personal representative of the estate of Mario III, brought this negligence action against Michael Sulhoff, personal representative of the estate of Mario Sr., and Union Pacific. Becerra appeals from an order of the district court for Douglas County granting summary judgment in favor of Sulhoff and Union Pacific.

II. BACKGROUND

On December 23, 2007, at approximately 1:30 p.m., Mario Sr. drove a motor vehicle with his minor son, Mario III, riding as a passenger. The vehicle was traveling eastbound on County Road B in Otoe County when it crossed railroad tracks owned and operated by Union Pacific. As the vehicle crossed the tracks, it was struck on the right rear by a northbound train owned and operated by Union Pacific. The vehicle was propelled by the collision into a concrete signal set base owned by Union Pacific. Both Mario Sr. and Mario III were killed as a result of the collision. The road preceding the tracks was ice covered and slick. A crossing advanced warning sign and crossbucks are located near the railroad tracks.

On December 22, 2009, Becerra filed this negligence action against Sulhoff and Union Pacific, seeking to recover general and special damages related to the death of Mario III. Becerra alleged that Mario Sr. was grossly negligent in (1) driving at an excessive speed under the conditions existing at the time and place of the collision, (2) failing to yield to the northbound Union Pacific train at a designated railroad crossing, and (3) failing to keep a proper lookout for the northbound Union Pacific train. Becerra alleged that Union Pacific was

negligent in (1) failing to keep a proper lookout for motor vehicular traffic under the conditions existing at the time and place of the collision, (2) failing to exercise due care under the last-clear-chance doctrine, and (3) failing to remove a concrete signal set base that presented a dangerous condition as a secondary impact object within close proximity to the crossing.

Union Pacific filed an answer on January 21, 2010, affirmatively alleging that the sole cause of the accident was the negligence of Mario Sr. On November 18, Union Pacific filed a motion for summary judgment alleging that there were no genuine issues of material fact and that it was therefore entitled to judgment as a matter of law. A hearing on Union Pacific's motion for summary judgment was held on February 3, 2011. In its order filed on April 14, the district court granted summary judgment in Union Pacific's favor. The district court found that (1) Mario Sr. was the sole proximate cause of the collision, (2) the last-clear-chance doctrine did not apply to support Becerra's claims, and (3) the concrete barrier was a condition, not a cause of the collision, which could not create an independent basis for recovery. Becerra subsequently filed a motion to alter or amend the judgment. The district court amended its order to provide "the necessary final judgment language" as well as clarify that the order makes "no actual factual determinations regarding the driver of the car at the time of the collision." Becerra then appealed the district court's order granting summary judgment in favor of Union Pacific. We dismissed Becerra's appeal, finding that the district court's order was not final and appealable, because the court had not disposed of Becerra's claim as to Mario Sr.

Sulhoff filed an amended answer on November 16, 2011, affirmatively alleging that Becerra's claims against him were barred by Nebraska's Motor Vehicle Guest Statute, Neb. Rev. Stat. § 25-21,237 (Reissue 2008). On July 13, 2012, Sulhoff filed a motion for summary judgment alleging that the pleadings, affidavits, and depositions demonstrate there were no genuine issues of material fact and that he was therefore

entitled to judgment as a matter of law. A hearing on Sulhoff's motion for summary judgment was held on August 1. In its order filed on August 23, the district court granted summary judgment in Sulhoff's favor. The district court found that pursuant to the Nebraska guest statute in effect at the time of this accident, § 25-21,237, Mario Sr. can be held liable for damages only if he was grossly negligent in the operation of his vehicle at the time of the collision. The district court found that there was clearly an inference Mario Sr. was guilty of ordinary negligence, but that there was no evidence Mario Sr. was guilty of gross negligence. The district court, having previously sustained a motion for summary judgment in favor of Union Pacific, dismissed Becerra's complaint. Becerra filed this timely appeal.

III. ASSIGNMENTS OF ERROR

Becerra assigns that the district court erred in (1) finding that the actions of Mario Sr. constituted the sole proximate cause of the accident, (2) finding that the concrete barrier did not constitute active negligence on the part of Union Pacific, (3) finding that there was no evidence that Mario Sr. was grossly negligent, (4) finding that there was no evidence that the weather conditions had any effect on the accident, (5) entering summary judgment in favor of Sulhoff, and (6) entering summary judgment in favor of Union Pacific.

IV. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (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.*

V. ANALYSIS

1. Summary Judgment in Favor of Union Pacific

Becerra assigns two errors relating to the district court's grant of summary judgment in Union Pacific's favor. Becerra asserts that the district court erred in finding that (1) the actions of Mario Sr. constituted the sole proximate cause of the accident and (2) the concrete barrier did not constitute active negligence on the part of Union Pacific.

[3-5] Union Pacific's general defense is that Mario Sr.'s negligent operation of the vehicle in which Mario III was a passenger was the sole proximate cause of the accident. The respective duties of motorists and train engineers approaching a grade crossing are well settled.

> A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains, and failure to do so without a reasonable excuse constitutes negligence. Although railroad trains do not have an absolute right-of-way at grade crossings under all conditions, an engineer operating a train has no duty to yield the right-of-way until it appears to a reasonably prudent person that to proceed would probably result in a collision. At that time, it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way.

Dresser v. Union Pacific RR. Co., 282 Neb. 537, 542, 809 N.W.2d 713, 718 (2011). Regardless of whether a road is icy, a motorist is expected to retain control of his or her vehicle and abide by his or her duties. See *Burkey v. Royle*, 233 Neb. 549, 446 N.W.2d 720 (1989).

[6,7] The respective duties of parties in a summary judgment proceeding are also well settled. 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. *Dresser v. Union Pacific RR. Co., supra*. 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.*

For Union Pacific to be successful on its motion for summary judgment, the record must show as a matter of law either that it owed Mario III no duty, that any duty owed was not breached, or that any breach was not the proximate cause of the accident.

(a) Failure to Keep a Proper Lookout

Becerra argues there are genuine issues of material fact related to her claim that Union Pacific was negligent in failing to keep a proper lookout and failing to control the train upon seeing Mario Sr.'s vehicle, knowing that the roads were icy and that the vehicle would likely be unable to stop in time to avoid the collision. We address whether genuine issues of material fact exist on this claim.

(i) Duty

Pursuant to long-established Nebraska law, Union Pacific's engineer had the right-of-way at the grade crossing. *Dresser v. Union Pacific RR. Co., supra*. He had a duty to exercise ordinary care to avoid an accident, including yielding the right-of-way, when it appeared to a reasonably prudent person that to proceed "would probably result in a collision." *Id.* at 542, 809 N.W.2d at 718.

It is undisputed that Mario Sr. did not stop his vehicle at the railroad crossing. Furthermore, testimony from the train engineer and conductor, as well as video evidence, shows that Mario Sr. did not attempt to slow his vehicle as he approached the railroad crossing. Precisely when the train engineer's duty to exercise ordinary care to avoid the accident arose in this case may be subject to dispute, but it is clear that it had arisen.

(ii) Breach

Union Pacific is entitled to summary judgment if the record shows as a matter of law that the engineer's duty to exercise

ordinary care to avoid the accident was not breached. Union Pacific presented evidence at the summary judgment hearing establishing that at the time of the collision, the weather was clear and the sun was shining. The evidence submitted at the summary judgment hearing established that the Union Pacific train was in a federally regulated speed limit zone of 60 m.p.h., that Union Pacific had self-imposed a modified speed limit of 50 m.p.h., and that the train was traveling at 42 m.p.h. at the time of the collision. The record clearly established that the train's whistle was activated 28 seconds before the collision, and continued to sound until after the collision. In the conductor's affidavit, he stated that he observed Mario Sr.'s vehicle, but had "every reasonable belief that the vehicle would stop" because the train's horn was blowing loudly and the train was clearly visible and quickly coming onto the crossing. The conductor then stated that "[i]n a split second, I then observed the vehicle proceed past the crossbucks and onto the crossing." The conductor stated that "[b]ecause of the locomotive's proximity to the crossing at the time the vehicle proceeded onto the crossing, it would have been impossible to stop the locomotive and avoid impact with the vehicle." Both the engineer and conductor testified in their depositions that the engineer activated the emergency brake as soon as they realized that Mario Sr.'s vehicle was not going to stop, which was before the train entered the crossing.

Union Pacific also offered the affidavit of a certified designated supervisor of locomotive engineers who has been specially trained in the interpretation of event recorder data. According to him, an event recorder is similar to a "black box" on an airplane. Event recorders are required and regulated by the Federal Railroad Administration. Event recorders provide a recording of the locomotive's functions (including speed, distance, time, horn activation, direction of travel, and braking) as they occur. The supervisor stated that the train's event recorder showed the emergency brake on the lead locomotive was activated between 2,488 and 2,550 feet prior to the stop. In Union Pacific's answers to interrogatories, which were received into evidence, it stated that the train traveled approximately 2,429 feet after the collision, before coming to a stop.

Thus, there is evidence that the train's emergency brakes were activated prior to the collision.

Union Pacific made a prima facie case by producing enough evidence to demonstrate that it was entitled to judgment on the issue of "failing to keep a proper lookout and failing to control the train" if the evidence was uncontroverted at trial. See *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011). The burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to Becerra. See *id.*

Becerra presented no evidence at the summary judgment hearing. Becerra argues, however, that the following matters create issues of material fact that warrant reversal of the district court's grant of summary judgment in Union Pacific's favor: (1) The engineer and conductor knew or should have known that the weather conditions were such that an approaching vehicle may not have been able to stop to avoid the collision, therefore requiring extra vigilance in keeping a proper lookout and in stopping as soon as they were made aware of the vehicle, (2) the train needed only to slow down to permit the vehicle to clear the tracks and did not need to come to a complete stop to avoid the collision, (3) had the crew maintained a proper lookout and seen the vehicle only seconds earlier, or deployed the engine's brakes seconds sooner, the train could have prevented the collision.

[8] We view the evidence in the light most favorable to the party against whom the summary judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence. *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012). But we are mindful that conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment. *Dresser v. Union Pacific RR. Co., supra*. As stated previously, Becerra presented no evidence at the summary judgment hearing. Becerra's foregoing assertions of "facts" regarding Union Pacific's failure to keep a proper lookout and failure to slow the train down sooner are nothing more than mere possibility based entirely on speculation and conjecture. Accordingly, Becerra did not produce

evidence showing the existence of an issue of material fact that prevents judgment as a matter of law in favor of Union Pacific on its alleged failure to keep a proper lookout.

(b) Concrete Barrier

Becerra asserts that the district court erred in finding that the concrete barrier did not constitute active negligence on the part of Union Pacific. The district court found that the concrete barrier did not create an independent basis for recovery. The district court, citing *Loudy v. Union P. R. R. Co.*, 146 Neb. 676, 21 N.W.2d 431 (1946), found that any negligence in maintaining the concrete barrier at the intersection was "passive and potential thereby only creating a condition" and that it was Mario Sr.'s actions that were "active and the effective cause of the accident."

In *Loudy*, the plaintiff sued to recover damages to his car incurred in a crossing accident. The plaintiff alleged that the collision and damages proximately resulted from the railroad's negligence, because it, among other things, negligently failed to keep in repair good and sufficient crossings over its tracks, including the grading, ditches, and culverts over its right-of-way. Plaintiff alleged that a mudhole in the railroad's right-of-way, 50 to 60 feet before the tracks, caused the car, driven by the plaintiff's wife, to slow down. Once the driver left the mudhole and approached the tracks, she saw the train three to four blocks away. The driver tried to hurry the car, but it had slowed down so much that she could not go on across, so she shifted from second gear directly into reverse, which killed the motor, and the car stopped on the tracks. The driver was able to exit the car and escape injury, but the train struck the car. The Nebraska Supreme Court stated:

> If we assume, without deciding, that defendant was obligated by statute to maintain the highway within its right-of-way, we must nevertheless conclude that the mud hole was only a condition and not the proximate cause of the collision. It is the rule that ordinarily where the negligence of one party is merely passive and potential causing only a condition while that of the other is the moving and effective cause of the accident, the latter is the proximate

> cause. Steenbock v. Omaha Country Club, 110 Neb. 794, 195 N.W. 117 [1923]; Anderson v. Byrd, 133 Neb. 483, 275 N.W. 825 [1937].
>
> In Baltimore & O. R. Co. v. Reeves, 10 F. 2d 329 [1926] (an Ohio case), the court assumed, without deciding, that the railroad company was required under a statute similar in many respects with our own to maintain the highway. Nevertheless, it was said in the opinion: "We are satisfied that this highway defect, even if due to defendant's default, cannot constitute an independent, affirmative basis of recovery. . . . It has no direct tendency to lead to a crossing collision; it only surrounds the traveler with a condition, save for which he might not have been injured."

Loudy v. Union P. R. R. Co., 146 Neb. at 683-84, 21 N.W.2d at 435.

However, the U.S. Court of Appeals for the Eighth Circuit has more recently addressed the issue of "condition" versus "cause." In *Heatherly v. Alexander*, 421 F.3d 638, 645 (8th Cir. 2005), the court stated that "the cause-condition analysis . . . reveals that a finding of a condition *derives from*, and does not *determine*, proximate cause," and that "[a] finding of proximate cause emerges from an analysis of the foreseeablility that the injury could arise from the negligent act." (Emphasis in original.)

In *Heatherly*, a professional truckdriver working for Midwest Specialized Transportation (MST) of Rochester, Minnesota, was hauling a load from Minnesota to California in his tractor-trailer unit. Around 1:15 a.m., he became tired and decided to pull off Interstate 80 to sleep at a rest area located at mile marker 317, near Phillips, Nebraska. The driver parked his truck on the shoulder (or emergency lane) of the deceleration portion of the exit ramp leading into the rest area. Around 2:30 a.m., Carroll and Margaret Heatherly's motor home approached mile marker 317 from the east. They were towing a Ford Escort. Another tractor-trailer rig, stolen and being driven by Steven Alexander, was coming up behind the motor home at a speed of nearly 90 m.p.h. A series of four collisions ensued. First, Alexander's truck struck the back of

the towed Escort. This propelled the Escort forward, striking the back of the motor home. The Escort rotated and was briefly sandwiched between the motor home and Alexander's truck before Alexander's truck ran over the top of the Escort. The third impact involved Alexander's truck striking the back of the motor home. This forced the motor home, still traveling at some 67 m.p.h., headlong into the back of the parked MST truck, the fourth and final impact. Alexander's truck proceeded, unimpeded, across the deceleration lane, and across the shoulder of the lane. It came to rest in the grassy ditch next to the shoulder of the lane. The motor home and the MST truck were soon engulfed in flames. All four of the Heatherly children and Carroll were rescued, although Carroll was badly injured. Margaret was killed in the collision.

Carroll commenced a personal injury and wrongful death action in the U.S. District Court for the District of Nebraska. Before trial, Alexander was dismissed as a defendant, leaving as defendants the truckdriver and MST. At the close of the evidence, the defendants moved for judgment as a matter of law. Taking the motion under advisement, the district court submitted the case to the jury. After the jury deadlocked, the district court declared a mistrial, granted the defendants' motion for judgment as a matter of law, and then dismissed the case. The district court concluded, as a matter of law, that the truckdriver's conduct in parking the MST truck where he did on the exit ramp was not a proximate cause of the Heatherlys' injuries, but merely created a condition by which those injuries were made possible through the negligence of Alexander. Carroll appealed to the Eighth Circuit.

[9-16] On appeal, the Eighth Circuit reversed the district court's judgment granting the defendants' motion for judgment as a matter of law and remanded the cause for a new trial. In doing so, the Eighth Circuit reviewed the law of proximate cause in Nebraska. We quote from their analysis at length:

> Under Nebraska negligence law, proximate cause consists of three elements: that (1) but for the negligence, the injury would not have occurred, (2) the injury is the natural and probable result of the negligence, and (3) there

is no efficient intervening cause. . . . The *foreseeability* of an injury that results from a negligent act determines whether that injury is the "natural and probable result" of the act. "To constitute proximate cause . . . the injury must be the natural and probable result of the negligence, and be of such a character as an ordinarily prudent person *could have known*, or would or ought to have *foreseen* might probably occur as the result." . . . "The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen." . . . Further, "[a] proximate cause is a cause that produces a result in a natural and continuous sequence, unaccompanied by an efficient intervening cause, and without which the result would not have occurred." . . . An efficient intervening cause "is a new and independent act, itself a proximate cause of a result, which breaks the causal connection between the original wrong and the result. A person is not legally responsible for a result if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have *reasonably anticipated* or *reasonably foreseen*." . . .

. . . .

In the instant case, it is difficult to tell the extent to which the role of foreseeability was considered in the analysis of proximate cause. This leaves us with two concerns. First, the question of causation was decided as a matter of law, when it is generally a matter of fact under Nebraska law. Second, though the district court relied on relevant precedent, our analysis of Nebraska proximate cause law dictates a different outcome. As an initial matter, proximate cause appears to have been analyzed from the standpoint that "'X' is a condition, therefore 'X' is not a cause." Instead, we think the question should have been "Is 'X' a proximate cause?" and if it is not, then "X" may be merely a condition. This latter approach follows the weight of Nebraska law which makes foreseeability the axis around which the cause-condition analysis rotates. It

> also makes more sense of the difficult inquiry involved in distinguishing cause from condition. This is so because it makes the finding of a condition the product of the proximate cause analysis.
>
> Finally, though Alexander's negligence was determined to have been an intervening cause of the collision, which it was, we believe an analysis of the foreseeability of that negligence acting in concert with the parked MST truck should have been a more prominent factor in the overall analysis. The question of whether an act is a proximate cause, or simply a non-actionable condition, is determined by whether it was foreseeable that the initial act could join with the intervening act to cause the alleged injuries.

Heatherly v. Alexander, 421 F.3d 638, 641-43 (8th Cir. 2005) (citations omitted) (emphasis in original).

The court held there was sufficient evidence, via expert testimony, to create a jury question regarding causation and foreseeability. The court held that a jury should decide (1) whether the Heatherlys' injuries reasonably flowed, at least in part, from the truckdriver's negligent parking of the MST truck on the shoulder of the exit ramp and (2) whether it was foreseeable that the parking of the MST truck on the shoulder of the exit ramp could result in a collision and injuries of the type suffered by the Heatherlys.

In this case, the concrete barrier was located on the opposite side of the crossing as Mario Sr.'s vehicle approached. The vehicle hit the concrete barrier after the collision with the train. Becerra argues that there are material questions of fact regarding (1) whether Union Pacific should have foreseen the type of accident that occurred in this case and (2) whether the collision with the concrete barrier enhanced the injuries to Mario III. We agree that these are questions of fact regarding causation and foreseeability that cannot be resolved as a matter of law. Further evidence is needed to show (1) whether Mario III survived the initial collision with the train; (2) if he did survive the initial collision, whether his injuries and death reasonably flowed, at least in part, from the collision with the concrete barrier; and (3) whether it was foreseeable

that the concrete barrier near the railroad crossing could result in a collision and the injuries/death suffered by Mario III. Accordingly, we reverse the district court's grant of summary judgment in favor of Union Pacific for further proceedings regarding Union Pacific's negligence and liability in maintaining the concrete barrier.

(c) Was Summary Judgment Premature?

Becerra argues that summary judgment was premature because she should have been allowed additional time to develop the record in support of her position. Given our remand of the summary judgment order on the issue of the concrete barrier, we consider Becerra's argument that the order of summary judgment was premature only with regard to her claim that Union Pacific failed to keep a proper lookout.

[17,18] In its order, the district court noted that Becerra did not comply with the demands of Neb. Rev. Stat. § 25-1335 (Reissue 2008) to obtain additional time. Section 25-1335 states:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The purpose of § 25-1335 is to provide an additional safeguard against an improvident or premature grant of summary judgment. *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988). A § 25-1335 affidavit need not contain evidence going to the merits of the case; rather, a § 25-1335 affidavit must contain a reasonable excuse or good cause, explaining why a party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment. *Wachtel v. Beer, supra*. Section 25-1335 prescribes a prerequisite for a continuance, or additional time or other relief under the statute, namely, an affidavit stating a reasonable excuse or good cause for a party's inability to oppose a summary judgment motion.

See *Wachtel v. Beer, supra*. Without the appropriate affidavit required by § 25-1335, a party is not entitled to a continuance or additional time to obtain affidavits or discovery to counteract an opposing party's motion for summary judgment. See *Wachtel v. Beer, supra*.

Becerra did not submit an affidavit supporting her position that summary judgment was premature. Accordingly, she was not entitled to additional time to develop the record on her claim that Union Pacific failed to keep a proper lookout.

(d) Conclusion With Regard to Union Pacific

For the foregoing reasons, we find that the order of the district court granting summary judgment in favor of Union Pacific is correct and is affirmed as to Becerra's claims that Union Pacific failed to keep a proper lookout and failed to control the train.

However, we find that there are genuine issues of material fact regarding Union Pacific's maintenance of the concrete barrier. Therefore, we reverse, and remand the district court's grant of summary judgment in favor of Union Pacific on this issue for further proceedings consistent with this opinion.

2. Summary Judgment in Favor of Sulhoff

Becerra assigns that the district court erred in finding there was no evidence Mario Sr. was grossly negligent and that the court therefore erred in granting summary judgment in Sulhoff's favor.

[19,20] The Nebraska guest statute in effect at the time of this accident, § 25-21,237, states:

> The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such vehicle.

> . . . Relationship by consanguinity or affinity within the second degree shall include . . . children . . . .

Because Mario III is the child of Mario Sr., Mario Sr. can be held liable for damages only if he was grossly negligent in the operation of his vehicle at the time of the collision—there was no evidence or allegation that Mario Sr. was intoxicated.

[21-23] Gross negligence, within the meaning of the Nebraska guest statute, means

> gross and excessive negligence or negligence in a very high degree, the absence of slight care in the performance of duty, an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.

Klundt v. Karr, 261 Neb. 577, 581, 624 N.W.2d 30, 33 (2001). Negligence that is purely momentary in nature generally does not constitute gross negligence. *Luther v. Pawling*, 195 Neb. 679, 240 N.W.2d 42 (1976). Gross negligence on the part of the driver must be proved by the plaintiff. *Id.*

Becerra alleged that Mario Sr. was grossly negligent in (1) driving at an excessive speed under the conditions then and there existing on County Road B, (2) failing to yield to the Union Pacific train at a designated railroad crossing, and (3) failing to keep a proper lookout for the Union Pacific train. The evidence presented at the summary judgment hearing included the train's track image recorder video, as well as the depositions of the investigating deputies, the train's conductor and engineer, and Becerra.

The Otoe County Sheriff's Department investigated the accident. The chief deputy of the Otoe County Sheriff's Department testified in his deposition that the speed limit was 50 m.p.h. where the accident took place; it did not appear Mario Sr. was exceeding the speed limit; there was no evidence the vehicle was swerving prior to the collision; and there were no skid marks, which meant the brakes were not "locked up" prior to the collision, but that the brakes still could have been applied. One sheriff's deputy testified in his deposition that there were no tire tracks that would indicate any evasive action or any marks in the roadway that would indicate that the tires were "locked up," it did not appear the vehicle was traveling faster

than the posted speed limit, there was no evidence the vehicle was swerving or fishtailing while approaching the train, and it is unknown whether the driver saw the train. Another deputy testified in his deposition that there was no evidence the vehicle was exceeding the speed limit and that there was no evidence the vehicle had lost control on the ice.

The Union Pacific conductor testified in his deposition that he saw the vehicle before the collision and that the vehicle was not speeding, swerving, or fishtailing. He did not know why the vehicle did not stop. The Union Pacific engineer testified that he did not see the vehicle until "[r]ight at the last second." The engineer testified that the vehicle was not swerving or fishtailing.

Becerra testified in her deposition that Mario Sr. was an excellent driver, was a safe driver, and would not do anything to put Mario III in danger while driving. She testified that on the day of the accident, Mario Sr. told her to "[b]e careful out there" because "[t]he roads are bad" and "ice-packed." Becerra testified that Mario Sr. had driven on County Road B "[a]bout a thousand times."

The train's track image recorder video was received into evidence at the summary judgment hearing. The video shows that there were no obstructions at the railroad crossing. The video shows that the vehicle did not stop or swerve prior to crossing the railroad tracks.

The Nebraska Supreme court has decided a number of cases in which the court found insufficient evidence of gross negligence. See, *Liston v. Bradshaw*, 202 Neb. 272, 275 N.W.2d 59 (1979); *Luther v. Pawling*, 195 Neb. 679, 240 N.W.2d 42 (1976); *Warmbier v. Zeurlein*, 182 Neb. 425, 155 N.W.2d 364 (1967); *Pester v. Nelson*, 168 Neb. 243, 95 N.W.2d 491 (1959); *Bishop v. Schofield*, 156 Neb. 830, 58 N.W.2d 207 (1953).

Although we acknowledge the foregoing decisions, we cannot say, as a matter of law, that Mario Sr. was not grossly negligent. As stated previously, included in the meaning of "gross negligence" is "the absence of slight care in the performance of duty." *Klundt v. Karr*, 261 Neb. 577, 581, 624 N.W.2d 30, 33 (2001). The evidence shows that Mario Sr. did not slow down or swerve prior to the collision, and neither the train's

conductor nor the engineer saw brakelights illuminated on the vehicle. Thus, there is a question of material fact as to whether Mario Sr. was grossly negligent in the operation of his vehicle. We therefore reverse the district court's grant of summary judgment in favor of Sulhoff for further proceedings consistent with this opinion.

VI. CONCLUSION

For the foregoing reasons, we find that the order of the district court granting summary judgment in favor of Union Pacific is correct and is affirmed as to Becerra's claims that Union Pacific failed to keep a proper lookout and failed to control the train.

However, we find that there are genuine issues of material fact regarding Union Pacific's maintenance of the concrete barrier. Therefore, we reverse, and remand the district court's grant of summary judgment in favor of Union Pacific on this issue for further proceedings consistent with this opinion.

We therefore reverse the order of the district court granting summary judgment in favor of Sulhoff and remand the cause for further proceedings consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL MESADIEU, APPELLANT.
837 N.W.2d 585

Filed August 27, 2013. No. A-12-357.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
4. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.

5. **Records: Appeal and Error.** It is the responsibility of the party appealing to have included within the bill of exceptions matters from the record which it believes material to the issues presented for review. Absent such a record, as a general rule, the decision of the lower court as to the assigned errors is to be affirmed.
6. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
7. **Effectiveness of Counsel: Proof: Appeal and Error.** In order to show prejudice due to ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
8. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.
9. **Pleas: Waiver.** Normally, a voluntary guilty plea waives all defenses to a criminal charge.
10. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
11. **Effectiveness of Counsel: Pleas: Proof.** Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial.
12. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a court denies relief without an evidentiary hearing, the appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he is entitled to no relief.
13. **Effectiveness of Counsel: Pleas: Proof.** Self-serving declarations that a defendant would have gone to trial will not be enough; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.
14. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Reversed and remanded for further proceedings.

Michael Mesadieu, pro se.

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

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

PER CURIAM.

INTRODUCTION

Michael Mesadieu, acting pro se, appeals the order of the Douglas County District Court denying his motion for postconviction relief without an evidentiary hearing. Because we find that the record before this court does not affirmatively show that Mesadieu is not entitled to relief, we reverse the order of the district court denying Mesadieu an evidentiary hearing and remand the cause to the district court for an evidentiary hearing.

STATEMENT OF FACTS

Background Information.

In 2005, pursuant to a plea agreement with the State, Mesadieu pled no contest to one count of attempted first degree murder and one count of use of a deadly weapon to commit a felony. Mesadieu was 17 years old at the time of the incident which led to these charges. The State provided a factual basis which indicated that on March 1, 2005, an unlicensed cabdriver received a call to pick up somebody. When the cabdriver arrived, Mesadieu and two other individuals got into the cab, and Mesadieu immediately pulled out a handgun and attempted to rob the cabdriver. During the events that ensued thereafter, Mesadieu fired numerous shots pointblank at the cabdriver, several of which shots struck her in the left arm and hand. The two other individuals, who were eventually named as codefendants, reported that Mesadieu fired the gun. The gun was found by police during a search conducted pursuant to a warrant.

In exchange for Mesadieu's pleas, the State dropped two additional charges against Mesadieu and further agreed to not file any additional charges. The district court accepted Mesadieu's pleas, found him guilty, and later sentenced him to

30 to 32 years' imprisonment for attempted first degree murder and to 10 to 15 years' imprisonment for use of a deadly weapon to commit a felony. The sentences were ordered to run consecutively, and Mesadieu was given 290 days' credit for time served.

In case No. A-05-1564, Mesadieu appealed to this court, with the same trial counsel and appellate counsel, assigning only that the district court abused its discretion by imposing excessive sentences; we summarily affirmed.

Motion for Postconviction Relief.

On July 15, 2011, with new counsel, Mesadieu filed a verified motion for postconviction relief in which he alleged numerous allegations upon which an evidentiary hearing could be granted. The motion stated that at the time of the entry of the no contest pleas, he was only 17 years old; that trial counsel failed to advise him that pursuant to Neb. Rev. Stat. § 29-1816 (Cum. Supp. 2012), he could request a transfer to juvenile court; and that the district court failed to advise him of the same. Mesadieu alleged that trial counsel failed not only to advise him of such a process, but also to attempt to move the case to juvenile court, which violated his rights of due process insomuch as a codefendant was allowed to transfer his case to juvenile court. Mesadieu further alleged that due to his young age and participation in special education classes, he was denied due process without further inquiry as to whether his pleas were made knowingly, intelligently, and voluntarily. Mesadieu also raised allegations of ineffective assistance of counsel, stating that he informed his attorney he was innocent and wished to proceed to trial, but that his attorney failed to request a plea withdrawal and failed to advise Mesadieu of an intoxication defense.

In April 2012, the district court entered an order denying Mesadieu's motion for postconviction relief without a hearing. The court first determined that the allegations regarding the district court's failure to advise him pursuant to § 29-1816 and the involuntariness of his plea were procedurally barred, because those issues were known and could have been litigated on direct appeal. The district court further found that

the allegations of ineffective assistance of counsel were without merit because Mesadieu did not raise any allegations showing prejudice he suffered in light of the plea bargain and the strength of the State's case. The court noted that even if Mesadieu had raised any facts relating to prejudice, those claims would be refuted by the record provided during the plea hearing. It is from this order that Mesadieu has timely appealed.

ASSIGNMENTS OF ERROR

On appeal, Mesadieu assigns that (1) the district court erred by committing plain error in denying Mesadieu the opportunity to be heard; (2) the district court erred by committing reversible error in failing to grant Mesadieu's request for postconviction relief, because he received ineffective assistance of counsel when trial counsel failed to request to have his case transferred to juvenile court pursuant to § 29-1816(2)(a); and (3) the court's legal conclusion prevented Mesadieu from any procedural mechanism by which he could adequately develop his claims of ineffectiveness and denial of due process.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

[2-4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *Id*. Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision. *Id*.

ANALYSIS

Opportunity to Be Heard.

Mesadieu assigns that the district court committed plain error by denying Mesadieu the opportunity to be heard. Mesadieu's

argument on this assignment is based upon an allegation contained within his brief that an ex parte hearing was held during which the State presented evidence and Mesadieu was denied participation, after which the district court denied the motion for a postconviction hearing.

[5] It is the responsibility of the party appealing to have included within the bill of exceptions matters from the record which it believes material to the issues presented for review. Absent such a record, as a general rule, the decision of the lower court as to the assigned errors is to be affirmed. *State v. Thompson*, 10 Neb. App. 69, 624 N.W.2d 657 (2001). We have carefully reviewed the record before the court; there is absolutely no showing in the record of an ex parte hearing as alleged by Mesadieu.

Ineffective Assistance of Counsel.

Mesadieu next argues that the district court erred by failing to grant him an evidentiary hearing, because he received ineffective assistance of counsel when trial counsel failed to preserve or move the district court to transfer his case to juvenile court pursuant to § 29-1816. In his brief, Mesadieu contends that but for this alleged deficiency by trial counsel, he would not have entered into the plea agreement and would have insisted on proceeding to trial.

[6-8] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* The two prongs of this test, deficient performance and prejudice, may be addressed

in either order. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

[9-11] Normally, a voluntary guilty plea waives all defenses to a criminal charge. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Dunkin, supra*. Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. *Id*.

[12] At this stage of the proceedings, the real question we address is not whether Mesadieu is entitled to postconviction relief, but whether his pleadings are sufficient to grant him an evidentiary hearing. When a court denies relief without an evidentiary hearing, the appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he is entitled to no relief. See *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

In his motion for postconviction relief, Mesadieu alleges that trial counsel was ineffective for failing to advise him that he could request to move the case to juvenile court and for failing to file a motion to do so. Mesadieu argues that had he been given such an advisement, he would have insisted on going to trial rather than entering into a plea agreement.

[13] Self-serving declarations that a defendant would have gone to trial will not be enough; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial. *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011); *State v. Seeger*, 20 Neb. App. 225, 822 N.W.2d 436 (2012). In his motion for postconviction relief, Mesadieu argues that he was not informed of his right to transfer his case to juvenile court, that trial counsel failed to make such a request, and that he incurred prejudice as a result, i.e., that he would have insisted

on going to trial rather than entering into a plea agreement with the State. Having reviewed the pleadings, and reading them liberally, we conclude that those pleadings are sufficient to state a claim for postconviction relief. Further, because the record does not affirmatively show that Mesadieu is not entitled to relief, he is entitled to an evidentiary hearing. The order of the district court is reversed, and the cause is remanded for such hearing.

Postconviction Statutes.

[14] Mesadieu also assigns that the district court's conclusion demonstrates a failure by the State to provide him with a procedural mechanism for him to adequately develop his postconviction claims. Having determined that the district court erred by failing to grant him an evidentiary hearing, we need not address this assignment of error because Mesadieu will now have an opportunity to develop his postconviction claims. However, we note that the arguments contained within Mesadieu's brief appear to challenge the constitutionality of the postconviction statutes, because the district court found he was procedurally barred from raising certain claims. The record indicates that Mesadieu did not properly raise or preserve any challenge to the constitutionality of the statute before the trial court and, further, that he did not give proper notice of his challenge or comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2012). See *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012). A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal. *Id*.; *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

CONCLUSION

The record before this court does not affirmatively show that Mesadieu is not entitled to relief; therefore, we find that the district court erred by denying the motion for postconviction relief without a hearing. The order of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

INBODY, Chief Judge, dissenting.

Although I understand the majority's position in this matter, given that these are serious felony convictions and also given the young age of Mesadieu at the time of the charges, I respectfully disagree with the resolution of the case.

The crux of Mesadieu's verified motion for postconviction relief revolves around his contentions that he received ineffective assistance of counsel because he was not advised he could move to transfer his case to juvenile court pursuant to § 29-1816 and that his attorney did not make any such motion. In his motion for postconviction relief, Mesadieu alleges that had he been advised he could transfer his case to juvenile court, he would not have entered into the plea agreement, but would have instead insisted on proceeding to trial. Case law is clear that self-serving declarations that a defendant would have gone to trial will not be enough. See, *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011); *State v. Seeger*, 20 Neb. App. 225, 822 N.W.2d 436 (2012). Mesadieu's motion for postconviction relief does not identify any specific facts that would satisfy any of the appropriate statutory factors for removal to juvenile court, nor does he allege that a motion for removal to juvenile court, if made, would have been successful. Mesadieu is required to present objective evidence showing a reasonable probability that he would have insisted on going to trial, and other than his self-serving statement setting forth that he would have gone to trial, he has failed to make any allegations supporting this claim. In my opinion, Mesadieu's motion for postconviction relief does not allege facts sufficient to warrant an evidentiary hearing, and accordingly, I would have affirmed the decision of the district court denying Mesadieu's motion for postconviction relief without a hearing.

TERRY L. JONES, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

838 N.W.2d 51

Filed August 27, 2013. No. A-12-717.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
3. **Jurisdiction: Affidavits: Appeal and Error.** Although jurisdiction is vested in an appellate court upon timely filing of a notice of appeal and an affidavit of poverty, the trial court retains jurisdiction to determine the validity of in forma pauperis proceedings.
4. **Habeas Corpus: Judgments: Collateral Attack.** Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction.
5. **Judgments: Collateral Attack.** Only a void judgment may be collaterally attacked.
6. **Judgments: Jurisdiction: Collateral Attack.** Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
7. **Habeas Corpus: Jurisdiction: Sentences.** A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose.
8. **Habeas Corpus.** A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.
9. **Habeas Corpus: Sentences.** The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding.
10. **Jurisdiction: Judgments: Appeal and Error.** Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void.
11. **Speedy Trial: Waiver.** A defendant waives any objection on the basis of a violation of the right to a speedy trial when he or she does not file a motion to discharge before the trial begins.

Appeal from the District Court for Lancaster County: ANDREW R. JACOBSEN, Judge. Affirmed.

Terry L. Jones, pro se.

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

PIRTLE and RIEDMANN, Judges, and MULLEN, District Judge, Retired.

PIRTLE, Judge.

INTRODUCTION

Terry L. Jones appeals the order of the district court for Lancaster County denying habeas relief and granting summary judgment against him.

BACKGROUND

In February 1995, an amended complaint was filed against Jones in the county court for Lancaster County alleging that Jones committed two criminal acts: first degree sexual assault and first degree false imprisonment. Jones was convicted in November on both counts. He was sentenced to a term of 30 to 40 years' imprisonment for the sexual assault conviction and to a consecutive term of 4 to 5 years' imprisonment for the false imprisonment conviction.

In November 2011, Jones filed a petition for writ of habeas corpus against the Nebraska Department of Correctional Services, the director of the department, and the warden of the Tecumseh State Correctional Institution (collectively the State). The petition alleged that his convictions and sentences were void or voidable because his right to a speedy trial was violated and because the district court lacked subject matter jurisdiction due to the failure to bring Jones to trial within the constitutional and statutory time period.

Prior to Jones' petition for writ of habeas corpus, Jones filed a motion to proceed in forma pauperis with his action in the trial court. The in forma pauperis request was denied, and the court found the petition proposed to be filed appeared on its face to be frivolous. The court gave Jones 30 days in which to pay a filing fee and service costs.

Although there is no evidence in the record that Jones paid the filing fee and service costs, he apparently did so. His petition for writ of habeas corpus was filed November 30, 2011.

The State filed a motion for summary judgment, stating that Jones' petition on its face did not raise an issue which is cognizable under Nebraska's habeas law and alleging that the State was entitled to summary judgment as a matter of law. The trial court held a telephonic hearing on the State's motion on July 11, 2012, and the motion was granted July 12. The court found that the issue raised by Jones could not be raised in a habeas proceeding, and the petition was dismissed. Jones timely appealed this order on August 8.

Jones filed a "Motion for Leave to Temponary [sic] Proceed in Forma Pauperis" on August 8, 2012. The motion indicated Jones' belief that he must pay the docket fee, though he did not have the funds to do so at that time. The district court's order on August 9 sustained the motion "to the extent that [Jones] is given 21 days from the date of this order to submit the filing fee for this appeal or the appeal will be dismissed."

ASSIGNMENT OF ERROR

Jones asserts on appeal that the district court erred and abused its discretion in denying the writ of habeas corpus on speedy trial grounds.

STANDARD OF REVIEW

[1] On appeal of a habeas petition, we review the trial court's factual findings for clear error and its conclusions of law de novo. *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008).

ANALYSIS

In Forma Pauperis Motion.

[2] An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Gerken v. Hy-Vee, Inc.*, 11 Neb. App. 778, 660 N.W.2d 893 (2003).

Before reaching the merits of this case, we note there were some irregularities in the trial court proceedings regarding Jones' motions for leave to proceed in forma pauperis.

The trial court's order on August 9, 2012, stated that Jones' motion to proceed in forma pauperis was sustained "to the extent that [Jones] is given 21 days from the date of this

order to submit the filing fee for this appeal or the appeal will be dismissed."

[3] Although jurisdiction is vested in an appellate court upon timely filing of a notice of appeal and an affidavit of poverty, the trial court retains jurisdiction to determine the validity of in forma pauperis proceedings. *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996). The trial court apparently determined that the in forma pauperis proceedings on appeal were valid because it granted Jones a form of "temporary" in forma pauperis status. The trial court sustained Jones' motion, but gave him 21 days from the date of the order to submit the filing fee or the appeal would be dismissed by the trial court. We note that in forma pauperis requests on appeal are either granted or denied by the trial court. There is no authority in the Nebraska Revised Statutes or the Nebraska court rules of appellate practice to support "temporary" in forma pauperis status.

In addition, although the trial court retains jurisdiction to determine the validity of in forma pauperis proceedings, after notice of appeal and poverty affidavits have been filed, the appeal is perfected and dismissal is at the discretion of the appellate court.

Further, the court's order for Jones to pay docket fees does not comply with the Nebraska court rules of appellate practice. The rules provide that docket fees shall be paid in advance as required by Neb. Rev. Stat. § 33-103 (Reissue 2008) except in specific categories of cases, including habeas corpus proceedings. See Neb. Ct. R. App. P. § 2-101(G)(1)(c) (rev. 2010). In habeas corpus proceedings, the fees are collected at the conclusion of the proceeding.

Because Jones appeals the denial of habeas corpus relief and the court rules do not require payment in advance in habeas corpus proceedings, we find this court does have jurisdiction to reach the merits on this appeal.

Habeas Corpus.

[4-7] Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction. *Peterson v. Houston*, 284 Neb. 861, 864 N.W.2d 26 (2012). Only a

void judgment may be collaterally attacked. *Id*. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *Id*. Thus, a writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose. *Id*.

[8,9] A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose. *Id*. The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding. *Id*.

[10,11] Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void. *Id*. The Nebraska Supreme Court has held that a defendant waives any objection on the basis of a violation of the right to a speedy trial when he or she does not file a motion to discharge before the trial begins. *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011). See Neb. Rev. Stat. § 29-1209 (Reissue 2008).

In February 1995, an amended information was filed against Jones, and on September 6, Jones filed a waiver of his speedy trial rights. He went to trial in November without asserting his speedy trial rights in a motion to discharge; he therefore waived his claim. Jones could have raised this issue in a direct proceeding, but he cannot inquire into the regularity of proceedings leading to his sentences on an application for habeas corpus. See *Peterson v. Houston, supra*.

We find the court had jurisdiction of the parties and the subject matter. Because Jones has not shown his convictions and sentences are void, Jones' appeal is meritless and the district court did not err in finding Jones did not raise an issue which could be addressed in a writ of habeas corpus proceeding.

CONCLUSION

We find that the trial court erred in sustaining Jones' motion for leave to proceed in forma pauperis on a temporary basis, but that this amounts to harmless error. Upon our review of the record, we do not find that the trial court erred when it denied Jones' writ of habeas corpus.

AFFIRMED.

ANNA MARIE RONESS, APPELLEE, V.
WAL-MART STORES, INC., APPELLANT.
837 N.W.2d 118

Filed August 27, 2013. No. A-12-963.

1. **Workers' Compensation: Judgments: Evidence: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2010), a judgment of the Workers' Compensation Court may 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.
2. **Evidence: Words and Phrases.** Competent evidence means evidence that tends to establish the fact in issue.
3. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, an appellate court will not disturb the findings of fact of the trial judge unless clearly wrong.
4. **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 is considered in the light most favorable to the successful party, every controverted fact is resolved in favor of the successful party, and the successful party has the benefit of every inference that is reasonably deducible from the evidence.
5. **Workers' Compensation: Proof: Expert Witnesses.** To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
6. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
7. **Workers' Compensation: Expert Witnesses: Words and Phrases.** Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient

as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the accident occurring in the course and scope of the worker's employment.

8. **Workers' Compensation: Rules of Evidence: Appeal and Error.** The compensation court is not bound by the usual common-law or statutory rules of evidence; 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.
9. **Workers' Compensation: Evidence: Due Process.** The compensation court's discretion to admit evidence is subject to the limits of constitutional due process.
10. **Workers' Compensation: Evidence.** Workers' Comp. Ct. R. of Proc. 10 (2011) allows for the introduction into evidence of signed medical reports in place of live expert testimony; such reports would often be hearsay in trial courts.
11. ____: ____. Workers' Comp. Ct. R. of Proc. 10 (2011) allows the compensation court to admit into evidence medical reports that would not normally be admissible in trial courts, provided that those reports are signed.

Appeal from the Workers' Compensation Court: J. MICHAEL FITZGERALD, Judge. Reversed.

Jennifer S. Caswell, of Ritsema & Lyon, P.C., for appellant.

Michael W. Meister for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Wal-Mart Stores, Inc. (Wal-Mart), appeals an order of the Nebraska Workers' Compensation Court awarding temporary benefits and payment of medical bills in favor of Anna Marie Roness for an aggravation of carpal tunnel syndrome allegedly caused by Roness' employment with Wal-Mart. On appeal, Wal-Mart challenges the compensation court's admission of and reliance on reports and deposition testimony of a physician's assistant in lieu of live testimony and challenges the court's finding that Roness demonstrated with sufficient medical evidence that there was a compensable injury caused by her employment. We find that there was not sufficient evidence to support an award of benefits, without the need to resolve the question concerning the admissibility of depositions or reports of physician's assistants. We reverse.

II. BACKGROUND

In August 2011, Roness filed a petition in the Workers' Compensation Court, seeking benefits from an alleged work-related accident. Roness alleged that she had been injured on or about December 19, 2010, and alleged that the injury suffered was an aggravation of bilateral carpal tunnel syndrome.

1. Factual Background

Roness testified that in 2005, prior to her employment with Wal-Mart, she had undergone surgery to relieve carpal tunnel syndrome in her right hand. She testified that the surgery had been successful and that she experienced no continuing problems after a period of 5 or 6 months' recovery time.

In September 2010, Roness began working for Wal-Mart. She worked the overnight shift in the dairy department. She testified that her job duties involved "offload[ing]" and "downstack[ing]" pallets, placing freight onto carts, and stocking shelves.

Roness testified that on or about December 19, 2010, she helped other employees unload "milk freight." This was not something that she normally did, but she helped out on this occasion. She testified that "milk freight" involved removing crates of milk from pallets and placing them into a cooler. She testified that the crates arrived "stacked five high," that there were "nine stacks on a pallet," and that each crate had to be removed from the pallet and stacked in the cooler. She testified that between 15 and 20 pallets of milk came in each shipment.

Roness testified that in December 2010, her "hands felt funny." She testified that "[t]hey felt different than they did the last time" and that she "wasn't sure what was wrong with them." She described the sensation as "buzzing, like you were holding onto something that vibrates." She testified that she experienced this sensation in both hands. According to Roness, the symptoms began before she did "milk freight," but they became "significantly worse after [she] did milk freight."

Roness testified that she did not immediately report any issues to management, because other employees had told her that "as long as [she] could do [her] job, [she] probably should

keep [her] mouth shut." She testified that she initially could still do her job, but that eventually, "[i]t got worse and worse and then it got painful and then [her hands] went completely numb," causing her to start "dropping product."

In April 2011, Roness reported her injury to management and stopped working. She testified that she filled out an incident report, and Wal-Mart sent her to an urgent care facility for treatment.

At the urgent care facility, Roness was treated by a physician's assistant. The physician's assistant assessed Roness as having "[c]arpal tunnel bilaterally." The physician's assistant recommended that Roness wear "hand splint[s]" and released her to return to work. The physician's assistant did not impose any restrictions on Roness' ability to work.

The physician's assistant authored a letter, the admissibility of which was challenged at trial and is challenged on appeal. In the letter, the physician's assistant noted Roness' history of and prior surgery for right carpal tunnel syndrome, noted that Roness was now experiencing pain in her left wrist and radiating into her fingers, and diagnosed Roness with carpal tunnel syndrome. The physician's assistant specifically indicated, "I can not say that it was caused by her work but the repetitive motions that she does at work will cause this condition to be aggravated."

In a deposition, the admissibility of which is also in question, the physician's assistant testified that she does not regularly treat carpal tunnel syndrome, that she does not always work with orthopedic patients, and that she saw Roness on only the one occasion. She testified that she had indicated in the letter that she "cannot say" that Roness' injury was caused by work. She testified that an opinion on causation is complicated by Roness' history of carpal tunnel syndrome and because the physician's assistant did not know about Roness' lifestyle outside of work or whether she engaged in other activities that could also have caused the aggravation. She acknowledged that she did not know what Roness' work routine was, did not know how many hours Roness worked per week, and did not know the type of work Roness performed.

Roness returned to work, using the splints recommended by the physician's assistant. Roness testified that the splints helped prevent her from waking up "in excruciating pain" but that they "made it almost impossible for [her] to do [her] job like [she] was supposed to be doing it."

Roness was eventually referred to see an orthopedic specialist, Dr. Diane Gilles. She saw Dr. Gilles in June 2011. The history provided to Dr. Gilles was of "complaints of numbness and pain in both hands, right greater than left." Dr. Gilles' impression was of "[b]ilateral carpal tunnel syndrome, right greater than left." She recommended that "electrical studies" be done to further assess Roness' injury.

According to Roness, Wal-Mart's workers' compensation carrier denied her request to have the electrical studies performed and paid for, and she lacked health insurance or any other way to pay for them. As a result, the studies were not performed.

Dr. Gilles authored a letter to Roness' counsel in May 2012. In the letter, Dr. Gilles noted that she had seen Roness on only one occasion and that Roness had "related her problems to an injury on 02/11/2011." Dr. Gilles noted her diagnosis of bilateral carpal tunnel syndrome, right greater than left. Dr. Gilles indicated that she "certainly [did] believe" that Roness' symptoms "could have likely aggravated [a] preexisting condition and that [Roness] probably had a tenosynovitis associated with it." She indicated, however, that "without further objective studies, [she] cannot give . . . a better treatment plan or history course."

Roness was also seen for an independent medical examination in February 2012, by Dr. Jonathan Sollender. Dr. Sollender noted that the physician's assistant who first treated Roness had indicated Roness was to return for a followup in 2 weeks, but that Roness had not done so and had, instead, waited approximately 4 months to seek additional medical treatment. Dr. Sollender agreed with the diagnosis of bilateral carpal tunnel syndrome, but specifically opined that it was not work related. Dr. Sollender was of the opinion that Roness' prior carpal tunnel syndrome had not been adequately resolved

prior to the current symptoms. He also opined that Roness' work was not sufficient to produce a causal relationship and noted a variety of perceived conflicts in Roness' reporting and description of her symptoms.

2. Compensation Court Hearings

The compensation court ultimately held two hearings in this case during which evidence was adduced concerning Roness' claim for workers' compensation benefits. At the first hearing, in May 2012, Roness offered a variety of exhibits, including medical records and medical bills. One of the exhibits offered was the April 2011 letter, authored by the physician's assistant who had first treated Roness at an urgent care facility in February 2011. Wal-Mart objected to the admission of this exhibit, arguing that it was hearsay, that there were foundation issues, and that its admission in lieu of live testimony was not authorized by the compensation court's rules of procedure. In response to the objection, Roness' counsel argued that the rules of evidence were not applicable in workers' compensation cases and argued that the compensation court had discretion to receive the evidence if it deemed the evidence to be relevant.

Roness' counsel argued that he had not been prepared for Wal-Mart to object to the evidence and that his only recourse was to seek a continuance, which he felt would be a waste of everyone's time. Wal-Mart's counsel indicated that she had expected Roness to present some evidence from a medical doctor concerning causation, not only the letter from the physician's assistant. Roness' counsel argued that requiring more than the physician's assistant's opinion, coupled with Roness' testimony that there were injuries and that she had an immediate onset of pain at work, was unreasonable.

The parties then engaged in some discussion about how Roness might remedy any problem caused by not having live testimony from the physician's assistant. Roness' counsel indicated that he could depose the physician's assistant, and the compensation court judge expressed a question about whether a deposition would remedy any problem with admissibility. Roness' attorney argued to the compensation court that "[a]n

evidentiary objection does not apply in workers' compensation" court.

The court ultimately sustained Wal-Mart's objection and granted a continuance. The court indicated that the real question to be addressed was causation, because the diagnosis of carpal tunnel syndrome did not mean that the injury was work related.

The compensation court held a second hearing, in August 2012. At that hearing, Roness again offered the same exhibits that were offered in the prior hearing, and also offered the deposition of the physician's assistant and the letter from Dr. Gilles. Wal-Mart again objected to the April 2011 letter from the physician's assistant, restating the same objections made at the prior hearing and reminding the court that it had sustained those objections in the prior hearing. Wal-Mart also objected to the deposition of the physician's assistant, on the same grounds. Similarly, Wal-Mart objected to the physician's assistant's notes concerning treatment of Roness. The compensation court took the objections under advisement.

Wal-Mart offered a variety of exhibits, including medical records related to Roness' prior treatment for carpal tunnel syndrome and medical reports from Dr. Sollender, who had performed the independent examination of Roness in relation to the present claim. Roness' counsel, despite his earlier arguments to the court concerning applicability of the rules of evidence, objected to various of these exhibits on the grounds of foundation, relevance, and "rule of evidence 403." The court overruled the objections, finding that Roness' prior treatment for carpal tunnel syndrome was relevant to the current claim of an aggravation of carpal tunnel syndrome.

Roness testified as set forth above. Roness was the only witness to provide live testimony to the compensation court.

3. Award

On September 18, 2012, the compensation court entered an award, granting Roness compensation benefits. That award included a variety of specific findings, conclusions, and explanations for the court's determination that Roness was entitled to benefits.

The compensation court noted that while the alleged accident occurred on or about December 19, 2010, Roness had not stopped working and sought treatment until February 21, 2011. The court indicated that this case would be treated like a repetitive trauma case and that therefore, the appropriate date of injury should be considered February 21.

The court specifically ruled that the notes, letter, and deposition of the physician's assistant were being admitted into evidence. In so ruling, the court specifically found that the physician's assistant's "treatment and treatment plan were reviewed by a physician who signed off on the treatment plan." The court also found that within the physician's assistant's notes was a referral to an orthopedic specialist, signed by a physician.

The court recounted that the physician's assistant's letter indicated the repetitive motions performed by Roness will aggravate carpal tunnel syndrome, but that the physician's assistant specifically indicated she "cannot state the cause of the carpal tunnel syndrome." The court noted that the physician's assistant indicated in the letter that Roness' employment "could have" aggravated her carpal tunnel syndrome.

The court also recounted that Dr. Gilles had opined that Roness' "symptoms likely could have aggravated [her] preexisting condition . . . and that she probably has tenosynovitis associated with it." The court found that "Dr. Gilles state[d] in [the] affirmative that [Roness] has tenosynovitis because of her work, and . . . added it could likely have aggravated the preexisting condition."

The compensation court narrowed the primary issue to the question of causation—there was really no dispute about the diagnosis of bilateral carpal tunnel syndrome, and the primary question was whether it was caused by Roness' employment. In that regard, the compensation court specifically recognized that the use of terms such as "could" and "could have likely" would be insufficient to establish causation.

Nonetheless, the court concluded that Roness had adduced sufficient medical support for a finding of causation. The court held that Roness was entitled to benefits "because the

physician's assistant gave a sufficient definite opinion that the carpal tunnel syndrome was aggravated" and held that Roness "is surely entitled to benefits because Dr. Gilles finds [Roness] probably has tenosynovitis associated with her symptoms. That alone is sufficient to award benefits because 'probably' is sufficient."

The court thus awarded temporary benefits and directed payment of medical bills. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Wal-Mart has assigned error to the compensation court's admission of and reliance on the deposition testimony, reports, and letter of the physician's assistant and to the compensation court's finding that Roness adduced sufficient medical evidence to support a finding of causation and an award of benefits.

IV. ANALYSIS

Wal-Mart challenges the compensation court's admission of and reliance on the deposition testimony, reports, and letter of the physician's assistant in lieu of requiring live testimony and also challenges the compensation court's conclusion that Roness adduced sufficient medical evidence to support a finding that her bilateral carpal tunnel syndrome was caused by her employment. We decline to determine the specific issue concerning the admission of a physician's assistant's records and deposition testimony in lieu of live testimony because, even assuming all evidence received by the compensation court was properly considered, there was no medical evidence opining in support of a finding that Roness' injury was caused by her employment.

[1,2] Under Neb. Rev. Stat. § 48-185 (Reissue 2010), a judgment of the Workers' Compensation Court may 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. *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013). Competent evidence means evidence that tends to establish the fact in issue. *Id.*

[3,4] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, an appellate court will not disturb the findings of fact of the trial judge unless clearly wrong. See *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013). In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence is considered in the light most favorable to the successful party, every controverted fact is resolved in favor of the successful party, and the successful party has the benefit of every inference that is reasonably deducible from the evidence. See *Pearson v. Archer-Daniels-Midland Milling Co., supra*.

[5-7] In the present case, the primary issue raised on appeal is the question of whether there was sufficient competent evidence to demonstrate that Roness' bilateral carpal tunnel syndrome was caused by her employment with Wal-Mart. To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997). If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999). Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the accident occurring in the course and scope of the worker's employment. See *id*.

Roness' injury in this case—bilateral carpal tunnel syndrome—is one not plainly apparent. As a result, she was required to present expert medical testimony which was sufficiently definite and certain to permit drawing a conclusion that there was a causal connection between the accident and her disability. To carry this burden, Roness presented evidence in the form of records, a letter, and deposition testimony from a physician's assistant who treated Roness at an urgent care

facility and records and a letter from a physician who provided followup care. Wal-Mart presented evidence in the form of a report from an independent physician who examined Roness and her medical records.

One of the primary disputes at trial, and one of Wal-Mart's primary assertions on appeal, concerns the admissibility of the evidence from the physician's assistant in lieu of requiring her to appear and provide live testimony. Wal-Mart objected to Roness' offer of the physician's assistant's records and letter during the first hearing held by the compensation court, and the court sustained the objection. Wal-Mart objected to Roness' offer of the records, the letter, and a deposition of the physician's assistant at the second hearing held by the compensation court, and the court overruled the objection.

Wal-Mart bases its challenge to the admissibility of the evidence on the basis of Workers' Comp. Ct. R. of Proc. 10(A) (2011), which provides in pertinent part as follows:

> The Nebraska Workers' Compensation Court is not bound by the usual common law or statutory rules of evidence; and accordingly, with respect to medical evidence on hearings before a judge of said court, written reports by a physician or surgeon duly signed by him, her or them and itemized bills may, at the discretion of the court, be received in evidence in lieu of or in addition to the personal testimony of such physician or surgeon; with respect to evidence produced by vocational rehabilitation experts, physical therapists, and psychologists on hearings before a judge of said court, written reports by a vocational rehabilitation expert, physical therapist, or psychologist duly signed by him, her or them and itemized bills may, at the discretion of the court, be received in evidence in lieu of or in addition to . . . personal testimony . . . . A sworn statement or deposition transcribed by a person authorized to take depositions is a signed, written report for purposes of this rule.

[8,9] As Roness' counsel emphasized at trial in this matter, the compensation court is not bound by the usual common-law or statutory rules of evidence; 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. See *Johnson v. Ford New Holland*, 254 Neb. 182, 575 N.W.2d 392 (1998). The compensation court's discretion to admit evidence is subject to the limits of constitutional due process. See *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013).

[10,11] Rule 10 is an evidentiary rule. *Johnson v. Ford New Holland, supra*. Rule 10 allows for the introduction into evidence of signed medical reports in place of live expert testimony; such reports would often be hearsay in trial courts. See *Johnson v. Ford New Holland, supra*. In *Johnson v. Ford New Holland*, the Nebraska Supreme Court held that rule 10 allows the compensation court to admit into evidence medical reports that would not normally be admissible in trial courts, provided that those reports are signed. The *Johnson* court affirmed the compensation court's refusal to accept a medical report of a physician into evidence because it was not signed, a requirement specifically indicated in the rule. See, also, *Baucom v. Drivers Mgmt., Inc.*, 12 Neb. App. 790, 686 N.W.2d 98 (2004) (finding compensation court erred in admitting medical evidence that did not comply with rule 10 requirement of signature).

Wal-Mart asserts that the records, letter, and deposition of the physician's assistant were not properly admitted in lieu of live testimony because rule 10 specifically allows for the admission of such evidence only from physicians, surgeons, vocational rehabilitation experts, physical therapists, and psychologists. The rule makes no mention of physician's assistants. Wal-Mart also asserts that it was error for the compensation court to admit the evidence from the physician's assistant because of due process concerns about the physician's assistant's foundation to qualify as an expert.

The question of whether evidence from a physician's assistant, a medical provider not specifically mentioned in the text of the rule, can be properly admissible in the compensation court pursuant to rule 10 appears to be one of first impression in Nebraska. Neither party has cited us to any authority concerning whether rule 10 should be limited to only the medical providers specifically mentioned or whether, because

admission of evidence is largely discretionary in the compensation court, the compensation court could, within its discretion, receive similar evidence from other medical providers. On the record presented in this case, however, we conclude that we need not specifically resolve that issue.

Even assuming that all of the evidence received by the compensation court in this case was properly received—a finding we expressly decline to reach—we find that there was insufficient evidence adduced by Roness to satisfy her burden to prove that her injury and disability were caused by her employment. None of the medical evidence adduced includes a sufficient opinion to support the crucial causal link between her injury and employment.

1. Physician's Assistant's Opinion

First, even if admissible, the records, letter, and deposition of the physician's assistant did not contain a sufficient opinion to establish causation. The physician's assistant's records reflected that Roness was treated at an urgent care facility, reported that her hand had been numb "since working delivering milk," and included an assessment of "[c]arpal tunnel bilaterally." The physician's assistant's records do not include any statement that could be considered any kind of an opinion that the carpal tunnel syndrome was caused by Roness' employment.

The letter authored by the physician's assistant similarly does not contain an opinion that Roness' injury was caused by her employment. In the letter, the physician's assistant related Roness' history and prior surgery for carpal tunnel syndrome and related the findings of tests performed at the urgent care facility. In the letter, the physician's assistant specifically indicated that "[i]t is in [her] opinion that [Roness] has carpal tunnel." However, the physician's assistant explicitly indicated that she "can not say that it was caused by [Roness'] work." The physician's assistant indicated that "the repetitive motions that [Roness] does at work will cause this condition to be aggravated."

Taken on its own, the letter of the physician's assistant amounts to an opinion that Roness has carpal tunnel syndrome

(which is not even disputed by Wal-Mart) and a specific representation that the physician's assistant cannot opine that it was actually caused by work, but a recognition that the physician's assistant believes that Roness' job duties are consistent with actions that aggravate carpal tunnel syndrome. Taken on its own, this is insufficient as an expert opinion to establish causation—indeed, it specifically includes an assertion that it "can not" be an opinion on causation. When read in conjunction with the physician's assistant's deposition, however, the evidence becomes even less useful as an expert opinion to establish causation.

In her deposition, the physician's assistant again related the history of her treatment of Roness at the urgent care facility and Roness' history of prior carpal tunnel syndrome. Roness' counsel referred the physician's assistant to her letter and specifically asked, "[I]n that letter you indicate that your opinion is that [Roness'] having carpal tunnel and the repetitive motions at work caused the condition to be aggravated, is that fair?" The physician's assistant again specifically iterated that she said she "cannot say that it was caused by [Roness'] work."

The physician's assistant explained that an opinion on causation was complicated because of Roness' history of carpal tunnel syndrome and also because the physician's assistant did not "know what [Roness'] other . . . lifestyle is outside of work." She continued, "So if [Roness] does a lot of typing, those kinds of things could have aggravated it too." Roness' counsel then asked if "it's reasonable to conclude that the work aggravated the symptoms." The physician's assistant answered, "Possibly."

The physician's assistant's opinion is, again, not sufficient to establish a crucial causal connection between Roness' employment and her aggravated bilateral carpal tunnel syndrome. The physician's assistant's deposition testimony establishes that she was not able to opine to such causation and that she was not opining to such causation.

In addition, although she had indicated in her letter and in her deposition testimony that "the repetitive motions" Roness

performed at work would cause the carpal tunnel syndrome to be aggravated, she testified on cross-examination that she was unaware of what Roness' routine at work was, was unaware of what type of work she performed, was unaware of how many hours she worked on a weekly basis, and was unaware of how long she had worked at Wal-Mart. The physician's assistant also testified that she did not regularly treat carpal tunnel syndrome.

A review of the evidence from the physician's assistant reveals that she never provided an opinion that Roness' bilateral carpal tunnel syndrome was caused by her work. At most, she indicated that it was "[p]ossibl[e]," but she specifically declined to give an opinion on causation and specifically indicated that she lacked sufficient information to do so. Her testimony further indicates that she lacked sufficient foundation about Roness' employment responsibilities to be able to give such an opinion.

In addition to finding that the physician's assistant did not give a sufficient opinion to establish causation, we also conclude that the compensation court was clearly wrong with respect to its factual findings concerning the physician's assistant's records in this case. The court specifically ruled that the notes, letter, and deposition of the physician's assistant were being admitted into evidence. In so ruling, the court specifically found that the physician's assistant's "treatment and treatment plan were reviewed by a physician who signed off on the treatment plan." The court also found that within the physician's assistant's notes was a referral to an orthopedic specialist, signed by a physician. These findings are clearly wrong.

There is no evidence in the record to suggest that the physician's assistant's treatment of Roness or treatment plan for Roness was reviewed by a physician or signed off on by a physician. The medical records include intake notes which were signed by the physician's assistant and which also contained a line designated to be for a "NURSE SIGNATURE." That line contains a signature of an individual, followed by a series of initials that appear to be "R-T. M.A." There is nothing in our

record to indicate who this person was or that it was a physician, and the signature does not appear to correspond to any physician referred to in the record.

Similarly, there is no evidence in the record to suggest that the referral contained within the physician's assistant's notes was signed by a physician. The referral is on what appears to be a prescription form and indicates that "[Roness] was seen at Urgent Care. She is recommended to see an ortho specialist." The referral then includes the signature of somebody on a line, and the end of the line includes a preprinted "MD." The signature is not legible, but the first two letters of the first name appear to be "Sh" and the first two letters of the last name appear to be "St." The left side of the referral includes a listing of physicians, physician's assistants, and nurses of the urgent care facility. None of the physicians has a name that would appear to correspond to the signature; one of the other physician's assistants, however, is named "Sheila Sterkel," which does appear to correspond to the signature.

There was no testimony adduced by anyone concerning the signatures, whose they were, or whether any physician reviewed and signed off on anything contained in the physician's assistant's records of Roness' treatment. The compensation court was clearly wrong in finding otherwise.

2. Dr. Gilles' Opinion

Dr. Gilles' medical records and letter similarly are not sufficient to establish the crucial causal link between Roness' employment and her carpal tunnel syndrome. Our review of the evidence adduced from Dr. Gilles reveals no indication of Roness' employment's causing her injury.

The medical records from Dr. Gilles' treatment of Roness include the "History of Present Illness" section which indicates that Roness related her work at Wal-Mart, the symptoms, and the prior history of carpal tunnel syndrome. The medical records include Dr. Gilles' impression of "[b]ilateral carpal tunnel syndrome, right greater than left" and "[s]tatus post previous right carpal tunnel release." The medical records from Dr. Gilles contain no statement on her behalf that appear to

be any kind of an opinion as to causation of Roness' bilateral carpal tunnel syndrome.

In the letter authored by Dr. Gilles, she indicated that she saw Roness on only one occasion and that Roness "related her problems to an injury on 02/11/2011." Dr. Gilles restated her diagnoses of "bilateral carpal tunnel syndrome, right greater than left," and "status post previous right carpal tunnel release." Dr. Gilles then specifically indicated as follows: "I certainly do believe that [Roness'] *symptoms* could have likely aggravated [a] preexisting condition and that she probably had a tenosynovitis associated with *it* but without further objective studies, I cannot give you a better treatment plan or history course." (Emphasis supplied.)

The court found that "Dr. Gilles state[d] in [the] affirmative that [Roness] has tenosynovitis because of her work, and . . . added it could likely have aggravated the preexisting condition" and held that Roness "is surely entitled to benefits because Dr. Gilles finds [Roness] probably has tenosynovitis associated with her symptoms. That alone is sufficient to award benefits because 'probably' is sufficient." These findings are clearly wrong.

Contrary to the compensation court's finding that Dr. Gilles stated that Roness has tenosynovitis "because of her work," Dr. Gilles never expressed any opinion relating any of Roness' injuries to her work. Dr. Gilles opined that Roness' "symptoms" could have aggravated her preexisting condition—but Dr. Gilles never related those symptoms to employment in any way. Similarly, Dr. Gilles opined that Roness probably had tenosynovitis associated with "it," but there is no indication that "it" referred to employment in any way. Rather, "it" would appear to refer to either Roness' preexisting condition or her symptoms. Dr. Gilles' opinion contains no reference to Roness' employment whatsoever. Dr. Gilles also specifically indicated that without further information, she could not provide more information.

As a result, Dr. Gilles' opinion appears, at most, to be that Roness has suffered an aggravation of her prior carpal tunnel syndrome. But that opinion does not provide the crucial causal

connection between Roness' employment and her carpal tunnel syndrome. The compensation court was clearly wrong with respect to its specific findings about what Dr. Gilles actually opined and with respect to its finding that Dr. Gilles' opinion was sufficient for the award of benefits.

3. Dr. Sollender's Opinion

The only other medical evidence in our record was adduced on behalf of Wal-Mart, in the form of the report of Dr. Sollender, an independent physician who examined Roness and her medical records. Dr. Sollender's opinion was specifically that Roness' current bilateral carpal tunnel syndrome was not caused by her employment.

V. CONCLUSION

In this case, Roness had the burden to adduce sufficient medical testimony to establish a causal connection between the alleged injury, the employment, and the disability. The evidence adduced establishes that she suffered bilateral carpal tunnel syndrome, but does not include any medical testimony opining that her injury was caused by her employment. As such, the compensation court was clearly wrong in finding the evidence sufficient to support an award of benefits. We reverse.

Reversed.

Melanie L. Dragon, now known as Melanie L. Tuamoheloa, appellant, v. Christopher P. Dragon, appellee.

838 N.W.2d 56

Filed September 3, 2013. No. A-12-1030.

1. **Child Custody: Visitation: Appeal and Error.** Child custody and visitation 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. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and

unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

3. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. ____. Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state.
5. ____. Legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state where there is a reasonable expectation of improvement in the career or occupation of the custodial parent, or where the custodial parent's new job includes increased potential for salary advancement.
6. ____. A custodial parent is not required to exhaust all possible job leads locally before securing a better position in another state.
7. ____. In determining whether removal to another jurisdiction is in a child's best interests, the court considers (1) each parent's motives for seeking or opposing the move; (2) the potential the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation.
8. ____. The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted removal in an effort to frustrate or manipulate the other party.
9. ____. In determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties.
10. ____. The list of factors to be considered in determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted.
11. ____. Where the evidence does not establish any significant improvement in housing or living conditions, that factor does not weigh in favor of or against a child's removal to another jurisdiction.
12. ____. In considering removal of a child to another jurisdiction, the existence of educational advantages receives little or no weight when the custodial parent fails to prove that the new schools are superior.

13. ____. The effect of the removal of a child to another jurisdiction must be evaluated in light of the child's relationship with each parent.
14. **Child Custody: Visitation.** A noncustodial parent's visitation rights are important, but a reduction in visitation time does not necessarily preclude a custodial parent from relocating for a legitimate reason.
15. **Child Custody.** In considering removal of a child to another jurisdiction, a court focuses on the ability of the noncustodial parent to maintain a meaningful parent-child relationship.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Reversed and remanded for further proceedings.

Tracy L. Hightower-Henne, of Hightower Reff Law, L.L.C., for appellant.

Hugh I. Abrahamson, of Abrahamson Law Office, for appellee.

PIRTLE and RIEDMANN, Judges, and MULLEN, District Judge, Retired.

PIRTLE, Judge.

I. INTRODUCTION

Melanie L. Dragon, now known as Melanie L. Tuamoheloa, appeals the order of the district court for Sarpy County which denied her request to remove her minor child from the State of Nebraska and awarded sole custody of the child to Christopher P. Dragon. We find that Melanie had a legitimate reason to request removal and find upon our de novo review that Melanie sufficiently demonstrated removal would be in the child's best interests. We also find the trial court erred in determining that sole custody should be awarded to Christopher. Accordingly, we reverse the denial of Melanie's complaint to modify the decree.

II. BACKGROUND

The parties divorced in 2005 and are the parents of Kendra Dragon, born in 2002. Pursuant to the decree of dissolution, the parties shared joint legal custody of the minor child and Melanie was awarded physical custody of Kendra. The parenting plan provided parenting time for Christopher with Kendra two evenings per week and every other weekend.

On April 23, 2012, Christopher filed a complaint for a temporary restraining order, preliminary injunction, and injunction, asking the court to prevent Melanie from removing Kendra from the State of Nebraska. Christopher also filed a motion for ex parte order requesting that the court prevent Melanie from permanently removing Kendra from the State of Nebraska. Melanie filed an answer and cross-complaint to modify the decree and gain permission to remove the minor child from the State of Nebraska to New Mexico. The parties stipulated that the child would not be removed without consent of the court.

Christopher's reply and answer to Melanie's cross-complaint alleged that "it is in the best interests of the parties' minor child that should [Melanie] leave the State of Nebraska that the care, custody and control of the minor child be with [Christopher]." Melanie's "Amended Motion for Expedited Trial or in the Alternative Motion for Temporary Allowances" requested the earliest possible trial date, permission for temporary removal, or permission from the court for Kendra to continue residing with Steven Tuamoheloa (Steven), her current husband and Kendra's stepfather, in Omaha, Nebraska, until trial.

Christopher objected to Melanie's motion and opposed temporary removal. Christopher's motion for temporary custody filed on July 27, 2012, stated it was not in Kendra's best interests to be placed in the custody of Steven. Christopher also stated it was in Kendra's best interests that when Melanie relocated from the State of Nebraska, he should retain the care, custody, and control of her. Although he mentions custody, he did not file a counterclaim requesting a change of custody.

Trial regarding removal took place on September 25 and 27 and October 23, 2012.

Melanie requested permission to remove Kendra from the State of Nebraska because she was moving to New Mexico to accept a job offer after completing her nursing degree. Melanie testified she was a stay-at-home mother with no employment income until she earned her degree from Creighton University in May 2012. Melanie is an enrolled member of the Omaha Tribe of Nebraska. She received a scholarship through Indian

Health Service, which paid for 2 years of nursing school. She also received a stipend in the amount of $18,000 for living expenses.

The scholarship required Melanie to be enrolled full time in nursing school and maintain a 3.0 grade point average. The scholarship also required Melanie to secure employment within 90 days of graduation, specifically at an Indian health care facility, and she was required to work for a year for each year the scholarship funded her education. Thus, Melanie was obliged to work for 2 years for an Indian health care facility. Should Melanie fail to meet the postgraduation requirement, she would be required to pay back the scholarship, totaling $80,000.

Melanie searched for employment with an Indian health care facility upon graduation, using the Indian Health Service Web site. She testified that there are two facilities in Omaha which would have fulfilled the requirement, but that there were no job opportunities available within 90 days at either facility. She expanded her search nationwide. She was unable to secure a job at a facility in Rapid City, South Dakota, because she did not have enough experience. She was offered positions at two facilities: one in Gallup, New Mexico, and one in Anchorage, Alaska. She accepted a job as a registered nurse with the Gallup Indian Medical Center and moved to New Mexico in August 2012. Because Melanie did not have permission to remove Kendra from Nebraska at that time, Kendra remained in Nebraska with Christopher.

Melanie immediately received benefits through her employer, including health insurance, a retirement plan, life insurance, vision and dental insurance, and long-term advancement training opportunities. She testified that if she maintains her job at this facility beyond 2 years, she will receive loan repayments totaling approximately $115,000.

Melanie married her current husband, Steven, 7 years ago, and they have three children together. Melanie testified that Kendra has two men that she calls "dad," Christopher and Steven. Melanie said Kendra has a loving relationship with Steven; they play together, and she is treated in the same way as the other children. Steven testified that he is active in

parenting Kendra and has been a part of her life since she was 2 years old. He said that "she's basically my first kid." Kendra is also bonded with her half siblings and takes a leading role as the oldest sibling. She enjoys playing with them and reading to them and likes to "play Barbies" and "dress up" with her half sister.

Melanie sought permission to remove Kendra from Nebraska so that she could live with Melanie and the family in New Mexico. Melanie was Kendra's primary caregiver from birth, and has remained in that role since the parties divorced, approximately 9 years ago. Melanie has been very involved in Kendra's schooling and activities and enjoys a loving relationship with her. Melanie testified that she takes Kendra to all of Kendra's medical appointments and talks to her about issues with school, friends, and concerns relating to puberty. Christopher has not provided health insurance for Kendra, despite being ordered to do so in the original decree, and did not know the names of Kendra's doctors or dentist.

Melanie testified that she helps Kendra with her homework and reviews incorrect answers to make sure she understands the work. Melanie expressed concern about the decline in Kendra's schoolwork since she began living with Christopher. Melanie received an e-mail from Kendra's teacher saying that she noticed a decline in Kendra's work and work habits and that her grades were in decline.

Melanie testified that if Kendra were allowed to move to New Mexico, she would live with the family in a leased three-bedroom home and would continue to share a room with her half sister. The home is one block away from the school Kendra would attend, and this is much closer than the distance between her home and school in Omaha. She said that there are no concerns about the size or safety of the home and that the neighborhood is comparable to their neighborhood in Omaha.

Melanie's extended family lives in Omaha, and she testified they would travel to Omaha to see extended family every few months. Melanie's father testified that they planned to visit New Mexico "[m]aybe six times a year" and that he was not concerned about any strain on the relationship between Kendra

and her extended family in Omaha. Melanie testified that Christopher would have unlimited access to Kendra through "Skype" calls, e-mails, and frequent telephone calls. She also said that she would be willing to pay for the majority of transportation costs for Kendra to visit Christopher or that she would be open to a deviation in child support if Christopher paid for a portion of transportation. She testified she would agree to Kendra's spending the majority of the time spent visiting in Omaha with Christopher.

If Christopher was awarded custody, Kendra would continue to live with Christopher, Christopher's fiance, and their 1-year-old daughter. Christopher testified that Kendra is close to his younger daughter and has a good relationship with his fiance. Kendra would continue to attend elementary school in Omaha's Millard school district, although they live in the Bellevue school district.

Christopher stated that he wants Kendra to stay in Nebraska, because it is where she was born and he wants to have a regular relationship with her. Melanie agreed that Kendra and Christopher have a good relationship and said she believes it is important for Kendra to maintain her relationship with her father. Christopher testified that his father, grandparents, aunts, and uncles live in Omaha. He testified that his mother lives out of town and that they do not spend much time together or communicate often. Christopher testified that he has two brothers and that he does not have a strong relationship with them. He testified that one brother is a convicted sex offender.

Christopher also testified that he was convicted of "[f]elony of a forged instrument" and successfully completed probation. He testified that he was aware that the Nebraska Revised Statutes prohibit felons from being in the possession of firearms. Christopher testified that he enjoys hunting and had used a gun prior to his conviction. He said he switched to a bow and arrow after the conviction and has not been hunting with a gun since 1999. Christopher's fiance testified that she provided him with a hunting permit as part of her duties working with the wildlife and parks department. She also said that

she was with Christopher the last time he hunted and that he used a shotgun.

Melanie stated she was concerned because Kendra was seeing her maternal grandmother two to three evenings per week and Christopher has been cutting their time together shorter and shorter. Melanie's mother testified that she did not get to see Kendra as much as she did before Melanie moved to New Mexico. Melanie also expressed concerns about whether Christopher would hinder her relationship with Kendra, because she was allowed to see Kendra for only 3½ hours after Melanie had been gone for 4 weeks.

A clinical psychologist testified that she met with Kendra on two occasions and also met with Christopher. She testified that Kendra is bonded to her family members and that she loves Melanie and Christopher and is happy with both of them. The psychologist testified that Kendra misses her mother, stepfather, and siblings, and she said it helps Kendra to have contact with Melanie every day on the telephone. The psychologist testified that the opinion she submitted in her report was that Kendra should stay in Nebraska.

The psychologist testified that she has made this type of recommendation before, and that she typically prefers to "grill the mother, grill the father and meet with the children once, twice. If additional times are needed, whatever seemed to fit the family's needs." She did not meet with Melanie prior to submitting her report in this case. She said that she would have preferred to meet with both parents and both attorneys together, but that it did not happen in this case. She said she represents the children in these situations but acknowledged that her report could "be slightly more swayed by [Christopher] because [she] didn't have contact with [Melanie]."

The court entered an order of modification on October 30, 2012, denying Melanie permission to remove Kendra from the State of Nebraska. The trial court concluded Melanie failed to satisfy the threshold test of proving that there was a legitimate reason to leave the State of Nebraska and that removal was in Kendra's best interests. Additionally, the trial court modified

custody, awarding Christopher physical custody, as well as the right to claim the tax exemption for Kendra every year.

Melanie was awarded reasonable visitation and was ordered to pay 100 percent of all travel expenses and $293 per month to Christopher for child support. She was also ordered to provide health and dental insurance for Kendra through Melanie's employer.

Melanie filed her notice of appeal on November 2, 2012.

III. ASSIGNMENT OF ERROR

Melanie asserts the trial court erred in denying her request to remove Kendra from the State of Nebraska.

IV. STANDARD OF REVIEW

[1,2] Child custody and visitation 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. *Colling v. Colling*, 20 Neb. App. 98, 818 N.W.2d 637 (2012). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

V. ANALYSIS

[3] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

1. Legitimate Reason for Leaving State

Melanie argues that the district court erred in finding that she did not have a legitimate reason for leaving Nebraska. At trial, Melanie provided evidence that she moved to New

Mexico to accept a position with a facility in the Indian health care network. Accepting this position would help her to fulfill the conditions placed upon her as a result of the scholarship she received to pay for her nursing degree. She testified that she was required to obtain a position within 90 days after graduation or she would be forced to repay approximately $80,000 for the scholarship and $18,000 for living expenses.

She presented evidence that she made an effort to find nursing positions in Omaha and surrounding areas, but that Omaha did not have any openings within the 90 days. She testified that she applied for a position in Rapid City because it was relatively close to Omaha, but that she was denied that position because she did not have the required experience. She was offered positions in Gallup and Anchorage. The position she accepted in Gallup would also provide a steady income, benefits, and the possibility for advancement and additional income and incentives if she maintained the position for longer than 2 years.

The district court determined that Melanie had the burden to show that she made reasonable efforts to gain employment in Nebraska before seeking employment outside of Nebraska and indicated her search of the Indian Health Service Web site may not have been sufficient. The court acknowledged that avoiding repayment of financial aid is reasonable, but stated that "the evidence was lacking as to whether the only available financial aid to [Melanie] was this particular type of financial aid, which is attached to an Indian health clinic." Further, the court stated Melanie is required to examine similar employment opportunities in Nebraska before looking to another state.

[4] In making these findings, the district court imposed burdens which have not been held to be the standard by this court. Rather, this court has repeatedly held that legitimate employment opportunities for a custodial parent may constitute a legitimate reason for leaving the state. *Steffy v. Steffy*, 20 Neb. App. 757, 832 N.W.2d 895 (2013); *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007). See, *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack v. Clinton*, 259 Neb. 198, 609

N.W.2d 328 (2000); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

[5] We have also stated, and recently reaffirmed, that such legitimate employment opportunities may constitute a legitimate reason where there is a reasonable expectation of improvement in the career or occupation of the custodial parent, or where the custodial parent's new job includes increased potential for salary advancement. See, *Jack v. Clinton, supra*; *Steffy v. Steffy, supra*.

[6] There is no standard that the custodial parent must seek employment in Nebraska prior to looking in other states, and there is no burden that a parent must investigate all types of financial aid before accepting a scholarship. Rather, the Nebraska Supreme Court has stated, "[W]e have never required a custodial parent to exhaust all possible job leads locally before securing a better position in another state." *Farnsworth v. Farnsworth*, 257 Neb. at 252-53, 597 N.W.2d at 600. The evidence considered by the trial court is relevant, but it would be more appropriate to consider this information when weighing the child's best interests.

Melanie provided evidence that the position in New Mexico can be expected to improve or advance her career as a nurse, as well as provide increased income for the family. Further, there is additional evidence that if Melanie failed to accept a position within 90 days after graduation, she would be forced to pay a significant amount of money for failing to meet the requirements of her scholarship. Melanie was required to begin her position within 90 days of graduation, and as a result, she was required to leave Kendra in Omaha with Christopher and move to New Mexico right away. She then sought permission to remove Kendra from Nebraska.

Melanie essentially had two choices: stay in Nebraska with Kendra and attempt to obtain similar employment, knowing that she would not be able to fulfill the requirements of her scholarship and would likely be responsible for paying back the entirety of her scholarship funds, or take a job in New Mexico which would fulfill the requirements of her scholarship and hope the court would approve her request for Kendra's removal. She chose the latter.

While one might conclude it was imprudent for Melanie to move to New Mexico and begin a job while petitioning the court for permission to leave the state, it cannot be said that her request was not legitimate. We find the district court erred in determining Melanie's evidence of a legitimate reason to leave the state was "questionable."

2. Best Interests

Having determined Melanie did meet the threshold requirement, we will consider upon our de novo review whether she demonstrated that removing Kendra from Nebraska is in Kendra's best interests. See *Farnsworth v. Farnsworth, supra*.

[7] In determining whether removal to another jurisdiction is in the child's best interests, the court considers (1) each parent's motives for seeking or opposing the move; (2) the potential the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *Steffy v. Steffy*, 20 Neb. App. 757, 832 N.W.2d 895 (2013).

(a) Each Parent's Motives

[8] The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted removal in an effort to frustrate or manipulate the other party. *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007).

The evidence shows Melanie sought removal because she was unable to find a job in Omaha that fulfilled the requirement, imposed by her scholarship, of employment within 90 days of graduation. There is no evidence that she sought employment in New Mexico to frustrate or manipulate Christopher, and she stated her intention to continue to foster his relationship with Kendra.

The evidence shows Christopher opposed removal because it would potentially affect his parenting time. We do not find his opposition was an attempt to frustrate or manipulate Melanie.

We do not find either party acted in bad faith, and this factor does not weigh for or against removal.

(b) Quality of Life

[9] In determining the potential that removal to another jurisdiction holds for enhancing the quality of life of the child and the custodial parent, a court should evaluate the following considerations: (1) the emotional, physical, and developmental needs of the child; (2) the child's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the child and each parent; (7) the strength of the child's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the removal would antagonize hostilities between the two parties. *Wild v. Wild, supra*.

[10] This list should not be misconstrued as setting out a hierarchy of considerations, and depending on the circumstances of a particular case, any one consideration or combination of considerations may be variously weighted. *Id*.

(i) Emotional, Physical, and Developmental Needs

We first consider the impact on the child's emotional, physical, and developmental needs in assessing the extent to which the move could enhance the child's life.

The district court noted that Kendra has thrived in all areas of her life and that Kendra's emotional, physical, and developmental needs were being met by both parents in Nebraska. The court determined this factor weighed against removal from Nebraska, because after the initial stress of Melanie's relocation, Kendra appeared to be doing well in Christopher's home and because moving to New Mexico would result in far less contact between Christopher and Kendra.

The district court did not consider whether any of these needs would also be met by Melanie in New Mexico, and apparently did not consider the impact of Kendra's having less contact with Melanie. We believe this information should have been considered.

Upon our de novo review, we find the evidence shows Melanie was Kendra's primary caregiver from birth, and continued to be her primary caregiver and physical custodian after the parties divorced in 2005. Melanie was responsible for Kendra's daily needs, she took Kendra to routine doctor and dentist appointments, and she discussed Kendra's problems with her and helped her understand the changes she is going through as part of puberty. Melanie has been a constant in Kendra's life, and the evidence shows Kendra exhibited signs of mental and emotional stress when Melanie moved to New Mexico.

After the parties' divorce, Melanie married Steven and their three children were born. Kendra has lived with Melanie and Steven, her stepfather, since she was 2 years old and has lived with the other children since their birth. She has been a vital part of their family unit and enjoys her role as the oldest sibling. Kendra has been separated from not only her mother, but from her stepfather and half siblings, with whom she is emotionally attached.

Recently, Melanie decided to go back to school to study nursing and received a scholarship to help her gain her degree. Her years as a stay-at-home mother allowed her to provide a stable home life for her children. Her decision to begin a career as a nurse allows her to provide for her family in other ways. She now has access to expanded insurance benefits and increased income. Although they are not currently in the same state, Melanie communicates daily with Kendra and makes every effort to maintain their bond.

Christopher's affidavit states that since the original decree, he has spent a minimum of every other weekend from 5 p.m. Friday to 6 p.m. Sunday with Kendra. He has also participated in midweek visitation from 5 to 9 p.m. Monday and Thursday evenings, plus holidays and extended parenting time during the summer. The record is void of evidence that Christopher made efforts to maintain daily contact with Kendra when she resided with Melanie in Omaha.

Christopher currently lives with his fiance and their 1-year-old daughter. He testified that he personally enjoys hunting

deer and turkeys. Christopher is a convicted felon, and the testimony is in conflict as to whether he hunts with a bow and arrow or a shotgun. His fiance testified she was with him when he hunted 2 years ago and used a shotgun.

When asked how Christopher planned to handle the changes that are associated with a developing teenage girl, such as puberty, he responded, "My girlfriend would be able to talk to her about that stuff." Christopher also testified that he did not know the names of Kendra's regular pediatrician or dentist and that although he was ordered to provide insurance as part of the original decree, he did not do so at any time.

Melanie testified that when Kendra lived with her, Kendra came home from school, had a snack, and did her homework. Melanie made sure that Kendra's homework was complete, and they reviewed incorrect answers. Melanie testified that she received an e-mail from Kendra's teacher that her grades have dropped since she moved to Christopher's home, and Melanie is aware of a few instances when homework was not completed. Kendra's teacher said she noticed a decline in Kendra's work and work habits. Melanie said this information was surprising because Kendra always completed her work and asked questions when she had them. Kendra's grades improved between trial dates, but Melanie still had concerns about Kendra's keeping her grades up and maintaining them. She used the school's Web site to verify assignments were turned in, albeit late.

Outside of school, Kendra is involved in gymnastics and would be able to continue this activity in New Mexico if she chose to do so.

Although it appears the emotional, physical, and developmental needs may be met at a baseline level with either parent, the evidence indicates Melanie has been a more stable and constant presence and would meet Kendra's emotional, physical, and developmental needs more effectively.

For these reasons, we determine this factor weighs in favor of removal.

(ii) Child's Opinion or Preference

Kendra did not testify, and this factor was not used to weigh in favor of or against removal.

(iii) Enhancement of Custodial Parent's Income

It is clear that the move to New Mexico will enhance Melanie's income. Prior to graduating from the nursing program, she was a stay-at-home mother, and during her schooling, she received only a stipend for living expenses. The job in New Mexico provides Melanie with a salary, health insurance, a retirement plan, life insurance, and long-term advancement training opportunities. She testified she will be trained as a charge nurse and will be eligible for promotions. If she maintains the position for 2 years, she will not be required to pay back the money she received as part of her scholarship and will be eligible for loan repayment. We agree with the district court's determination that this factor weighs in favor of removal.

(iv) Degree to Which Housing or Living Conditions Would Be Improved

The district court determined this factor did not support removal, because Melanie "has the burden to prove that the minor child's housing *shall be improved* by relocating to New Mexico and failed to meet that burden." (Emphasis supplied.) By saying Melanie has the burden of showing how housing "shall be improved," the trial court imposes a burden requiring a heightened level of proof that we have not previously required.

A parent requesting removal must show how the child's quality of life will be improved, and each of the factors listed in *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007), and other such removal cases contribute to the court's ultimate determination regarding the child's best interests. Improvement in housing or living conditions is merely one factor the court may consider when determining whether the quality of life will be impacted.

[11] In previous cases, where the evidence does not establish any significant improvement in housing or living conditions, we have determined that the factor does not weigh in favor of or against removal. *Colling v. Colling*, 20 Neb. App. 98, 818 N.W.2d 637 (2012).

In Omaha, Melanie and her husband lived in a four-bedroom home and Kendra shared a room with her half sister. In New Mexico, Melanie and her husband leased a three-bedroom home and Kendra would continue to share a room with her half sister. Melanie testified that the room in Gallup would be larger than the room in Omaha. Melanie also testified that Kendra's school is one block away from their home and that she had no concerns about the size of the home or the safety of the neighborhood. She said the neighborhood is comparable to their neighborhood in Omaha.

We find the living conditions in Omaha and Gallup are comparable, and this factor does not weigh in favor of or against removal.

(v) Existence of Educational Advantages

Another factor to consider is whether New Mexico offers educational advantages. The trial court stated Melanie had the "burden to prove that the minor child's schooling *shall be improved* by relocating to New Mexico and failed to meet that burden." (Emphasis supplied.) Again, the trial court imposes a burden requiring a heightened level of proof that we have not previously required.

[12] We have held this factor receives little or no weight when the custodial parent fails to prove that the new schools are superior. *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008).

Melanie testified that if allowed to move, Kendra would attend an elementary school in Gallup and would be able to start immediately. Neither party provided evidence that one school is superior to the other. Therefore, we find this factor does not weigh in favor of or against removal.

(vi) Quality of Relationship Between Child and Each Parent

It appears Kendra has a good relationship with both parties. Both parties testified that Melanie was the primary caregiver during their marriage and that she continued to fill that role after the parties' divorce. If Melanie were given permission

to remove Kendra, she would not have weekly visitation with Christopher. However, Melanie testified she would return to Omaha with Kendra often to visit extended family and would allow Kendra to spend the majority of the time in Omaha with Christopher. Additionally, Melanie's proposed parenting-time plan allowed for parenting time over school vacations and holidays and extended time in the summer.

The evidence shows Kendra has a good relationship with both parents. Christopher testified that he has maintained a close relationship with Kendra and that he spends time with her on the weekends camping, fishing, riding bikes, and doing art projects.

The district court considered the evidence and determined Christopher's relationship with Kendra would be negatively affected by the move, because it would affect his weeknight and weekend parenting time. The court determined this factor weighed strongly against removal.

[13] The effect of the removal of a child to another jurisdiction must be evaluated in light of the child's relationship with each parent. *Wild v. Wild*, 13 Neb. App. 495, 696 N.W.2d 886 (2005).

The district court did not consider the quality of the relationship between Kendra and *each* parent, because there is no mention or consideration of Kendra's relationship with her mother. The evidence is clear that Kendra has a strong bond with Melanie as well. Under the established visitation schedule, Kendra spent two evenings with Christopher per week and had overnights every other weekend. The remaining time was spent with Melanie. Melanie was involved in Kendra's daily routine, helped with homework, and cared for her emotionally and physically. They enjoy going to the park, watching movies, and participating in Native American ceremonies with Melanie's extended family. After Melanie's move, she and Kendra talked on the telephone every day and have had regular e-mail and "Skype" contact, but this is clearly not the same quality of relationship they enjoyed prior to the move.

We find Kendra's strong bond with Melanie, coupled with Melanie's willingness to help Kendra maintain a strong bond with Christopher, weighs in favor of allowing removal.

(vii) Strength of Child's Ties to Present Community and Extended Family

The district court determined this factor weighs strongly against removal of Kendra, because all of her extended family resides in Nebraska, including both her mother's and her father's families. The district court also gave credit to Christopher for allowing Kendra to continue seeing her extended family on Melanie's side after Melanie moved.

The evidence shows that although Christopher continued to allow Kendra to see Kendra's maternal grandparents, they testified that the visits are becoming shorter and less frequent.

The district court correctly determined that Kendra has strong ties to family members residing in Omaha, including Christopher's father, grandparents, and aunts and uncles; Christopher, his fiance, and their 1-year-old daughter; and Melanie's extended family. There are also multiple members of Christopher's family, including his mother and brothers, with whom he has no contact. We also must consider the relationship between Kendra and her stepfather and her half siblings, with whom she resided for many years. Additionally, we consider the testimony of Melanie's parents that they would visit New Mexico approximately six times per year and that they would enjoy visits with Kendra whenever she returned to Nebraska to see Christopher and his family. Upon our review, we find Kendra has relationships with individuals in both New Mexico and Nebraska, and this factor weighs only slightly against removal.

(viii) Likelihood That Allowing or Denying Move Would Antagonize Hostilities Between Parties

We find that either granting or denying removal has the potential to antagonize hostilities between the parties, so we do not find this factor weighs in favor of or against removal.

(ix) Conclusion Regarding Quality of Life

After considering all of the quality-of-life factors, we conclude upon our de novo review that Melanie established

removal would enhance the quality of life for Kendra and for herself.

(c) Impact on Noncustodial Parent's Visitation

Relocating to New Mexico will undoubtedly have an effect on the time Kendra spends with Christopher. Christopher would no longer have the ability to exercise his parenting time two evenings per week and every other weekend.

Melanie recognized the impact this change would have on the relationship between Kendra and Christopher and proposed changes to the parenting plan to include extended time with Christopher during holidays, school breaks, and summer vacation. Melanie's "Suggestions to the Court" prior to trial proposed maintaining joint legal custody and making Melanie's possession subject to Christopher's liberal parenting time. She proposed allowing Christopher up to 8 weeks of summer parenting time and suggested Christopher be entitled to spring break and half of the Christmas holiday every year. She recognized that schedules would be subject to travel issues and said she would take that into account when scheduling and exercising parenting time.

Melanie also stated she would return to Nebraska frequently to visit her family and would allow Kendra to stay with Christopher for the majority of that time. Melanie's suggestions to the court proposed splitting the travel expenses on behalf of Kendra equally, but stated at trial that she would pay for the majority of Kendra's travel expenses or accept a reduction in child support if Christopher paid for transportation. Christopher and Kendra could stay in contact during the time between visits via telephone calls, e-mails, and "Skype" calls.

[14,15] Nebraska courts have recognized that a noncustodial parent's visitation rights are important, but a reduction in visitation time does not necessarily preclude a custodial parent from relocating for a legitimate reason. See *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986). Rather, we focus on the ability of the noncustodial parent to maintain a meaningful parent-child relationship, and such relationship is possible even

if Kendra moves to New Mexico. See *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008).

This factor weighs slightly against removal, because it will reduce the amount of in-person weekly contact Kendra has with Christopher, but removal would still allow Kendra and Christopher to maintain a meaningful relationship.

(d) Conclusion on Best Interests

A de novo review of the evidence shows that the parents were not motivated by an effort to frustrate the relationship of their child with the other parent, that the move would enhance Kendra's quality of life, and that it would not greatly impact the relationship between Kendra and Christopher. The record demonstrates sufficient evidence that it is in Kendra's best interests to move from Nebraska to New Mexico.

(e) Custody

Custody in this case would not be at issue were it not for Melanie's decision to move to New Mexico to pursue a job opportunity. The district court stated that "but for [Melanie's] making a voluntary financial decision to stay in New Mexico, she would retain custody." The parties agree Melanie was the primary caregiver, and there is no indication that Christopher intended to gain custody if Melanie had stayed in Omaha with Kendra. In fact, Christopher did not initially seek custody in his complaint in April 2012; rather, he sought an injunction preventing Melanie from removing Kendra from the State of Nebraska.

The first indication that Christopher was willing to assume care, custody, or control of Kendra was included in his reply and answer to Melanie's answer and cross-complaint to modify in June 2012. The reply and answer affirmatively alleged that "it is in the best interests of the parties' minor child that should [Melanie] leave the State of Nebraska that the care, custody and control of the minor child be with [Christopher]." While he mentions custody in such pleading, he did not file a counterclaim seeking custody or allege there had been a material change of circumstances warranting a change of custody.

We determined above that Melanie had a legitimate reason to leave the State of Nebraska and provided sufficient evidence that removal was in Kendra's best interests. Therefore, we reverse the trial court's custody determination and reinstate the custody determination set forth in the decree.

VI. CONCLUSION

We conclude the district court abused its discretion in determining that Melanie's acceptance of a job in New Mexico did not constitute a legitimate reason to leave the state. Upon our de novo review and after consideration of various relevant factors, we find that removing Kendra to New Mexico is in her best interests. Accordingly, we reverse the court's order denying Melanie's complaint to modify and the court's modification of custody. We order legal custody of Kendra to be held jointly by the parties and order physical custody be restored to Melanie. We remand for further proceedings consistent with our opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
LARRY LEE RUEGGE, APPELLANT.
837 N.W.2d 593

Filed September 10, 2013. No. A-12-550.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
3. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion by the trial court.

4. **Attorneys at Law: Motions for Mistrial: Verdicts: Appeal and Error.** A party may not raise alleged misconduct of adverse counsel on appeal where, despite knowledge of the alleged misconduct, the party claiming the misconduct failed to request a mistrial and instead agreed to take his or her chance on a favorable verdict.
5. **Trial: Appeal and Error.** On appeal, a defendant may not assert a different ground for an objection than was offered to the trier of fact.
6. **Trial: Attorneys at Law.** One is allowed considerable latitude in making an opening statement.
7. **Trial: Appeal and Error.** An objection to the prosecutor's argument made after the jury has been instructed and has retired is untimely and for that reason will not be reviewed on appeal.
8. **Records: Appeal and Error.** It is incumbent upon an appellant to present a record which supports the errors assigned.
9. **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.
10. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
11. **Theft: Words and Phrases.** The term "knowing," as used in Neb. Rev. Stat. § 28-517 (Reissue 2008), imposes a subjective standard of knowledge.
12. **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.
13. ____: ____. The two-prong ineffective assistance of counsel test need not be addressed in order.
14. **Effectiveness of Counsel: Presumptions.** When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
15. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
16. **Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.
17. **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.
18. **Motions for Mistrial.** A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.

19. **Trial: Attorneys at Law.** The decision about whether to make an objection during a trial has long been considered an aspect of trial strategy.
20. ____: ____. A decision not to object could be explained by trial counsel's calculated strategy not to highlight the objectionable material.

Appeal from the District Court for Holt County: MARK D. KOZISEK, Judge. Affirmed.

Michael S. Borders, of Borders Law Office, for appellant.

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

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Larry Lee Ruegge was convicted by a jury of theft by receiving stolen property. The district court subsequently found Ruegge to be a habitual offender and sentenced him to 10 years' imprisonment. Ruegge appeals from his conviction for theft by receiving stolen property. On appeal, Ruegge assigns numerous errors, including that there was insufficient evidence to support his conviction, that the State committed various instances of misconduct, and that the district court erred in failing to amend a certain jury instruction pursuant to Ruegge's request. Ruegge also alleges that he received ineffective assistance of trial counsel.

Upon our review, we find no merit to Ruegge's assertions on appeal. Accordingly, we affirm his conviction for theft by receiving stolen property.

II. BACKGROUND

The State filed a criminal complaint charging Ruegge with theft by receiving stolen property pursuant to Neb. Rev. Stat. § 28-517 (Reissue 2008). Later, the State filed an amended complaint which charged Ruegge with being a habitual offender pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 2008), in addition to the original charge of theft by receiving stolen property.

The theft by receiving stolen property charge stems from events which occurred in November and December 2010.

Evidence adduced at trial revealed that sometime during this time period, a flatbed trailer was stolen from Scribner Grain. Bolted to the flatbed trailer when it was stolen were various tools, including a generator/welder, an air compressor, a power washer, and some smaller hand tools. In the early part of December, an employee of Scribner Grain observed in the back of a pickup truck the generator/welder that had been stolen with the flatbed trailer. The employee followed the pickup truck to a local salvage yard, where it was discovered that the generator/welder was, in fact, the same generator/welder that had previously been stolen from Scribner Grain.

At trial, the State presented evidence to demonstrate that Ruegge had been in possession of the stolen generator/welder and had traded it, knowing that it was stolen, to the owner of the salvage yard, Richard Vande Mheen. Vande Mheen testified that on November 26, 2010, Ruegge came to Vande Mheen's home with the generator/welder and proposed a trade. Ruegge gave Vande Mheen the generator/welder in exchange for a snowmobile. Vande Mheen testified that Ruegge told him that he had purchased the generator/welder "when he was repairing irrigation systems."

When Vande Mheen was informed that the generator/welder had been stolen, he told police that he had gotten the tool from Ruegge. Vande Mheen then informed Ruegge that the police were asking about the generator/welder. Ruegge told Vande Mheen that if he did not tell police where he had gotten the tool, Ruegge would "make it worth [his] while." Ruegge also told Vande Mheen that he should tell police that the tool had "come in in a load of iron."

The State also presented evidence to demonstrate that the value of the generator/welder was approximately $2,500.

Ruegge's defense focused almost primarily on discrediting Vande Mheen's testimony. Through his cross-examination of the State's witnesses, Ruegge attempted to demonstrate that no one actually saw Ruegge with the generator/welder except for Vande Mheen and that Vande Mheen was simply not a credible witness, because he had a reason to lie to the police and to the jury, that is, he knew the tool was stolen when he obtained it. Ruegge also elicited testimony from the State's witnesses to

establish that Vande Mheen had actually obtained the stolen generator/welder from someone other than Ruegge.

After hearing all of the evidence, the jury convicted Ruegge of theft by receiving stolen property. The district court subsequently found Ruegge to be a habitual criminal and sentenced him to 10 years' imprisonment.

Ruegge appeals his conviction here.

III. ASSIGNMENTS OF ERROR

On appeal, Ruegge assigns 11 errors, which we consolidate to 4 errors for our review. Ruegge first alleges that the evidence was insufficient to support his conviction. He also alleges that the State committed various instances of misconduct during voir dire and its opening and closing statements. He alleges that the district court erred by denying his request for a specific jury instruction. Finally, Ruegge asserts that he received ineffective assistance of trial counsel.

IV. ANALYSIS

1. Sufficiency of Evidence

Ruegge alleges that the State presented insufficient evidence to prove beyond a reasonable doubt that he was ever in possession of the stolen generator/welder. Ruegge also alleges that the district court erred in overruling his motion for a directed verdict which was based upon insufficiency of the evidence. Upon our review, we conclude that the evidence was sufficient to support the conviction for theft by receiving stolen property and that, accordingly, the district court did not err in overruling Ruegge's motion for a directed verdict.

(a) Standard of Review

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed,

in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

(b) Analysis

Ruegge was charged with and convicted of theft by receiving stolen property pursuant to § 28-517. Section 28-517 provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner."

At trial, the State presented the testimony of Vande Mheen to establish that Ruegge was in possession of the generator/welder and that he "disposed" of the generator/welder by trading it to Vande Mheen for a snowmobile. Vande Mheen testified that Ruegge brought the generator/welder to his home and offered Vande Mheen the tool as part of a trade. Vande Mheen accepted Ruegge's offer and took possession of the generator/welder.

The State also presented evidence to establish that Ruegge knew the generator/welder was stolen at the time he traded the tool to Vande Mheen. Vande Mheen testified that Ruegge told him that he had previously purchased the generator/welder to assist him in the repair of irrigation systems. Other evidence suggested Ruegge's statement to be untrue, because the generator/welder had belonged only to Scribner Grain prior to being stolen. Additionally, Vande Mheen testified that Ruegge told him to lie to police about where he had obtained the generator/welder. Ruegge told Vande Mheen to tell police that he had gotten the tool in a load of iron. Such evidence suggests that Ruegge knew the generator/welder was stolen and that he did not want to get into trouble for trading the stolen property to Vande Mheen.

The evidence presented by the State, if believed by the jury, was sufficient to establish that Ruegge was guilty of theft by receiving stolen property.

On appeal, Ruegge argues that Vande Mheen's testimony is not credible and, as such, is insufficient to establish Ruegge's guilt beyond a reasonable doubt. Specifically, Ruegge argues, "Vande Mheen is the only one that explains where he got the property and blamed it on [Ruegge]." Brief for appellant at 11. He goes on to assert that Vande Mheen's "conflicts of interest are overwhelming for him to blame someone else and get the law enforcement off of his own back." *Id.*

Ruegge's arguments on appeal focus on the credibility of Vande Mheen. However, the jury, as the fact finder, clearly found Vande Mheen's testimony to be credible, and we, as an appellate court, do not pass on the credibility of witnesses. See *State v. France, supra*. The jury convicted Ruegge of theft by receiving stolen property based on the testimony of Vande Mheen. And, as we discussed above, the jury was aware of Ruegge's belief that Vande Mheen was lying in order to ensure that he was not also charged with a crime for being in possession of the stolen property.

Because the jury as the trier of fact could have found the essential elements of theft by receiving stolen property beyond a reasonable doubt based on Vande Mheen's testimony, the evidence was sufficient to support Ruegge's conviction. The district court did not err in overruling Ruegge's motion for a directed verdict, and Ruegge's assertions to the contrary have no merit.

2. Prosecutorial Misconduct

Ruegge alleges that he is entitled to a new trial based upon prosecutorial misconduct which occurred during voir dire, during the State's opening statement, and during the State's closing argument. Upon our review, we conclude that Ruegge's numerous assertions concerning prosecutorial misconduct are without merit.

(a) Standard of Review

[2,3] Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct

for an abuse of discretion by the trial court. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999).

(b) Voir Dire

Ruegge alleges that the State committed misconduct during voir dire. Specifically, he alleges that the State committed misconduct when the prosecutor informed the jury that as a prosecutor, it is his job to be impartial to the people of Nebraska and the people of Holt County; when the prosecutor referred to "'Tri-County Bank'" as "'Brewster's Bank'" (Steven Brewster was defense counsel during trial); when the prosecutor asked jurors whether they had the "nerve to admit" that they hate police officers; and when the prosecutor referred to Scribner Grain as the "victim" in this case. Brief for appellant at 13.

[4] A party may not raise alleged misconduct of adverse counsel on appeal where, despite knowledge of the alleged misconduct, the party claiming the misconduct failed to request a mistrial and instead agreed to take his or her chance on a favorable verdict. See *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

Despite Ruegge's assertions on appeal that the State committed multiple instances of misconduct during voir dire, he did not specifically object to any of the comments made by the prosecutor during voir dire, nor did he make a motion for a mistrial as a result of any of these instances. Because Ruegge failed to object to the State's conduct during voir dire and failed to make a motion for a mistrial, we conclude that Ruegge failed to preserve for appellate review his assertions concerning the State's misconduct during voir dire.

(c) Opening Statement

Ruegge alleges that the State committed misconduct during its opening statement. Specifically, he alleges that the State committed misconduct when the prosecutor discussed a line of inquiry conducted by defense counsel during voir dire which questioned the potential jurors' opinions about the credibility of witnesses who have been given immunity. Ruegge goes on to allege that the prosecutor committed misconduct when he told the jury during his opening statement that he was no

longer planning on presenting the testimony of any witness who had been given immunity.

During voir dire, defense counsel questioned each potential juror individually about his or her opinion concerning the credibility of a witness who has been given immunity against prosecution from certain crimes in exchange for his testimony. Defense counsel initiated this conversation by explaining to the jury pool:

> Well, it's always difficult because we don't always know for sure what the testimony and what the evidence will be, but we think we know. And so what we're trying to do is make sure that given — anticipating what that might be, that you feel comfortable that you can be fair and impartial. And that's what the real goal is here.
>
> And so, the next topic that I want to talk about is an idea called . . . immunity, meaning they won't be prosecuted for any crimes or certain crimes, maybe, that they may have committed, in exchange for them testifying.

During defense counsel's questioning of the potential jurors, many of the members on the panel expressed some discomfort in accepting or believing the testimony of someone who had been provided with immunity in exchange for his testimony.

After the parties selected a jury, the prosecutor gave an opening statement. During that statement, the prosecutor told the jury:

> Now, after listening to two hours about what you folks think about lies and immunity, I've decided I won't call anybody that's been given immunity. I don't need it. If I think I need it, I'll call them and I'll inform you if I put on anybody that's been granted any form of immunity or not.
>
> But because I felt that my witness had been somehow diminished by the questioning and the ill informed —

At this point in the prosecutor's opening statement, defense counsel made an objection and asked to be heard by the court. The parties and the trial judge then proceeded to have a discussion in the judge's chambers and outside the presence of the jury.

During the in-chambers discussion, defense counsel argued that the prosecutor's comments were "outside of the scope of [an] opening statement." Defense counsel believed that the prosecutor was "making an argument rather than presenting what the evidence will be."

The court disagreed with defense counsel's assertions. The court stated:

> Well, [the prosecutor is] explaining. You no doubt spent a considerable amount of time dealing with [the witness who was given immunity] and his shortcomings, and I think that the county attorney should be allowed to address that in his opening statement, because he's no longer going to call him, and I think he's entitled to tell the jury why he's not going to call him.
>
> . . . .
>
> . . . I think [that during an opening statement] you can tell what you're not going to have, you can tell what you're going to have.

The court told defense counsel that the "[o]bjection's noted" and permitted the prosecutor to continue with his opening statement. The prosecutor then informed the jury about the witnesses he planned on calling to testify and about what he believed the evidence would show.

[5] On appeal, Ruegge argues that the prosecutor committed misconduct during his opening statement by discussing the potential witness who had been given immunity. However, at trial, Ruegge did not argue that this discussion constituted misconduct, nor did he request a mistrial as a result of the prosecutor's discussion. Instead, Ruegge objected on the basis that the prosecutor's comments were outside the scope of an opening statement. On appeal, a defendant may not assert a different ground for an objection than was offered to the trier of fact. See *State v. Muse*, 15 Neb. App. 13, 721 N.W.2d 661 (2006). Because Ruegge did not object to the prosecutor's statements on the basis of prosecutorial misconduct and because he did not make a motion for a mistrial as a result of the prosecutor's statements, we conclude that he has waived appellate review of this issue.

However, to the extent that Ruegge suggests that the district court erred in overruling his objection to the prosecutor's comments because the comments were not properly included in an opening statement, we conclude that Ruegge's assertion has no merit.

[6] The Nebraska Supreme Court has previously held that "one is allowed considerable latitude in making an opening statement." *State v. Bradley*, 236 Neb. 371, 401, 461 N.W.2d 524, 544 (1990). In this case, a majority of the prosecutor's opening statement was dedicated to telling the jury what evidence would be presented during the trial. However, prior to this recitation, the prosecutor informed the jury that he would no longer be calling any witness who had been given immunity. The prosecutor's comments on this subject were clearly a response to defense counsel's thorough and detailed discussion with the jury about the credibility of such witness testimony. The prosecutor did not tell the jury anything about the witness in question, nor did he relay anything about what that witness would have testified to if he had been called to the stand. The prosecutor's comments were not inappropriate or outside the scope of an opening statement, and we do not find that the district court erred in overruling Ruegge's objection to the comments.

(d) Closing Argument

Ruegge alleges that the State committed misconduct during its closing argument. Specifically, he alleges that the State committed misconduct when the prosecutor discussed the "chaos and anarchy" that would result from the improper use of the legal system, when the prosecutor informed the jury that he represents "the people," when the prosecutor discussed a witness who did not testify at the trial, when the prosecutor told the jury that defense counsel is using a "standard tactic" in blaming someone else for the crime, when the prosecutor accused defense counsel of "lying" during his closing argument, and when the prosecutor told the jurors to "do the right thing" so that they are "fine" when they go home after the trial. Brief for appellant at 15-17.

(i) Discussion of Witness Who Did Not Testify at Trial

During the State's closing argument, the prosecutor reiterated the statements he made during his opening statement concerning why he did not offer the testimony of any witness who had been given immunity. The prosecutor stated:

> Now, first of all, it was my intention to put on another witness yesterday. But, after hearing all that talk from all of the prospective jurors about how you would not give credence to a person who had been granted immunity in exchange for his testimony, I put that to one side. I'm not going to belabor you with the testimony of a person that you've already told me you won't pay any attention to.
>
> That runs contrary to my personal and professional beliefs and experience. I'm in my 32nd or -3rd year of doing this, and years and years and years ago, I developed the concept or belief that it's never wise to leave out a witness, because the jury always wonders what that witness would have said.
>
> But, I'm not going to put on a witness that's already been beaten up, bloodied, before we even get to trial, when the very jurors have told me they won't believe him anyway. So I made a strategic decision yesterday to cut [that witness] out of the witness list. I don't like to do that. But, you folks made your own bed there. You're not going to hear the details that [the witness] could have provided us.
>
> Therefore, just consider that your own responses resulted in not listening to what [that witness] had to say.

Defense counsel did not object to the prosecutor's statements during the prosecutor's closing argument. Instead, defense counsel waited to object until after all of the closing arguments had concluded, the court had read the jury its instructions, and the case had been submitted to the jury. At that time, defense counsel indicated to the court:

> I would move for a mistrial based on the comments of [the prosecutor] during the closing, suggesting that the jury was the reason that we made the decision that [the

> witness who was given immunity] would not testify. I believe that was really a misstatement of the situation.

The court overruled the motion for a mistrial. The court indicated that the prosecutor was only explaining to the jury his decision not to call a certain witness to testify. The court also indicated its belief that the prosecutor's comments were directly tied to defense counsel's discussion of immunity during voir dire. Additionally, the court noted, "I also note that [your motion is] probably not very timely."

On appeal, Ruegge argues that the district court erred in overruling the motion for a mistrial, because the prosecutor's comments during his closing constituted misconduct that prejudiced Ruegge's defense. Ruegge's assertion has no merit, because the motion for a mistrial was not timely made.

[7] An objection to the prosecutor's argument made after the jury has been instructed and has retired is untimely and for that reason will not be reviewed on appeal. *State v. Hernandez*, 242 Neb. 78, 493 N.W.2d 181 (1992). Here, defense counsel did not motion for a mistrial concerning the prosecutor's statements about the witness who was given immunity until after all of the closing arguments, after the court instructed the jury, and after the case had been submitted to the jury. The motion was clearly untimely, and as such, we do not review Ruegge's assertions about the motion for a mistrial on appeal.

(ii) Reference to "Standard Defense" in Blaming Someone Else

During the State's rebuttal argument, the prosecutor stated, "[Defense counsel], in his defense of . . . Ruegge, has taken up the standard defense that I've seen throughout my career. I label it transference. He's transferred guilt from . . . Ruegge to . . . Vande Mheen and wants you to buy into that." After the prosecutor made this statement, defense counsel asked the court whether he "may . . . be heard." Then, both defense counsel and the prosecutor apparently approached the trial judge and conversed about something. However, this discussion was held off the record. As such, our record does not reflect what the parties discussed. When the discussion was over, the court noted, on the record, "Objection is overruled."

[8] We can assume from the court's statement that the "[o]bjection is overruled" that defense counsel made an objection to something. However, based on the record presented to us, we cannot, and do not, assume that defense counsel specifically objected to the prosecutor's discussion about the "standard defense," nor do we assume that defense counsel made a motion for a mistrial as a result of this discussion. See *State v. Trackwell*, 250 Neb. 46, 49, 547 N.W.2d 471, 474 (1996) (it is "incumbent upon an appellant to present a record which supports the errors assigned").

Because Ruegge's objection to the prosecutor's comments was made and discussed off the record, we conclude that Ruegge failed to preserve for appellate review his assertions concerning the State's misconduct in discussing Ruegge's "standard defense."

(iii) Other Allegations of Prosecutorial Misconduct During Closing Argument

Ruegge did not specifically object or make a motion for a mistrial as a result of any of his remaining allegations of prosecutorial misconduct during the State's closing argument. As we discussed above, because Ruegge did not properly object or move for a mistrial, he has waived appellate review of these allegations. See *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

3. Jury Instruction Amendment

Ruegge alleges that the district court erred in denying his request to amend proposed jury instruction No. 8. Proposed jury instruction No. 8 concerned the knowledge element of theft by receiving stolen property as defined by § 28-517. Upon our review, we conclude that Ruegge was not prejudiced by the district court's failure to amend jury instruction No. 8 and, as such, we conclude that this assignment of error has no merit.

(a) Standard of Review

[9] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011).

(b) Analysis

The district court's proposed jury instructions included the following instruction, which was numbered "Instruction No. 8" and which was entitled "State of Mind": "Knowledge or belief is an element of theft by receiving stolen property. In deciding whether the defendant possessed such knowledge or belief you should consider his words and acts and all of the surrounding circumstances." During the jury instruction conference held after the parties had presented all of their evidence, Ruegge requested that proposed instruction No. 8 be amended to include the following language after the language of the original, proposed instruction: "The knowledge that the property has been stolen must be subjective knowledge, proved beyond a reasonable doubt."

The district court denied Ruegge's request to amend proposed jury instruction No. 8. Specifically, the court stated:

> And I think that the instruction as written and as proposed as state of mind requires that the — or instructs the jury that knowledge or belief is an element, and then it tells the jury in deciding whether the defendant possessed such knowledge, they are to consider words, acts, et cetera. I think that, by its very definition, makes it subjective because they must determine that the defendant possessed or required the knowledge or belief. And so that is subjective.
>
> And so the wording that you want, I would consider surplusage, and that . . . instruction is refused.

Instruction No. 8 was read to the jury as originally proposed and with no amendment.

On appeal, Ruegge argues that the district court erred in refusing to amend jury instruction No. 8 and that he was prejudiced because, ultimately, "the jury was not given the proper [i]nstruction when deciding this case." Brief for appellant at 19. In his brief, Ruegge appears to assert that the district court should have included his proposed language in the jury instruction to make clear to the jury that it must find that Ruegge actually had knowledge that the generator/welder was stolen property. We conclude that Ruegge's assertion has no merit, because the jury instruction actually provided to the jury

clearly indicates that the jury must find, from the evidence presented, that Ruegge knew the property was stolen. As such, Ruegge was not prejudiced by the court's failure to amend jury instruction No. 8.

[10] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Gangahar*, 9 Neb. App. 205, 609 N.W.2d 690 (2000).

[11] As we stated above, Ruegge was charged with and convicted of theft by receiving stolen property pursuant to § 28-517. Section 28-517 provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner." We agree with Ruegge's basic assertion that the term "knowing," as used in § 28-517, imposes a subjective standard of knowledge. See *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011). Stated more simply, we agree with Ruegge that in order to convict Ruegge of theft by receiving stolen property, the State must have proven and the jury must have found that Ruegge possessed actual knowledge that the generator/welder was stolen property or believed that the property was stolen. This subjective standard of knowledge is in contrast to an objective standard of knowledge, which requires only a showing that a reasonable person in the defendant's situation would or should have known that the property was stolen. See *id*.

However, we also agree with the district court's comments at the jury instruction conference that proposed jury instruction No. 8 clearly instructed the jury that it must find that Ruegge possessed actual knowledge that the property was stolen in order to convict him. We also agree with the court's assertion that Ruegge's proposed amendment to instruction No. 8 was unnecessary "surplusage."

In jury instruction No. 8, as read to the jury, the district court instructed the jury that it must find that "the defendant

possessed [the requisite] knowledge" and that in making that finding, the jury should consider the defendant's own "words and acts and all of the surrounding circumstances." As the district court indicated, this instruction, "by its very definition," instructed the jury that it must find that Ruegge possessed a subjective knowledge that the property was stolen. As such, Ruegge's proposed amendment, which would have added only an explicit statement that the knowledge required by § 28-517 was subjective in nature, was simply not necessary.

Because the district court's instruction to the jury regarding the degree of knowledge Ruegge must have possessed to be found guilty of theft by receiving stolen property was correct and because Ruegge's proposed amendment to that instruction would not have added anything substantive, we conclude that the district court did not err in denying Ruegge's request to amend jury instruction No. 8. Ruegge cannot show that he was prejudiced in any way by the court's decision to deny his request to amend the jury instruction.

4. Ineffective Assistance of Trial Counsel

[12,13] Ruegge asserts that his trial counsel was ineffective in a number of respects. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The two-prong ineffective assistance of counsel test need not be addressed in order. *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010).

[14,15] When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *Id*. Furthermore, trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *Id*.

[16] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. *State v. Young, supra*. The determining factor is whether the record is sufficient to adequately review the question. *Id*.

Because Ruegge has different counsel in this appeal from trial counsel, Ruegge can make a claim for ineffective assistance of trial counsel on direct appeal. See *State v. York*, 273 Neb. 660, 664, 731 N.W.2d 597, 602 (2007) ("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").

We now turn to Ruegge's specific claims.

(a) Failure to Make Timely Motion for Mistrial

Ruegge alleges that trial counsel was ineffective in failing to make a timely motion for a mistrial after the prosecutor committed misconduct during his closing argument by explaining to the jury why he did not offer the testimony of any witness who had been given immunity. Upon our review, we conclude that Ruegge's assertion has no merit. Ruegge cannot show that he was prejudiced by counsel's failure to make a timely motion for a mistrial, because such a motion would have been unsuccessful.

As we discussed more thoroughly above, during the prosecutor's closing argument, he commented to the jury that he had decided not to offer the testimony of a particular witness who had been given immunity. He went on to inform the jury that the basis for his decision was the comments and concerns voiced by many potential jurors during voir dire that they would have a problem believing or accepting the testimony of a witness who had been previously provided with immunity. Defense counsel motioned for a mistrial as a result of the prosecutor's comments. However, the motion was made after the case was submitted to the jury and, as we concluded above, the motion was untimely and the issue was not preserved for appellate review.

Despite the untimeliness of counsel's motion for a mistrial, the district court did rule on the merits of the motion. The court overruled the motion and stated:

> I think what the [prosecutor] was referring to was the fact that upon your inquiry of the panel, they had indicated — most, if not all of them, had indicated that they would discount or more intensely scrutinize the testimony of someone that had been granted immunity. And he was basically telling them because of their concerns, as expressed pursuant to your questions on voir dire, that he made a tactical decision not to call [that witness]. And I think that's what he was referring to when he spoke to the . . . jury . . . .

We understand the district court's comments to indicate its finding that the prosecutor's remarks were simply not improper under the circumstances of this case. We agree with the district court's finding.

[17,18] 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. *State v. Balvin*, 18 Neb. App. 690, 791 N.W.2d 352 (2010). A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. *Id.*

In light of the thorough discussion of immunity held during voir dire, we cannot say that the prosecutor's comments to the jury about why he did not call any witness who had been given immunity were improper. Rather, it appears the prosecutor was merely trying to provide the jury with an explanation for the absence of such a witness. And, the prosecutor did not discuss what that witness would have testified to had he been called or provide any other extraneous, improper information to the jury.

Moreover, even if we were to find that the prosecutor's comments were improper, it is difficult to imagine how the comments prejudiced Ruegge in any way. And, we note that in

his brief on appeal, Ruegge does not articulate exactly why the comments were prejudicial in nature.

We conclude that if counsel had made a timely motion for a mistrial based on the prosecutor's comments, such a motion would not have been successful, because the comments were not improper and did not prejudice Ruegge. As such, Ruegge cannot demonstrate that he was prejudiced by counsel's failure to make a timely motion for a mistrial and this assertion of ineffective assistance of counsel is without merit.

(b) Failure to Object to Alleged Instances of Prosecutorial Misconduct

Ruegge alleges that trial counsel was also ineffective in failing to object or make a motion for a mistrial as a result of the other alleged instances of prosecutorial misconduct which occurred during voir dire, the State's opening statement, and the State's closing arguments. We have detailed Ruegge's specific claims of prosecutorial misconduct in our analysis above. We do not repeat each of his claims here, because, ultimately, we conclude that our record is insufficient to review Ruegge's claims that his trial counsel was ineffective for failing to object to each of these allegations of misconduct.

[19,20] The decision about whether to make an objection during a trial has long been considered an aspect of trial strategy. See *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013). In fact, the Nebraska Supreme Court has previously discussed the notion that a decision not to object could be explained by trial counsel's calculated strategy not to highlight the objectionable material. See *id*. Because the decision about whether to object is considered an aspect of trial strategy, we must consider trial counsel's strategy when reviewing his failure to object to each instance of alleged prosecutorial misconduct.

As we stated above, when reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics. See *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010). And, there is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic

decisions. See *id*. Because of this deference, the question whether the failure to object was part of counsel's trial strategy is essential to a resolution of Ruegge's ineffective assistance of counsel claims.

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

(c) Waiver of Argument in Support of Directed Verdict Motion

Ruegge alleges that counsel was ineffective in failing to provide to the court any argument in support of his motion for a directed verdict at the close of the State's presentation of evidence. We conclude that Ruegge's assertion is without merit, because he cannot show that he was prejudiced by counsel's actions.

Counsel did make a motion for a directed verdict on the basis of "[l]ack of evidence." However, when the court asked counsel whether he wished to "point out where [he thought] the evidence [was] lacking," counsel indicated, "I'll waive . . . ." The district court then overruled the motion for a directed verdict.

The standard for granting a motion for a directed verdict is whether, after viewing all of the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. See *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009). And, as we discussed more thoroughly above, the district court properly overruled counsel's motion for a directed verdict, because the evidence presented by the State, if believed by the jury, was sufficient to establish that Ruegge was guilty of theft by receiving stolen property. Accordingly, no matter what argument defense counsel would or could have provided to the court in support of the motion for a directed verdict, his motion would have failed. Ruegge was not prejudiced by his counsel's

failure to offer any argument in support of the motion for a directed verdict.

(d) Failure to Present Defense

Ruegge alleges that counsel was ineffective in failing to present any evidence in his defense. However, he does not specify what evidence could have been presented in his defense, nor does he indicate what witnesses could, or should, have been called to testify in his defense. Moreover, he does not allege what any additional evidence or testimony would have shown or whether it would have altered the ultimate outcome of the trial.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by that deficient performance. *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009). Because Ruegge does not specifically allege what other evidence or testimony could, or should, have been presented in his defense at the trial, he cannot demonstrate that he was prejudiced by his counsel's failure to put on a defense. As such, this assertion has no merit.

V. CONCLUSION

Upon our review, we affirm Ruegge's conviction for theft by receiving stolen property. We find that there was sufficient evidence presented at trial to support his conviction and that Ruegge's assertions of error on appeal are without merit.

As to Ruegge's claims of ineffective assistance of trial counsel, we find that he was not denied effective assistance of counsel when counsel failed to make a timely motion for a mistrial during the State's closing arguments, when counsel waived making an argument in support of his motion for a directed verdict, and when counsel failed to put on evidence in Ruegge's defense. We find that the record is insufficient to review the remaining grounds for Ruegge's ineffective assistance of counsel claim.

AFFIRMED.

FAYE SPRACKLIN, APPELLANT, V. GORDON E. SPRACKLIN, PERSONAL REPRESENTATIVE OF THE ESTATE OF EUGENE G. SPRACKLIN, APPELLEE.

837 N.W.2d 826

Filed September 10, 2013. No. A-12-834.

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 is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Motor Vehicles: Words and Phrases.** The term "affinity," as it is used in Neb. Rev. Stat. § 25-21,237 (Reissue 2008), is defined as the relationship which arises as a result of the marriage contract between one spouse and the blood relations of the other.
5. **Motor Vehicles.** Pursuant to the language of Neb Rev. Stat. § 25-21,237 (Reissue 2008), a driver who is the father-in-law of his passenger is related to the passenger within the second degree of affinity.
6. **Statutes.** In construing the meaning of a statute, a court must examine the statutory section as a whole, rather than focusing on individual, separate parts of the statute.

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

Ralph E. Peppard, of Peppard Law Office, for appellant.

Thomas A. Grennan and Abbie M. Schurman, of Gross & Welch, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Faye Spracklin appeals an order of the district court for Douglas County, Nebraska, granting summary judgment to Gordon E. Spracklin, the personal representative of the estate

of Eugene G. Spracklin, deceased. In granting summary judgment, the court determined that Faye's negligence suit, which arose from an automobile accident involving Faye and Eugene, was barred as a matter of law by the Motor Vehicle Guest Statute, Neb. Rev. Stat. § 25-21,237 (Reissue 2008). We find no error in the court's determination, and we affirm.

II. BACKGROUND

The facts in this case are undisputed. On September 15, 2009, Faye was a passenger in a vehicle driven by Eugene when the vehicle was involved in an accident. Faye suffered injuries in the automobile accident. At the time of the accident, Faye was married to Gordon, Eugene's son, and as a result, Eugene was Faye's father-in-law. Eugene is now deceased.

On May 1, 2012, Faye filed a complaint in district court. In the complaint, Faye alleged that Eugene was careless, reckless, and negligent in his operation of the vehicle on September 15, 2009, and that he was responsible for the accident which occurred. Faye also alleged that she suffered "permanent injuries" as a result of the accident. Faye asked that the district court order Gordon, as the personal representative of Eugene's estate, to compensate her for her medical expenses, her lost wages, and her permanent disability.

Gordon filed an answer to Faye's complaint on June 11, 2012. In his answer, Gordon admitted that Faye and Eugene were involved in an automobile accident on September 15, 2009, but denied that Eugene was careless, reckless, or negligent and denied that Eugene was responsible for the accident. Gordon also provided "affirmative defenses" to Faye's claims. Gordon alleged that Faye's claim was "barred by operation of the Nebraska Guest Statute" and that as result of the guest statute, Faye had failed to state a claim upon which relief could be granted.

Subsequently, Faye filed a motion for partial summary judgment and Gordon filed a motion for summary judgment. Both parties' motions asked the district court to determine whether the Motor Vehicle Guest Statute, § 25-21,237, prohibited Faye from recovering damages from Eugene's estate.

Section 25-21,237 controls this case. We note that § 25-21,237 has been repealed by the Legislature. See 2010 Neb. Laws, L.B. 216. However, in September 2009, when the automobile accident involving Faye and Eugene occurred, the statute was still in effect. In September 2009, § 25-21,237 provided:

> The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such motor vehicle being under the influence of intoxicating liquor or (2) the gross negligence of the owner or operator in the operation of such motor vehicle.
>
> For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor but shall not be construed to apply to or include any such passenger . . . as a prospective purchaser. Relationship by consanguinity or affinity within the second degree shall include parents, grandparents, children, grandchildren, and brothers and sisters. Should the marriage of the driver or owner be terminated by death or dissolution, the affinal relationship with the blood kindred of his or her spouse shall be deemed to continue.

In August 2012, a hearing was held on the parties' motions for summary judgment and, thus, on the applicability of § 25-21,237 to the facts of this case. At the hearing, the parties submitted a joint stipulation into evidence. The parties stipulated to all of the pertinent facts surrounding the September 2009 automobile accident, as we detailed above. In addition, the parties stipulated that on September 15, Faye did not pay any money to Eugene for the purpose of transporting her in his vehicle and Eugene was not under the influence of any intoxicating liquor. At the hearing, the parties also indicated that there was no allegation of any "gross negligence." Essentially, the only question presented at the summary judgment hearing was whether Faye was "related to" Eugene and,

as a result if so, was a "guest passenger" who was prohibited from recovering damages from Eugene pursuant to the language of § 25-21,237.

After the hearing, the district court entered an order finding that Faye was "related to" Eugene pursuant to § 25-21,237 and that as a result, she was the type of "guest" described by the statute and was barred from recovering damages for the injuries she incurred in the September 2009 automobile accident. In finding that Faye and Eugene were related pursuant to § 25-21,237, the court indicated that "affinity" is defined as "'the relationship which arises as the result of the marriage contract between one spouse and the blood relations of the other, in contradistinction from consanguinity or relationship by blood. . . .'" The court then specifically found, "Since 'affinity' is a relationship arising from marriage, Faye . . . was 'within the second degree of . . . affinity' with the driver of the vehicle, [Eugene]." The court granted Gordon's motion for summary judgment, overruled Faye's motion for partial summary judgment, and dismissed the case with prejudice.

Faye appeals from the district court's order.

III. ASSIGNMENTS OF ERROR

On appeal, Faye alleges that the district court erred in granting Gordon's motion for summary judgment and in denying her motion for partial summary judgment. The basis for Faye's assignments of error is her assertion that the district court incorrectly interpreted § 25-21,237 to prohibit her recovery of any damages resulting from the September 2009 automobile accident.

IV. STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Pinkard v. Confederation Life Ins. Co.*, 264 Neb. 312, 647 N.W.2d 85 (2002). Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue

of material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. See, *id.*; *Trueblood v. Roberts*, 15 Neb. App. 579, 732 N.W.2d 368 (2007).

[3] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 566 N.W.2d 771 (1997).

V. ANALYSIS

The only question presented by this appeal is whether, pursuant to the language of § 25-21,237, Faye was "related to" Eugene at the time of their automobile accident and, as a result if so, was a guest passenger who is prohibited from recovering damages for the injuries she sustained in that accident. As we stated above, § 25-21,237 provided that a guest passenger is someone who is related to the owner or operator of a motor vehicle "as spouse or within the second degree of consanguinity or affinity." The statute goes on to define these terms as follows: "Relationship by consanguinity or affinity within the second degree shall include parents, grandparents, children, grandchildren, and brothers and sisters."

Faye and Eugene were connected by virtue of Faye's marriage to Gordon, Eugene's son. To be more specific, Eugene was Faye's father-in-law and, along those same lines, Faye was Eugene's daughter-in-law. It is clear, then, that Faye and Eugene were not related as spouses or within the second degree of consanguinity, as they were not blood relatives. As such, in order for Faye and Eugene to have been related pursuant to the language of § 25-21,237, they must have been related within the second degree of affinity.

The Nebraska Supreme Court and this court have previously defined affinity as it relates to other statutory provisions. In *Zimmerer v. Prudential Ins. Co.*, 150 Neb. 351, 34 N.W.2d 750 (1948), the Supreme Court defined affinity as it was used in Neb. Rev. Stat. § 24-315 (Reissue 1964) (now codified at Neb. Rev. Stat. § 24-739 (Reissue 2008)), a statute which concerned when a trial judge was disqualified from presiding over

certain proceedings. Section 24-315 provided, in pertinent part: "A judge or justice is disqualified from acting as such in the county, district or Supreme Court, except by mutual consent of the parties, in any case . . . where he is related to either party by consanguinity or affinity within the fourth degree . . . ." The court ultimately defined affinity as "the relationship which arises as a result of the marriage contract between one spouse and the blood relations of the other, in contradistinction from consanguinity or relationship by blood." *Zimmerer v. Prudential Ins. Co.*, 150 Neb. at 353, 34 N.W.2d at 751. The court went on to find that the trial judge had a "relationship of affinity" with his wife's brother. *Id.*

Similarly, in *State v. Vidales*, 6 Neb. App. 163, 571 N.W.2d 117 (1997), this court discussed the term "affinity" as it is used in § 24-739(1), which concerns judicial disqualification. Section 24-739 provides, in pertinent part:

> A judge shall be disqualified from acting as such in the county court, district court, Court of Appeals, or Supreme Court, except by mutual consent of the parties . . . in the following situations:
>
> (1) In any case in which (a) he or she is a party or interested, (b) he or she is related to either party by consanguinity or affinity within the fourth degree, (c) any attorney in any cause pending in the county court or district court is related to the judge in the degree of parent, child, sibling, or in-law or is the copartner of an attorney related to the judge in the degree of parent, child, or sibling . . . .

In *State v. Vidales*, we noted that affinity is a relationship created by marriage. In addition, we concluded that the terms "'in-laws'" and "'affinity'" are essentially interchangeable. *Id.* at 170, 571 N.W.2d at 122.

[4] The term "affinity" has never been specifically defined as it was used in § 25-21,237. However, we now explicitly adopt the definition espoused by the Supreme Court in *Zimmerer v. Prudential Ins. Co., supra*, and apply it to the term "affinity" as it was used in the Motor Vehicle Guest Statute. The term "affinity," as it is used in § 25-21,237, is defined as the relationship which arises as a result of the marriage contract

between one spouse and the blood relations of the other. We also find that based on this definition, the term "in-laws" can be used interchangeably with the term "affinity."

[5] Applying this definition of affinity to the facts of this case, we conclude that Faye was related to Eugene "within the second degree of . . . affinity" pursuant to § 25-21,237. The relationship between Faye and Eugene arose as a result of Faye's marriage to Gordon, Eugene's son. As a result of Faye's marriage to Gordon, Eugene was Faye's father-in-law and the two were related within the second degree of affinity pursuant to the language of § 25-21,237. Because Faye and Eugene were related within the second degree of affinity, Faye was a guest passenger and is prohibited from recovering from Eugene's estate any damages resulting from the September 2009 automobile accident.

On appeal, Faye agrees that affinity is defined as the relationship which arises as the result of the marriage contract between one spouse and the blood relations of the other. However, she disagrees that Eugene is related to her by affinity. Specifically, she argues that "[t]o be related to the driver by affinity she would have to be a blood relative of the spouse of the driver" and she is not. Brief for appellant at 7. Faye's argument is without merit.

Faye's understanding of the relationship between one spouse and the blood relations of the other spouse is too narrow. Faye argues that a relationship of affinity exists only as to the spouse and not as to the blood relatives of the other spouse. To put this more simply, Faye argues that although she was related to Eugene by affinity because he is a blood relative of her spouse, Eugene was not related to her by affinity because he was related as such to only his spouse's blood relatives. Faye's argument fails, however, because when a relationship is created by marriage, or by affinity, the relationship exists between the blood relative of one spouse and the other spouse. Faye and Eugene were related by virtue of Faye's marriage to Gordon, Eugene's son. Together, they possessed a relationship by affinity, and, pursuant to § 25-21,237, such a relationship prohibits Faye from recovering any damages arising from the September 2009 accident.

On appeal, Faye also asserts that the specific language of § 25-21,237 demonstrates that the Legislature did not intend for a driver's daughter-in-law to be considered a guest passenger who is prohibited from recovering damages arising from an automobile accident. Faye bases her argument on a comparison between the language in § 25-21,237 and the language in Neb. Rev. Stat. § 76-238 (Cum. Supp. 2012), an unrelated statutory section which concerns providing effective notice of the possession of real property.

Section 25-21,237 states that a "[r]elationship by consanguinity or affinity within the second degree shall include parents, grandparents, children, grandchildren, and brothers and sisters." Faye compares this language with language in § 76-238(3)(c) which states that a relationship "within the third degree of consanguinity or affinity [as previously referred to within the statutory section] includes parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, brothers, sisters, uncles, aunts, nephews, nieces, and spouses of the same . . . ."

Specifically, Faye focuses on the language in § 76-238(3)(c) which explicitly includes in the definition of a relative within the third degree of consanguinity or affinity the spouses of blood relatives. Faye asserts that if the Legislature had intended for the spouse of a blood relative of the owner or operator of an automobile to be a guest passenger pursuant to § 25-21,237, the Legislature would have included an explicit reference to the spouses of the blood relatives in its list of relatives within the second degree of consanguinity or affinity as it did in § 76-238(3)(c). We find Faye's assertion to be without merit.

[6] In construing the meaning of a statute, a court must examine the statutory section as a whole, rather than focusing on individual, separate parts of the statute. See *In re Application of Rozgall*, 147 Neb. 260, 23 N.W.2d 85 (1946). In fact,

> [I]t is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof [and] it is the duty of the court, so far as

> practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible.

Id. at 264, 23 N.W.2d at 89. See, also, *State v. Donner*, 13 Neb. App. 85, 87, 690 N.W.2d 181, 184 (2004) ("[i]n reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense").

When we read § 25-21,237 as a whole, it is clear that the Legislature did not intend that only those blood relatives specifically delineated within the statute, including parents, grandparents, children, grandchildren, and brothers and sisters, were "related to" the owner or operator of a vehicle in such a manner as to make them guest passengers who were prohibited from recovering damages. The Legislature specifically indicated that guest passengers included those individuals who were related to the owner or operator of the vehicle "as spouse or within the second degree of consanguinity or affinity." *Id.* As we discussed above, a relationship of affinity is a relationship created between a spouse and the blood relatives of the other spouse. In addition, we found that the term "in-laws" can be used interchangeably with the term "affinity." Accordingly, the statute implicitly provides that a guest passenger can be the driver's parent, grandparent, child, grandchild, or brother or sister or a spouse of such blood relatives, who would be related to the owner or operator of the vehicle by affinity. To conclude otherwise would be to ignore the specific language of the statute, which states that a guest passenger is a person who is related to the owner or operator of the vehicle within the second degree of affinity.

Additionally, we note that in § 25-21,237, the explicit list of relatives who may be considered guest passengers is not exclusive. While the statute indicates that "[r]elationship by consanguinity or affinity within the second degree shall include parents, grandparents, children, grandchildren, and brothers and sisters," the use of the term "include" indicates that the list is not meant to be exclusive. Instead, the term "include" indicates that the list is meant to provide only some of the relatives

who may be guest passengers. In fact, we read the list provided in the statute to be an explanation of the type of relative that is within the second degree of relation to the owner or operator of the vehicle, whether the relationship be one of consanguinity or one of affinity.

Based on our review, we conclude that Faye and Eugene were related within the second degree of affinity. As a result of Faye's marriage to Gordon, Eugene's son, Eugene was Faye's father-in-law and the two were related within the second degree of affinity pursuant to the language of § 25-21,237. Because Faye and Eugene were related within the second degree of affinity, Faye was a guest passenger and is prohibited from recovering any damages resulting from the September 2009 automobile accident. We affirm the decision of the district court to grant Gordon's motion for summary judgment and to dismiss Faye's complaint with prejudice.

VI. CONCLUSION

Pursuant to § 25-21,237, Faye was a guest passenger in Eugene's automobile at the time of the accident in September 2009. As a result, Faye is prohibited from recovering any damages arising from that automobile accident. We affirm the decision of the district court to dismiss Faye's complaint with prejudice.

AFFIRMED.

BRENT BUSSELL, APPELLANT AND CROSS-APPELLEE, V.
SHERI BUSSELL, APPELLEE AND CROSS-APPELLANT.
837 N.W.2d 840

Filed September 17, 2013. No. A-12-713.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.

2. **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. **Divorce: Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
4. ____: ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
5. ____: ____. Property which one party brings into the marriage is generally excluded from the marital estate.
6. ____: ____. The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's ability to determine how the property should be divided in an action for dissolution of marriage.
7. ____: ____. When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the gift or inheritance and is not considered a part of the marital estate. An exception to the rule applies where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the gift or inheritance has significantly cared for the property during the marriage.
8. **Divorce: Property: Words and Phrases.** "Dissipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown.
9. **Divorce: Property Division.** Marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions.
10. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
11. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
12. **Alimony.** Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.

13. ____. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
14. ____. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate.
15. **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.

Appeal from the District Court for Chase County: DAVID URBOM, Judge. Affirmed as modified.

James C. Bocott, of Law Office of James C. Bocott, P.C., L.L.O., for appellant.

Larry R. Baumann and Angela R. Shute, of Kelley, Scritsmier & Byrne, P.C., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

I. INTRODUCTION

Brent Bussell appeals, and Sheri Bussell cross-appeals, from the decree of dissolution entered by the district court for Chase County dissolving the parties' marriage. The parties challenge certain aspects of the district court's determination and division of the marital estate. Sheri also assigns error to the court's calculation of child support, failure to order Brent to pay health insurance premiums, and awards of alimony and attorney fees. For the reasons set forth herein, we affirm as modified.

II. BACKGROUND

The parties were married on August 5, 1995. They have two minor children, Ashlin Bussell, born in 1996, and Jadin Bussell, born in 1998. The parties separated in 2010. Brent filed a complaint for dissolution of marriage on July 5, 2010.

Sheri received $1,400 per month in temporary child support. It is not clear from the record on appeal whether the child support was voluntary or court ordered or when the payments began. On October 3, 2011, the district court ordered Brent to

pay Sheri additional temporary spousal support of $1,500 per month beginning on October 1.

The dissolution trial was held on January 18 and 19, 2012. Prior to trial, the parties entered into a parenting plan concerning custody and parenting time, which plan was received into evidence by the district court. The court heard evidence on the parties' assets and debts, child support, alimony, and attorney fees. Specifically, the district court received documentary exhibits and heard testimony from witnesses, including the parties, Brent's brother and father, Brent's accountant, and two real estate appraisers. We summarize only the evidence relevant to the contested issues on appeal.

Sheri was employed when the parties married, but she quit working outside the home shortly before Ashlin was born. Thereafter, Sheri became the primary caregiver and performed most of the household chores, while Brent continued to work for his father on the family farm and earn the income for the parties' monthly expenses. The parties mutually decided that it would be best for Sheri to stay home with the children, and they could financially afford for her to do so. Sheri did not return to work until 2003 or 2004, after Jadin was enrolled in school. Sheri took medical transcription courses online and also obtained a certified nursing assistant certificate or degree. She began courses for a nursing degree in 2007, but she quit because it was difficult for the children to have her gone. At the time of trial, Sheri was working at a Chase County clinic, earning $10.28 per hour. Her gross wages for 2011 were $18,194.99.

Sheri testified that she wanted to pursue an advanced directive registered nurse degree, which would take 3 years to complete. She testified that it would cost about $11,000 a year plus mileage to either Sterling, Colorado, or North Platte, Nebraska, to receive such degree. She testified that opportunities for a registered nurse in Chase County are minimal compared to other areas, but that there are two nursing homes, a hospital, and a clinic in the county. The starting salary for a full-time registered nurse in Chase County would be $19 an hour.

Sheri testified about the ways she helped out on the farm during the marriage. She took lunches to the field so that the children could see Brent, made sure he had meals and clean clothes, helped move people and vehicles to different fields, picked up parts at several stores, delivered utility checks and loan payments, made bank deposits, picked up grain checks, and rode in the "semi" to deliver grain. In addition, she made sure all of the parties' personal bills were paid and mailed, maintained their house and yard, and reminded Brent of the children's activities.

Brent graduated from high school in 1985 and obtained his associate's degree in production agriculture in 1987. Brent worked for approximately a year in Colorado before returning to Nebraska in 1988 or 1989 to work for the family farming partnership. Brent's father formed an informal family farming partnership with Brent and Brent's brother. Brent and his brother were each given a 20-percent interest in the partnership, and Brent's parents had the remaining 60-percent interest. Brent did not pay anything or provide any particular consideration for his interest in the partnership. Brent has had no other employment since that time. Brent later received an additional 5-percent interest in the partnership, for a total of 25 percent. The partnership was formalized in February 2010 as Bussell Farms.

The partnership owns grain and equipment, including machinery, tools, and supplies. Evidence was presented to value Brent's 20-percent interest in the equipment that was owned by the partnership prior to his marriage in 1995 and to value his 25-percent interest at the time of trial. Specifically, the evidence included a farm equipment appraisal prepared by an appraisal service. The appraisal identifies the farm equipment owned by the partnership on the date of the marriage in 1995 and the equipment owned by the partnership as of September 29, 2011. The appraisal valued the premarital farm equipment at $955,850. It valued the equipment owned as of September 2011 at $1,982,200. The record shows that the partnership regularly buys and sells farm equipment at the end of each year.

The partnership's sole source of income is from the sale of grain. The partners each receive their respective percentage of the income from the grain sales, which they deposit into their own bank accounts, and the partners each pay their respective share of expenses associated with the grain production. At the time of trial, all of the 2011 beans and corn had been harvested and the wheat planted in 2011 remained in the fields to be harvested in 2012. It appears from the record that all of the 2011 beans had been sold by the time of trial. Some of the 2011 corn had been sold, and the remainder was stored in grain bins owned by the partnership. Of the stored corn, 95 percent had been contracted for sale. Depending on shrinkage that occurs in the bins, there may be remaining approximately 10,000 bushels of corn that had not yet been contracted or sold at the time of trial. Although not clear from the entire record, it appears from exhibit 71 that approximately 175,000 bushels of corn under contract were set to be delivered in January, February, and March 2012, after which the partners would receive their respective shares of the gross revenues. However, it appears from the record that the partnership had received significant income in early January 2012 and it is not clear whether this revenue derived from any of the contracted corn shown in exhibit 71.

The parties' tax returns from 2005 to 2010 were received in evidence. The 2011 tax return had not yet been prepared at the time of trial. According to Brent and his brother, the 2011 corn crop suffered significant hail damage, which cut the yield approximately in half compared to previous years. Brent expects that the revenue from the 2011 crops will be dramatically reduced because of the hail losses and that the impact will be felt for the next 2 years, a consequence that is not within his control. In addition, approximately 75 percent of the 2011 seed wheat was totally hailed out and the remainder was damaged.

At the time of the marriage, Brent owned an undivided one-fourth interest in an acreage in Chase County. The acreage included a house, garage, and steel building. During the marriage, Brent's parents gifted him the remaining three-fourths

interest in the acreage. In 1997, Brent executed a deed for the property to Brent and Sheri as joint tenants with right of survivorship. Brent testified that when he executed the deed, it was not his intent to make a gift to Sheri of one-half of the property; rather, he placed her name on the property because Sheri was concerned that she would lose the property if Brent died.

The parties lived in the house on the acreage for about 8 years. Sheri testified that they made and paid for many improvements to the home, including a new roof, siding, windows, upstairs carpet, downstairs bathroom and bedroom carpet, a furnace, and central air conditioning. They also tore out and replanted trees, and they poured a concrete floor in the steel building on the property, which floor cost over $20,000. Sheri testified that they also spent $20,000 on a kitchen remodel, which included custom-made oak cabinets, new flooring, and new appliances. Finally, they put in a sprinkler system that cost about $5,000. The parties sold the property in 2003 for $120,000. They used the $120,000 in the construction of the marital home, where Sheri was residing at the time of trial and which was awarded to her in the division of property.

After the parties separated, Brent purchased a house for $156,000 and took out two loans for the full purchase amount. He purchased a 2010 Chevrolet Avalanche for his personal use. The house and vehicle, along with their corresponding debts, were included in the marital estate and assigned to Brent. Brent also purchased some household goods and furnishings for his new home, although it is not clear whether these items were listed in the court's division of property.

We have set forth additional details of the evidence at trial as necessary to our resolution of this appeal in the analysis section below.

The district court entered a decree of dissolution on May 18, 2012. The court approved the parties' parenting plan, and pursuant to that plan, it awarded custody of Ashlin to Sheri and custody of Jadin to Brent, subject to each party's rights of visitation with the other child as specified in the parenting plan. The court ordered Brent to pay Sheri child support of $816

per month, commencing June 1, pursuant to a split custody calculation. The court also ordered child support to increase to $1,431 when there was only one minor child remaining. We note that this portion of the child support award was later corrected through the court's order on the parties' motions for new trial. In calculating child support, the court assigned Sheri total monthly income of $1,782, with a net monthly income of $1,629.91, and Brent total monthly income of $11,153.93, with a net monthly income of $8,737.35. The court ordered Brent to pay 84 percent and Sheri to pay 16 percent of any medical, orthodontic, ophthalmic, and dental expenses not covered by insurance, in excess of $480 per year per child.

The district court gave Brent credit for his 20-percent premarital interest in the partnership equipment, which the court valued at $191,170, and for the gift of the additional 5-percent interest, which the court valued at $99,110. The court also gave Brent credit for the $120,000 from the sale of the Chase County acreage. The court awarded Brent two quarter sections of pivot-irrigated real property as marital property, which real estate was used by the partnership, and valued Brent's interest in those tracts at $135,937.50 and $775,000. The court also awarded Brent his farm bank account, valued at $418,413.78 as of January 11, 2012, as well as other miscellaneous property. In dividing the marital estate, the court assigned property and debt to Brent totaling $1,692,246.73 and property and debt to Sheri totaling $353,066.57. In order to equalize the division of the marital estate, the court ordered Brent to pay Sheri $650,000 and set forth provisions for the payment of the judgment.

Finally, the district court awarded Sheri alimony and attorney fees. The court ordered Brent to pay Sheri alimony of $1,500 per month, beginning July 1, 2012, and continuing for a total of 96 months. The court noted Sheri's request for attorney fees in the amount of $70,000. The court also noted the evidence that Sheri withdrew $100,000 from Brent's farm account and $18,264 from the parties' savings account, and took $1,800 in cash from the marital home at the time of the separation, which sums were used by Sheri for her living expenses during the separation. The court awarded attorney fees of $10,000, but

inadvertently ordered the payment of these attorney fees from Sheri to Brent, instead of from Brent to Sheri.

The parties filed motions for new trial, and on July 10, 2012, the district court entered an order amending the decree to order Brent to pay Sheri attorney fees of $10,000 and amending its child support award to order Sheri to pay Brent child support of $267 per month at the time when there is only one minor child remaining. Brent subsequently perfected his appeal to this court and Sheri her cross-appeal.

III. ASSIGNMENTS OF ERROR

Brent asserts that the district court erred in valuing his interest in the partnership farm equipment at $734,512.50.

On cross-appeal, Sheri asserts that the district court erred in (1) calculating the value of certain premarital assets of Brent and dividing the marital estate, (2) calculating child support and failing to order Brent to pay health insurance for Sheri for 6 months following the dissolution and for the minor children, (3) failing to award alimony for a period of 10 years, and (4) awarding Sheri attorney fees of only $10,000.

IV. STANDARD OF REVIEW

[1,2] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion. *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012). 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. *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

V. ANALYSIS

We begin our analysis with the parties' assignments of error regarding property division. Both parties challenge certain aspects of the valuation of Brent's interest in the partnership farm equipment, and Sheri also challenges the credit given

to Brent for the premarital acreage, the failure of the court to include partnership grain as a marital asset, Brent's alleged failure to account for certain checks received while the divorce was pending, and Brent's alleged dissipation of assets during the pendency of the action.

1. Valuation of Premarital Assets and Division of Marital Estate

[3-5] Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Plog v. Plog*, 20 Neb. App. 383, 824 N.W.2d 749 (2012). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Id.* Property which one party brings into the marriage is generally excluded from the marital estate. *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

(a) Valuation of Farm Equipment

Both parties assign error to the district court's valuation of Brent's interest in the partnership farm equipment. We address Brent's argument first and then Sheri's.

(i) Brent's Argument

Brent asserts that the district court erred in valuing his interest in the partnership farm equipment at $734,512.50.

In the decree, the district court, using the values from the appraiser, found that the premarital partnership equipment was worth $955,850, found that Brent's 20-percent premarital interest was $191,170, and excluded this value from its calculation of the marital estate. The court then found that the current value of the partnership equipment was $1,982,200, found that Brent's gifted 5-percent interest was valued at $99,110, and excluded that value from the marital estate. Brent does not take issue with these valuations and calculations. Rather, he asserts that the court erred in calculating his 25-percent

interest in the current partnership equipment at $734,512.50, as reflected in the court's recapitulation chart contained in the decree. We agree with Brent that based on the court's valuation of the current partnership equipment in the decree at $1,982,200, Brent's 25-percent interest should be $495,550 ($1,982,200 × .25). We have reviewed the record and Brent's arguments and agree that the court erroneously included a different figure in the chart than is supported by the evidence and reflected in the valuations contained in the body of the decree. Accordingly, we modify the marital asset division chart to reflect that Brent's 25-percent interest in the Bussell Farms equipment is $495,550.

(ii) Sheri's Argument

Sheri does not dispute that Brent should be given credit for his premarital interest in the partnership equipment, but she argues that he should be given credit only for his interest in the premarital equipment still owned by the partnership at the time of the dissolution.

In deciding to exclude the value of Brent's premarital interest in the equipment from the value of the interest in the equipment owned at the time of trial, the district court relied on this court's decision in *Shafer v. Shafer*, 16 Neb. App. 170, 741 N.W.2d 173 (2007), a case involving the setoff of premarital cattle. In that case, the husband's practice had been to sell cattle and purchase replacement cattle or additional cattle. The husband owned cattle at the time of the marriage, and throughout the marriage, the proceeds from the sale of cattle were reinvested in replacement cattle, producing the herd owned at the time of the divorce. In finding that the setoff should have been allowed, we stated:

> Given the undisputed evidence concerning the cattle herd which we have recounted above, the controlling precedent on set-aside of premarital assets, and the fact that this is an equitable matter, we can discern no reason not to set aside to [the husband] that portion of the value of the present cattle herd which is attributable to [his] premarital cattle. In doing so, we view the cattle herd as in effect a single asset—rather than taking a "cow by cow" approach

> to the tracing issue. Thus, we believe we have simply acknowledged the realities of what happens over time in a cattle operation. In short, while an individual cow which [the husband] owned in 1991 was long ago turned into hamburger, hot dogs, and shoe leather and thus is not traceable, the cattle herd itself, which has always been part of [his] farming operation, is in fact traceable. To do otherwise seems to us to exalt form over substance and ignore the equitable nature of a dissolution action.

Id. at 178, 741 N.W.2d at 179.

Although we are dealing with the replacement of farm equipment as opposed to cattle, we find no abuse of discretion in the district court's reliance on *Shafer* under the particular facts of this case. The record shows that Brent, his brother, and his father would regularly trade and upgrade the partnership equipment. The court did not err in setting aside $191,170 and giving Brent credit for this amount as his 20-percent premarital interest in the equipment.

(b) Proceeds from Sale of Acreage

Sheri argues that Brent should not have been given credit for the $120,000 from the sale of the acreage that was then used to purchase the marital home.

Prior to the marriage, Brent owned an undivided one-fourth interest in an acreage in Chase County, and during the marriage, Brent's parents gifted him the remaining three-fourths interest. Brent thereafter deeded the property to himself and Sheri. Brent testified that he did not intend to make a gift of the property to Sheri by placing her name on the deed, but only wished to make her a joint owner with right of survivorship in the event he were to meet an untimely death. Brent's father also testified that he did not intend to make a gift to Sheri at the time of the conveyance and that he wanted the property to remain in the family. There is no evidence in the record of the value of the property at the time it was gifted to Brent; the only evidence of value is that the property was sold in 2003 for $120,000. There is no dispute that the $120,000 was applied to the purchase of the marital home, which Sheri is receiving in the property division.

[6] Sheri argues that Brent's conveyance of the property to the parties jointly showed an intent to turn the property into marital property. However, the manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's ability to determine how the property should be divided in an action for dissolution of marriage. *Plog v. Plog*, 20 Neb. App. 383, 824 N.W.2d 749 (2012).

[7] Sheri also argues that an exception to the rule concerning the treatment of gifted property should apply in this case. When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the gift or inheritance and is not considered a part of the marital estate. An exception to the rule applies where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the gift or inheritance has significantly cared for the property during the marriage. *Id.* When applying this exception, evidence of the value of the contributions and evidence that the contributions were significant are generally required. See *id.* See, also, *Tyler v. Tyler*, 253 Neb. 209, 570 N.W.2d 317 (1997).

Although there is evidence in the record that the parties made certain improvements to the acreage during the time that they lived there and evidence of the cost associated with some of those improvements, there is no evidence to show the value of these improvements, that these improvements were significant, or that they resulted in an increase in the value of the property between the time the property was gifted to Brent and its sale. We find no error in the district court's treatment of the acreage as Brent's premarital or gifted property and in the credit to Brent of $120,000.

(c) Brent's Interest in Partnership Grain

Sheri argues that the district court erred in not considering Brent's interest in the partnership grain to be a marital asset. The evidence at trial showed that all of the 2011 beans and

corn had been harvested and that virtually all of the corn had been either sold or contracted. Some of the partnership's contracted corn remained in the bins at the time of trial and was scheduled to be delivered to the buyers in the next couple of months. At the time of trial, the only growing crop was wheat. The evidence also showed that all of the crop insurance payments for 2011, except for one of approximately $6,000, had been received and deposited. After reviewing the evidence, the court found that the stored crops should not be treated as a divisible marital asset.

In *Kalkowski v. Kalkowski*, 258 Neb. 1035, 1042, 607 N.W.2d 517, 524 (2000), the Nebraska Supreme Court declined "to adopt any bright-line rule as to whether or not crops which will eventually generate income may be treated as divisible marital property in a dissolution proceeding." In *Kalkowski*, the Supreme Court found that inclusion of the growing and stored crops in the marital estate was not an abuse of discretion, primarily because the husband had valued these assets and asked to be awarded them in the division of the marital estate.

In this case, Brent did not value the stored crops as part of the marital estate and, in fact, he testified that awarding Sheri one-half of his portion of the partnership grain would amount to an award of half of his income for the upcoming year, which would have a significantly negative impact upon his ability to meet his farm expense obligations. The record shows that the only thing the partnership does to produce income is sell grain and that this is Brent's only source of income. When the remaining 2011 corn is delivered to the buyers in 2012, Brent will receive his respective portion of the proceeds, which will be included in his 2012 income. In fact, Brent received a portion of the proceeds from the stored grain in January 2012, shortly before trial. Brent argues that including the remaining stored grain in the marital estate valuation would amount to "double-dipping," because his child support and alimony payments are based upon and paid from his income derived from the sale of grain.

It was within the court's discretion as to whether the stored grain in this case would be treated as a divisible marital asset.

The court declined to do so, and under the circumstances of this case, we find no abuse of discretion. Even if we were to consider Brent's portion of the 2011 stored grain as a marital asset, it is not clear from this record what the total value of the stored grain was at the time of trial, since some of the stored grain shown on various exhibits had recently been sold and the revenue distributed to the partners. Further, it was not clear from the record what Brent's share of the expenses were in connection with the production of this 2011 grain, which should be considered in arriving at the net value of the stored grain. See *Gebhardt v. Gebhardt*, 16 Neb. App. 565, 746 N.W.2d 707 (2008) (rejected inclusion of gross value of corn crop while ignoring all costs associated with planting, fertilizing, watering, and harvesting).

We reject Sheri's argument that the district court abused its discretion in its decision to not include the stored grain in the division of the marital estate.

(d) Checks Received While Divorce Pending

Sheri argues that Brent failed to disclose or account for a number of checks he received while the divorce was pending. She first points to a check for $58,699 for hail insurance proceeds that was issued in September 2011, but not deposited by Brent until a week before trial. However, this $58,699 deposit was included in the bank account awarded to Brent in the division of marital assets, as reflected in exhibit 94. Sheri also notes an insurance check for $38,775 that Brent stated he deposited into one of his accounts but which deposit he was unable to locate when reviewing copies of his statements at trial. Brent testified it was possible that when he copied his bank statements, he missed copying information on the back of a page, but in any event, he thought it had been deposited.

Other than stating that Brent failed to disclose or account for these crop insurance checks, Sheri presents no argument in support of this portion of her assignment of error. As noted above, the $58,699 check had been deposited and was included in the division of assets. We can find nothing in the record to

suggest that the handling of these checks was anything other than in the normal course of the farm's business or that Brent was hiding assets. This argument is without merit.

(e) Dissipation of Marital Assets

[8,9] Sheri argues that Brent dissipated some marital assets following the parties' separation. "Dissipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown. *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009). Marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions. *Id.*

Sheri points to trips Brent took to Las Vegas, Nevada, and Alabama, certain charges he made in Las Vegas, and his purchase of a television and a vehicle. She argues that these and any other substantial withdrawals made by Brent from the parties' joint account following their separation should be taken into account in the division of the marital estate.

The record shows that both parties made withdrawals from their joint account at or near the time of separation, and we find no error in the district court's failure to consider these withdrawals in the division of the marital estate. In this regard, we note that the court determined prior to trial to value the marital estate as of the date of trial. With regard to Brent's purchase of a vehicle postseparation, this vehicle and the corresponding debt were included in the court's division of the marital estate, as were the home and associated debt purchased by Brent after the separation.

Brent testified that he went to Las Vegas once following the separation and that he also took a friend to Alabama to look at a truck. However, no evidence was presented to indicate the cost of these trips, other than a credit card charge at a restaurant and an automated teller machine withdrawal totaling $1,600. Brent purchased a television and stand in the process of furnishing his new house for approximately $1,800, which does not appear to be listed on the court's property division. After considering the overall division of this relatively large

marital estate, we find no error in the district court's treatment of these items addressed in this assignment of error.

(f) Conclusion Regarding Property Valuation and Division

Based on the above analysis and our finding regarding the value of Brent's interest in the partnership equipment, we modify the total value of the marital property assigned to Brent to $1,641,934.23. Once the debts assigned to Brent of $188,650 are subtracted, Brent's net portion of the marital estate becomes $1,453,284.23. When Sheri's net portion of the marital estate ($353,066.57) is subtracted from Brent's net portion, the difference is $1,100,217.66. Half of this amount is $550,108.83. We note that in the court's original calculation of the equalization payment, one-half of the difference between the parties' net awards was $669,590, which the court rounded down to $650,000 due from Brent to Sheri. Similarly, we determine that the property equalization payment reflected in the decree should be reduced from $650,000 to the rounded figure of $550,000. We modify the decree to enter judgment against Brent in favor of Sheri for that amount. We modify the provision of the decree regarding the payment of the property equalization payment to provide that Brent shall pay to Sheri, on or before October 1, 2012, the sum of $50,000 without interest. The balance of the judgment of $500,000 shall draw interest from the date of the decree and shall be paid in five equal annual principal installments of $100,000 each. In addition to the annual principal installment, Brent shall pay any accrued interest at the judgment rate of 2.142 percent per annum. The first annual payment shall be made on or before March 1, 2013, and a like amount plus accrued interest on the first day of each March thereafter until the full amount of the judgment plus the accrued interest is paid.

2. Child Support and Health Insurance

Sheri asserts that the district court erred in calculating child support and failing to order Brent to pay health insurance for Sheri for 6 months following the dissolution and for the minor children.

(a) Brent's Income for Child Support Purposes

Sheri argues that the district court erred in determining Brent's income for child support purposes. She takes issue with the deduction of depreciation expenses from Brent's income and the court's averaging of Brent's income. In calculating child support, the court assigned Brent total monthly income of $11,153.93 and net monthly income of $8,737.35.

(i) Depreciation

With respect to depreciation, the Nebraska Child Support Guidelines provide:

> Depreciation calculated on the cost of ordinary and necessary assets may be allowed as a deduction from income of the business or farm to arrive at an annualized total monthly income. After an asset is shown to be ordinary and necessary, depreciation, if allowed by the trial court, shall be calculated by using the "straight-line" method, which allocates cost of an asset equally over its useful duration or life. . . . A party claiming depreciation shall have the burden of establishing entitlement to its allowance as a deduction.

Neb. Ct. R. § 4-204.

Brent's income tax returns for 2005 to 2010 were admitted into evidence. We note that Brent complied with § 4-204 of the guidelines, which requires any party claiming an allowance of depreciation as a deduction from income to furnish a minimum of 5 years' tax returns. Brent also offered testimony from his accountant, Jeffrey Olsen. Olsen examined Brent's prior tax documents and testified about how Brent had been claiming depreciation on farm and business equipment. Olsen testified that in many of the past few years, Brent had been using the "fast write off" method for the section 179 elections to expense a lot of the equipment purchases in the year that they were purchased. Olsen opined that this may not accurately reflect Brent's income in recent years. In an effort to comply with the above guideline regarding depreciation deduction, Olsen recalculated Brent's depreciation schedules using a straight-line method from 2005 to 2010, which

recalculation of depreciation was received in evidence. Olsen testified that in order to arrive at an adjusted net farm profit for Brent for purposes of determining child support income, the claimed depreciation on schedule F should be added back to the net profit and then the straight-line depreciation should be deducted.

We summarize Brent's schedule F documents from his tax returns for 2006 to 2010 (5 years) and Olsen's recalculation to arrive at the adjusted net farm profit as follows:

	Net Profit (Sch. F)	**+ Depreciation (Sch. F)**	**– Straight-Line (Olsen)**	**= Adj. Net Profit**
2006	$ 67,394	$ 43,778	$33,810	$ 77,362
2007	80,132	47,384	35,061	92,455
2008	95,758	51,115	39,098	107,775
2009	115,485	131,495	47,505	199,475
2010	127,858	127,306	62,995	192,169

While the district court did not specifically articulate how it arrived at its calculation of Brent's monthly income, it is apparent from our chart above that the court averaged the adjusted income from 2006 to 2010 ($669,236 ÷ 5 years = $133,847.20 ÷ 12 months = $11,153.93). We conclude that the district court properly allowed and determined the depreciation deduction from Brent's farm income to arrive at his monthly income as provided in the guidelines. Sheri's argument to the contrary is without merit.

(ii) Income Averaging

The next question we must address is whether the district court properly averaged Brent's income in calculating child support. As shown above, the court apparently utilized a 5-year average in determining Brent's monthly income. Sheri argues that because Brent's income is steadily increasing, the use of income averaging was error.

The Nebraska Supreme Court first discussed the propriety of using income averaging in determining a parent's income for purposes of setting child support in *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). The court recognized that a footnote to worksheet 1 of the guidelines provided that "'[i]n the event of substantial fluctuations of annual earnings

of either party during the immediate past 3 years, the income may be averaged to determine the percent contribution of each parent . . . .'" *Peter v. Peter*, 262 Neb. at 1023-24, 637 N.W.2d at 872. The father-obligor in *Peter* was working on commission as a stockbroker and successfully convinced the trial court to average his last 3 years of income in modifying his child support obligation. The Supreme Court found the income averaging to be error because the father's annual earnings showed a clear pattern of consistently increasing income. In reaching this conclusion, the court noted that there was no evidence in the record to suggest the father's current rate of earnings would decrease and that in fact, there was evidence to suggest that his income would continue to increase. This court applied the same rationale in a situation where the father-obligor's income was steadily declining, finding that income averaging was not appropriate. See *State on behalf of Hannon v. Rosenberg*, 11 Neb. App. 518, 654 N.W.2d 752 (2002). See, also, *Lucero v. Lucero*, 16 Neb. App. 706, 750 N.W.2d 377 (2008) (income averaging not appropriate where father-obligor's W-2 statements for only 2 years do not show that his income has substantially fluctuated).

On the other hand, several cases have allowed the use of income averaging when dealing with farm income. The Nebraska Supreme Court addressed the issue of income averaging for a farmer in *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007). The husband-obligor had annual income which fluctuated the 3 years prior to trial from $51,654 to $61,059 to $28,400, respectively. The Supreme Court recognized that as a self-employed farmer, the husband's income was prone to fluctuations from year to year, which is the type of contingency provided for in the guidelines. The court discussed at length the number of years that a court should use when averaging income pursuant to the guidelines, including an unpublished decision from this court that used a 5-year average, and decisions or recommendations from other jurisdictions that support the use of 2-, 3-, 4-, 5-, and 10-year averages. The court in *Gress* concluded that a 3-year average tended to be the most common approach in cases where a parent's income fluctuates and that courts appear reluctant to use more than a 5-year

average. In *Gress*, the trial court used a 3-year average rather than the 8-year average urged by the husband. The Supreme Court concluded that even assuming that income averaging under the Nebraska guidelines is not limited to a 3-year average, the district court did not abuse its discretion by declining to use an 8-year average. We note that the Supreme Court recently found no abuse of discretion in averaging a father-obligor's income over 4 years where the income was derived from investments and included both years of gain and years of losses. See *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).

In *Willcock v. Willcock*, 12 Neb. App. 422, 675 N.W.2d 721 (2004), this court affirmed a trial court's utilization of a 3-year income average in calculating the father-obligor's child support obligation. The father's income was derived from farming, "a profession that is subject to income fluctuations based on a variety of factors." *Id.* at 430, 675 N.W.2d at 727. The father testified about the variety of factors that affect his income, including the farm economy, weather conditions and crop yields, and government payments. The father's tax returns bore out such fluctuations, showing both increases and decreases over a 5-year period. Thus, we rejected the father's argument that his current income should be used as opposed to the 3-year average, distinguishing this case from *State on behalf of Hannon v. Rosenberg, supra*, where the father's income was derived from an hourly wage and no evidence existed to suggest that his pay decrease was temporary in nature. However, we also stated that "[t]his is not to say that the principles [income averaging not appropriate where income steadily increasing or decreasing] announced in *Peter v. Peter* . . . and *State on behalf of Hannon v. Rosenberg* could never be applicable in calculating the child support obligation of someone engaged in the farming profession." *Willcock v. Willcock*, 12 Neb. App. at 430, 675 N.W.2d at 727.

This court again found that income averaging was appropriate in determining a self-employed farmer's annual income in *Pohlmann v. Pohlmann*, 20 Neb. App. 290, 824 N.W.2d 63 (2012). A review of the evidence in that case showed that the father's income from farming was prone to fluctuations from

year to year, due in part to his use of the cash basis of accounting. Although the father's income showed a pattern of decline for the 3 years prior to trial, we found merit to his argument that the court should have used the average income reported on his tax returns for the 3 years preceding trial, and we remanded the cause to the district court to recalculate the father's income and resulting child support obligation. See, also, *Hughes v. Hughes*, 14 Neb. App. 229, 706 N.W.2d 569 (2005) (error found in failure to include 4-year average of trust income in calculating father's child support obligation).

Applying the foregoing principles to the case at hand, we conclude that the district court did not abuse its discretion in using a 5-year income average in determining Brent's income and resulting child support obligation. While Brent's tax returns for the past 5 years show that his income has steadily increased, there is also evidence in the record to indicate that Brent's farm income is subject to various factors outside of his control which can cause fluctuations. The district court did not err in setting Brent's total monthly income at $11,153.93 for purposes of calculating his child support obligation.

(b) Health Insurance

The district court made no ruling in the decree for the provision of health insurance for the children, nor did it include an adjustment for health insurance premiums for the children in its child support calculation. Sheri argues that the district court erred in this regard and that Brent should be ordered to pay all of the children's health insurance premiums in the future and to pay for her health insurance for 6 months following the dissolution. She also argues that she should be given credit for the health insurance premiums she paid during the separation and following trial, including credit for her own health insurance premium in the 6 months following the dissolution.

Neb. Rev. Stat. § 42-369(2)(a) (Cum. Supp. 2012) provides in part:

> If the party against whom an order, decree, or judgment for child support is entered or the custodial party has health insurance available to him or her through an

> employer, organization, or other health insurance entity which may extend to cover any children affected by the order, decree, or judgment and the health care coverage is accessible to the children and is available to the responsible party at reasonable cost, the court shall require health care coverage to be provided.

The Nebraska Child Support Guidelines provide, "As required by . . . § 42-369(2), the child support order shall address how the parents will provide for the child(ren)'s health care needs through health insurance . . . ." Neb. Ct. R. § 4-215 (rev. 2011).

At trial, Sheri asked the district court to order Brent to pay all health insurance premiums for the children and to pay her health insurance premium for 6 months following the dissolution. Up through the date of trial, Sheri had been "covered by the family plan . . . through Brent." Sheri paid all of the health insurance premiums for the family after the divorce was filed in July 2010 to the time of trial. In an affidavit filed after trial and dated March 23, 2012, Sheri stated that the premium for the whole family is $778.46 per month and that she continued to pay the premiums after trial.

We agree that the district court erred in failing to address the provision of health insurance for the minor children in the decree. We modify the decree so that Brent is ordered to provide health insurance for the minor children, so long as such coverage is available to him through his health insurance policy at a reasonable cost, and is ordered to pay the premium for the children commencing on the date of the entry of the decree. However, because we do not have evidence of the cost to provide health insurance solely for the children, we are not able to make any adjustment to the child support calculation as allowed under § 4-215. We decline to require Brent to reimburse Sheri for premiums paid for the family during the pendency of the dissolution proceeding, because Sheri had both temporary support and the use of funds withdrawn from the parties' accounts during this time. Likewise, we decline to require Brent to reimburse Sheri for the premium associated with her health insurance coverage after the trial. First, we note

from the record before us that Sheri's request for reimbursement of premiums paid by her after the completion of the trial was not addressed by the trial court below, and as such, there is no error for us to review. Further, we note that Sheri was awarded alimony and a significant property award from which to pay for her health insurance.

3. Alimony

Sheri asserts that the district court erred in failing to award alimony for a period of 10 years. The court awarded Sheri alimony of $1,500 per month for 96 months, which is 8 years.

[10-14] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party. *Jensen v. Jensen*, 20 Neb. App. 167, 820 N.W.2d 309 (2012). In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Id*. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Smith v. Smith*, 20 Neb. App. 192, 823 N.W.2d 198 (2012). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Id*. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. *Id*.

The parties were married for over 15 years, and during the marriage, Sheri contributed by maintaining the parties' household, being the primary caregiver for their children, and providing assistance with the farming operation in various ways. Sheri quit working outside the home when the parties'

first child was born, becoming the primary caregiver and performing most of the household chores. This was a mutual decision by the parties. Sheri returned to work in 2003 or 2004. Sheri has taken medical transcription courses online and has obtained a certified nursing assistant certificate or degree. At the time of trial, Sheri was working at a Chase County clinic, earning $10.28 per hour, and her gross wages for 2011 were $18,194.99. Sheri plans to pursue an advanced directive registered nurse degree, which will take 3 years to complete. Although she testified that opportunities for a registered nurse in Chase County are limited, the starting salary for a full-time registered nurse would be $19 an hour, which is almost double her current wage. Sheri testified that she has monthly living expenses of $5,773.27. In addition to alimony and child support, Sheri has been awarded marital assets totaling $416,746.62. The only marital debt assigned to her is the mortgage on the marital home of $63,680.05, leaving a net marital estate of $353,066.57. Sheri is receiving property equalization payments of $550,000. Sheri will continue to receive alimony for a number of years after she has completed her 3-year nursing program. We find no abuse of discretion in the duration of the district court's alimony award.

4. Attorney Fees

[15] Sheri asserts that the district court erred in awarding her attorney fees of only $10,000. Although the court noted in the decree that Sheri requested attorney fees of $70,000, her actual request at trial was for $50,000 in 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. *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

In awarding attorney fees to Sheri, the district court noted that at the time of the separation, Sheri took $100,000 from the parties' farm account, $18,264 from their savings account, and $1,800 in cash from the family home. Sheri testified at trial that she did so to protect herself and the children during the

separation and that she has used the money for living expenses, including paying the mortgage on the marital residence and health insurance premiums for Brent and the children. At the time of trial, she had only $17,984.75 remaining of the $100,000. However, Sheri also received temporary child support of $1,400 per month and spousal support of $1,500 per month during the pendency of the proceedings. And, she will continue to receive $1,500 in monthly alimony for 8 years. Finally, Sheri has received a significant award of property and equalization payments.

We have reviewed the record and find no abuse of discretion in the court's award of $10,000 in attorney fees to Sheri. Her assignment of error is without merit.

VI. CONCLUSION

As discussed above, we modify the marital asset division chart to reflect that Brent's 25-percent interest in the Bussell Farms equipment is $495,550. We find no merit to the other assignments of error relating to the valuation of premarital assets, the credits given to Brent, and the division of the marital estate. We have modified the decree with respect to the property equalization payment as set forth above.

In determining Brent's income for child support purposes, the district court properly allowed and determined the depreciation deduction and did not abuse its discretion in using a 5-year income average in determining Brent's income and resulting child support obligation. Accordingly, the court did not err in setting Brent's total monthly income at $11,153.93 for purposes of calculating child support.

We modify the decree so that Brent is ordered to provide health insurance for the minor children, so long as such coverage is available to him through his health insurance policy at a reasonable cost, and is ordered to pay the premium for the children's health insurance commencing on the date of the entry of the decree. However, because we do not have evidence of the cost to provide health insurance solely for the children, we are not able to make any adjustment to the child support calculation. Further, we decline to require Brent to reimburse

Sheri for premiums paid during the pendency of the dissolution proceeding or after trial.

We find no abuse of discretion in the duration of the district court's alimony award or in its award of $10,000 in attorney fees to Sheri.

AFFIRMED AS MODIFIED.

SAM GRIMMINGER AND KAY GRIMMINGER, APPELLANTS,
V. JAMES MUDLOFF, APPELLEE.
837 N.W.2d 833

Filed September 17, 2013. No. A-12-1000.

1. **Actions: Restrictive Covenants: Equity.** An action to enjoin a breach of restrictive use covenants is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.
4. **Restrictive Covenants.** If the language of a restrictive covenant is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction.
5. ____. Restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property.
6. **Contracts.** An ambiguity exists when the instrument at issue is susceptible of two or more reasonable but conflicting interpretations or meanings. Moreover, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
7. **Restrictive Covenants: Words and Phrases.** A dwelling is a structure in which a person lives or that has been designed for living.
8. ____: ____. The term "residential" prohibits the affected real property from being utilized for commercial purposes.

Appeal from the District Court for Howard County: KARIN L. NOAKES, Judge. Affirmed.

Sam Grimminger, pro se, and for appellant Kay Grimminger.

David T. Schroeder for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

Sam Grimminger and Kay Grimminger, lot owners in the Lake of the Woods subdivision, filed suit for an injunction in the district court for Howard County against James Mudloff, another lot owner in the subdivision. The Grimmingers contended that Mudloff's use of his lot and construction of a detached garage structure violated the subdivision's restrictive covenants. Following trial, the district court entered judgment in favor of Mudloff. The Grimmingers challenge the district court's conclusions that Mudloff's detached garage structure was not a dwelling structure and did not violate the "residential lot" designation contained in the covenants. Finding no error, we affirm.

FACTUAL BACKGROUND

Restrictive Covenants.

On December 11, 1980, a document entitled "Restrictive Covenants for Lake of the Woods Subdivision" was recorded in the office of the register of deeds for Howard County, Nebraska. These covenants apply to all real property in the Lake of the Woods subdivision. Since their adoption and recording in 1980, these covenants have been amended various times. For purposes of this appeal, the latest amendment to these covenants was recorded on August 31, 2007.

Included in these restrictive covenants are three particular provisions that are at issue in this case: (1) a "residential lot" covenant, (2) a "building specifications" covenant, and (3) a "law suit" covenant. The "residential lot" covenant states that "[a]ll lots in [the] Subdivision shall be known and described as Residential lots." The "building specifications" covenant contains various building specifications to which lot owners are required to comply, the pertinent part of which states:

> No dwelling structure, garage or other incidental building shall be built with scrap lumber, but all

> dwellings shall be completed within one (1) year of the date commenced. No dwelling structure shall be considered complete until it has at least one floor of living space. No dwelling unit shall have less than 1100 square feet of living space above ground, shall have at least a 5/12 roof pitch, shall conform to the Howard County Building Regulations, and shall be set on a permanent foundation with permanent utility connection. Living space shall not include garage, breezeway or open or enclosed porches. Mobile Homes will not be permitted. All new construction will be approved by an architectural committee comprised of from five to seven lot owners selected by a majority of the lot owners of all lots in the subdivisions.

Finally, each lot owner in the subdivision is permitted by the "law suit" covenant to personally file suit to enforce these covenants.

Mudloff's Lot.

On October 24, 2008, Mudloff acquired a lot in the Lake of the Woods subdivision. At the time he purchased this lot, Mudloff was aware that it was subject to the recorded restrictive covenants. Sometime in May 2009, Mudloff submitted plans to build two buildings on the lot. One building was a proposed 44- by 77-foot house with an attached garage. The other proposed building was a 24- by 30-foot detached garage. The architectural committee approved these plans.

Having received the architectural committee's approval for his plans, Mudloff began construction on the detached garage in May 2009. This building is attached to a permanent foundation and is connected to a septic tank and leachfield that are large enough to support additional facilities. The building is 720 total square feet and is separated into distinct parts. One part is 408 square feet, is unfinished, and is used to store Mudloff's all-terrain vehicle, riding lawnmower, and golf cart, along with other outdoor items. The other part of the building is 312 square feet and is partially carpeted and partially covered in linoleum. This part contains a sink, cabinetry, and an enclosed half bath. The completed structure has running

water, indoor plumbing, a permanent utility connection, electrical outlets, heating and cooling, and an attached wood deck. According to Mudloff, construction of this building was completed in October 2009.

Although Mudloff's approved plans contained two proposed buildings, he has built only the detached garage. Sometime later, the Grimmingers became aware that Mudloff had completed only the detached garage structure and had not taken steps to construct the accompanying house. While he was a member of the board of the Lake of the Woods Property Owners Association, Sam sent Mudloff letters requesting his attendance at a board meeting for the purpose of discussing Mudloff's construction plans and timelines. When Mudloff had not begun construction on his proposed home a year after these letters, the Grimmingers determined that he had violated the covenants and retained legal representation to enforce the covenants. The Grimmingers believed that Mudloff's structure did not conform to the restrictive covenants because it did not contain the minimum square footage and did not have the compliant "5/12 roof pitch." On July 14, 2011, the Grimmingers, exercising their rights to personally sue to enforce the subdivision's covenants, filed a complaint in the district court for Howard County seeking an injunction against Mudloff.

Trial.

On September 26, 2012, trial was held on the Grimmingers' complaint. At trial, Sam testified that he believed the covenants did not allow a lot owner to build a garage on a lot unless there was an accompanying residence. Sam stated that if Mudloff's building was permitted to remain, the covenants would effectively be rendered nonexistent.

Mudloff testified that he believed his structure, as constructed, did not violate the covenants. Mudloff stated that his structure was not a dwelling and that he did not utilize it as a dwelling. Photographs of the finished part of the structure show that it contains a lawnmower, a grill, stacked lawn chairs, a table, and various tools. Mudloff continues to reside in St. Paul, Nebraska. According to Mudloff, the covenants

do not require a house to be constructed on a lot in order for the lot to conform to the covenants. Despite this position, Mudloff testified that he intends to build his proposed house and would do so as soon as other circumstances in his life permitted.

A member of the subdivision's architectural committee testified that Mudloff's current use of his lot did not violate the covenants.

District Court Order.

The district court issued its order on September 28, 2012, ruling that Mudloff's structure did not violate the covenants. In its findings, the district court concluded that the facts are largely undisputed and turned to an analysis of whether Mudloff's structure was a "dwelling" in violation of the covenants and whether the covenants' designation of the phrase "residential lots" prohibits the construction of such a building without a residence having first been built. Because the covenants did not define the term "dwelling," the court referred to Black's Law Dictionary, which generally defined the word "dwelling" as a house or other structure in which a person lives. Applying that definition to Mudloff's garage structure, the court determined that because Mudloff did not live in the structure, it could not be considered a dwelling and, therefore, did not violate the covenants as they relate to dwelling structures.

The district court also considered whether Mudloff violated the covenants because he had not built a residence on his lot. The court found that although the covenants designated all lots in the subdivision as "residential lots," there was no definition of the phrase "residential lot" in the covenants. The court determined that a residential lot is commonly intended for use as a private residence or dwelling and is not utilized for commercial purposes, which would certainly prohibit building and operating a business on the lots and prohibit construction of buildings that would interfere with the residential use of the lots. Concluding that Mudloff was intending to use the lot for a residence and that the detached garage did not prevent later construction of a residence or contradict the residential nature of the lot or subdivision, the court found that the covenants

had not been violated and dismissed the Grimmingers' complaint. The Grimmingers appeal from this order.

ASSIGNMENTS OF ERROR

Although the Grimmingers assign six errors, the argument section of their brief reveals that these six errors can be condensed into two. The Grimmingers contend the district court erred in (1) determining that Mudloff's detached garage was not a dwelling structure and (2) determining that Mudloff did not violate the "residential lot" designation contained in the covenants.

STANDARD OF REVIEW

[1,2] An action to enjoin a breach of restrictive use covenants is equitable in nature. *Elkhorn Ridge Golf Partnership v. Mic-Car, Inc.*, 17 Neb. App. 578, 767 N.W.2d 518 (2009). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

ANALYSIS

[3-5] We begin our analysis of this case by reviewing some well-established law relating to restrictive covenants. Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants. *Southwind Homeowners Assn. v. Burden*, 283 Neb. 522, 810 N.W.2d 714 (2012). If the language is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction. *Id.* However, restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property. *Id.*

[6] An ambiguity exists when the instrument at issue is susceptible of two or more reasonable but conflicting interpretations or meanings. Moreover, the fact that the parties have

suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994).

Should Mudloff's Detached Garage Be Considered Dwelling Structure?

The Grimmingers contend that Mudloff's detached garage is a dwelling structure that violates the covenants. They argue that because this building contains many amenities that are typically found in a standard residence, such as running water, heating and cooling, a half bath, and carpeted floors, the district court should have considered it a dwelling. The Grimmingers also contend that the district court should not have given weight to Mudloff's testimony that he does not use the building as a dwelling. Finally, because this building does not comply with the requirements in the covenants in terms of its square footage and roof pitch, the Grimmingers argue that the district court should have granted their requested injunctive relief.

The parties have not cited, nor have we discovered in our research, any Nebraska case providing a definition of "dwelling structure." However, the term "dwelling" is defined in various Nebraska statutes. For the sake of brevity, we list only three such occurrences. In the criminal law statutes, "[d]welling" is defined as "a building or other thing which is used, intended to be used, or usually used by a person for habitation." Neb. Rev. Stat. § 28-109(9) (Reissue 2008). See, also, Neb. Rev. Stat. § 28-1406(5) (Reissue 2008) ("[d]welling shall mean any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging"). The Nebraska Fair Housing Act defines "[d]welling" as "any building, structure, or portion thereof which is occupied as or designed or intended for occupancy as a residence for one or more families . . . ." Neb. Rev. Stat. § 20-310 (Reissue 2012). In Nebraska's Uniform Residential Landlord and Tenant Act, "[d]welling unit" is defined as "a structure or the part of a structure that is used as a home, residence, or sleeping place by one person

who maintains a household or by two or more persons who maintain a common household." Neb. Rev. Stat. § 76-1410(3) (Reissue 2009).

More general resources contain similar definitions for dwelling. According to Black's Law Dictionary 582 (9th ed. 2009), a "dwelling-house" is defined as "[t]he house or other structure in which a person lives; a residence or abode." Black's Law Dictionary also notes that the term "dwelling-house" is commonly shortened to "dwelling." This legal definition of "dwelling-house" closely relates to the common definition of dwelling. See Merriam-Webster's Collegiate Dictionary 360 (10th ed. 2001) (defining "dwelling" as "a shelter (as a house) in which people live").

[7] Although the definitions of "dwelling" cited above vary in their language, it is clear that a dwelling is a structure in which a person lives or that has been designed for living. Both parties essentially agree with this definition, but they dispute whether Mudloff's structure should be considered a dwelling. Upon our de novo review of the record, we conclude that the detached garage structure at issue in this case, although containing various amenities that are commonly found in a dwelling, cannot be considered a dwelling. The part of the structure that is finished is 312 square feet, which includes a separate half bath with a sink and toilet, and some cabinetry, a sink, and a refrigerator in the main area. The main area, which is partially carpeted, serves as additional storage for a lawnmower, a grill, stacked lawn chairs, and a table. Mudloff does not live in this structure, but, rather, maintains a house in St. Paul as his permanent residence. Mudloff testified that his detached garage structure was not designed for living and could not be utilized for living because it did not contain a shower or bathtub, a stove, or a bed.

Having found that the detached garage structure in this case is not a dwelling, we conclude that it does not violate restrictive covenants. The covenants specify that "dwelling units" must have a "5/12 roof pitch" and at least "1100 square feet of living space above ground." However, because this detached garage is not a dwelling, it is not subject to these restrictions. This assigned error is without merit.

Does Mudloff's Current Use of His Lot Violate Covenants' Residential Lot Designation?

As stated above, the covenants state that all lots in the Lake of the Woods subdivision are to be classified as "residential lots." The Grimmingers argue that allowing Mudloff's current use of his lot would subvert the intent and purpose of the covenants. They fear that if Mudloff is permitted to use his lot in its current state, many other substandard structures would also be allowed in the subdivision.

[8] The restrictive covenants do not contain any definition of the phrase "residential lot" in the recorded instrument or subsequent amendments. However, the Nebraska Supreme Court has had occasion to consider restrictive covenants containing similar language. In *Reed v. Williamson*, 164 Neb. 99, 104, 82 N.W.2d 18, 22 (1957), the Supreme Court construed the meaning of a restrictive covenant which provided that "'[n]o lot shall be used except for residential purposes.'" Determining that the term "residential" prohibited the affected real property from being utilized for commercial purposes, the Supreme Court held that the proposed use of the affected property for the production of oil and gas would violate the covenants. See *id*.

In *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 356, 639 N.W.2d 905, 908 (2002), the Nebraska Supreme Court construed a restrictive covenant which provided that "'[a]ll lots shall be used as residential lots except Lot 1, Block 14, which may be used for commercial use.'" Adopting the meaning of "residential" from *Reed v. Williamson, supra*, the Supreme Court concluded that the defendant's use of his lot inside the subdivision for the purpose of accessing property outside the subdivision did not disturb the residential designation in the restrictive covenants. *Lake Arrowhead, Inc. v. Jolliffe, supra*.

We adopt and apply the Supreme Court's conclusion as to the meaning of "residential" in our analysis of these covenants. Having done so, we determine that Mudloff's current use of his lot does not violate the covenants. There is no evidence in the record that Mudloff has used his lot for any commercial

purpose. Additionally, and contrary to the Grimmingers' assertions, there is nothing in the covenants that affirmatively requires a lot owner to construct a residence on his or her lot before building any incidental structure in order to be in compliance with the residential designation. If the subdivision wished to preclude a lot owner from constructing this type of structure before constructing a residence, more specific covenants could have been drafted.

Accordingly, we find no violation of the restrictive covenants and determine this error to be without merit.

CONCLUSION

Having determined that Mudloff's detached garage structure and current use of his lot do not violate the restrictive covenants, we affirm the district court's decision.

AFFIRMED.

IN RE INTEREST OF MONTANA S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. NICOLE S., APPELLEE, AND ANN T., INTERVENOR-APPELLANT.

837 N.W.2d 860

Filed September 24, 2013. No. A-12-1028.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
5. ____: ____. A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy.

6. **Child Custody: Standing.** Foster parents of children who have been adjudicated as being without proper support have standing to object to a plan to change foster care placement of the children.
7. **Child Custody: Standing: Appeal and Error.** Because a foster parent has standing to object to a plan recommending a change in placement, a foster parent also has standing to appeal the juvenile court's decision to adopt such a plan and change the child's placement.
8. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
9. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
10. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
11. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.
12. **Juvenile Courts: Child Custody.** A juvenile court's order changing a child's placement to a different foster home affects a substantial right held by the child's current foster parent where that foster parent has been the child's primary caregiver during a vast majority of the juvenile court proceedings and for the majority of the child's life, and where all of the parties, including the Department of Health and Human Services and the State, agree that the foster parent should be considered as an adoptive placement for the child.
13. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the code must be construed to assure the rights of all juveniles to care and protection.
14. **Juvenile Courts: Child Custody.** Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests.
15. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Affirmed.

Regina T. Makaitis for intervenor-appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer C. Clark, and Emily H. Anderson, Senior Certified Law Student, for appellee State of Nebraska.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Ann T., the maternal grandmother of Montana S. and an intervenor in these juvenile court proceedings, appeals from an order of the juvenile court which granted a motion to change Montana's physical placement from Ann's home to a different foster home. For the reasons set forth herein, we affirm the decision of the juvenile court to grant the change in Montana's placement.

II. BACKGROUND

These juvenile court proceedings involve Montana, who was born in September 2007. In January 2011, when Montana was approximately 3 years old, the State filed a petition in the juvenile court alleging that Montana was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the faults or habits of his biological mother, Nicole S.

The State filed its petition after it received information from Montana's maternal grandmother, Ann. Ann reported that Nicole had left Montana at Ann's home for approximately a week and had not yet returned. In addition, Ann reported that she believed that Nicole was using methamphetamines and was struggling with mental health issues. Ann indicated that she believed that Nicole was not currently capable of caring for Montana.

After the State filed its petition, the juvenile court entered an order granting the Department of Health and Human Services (the Department) immediate custody of Montana. The Department then formally placed Montana in Ann's home. Montana has continued to be placed with Ann throughout the majority of these juvenile court proceedings.

Ultimately, Nicole admitted that she had been using methamphetamines, that she had left Montana with Ann indefinitely, and that her actions placed Montana at risk for harm. In light of Nicole's admissions, the juvenile court adjudicated Montana to be a child within the meaning of § 43-247(3)(a).

After Montana was adjudicated to be a child within the meaning of § 43-247(3)(a), the juvenile court held disposition hearings in March, July, and September 2011, and in January and April 2012. At these disposition hearings, the juvenile court ordered Nicole to comply with a rehabilitation plan. The rehabilitation plan required Nicole to find stable housing and employment, to abstain from using alcohol and controlled substances, to complete a substance abuse treatment program, and to participate in supervised visitation with Montana. Such visitation was to be arranged through the Department. The juvenile court also ordered that Nicole's boyfriend, John B., was to have no contact whatsoever with Montana.

Ann attended the disposition hearing held in April 2012. At that hearing, the juvenile court advised Ann of her right to intervene in the juvenile court proceedings. On June 19, Ann filed a complaint for intervention. In her complaint, she indicated that she wished to intervene in the proceedings in order to receive notice of and participate in all hearings, to be granted custody of Montana during the pendency of the proceedings, and to be permitted to adopt Montana if Nicole's parental rights were terminated. After a hearing, the juvenile court entered an order, dated July 25, 2012, which granted Ann's request to intervene in the proceedings.

On July 24, 2012, the day before entry of the court's order granting Ann's request to intervene, all of the interested parties in the juvenile court proceedings, including Ann, Nicole, the State, Montana's guardian ad litem, and the family's foster care specialist, participated in a mediation "to discuss the case in regards to terminating parental rights and to provide the parties an opportunity to explore non-trial alternatives." During this mediation, it was agreed that Nicole would relinquish her parental rights to Montana and that Ann would be considered as an adoptive placement for Montana pending the completion of an adoption home study.

On July 26, 2012, the day after entry of the court's order granting Ann's request to intervene and 2 days after the mediation, the Department notified the juvenile court and all of the parties, including Ann, that it planned to change Montana's placement from Ann's home to a different foster home on August 3. The notice indicated that the Department had reason to believe that Ann was permitting Nicole to have unauthorized contact with Montana without proper supervision. Ann filed an objection to the proposed change in Montana's placement and asked the court to stay any change in placement until after an evidentiary hearing could be held. The court granted Ann's request for a stay and scheduled an evidentiary hearing.

Before an evidentiary hearing on the Department's request for a change in placement was held, Montana's guardian ad litem filed an ex parte motion for change of placement. In the motion, the guardian ad litem alleged that Montana would be at risk for harm if he were to remain in Ann's home. Specifically, the guardian ad litem alleged that Ann was permitting unsupervised contact between Montana and Nicole and that Ann had permitted John to have contact with Montana in contravention of explicit court orders. The guardian ad litem requested that Montana be immediately removed from Ann's home. In an order dated July 31, 2012, the juvenile court granted the motion of the guardian ad litem and ordered that Montana be removed from Ann's home.

In August 2012, a hearing was held concerning whether Montana's change of placement from Ann's home should be permanent or whether he should be returned to Ann's care.

At the hearing, the guardian ad litem presented evidence which established that during the pendency of the juvenile court proceedings, Nicole was permitted to have only supervised contact with Montana because there was some question about whether Nicole was still using controlled substances. The supervision was to be provided by a designated, third-party visitation worker to ensure that Nicole did not have contact with Montana when she was under the influence of any alcohol or drugs. Ann was aware of this court order. In fact, Ann had specifically requested a visitation worker to attend certain

family events so that Nicole could participate. Ann was permitted to supervise a visit between Nicole and Montana during the Christmas holiday in 2011, but this was a "one-time" occurrence, and Ann was made aware of that.

Despite the juvenile court order permitting only supervised contact between Nicole and Montana, the guardian ad litem presented evidence that Ann permitted Nicole to see Montana without a designated visitation worker in October 2011 and in April, May, and July 2012. Ann admitted to permitting unauthorized contact between Nicole and Montana.

The guardian ad litem also presented evidence that Nicole lived with Ann for a period of time after these juvenile court proceedings began and, thus, after Montana had been placed with Ann. There was also evidence that when Nicole lived with Ann, John was a frequent visitor at Ann's home, even though the juvenile court had specifically ordered that John was not to have any contact with Montana.

There was evidence that Ann has stated that she "breaks the rules all the time" so that Nicole can see Montana. In addition, there was evidence that on a separate occasion, Ann stated that "we don't always play by the rules."

Contrary to the evidence presented by the guardian ad litem, Ann testified that she did not intentionally disobey or disregard the juvenile court's orders concerning Nicole's visitation with Montana. Ann testified that she did not receive any of the juvenile court's orders. Ann admitted that she had permitted Nicole to see Montana on Mother's Day and Easter in 2012 without a visitation worker present. However, she testified that she believed these visits were authorized because she had previously been told she could provide supervision for Nicole's visits with Montana during family events. Ann also testified that she never left Nicole alone with Montana and that she made sure that Nicole was sober when she saw Montana. Ann testified that Nicole has not lived with her since November 2009, more than a year prior to the inception of these juvenile court proceedings. In addition, Ann testified that she has not permitted John to visit her home.

After the hearing, the juvenile court entered an order finding that it would be in Montana's best interests to grant the

motion for a change in placement. Specifically, the court found that the testimony and evidence presented by the guardian ad litem was credible and demonstrated that Ann permitted Nicole and John to have unauthorized contact with Montana and even permitted Nicole to reside in Ann's home during a time when Montana also resided there. The court stated, "Montana has been removed from the care of [Nicole] because she has placed the child at risk for harm. Allowing [Nicole] to reside in the home continues this child's exposure to risk of harm by [Nicole]. This particular risk was facilitated, aided, and abetted by [Ann]."

The court went on to find that Ann had knowingly and intentionally violated the court's orders in order to provide Nicole with time and access to Montana. The court stated:

> [Ann] has also placed this child at risk for harm by breaching the trust, promise and credibility required of foster parents. This process relies upon foster parents "playing by the rules". [Ann] has expressed to others that she does not play by the rules and that she was going to permit contact between [Nicole] and Montana. Such disregard of the court's orders cannot be sanctioned, tolerated and/or condoned as such violations are material.

The court ordered that placement of Montana "shall exclude the homes of [Nicole] and [Ann] until further order of this court."

Ann appeals from the juvenile court's order here.

III. ASSIGNMENT OF ERROR

On appeal, Ann assigns three errors which we consolidate and restate into one error for our review. Ann asserts that the juvenile court erred in granting the motion to change Montana's placement from her home to a different foster home.

IV. ANALYSIS

1. Standard of Review

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Id.*

2. Jurisdiction

[3,4] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. See *In re Interest of Diana M. et al.*, 20 Neb. App. 472, 825 N.W.2d 811 (2013). Two jurisdictional issues are presented in this case. The first is whether Ann has standing to appeal from the juvenile court order changing Montana's placement. Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *In re Interest of Meridian H., supra.*

[5] A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy. See *In re Interest of Angelina G. et al.*, 20 Neb. App. 646, 830 N.W.2d 512 (2013). The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.* In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties. *Id.*

[6,7] The Nebraska Supreme Court has previously held that foster parents of children who have been adjudicated as being without proper support have standing to object to the Department's plan to change foster care placement of the children. See *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. 892, 546 N.W.2d 796 (1996). It is clear, then, that Ann, as Montana's foster parent, had standing to object to the Department's decision to change the placement of Montana. Because Ann had standing to object to the Department's plan, we conclude that she must also have standing to appeal the juvenile court's decision to adopt the Department's plan and

change Montana's placement. To hold otherwise would seemingly diminish a foster parent's right to object to a change in placement at the trial court level.

Furthermore, Neb. Rev. Stat. § 43-2,106.01(2)(c) (Cum. Supp. 2012) states in relevant part that an appeal from an order of the juvenile court may be taken by certain persons, including "[t]he juvenile's parent, custodian, or guardian. For purposes of this subdivision, custodian or guardian shall include, but not be limited to, the Department . . . , an association, or an individual to whose care the juvenile has been awarded pursuant to the Nebraska Juvenile Code." Prior to the juvenile court's order changing Montana's placement, Ann was arguably an individual to whose care Montana had been awarded.

For these reasons, we conclude that Ann has standing to bring this appeal.

[8] The second jurisdictional issue presented by this appeal is whether the order granting the change in Montana's placement is a final, appealable order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *In re Interest of Jorius G. & Cheralee G., supra*.

[9,10] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. See *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). A proceeding before a juvenile court is a "special proceeding" for appellate purposes. See *id*. As such, we must determine whether the juvenile court's order changing Montana's placement affected a substantial right.

[11] The term "substantial right" has been defined as an essential legal right, not a mere technical right. See *In re Interest of Karlie D., supra*. A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken. *Id*.

The Nebraska Supreme Court has previously held that an order changing a child's placement from a state-sponsored foster care home to the child's grandparents' home affected a substantial right of the State and was, as such, a final, appealable order. See *In re Interest of Karlie D., supra*. There, the Supreme Court held that once a juvenile has been adjudicated under § 43-247(3) and the court has granted the Department, and thus the State, custody of the child, the State has the right to recommend where the child should live. *In re Interest of Karlie D., supra*. See, also, *In re Interest of Tanisha P. et al.*, 9 Neb. App. 344, 611 N.W.2d 418 (2000) (holding that juvenile court order changing adjudicated child's placement from state-sponsored foster care home to child's grandmother's home affected substantial right of State and was final and appealable).

In addition, this court has previously regarded a change in placement pursuant to a juvenile court's approval of a Department plan to be a final, appealable order where the juvenile's guardian ad litem appealed from the decision transferring the juvenile from one foster home to another. See *In re Interest of John T.*, 4 Neb. App. 79, 538 N.W.2d 761 (1995).

[12] In this case, Ann, as Montana's grandmother, Montana's foster parent, and the intervenor in the juvenile court proceedings, appeals from the juvenile court's order which changed Montana's placement from Ann's home to a different foster home. Under the specific facts of this case, we conclude that the juvenile court's order affected a substantial right held by Ann. Ann has been Montana's primary caregiver during a vast majority of these juvenile court proceedings and, as certain evidence suggested, for the majority of Montana's life. And, just days prior to the Department's decision to change Montana's placement, all of the parties, including the Department and the State, agreed that Ann should be considered as an adoptive placement for Montana when Nicole relinquished her parental rights. The juvenile court's order changing Montana's placement not only removed Montana from Ann's immediate care, but also removed any chance that Ann had of being able to adopt Montana and care for him on a permanent basis.

Based on the specific facts of this case, we conclude that the juvenile court's order changing Montana's placement from Ann's home to a different foster home affected a substantial right and, thus, was a final, appealable order.

3. Change of Placement

Having concluded that Ann has standing to appeal from the juvenile court's order and that the order is final and appealable, we now address the juvenile court's decision to grant the motion to change Montana's placement. Ann argues that the juvenile court erred in granting the motion to change Montana's placement from her home to a different foster home. Specifically, she challenges the credibility of the witnesses who testified in support of the motion for a change in placement and asserts that the juvenile court failed to consider the evidence she presented in opposition to the motion. Upon our review, we cannot say that the juvenile court abused its discretion in granting the motion for a change in placement. Accordingly, we affirm.

[13,14] The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the code must be construed to assure the rights of all juveniles to care and protection. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). Neb. Rev. Stat. § 43-285(2) (Cum. Supp. 2012) provides that once a child has been adjudicated under § 43-247(3), the juvenile court must ultimately decide where a child should be placed. See, also, *In re Interest of Karlie D., supra*; *In re Interest of Diana M. et al.*, 20 Neb. App. 472, 825 N.W.2d 811 (2013). Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests. *In re Interest of Karlie D., supra*; *In re Interest of Diana M. et al., supra*.

In this case, the Department and Montana's guardian ad litem requested that the juvenile court order a change in Montana's placement. Pursuant to the language of § 43-285(2), the Department and the guardian ad litem had the burden of proving that the change in placement was in Montana's best interests. See *In re Interest of Ethan M.*, 19 Neb. App. 259, 809

N.W.2d 804 (2011). As such, the question presented by this case is whether there was sufficient evidence presented at the hearing to prove that a change in placement was in Montana's best interests.

At the hearing, the guardian ad litem presented evidence that Montana was at risk for harm in Ann's home because Ann repeatedly permitted Montana's mother, Nicole, to see him without a designated third-party visitation worker present. In addition, there was evidence that Ann had even permitted Nicole to live in her home with Montana for a period of time during the juvenile court proceedings and that during that same period of time, Ann had allowed Nicole's boyfriend, John, to have contact with Montana. These actions were contrary to explicit court orders which provided that Nicole was to have only supervised visitation with Montana and that John was to have absolutely no contact with Montana. Furthermore, these actions were contrary to Montana's best interests, because Nicole was struggling with an addiction to controlled substances and was not complying with court orders meant to help her rehabilitate herself.

Additionally, there was evidence that Ann had knowingly and intentionally disobeyed the court's orders by her actions. She repeatedly stated that she did not follow "the rules" and that she would permit Nicole to see Montana without proper supervision.

Taken together, the evidence presented by the guardian ad litem indicates that Montana would be at risk for harm if left in Ann's home. The evidence demonstrates that Ann has put Nicole's interests ahead of Montana's interests and that Ann is not willing to abide by the court's orders. As such, we find that there was sufficient evidence presented to demonstrate that a change in Montana's placement was in his best interests.

We recognize that Ann presented evidence to contradict the guardian ad litem's evidence. Specifically, she testified that she did not allow Nicole to live with her during the juvenile court proceedings, that she was allowed to supervise visits between Nicole and Montana during family events, and that she did not ever permit John to visit her home and have contact with

Montana. In addition, Ann testified that she did not intentionally disobey the court's orders.

On appeal, Ann asserts that the evidence presented by the guardian ad litem was not credible and did not definitively establish that she intentionally disregarded the court's orders or that she permitted Nicole to live with her during the pendency of the juvenile court proceedings. In her brief, Ann points to portions of her testimony where she specifically refuted such evidence. Ultimately, however, Ann's assertions relate to the juvenile court's decisions about credibility and about the weight to be given certain evidence.

[15] In its order, the juvenile court explicitly stated that it had considered Ann's testimony, but gave such testimony "no weight . . . as it is inconsistent with the greater weight of the evidence." In addition, the court stated that it found the evidence presented by the guardian ad litem "to be credible, probative and entitled to weight." The juvenile court's statements clearly indicate its finding that the guardian ad litem's evidence was more credible than Ann's testimony. And, as we have often stated, where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *In re Guardianship of Jordan M.*, 20 Neb. App. 172, 820 N.W.2d 654 (2012).

Given the broad discretion that a juvenile court possesses in determining the placement of an adjudicated child, and given the juvenile court's explicit findings regarding the credibility of the evidence presented at the hearing, we cannot say that the juvenile court abused its discretion in granting the motion to change Montana's placement from Ann's home to a different foster home. We affirm the decision of the juvenile court.

V. CONCLUSION

We find that Ann has standing to appeal the juvenile court's order changing Montana's placement and that the order is final and appealable. However, upon our de novo review of the record, we find that the record supports the juvenile court's

order changing Montana's placement from Ann's home to a different foster home and that such order is in Montana's best interests. Accordingly, we affirm.

AFFIRMED.

STITCH RANCH, LLC, APPELLEE AND CROSS-APPELLANT, V. DOUBLE B.J. FARMS, INC., APPELLANT AND CROSS-APPELLEE.

837 N.W.2d 870

Filed October 1, 2013. No. A-12-547.

1. **Contracts: Parties: Intent.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.
2. ____: ____: ____. A fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties as to the essential terms and conditions of the proposed contract.
3. ____: ____: ____. A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties about the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances.
4. **Contracts: Parties.** In limited circumstances, the parties' failure to specify an essential term does not prevent the formation of a contract.
5. ____: ____. The actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon.
6. ____: ____. Sometimes, a court can ascertain the meaning of a party's promise by referring to the parties' course of dealing with each other, or a general reasonableness standard.
7. **Breach of Contract: Parties: Intent.** The circumstances must show that the parties manifested an intent to be bound by a contract. Their manifestations are usually too indefinite to form a contract if the essential terms are left open or are so indefinite that a court could not determine whether a breach had occurred or provide a remedy.
8. **Contracts.** It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto.
9. **Contracts: Intent: Words and Phrases.** A mutual mistake is a belief shared by the parties, which is not in accord with the facts.
10. ____: ____: ____. A mutual mistake is one common to both parties in reference to the instrument, with each party laboring under the same misconception about the instrument.

11. ____: ____: ____. A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.
12. **Rescission.** Relief by way of rescission of a contract may be warranted on the basis of a unilateral mistake when the mistake is of so fundamental a nature that it can be said that the minds of the parties never met and that the enforcement of the contract as made would be unconscionable.
13. ____. An instrument may be canceled on the ground of a mistake of fact where the parties entered into a contract evidenced by a writing, but owing to a mistake their minds did not meet as to all essential elements of the transaction.

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

Patrick J. Nelson, of Law Office of Patrick J. Nelson, L.L.C., for appellant.

Stephen D. Mossman and Joshua E. Dethlefsen, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Stitch Ranch, LLC (Stitch), and Double B.J. Farms, Inc. (DBJ), entered into a contract for the transfer of real property in Dawson County, Nebraska. The contract included a provision requiring Stitch to obtain a "feedlot permit" on the property and to assign the permit to DBJ. A dispute arose between the parties concerning what was required to satisfy the "feedlot permit" provision, and the parties never completed closing. Stitch eventually brought suit, alleging breach of contract and seeking monetary damages, a declaratory judgment, and/or rescission or cancellation of the contract. The district court ultimately concluded that each party had attached reasonable but materially different meanings to the term "feedlot permit," characterized the issue as one of "mistake," and ordered the contract canceled.

DBJ now appeals, asserting, among other things, that the district court erred in finding that the parties attached different meanings to the term "feedlot permit," in finding that there was a "mistake," and in canceling the contract. We find that

the evidence adduced by the parties demonstrates that there was never any meeting of the minds about the term "feedlot permit," and we affirm the district court's cancellation of the contract.

II. BACKGROUND

1. Relevant Parties and Individuals

(a) Stitch and Triple 7, Inc.

Stitch is a Texas limited liability company. Its members are Ashley C. Maloley, individually, and Ashley C. Maloley, as custodian for Grace E. Maloley. Ashley's husband, Phil Maloley, is not a member of Stitch.

Triple 7, Inc., is a Nebraska corporation. Phil is the president of Triple 7. Ashley holds "one or more offices" in Triple 7.

Phil testified at trial concerning the relationship between Stitch and Triple 7. He testified that Stitch owns property, while Triple 7 owns and runs cattle on Stitch property. He testified that "all the bills go through" Triple 7. Phil testified that he and Ashley jointly make all decisions concerning both Stitch and Triple 7.

(b) DBJ

DBJ is a corporation. Brian Johnson is the president of DBJ. Brian and his wife, along with his brother Blake Johnson and Blake's wife, are the shareholders in the corporation. Brian testified that all four of them jointly make decisions for DBJ.

2. Real Estate Sale Contract

In October 2010, Stitch and DBJ executed a real estate sale contract concerning real property in Dawson County and Phelps County, Nebraska. Pursuant to the contract, DBJ agreed to pay $1,200,000, including an earnest money deposit of $50,000. DBJ agreed to deliver the balance of the purchase price at closing, upon delivery of a warranty deed and all other documents needed to properly transfer title. The contract provided that closing "shall occur on or about December 15, 2010."

The Dawson County property included farm ground and land that had previously been operated as a feedlot. The real estate sale contract included a provision that "Seller agrees

to obtain a feedlot permit on Dawson County property and to assign permit to Purchaser by January 1, 2011." Testimony adduced at trial indicated that this language concerning a "feedlot permit" was included by Blake and the real estate broker; the real estate broker testified that he and Blake came up with the language "jointly."

3. Permit Transfer Forms and Correspondence

(a) Nebraska's Department of Environmental Quality Forms

The record includes information about the relevant forms from Nebraska's Department of Environmental Quality (hereinafter DEQ) necessary for an entity to obtain and/or transfer a permit relative to operation of a feedlot in Nebraska. The district court received a copy of title 130 of the Nebraska Administrative Code, implementing Nebraska's Livestock Waste Management Act. See Neb. Rev. Stat. § 54-2416 et seq. (Reissue 2010 & Cum. Supp. 2012). See, also, Neb. Rev. Stat. § 81-1501 et seq. (Reissue 2008 & Cum. Supp. 2012). The court noted that title 130 identifies several permits which have application to feedlots, including a "construction and operating permit" and a "National Pollutant Discharge Elimination System" permit (pollution permit).

Applicants for permits are required to complete a form C applicant disclosure (Form C applicant disclosure) document. See, 130 Neb. Admin. Code, ch. 4, § 001.03 (2008); Neb. Admin. Code, ch. 5, § 003.03 (2008). A party possessing a DEQ permit may apply to have that permit transferred to another party by submitting a completed form D transfer request (Form D transfer request) document. See 130 Neb. Admin. Code, ch. 6, § 003.01 (2008).

(b) Forms Sent to DBJ From Stitch

Phil testified that after the real estate sale contract was executed, he began taking steps to deal with the "feedlot permit" provision of the contract. Stitch hired an environmental consultant to assist in obtaining and transferring the necessary permit. The evidence adduced at trial indicates that a variety

of proposed transfers, "demands" for completion of transfer forms, and other correspondence were exchanged between the parties.

(i) Proposed Transfer to Daron Huyser

Phil testified that he understood that DBJ intended to immediately resell the Dawson County property to another party, Daron Huyser. Phil testified that he understood that DBJ wanted the permit transferred in Huyser's name.

On December 23, 2010, the real estate broker e-mailed DBJ's counsel and forwarded a Form D transfer request, indicating a proposal to transfer a permit from Triple 7 to Huyser. On the form, the box next to "Construction and Operating Permit" was checked, the current owner or operator was listed as Triple 7, and the name of the proposed owner or operator was listed as "Huyser Cattle Co." Huyser declined to sign any such form.

(ii) First "Demand" by Stitch

On January 5, 2011, Stitch's counsel sent a letter, a Form C applicant disclosure, and a Form D transfer request to DBJ's counsel. In the letter, Stitch's counsel requested that DBJ sign the forms and return them by January 10. The Form C applicant disclosure listed the name of the animal feeding operation applying for a DEQ permit as DBJ. On the Form D transfer request, the box next to "Construction and Operating Permit" was checked, the current owner or operator was listed as Triple 7, and the name of the proposed owner or operator was listed as DBJ. The form included a line for the date of the "[c]urrent" permit to be transferred, but that line was left blank. The Form D transfer request also included the certification that the applicant (DBJ) had "personally examined and [was] familiar with the permit(s) or construction approval for [the] animal feeding operation." DBJ did not sign and return the forms.

Blake testified that DBJ did not sign the Form D transfer request for a variety of reasons. He testified that the real estate sale contract was with Stitch, not with Triple 7, but that the

Form D transfer request was from Triple 7. He testified that the form also did not indicate any date of a current permit to be transferred, "so [DBJ] had no idea which permit it was or if [Stitch] even had a permit." Finally, the form was not signed by the purported transferor. He also testified that the certification on the form required him to sign and attest he had personally examined and was familiar with the permit, but that Stitch had not provided an actual permit.

On January 7, 2011, DBJ's counsel sent a letter to Stitch's counsel, in which he iterated that the real estate sale contract required Stitch to obtain and transfer a "feedlot permit," that there had been no indication Stitch had ever obtained a feedlot permit, and that the Form D transfer request sent by Stitch's counsel showed the transferor to be Triple 7. DBJ's counsel asked for clarification.

(iii) Second "Demand" by Stitch

On January 13, 2011, Stitch's counsel sent another letter, a copy of a DEQ 2010 annual permit fee invoice, a Form C applicant disclosure, and a Form D transfer request to DBJ's counsel. In the letter, Stitch's counsel represented that the Dawson County property "currently [held] a permit . . . in the name of R & J Cattle, Inc.," and represented that "[t]his 'feedlot permit' [would] be transferred" to DBJ "through a series of two transfers," with the first being a transfer from "R & J Cattle, Inc." (hereinafter R&J Cattle), to Triple 7 and the second being a transfer from Triple 7 to DBJ. Stitch's counsel indicated that "[t]he transfer requests [could] be filed . . . contemporaneously."

Stitch's counsel indicated that he was including copies of the forms necessary to transfer the DEQ permit held by R&J Cattle to Triple 7. He indicated that transfer of the permit from Triple 7 to DBJ would be accomplished through DBJ's executing the forms attached to the January 5, 2011, correspondence.

The annual permit fee invoice indicated that on February 1, 2010, R&J Cattle had owed DEQ for an annual permit fee. The invoice specifically referenced a "National Pollutant Discharge Elimination System (NPDES) permit" (i.e., a

"pollution permit"). It did not reflect payment and did not indicate the status of any permit as of January 2011. The Form C applicant disclosure listed the name of the animal feeding operation applying for a DEQ permit as Triple 7. On the Form D transfer request, the box next to "Construction and Operating Permit" was checked, the current owner or operator was listed as "Ryan and Jeff Cattle Co.," and the name of the proposed owner or operator was listed as Triple 7. The form included a line for the date of the "[c]urrent" permit to be transferred, but that line was left blank.

On January 20, 2011, DBJ's counsel sent a letter to Stitch's counsel, in which letter DBJ's counsel indicated that he had learned that "there is apparently no feedlot permit presently in place" for the Dawson County property. DBJ's counsel asked Stitch's counsel what he knew "about that issue."

(iv) Third "Demand" by Stitch

On January 27, 2011, Stitch's counsel sent another letter to DBJ's counsel. In the letter, Stitch's counsel indicated that the person who had informed DBJ's counsel that there was no permit in place on the property "does not have the authority to speak on behalf of Stitch . . . , particularly as it relates to complex issues involving" DEQ. Stitch's counsel did not otherwise respond to the assertion that there was then no existing permit on the property. Stitch's counsel also, again, indicated that to close, DBJ needed to execute the previously proffered Form C applicant disclosure and Form D transfer request.

Stitch's counsel also noted that the parties were then "nearly a month and a half past" the date of closing specified in the contract, and asserted that "[a]s a general matter, time is of the essence in all real estate dealings." Stitch's counsel then set "a deadline of Tuesday, January 31, 2011 at 3:00 p.m. for receipt of the executed" forms. Stitch's counsel concluded the letter by indicating that "[i]f the forms are not received by that time, Stitch . . . will have no choice but to conclude that [DBJ] has declined to consummate the purchase with the attendant remedies available to Stitch . . . under the Contract."

On January 31, 2011, DBJ's counsel responded with a letter. DBJ's counsel took issue with Stitch's counsel's assertions

that the contract called for closing on a specific date, pointing out the contract indicated closing was to be "'on or about'" a particular date, and that time is generally of the essence, citing authority in Nebraska indicating that time is generally not of the essence unless so provided in the instrument. DBJ's counsel iterated DBJ's assertion that Stitch had not, as of that time, obtained "any feedlot permit whatsoever" and had not assigned "any feedlot permit whatsoever."

DBJ's counsel asked Stitch to identify "[w]hat feedlot permit or permits [it] claim[ed] or contend[ed] [were then] in force and effect in connection with the Dawson County land," and requested a "full, complete and genuine copy of each one." DBJ's counsel then noted that the documents previously forwarded by Stitch included references to a "'Construction and Operating'" permit (i.e., the various Form C applicant disclosure and Form D transfer request forms attached to the January 5 and 13, 2011, letters) and a pollution permit (i.e., the annual permit fee invoice attached to the January 13 letter).

DBJ's counsel again represented that it had received information, this time from DEQ, indicating that there was then "no feedlot permit in effect." DBJ's counsel indicated that "'Ryan and Jeff Rogers Cattle Co.'" had previously been issued a pollution permit in 1993, but that it had expired in 1998 and was not a permit that was transferable at all. DBJ's counsel indicated that the only construction and operating permit ever issued in connection with the property had been issued in 1973, in the name of "'Sarnes & Son.'"

(v) Fourth "Demand" by Stitch

On February 3, 2011, Stitch's counsel responded with another letter to DBJ's counsel. Stitch's counsel indicated that "[w]e all agree what the Contract states in relevant part. The Feedlot Permit cannot be transferred without [DBJ's] signature" on the forms previously forwarded. Stitch's counsel specifically represented that the contract did not obligate Stitch to transfer any pollution permit, "only a 'Feedlot Permit.'"

On February 4, 2011, DBJ's counsel responded with another letter to Stitch's counsel. DBJ's counsel indicated that DBJ had scheduled closing for February 9 at the closing agent's office.

DBJ's counsel again asked Stitch to forward "a copy of whatever document(s) it is/are that constitute(s) the 'feedlot permit' [Stitch] was contractually obligated 'to obtain,'" as well as "a copy of whatever document(s) it is/are that constitute(s), when completed by [Stitch], the assignment of such feedlot permit to [DBJ]."

(vi) Fifth "Demand" by Stitch

On February 8, 2011, DBJ's counsel sent another letter, enclosing a variety of documents related to the closing scheduled for the next day, and again requesting copies of the "'feedlot permit'" that Stitch was purporting to possess and transfer.

The same day, Stitch's counsel responded with another letter in anticipation of the closing scheduled for the next day. Stitch's counsel included another copy of the Form C applicant disclosure and Form D transfer request that had been previously forwarded for DBJ's completion. Stitch's counsel iterated, again, that the forms "are all that is required to transfer the 'Feedlot Permit' to [DBJ]." Stitch's counsel represented that "[s]imilar forms [had] already been filed with [DEQ] to transfer the 'Feedlot Permit' to Triple 7 . . . ." Stitch's counsel also included a draft of a release, which he indicated Stitch would require to close and which indicated that the forms previously provided by Stitch fulfilled Stitch's contractual responsibilities.

On February 9, 2011, DBJ provided the closing agent with a check slightly in excess of $1,150,000, as well as other documents necessary to close on the purchase. DBJ also provided the closing agent with instructions that DBJ did not authorize closing unless Stitch tendered a "presently effective feedlot permit in the name of Stitch" and a "written assignment of the above-described feedlot permit from [Stitch] to [DBJ]." DBJ represented to the closing agent that, to its knowledge, Stitch "ha[d] not obtained a feedlot permit" related to the Dawson County property.

Ashley testified that at the February 9, 2011, closing, Stitch presented to DBJ the same Form C applicant disclosure and Form D transfer request documents previously sent to DBJ and requested, again, that DBJ sign the forms. She testified that

DBJ, again, did not sign the forms. The closing did not occur on February 9.

(vii) Sixth "Demand" by Stitch

On February 10, 2011, DBJ's counsel sent a letter to Stitch's counsel. In the letter, DBJ's counsel indicated that DBJ felt that it was "in a position to seek relief in a specific performance lawsuit." DBJ's counsel proposed negotiations "in an effort to resolve the matter."

On February 17, 2011, Stitch's counsel responded with a letter to DBJ's counsel. Stitch's counsel attached copies of documents showing that DEQ had authorized transfer of a "'Feedlot Permit'" to Triple 7, including a letter from DEQ and a copy of a construction and operating permit issued to Triple 7. Stitch's counsel again requested, "for the final time," that DBJ complete the Form C applicant disclosure and Form D transfer request documents previously forwarded to DBJ. Stitch's counsel represented that DBJ's failure to sign the forms in response would entitle Stitch to retain the $50,000 earnest money deposit and would constitute an abandonment by DBJ of any claims to the property.

The letter from DEQ attached to Stitch's counsel's letter indicated that DEQ had received from Stitch a Form D transfer request "requesting a transfer of the [pollution] permit previously issued to" R&J Cattle. DEQ advised, however, that the pollution permit had expired and was not able to be transferred, and advised that DEQ could transfer an operating permit "previously issued to Sarnes & Son on November 6, 1973."

This information from DEQ was consistent with representations DBJ made to Stitch in the January 31, 2011, letter responding to Stitch's third "demand" for DBJ to sign the forms. In addition, it is apparent from the record that the construction and operating permit issued to Triple 7 and referenced in the DEQ letter, dated February 15, 2011, was the first permit actually issued to Stitch or Triple 7.

On February 18, 2011, DBJ's counsel responded to Stitch's counsel's letter. DBJ's counsel indicated that DBJ did not "agree with [Stitch's] threatened assumption nor the legal claims and conclusions contained in [Stitch's counsel's] letter."

DBJ's counsel indicated that he would meet with DBJ and be in touch with Stitch's counsel.

On February 21, 2011, DBJ's counsel sent another letter to Stitch's counsel. DBJ's counsel indicated that "the feedlot permit which is required, by the contract's terms, to be assigned to [DBJ] includes [a pollution] permit." DBJ's counsel indicated that Stitch "has pretty much conceded the point in [Stitch's counsel's] letters (and relevant enclosures, if any) . . . of January 13, 2011, February 3, 2011, and February 8, 2011, and in [Phil's] engineer's letter . . . and enclosures, sent to the [DEQ]." DBJ's counsel then proposed settlement terms.

4. Litigation

On February 22, 2011, Stitch's counsel sent an e-mail to DBJ's counsel. In the e-mail, Stitch's counsel represented that DBJ's offer to settle was rejected and inquired whether DBJ would file a voluntary appearance to the complaint Stitch intended to file. A complaint was filed in the district court for Dawson County the same day.

On February 23, 2011, DBJ's counsel responded with an e-mail. In that e-mail, DBJ's counsel represented that DBJ "ha[d] decided to proceed with closing at the $1.2 million figure, based on the present feedlot permit status." As noted, however, by this time, the complaint had already been filed.

(a) Complaint

In its complaint, Stitch alleged that Stitch and DBJ had entered into a real estate sale contract. Stitch alleged that the contract included a provision requiring Stitch to obtain and transfer a "feedlot permit" and that the contract specifically contemplated that the "feedlot permit" would be transferred after closing.

Stitch then alleged that the property "currently [held] a 'Feedlot Permit'" from DEQ and that attached and incorporated was the 2010 annual permit fee invoice related to" R&J Cattle. Stitch then alleged that "[t]his 'Feedlot Permit' was to be transferred to [DBJ] through a series of two transfers" and alleged that the first transfer was to be to Triple 7 and the second was to be from Triple 7 to DBJ. Stitch alleged that

the required Form C applicant disclosure and Form D transfer request documents had been forwarded to DBJ on January 5 and 13, 2011, and that several demands had been made by Stitch to DBJ for completion of the forms.

Stitch alleged that it "stood ready, willing and able to close the sale but could not do so until [DBJ] signed the [f]orms" and that DBJ "declined to consummate the purchase."

Stitch alleged that on February 15, 2011, DEQ "granted the transfer of the 'Feedlot Permit' to Triple 7" and that on February 17, Stitch made another demand on DBJ to sign and return the forms needed to transfer the permit from Triple 7 to DBJ.

Stitch alleged that DBJ breached the contract and that Stitch was entitled to liquidated and general monetary damages. Stitch also sought a declaratory judgment that it had complied with the "feedlot permit" provision in the contract and that DBJ had failed to consummate the purchase, entitling Stitch to retain the earnest money deposit. Finally, Stitch sought, in the alternative, an order rescinding and canceling the contract due to the "mutual mistake of the parties" by using the term "feedlot permit" in the contract.

(b) Answer

In its answer, DBJ essentially denied the vast majority of Stitch's assertions. For example, Stitch alleged in its complaint the following: "11. Under Miscellaneous Provisions, the Contract states: Seller agrees to obtain a feedlot permit on Dawson County property and to assign permit to Purchaser by January 1, 2011." A review of the second page of the contract indicates that the asserted language appears, word for word, under the heading "Miscellaneous Provisions," in the real estate sale contract. Nonetheless, in its answer, DBJ responded to this assertion as follows: "11. Denies, except that [DBJ] admits that the Sale Contract speaks for itself as to its terms." DBJ made similar "denials," with the limitation that the contract "speaks for itself" with respect to other assertions by Stitch that the contract included specific language which a review of the contract reveals it did, in fact, include exactly as represented by Stitch.

DBJ specifically denied that Stitch had complied with the "feedlot permit" provision of the contract. DBJ also specifically denied that the parties had made a mutual mistake by using the term "feedlot permit" in the contract.

DBJ also asserted a counterclaim, requesting the district court to "enter a decree of specific performance, requiring [Stitch] to specifically perform its obligations under the Sale Contract." DBJ also requested an accounting of rents and profits from the properties from and after February 9, 2011.

(c) Trial

The primary issue litigated in this case was the meaning of the "feedlot permit" provision in the real estate sale contract. To litigate that issue, the parties adduced more than 450 pages of testimony and presented nearly 280 exhibits, some of which comprised three-ring binders containing as many as 80 different documents. Trial was held over the course of 2 days.

At trial, Stitch argued that the term "feedlot permit" in the contract meant an operating permit, not both an operating permit and a pollution permit. Stitch argued that the only way to transfer a permit to DBJ was for DBJ to sign the tendered Form C applicant disclosure and Form D transfer request documents, that Stitch presented those documents and requested DBJ's signature on multiple occasions, and that DBJ had refused to consummate the contract. Stitch also argued that accomplishing the transfer by use of Triple 7, instead of Stitch itself, was not a problem.

At trial, DBJ argued that Stitch never obtained or transferred any feedlot permit to DBJ. DBJ argued that the Form C applicant disclosure and Form D transfer request documents presented to it from Stitch were ineffective for a variety of reasons, including that they did not include dates of any permits proposed to be transferred. DBJ argued that it had asked Stitch on multiple occasions to identify what permit was being proposed to be transferred to DBJ, but that Stitch repeatedly failed to do so. DBJ argued that Stitch had represented on some occasions it intended to transfer a permit previously held by R&J Cattle, but that R&J Cattle only ever possessed

a pollution permit and that Triple 7 never obtained a pollution permit and obtained only an operating permit.

Stitch adduced testimony, inter alia, from Phil and Ashley, Brian and Blake, and the real estate broker. DBJ adduced testimony from Phil and Ashley and from Brian and Blake. That testimony, and the documentary evidence proffered by the parties, establishes the timeline of correspondence detailed above.

Phil testified that prior to Stitch's ever purchasing the Dawson County property, he performed "due diligence" and learned that there was an operating permit in the name of "Sarnes & Son." He testified that the paperwork needed to transfer the permit from Sarnes & Son to R&J Cattle had never been completed. Phil testified that he never provided Stitch's counsel with a copy of the Sarnes & Son permit to be provided to DBJ. He acknowledged having seen letters from DBJ's counsel to Stitch's counsel requesting to see copies of the "feedlot permit" that Stitch was proposing would be transferred by completion of the Form C applicant disclosure and Form D transfer request documents, and acknowledged that after seeing the requests from DBJ, he did not forward a copy of the Sarnes & Son permit to Stitch's counsel.

Brian testified that he and Blake were also directors in another corporation. He testified that in 2005, that corporation went through the process with DEQ to obtain both a construction and operating permit and coverage under a pollution permit, in association with operating a feedlot. He testified that he spoke with Blake about the language in the "feedlot permit" provision in the real estate sale contract at issue in this case, but that he did not specify whether Stitch was to obtain a construction and operating permit, a pollution permit, or both.

Blake testified that DBJ declined to sign the Form C applicant disclosure and Form D transfer request documents proffered by Stitch for a variety of reasons, including that the forms did not specify what permit Stitch was purporting would be transferred. He testified that DBJ was not contending that the term "feedlot permit" in the real estate sale contract actually meant "feedlot permits, plural."

Also introduced in evidence was the deposition of the environmental consultant hired by Stitch to assist in obtaining and transferring the required "feedlot permit." In his deposition, the consultant testified that he informed Stitch's counsel in November 2010 that he could not find a "'current'" pollution permit for the property. He testified that the pollution permit had, at that time, expired. He testified that he forwarded Form C applicant disclosure and Form D transfer request documents to Stitch's counsel to request the transfer of the previous pollution permit from R&J Cattle to Triple 7.

The environmental consultant also testified that he, on behalf of Stitch and Triple 7, forwarded documents to DEQ for Triple 7 to obtain a feedlot permit. He testified that on the documents he forwarded, he had "checked" the boxes next to both "Construction and Operating Permit" and "[pollution] permit." He testified that DEQ eventually issued Triple 7 an operating permit.

Also introduced in evidence was the deposition of a supervisor from DEQ. The supervisor was asked if he would consider Stitch's counsel to be "more or less of an expert in the cattle feedlot area of the law," and he indicated that he would so consider Stitch's counsel. The supervisor testified about the history of permits on the property, including that Sarnes & Son had been issued an operating permit in 1973, that R&J Cattle had been issued a pollution permit in 1993, and that R&J Cattle's pollution permit expired in 1998 and was never transferable to any other entity. He confirmed that Stitch never held any DEQ permit concerning the property.

The DEQ supervisor was specifically asked about whether the paperwork could have been submitted simultaneously for Triple 7 to obtain a permit and to transfer it to DBJ. He acknowledged that for DEQ's "permitting process," a party has to have a permit to be able to transfer that permit to another party. When asked if the paperwork could have been submitted simultaneously, he first answered, "My assessment would say no because . . . there wouldn't be a permit to transfer yet." He acknowledged, however, that the paperwork could be reviewed "with the thought of a transfer [that] couldn't be

simultaneous but with a transfer after the transfer [was] made to Triple 7."

(d) District Court's Judgment

The district court found that "the evidence clearly and convincingly prove[d] the parties attached different meanings to the term 'feedlot permit' as used in the [real estate sale] contract." The court found that Stitch "held the belief that its obligation under the contract was to transfer a construction and operating permit," while DBJ "held the belief that [Stitch] was required to obtain and 'assign' to it a 'feedlot permit' which included a [pollution] permit." The court held that the "beliefs on the part of the parties as to the meaning and effect attached to the wording in the contract constituted a mistake, i.e., each party held a reasonable, but materially different understanding of the meaning" of the term "feedlot permit."

The court held that it was "not possible to resolve the differences in meaning in a manner clearly fair to both parties." The court held that it could not "determine the intent of the parties under the contract to know whether the reference to 'feedlot permit' referred to just one or all of the permits required [to operate] a feedlot." The court held that "[i]t is uncertain and unclear whether the parties intended that only one or all necessary permits were required."

The court also held that "[t]he mistake" was "so substantial and fundamental that it defeats the object of the parties in making the agreement." The court held that the parties "attached substantially different meanings to a fundamental term in the contract which could not be reconciled and such difference in meanings defeats the object of the contract."

The court concluded that it could not find that either party had breached the contract, because each had attached a different meaning to the term "feedlot permit." Similarly, the court concluded that it could not "issue a declaratory ruling to declare the rights and obligations of the parties under the contract," because each party's rights and obligations were "subject to reasonable, but materially and substantially different, interpretations." Finally, the court concluded that it could not

order specific performance of the contract, again because of the reasonable but substantially different meanings each party attached to the term "feedlot permit."

The court ultimately held that the contract between the parties "should be cancelled on the grounds of mistake." The court further held that the "mistake" was fundamental in nature, making the contract voidable, and ordered the contract voided and canceled, and the parties restored as nearly as possible to the positions they held before entering the contract.

The district court entered a decree of cancellation and rescission. The court ordered the contract "cancelled, annulled, and rendered *void ab initio*." The court also ordered the return of the earnest money deposit to DBJ. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, DBJ has assigned several errors, including that the district court erred in finding that the parties attached different meanings to the term "feedlot permit," in finding that there was a "mistake" by the parties in using the term "feedlot permit," and in canceling the real estate sale contract between the parties.

Stitch has asserted a cross-appeal, asserted only in the event this court finds merit to DBJ's direct appeal, assigning as error the district court's failure to find that DBJ breached the contract.

IV. ANALYSIS

1. DBJ's Direct Appeal

DBJ has assigned several errors challenging the district court's conclusion that the contract should be canceled. DBJ challenges the court's finding that the parties attached different meanings to the term "feedlot permit" and that there was a "mistake" by the parties in using that term. We find that the evidence adduced at trial demonstrates there was never a meeting of the minds between the parties concerning the meaning of the term "feedlot permit" and that the court did not err in canceling the contract.

[1-3] The basic principles of law governing this case have long been established. To create a contract, there must be both

an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011). A fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties as to the essential terms and conditions of the proposed contract. *Peters v. Halligan*, 182 Neb. 51, 152 N.W.2d 103 (1967). A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties about the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances. *City of Scottsbluff v. Waste Connections of Neb., supra.*

[4-7] In limited circumstances, the parties' failure to specify an essential term does not prevent the formation of a contract. *Id.* "The Restatement (Second) of Contracts provides that 'the actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon.'" *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. at 861, 809 N.W.2d at 740. Sometimes, a court can also ascertain the meaning of a party's promise by referring to the parties' course of dealing with each other, or a general reasonableness standard. *City of Scottsbluff v. Waste Connections of Neb., supra.* The circumstances must still show that the parties manifested an intent to be bound by a contract. Their manifestations are usually too indefinite to form a contract if the essential terms are left open or are so indefinite that a court could not determine whether a breach had occurred or provide a remedy. *Id.*

[8] It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto. *MBH, Inc. v. John Otte Oil & Propane*, 15 Neb. App. 341, 727 N.W.2d 238 (2007); *Wells v. Wells*, 3 Neb. App. 117, 523 N.W.2d 711 (1994).

(a) Evidence of Stitch's Interpretation of Term

It appears that throughout the course of these proceedings, Stitch's interpretation of the term "feedlot permit" was inconsistent. The evidence adduced at trial demonstrates that Stitch sometimes operated as if the term meant an "operating permit," sometimes operated as if the term meant a "pollution permit," and sometimes operated as if the term meant both permits.

Phil testified that prior to Stitch's ever purchasing the Dawson County property at issue in this case, he performed "due diligence" and learned that there was an "operating permit" in the name of Sarnes & Son. He testified that the paperwork had never been completed to transfer that permit to R&J Cattle, although other evidence indicates that R&J Cattle did, at one time, possess a "pollution permit" related to the property.

The first correspondence from Stitch's counsel to DBJ's counsel concerning transfer of a permit was a January 5, 2011, letter. In that letter, Stitch's counsel included partially completed Form C applicant disclosure and Form D transfer request documents. On those documents, Stitch had checked a box indicating that the permit to be transferred was a "Construction and Operating Permit." The form did not, however, include any date information to identify a then-existing permit.

On January 13, 2011, Stitch's counsel sent another correspondence to DBJ's counsel concerning transfer of a permit. In that letter, Stitch's counsel referenced the prior forms—which referred to a "Construction and Operating Permit"—but also referenced a plan to transfer a permit held by R&J Cattle to Triple 7 and then to DBJ. Stitch's counsel included documents to demonstrate the paperwork necessary to transfer R&J Cattle's permit to Triple 7, and also included a copy of an invoice for the permit allegedly held by R&J Cattle. That invoice, and other evidence adduced at trial, indicated that R&J Cattle had at one time possessed a "pollution permit." There was evidence adduced that R&J Cattle never possessed an operating permit, only ever possessed a pollution permit, and did not possess a permit that could actually be transferred

to anyone. The paperwork sent by Stitch's counsel on this date again did not include any date information to identify a then-existing permit.

On January 20, 2011, DBJ's counsel expressed concern to Stitch's counsel that there was no then-existing feedlot permit on the property.

On January 27, 2011, Stitch's counsel again represented that DBJ needed to complete the forms first forwarded to DBJ's counsel on January 5, which referenced a "Construction and Operating Permit" and not a "pollution permit." Stitch's counsel again did not provide any date information or other information to identify any then-existing permit that Stitch was intending to transfer.

On January 31, 2011, DBJ's counsel specifically represented to Stitch's counsel that his prior correspondence had varyingly referenced a "Construction and Operating Permit" and a "pollution permit," and again requested Stitch to identify precisely what permit it was intending to transfer. DBJ's counsel also specifically represented to Stitch's counsel that R&J Cattle did not possess a then-existing permit, having previously possessed a "pollution permit," which had expired, and that the only "operating permit" had been issued in 1973 in the name of Sarnes & Son.

On February 3, 2011, Stitch's counsel again represented that DBJ needed to complete the forms previously forwarded to DBJ's counsel—which referenced only a "Construction and Operating Permit." Stitch's counsel specifically represented that Stitch was not required to transfer a "pollution permit." Stitch's counsel again did not provide any date information or other information to identify a then-existing permit on the property that it intended to transfer.

On February 8, 2011, Stitch's counsel again represented that DBJ needed to complete the forms previously forwarded to DBJ's counsel—which referenced only a "Construction and Operating Permit." Stitch's counsel also indicated that Stitch would require DBJ to execute a release providing that the forms provided by Stitch—referencing only a "Construction and Operating Permit"—fulfilled Stitch's contractual obligation.

Evidence adduced at trial demonstrated that the environmental consultant, on behalf of Stitch, eventually forwarded documents to DEQ for Triple 7 to obtain a feedlot permit. The documents he forwarded to DEQ indicated that Triple 7 was seeking both a "Construction and Operating Permit" and a "pollution permit."

On February 17, 2011, Stitch's counsel forwarded documents showing that DEQ had then issued a construction and operating permit to Triple 7. Stitch's counsel again represented that DBJ needed to complete the forms previously forwarded to DBJ's counsel. The paperwork related to Triple 7's permit, however, demonstrated that Stitch had requested DEQ transfer the "pollution permit" previously possessed by R&J Cattle, but that DEQ informed Stitch that the permit had expired and that the only existing permit which could be transferred was the 1973 operating permit issued to Sarnes & Son.

On February 22, 2011, Stitch filed a complaint in the district court. In that complaint, Stitch again referenced the permit that had previously been held by R&J Cattle—which the evidence demonstrates was only a "pollution permit"—and specifically alleged that "[t]his 'Feedlot Permit' was to be transferred" to DBJ. Stitch also alleged that it was ready, willing, and able to transfer the permit DEQ had issued to Triple 7—a "construction and operating permit"—to DBJ.

At trial, Stitch argued that the term "feedlot permit" in the real estate sale contract meant an "operating permit," and not both an "operating permit" and a "pollution permit." In addition, despite the evidence that Stitch was inconsistent about its representations and interpretations of the term, evidence was adduced indicating that a supervisor from DEQ considered Stitch's counsel to be an expert in this area of law.

Thus, the evidence adduced in this case demonstrates that Stitch has acted inconsistently with the term "feedlot permit," meaning at various times a "construction and operating permit," a "pollution permit," and both a "construction and operating permit" and a "pollution permit." Despite Phil's knowledge before purchasing the property that the "operating permit" was in the name of Sarnes & Son and despite Stitch's

counsel's being informed during the course of correspondence that R&J Cattle possessed only an expired "pollution permit," Stitch acted to transfer the R&J Cattle permit, applied for both a "construction and operating permit" and a "pollution permit," made assertions in its complaint suggesting that it believed it was obligated to transfer the R&J Cattle "pollution permit," and argued at trial that it was never obligated to transfer a "pollution permit." This evidence demonstrates that Stitch was not consistent in its own representations about what it believed the term "feedlot permit" was intended to mean.

(b) Evidence of DBJ's Interpretation of Term

Similarly, it appears that throughout the course of these proceedings, DBJ's interpretation of the term "feedlot permit" was inconsistent. The evidence adduced at trial demonstrates that DBJ often made no representation about what it believed the term meant but, at other times, made representations suggesting it believed that the term meant both an "operating permit" and a "pollution permit," and at still other times, that the term meant only an "operating permit."

Brian testified that he and Blake—principals in DBJ—were also directors in another corporation, and that in 2005, they went through the process with DEQ to obtain both a "construction and operating permit" and a "pollution permit" concerning an unrelated parcel of property. Blake, along with the real estate broker, was the one who included the language "feedlot permit" in the provision at issue, and Brian testified that he and Blake spoke about the language but did not specify whether it was intended to mean a "construction and operating permit," a "pollution permit," or both.

Throughout most of the correspondence between the parties, DBJ did not object to completing the forms forwarded by Stitch on the basis that they appeared to refer only to an "operating permit" and not also a "pollution permit." Rather, DBJ's counsel repeatedly inquired of Stitch what permit it was intending to transfer, but did not explicitly represent that a "pollution permit" or both permits were required.

It was not until February 21, 2011, that DBJ first explicitly represented to Stitch that the term "feedlot permit" in the real estate sale contract included a "pollution permit." DBJ proposed settlement to Stitch even without a "pollution permit" if Stitch would reduce the purchase price. Then, once Stitch filed a complaint, DBJ represented that it would proceed with closing based on the then-existing permit status—with Triple 7's possessing and proposing to transfer only a "construction and operating permit."

At trial, Brian testified that DBJ did not contend that the term "feedlot permit" in the real estate sale contract required more than one permit.

Thus, although DBJ's representations and actions throughout have arguably been less inconsistent, the evidence adduced demonstrates that DBJ did not specifically indicate to Stitch whether DBJ required only a "pollution permit," only a "construction and operating permit," or both permits. DBJ variously indicated that a "pollution permit" was required, but also offered to accept only the "construction and operating permit," and Brian testified that DBJ did not allege that more than one permit was required.

(c) Application and Resolution

In the present case, there was substantial evidence adduced at trial concerning the "feedlot permit" provision in the real estate sale contract, including the correspondence and testimony outlined above in the background section of this opinion. Although there were other ancillary issues between the parties related to performance and closing on the real estate sale contract, the "feedlot permit" provision was the primary issue between the parties that resulted in the fact that the contract was never closed and litigation was pursued.

Among other assertions, Stitch alleged in its complaint that the use of the term "feedlot permit" was a mutual mistake by the parties. The district court ultimately concluded that each party attached materially different meanings to the term and that such constituted a "mistake" sufficient to justify cancellation of the contract.

[9-11] A mutual mistake is a belief shared by the parties, which is not in accord with the facts. *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 798 N.W.2d 121 (2011). A mutual mistake is one common to both parties in reference to the instrument, with each party laboring under the same misconception about the instrument. See *id*. A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties. *Id*.

The record in the present case does not demonstrate a mutual mistake, because it is clear that there was no shared belief or common misunderstanding about the term "feedlot permit," as used in the real estate sale contract. Indeed, the record demonstrates quite the opposite and indicates that there was no common understanding or shared belief about what the term was intended to mean.

In this case, the evidence adduced at trial demonstrates that there was never any meeting of the minds concerning the term "feedlot permit" and what DEQ permit or permits had to be obtained and transferred by Stitch to satisfy the contract. The term was not defined in the contract, and the evidence indicates that each party's actions and representations throughout the proceedings suggested changing interpretations of the term; there is no evidence that the parties ever actually discussed exactly what was intended by the term.

The parties' conduct and surrounding circumstances in this case demonstrate that it is impossible to determine whether the term "feedlot permit" was intended to require an "operating permit" or a "pollution permit" or both permits. Stitch's continued references to the R&J Cattle permit (which was only ever a "pollution permit") while simultaneously arguing that only an "operating permit" was ever required, even through the course of this appeal, demonstrate that Stitch never had an understanding of what permit was required. DBJ's varying representations about needing a "pollution permit," DBJ's being willing to accept only an "operating permit," and testimony that the term was not intended to require multiple permits, similarly

demonstrate a lack of clarity concerning DBJ's belief and understanding. The term "feedlot permit" is so indefinite that the court could not determine whether a breach had occurred or provide a remedy. See *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

[12,13] In *Turbines Ltd. v. Transupport, Inc.*, 19 Neb. App. 485, 808 N.W.2d 643 (2012), this court recognized that relief by way of rescission of a contract could be warranted on the basis of a unilateral mistake when the mistake is of so fundamental a nature that it can be said that the minds of the parties never met and that the enforcement of the contract as made would be unconscionable. See, also, *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129, 825 N.W.2d 767 (2013). Similarly, in *In re Estate of Potthoff*, 6 Neb. App. 418, 573 N.W.2d 793 (1998), we recognized that an instrument may be canceled on the ground of a mistake of fact and noted that where the parties have apparently entered into a contract evidenced by a writing, but owing to a mistake their minds did not meet as to all essential elements of the transaction, a court of equitable jurisdiction could interpose to rescind and cancel the apparent contract and to restore the parties to their former positions.

In the present case, the district court concluded that the parties did not attach the same meaning to the term "feedlot permit" in their real estate sale contract. As demonstrated by the evidence discussed above, we agree with this conclusion—in fact, the evidence suggests that each individual party did not consistently attach the same meaning to the term, let alone attach the same meaning as the other party. As a result, their minds did not meet as to this term, which nobody has asserted was a nonessential term. We therefore affirm the court's cancellation of the contract and restoration of the parties to their former positions.

2. Stitch's Cross-Appeal

Stitch asserted error in the district court's judgment by way of a cross-appeal. Stitch asserted, however, that the cross-appeal was being brought "[o]nly in the alternative" and only if this court found error in the district court's cancellation of the

contract. Brief for appellee on cross-appeal at 29. Inasmuch as we have affirmed the court's cancellation of the contract, we need not further address Stitch's cross-appeal.

V. CONCLUSION

We find that the evidence adduced at trial demonstrates that there was never a meeting of the parties' minds concerning the meaning of the term "feedlot permit" in the real estate sale contract. We affirm the district court's cancellation of the contract.

AFFIRMED.

IN RE ROLF H. BRENNEMANN TESTAMENTARY TRUST.
KIM ABBOTT, BENEFICIARY, APPELLANT, V.
JOHN E. BRENNEMANN ET AL., TRUSTEES, APPELLEES.

838 N.W.2d 336

Filed October 1, 2013. No. A-12-1029.

1. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
2. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
3. ____: ____. When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.

Appeal from the County Court for Grant County: JAMES J. ORR, Judge. Affirmed.

David A. Domina and Jeremy R. Wells, of Domina Law Group, P.C., L.L.O., for appellant.

Neil E. Williams and Nathaniel J. Mustion, of Lane & Williams, P.C., L.L.O., for appellees.

INBODY, Chief Judge, and MOORE, Judge.

INBODY, Chief Judge.

I. INTRODUCTION

Kim Abbott is a beneficiary of the testamentary trust created by the last will and testament of her grandfather, Rolf H. Brennemann. Abbott sued the trustees of the trust to compel an accounting of trust assets and liabilities. Abbott's complaint was dismissed by the county court, and she has now appealed to this court.

II. STATEMENT OF FACTS

1. BACKGROUND INFORMATION

On August 18, 1976, Rolf passed away, leaving a last will and testament. Under the terms of Rolf's will, 525 shares of the "Rolf H. Brennemann Company" (the company) were to be held in the Rolf H. Brennemann Testamentary Trust; however, since Rolf's wife, Bessie Brennemann, filed for an elective share of Rolf's estate, 325 shares of the company ended up being held by the trust, which shares constituted a 42.42-percent share of the company. The primary asset of the company was an approximately 5,425-acre ranch located in Grant and Cherry Counties, Nebraska.

Pursuant to the terms of Rolf's will, all of the net income of the trust was to be paid to Bessie for the duration of her life. Upon Bessie's death, the net income of the trust was to be distributed in equal shares to Rolf's three children: Edward Brennemann, Mamie Brennemann, and Rolf William Brennemann (Rolf William). Upon the death of Rolf's last surviving child, the corpus of the trust was to be distributed to Rolf's grandchildren. Bessie died in 1998.

Rolf's will appointed Edward, Mamie, and Rolf William as trustees. If any of the originally appointed trustees, i.e., Rolf's children, were unable to serve as trustee, the oldest son of the previously nominated trustee would serve as successor trustee. Edward passed away in 1982, at which time his children became qualified beneficiaries of the trust and his oldest son, John E. Brennemann, became a trustee. Rolf William passed away on June 1, 2002, at which time his children, including Abbott, became qualified beneficiaries of the trust and his

oldest son, Rolf William Brennemann, Jr. (Rolf William Jr.), became a trustee.

In 1986, the trustees filed a petition to vote company stock, alleging that the company owed significant liabilities, had never paid dividends, and was not providing income to the trust. The petition alleged that John had offered to purchase the ranch, which offer was accepted; it was only after John's offer to purchase the ranch had been accepted that Abbott, one of Rolf William's daughters, also made an offer to purchase the ranch. Thereafter, the county court authorized the trustees to vote the company stock for the sale of the ranch to John pursuant to a June 10, 1986, purchase agreement. The court determined that the price paid for the real estate was at or above fair market value and constituted the most advantageous terms for the trustees to secure.

The 1986 purchase agreement set forth that John and his wife agreed to purchase the ranch on an installment payment basis for a total purchase price of $494,021. Payment of the purchase was to be made with $16,000 at the execution of the purchase agreement; $144,000 at closing; and $334,021 to be paid in nine annual payments, with a 10-percent interest rate and a balloon payment of the unpaid principal and interest on July 1, 1996.

In 1996, an agreement was executed, extending the original purchase agreement for 10 additional years, until July 2006. The record indicates that these additional payments were made each year from 1996 to 2006 at an 8-percent interest rate. Records indicate that on July 11, 1996, the beginning loan amount on the extension agreement was approximately $209,420. Bank statements and canceled checks indicate that John paid those annual payments to the bank and to the trust. On July 14, 2006, the bank issued a trustee's deed of reconveyance for the ranch to John and his wife upon John's final payment in accordance with both the purchase agreement and the extension agreement.

2. Procedural History

On April 9, 2010, Abbott filed a "Complaint by Beneficiary to Compel Accounting by Testamentary Trustee" against the

current trustees of Rolf's trust, namely John, Mamie, and Rolf William Jr. Abbott's complaint alleged that she had occasionally been paid small sums of money, but had never received any information regarding the trust. The complaint further alleged that in December 2009, she requested an accounting from the trustees and was refused. The complaint sought a full and complete accounting of the trustees' actions and payment of income derived from the administration of the trust, along with costs and attorney fees.

John, Mamie, and Rolf William Jr. filed an answer and cross-petition, denying many of the allegations contained within Abbott's complaint and petitioning the court for a termination of the trust. On July 12, 2010, the trustees filed a report including an 11-page accounting of trustee actions on the trust from January 1, 2002, through April 30, 2010, with updates on actions taken throughout the proceedings filed thereafter. The report indicated that the trust has four active bank accounts; sets forth moneys received in those accounts, including interest and John's payments pursuant to the purchase agreement; and also lists items paid out, including taxes, professional fees for the accountant, beneficiary distributions for each year, and various bank charges. The trustees' report indicated that the trust balance on January 1, 2002, was $10,917.36 and that through April 30, 2010, the trust had received a total of $208,560.47 and paid out $207,811.73, leaving an April 30 balance forward of $748.74.

In July 2010, Abbott filed a motion to amend her complaint, additionally alleging that the trustees had filed an accounting and that the accounting failed to fully account for trust assets. Abbott's amended complaint includes the original allegation that in December 2009, she requested an accounting and the trustees failed and refused to provide one, and additional allegations that the trustees have failed to maintain adequate records and breached their fiduciary duty to administer the trust in good faith. The amended complaint requested that the trustees be required to render a full and complete accounting, to pay Abbott all the income from the trust in the trustees' control, to redress the breaches by personally paying the amount required to restore the value of the trust property, to restore the

principal of the trust, and to pay all attorney fees and costs, and any other appropriate relief.

3. Trial Testimony and Evidence

Trial was held on the matter, during which Mamie, who was 74 years old, testified that she had been a trustee since the inception of the trust in 1976. Mamie believed that over the course of the life of the trust, the trustees had acted properly in their duties. Mamie testified that the trust paid income to her mother, Bessie, until Bessie died and that that was her only source of income. In the early 1980's, Mamie testified, the family ranch was indebted and should have been sold, which it was pursuant to a court-approved sale in which John purchased the ranch. Many of the payments made from the sale of the ranch were also used to pay the debts of the ranch, which Mamie said "owed so much money then." Mamie indicated that she was certain all the payments required of John had been made but could not recall specifics about disbursement of the money. Mamie testified that the money from those payments was deposited with the Bank of Hyannis and that she had tried to get the corresponding records from the bank, but had been informed the records had been destroyed. Mamie testified that she did not keep any trust documents and did not know which other trustee or trustees did, though she was sure that such documents had been kept. Further, Mamie was aware that the various banks and accountants were all contacted to retrieve past trust documents and none had any of the requested documents archived. Mamie testified that prior to 2002, beneficiaries were always welcome to information regarding the trust but she did not know what her efforts were to inform the beneficiaries and did not recall making any efforts as a trustee. Mamie and the other trustees had annual meetings before the annual ranch payment was due, and all of the decisions made by trustees were unanimous.

Mamie agreed that many of the documents which predated 2002 were unavailable because they had been destroyed. Mamie testified that the trust, since its inception, had been managed by three separate accounting firms and that if she received any

information regarding the trust, she took it directly to the bank or accounting firm in question.

Mamie testified that at the time of Rolf's death, her two brothers rented the land from the company, which rental continued after Rolf's death. However, Mamie explained that over time, the debt that the ranch incurred became unmanageable and she and her brothers determined that it was not feasible to keep the ranch, resulting in the sale of the ranch in 1986. Mamie testified that at that time, the ranch owed the Federal Land Bank of Omaha approximately $19,000 and Alliance Production Credit $100,000. Mamie testified that the Bank of Hyannis was handling the sale under the trust at that time.

Mamie testified that John and his wife sent the promissory note payments on the purchase agreement to the bank, which changed corporate names several times over the course of the trust. The bank disbursed the funds directly, including distributions. Mamie testified that all of the payments for the ranch were made by John and that the payments were extended, not because John was unable to pay but because her mother, Bessie, was still alive at that time and the extension would ensure that Bessie continued to receive income from the trust, which was a 42.42-percent shareholder in the company. Mamie agreed that regardless of who paid off the promissory note, the bank issued a trustee's deed of reconveyance once the extension agreement had been paid off. We note that after trial was held in this matter, Mamie passed away; however, the action was revived in the name of her personal representative, John. According to the will, after the death of Mamie, Rolf's last surviving child, the trust would terminate and the remaining corpus of the trust was to be paid in accordance with the will's directives.

John testified that he had been serving as trustee since his father, Edward, died in 1982. John testified that in 1996, when the original balloon payment on the ranch was due, he and his wife were in a position to make the payment and his banker recommended that they do so. However, after discussing the matter with Mamie, John decided to extend the loan out another 10 years in order to continue to provide a source

of income for Bessie. John testified that in 2002, when Rolf William Jr. became a trustee, he was present during only the winter months because he lived in Alaska during the summer, so most times John and Mamie were left to deal with the trust. When Rolf William Jr. was present, the three would discuss any issues and would make disbursements after John made the ranch payment in July. John and Mamie would also take care of putting the principal into investments and disbursing the interest.

John testified that he and his wife made every single payment on the ranch and that he never defaulted on any of those payments. John testified that he attempted to locate trust documents from prior to 2002, but discovered that the old files had been destroyed. John explained that Edward and Rolf William had entered into a leasing agreement with the company, which agreement was designed to pay off outstanding debts to the Federal Land Bank of Omaha and Alliance Production Credit, but that Rolf William had failed to make several payments. John indicated that had all the rental payments been made, the debt would have been paid and the ranch would not have needed to be sold. John testified that he had received documents regarding the trust from the accountant, but could not locate those documents.

Abbott testified in her own behalf, in addition to her deposition's being received at trial. Abbott testified she filed this action after receiving a letter from the trust accountant indicating that the trust contained $75,000 and suggesting that the trust be terminated. Abbott testified that after receiving the letter, she requested an accounting, but that she believed the information that she received was only a partial accounting. Abbott testified that prior to her filing the lawsuit, the trustees had failed to provide her any information regarding trust assets, liabilities, and disbursements. Abbott testified that she believed that at the time of Mamie's death, the trust would be divided according to the will, which division would include the value of the ranch. Abbott testified that the trustees had breached their duty as trustees due to the absence of any accounting from 1976 through 2002. Abbott testified that the breach was further substantiated by a lack of evidence

that payments were made by John, by evidence that the loan was not called when it was due and instead was refinanced at a lower interest rate, and by evidence that no default interest income had been noted in the trust. Abbott testified that she would not have an objection to the termination of the trust, except that she felt the trust was not handled in accordance with Rolf's intent, which she felt was to continue the trust until the death of his last surviving child and then to "divide it up."

Abbott testified that the only trust information she ever received, prior to the letter from the accountant, was schedule K-1 tax forms which included information such as interest, the beneficiary's share of income, and expenses. Abbott testified that until Rolf William's death, she did not receive any benefit or payment of money from the trust and did not receive any schedule K-1 tax forms, but Abbott admitted that until that time, she was not entitled to any income from the trust. Abbott testified that she reviewed the schedule K-1 tax forms she received from the trust each year and that she had no questions, but thought that she should have received more information. Abbott testified that she was not aware of whether Rolf William, when he served as a trustee, kept a separate file or provided accountings.

Josh Weiss, an audit shareholder hired by Abbott to analyze the accounting filed by the trustees, testified that he held certifications as a public accountant, in financial forensics, and in business valuation. In his analysis, Weiss inspected several documents pertaining to the case, such as the pleadings, purchase agreement, and accountings submitted to the court. Weiss testified that based upon his review of those documents, in 1986 the trust was entitled to $209,578, or $233,011 taking into account the changes in ownership and a discrepancy in the refinance amount. Weiss testified that Mamie's statement that the trust principal was invested in a fund, totaling approximately $35,000, was inaccurate and that instead of the $25,000 indicated on the August 23, 1995, fund statement, as a purchase confirmation, the trust should have held $101,000 in principal at that time based upon his calculations of the trust's share of the downpayment and principal payments that

should have been made. Weiss testified that he was unable to tell if principal amounts were set aside or if distributions were made from the principal or interest, but that based on his calculations, $157,300 in principal funds was unaccounted for. Weiss testified that the interest rate reduction in the extension agreement from 10 percent to 8 percent resulted in the trust's receiving $22,994 less than it would have received.

Weiss further testified that he could not find any evidence of payments made to the trust prior to 1997 and that there was a default term in the promissory note for late payments made with a default interest rate of 16 percent after the fifth day. Weiss testified that some of the payments on the promissory note were made after the annual July 6 due date and thus were late payments. Weiss indicated that the trustees did not collect any of the late payment fees and interest, which amounted to $786,906 from 1987 to 2001, but Weiss testified on cross-examination that he was unfamiliar with any statutes which might allow for a 30- or 60-day window to cure the late payment without entering into default.

Also on cross-examination, Weiss testified that he did not take into account the $16,000 placed into escrow at the bank for the first payment on the purchase agreement and did not take into account any of the debts of the company, such as the $119,000 in debts to Federal Land Bank of Omaha and Alliance Production Credit, or any of the allowance for open account and attorney fees. Weiss also testified that other expenses, such as loans from shareholders to the company, real estate taxes, and tax consequences from the sale of the company, were likewise not taken into account.

Dan Gilg testified that he had been the accountant for the trust since January 1996. Gilg, an attorney, a certified public accountant, and a certified financial planner, testified that it is customary when a file moves from one accounting firm to another that the predecessor would transfer just enough information as would be necessary for the preparation of the next year's tax return. The previous accounting firm for the trust forwarded Gilg, at his firm, a balance sheet in the transition of the trust, and thereafter, a balance sheet, income statement, statement of expenses, and statement of distributions were all

utilized in preparing the income tax returns and schedule K-1 tax forms that were sent out. The January 1, 1996, balance sheet indicates:

	Debit	Credit
Cash in bank	$ 3,558.86	
Note receivable—John Brennemann (42.42 percent of contract)	108,107.55	
Investment fund	25,000.00	
Deferred income—John Brennemann contract		$ 54,699.16
Fund balance—income		176.64
Fund balance—principal		81,790.61
	$136,666.41	$136,666.41

Gilg testified that each year, a similar balance sheet was created. Gilg testified that the balance sheet and tax documents from prior to 2002 were shredded in the ordinary course of his firm's business. Gilg testified that in 2009, he issued a letter suggesting that the trust be terminated because it was "non-economical." Thereafter, Gilg testified, he received several requests from Abbott and her sister for trust balance sheets and tax information, in response to which he sent Abbott one packet of information and Abbott's sister three packets of information. Gilg explained that at no time did he deny any request for trust information or withhold information.

Regarding Weiss' report, Gilg indicated that the report and calculations failed to take into account that the sale of the company was a taxable transaction and that there was no information in the calculations regarding federal or state income tax. Gilg explained that for every principal payment made, over 50 percent would have been subject to taxation, and that payment of federal and state taxes are corpus items, not income items, and would not be included in the calculation of distributable income, which would, in turn, account for some of the alleged missing principal testified to by Weiss. Gilg opined that Weiss' calculations were incorrect because in Gilg's analysis of the trust documents, it was evident that early on, the trustees were unable to pay the liabilities of the trust, which led to their seeking court permission to sell the ranch. In his review of those court documents, verification was provided

that there were outstanding liabilities, outstanding real estate taxes, an outstanding note payable to a beneficiary, outstanding open accounts, and outstanding federal and state income taxes. Based upon these liabilities, Gilg opined that little or none of the downpayment made by John would have been left to pay into the trust. Thus, Gilg explained that Weiss' calculations were based upon an assumption that all of the principal on the purchase agreement note payments was put into the bank, but that the calculations were incorrect because of the liabilities on the money. Gilg opined that Weiss' approach focused on the remainder beneficiaries, the grandchildren, instead of on the income beneficiary, which Gilg believed was more in line with the intent of Rolf's will.

Furthermore, Gilg disputed Weiss' statements that no payments had been made on the loan agreement and that the trust had no assets and received no funding prior to 2002, because evidence indicated that payments were being made in 1999 and that the bank was acting as the trustee of the deed of trust, collecting payments, and disbursing income to the beneficiaries. Gilg also testified that during that time, there were only five or six beneficiaries, some of whom were trustees, and that had there been any gap in payments, there would have been issues raised by those beneficiaries or the bank, which was the lender and accepted the payments.

Gilg testified that he was involved in the consideration of the extension of the balloon payment and testified that John and his wife were ready and able to pay the amount designated in the 1986 purchase agreement. However, Gilg testified that in light of the primary purpose of the trust, which was to provide an income stream for Bessie, he was concerned that if the amount due were paid off, the trust would be hit with federal and state income taxes, which would reduce the principal. Further, Gilg testified that the rate of interest for certificates of deposit would not have been sufficient to provide income to Bessie, so in order to avoid those problems, the option to extend the purchase contract at a rate that was higher and to defer the income tax consequences was better.

Gilg testified that in his opinion, the beneficiaries did not suffer any monetary losses by reason of the trustees'

administration of the trust. Gilg agreed that even though he did not have the trust administration documents from prior to 1996, it appeared from the 1996 balance sheet and the 1986 land sale documents that there had been no prepayments and no missed payments. Gilg testified that he had "firsthand knowledge" that all of the payments had been made since 1996. Gilg testified that based upon his calculations, since 1995, the trust had maintained the principal balance within approximately $3,000 of the initially funded balance. Gilg testified that, as he indicated in the letter which led to the litigation, there was no purpose or benefit for the trustees and beneficiaries to continue the trust and that it was very likely the expenses incurred in the maintenance of the trust would very soon exceed the trust's income.

4. Trial Court's Order

The trial court found that the trustees had provided the beneficiaries, including Abbott, with a schedule K-1 tax form each year showing the beneficiaries their respective share of the income or loss from the trust estate. The trial court found that in December 2009, Abbott requested a formal accounting of the trust, and that in 2010, the trustees provided a full accounting dating back to 2002, but were unable to provide documentation for years prior to that date because the documents had been destroyed.

The trial court set forth that prior to the enactment of the Nebraska Uniform Trust Code, the trustees had a duty to keep Abbott reasonably informed of the trust and its administration and, upon reasonable request, Abbott would have been entitled to an annual statement of trust accounts. The trial court also set forth that pursuant to Neb. Rev. Stat. § 30-3878(c) (Reissue 2008), the trustees were required to provide Abbott with "'at least annually . . . a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee[s'] compensation, a listing of the trust assets and, if feasible, their respective market values.'"

The trial court found that Abbott's overall position rested upon her contention that the trustees were unable to provide

any documentation from 1976 to 2002. The trial court found that Abbott attempted to improperly switch the burden of proof to the trustees, to prove that they did not breach their duties, and also that she ignored the fact that prior to 2005, the only obligation of the trustees was to keep Abbott reasonably informed absent a reasonable request for more information or documentation. The court found that Abbott had never requested more than the schedule K-1 tax form provided to her, which, in this circumstance, was adequate to keep her reasonably informed of the trust, and that thus, the burden of proof with regard to the alleged breach of duty remained with her.

The court found that although Abbott asserted that she suffered damages because the trustees could not account for $307,942.71 of the principal and interest payments, she could not prove that assertion. The court found that the evidence presented indicated the payments were made, that the evidence did not indicate there were damages for late payments, and that the trustees did not breach their fiduciary duty by waiving the right to collect a late fee within the context of this family trust. The trial court also determined that Abbott's allegation of the trustees' causing unaccounted principal growth was similarly not proved by Abbott. The court denied Abbott's request for attorney and witness fees and also denied the trustees' request to terminate the trust. It is from this order that Abbott has appealed.

III. ASSIGNMENTS OF ERROR

Abbott assigns that the trial court erred in the following ways: (1) by failing to shift the burden of proof from Abbott to the trustees when Abbott presented evidence that the trustees had not rendered accountings, (2) by dismissing her claims because she failed to establish a burden of proof she did not bear and imposing upon her the burden of proving matters within the exclusive control of the trustees, (3) by finding that the schedule K-1 tax forms were sufficient accountings when none were received into evidence, and (4) by failing to award attorney fees.

IV. STANDARD OF REVIEW

[1] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

V. ANALYSIS

1. Burden of Proof

Abbott first argues that the trial court erred by failing to shift the burden of proof to the trustees when she made a prima facie case proving that the trustees had not rendered accountings. Abbott contends that the trustees admitted that "no accounting was made by [them] at any time between the [t]rust's origination in 1976 and 2009." Brief for appellant at 16. Abbott argues that her burden was to establish that she received no accounting.

Before addressing this issue, we first note that Abbott makes numerous assertions in her pleadings, throughout the proceedings, and on appeal that in December 2009, she requested an accounting and was denied such request. Contrary to those assertions, the record indicates that upon receiving the letter suggesting that the trust be terminated, Abbott requested an accounting from the trustees' accountant, Gilg, which accounting was provided to her, through her attorney, in addition to being filed with the court after she filed her complaint. Gilg testified that he did not deny any such request and fully complied by forwarding Abbott's attorney the accounting. Abbott admitted that she received the accounting, but felt that it was insufficient and alleged that it was only a partial accounting. Clearly, as of 2010, Abbott had received the accounting she had requested in December 2009, after receiving Gilg's letter suggesting termination of the trust, and any argument to the contrary is incorrect.

In Nebraska, the issue of the burden of proof in testamentary trust cases has not frequently been addressed, and there is no Nebraska case law directly addressing the issue of the burden of proof for the duty to inform and account to beneficiaries. Cf., *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d

13 (2009) (beneficiary establishes prima facie case of fraud by showing that trustee's transaction benefited trustee at beneficiary's expense; burden of going forward with evidence then shifts to trustee to establish by clear and convincing evidence that transaction was made under power expressly granted in trust and clear intent of settlor and was in beneficiary's best interests); *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991) (burden of proof is upon one seeking to establish and enforce trust or prove same by clear and convincing evidence).

In proceedings for construction of testamentary trusts and against a testamentary trustee for misconduct and breach of trust, the Missouri Supreme Court has repeatedly found that the presumption is that a trustee has acted in good faith and that the burden is on the one questioning his actions and seeking to establish a breach of trust to prove the contrary. See, *Jarvis v. Boatmen's National Bank of St. Louis*, 478 S.W.2d 266 (Mo. 1972); *First National Bank of Kansas City v. Hyde*, 363 S.W.2d 647 (Mo. 1962). Several other courts from around the country appear to follow the same suit. See, also, *In re Estate of Damon*, No. 28378, 2011 WL 576588 at *6 (Haw. App. Feb. 18, 2011) (unpublished disposition listed at 125 Haw. 242, 257 P.3d 1219 (2011)) ("'[t]he person questioning the trustees' action has the burden of producing evidence to overcome the presumption, and . . . upon the production of such evidence, the trustees have the ultimate burden of establishing the regularity and good faith of the questioned action'"), quoting *Estate of James Campbell, Decsd.*, 42 Haw. 586 (1958); *Salem v. Lane Processing Trust*, 72 Ark. App. 340, 37 S.W.3d 664 (2001) (Arkansas law presumes trustee has acted in good faith and places burden of proof upon those who question his or her actions and seek to establish breach of trust); *Gregory v. Moose*, 266 Ark. 926, 590 S.W.2d 665 (Ark. App. 1979).

The Restatement (Third) of Trusts § 83 (2007), regarding the duty to keep records and provide reports, provides that a "trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust, and, at reasonable intervals on request, to

provide beneficiaries with reports or accountings." The comments to that section indicate that "the records of a trust must provide information that will enable the trustee to account for receipts, expenses, and distributions made to beneficiaries. . . ." *Id.*, comment *a.* at 204. The reporter's notes to § 83, comments *a.* and *a(1).*, also provide that the general rule of law applicable to a trustee burdens the trustee with the duty of showing that the account which he or she renders and the expenditures which he or she claims to have made were correct, just, and necessary. "'"He is bound to keep clear and accurate accounts, and if he does not the presumptions are all against him, obscurities and doubts being resolved adversely to him."'" *Id.* at 208, citing *Wood et al. v. Honeyman et al.*, 178 Or. 484, 169 P.2d 131 (1946), citing 4 Bogert on Trusts and Trustees § 962 (1935). However, the Restatement (Third) of Trusts § 100, comment *f.* at 68 (2012), specifically sets forth the burden of proof in a suit against a trustee: "When a plaintiff brings suit against a trustee for breach of trust, the plaintiff generally bears the burden of proof."

In its final order, the trial court found:

> In order to prevail on her claim for damages, [Abbott] acknowledges in her written closing argument that she has the burden of proof to show [the trustees] have breached their duties as trustees and the amount of damages caused by the breach. An overall theme to [Abbott's] position is that . . . since [the trustees] are unable to provide documentation from 1976 to 2002, the court must therefore assume that there were breaches of duty causing damages to [Abbott]. To this court, that argument is an attempt to improperly switch the burden of proof upon the [trustees] to prove that they did not breach their duties as trustees. That argument also ignores that, prior to 2005, the trustees[']' only obligation was to keep [Abbott] "reasonably informed" absent a reasonable request by [Abbott] for a more thorough statement of the accounts of the trust. . . . The court believes that in this circumstance, the annual K-1 was adequate to keep [Abbott] reasonably informed of the trust in order for [Abbott] to protect her interests. The fact that records

> prior to 2002 have been destroyed when [Abbott] never requested them, does not prove a breach of the trustees' duties. The burden, therefore, remains with [Abbott] to prove any alleged breaches of duty.

It is clear from that order that the trial court did not fail to shift the burden of proof, but instead determined that Abbott had not met her initial burden of proof as she alleges and, as such, that the burden never shifted to the trustees. This assignment of error is without merit, but leads us into Abbott's next assignment of error.

2. Trust Accounting

Abbott assigns that the trial court erred by dismissing her complaint because she failed to establish her burden of proof. Abbott contends that the trustees did not provide any accountings to the beneficiaries at any time from 1976 through 2009. In order to more efficiently address the merits of this issue, we have broken down the analysis into three relevant time periods: 1976 through June 1, 2002; June 1, 2002, through December 31, 2004; and 2005 through 2009.

(a) 1976 through June 1, 2002

The first time period during which Abbott contends that no accountings were made is from 1976, when the will came into effect, through Rolf William's death on June 1, 2002.

The first component of Abbott's argument for this timeframe is that the trustees admitted that no accountings were made during this time. John and Mamie admitted that no documents prior to 2002 could be found because they had been destroyed by the banks and accountants managing the trust. Mamie testified that she could not remember what information she had forwarded to the accountant and bank and could not remember whether any information, or what information, was distributed to beneficiaries. From 1976 through 1982, the income beneficiaries, aside from Bessie, were also trustees. In 1982, Edward passed away and John became a trustee. Aside from Abbott, no beneficiary testified or was involved in the proceedings, and thus, the record is devoid of any information regarding what any of the other beneficiaries may or may

not have received during the time at issue. Abbott testified that she did not receive information or distributions from the trust until she became a beneficiary in 2002, when Rolf William died.

Abbott alleged that there had not been a proper accounting for the trust by virtue of the lack of any documentation from 1976 through 2002, at which time the burden shifted to the trustees to show to the contrary. The testimony and evidence presented at trial are clear that the trustees could not produce evidence of recordkeeping for the trust through 2002, aside from some banking statements and documents involving the purchase agreement and extension agreement. The trustees could not provide an adequate accounting of the trust from 1976 through 2002 and, therefore, breached their duty to inform and report.

Neb. Rev. Stat. § 30-3890 (Reissue 2008) provides that the remedy for a trustee's violating a fiduciary duty ranges from compelling the trustee's performance to monetary redress to restoring the trust. See, also, Restatement (Third) of Trusts § 83, comment *a(1)*. at 204 (2007) (trustee who fails in duty to keep proper records "is liable for any loss or expense resulting from that failure").

These possible remedies lead us directly to the central component of Abbott's argument that, beyond the fact that trust information was never supplied to the beneficiaries, there is no evidence that John ever made any payments on the purchase agreement and the extension agreement to the trust. To the contrary, the information and records regarding the trust from that time period consist mainly of information regarding the purchase of the ranch by John. In that regard, Mamie testified that although she did not have any trust documentation dating that far back, the information regarding the trust was available and was forwarded and taken care of by the bank or accountant dealing with the trust. Mamie testified that all of the payments were made by John and that those payments provided the income for Bessie. John testified that he and his wife made all the payments on the purchase agreement and the extension agreement, and bank records indicate that those

payments were made. The original purchase price of the ranch was $494,021. A payment of $16,000 was made by John at the execution of the purchase agreement; $144,000 was paid at closing; and $334,021 was to be paid in nine annual payments, with a 10-percent interest rate and a balloon payment of the unpaid principal and interest on July 1, 1996. The original purchase agreement was extended by the parties in order to continue to provide Bessie with an income source in line with Rolf's intent to provide for her. Evidence received by the trial court indicates that on July 11, 1996, the beginning loan balance on the extension agreement was approximately $209,420. The record indicates that the payments under the extension agreement were made each year from 1996 to 2006, at an 8-percent interest rate. Bank statements and canceled checks indicate that John made those annual payments to the bank and to the trust. On July 14, 2006, the bank issued a trustee's deed of reconveyance for the ranch to John and his wife upon John's final payment in accordance with both the purchase agreement and the extension agreement.

Unfortunately, the underlying issue revealed in these proceedings, as is the case in many family trust cases, is that there is animosity between Abbott and John stemming from the court-approved sale of the ranch to John and the rejection of Abbott's offer to purchase, but as far as these proceedings are concerned, those feelings do not translate into evidence of nonpayment of the annual payments due by John and his wife. Therefore, even though the trustees breached their duty to inform and report during this time period, that breach caused no damage to the trust and is harmless.

(b) June 1, 2002, through December 31, 2004

The next time period which we address, which is included in Abbott's arguments regarding a lack of accounting by the trustees, is June 1, 2002, through December 31, 2004. As indicated above, on June 1, 2002, Abbott's father, Rolf William, passed away and, by virtue of the trust, Abbott became an income beneficiary.

Testimony elicited at trial indicates that beneficiaries received annual schedule K-1 tax forms which provided the recipient with information such as interest, the beneficiary's share of income, and expenses, which Abbott admitted herself to receiving and reviewing each year after she became a beneficiary in 2002, after Rolf William's death. Abbott testified that prior to becoming a beneficiary in 2002, she had no specific knowledge of the trust outside of its existence, and she explained that Rolf William did not discuss the trust with her and that she herself had not made any request of the trustees for any information regarding the trust prior to 2009. This evidence clearly indicates that trust information was distributed during the timeframe at issue, but it is the sufficiency of that information that Abbott next calls into question.

As the trial court indicated in its order, prior to the enactment of the Nebraska Uniform Trust Code, the trustees, in their duty to inform and account to beneficiaries, were required to keep beneficiaries "reasonably informed" and, upon "reasonable request," were required to provide beneficiaries with "a statement of the accounts of the trust annually." Neb. Rev. Stat. § 30-2814 (Reissue 1995). Pursuant to § 30-2814, from 2002, when Abbott became a beneficiary to the trust after Rolf William's death, through December 31, 2004, Abbott was reasonably informed of the trust, as she received schedule K-1 tax forms annually and made no further request for information regarding the trust. There is also no merit to this portion of Abbott's argument.

(c) 2005 through 2009

The final time period which Abbott raises is from 2005 through 2009. Clearly, beneficiaries were receiving information regarding the trust through the distribution of schedule K-1 tax forms, so the question then becomes whether or not those schedule K-1 tax forms, sent to the beneficiaries each year in this case, were sufficient to inform pursuant to the Nebraska Uniform Trust Code from January 1, 2005, forward. Section 30-3878(a) provides for the trustees' duty to inform and report, insomuch as the "trustee shall keep the qualified beneficiaries of the trust reasonably informed about the

administration of the trust and of the material facts necessary for them to protect their interests." Section 30-3878(c) further enumerates:

> A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.

Testimony elicited at trial indicates that the schedule K-1 tax form includes information regarding interest, the beneficiary's share of income, and expenses. However, we cannot make any further examination of what information is within the contents of the schedule K-1 tax forms distributed annually, other than the information testified to by Abbott, because none of those tax forms are found in the record before the court. As such, the information in the record regarding the schedule K-1 tax forms does not appear to be sufficient within the confines of § 30-3878, as compared to the more detailed accounting which was filed by the trustees with the court at the inception of this litigation. That accounting provided specific information regarding bank accounts, investment account growth and transactions, deposits, and transfers. The accounting also includes a detailed accounting of various fees, beneficiary and trust distributions, and bank charges. Therefore, based upon the record before the court, we conclude that the schedule K-1 tax forms distributed in 2005 through 2008 did not comply with the trustees' duty to inform and report as required by § 30-3878, and the trustees thereby breached their duty to inform and report by not providing sufficient accountings to the beneficiaries. The trial court erred by determining that there had been no breach of duty by the trustees.

Although we find that the trustees breached their duty to inform and report, based upon the record in this case, we nonetheless find that the trial court did not err by dismissing Abbott's complaint. As discussed above, § 30-3890 provides

the trial court with a list of possible options to remedy a breach of trust, which includes, in subsection (b)(4), to "order a trustee to account." We find no error in the trial court's dismissal, because the trustees' breach was cured once the accounting information was filed with the court. The submitted accounting, as indicated above, reveals all of the trust actions and more fully complies with § 30-3878. Thus, even though the county court erred by finding that there had been no breach of the trustees' duty to inform, that error was harmless, as the breach has been cured.

Furthermore, the record in this case does not support Abbott's assertions that the trustees' breach caused monetary damages to the trust. We agree with the trial court that the record indicates that this trust was not a significant income-producing trust and that although distributions were made to the beneficiaries, those distributions were minimal in comparison to the funds that Abbott alleges existed. The record indicates that tax forms were sent out yearly to the beneficiaries. The original purpose of the trust, which was clearly laid out in Rolf's will, was to provide income for Bessie. The trustees' actions throughout the life of the trust, including the sale of the ranch to a trustee, were court approved and prolonged the benefit to Bessie through the extension of the purchase agreement, the payments under which were all made in accordance with purchase agreements and extensions with the bank and were substantiated through bank statements indicating the payments had been made.

3. Attorney Fees

Abbott argues that the trial court erred by denying her request for attorney fees, because the trustees failed to discharge their duties to account for the trust.

[2,3] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007). When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Id.* "In a judicial proceeding involving the

administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." Neb. Rev. Stat. § 30-3893 (Reissue 2008).

Having reviewed the record, and based upon the circumstances of this case, we conclude that the trial court did not abuse its discretion by denying Abbott's request for attorney fees and we affirm that determination.

VI. CONCLUSION

In sum, we find that the trial court did not improperly shift the burden to Abbott, but it found that she had not met her burden to show that the trustees had violated their duty to report and inform. Upon our review of the evidence, we find that Abbott met her burden of proof by alleging that she received no information regarding payments made by John when Mamie admitted to having no documentation prior to 2002. The burden then shifted to the trustees to show, through evidence and testimony, that sufficient information was provided to the trustees and beneficiaries—which they could not. However, the trust did not suffer any losses due to that breach and, thus, was harmless. For the time period of 2002 through 2005, the accounting given to the beneficiaries was sufficient. However, the record indicates that from 2005 until 2009, that information was insufficient to satisfy the statutory requirements and a breach of duty was committed by the trustees, although that breach was thereafter cured. Thus, we find that the trial court did not err by dismissing Abbott's complaint. Furthermore, we also find that the trial court did not abuse its discretion by denying Abbott's request for attorney fees. Therefore, we affirm.

AFFIRMED.

RIEDMANN, Judge, participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. KAYS, APPELLANT.

838 N.W.2d 366

Filed October 15, 2013. No. A-11-504.

1. **Appeal and Error.** In order to be considered by an appellate court, alleged errors must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. ____. An appellate court does not consider errors which are argued but not assigned.
3. **Rules of the Supreme Court: Conflict of Interest: Words and Phrases: Appeal and Error.** A "conflict of interest" has been interpreted by the Nebraska Supreme Court to fall within the definition of a "disability" under Neb. Ct. R. App. P. § 2-105(5) (rev. 2010).
4. **Rules of the Supreme Court: Recusal: Conflict of Interest: Words and Phrases: Appeal and Error.** For the purposes of Neb. Ct. R. App. P. § 2-105(5) (rev. 2010), the term "disability" includes situations where a judge has recused himself or herself due to a conflict of interest.
5. **Trial: Records: Appeal and Error.** The record of the trial court, when properly certified to an appellate court, imports absolute verity; if the record is incorrect, any correction must be made in the district court.
6. **Trial: Records: Evidence: Appeal and Error.** The trial court record cannot be contradicted in an appellate court by extrinsic evidence.
7. **Trial: Records: Appeal and Error.** An issue of fact cannot be made by an appellate court as to any matter properly shown by the records of the trial court.
8. **Trial: Records: Evidence: Appeal and Error.** In an appellate review, a transcript of the orders or judgment entered is the sole, conclusive, and unimpeachable evidence of the proceedings in the district court.
9. **Trial: Records: Appeal and Error.** The correctness of the trial court record may not be assailed collaterally in an appellate court.
10. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
11. **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.
12. **Sexual Assault: Words and Phrases.** For sexual penetration, it is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia is sufficient.

13. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
14. **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.
15. **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.
16. **Constitutional Law: Sentences.** In cases where a defendant does not raise a facial challenge to the constitutionality of the statute regarding his or her sentencing, but, rather, asserts that the sentence "as applied" to him or her constitutes cruel and unusual punishment, the challenge involves the same considerations as a claim of excessive sentence.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed.

Frank E. Robak, Sr., of Robak Law Office, for appellant.

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

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

Charles E. Kays appeals his convictions, following a jury trial, of first degree sexual assault of a child and two counts of third degree sexual assault of a child, and appeals the sentences imposed thereon.

II. FACTUAL BACKGROUND

The victim in this case, C.F., has lived with her grandparents, Kays and Linda Kays, since she was 4 years old. On October 5, 2010, C.F. got into an argument with Kays and Kays threatened to shoot several people, including C.F., C.F.'s father, Linda, and C.F.'s aunt. C.F. called her father, after which both C.F. and her father called the 911 emergency dispatch service. Two Omaha police officers, Joe Eischeid and another officer, responded to the Kays' home to conduct a check on the well-being of

C.F. and her younger brother. Upon investigation, the officers determined that there was no immediate threat; however, as the officers were leaving, C.F. became very upset and began crying. As a result, the officer accompanying Eischeid took C.F. outside to speak to her privately, at which time she disclosed sexual abuse.

In the meantime, Eischeid remained in the house with Kays. Kays informed Eischeid that "he thinks he knows what is bothering [C.F.]," and Kays indicated that "a few years ago [C.F.] had the habit of walking around the residence naked"; that "at times, she would come out of the shower or bathtub naked and run around the house"; and that "on several occasions, she would come up to him while . . . she did not have any clothes on and would sit on his face." Kays indicated he would tell C.F. that it was wrong and that she was a "big girl." Kays also told Eischeid that on a few occasions, C.F. would climb into bed with him, get under the covers while he was sleeping, and put her hand down his pants, touching his penis. Kays said he would tell her that it was not right and that she was a "big girl." Kays further indicated that he has a vibrating massager he uses on his back and that on one other occasion, he had used the vibrator on C.F. while she did not have any clothes on and may have accidentally touched her vaginal area with it. During Kays' statements, Eischeid did not ask any questions, testifying that he "was just totally shocked and just let him talk." After conferring with the other officer, Eischeid transported C.F. and her brother to "Project Harmony," an agency which has specially trained investigators to handle potential child sexual assault victims. Officer Amber Schlote from the child victims unit conducted an interview of C.F., and following the interview with C.F. and an interview with Kays, Kays was arrested and charged with first degree sexual assault of a child. The information was later amended to add two counts of third degree sexual assault of a child.

A jury trial was held on April 6 through 8, 2011. During voir dire, 13 jurors were sworn in, with the alternate juror not identified. Trial commenced. Evidence adduced at trial established that Kays was born in April 1941 and that C.F. was born in March 2000.

The State's first witness was Schlote. Schlote testified that during her interview of C.F., she asked C.F. to use dolls to demonstrate what had happened to her during the first incident of sexual abuse. According to Schlote,

> [C.F.] laid the grandpa doll on the floor on its back and used the doll that was her and sat it on top of the grandpa doll and showed that she was facing him with her knees under here. She was on her knees and her feet behind her and she said she straddled him.

Specifically, "[s]he showed that she straddled his chest and showed that he used his hand to pull her forward to his face." Additionally, C.F. demonstrated that the male doll put his head in the female doll's vaginal area. According to Schlote, C.F. demonstrated two different incidents where the female doll was pulled up toward the male doll's face, with the vaginal area in the male doll's face. In speaking with C.F., Schlote was able to determine that the incidents occurred in two locations or houses and that the incidents occurred over a period of time. After Schlote asked C.F. to draw a picture of something that happened, C.F. drew a picture of a vibrating massager. During the interview, C.F. indicated to Schlote that Kays acted inappropriately on four or five occasions.

C.F. testified that at the time of trial, she was 11 years old. She testified that she began living with her grandparents, Kays and Linda, when she was 4 years old and that her brother began living with them the following year. The first place that C.F. lived with her grandparents was on Cypress Drive in Omaha; then, when C.F. was 7 years old, they moved to a house on Holmes Street in Omaha. C.F. testified that she remembered that the move occurred when she was 7 years old, because Kays had a heart attack and wanted to move to a different residence. C.F. testified that since she began living with her grandparents, Kays had touched her four times in a way that made her feel bad.

C.F. testified that the first incident occurred when she was 4 years old and lived on Cypress Drive. C.F. testified that she had been sitting on her bed, when Kays told her to move on top of him and pull her pants down. Kays was lying down, and C.F. sat so that her legs were on both sides of him and

she was facing him. C.F. testified that Kays "would lick [her]" "[a]round [her] private" and that Kays told her not to tell anyone what happened or he would go to jail.

The second incident also occurred at the house on Cypress Drive. C.F. testified that she was 5 years old at the time of the second incident. C.F. testified that she was lying down with Kays in his bedroom when he told her to shut the door and to take off her panties. C.F. "went up next to [Kays]," he moved her to get her on top of him, and then he licked her vagina.

The third incident occurred when C.F. was 7 years old, after moving to the home on Holmes Street. C.F. testified that Kays touched her with his hands "[a]round [her] vagina."

The fourth incident also occurred at the Holmes Street address when she was 8 years old. Kays again touched C.F. "around [her] private" with his hands and with a vibrating massager. C.F. stated that Kays then told her to follow him into the bathroom and that he then plugged in the vibrating massager and put it on his penis until semen "went into the toilet."

C.F. responded in the negative when asked: "Did [Kays] put his fingers in your vagina?" and "[D]id he ever touch inside it?" and "Was there ever a time when he was touching you with his fingers that he put them in your private?" C.F. further responded negatively when asked whether she remembered a time where she said that "he took his finger and put it in [her] vagina."

The defense moved for a directed verdict on count I, first degree sexual assault of a child, on the basis that the State had not proved the element of penetration. The motion was overruled, and Kays called witnesses on his behalf consisting of Linda and himself. At the close of the evidence, the defense renewed its motion for a directed verdict, which was overruled by the court. After closing arguments, the case was submitted to the jury. The dismissal of the alternate juror is not found in the record.

The jury found Kays guilty of the charged offenses. The 12 jurors were polled, and, when asked, each juror responded individually that this was his or her verdict. Thereafter, the district court sentenced Kays to 15 to 15 years' imprisonment

on count I and 20 months' to 5 years' imprisonment each on counts II and III. Additionally, counts II and III were ordered to be served concurrently to each other and consecutively to count I. Kays was given credit for 97 days served.

III. PROCEDURAL BACKGROUND

Kays timely appealed to this court, but filed an "Application for Relief, Guidance, or Other Remedy Including Striking of [the] Bill of Exceptions" and/or motion for the issuance of a show cause order as to why summary reversal should not be granted due to "Bill of Exceptions Irregularities Highly Prejudicial" to Kays. The accompanying affidavit set forth that copies of the bill of exceptions, one of which was e-mailed to Kays' appellate counsel by the court reporter, provided that 13 jurors had been selected and 13 jurors polled. However, the affidavit stated that in January 2012, after preparation of Kays' brief, the court reporter took the bill of exceptions, without signing it out, and substituted a replacement bill of exceptions which contained a file-stamped cover page dated August 11, 2011, and that this replacement bill of exceptions altered the polling of jurors to include 12 jurors. Kays' motion was overruled without prejudice to proceeding in the district court to correct the bill of exceptions. Kays then filed an application for remand of the cause to the district court to correct the bill of exceptions due to discrepancies in the original bill of exceptions and a subsequently filed bill of exceptions regarding the polling of a 13th juror, which motion for remand was sustained by this court. Thereafter, on September 4, 2012, a hearing was held before a different district court judge regarding Kays' motion to correct and file an amended bill of exceptions and a supplemental request for leave to amend the bill of exceptions to conform to the evidence; on the court's own motion, due to a conflict of interest, the original district court judge who had conducted the trial recused herself from the proceedings to amend the bill of exceptions.

At the hearing on Kays' motion to correct and file an amended bill of exceptions and a supplemental request for leave to amend the bill of exceptions to conform to the evidence, the court reporter testified that she was the court

reporter during Kays' jury trial and that she created the original bill of exceptions. The court reporter initially filed the original bill of exceptions on August 11, 2011. After the filing of the original bill of exceptions, the court reporter received a letter from Kays' appellate counsel, dated September 23, 2011, informing her that there were some errors in the bill of exceptions and that "he wanted [her] to correct it and refile it." The court reporter proceeded to have the bill of exceptions proofread again, made corrections, printed out a new corrected copy of the bill of exceptions, and refiled the corrected replacement bill of exceptions. She further testified that when Kays' appellate counsel "didn't tell [her] to do it a different way, that that was the way I was to do it. That's the first time I've ever had to do that before." The court reporter testified that at her request, the replacement bill of exceptions was backdated to August 11, 2011, which was the date that the original bill of exceptions had been filed. The court reporter testified that when she refiled the bill of exceptions, she was not aware she was not allowed to "backdate" it, and that she was not trying to hide anything or cover up anything by her actions. The court reporter admitted that she changed the contents of the bill of exceptions without court order or court approval, that she shredded the original bill of exceptions, and that she did not have court approval to destroy the original bill of exceptions. The court reporter further admitted that on a later unknown date, she backdated the replacement certificate page to reflect the original filing date of August 11, 2011.

The court reporter also testified that she e-mailed Kays' appellate counsel a copy of the original version of the bill of exceptions and that when she attempted to e-mail a corrected version of the bill of exceptions, she e-mailed the wrong file and did not send the proofread version. When asked about e-mailing the bill of exceptions to defense counsel, the court reporter stated:

> [W]hy I emailed that to him is because I — I felt bad. This is the first time that's ever happened to me where someone pointed out there [were] errors in my Bill of Exceptions. Usually you have to pay for the copies. I felt

> bad, so I emailed it to him, and I must have picked the wrong file.

The court reporter admitted the mistakes that she made in this case, but testified that the final version of the bill of exceptions currently filed with the clerk of the district court is the accurate version of what transpired at Kays' trial. She further testified:

> I feel bad that it all happened. It was a mistake. And I — I tried to correct it because I wanted to show what happened in the courtroom. I did not do it the right way. I've learned that now. I mean, I just want the accurate record to go up to the appeals court. That's what happened. There were 12 jurors.

One of the exhibits admitted into evidence was an affidavit from juror No. 13. Her affidavit set forth that she had been impaneled as a member of the jury in Kays' case and that she sat as a juror until the case was submitted for deliberation at the close of the evidence, at which time the judge explained that she was the alternate juror and that her service was no longer needed. Her affidavit stated that she did not deliberate in Kays' case.

The district court entered an order finding that the bill of exceptions prepared and filed by the court reporter had been corrected as ordered and constituted the bill of exceptions upon which Kays' appeal should proceed.

IV. ASSIGNMENTS OF ERROR

On appeal, Kays' assignments of error, consolidated and restated, are that the district court erred in finding that the replacement bill of exceptions was credible and was to serve as the bill of exceptions in this case and in failing to discharge the alternate juror prior to submission of the case to the jury for deliberation, in accordance with Neb. Rev. Stat. §§ 29-2004(2) and 29-2005 (Reissue 2008), resulting in a verdict by a 13-member jury without his consent or waiver. Kays also contends that he did not receive a fair and impartial trial because of prosecutorial misconduct, that the evidence was insufficient to support his convictions, and that he received

ineffective assistance of trial counsel. Finally, Kays contends that the sentences imposed upon him were excessive.

[1,2] We note that in his brief, Kays argues several errors that are not assigned, such as that the district court abused its discretion in not allowing testimony concerning a psychologist, that a written question by the jury contained in the file was not addressed on the record, and that the district court erred in overruling his motion for directed verdict. In order to be considered by an appellate court, alleged errors must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Dowd Grain Co. v. County of Sarpy*, 19 Neb. App. 550, 810 N.W.2d 182 (2012). We do not consider errors which are argued but not assigned. See *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

V. ANALYSIS

1. Bill of Exceptions

Kays contends that the district court erred in finding that the replacement bill of exceptions was credible and was to serve as the bill of exceptions in this case.

Due to discrepancies in the original bill of exceptions and a subsequently filed bill of exceptions, the cause was remanded to the district court for the certification of an appellate record to be conducted pursuant to the procedure set forth in Neb. Ct. R. App. P. § 2-105(5) (rev. 2010), which provides:

> The parties in the case may amend the bill of exceptions by written agreement to be attached to the bill of exceptions at any time prior to the time the case is submitted to the Supreme Court. Proposed amendments not agreed to by all the parties to the case shall be heard and decided by the district court after such notice as the court shall direct. The order of the district court thereon shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court. Hearings with respect to proposed amendments to a bill of exceptions may be held at chambers anywhere in the state. If the judge shall have ceased to hold office, or shall be prevented by disability from holding the hearing, or shall be absent from the state, such proposed amendments shall

> be heard by the successor judge, or by another district judge in the district, or by a district judge in an adjoining judicial district.

[3] On September 4, 2012, a hearing was held before a different district court judge regarding Kays' motion to correct and file an amended bill of exceptions and a supplemental request for leave to amend the bill of exceptions to conform to the evidence; on the court's own motion due to a conflict of interest, the original district court judge who had conducted the trial recused herself from the proceedings to amend the bill of exceptions. Although a "conflict of interest" is not one of the listed factors in § 2-105(5) which prevent the original judge from presiding over a hearing to certify a bill of exceptions, the rule does provide that another district judge may hold the hearing if the original judge "shall be prevented by disability from holding the hearing." In similar circumstances, a "conflict of interest" has been interpreted by the Nebraska Supreme Court to fall within the definition of a "disability." See, *In re Complaint Against White*, 264 Neb. 740, 651 N.W.2d 551 (2002); *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965); *Gandy v. State*, 27 Neb. 707, 43 N.W. 747 (1889).

Stewart v. McCauley, supra, involved an action instituted in a district court by an infant child's prospective adoptive parents to bring to the court's attention the need to provide for the welfare, custody, and control of a neglected and dependent child, where the county attorney had accepted employment in a civil action representing the child's biological parents, which made it impossible to secure the consent of the county attorney as required by statute at that time and therefore prevented any action to protect the welfare of the minor child. The Nebraska Supreme Court phrased the question presented as whether an irresponsible parent (or possibly a much worse parent) could prevent action by the juvenile court to protect the welfare of an innocent child merely by hiring the county attorney in a civil action involving that child.

The Supreme Court turned to Neb. Rev. Stat. § 23-1205 (1943), which, at that time, gave the district court the authority to appoint an acting county attorney in the event of absence,

sickness, or disability of the county attorney. *Stewart v. McCauley, supra*. The Supreme Court noted that as early as its decision in *Gandy v. State, supra*, in 1889, the term "disability" had been interpreted "to cover situations where the county attorney by reason of prior employment disqualified himself to act in the new case." *Stewart v. McCauley*, 178 Neb. at 418, 133 N.W.2d at 925. See, also, *In re Complaint Against White, supra* (judge's personal dissatisfaction with performance of county attorney's office did not constitute "disability" within meaning of § 23-1205 (Reissue 1997)). Thus, the Supreme Court in *Stewart v. McCauley, supra*, determined that the county attorney's representation of the minor child's biological parents constituted a "disability" for the purposes of § 23-1205 (1943).

[4] Applying a consistent interpretation of the term "disability" to § 2-105(5), if the term "disability" is interpreted to cover situations where a public official disqualifies himself or herself to act in a new case by reason of prior employment, it follows that "disability" would likewise cover situations where a judge has recused himself or herself due to a conflict of interest. Thus, the original district court judge who presided over Kays' trial and who recused herself from holding the hearing regarding the certification of the bill of exceptions due to a conflict of interest was, in fact, prevented by a "disability" from holding the hearing, and the hearing was properly held by a different district court judge, who then certified a bill of exceptions to this court.

[5-7] The record of the trial court, when properly certified to an appellate court, imports absolute verity; if the record is incorrect, any correction must be made in the district court. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *Wonderling v. Conley*, 182 Neb. 446, 155 N.W.2d 349 (1967). The trial court record cannot be contradicted in an appellate court by extrinsic evidence. See *Anderson v. State*, 163 Neb. 826, 81 N.W.2d 219 (1957). An issue of fact cannot be made by an appellate court as to any matter properly shown by the records of the trial court. See *id*.

[8,9] Upon remand, the district court entered an order finding that the bill of exceptions prepared and filed by the court

reporter has been corrected as ordered and constitutes the bill of exceptions upon which Kays' appeal should proceed. In an appellate review, a transcript of the orders or judgment entered is the sole, conclusive, and unimpeachable evidence of the proceedings in the district court. *Anzalone Inv. Co. v. City of Omaha*, 179 Neb. 314, 137 N.W.2d 857 (1965). The correctness of the trial court record may not be assailed collaterally in this court. *Id.* Thus, Kays' appeal will be heard on the bill of exceptions presented to this court to which we import absolute verity.

2. Discharge of Alternate Juror

Kays next contends that the district court erred in failing to discharge the alternate juror prior to submission of the case to the jury for deliberation, resulting in a verdict by a 13-member jury without his consent or waiver.

However, as we noted in the prior section of this opinion, having determined that the bill of exceptions which has been certified to this court is given absolute verity, we note that the bill of exceptions reflects that 13 jurors were selected at the beginning of the trial. Although the record does not reflect that the alternate juror was discharged, the record does reflect that when the jury was polled after the verdict, 12 jurors responded affirmatively that the verdict was their verdict. Additionally, at the September 4, 2012, hearing on remand, an affidavit was received into evidence from juror No. 13 which set forth that she had been impaneled as a member of the jury in Kays' case and that she sat as a juror until the case was submitted for deliberation at the close of the evidence, at which time the judge explained that she was the alternate juror and that her service was no longer needed. Her affidavit stated that she did not deliberate in Kays' case. The district court entered an order finding that juror No. 13 did not participate in deliberations and that the bill of exceptions as corrected constituted the bill of exceptions on which the appeal should proceed. The record does not support, and in fact contradicts, Kays' claim that his verdict was delivered by a 13-member jury. This assignment of error is without merit.

3. Fair and Impartial Trial

Kays also contends that he did not receive a fair and impartial trial because of prosecutorial misconduct, insufficient evidence to support his convictions, and ineffective assistance of trial counsel.

(a) Prosecutorial Misconduct

Kays argues that the prosecution committed misconduct during its opening statement, during its cross-examination of both Kays and defense witness Linda, and during its closing arguments. Kays also claims that the State asked leading questions of the victim.

[10] A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998); *State v. Balvin*, 18 Neb. App. 690, 791 N.W.2d 352 (2010).

The record discloses that Kays did not move for a mistrial at any time during the trial. Consequently, he has waived his claim that a mistrial should have been declared due to the prosecution's alleged misconduct.

(b) Insufficiency of Evidence

Kays also contends that the evidence was insufficient to support his convictions of one count of first degree sexual assault of a child and two counts of third degree sexual assault of a child.

[11] 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. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013); *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.*

(i) First Degree Sexual Assault of Child

[12] A person commits first degree sexual assault of a child if he or she subjects another person under 12 years of age to sexual penetration and the actor is at least 19 years of age or older. Neb. Rev. Stat § 28-319.01 (Reissue 2008). Neb. Rev. Stat. § 28-318(6) (Reissue 2008) defines sexual penetration as

> sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.

It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia is sufficient. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

Kays' argument regarding the insufficiency of the evidence focuses on the evidence of penetration. There was no dispute at trial over the ages of Kays and C.F. It is clear that the age element of the offense is satisfied, because the evidence established that Kays was born in April 1941 and that C.F. was born in March 2000. Additionally, the evidence, when viewed in the light most favorable to the State, established that Kays licked C.F.'s vagina. This evidence is sufficient to support Kays' conviction of first degree sexual assault of a child.

(ii) Third Degree Sexual Assault of Child

Kays was charged with two counts of third degree sexual assault of a child. A person commits third degree sexual assault of a child if he or she subjects another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older and does not cause serious personal injury to the victim. See Neb. Rev. Stat. § 28-320.01(1) and (3) (Reissue 2008).

There is no question that the age element of the offense is satisfied, because the evidence established that Kays was

born in April 1941 and that C.F. was born in March 2000. The evidence, when viewed in the light most favorable to the State, establishes that Kays touched C.F.'s vagina with his hands and, on another occasion, touched C.F.'s vagina with his hands and with a vibrating massager. Thus, the evidence is sufficient to support both of Kays' convictions for third degree sexual assault of a child.

(c) Ineffective Assistance of Counsel

Kays claims that his trial counsel was ineffective in failing to object when the prosecutor made "improper, misleading, or derogatory statements"; in failing to move for a mistrial or new trial; in failing to discuss the presentence investigation report with Kays prior to the time of sentencing; and in failing to notice 13 jurors in the selection, deliberation, and polling of the jury. Brief for appellant at 27.

[13,14] 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. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013). Conversely, we will not address an ineffective assistance of counsel claim on direct appeal if it requires an evidentiary hearing. *Id.*

[15] 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), Kays must show that his counsel's performance was deficient and that this deficient performance actually prejudiced his defense. See *State v. McClain, supra*.

(i) Failure to Object to Prosecutorial Misconduct

First, we address Kays' claim that his trial counsel was ineffective for failing to raise proper objections when the prosecutor made "improper, misleading, or derogatory statements." It appears from Kays' brief that his allegations relate to five separate areas: opening statements, leading questions of the victim,

cross-examination of Linda, cross-examination of Kays, and closing arguments.

a. Opening Statements

Kays argues that trial counsel was ineffective for failing to object when the prosecutor referenced "sexual assaults" in the plural and that because he was charged with only one count of "sexual assault," this statement was highly prejudicial. Although Kays correctly notes that he was charged with only one count of first degree sexual assault of a child, he was also charged with an additional two counts of third degree sexual assault of a child. Since the prosecutor's comments were accurate—Kays was charged with multiple counts of sexual assault—there can be no prosecutorial misconduct, no prejudice, and no ineffectiveness of trial counsel for failing to object.

b. Leading Questions of Victim

Kays contends that his trial counsel was ineffective for failing to object to the prosecution's asking leading questions of C.F. Kays objects to the following specific instances of questioning of C.F. by the prosecution:

> Q. Were you facing him?
> A. Yeah.
> Q. So you were looking at each other?
> A. Uh-huh.
> Q. Was he laying down or sitting up?
> A. He was laying down.
> Q. And how did he touch you?
> A. He would lick me.
> Q. And how did he lick you? Did he move you to his face?
> [Defense counsel]: Objection, leading.
> THE COURT: Sustained.
> . . . .
> Q. And after he got done licking you, your vagina — or how long did that last?
> A. I don't remember.

Kays also objects to the prosecutor's questioning of C.F. in this exchange concerning Kays' hands and fingers:

> Q. And where was he touching your vagina?
> A. Around it.
> Q. And then did he ever touch inside it?
> A. No.
> Q. On this time did he put his fingers in your vagina?
> [Defense counsel]: Objection, asked and answered.
> THE COURT: Overruled.
> . . . .
> Q. Did he put his fingers in your vagina?
> A. No.
> . . . .
> Q. Was there ever a time when he was touching you with his fingers that he put them in your private?
> [Defense counsel]: Objection, asked and answered.
> [C.F.]: No.
> THE COURT: Overruled.
> . . . .
> Q. Do you remember a time when you told us that he took his finger and put it in your vagina?
> [Defense counsel]: Objection, leading.
> THE COURT: Overruled.
> [C.F.]: No.

In each of these instances, defense counsel objected to the prosecutor's questions, and therefore, Kays cannot establish deficient performance, because defense counsel has performed in the manner requested. Additionally, defense counsel did not object to the State's question "And after he got done licking you, your vagina — or how long did that last?"; however, C.F.'s answer of "I don't remember" did not prejudice Kays and neither did her earlier testimony regarding this particular incident, that Kays had touched her "[a]round [her] private," or vagina. Thus, Kays cannot establish any prejudice from defense counsel's failure to object to this particular question posed to C.F. by the State.

c. Cross-Examination of Linda

Kays contends that the prosecutor engaged in highly inflammatory and prejudicial nonrelevant cross-examination of Linda consisting of the following exchange:

> Q. [Linda, C.F.] is not your biological granddaughter; is that correct?
>
> A. Yes.
>
> Q. Your husband had a child with another woman while you were with him?
>
> A. That's correct.
>
> Q. And that would be [C.F.'s] father?
>
> A. Yes.
>
> Q. And he's had other children since you've been with him with other women?
>
> [Defense counsel]: Objection, relevance.
>
> THE COURT: Overruled — sustained.

Again, defense counsel objected to the prosecution's questions and Kays cannot establish deficient performance, because defense counsel has performed in the manner requested.

d. Cross-Examination of Kays

Kays contends that the prosecutor engaged in what he referred to as a "malicious attack" during cross-examination of Kays, brief for appellant at 25, during the following exchange:

> Q. And . . . you sat here while your wife was testifying; correct?
>
> A. Yes.
>
> Q. And so it's true [C.F.] is not your wife's biological grandchild?
>
> A. Correct.
>
> Q. Who was the person you had a child with out of wedlock?
>
> A. [My son's] mom.
>
> Q. Where were you living when that occurred?
>
> [Defense counsel]: Objection, relevance.

THE COURT: Sustained.

. . . .

Q. But you were married to your wife at the time that you had —

A. We were separated —

[Defense counsel]: Objection, relevance.

THE COURT: Only one person can talk at a time. Overruled. He's answered the question. They were separated.

. . . .

Q. And were you separated every time you had a child out of wedlock?

[Defense counsel]: Objection.

THE COURT: Sustained.

Defense counsel objected to the prosecution's questions, and Kays cannot establish deficient performance, because defense counsel has performed in the manner requested.

e. Closing Arguments

Kays contends that certain statements made by the prosecutor during closing arguments were improper and should have been objected to by defense counsel. Kays objects to the following statements made by the prosecutor during closing arguments:

> Do you believe [C.F.] and all of the corroborating evidence or what this guy said? The defense attorney got up here and said, don't forget about Paul Harvey. You'll hear the rest of the story. I didn't hear the rest of the story. All you heard was a liar. It wasn't the rest of the story. Why is he not credible? Why is he lying?
>
> . . . .
>
> . . . [H]e's telling you what he wants when he wants. That's not the story. He's lying.
>
> . . . .
>
> . . . Look at his lies, and use your common sense. Throw out his testimony.

The record on direct appeal is insufficient to review this claim.

(ii) Failure to Move for Mistrial/New Trial

Kays claims that his counsel was ineffective in failing to move for a mistrial due to the prosecution's inflammatory statements and conduct. The record on direct appeal is insufficient to review Kays' claim that his trial counsel was ineffective for failing to move for a mistrial.

Kays also contends that his counsel was ineffective for failing to move for a new trial due to the prosecution's inflammatory statements and conduct. However, Kays does not allege what issues should have been raised in a motion for new trial or what grounds he would have had for raising those issues. More important, there are no allegations explaining why the motion would have been successful or how he was prejudiced by trial counsel's failure to file the motion. See, *State v. Davis*, 6 Neb. App. 790, 577 N.W.2d 763 (1998) (defendant's failure to set forth allegations explaining why motion for new trial would have been successful or how he was prejudiced by attorney's failure to file motion did not justify presumption of prejudice for purposes of postconviction claim of ineffective assistance of counsel); *State v. McGurk*, 3 Neb. App. 778, 532 N.W.2d 354 (1995) (in order to satisfy prejudice prong of ineffective assistance of counsel analysis, defendant must first make allegation of nature and effect of requisite prejudice). Thus, Kays has not alleged sufficient prejudice and his claim of ineffectiveness of counsel for failing to file a motion for new trial is without merit.

(iii) Presentence Investigation Report

Kays claims that his trial counsel was ineffective in failing to discuss the presentence investigation report with him prior to the time of sentencing.

The record reveals that Kays' trial counsel was unable to review the presentence investigation report until the afternoon of the sentencing hearing due to delays in the report's being made available by the probation office. However, counsel did review the report and, at the sentencing hearing, referenced information contained in the report. Trial counsel indicated that he spoke to Kays about the contents of the presentence

investigation report, but Kays did not make any comments at the sentencing hearing to indicate whether counsel reviewed the report with him.

Neb. Rev. Stat. § 29-2261(6) (Reissue 2008) provides, in part, that a court "may permit inspection of the [presentence investigation] report or examination of parts thereof by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender." Thus, the plain language of the statute does not require an attorney to physically review the presentence investigation report with a defendant.

Furthermore, even if his trial counsel did fail to review his presentence investigation report with him, Kays has not alleged how he was prejudiced by counsel's actions. Specifically, he has not alleged how the ultimate outcome of the sentencing hearing would have been different had he had the opportunity to review the report with his trial counsel. See *State v. Derr*, 19 Neb. App. 326, 809 N.W.2d 520 (2011) (defendant could not show prejudice from trial counsel's alleged failure to adequately review contents of presentence report with defendant prior to sentencing hearing, and therefore such failure did not constitute ineffective assistance of counsel; defendant did not allege how ultimate outcome of sentencing hearing would have been different had he had opportunity to review report with counsel). Thus, this assertion has no merit.

(iv) 13 Jurors

Kays contends that his trial counsel was ineffective in failing to notice 13 jurors in the selection, deliberation, and polling of the jury. Having determined earlier in this opinion that the record does not support Kays' claim that his verdict was delivered by a 13-member jury, there is no ineffectiveness of counsel in this regard. This assignment of error is without merit.

(v) Summary

Having considered Kays' numerous allegations regarding the ineffectiveness of trial counsel, we find the majority of them to be without merit. However, we find that the record on

direct appeal is insufficient to address Kays' claims that trial counsel was ineffective for failing to object to comments made by the prosecution during closing statements and for failing to move for a mistrial due to inflammatory statements and conduct by the prosecution.

4. Excessive Sentences

[16] Kays contends that due to his advanced age, lack of criminal history, and ailing health, the cumulative sentences imposed effectively constitute a sentence of life imprisonment and, as applied to him, constitute cruel and unusual punishment. In cases where a defendant does not raise a facial challenge to the constitutionality of the statute regarding his or her sentencing, but, rather, asserts that the sentence "as applied" to him or her constitutes cruel and unusual punishment, the challenge involves the same considerations as a claim of excessive sentence. See *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009).

Kays was convicted of one count of first degree sexual assault of a child and two counts of third degree sexual assault of a child. First degree sexual assault of a child is a Class IB felony with a mandatory minimum sentence of 15 years' imprisonment and a maximum sentence of life imprisonment. See, Neb. Rev. Stat. § 28-105 (Reissue 2008); § 28-319.01. Kays' sentence of 15 to 15 years' imprisonment is the most lenient sentence of imprisonment that could be imposed by the district court for this conviction.

Third degree sexual assault of a child is a Class IIIA felony punishable by up to 5 years' imprisonment and/or a $10,000 fine. See, § 28-105; § 28-320.01(1) and (3). Kays' sentences of 20 months' to 5 years' imprisonment on each of his convictions for third degree sexual assault of a child were within the statutory sentencing range.

At the time of the preparation of the presentence investigation report, Kays was 70 years old, married, and retired. He has a minimal criminal history consisting of a conviction for assault and a conviction for driving under the influence, both having occurred in the early 1970's. Kays has medical issues, including having had two heart attacks and a brain injury.

According to a report by Kays' physician, Kays suffered an episode of anoxic brain injury in November 2006 and underwent a prolonged intensive care unit stay requiring mechanical ventilation. The doctor reported that since that time, Kays has demonstrated decreased short-term memory, decreased impulse control, and irritability. His doctor reports that Kays' diagnosis would potentially limit his ability to think rationally, recall episodes, and control his impulses.

According to the presentence investigation report, Kays' scores on the "Simple Screening Instrument" were in the low risk range and there is no indication of a problem with substance abuse or of substance use contributing to this offense. Kays scored in the low risk range for recidivism, based upon a combined risk assessment of the "Static 99-R" risk assessment and the "Stable 2007" risk assessment. On the "Vermont Assessment of Sex Offender Risk," Kays scored in the high risk range, with some of the reasons for the high score including the age of the victim when the abuse began, a prior conviction for assault, and the level of intrusiveness for the current offense. Kays' total score on the level of service/case management inventory indicated that he was in the medium-high risk range to recidivate.

Considering that the sentences imposed are within the applicable statutory sentencing ranges, that the Class IB felony sentence is the most lenient sentence available, and that Kays further benefited from the district court's decision to order the third degree sexual assault counts to be served concurrently—and taking into account the seriousness of the offenses for which Kays was convicted, Kays' age and health, his minimal criminal history, and his scores on the risk assessments—we cannot say the district court abused its discretion in the sentences imposed.

VI. CONCLUSION

Having considered and found Kays' assignments of error, including most of his claims of ineffective assistance of trial counsel, to be without merit, his convictions and sentences are affirmed. However, we specifically find that the record on

direct appeal is insufficient to address Kays' claims that his trial counsel was ineffective for failing to object to comments made by the prosecution during closing statements and for failing to move for a mistrial due to inflammatory statements and conduct by the prosecution.

AFFIRMED.

IRWIN, Judge, dissenting.

I respectfully disagree with the majority's conclusion that the term "disability" as used in Neb. Ct. R. App. P. § 2-105(5) (rev. 2010) encompasses "situations where a judge has recused himself or herself due to a conflict of interest." Such an interpretation, as evidenced by the facts of the present case, defeats the very purpose of § 2-105(5) and seriously undermines the sanctity of judicial proceedings and public confidence and trust in such proceedings.

Although the majority opinion references some actions of the court reporter that led to this appeal, the majority has understated the severity of the court reporter's misconduct. In this case, appellant's appellate counsel discovered errors in the originally created bill of exceptions, including indications that 13 jurors had deliberated and been polled. When he brought the errors to the attention of the court reporter, she obtained the bill of exceptions from the court file, removed the file-stamped cover page of the bill of exceptions, shredded the remaining pages of the original bill of exceptions, created an entirely new bill of exceptions, and backdated the newly created bill of exceptions with help from an employee in the district court clerk's office. These actions were all, without question, contrary to well-established rules concerning the proper conduct of a court official.

Appellant brought these matters to the attention of this court and requested we remand the matter to the district court for a properly conducted hearing to amend or correct the bill of exceptions. Appellant's request was clearly an attempt to ensure the accuracy and completeness of the record available to us for our review of the serious criminal matters involved in this case. We sustained appellant's motion and remanded the matter for the district court to amend or correct the bill of

exceptions in accordance with the requirements of § 2-105(5). However, prior to the hearing, the judge who had conducted the trial recused herself from the proceedings.

The Nebraska appellate courts have not previously had occasion to discuss § 2-105(5). The rule provides as follows:

> The parties in the case may *amend the bill of exceptions* by written agreement to be attached to the bill of exceptions at any time prior to the time the case is submitted to the Supreme Court. Proposed amendments not agreed to by all the parties to the case shall be heard and decided by the district court after such notice as the court shall direct. The order of the district court thereon shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court. Hearings with respect to proposed *amendments to a bill of exceptions* may be held at chambers anywhere in the state. *If the judge shall have ceased to hold office, or shall be prevented by disability from holding the hearing, or shall be absent from the state, such proposed amendments shall be heard by the successor judge, or by another district judge in the district, or by a district judge in an adjoining judicial district.*

(Emphasis supplied.)

The plain language of the rule makes it clear that the purpose of holding a hearing, presided over by the trial judge, is to ensure the creation of an accurate record in situations where the parties cannot reach an agreement about the proposed amendments or corrections. In such a situation, the trial judge who presided at trial will be crucial to the process, because that judge is in the best position to make a determination about the accuracy of a party's disputed attempt to amend or correct the bill of exceptions and will necessarily be in the best position to exercise judgment about any disputed amendments or corrections and how to most accurately complete the record of what occurred at trial. A substitute judge who had no prior history of the case and who was not present during any of the original proceedings is necessarily not in a position to make such determinations as effectively or as accurately. As a result, the

circumstances in which the rule allows for a substitute judge are necessarily narrow.

Section 2-105(5) delineates three specific situations in which a substitute judge may preside over the hearing. Notably, none of those situations are applicable to the present case. The rule provides that a substitute judge may preside over the hearing if the original trial judge has ceased to hold office, is absent from the state, or is prevented "by disability" from holding the hearing. A plain reading of these three exceptions, especially in light of the important role to be played by the judge presiding over a § 2-105(5) hearing, makes it apparent that these exceptions are intended to allow for a substitute judge only when the original trial judge is incapable of conducting the hearing.

There is no dispute that the use of a substitute judge in this case was not authorized by either of the first two exceptions in the rule; the original trial judge continued to hold office and was not absent from the state. The majority concluded that the judge was prevented "by disability" from holding the hearing. However, the record presented does not disclose any disability that would have prevented the original trial judge from holding the hearing.

In this case, the trial judge entered an order—on her own motion—recusing herself from conducting the hearing on the basis of a "conflict of interest." There was no motion by any party, and there was no hearing concerning any alleged conflict of interest. There is nothing anywhere in the record to suggest what possible conflict of interest prevented the original trial judge from conducting the hearing, as she was required to do under § 2-105(5). The majority simply accepts that there was, in fact, a conflict of interest (although without any indication of what it might have been) and then concludes that such a conflict of interest constitutes a disability under the rule. I cannot agree.

The majority cites to three authorities to support its conclusion that a conflict of interest should constitute a disability under this rule. However, none of the cases stand for the proposition that an entirely undisclosed alleged conflict of

interest constitutes a disability for purposes of a rule like § 2-105(5).

The majority cites to *In re Complaint Against White*, 264 Neb. 740, 651 N.W.2d 551 (2002). The majority does not explain how that opinion supports its conclusion, and a review of that opinion demonstrates that it does not. The factual context of the *In re Complaint Against White* opinion concerned a county court judge who had been dissatisfied that one of her opinions had been reversed by the district court and that the county attorney had not appealed the reversal. The county court judge injected herself into the proceedings, allegedly demanded an appeal and provided to a deputy county attorney legal arguments and authorities in support of an appeal, and appeared in front of the district court to request the appointment of a special prosecutor because the county attorney had declined to file an appeal. In that context, the Nebraska Supreme Court noted that there was no basis for the appointment of a special prosecutor under a court rule allowing for such appointment in the event of absence, sickness, or disability of the county attorney. The court concluded that the term "disability" had been interpreted, in the context of that rule, to include situations where the county attorney was actually disqualified to act because of a conflict of interest related to employment. The majority also cites, and discusses, *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965). The factual context of *Stewart v. McCauley* involved an actual disqualification of a prosecutor because of civil representation of one of the parties.

Both the Supreme Court's noting in *In re Complaint Against White* and the court's holding in *Stewart v. McCauley* that the term "disability" in the context of rules concerning appointing a special prosecutor includes situations where the county attorney is actually disqualified from performing his or her duties because of a prior employment conflict of interest are clearly distinct from the situation in the present case. The use of the term "disability" in both of those situations clearly related to an attorney being unable to perform his or her duties *as an advocate* on behalf of a party because of an established and

actual conflict of interest. There is nothing in either case to suggest that a mere assertion of a conflict of interest, without one actually existing, would suffice to constitute a disability. The actual conflict of interest contemplated in that situation is one that actually does prevent the attorney from performing his or her role as an advocate.

The role of the judge in a § 2-105(5) hearing is markedly different, however. The judge is not to be an advocate for either party, but a neutral and knowledgeable arbiter ensuring the creation of an accurate appellate record concerning a case that the judge actually presided over. When the judge presided over the entire trial without any conflict of interest which prevented her from fairly judging the case, and without any demonstration or suggestion of what possible conflict of interest would prevent her from carrying out that same role to ensure the creation of an accurate record of the trial, finding a disability is entirely different and unwarranted.

The majority also cites to *Gandy v. State*, 27 Neb. 707, 43 N.W. 747 (1889). Although the majority does not discuss the application of that case, it also involves the notion that if a prosecutor has an actual conflict of interest which prevents him or her from performing official duties, that conflict can be considered a disability for purposes of meriting appointment of another prosecutor. In that case, the proposition was expressed in relation to a county attorney being disqualified from prosecuting a criminal defendant whom he had previously represented in other proceedings. Once again, that kind of actual conflict of interest which prevents the performance of duties is clearly a very different situation from one where a judge declines to preside over a hearing in which it is not apparent that there is any actual conflict of interest.

Rather than comparing the factual context of the present case to situations and prior cases wherein prosecutors had actual conflicts of interest meriting the appointment of special prosecutors, I would suggest that we should be guided by cases involving the propriety of appointing a substitute or successor judge to perform duties that would otherwise be required of a trial judge.

For example, in *Newman v. Rehr*, 10 Neb. App. 356, 630 N.W.2d 19 (2001), we were presented with a question about the authority of a successor judge to render judgment in a case over which he had not presided and was not familiar. In that case, the retirement of District Judge Lawrence J. Corrigan resulted in the use of interim judges prior to District Judge W. Mark Ashford's taking office. In one of the cases heard during that interim, retired District Judge James A. Buckley heard the case as an interim judge, but there was no record made of the hearing conducted by Judge Buckley. After Judge Ashford took office, he signed the final order in the matter. On appeal, we held that because Judge Buckley had heard the case and the witnesses, no other judge could have the degree of familiarity with the case that he had. Consequently, we concluded that the parties' stipulation to submit the case to another judge could not be fairly applied or implemented by any judge other than Judge Buckley. We held it was reversible error for Judge Ashford to enter an order based on evidence he had not heard, and we vacated the judgment.

That case, although in a different factual context, is consistent with the notion that substitution of judges should be limited and avoided when reasonably possible. The judge who is familiar with the proceeding and capable of performing his or her judicial function and in the best position of doing so should be the one to discharge judicial duties. See, also, *Malony v. Adsit*, 175 U.S. 281, 20 S. Ct. 115, 44 L. Ed. 163 (1899) (emphasizing that knowledge of what happened at trial is unique to judge who presided and cannot be brought to judge who did not participate in trial).

Similarly, in *Commonwealth v. Trapp*, 396 Mass. 202, 213, 485 N.E.2d 162, 169 (1985), the Massachusetts Supreme Court discussed appropriate substitution of judges and explained that it is a matter "of grave concern to the proper administration of justice." In that case, the judge who had presided over the trial had been "absent" during jury deliberations, a substitute judge had taken questions from the jury and answered them, and a second substitute judge had taken the jury's verdict. *Id*. The court noted that a Massachusetts rule of criminal

procedure allowed for the substitution of a judge presiding over a proceeding in situations where the judge is unable to proceed "by reason of death, sickness, or other disability." See Mass. R. Crim. P. 38(a) (2006). The court noted that the rule is mandatory and that given the language of the rule, except for ministerial acts such as the taking of a verdict, the original judge should ordinarily be available throughout the process to "ensure the integrity of the trial process." *Commonwealth v. Trapp*, 396 Mass. at 214, 485 N.E.2d at 170.

The Massachusetts court also discussed *Durden v. The People*, 192 Ill. 493, 61 N.E. 317 (1901), and *State v. Gossett*, 11 Wash. App. 864, 527 P.2d 91 (1974), both involving substitution of judges. In *Durden v. The People*, the Illinois Supreme Court held that the power of judges did not include the right to delegate a duty involving the exercise of judgment and application of legal knowledge and judicial deliberation to facts known to the first judge and not to the second judge. Along those same lines, in *State v. Gossett*, the Washington Court of Appeals found it to be error when a substitute judge, over the objection of the defendant, instructed the jury in response to jury questions.

The Massachusetts, Illinois, and Washington cases are all consistent in the notion that judicial integrity and confidence in the sanctity of the judicial proceedings dictate that a judge who presides over a judicial proceeding and gains important knowledge of the proceedings should not delegate to a substitute judge, who is unfamiliar with the case, judicial duties that depend on discretion and exercise of judgment concerning the proceedings known to the original judge and not to the substitute. Such substitution should be allowed only in narrow and unusual circumstances, and rules governing such substitution should be narrowly and strictly construed.

Section 2-105(5) is a rule which governs such substitution of judges and which, as a result, should be narrowly and strictly construed. The rule indicates that a substitute judge may be necessary at a hearing to properly amend or correct a bill of exceptions only where the original judge is incapable of carrying out his or her duties, either because that judge

is no longer serving on the bench, is physically absent from the jurisdiction, or is suffering some kind of "disability" that actually prevents the discharge of duties. Here, none of those narrow situations are apparent on the record presented to this court, where the judge inexplicably and on her own motion recused herself.

The majority overlooks the fact that there is no explanation of what possible conflict of interest might have prevented this trial judge from performing her duties to ensure that an accurate record be presented in this serious criminal matter. The majority simply concludes that because the judge, on her own motion and without creating any record, did recuse herself, she "was, in fact, prevented by a 'disability' from holding the hearing." The majority then also focuses on the bill of exceptions that was created as being "properly certified" by a different judge—one who had no prior history or involvement with the actual trial for which this bill of exceptions was the official record.

Court records are sacrosanct. Accuracy in the judicial review process, and public confidence and trust in the process, depends mightily on the accuracy and trustworthiness of the record presented to the appellate court. As the majority points out, if the rules and procedures governing the creation of that record are all properly followed, the record imports absolute verity when the record comes to an appellate court. See, *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *Wonderling v. Conley*, 182 Neb. 446, 155 N.W.2d 349 (1967). In *State v. Dyer, supra*, the Supreme Court was presented with an assertion by the parties on appeal that there was an error in the record and the court noted that it could decide the case only on the record presented, because amendments or corrections have to be made in the district court, pursuant to § 2-105(5). It is ironic that the majority rejects appellant's complaints about the record in this case on the basis of *State v. Dyer* when the issues before us arise out of appellant's actually doing what was supposed to be done, seeking proper amendment under § 2-105(5), but having a trial judge who delegated her duties to a substitute judge. The absolute verity afforded the record

cannot be afforded when the procedures for creation of an accurate record were not complied with because of the actions of an official court reporter and the trial judge. See *Walton v. Southern Pac. Co.*, 53 F.2d 63 (1931) (presumptions of regularity and unimpeachability of trial record not applicable if record intrinsically defective).

What happened in this case presents a serious undermining of the sanctity of judicial proceedings and public confidence in them. The court reporter in this case acknowledged having intentionally violated rules designed to ensure the accuracy and proper preparation of the court record in a criminal prosecution involving very serious charges of egregious conduct. When the court reporter was notified of errors in the record, she obtained the bill of exceptions from the court file, removed the file-stamped cover page of the bill of exceptions, shredded the remaining pages of the original bill of exceptions, created an entirely new bill of exceptions, and backdated the newly created bill of exceptions with help from an employee in the district court clerk's office. When this misconduct was brought to the attention of this court, we specifically remanded the matter for a hearing in compliance with § 2-105(5), which provides a procedure for preserving the sanctity of the record and for ensuring the accuracy of amendments and corrections to the record. That process required the trial judge, if able to do so, to preside over the hearing. She did not do so, and there is no indication in our record of why.

As a result, an evidentiary hearing was eventually conducted in front of a judge who had no familiarity with the trial proceedings and who had no basis of knowledge to properly determine whether the amendments and corrections to be made were accurate. At that hearing, appellant was represented by appellate counsel—who was different counsel than appellant's trial counsel—and the State was represented by one of the two attorneys from the Douglas County Attorney's office who had prosecuted the matter at trial. Aside from appellant and the prosecutor, the only other person present in the courtroom during this hearing who had been present

during the trial was the offending court reporter—and the court reporter was accompanied by her privately retained legal counsel.

The offending court reporter was the sole witness at the hearing. She acknowledged each action set forth above. In defending or rationalizing her actions, she testified under oath that although she had served two Douglas County District Court judges, she was not aware before this case that shredding a court record and then backdating a newly created one was improper. Although the record indicates that her original stenographic notes and original audio recording were in existence, they were never offered or presented to the substitute judge. Without any prior knowledge or history of what actually happened at trial, and without being offered or reviewing the original notes or audio, the substitute judge found that the revised bill of exceptions corrected all mistakes. It is entirely possible that the record presented to us now is accurate in every way. But there is no way of knowing that. What we do know is that serious misconduct concerning its preparation occurred after errors in the original bill of exceptions were discovered. What we also know is that if the process set forth in § 2-105(5) had been followed, the original trial judge could have determined that the current record is an accurate record of the trial she presided over. I disagree with the majority's conclusion that allowing a substitute judge to preside over the § 2-105(5) hearing without any actual record or showing of a disability on the part of the original judge can be overlooked. I would remand the matter to the district court for a properly conducted § 2-105(5) hearing by the original trial judge. The sanctity of judicial records and public confidence in the judicial process warrant this.

STATE OF NEBRASKA ON BEHALF OF SAVANNAH E. AND CATILYN E., MINOR CHILDREN, APPELLEE, V. KYLE E., APPELLEE, AND AMANDA W., APPELLANT.

838 N.W.2d 351

Filed October 15, 2013. No. A-12-1027.

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. **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.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Child Custody.** In cases where a noncustodial parent is seeking sole custody of a minor child while simultaneously seeking to remove the child from the jurisdiction, a court should first consider whether a material change in circumstances has occurred and, if so, whether a change in custody is in the child's best interests. If this burden is met, then the court must make a determination of whether removal from the jurisdiction is appropriate.
6. ____. Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
7. **Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a material change in circumstances.
8. **Modification of Decree: Child Custody: Evidence: Time.** In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time.
9. **Child Custody.** In determining a child's best interests, courts may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient

age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.

10. ____. In relocation cases, a parent must first satisfy the court that he or she has a legitimate reason for leaving the state.
11. **Child Custody: Proof: Visitation.** Once the threshold burden of showing a legitimate reason for leaving the state has been met, the court then determines whether removal to another jurisdiction is in a child's best interests, which in turn depends on (1) each parent's motives for seeking or opposing the move, (2) the potential the move holds for enhancing the quality of life for the child and the custodial parent, and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements.

Appeal from the District Court for Kimball County: DEREK C. WEIMER, Judge. Affirmed.

Audrey M. Elliott, of Kovarik, Ellison & Mathis, P.C., for appellant.

Leonard G. Tabor for appellee Kyle E.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

I. INTRODUCTION

Kyle E. and Amanda W. are the biological parents of two minor children, Savannah E. and Catilyn E. In 2005, Kyle and Amanda agreed that Amanda would have primary physical custody of Savannah and Catilyn and that Kyle would have liberal visitation time. This custodial arrangement remained intact until January 2011, when Kyle filed a motion to modify custody of the children. In the motion, he asked that he be awarded primary physical custody. After a hearing, the district court granted Kyle's request. Amanda appeals from the court's decision here.

On appeal, Amanda alleges that the district court erred in granting Kyle's motion to modify custody, because Kyle failed to prove that a material change of circumstances had occurred since 2005 when the parties agreed that Amanda would have primary physical custody of the children and because Kyle failed to demonstrate that a change in custody was in the

girls' best interests. Upon our de novo review of the record, we affirm.

II. BACKGROUND

These proceedings involve Savannah, born in March 2003, and Catilyn, born in December 2004. Amanda is the children's biological mother, and Kyle is their biological father. Amanda and Kyle have never been married to each other.

1. Procedural History

In July 2005, Amanda and Kyle entered into a stipulation concerning custody of Savannah and Catilyn. As a part of the stipulation, they agreed that Amanda would maintain physical custody of the girls and that Kyle would be awarded liberal visitation time. On July 19, the district court entered an order reflecting the terms of the parties' stipulation.

On January 20, 2011, more than 5 years after the parties agreed that Amanda would maintain physical custody of the girls, Kyle filed a motion to modify that custody arrangement. In the motion, he alleged that a material change of circumstances had occurred since he entered into the custody agreement with Amanda. Specifically, he alleged that both parties had married, that Amanda had a baby with her new husband, that Savannah occasionally takes care of Catilyn and Amanda's new baby, that Amanda spends a lot of time in the bars, that the girls and their clothing are usually dirty when they come to visit Kyle, that the girls are occasionally late for school, and that Amanda has been neglecting the children and is no longer a fit and proper parent to have permanent custody of the children. In addition, he alleged that in December 2010, Amanda was arrested for domestic assault. Kyle requested that he be awarded physical custody of the girls, that Amanda be ordered to pay child support, that the court establish a visitation schedule, and that he be granted permission to move the children to the State of Wyoming.

On February 17, 2011, Amanda filed an answer and a cross-complaint to modify. Amanda denied that there had been any material change of circumstances warranting a modification of the original custody arrangement. However, she alleged that

there had been a material change of circumstances warranting a modification of Kyle's child support obligation.

While the modification action was pending in the district court, Amanda informed Kyle that she was planning on moving from Nebraska to Colorado in order to assist an ailing relative. Prior to informing Kyle about her plans, Amanda had removed the children from their school and was preparing for the move. Kyle immediately filed an ex parte motion requesting temporary custody of the girls so that Amanda could not remove them from Nebraska. The district court granted Kyle's request on February 13, 2012, and awarded him immediate, temporary custody of Savannah and Catilyn. Kyle moved the children to his home in Pine Bluffs, Wyoming, and enrolled them in school.

One week later, on February 21, 2012, a hearing was held to determine whether Kyle should maintain temporary custody of the girls pending the modification hearing. The evidence presented at the hearing revealed that although Amanda had planned on moving to Colorado, she had since decided to remain in Nebraska. In addition, there was evidence that Amanda did not know that she could not move with the children outside of Nebraska and that she did not intend the move to affect Kyle's visitation in any way. The evidence revealed that if Amanda moved to Colorado, she would still live only approximately 1½ hours away from Kyle's home in Wyoming.

Because Amanda had decided not to move out of the state, the court returned the girls to her custody pending the modification hearing. The court ordered Kyle to return the girls to Amanda and ordered Amanda to enroll them again in school.

In September 2012, a hearing was held on Kyle's request to modify custody and on Amanda's request to modify Kyle's child support obligation. At the hearing, Amanda and Kyle both presented evidence about their relationships with Savannah and Catilyn and about their current circumstances.

2. Amanda's Evidence

Amanda testified that at the time of the modification hearing, she was living in a home in Dix, Nebraska, with Savannah

and Catilyn and her youngest daughter, who was approximately 3 years old. Amanda was working part time as a nurse's aide for a disabled individual, and she was enrolled at a community college. However, she had not yet started attending any classes, because she was waiting for funding.

Amanda had married Robert G. in March 2009. They were still married at the time of the modification hearing, but Amanda testified that they were separated and planned to get a divorce.

Amanda and Robert's marriage has been tumultuous. Both Amanda and Robert have requested protection orders against each other. Robert filed for protection orders against Amanda in January and April 2011. Robert alleged that Amanda was physically violent with him and threatened to cause him harm. Amanda was arrested for domestic assault in April 2011 as a result of Robert's assertions. Amanda filed for a protection order against Robert in November 2010 or 2011. During her testimony at the modification hearing, she indicated that she requested the protection order because she was "physically scared." She testified that even though Robert has never caused her to suffer any physical injuries, she has felt threatened by him because he is bigger and stronger and sometimes things get "out of . . . control."

Robert testified that none of the incidents between him and Amanda occurred "in front of the kids." He testified that he could not specifically remember if the girls were present in the house during the incidents or if they were with Amanda's mother, but he did testify that if the children were at home, they would have been upstairs in their bedrooms. There was no other evidence to indicate that the girls were ever physically present during the incidents between Amanda and Robert or that they had any knowledge of what had occurred during these incidents.

Amanda has a criminal history. Since 2005, when the parties entered into the original custody agreement, Amanda has been convicted of domestic assault, possession of marijuana, failure to appear, and issuing a bad check. She has also been convicted of disturbing the peace on two separate occasions. During the pendency of the modification proceedings, in August 2012,

Amanda was arrested for driving under the influence. In the days prior to the modification hearing, she pled no contest to that charge and her license was suspended. Savannah and Catilyn were not with Amanda on the day of that incident. Amanda testified that on two occasions, she spent a few nights in jail as a result of being arrested. However, there was no evidence that she had spent any significant time in jail away from the children.

Amanda has moved multiple times since the entry of the 2005 custody agreement. She testified that she has lived in approximately seven different residences since 2005, including her parents' house and her uncle's house while he was residing outside of the country.

Amanda has had multiple jobs since 2005. She has worked at a few restaurants and bars, a daycare, various professional offices, and other, various "odd jobs." She has not worked at any one place for a significant period of time. Amanda testified that she considers herself to be a stay-at-home mother. She indicated that she is willing to work if she needs to, but that it is important to her to be available for her children. Amanda also admitted that recently, she has struggled to find any employment as a result of her criminal history.

Amanda presented evidence to demonstrate that she is very involved in her children's lives. She testified that Savannah and Catilyn are very active in Girl Scouts. In addition, they participate in soccer, softball, and swimming. Savannah also sings in a musical group. Amanda testified that both Savannah and Catilyn are good students who are thriving in school. She indicated that she regularly communicates with the girls' teachers about how they are doing. She testified that they are both healthy and happy girls.

In addition, Amanda testified that she does her best to communicate and work with Kyle concerning his visitation time and that she is willing to maintain such efforts if she continues to have physical custody of the girls. In fact, there was evidence that Amanda has permitted the girls to spend a significant amount of additional time with Kyle during the summer months and that she has told the girls that when they want to see their father, they just have to tell her.

3. Kyle's Evidence

At the time of the modification hearing, Kyle was living with his wife and their infant son. Kyle and his wife married in December 2010 and have resided in Pine Bluffs since that time. Kyle testified that he and his wife plan on remaining in Pine Bluffs.

Kyle currently works as a wind turbine technician and has been with the same company for 4½ years. He indicated that he plans on keeping his same employment for the foreseeable future.

Kyle testified that when he has visitation with his daughters, they engage in a variety of family activities, including attending various high school sporting events, watching movies, playing outside, playing video games, and spending time with Kyle's extended family. In addition, Kyle and his wife have taken the girls to do special activities in the Denver, Colorado, area, including going to a Denver zoo, viewing a dinosaur exhibit, and playing at a water park. Kyle testified that Savannah and Catilyn are happy and well-behaved children.

Kyle did present evidence that during the 2011-12 school year, the girls were absent from school approximately 10 days and were tardy approximately 6 days. However, there was no evidence to explain why the girls were absent or tardy from school, nor was there any evidence that such absences were unusual or excessive.

Kyle believes it is in Savannah's and Catilyn's best interests to live with him on a full-time basis. He testified that he can provide the girls with everything they need because he has a stable lifestyle and because both he and his wife have full-time, steady jobs. To the contrary, Kyle believes that Amanda is an unfit mother because she does not have steady employment and is unable to support herself and the girls. Further, Kyle testified that he is concerned that Amanda does not spend much time with the girls and that she does not "take as good of care of them as she used to." Kyle is also concerned that Amanda is using marijuana, although he admitted that he did not have any personal knowledge concerning Amanda's drug use.

Kyle told the district court that if he is awarded physical custody of Savannah and Catilyn, he is willing to be flexible with Amanda in permitting her to see the girls often. He also testified that he does not speak negatively about Amanda in front of the children. However, during cross-examination, Kyle admitted that he told the girls that Amanda was "on drugs."

4. District Court Order

After the modification hearing, the district court entered a detailed order granting Kyle's request to modify the original custody arrangement such that he be awarded primary physical custody of Savannah and Catilyn. The court conducted a three-part analysis: It first considered whether there had been a material change of circumstances since the 2005 custody agreement, it then considered whether the best interests of the children required modification of custody, and it lastly considered whether relocation of the children from Nebraska to Wyoming should be ordered.

The court first found that there had been a material change in circumstances since the 2005 custody agreement. Specifically, the court indicated:

> The juxtaposition of the two lives of the [parties] establishes [such a] change. [Amanda's] life has been marked by changes in residence, changes in employment, criminal charges and convictions, and marital difficulties. By contrast, [Kyle's] life is marked by stability: in residence, in relationships, in employment. The minor children in this case have been moved at least seven times since the parties separated. They have been moved to three different school districts . . . . This is sufficient evidence of a material change of circumstances.

The court next found that "it would be in the best interests of the minor children that custody be modified." In reaching this conclusion, the court analyzed the various statutory and case law factors concerning best interests. See, Neb. Rev. Stat. § 43-2923(1) (Cum. Supp. 2012); Neb. Rev. Stat. § 42-364(2) (Cum. Supp. 2012); *Klimek v. Klimek*, 18 Neb. App. 82, 775

N.W.2d 444 (2009). The court found that both parents enjoy a positive and healthy relationship with the children; that they are typical, healthy, and well-adjusted children and they do well in school; that there has been no abuse between the parents or involving the children (although the court noted the domestic assault allegations between Amanda and her husband); that the other familial relationships would not be detrimentally impacted by a change of custody, because the children would not be going far away; and that both parties have the capacity to provide for the children's physical care and satisfy their educational needs. The court went on to find that Amanda has had legal problems and relationship difficulties which reflect on her moral fitness, whereas Kyle has a stable and solid marriage; has found and maintained good, long-term employment; and has maintained a residence in one place for an extended period of time. The court found that Kyle offered a more stable environment for the children due to the stability of his home, employment, and relationships as compared to Amanda. The court found that the "attitude and stability of [Amanda's] character is decidedly less stable than that of [Kyle's]."

The court then analyzed the factors regarding relocation from Nebraska to Wyoming as set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). The court found that Kyle had a legitimate reason to relocate the children to Wyoming. In concluding that it was in the best interests of the minor children to relocate to Wyoming, the court found that neither party seems to be "ill-motivated" in his or her position regarding relocation, that the children's quality of life will be improved by relocation, that the parties live only about 40 miles apart, and that the relocation of the children to Wyoming would not detrimentally impact Amanda's ability to have meaningful parenting time.

After granting Kyle's request for a modification of custody and awarding him physical custody of Savannah and Catilyn, the district court ordered Amanda to pay Kyle child support in the amount of $50 per month.

Amanda appeals from the district court's order.

III. ASSIGNMENTS OF ERROR

On appeal, Amanda asserts that the district court erred in modifying the parties' 2005 custody agreement by awarding Kyle sole physical custody of Savannah and Catilyn. In addition, Amanda alleges that if we reverse the district court's decision to modify custody, we should also reverse the court's decision concerning the parties' child support obligations.

IV. ANALYSIS

1. Standard of Review

[1] 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 *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

[2] 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. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

[4] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Keig v. Keig*, 20 Neb. App. 362, 826 N.W.2d 879 (2012).

2. Modification of Custody

On appeal, Amanda argues that the court erred in modifying the custodial arrangement by awarding Kyle sole physical custody of Savannah and Catilyn. We begin our analysis with a discussion of the procedural posture of this case. This case presents an unusual factual situation wherein the noncustodial parent is seeking a modification of custody and at

the same time is seeking permission to remove the children from the state. We have not found any reported cases, nor have the parties directed us to any, with a similar factual situation. Generally, removal cases present to us when a custodial parent seeks to move with the children out of state. See, e.g., *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008); *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007).

In *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000), the parents shared joint legal and physical custody of the children and the mother sought permission to modify the decree by awarding her sole custody of the children and granting her permission to move them to another state. The Nebraska Supreme Court enunciated a two-part analysis in which it required that the parent seeking modification first prove a material change in circumstances affecting the best interests of a child by evidence of a legitimate reason to leave the state, together with an expressed intention to do so. Once the party seeking modification has met this threshold burden, the separate analyses of whether the custody should be modified and whether removal should be permitted become intertwined.

[5] In the case of a noncustodial parent seeking a modification of custody and removal from the jurisdiction, we conclude that the approach utilized by the district court in this action was appropriate. We hold that in cases where a noncustodial parent is seeking sole custody of a minor child while simultaneously seeking to remove the child from the jurisdiction, a court should first consider whether a material change in circumstances has occurred and, if so, whether a change in custody is in the child's best interests. If this burden is met, then the court must make a determination of whether removal from the jurisdiction is appropriate.

(a) Material Change in Circumstances

Amanda asserts that the district court erred in concluding that there has been a material change in circumstances since the entry of the 2005 custody agreement. Upon our de novo

review of the record, we conclude that Amanda's assertion is without merit.

[6,7] Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). The party seeking modification of child custody bears the burden of showing a material change in circumstances. See *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

The Nebraska Supreme Court has previously explained the type of situation which constitutes a material change in circumstances. In *Hoschar v. Hoschar*, 220 Neb. 913, 915, 374 N.W.2d 64, 66 (1985) (*disapproved on other grounds, Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989)), the court explained:

> By this rule we do not mean that every change, no matter how insignificant, justifies a change in custody. Rather, by material change of circumstances we mean that the evidence must show that something has occurred, which if the trial court had been aware of the existence of these circumstances initially, the trial court in the best interests of the children would have granted their custody to the other parent. "'A decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the children.'" *Youngberg v. Youngberg*, 193 Neb. 394, 396, 227 N.W.2d 396, 397 (1975).
>
> We do not mean to say that the paramount question is not the best interests of the children, for, indeed, it is. We do mean to say that in response to a motion to modify a custody decree, before the trial court considers what is in the best interests of the children, the court must first find that there has been a material change of circumstances which occurred after the entry of the earlier order granting custody and which affects the best interests of the children.

In its order modifying the original custody agreement, the district court found that a material change of circumstances had occurred since 2005, because Kyle has demonstrated stability and security in his lifestyle and Amanda has been unable to demonstrate the same level of stability and security in her lifestyle. Specifically, the court found that since 2005, Kyle has had a stable home, has established a stable relationship, and has secured stable employment. In contrast, since 2005, Amanda has changed residences and employment frequently, is in the midst of a divorce, and has been convicted of multiple criminal offenses.

Upon our de novo review of the record, we conclude that the district court did not abuse its discretion in finding a material change of circumstances which affected the best interests of the children.

[8] The evidence presented at the modification hearing revealed that in the approximately 7 years since the original custody agreement, Amanda has changed residences and employment frequently. At the time of trial, she testified that she is trying to get a job "to please the court's, to please everyone else," but that she feels that a mother should stay home with her children. Amanda admitted that her inability to find stable employment was related to her criminal convictions. In 2011, Amanda was convicted of possession of marijuana, domestic assault, and disturbing the peace. In 2012, in the midst of these proceedings, Amanda was convicted of driving under the influence of alcohol. In addition, Amanda's current marriage has been marked by instability. Amanda has relied upon her husband to help care for the girls; however, Amanda and her husband are currently separated and planning to divorce. At the outset of these proceedings, Amanda attempted to move the children to Colorado despite Kyle's objection. During the school year prior to trial, the girls had numerous unexplained absences and tardies from school while in Amanda's care. We note, however, that there was no evidence these absences and tardies have negatively affected their schoolwork and that the record indicates both girls have done well in school so far. In sum, the evidence concerning Amanda's lifestyle in the last couple of years, and

consequently the lifestyle to which these children are exposed, presents a legitimate concern regarding their custody. See *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004) (in determining whether custody of minor child should be changed, evidence of custodial parent's behavior during year or so before hearing on motion to modify is of more significance than behavior prior to that time).

By contrast, during those same 7 years, Kyle has obtained steady employment and housing and he has demonstrated stability in his marriage. This evidence clearly demonstrates that Kyle currently has a more stable lifestyle than Amanda. Kyle expressed concern that Amanda is not able to support herself and the girls, and he testified that Amanda does not take care of the girls as much or as well as she did in 2005. Kyle once smelled marijuana in Amanda's residence when picking up the girls. Kyle indicated that the girls sometimes come to his home for visitation in dirty clothes and not having showered for some time.

We conclude that the totality of the evidence amounts to a material change in circumstances which has affected the children's best interests. In other words, had the district court been presented with this set of facts in 2005 in the context of a contested custody dispute, it would likely have been led to award custody of the children to Kyle.

(b) Best Interests

The next inquiry is whether the best interests of these children compel a change of custody.

[9] Section 43-2923(6) provides:

> In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of . . . :
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological

> age, when such desires and wishes are based on sound reasoning; [and]
>
> (c) The general health, welfare, and social behavior of the minor child.

In addition to these factors, the Nebraska Supreme Court has held that in determining a child's best interests, courts

> "'may consider factors such as general considerations of moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; parental capacity to provide physical care and satisfy educational needs of the child; the child's preferential desire regarding custody if the child is of sufficient age of comprehension regardless of chronological age, and when such child's preference for custody is based on sound reasons; and the general health, welfare, and social behavior of the child.'"

Davidson v. Davidson, 254 Neb. 357, 368, 576 N.W.2d 779, 785 (1998).

Based upon our de novo review of the record, we agree that the best interests of the children will be served by being placed in Kyle's custody. We acknowledge that this is a close case in that the girls are "typical, healthy, well-adjusted children" and that both Amanda and Kyle "enjoy a positive and healthy relationship with the minor children." Nevertheless, Kyle is able to offer a more stable environment for the children by virtue of his stable and solid housing, employment, and marriage, when compared to Amanda's past conduct and current living situation.

We conclude that the record supports a finding that a material change in circumstances has occurred such that it is in the best interests of the children to change their custody from Amanda to Kyle. In reaching this conclusion, we note that the 2005 order granting Amanda custody was based upon the

parties' stipulation, and there was no explicit finding by the district court that such a custody award was in the best interests of the children. We are also mindful of the fact that the trial judge heard and observed the witnesses and was in a better position to determine the credibility of the parties.

In determining that the trial court did not abuse its discretion in modifying custody of the children, we do not find that Amanda is an unfit parent. To the contrary, the evidence shows that Amanda is a loving parent and that the girls have generally been thriving in her care. Nevertheless, the record supports the district court's determination that their best interests would be better served in Kyle's custody.

(c) Removal From Jurisdiction

Although Amanda did not assign error separately to the portion of the order granting Kyle permission to remove the children from the jurisdiction, for the sake of completeness, we address this issue.

[10] In relocation cases, a parent must first satisfy the court that he or she has a legitimate reason for leaving the state. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). As noted above, this case differs from the typical removal case because Kyle was the noncustodial parent seeking to move the children. It differs further in that Kyle is not "leaving the state," but, rather, he has resided in Pine Bluffs for several years and is seeking permission to relocate the children there. We agree with the district court that Kyle has demonstrated a legitimate reason to relocate the children.

[11] Once the threshold burden of showing a legitimate reason for leaving the state has been met, the court then determines whether removal to another jurisdiction is in a child's best interests, which in turn depends on (1) each parent's motives for seeking or opposing the move, (2) the potential the move holds for enhancing the quality of life for the child and the custodial parent, and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Farnsworth v. Farnsworth, supra*.

(i) Each Parent's Motives

The district court determined that neither party seemed to be "ill-motivated" in his or her position regarding a relocation of the children. We agree.

(ii) Children's Quality of Life

The district court noted its previous findings in support of the conclusion that the children's best interests would be served by a change in custody. The court concluded that the children's quality of life "will be improved by relocation to the State of Wyoming." We agree.

(iii) Impact on Noncustodial Parent

As noted by the district court, this factor is usually of paramount concern when a child is being relocated some distance away from the noncustodial parent. The court found that this was not the issue here, because the parties now live only about 40 miles apart. The court further found that this distance has not affected the current custodial and parenting arrangements and that a change in the custodial arrangements would not detrimentally impact Amanda's ability to have meaningful parenting time. We agree.

(d) Conclusion Regarding Custody

We conclude that the district court did not abuse its discretion in finding that a material change in circumstances had occurred since entry of the 2005 order and in finding that it was in the best interests of the children to modify custody from Amanda to Kyle. We further conclude that there was no abuse of discretion in granting Kyle permission to move the children to Wyoming.

3. Child Support

After the district court awarded Kyle custody of Savannah and Catilyn, it addressed the parties' current financial circumstances and resulting child support obligations. Ultimately, the court imputed to Amanda an average monthly income of $628.33 and found that Kyle earned an average monthly income of $3,196.89. The court then indicated that normally, the court would prepare a "step worksheet" to reflect the parties'

obligations to their other children; however, in this instance, such a calculation was unnecessary because Amanda's obligation as the noncustodial parent "would be set at the minimum level of $50.00 per month regardless of other obligations." The district court then ordered Amanda to pay child support in the amount of $50 per month.

On appeal, Amanda appeals from the district court's order concerning child support. Essentially, Amanda argues that the court erred in ordering her to pay child support because the court erred in awarding Kyle custody of the children. Given our resolution of Amanda's first assignment of error regarding custody of the children, we find that the district court did not err in determining Amanda's child support obligation.

V. CONCLUSION

Upon our de novo review of the record, we find that the district court did not abuse its discretion in finding that a material change of circumstances had occurred since the parties' 2005 custody agreement, which warranted a change in the custody of the minor children, and in granting Kyle permission to move the children to Wyoming. Accordingly, we affirm the order of the district court granting custody of the children to Kyle. We also affirm the court's order requiring Amanda to pay $50 per month in child support to Kyle.

AFFIRMED.

IRWIN, Judge, dissenting.

I respectfully disagree with the conclusion of the majority that a material change in circumstances has occurred since the parties' 2005 custody agreement which affects the best interests of the children and which warrants a change in custody. Contrary to the conclusion of the majority, there is no evidence in the record to establish that the recent changes in the parties' circumstances have affected the children in any way. Instead, the evidence presented by both parties reveals that the children are happy and healthy and thriving in Amanda's care. For this reason, I would reverse the decision of the district court which modified the original custody agreement and awarded Kyle primary physical custody of the children.

The majority concentrates its analysis of whether there has been a material change of circumstances exclusively on the changes that have occurred in the parties' circumstances since the original custody agreement was filed. The majority concludes that the evidence demonstrates that in the 7 years since the original custody agreement, "Kyle has obtained steady employment and housing and he has demonstrated stability in his marriage," while during this same time period, "Amanda has changed residences and employment frequently, is in the midst of a divorce, and has been convicted of multiple criminal offenses." Based solely on these changes in the parties' lives, the majority finds that there has been a material change in circumstances warranting a change in custody.

I agree that the evidence presented at the modification hearing establishes that there have been changes in both Amanda's and Kyle's circumstances since the original custody agreement. However, I do not agree that an analysis of whether there has been a material change in circumstances warranting a change in custody should end with a finding that the parties have experienced changes in their lives since the original custody order. It is clear from our case law that not every change in the parties' circumstances justifies a change in custody. See *Youngberg v. Youngberg*, 193 Neb. 394, 227 N.W.2d 396 (1975). Instead, in order to find that a *material* change in circumstances has occurred, the changes in the parties' circumstances must be significant enough to have affected the best interests of the children involved. See *id*.

Because a material change in circumstances means a change in circumstances which has affected the best interests of the children, a complete analysis of whether such a change in circumstances has occurred in this case requires a discussion of both the changes that have occurred in Amanda's and Kyle's lives and whether the children have been affected by those changes. Here, the evidence presented at the modification hearing revealed that despite the changes in Amanda's and Kyle's lives, the children are flourishing under the current custody arrangement.

Under the current custody arrangement, Amanda has been the children's primary caregiver for the last 7 years. During that time, the children have thrived. Both Amanda and Kyle agree that Savannah and Catilyn are happy and healthy children who do well in school and who have an active life. At the modification hearing, Kyle testified that Savannah and Catilyn are basically "happy young girls." Similarly, the district court found that the evidence revealed that both Amanda and Kyle "enjoy a positive and healthy relationship with the minor children" and that the children are "typical, healthy, well-adjusted children." The majority does not dispute any of these factual findings.

There was no evidence presented at the modification hearing to establish that Amanda's current lifestyle has affected the girls in any way. There was no evidence that the girls have been negatively affected by moving frequently or by Amanda's marital problems. There was no evidence that the girls witnessed any of the instances of domestic strife between Amanda and her current husband or that they were aware of Amanda's criminal convictions. In fact, the only evidence presented to demonstrate that the girls knew anything about Amanda's recent struggles was Kyle's testimony that he had informed the girls that Amanda was "on drugs." And, Kyle admitted that he had no actual information about Amanda's drug use.

While I can understand the majority's concerns with regard to the evidence of Amanda's struggles and life choices, I cannot disregard the very clear definition of a material change in circumstances which has been stated time and time again in our case law. A material change in circumstances is a change which has affected the best interests of the children involved. Despite the changes in the lives of the parties, Savannah and Catilyn have thrived in Amanda's custody. Kyle did not present any evidence to demonstrate otherwise. Accordingly, I must conclude that Kyle failed to establish that there has been a material change in circumstances since 2005 which would warrant a change in custody. Although Kyle established that the parties' circumstances have changed, he did not establish that those changes have affected Savannah and Catilyn.

Accordingly, I would reverse the decision of the district court which modified custody by awarding Kyle primary physical custody of the children.

IN RE ESTATE OF MASON D. ROBB, DECEASED.
LINDA HAHN AND SHAWN EICHMAN, APPELLEES, V. THEODORE J. ROBB, PERSONAL REPRESENTATIVE AND TRUSTEE, APPELLANT.

839 N.W.2d 368

Filed October 22, 2013. No. A-12-1002.

1. **Decedents' Estates: Trusts: Appeal and Error.** In trust administration and probate cases, an appellate court uses an "issue-specific approach" to determine the appropriate standard of review.
2. **Decedents' Estates: Trusts: Equity: Appeal and Error.** Both probate and trust administration matters are reviewed for error appearing on the record, absent an equity question.
3. ____: ____: ____: ____. Both probate and trust administration matters are reviewed de novo, where an equity question is presented.
4. ____: ____: ____: ____. The removal of a trustee is a question of equity. Accordingly, in a trust proceeding, an appellate court reviews de novo the question of whether a trustee was properly removed.
5. **Decedents' Estates: Appeal and Error.** The removal of a personal representative is not an equity question. The removal of a personal representative is reviewed for error appearing on the record.
6. **Decedents' Estates: Executors and Administrators: Appeal and Error.** A trial court's decision whether to appoint a special administrator is not a question of equity. Appointment of a special administrator is reviewed for error appearing on the record.
7. **Decedents' Estates: Executors and Administrators.** When an executor has a personal interest in the administration of an estate and in the disposition of the estate property, and when the circumstances disclose that those interests prevent him from performing his duties in an impartial manner, he should be removed.
8. **Trusts.** A trustee commits a breach of trust if he violates any of the duties owed to beneficiaries.
9. ____. A trustee has the duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code.
10. ____. Transactions involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal

interests are voidable unless they are authorized, are approved, or were entered into before the trustee contemplated becoming a trustee.

11. **Decedents' Estates: Executors and Administrators.** A trial court has the authority to appoint a special administrator under Neb. Rev. Stat. § 30-2457 (Reissue 2008).
12. ____: ____. After a special administrator is appointed, the administrator has the same powers as a personal representative, except the power is limited to the duties prescribed in the trial court's order.

Appeal from the County Court for Hall County: ARTHUR S. WETZEL, Judge. Affirmed.

David C. Huston, of Huston & Higgins, for appellant.

Ronald S. Depue, of Shamberg, Wolf, McDermott & Depue, for appellees.

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Theodore J. Robb appeals the order of the county court for Hall County removing him as the personal representative of his deceased father's estate and as the trustee of his father's inter vivos trust. The issue raised is whether the trial court erred in determining that it was in the best interests of the estate and the trust to remove Theodore from his fiduciary positions. Because Theodore's individual interests conflicted with the interests of the estate and the trust, we affirm the trial court's decision to remove him from his fiduciary positions.

II. BACKGROUND

Mason D. Robb passed away in March 2010. Pursuant to his last will and testament and his trust documents, his son, Theodore, became the personal representative of his estate and the trustee to the inter vivos Mason D. Robb Revocable Living Trust (the Trust). The Trust included three pieces of real estate: the Tri Street house, the Hall County farm, and the Sherman County pastures.

The Trust declared that the trustee should hold and use the Trust property for two purposes: to pay administrative costs

and the settlor's debts and for the benefit of the Mason D. Robb QTIP Family Trust (the Family Trust). The Trust directed the trustee to separate the funds in the Family Trust into two equal shares: one for the benefit of Theodore and one for the benefit of Theodore's sister, Linda Hahn (Linda). The share created for Theodore was to be delivered to him outright, and the share created for Linda was to be held in trust for Linda's benefit. The Family Trust stated that Linda should receive income from her share of the Family Trust periodically throughout her lifetime.

In September 2011, Linda and her son, Shawn Eichman (Shawn), filed a motion to remove Theodore as the personal representative. In December, Linda and Shawn filed an additional motion to remove Theodore as the trustee. Linda and Shawn also filed a petition to appoint a special administrator to administer the estate and the Trust in the event that Theodore was not removed. The county court of Hall County heard the matter in September 2012.

1. Theodore's Actions as Personal Representative

The evidence presented at trial indicates that Theodore received a $50,000 "death-bed transfer" from his father. Theodore admitted receipt of the payment and agreed that the payment should be treated as an estate asset, but he stated that he had not deposited it in the estate account at the time of trial. Theodore also failed to include it in either the inventory or the amended inventory filed with the court.

The evidence also reveals that Theodore sold several items of personal property belonging to his father, in the amount of approximately $900, but that he had not included that amount in any accounting filed with the court as of the date of the hearing. Theodore had, however, deposited the funds into the estate account.

Theodore was also untimely in his filing of his original inventory and accounting. Despite a court order, Theodore failed to file an amended inventory or an accounting that included funds and assets through June 15, 2012; rather, his amended filings were current through only 2011.

2. Theodore's Management as Trustee

The evidence presented at trial showed that after becoming the trustee, Theodore undertook efforts to improve the Trust properties. He compensated himself and others he hired for their efforts in improving the real property. At times, he compensated himself by using the property, determining a rental price to charge himself for that use, and offsetting the rent he owed the Trust against the compensation the Trust allegedly owed him for improving the property. The efforts to improve the three properties were substantial.

Theodore claimed the Trust owed him $7,461.26 for improving the Tri Street house. Some of his expenses for the property included painting the house and paying the utilities and taxes. After improving the house, Theodore began renting it to a third party in October 2011 for $650 per month. At the time of trial, Theodore had received $7,800 in rent from the property but had deposited only 3 months of rent ($1,950) into the Trust account. He also credited 3 months of rent ($1,950) against his costs for improving the property. After crediting $1,950 against the $7,461.26 he claimed he was owed, Theodore determined that the Trust owed him $5,511. At the time of trial, 6 months of rent from the Tri Street property were not accounted for in Theodore's accounting.

Theodore claims the Trust owed him $41,675 for his work improving the Hall County farm and $37,175.54 for his work improving the Sherman County pastures. The Hall County farm had fallen into a state of disrepair before Theodore began improving it. Theodore hired laborers to help remove "junk" from the farm, including tires and overgrown trees. The Sherman County pastures required pressure spraying, installation of water lines, and other labor to make the land suitable for rental.

Theodore completed a large portion of the work on these properties himself, but he also hired others to help. Robert Boyd testified that he worked for Theodore improving both properties. According to Boyd, Theodore paid him a flat rate of $2,500 per month, either in cash or by check written on Theodore's personal checking account. Boyd testified that

Theodore hired other men to work as well, but he did not provide details. Boyd also testified that he sometimes worked on Theodore's property in addition to the Trust property and that his compensation covered work on both properties. Theodore did not issue W-2 or 1099 forms to the workers.

After working to improve the Hall County farm and Sherman County pastures, Theodore generated income from the properties by renting them to himself and crediting the Trust with the rental value. The parties dispute whether Theodore charged the fair market rental values of the properties.

In 2011 and 2012, Theodore rented the Hall County farm and charged himself $29,062 per year, which equates to $200 per acre. He had not paid any rent for 2012 at the time of trial but acknowledged that he did owe that amount to the Trust. He testified that he determined the rental amount of $200 per acre because that is the price another individual paid to rent the property in 2010. Theodore's appraiser placed the annual rental value at $6,700 higher than Theodore was paying. Linda and Shawn's appraiser determined the rental value of the property to be around $43,000, which is well over $10,000 more than Theodore paid. As a result of the litigation surrounding the estate and the Trust, Theodore executed a contract to sell the Hall County farm to an acquaintance for $6,000 per acre, but Linda and Shawn's appraiser determined that the property was worth $10,000 per acre.

Theodore also rented the Sherman County pastures to himself at a price of $6,400 per year. Theodore determined this rent based on the amount he charged someone else to rent one of his pastures. He did not deposit this amount into the Trust account, but, rather, credited that amount to the Trust against the amount he claimed the Trust owed him for his work improving the property. Theodore hired an appraiser, who determined the rental value of the property to be $14,554 per year.

In addition to the real estate, Theodore also received a $50,000 "death-bed transfer" from his father's account. Both parties agree that the money should be deposited into the Trust account, but Theodore had not yet deposited it at the time of trial, 2½ years after his father's death. As of the date of trial,

Theodore claimed the Trust still owed him $112,896.87. As a result, Linda had not yet received any payments from the Family Trust.

3. Trial Court Determination

The court found that Theodore should be removed from his positions as the personal representative and as the trustee, because his actions in commingling his individual funds with the funds and assets of the estate and the Trust caused irreconcilable conflict and could continue to do so. Accordingly, the trial court determined that removing Theodore from his positions as the personal representative and as the trustee was in the best interests of the estate and the Trust.

This timely appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Theodore argues that the county court erred in removing him from his role as the personal representative and as the trustee, because removal was not in the best interests of the estate and the Trust. In the alternative, Theodore argues that the trial court failed to use a less intrusive method, such as appointing a special administrator, to limit Theodore's role as the personal representative and as the trustee.

IV. STANDARD OF REVIEW

[1] In trust administration and probate cases, an appellate court uses an "issue-specific approach" to determine the appropriate standard of review. See *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 198, 794 N.W.2d 700, 710 (2011). Consequently, the applicable standards of review regarding issues arising in probate and trust cases can be enigmatic. Accordingly, we set forth below the applicable standards of review in a slightly unorthodox manner.

1. Probate and Trust Issues Not Involving Equitable Issues

[2] Both probate and trust administration matters are reviewed for error appearing on the record, absent an equity question. See *id*.

2. Probate or Trust Issues Involving Equitable Issues

[3] Both probate or trust administration matters are reviewed de novo, where an equity question is presented. See *id*.

3. Probate and Trust Administration Issues: Equitable or Not

(a) Trust Administration Cases—Removal of Trustee Is Equitable Issue

[4] The removal of a trustee is a question of equity. See *Burnham v. Bennison*, 121 Neb. 291, 236 N.W. 745 (1931). Accordingly, in a trust proceeding, an appellate court reviews de novo the question of whether a trustee was properly removed.

(b) Probate Cases—Removal of Personal Representative Is Not Equitable Issue

[5] The removal of a personal representative is not an equity question. See *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002). The removal of a personal representative is reviewed for error appearing on the record. See *In re Estate of Webb*, 20 Neb. App. 12, 817 N.W.2d 304 (2012).

(c) Probate Cases—Appointment of Special Administrator Is Not Equitable Issue

[6] A trial court's decision whether to appoint a special administrator is not a question of equity. See *In re Estate of Evans*, 20 Neb. App. 602, 827 N.W.2d 314 (2013) (noting that trial court erred in ordering removal of appellant as personal representative rather than making independent determination). Therefore, appointment of a special administrator is reviewed for error appearing on the record.

V. ANALYSIS

1. Removal From Role as Personal Representative

Theodore argues that the trial court erred in removing him as the personal representative. We disagree.

[7] Neb. Rev. Stat. § 30-2454(a) (Reissue 2008) states that a court may remove a personal representative from an estate if "removal would be in the best interests of the estate, or if it is shown that a personal representative . . . has mismanaged the estate or failed to perform any duty pertaining to the office." See, also, *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992). When an executor has a personal interest in the administration of an estate and in the disposition of the estate property, and when the circumstances disclose that those interests prevent him from performing his duties in an impartial manner, he should be removed. See *In re Estate of Marconnit*, 119 Neb. 73, 227 N.W. 147 (1929).

In this case, Theodore failed to impartially perform his duties as the personal representative. In particular, as the personal representative, Theodore was entrusted with the duty to manage and properly account for the property that was part of the estate. The record reveals that Theodore has failed to properly account for estate assets, particularly the $50,000 "deathbed transfer." While Theodore acknowledged that this money should be considered property of the estate, he had not deposited it into the estate's account during the 2½ years between his father's death and the hearing. In addition, Theodore sold items of personal property belonging to his father without notification to the remaining heirs and had not accounted for the income. Furthermore, Theodore did not timely file his original inventory and accounting, nor was it complete. These actions disclose that Theodore's personal interest in the estate prevented him from impartially performing his duties as the personal representative. We agree with the trial court that allowing Theodore to continue as the personal representative was not in the best interests of the estate and that his removal was proper.

2. Removal From Role as Trustee

Theodore argues that the trial court erred in removing him from his role as the trustee. We disagree.

Neb. Rev. Stat. § 30-3862(b) (Reissue 2008) states that the court may remove a trustee if:

> (1) the trustee has committed a serious breach of trust;
>
> (2) lack of cooperation among cotrustees substantially impairs the administration of the trust;
>
> (3) because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
>
> (4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

The language of § 30-3862 is identical to that of Unif. Trust Code § 706, 7C U.L.A. 575 (2006). The comments to § 706 of the Uniform Trust Code are helpful in evaluating whether a trustee has committed a "serious breach of trust." The comment to § 706 provides:

> The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together.

7C U.L.A. at 576. See, also, *In re Charles C. Wells Revocable Trust*, 15 Neb. App. 624, 734 N.W.2d 323 (2007).

[8,9] A trustee commits a breach of trust if he violates any of the duties owed to beneficiaries. See Neb. Rev. Stat. § 30-3890(a) (Reissue 2008). A trustee has the duty to "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code." Neb. Rev. Stat. § 30-3866 (Reissue 2008). The Nebraska Uniform Trust Code, in turn, states that trustees owe the beneficiaries duties that include the duty of loyalty, impartiality, prudent administration, protection of trust property, proper recordkeeping, and informing and reporting.

[10] The duty of loyalty requires a trustee to administer the trust solely in the interests of the beneficiaries. Neb. Rev.

Stat. § 30-3867(a) (Reissue 2008). Transactions involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests are voidable unless they are authorized, are approved, or were entered into before the trustee contemplated becoming a trustee. See § 30-3867(b).

To further help prevent conflicts of interests, Neb. Rev. Stat. § 30-3875 (Reissue 2008) requires trustees to keep adequate records of the trust administration and to keep trust property separate from the trustee's property. Trust property must be designated so that the trust's interest, "to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary." *Id.*

Trustees can run afoul of these requirements when they commingle their personal property with trust property. In *Sherman v. Sherman*, 16 Neb. App. 766, 751 N.W.2d 168 (2008), for example, we found that a trustee's action in leasing land to himself ran afoul to the general prohibitions on self-dealing by a trustee. In that case, the trial court found that the trustee's action in leasing the land to himself for a lower amount than he could have otherwise received violated the trustee's duty to act for the beneficiaries and remaindermen. Accordingly, we determined that the trial court did not clearly err when it removed the trustee. *Id.*

Nebraska law supports the trial court's decision to remove Theodore as the trustee. As discussed above, § 30-3862(b) authorized the trial court to remove Theodore if he committed a serious breach of trust. Theodore committed a breach of trust by commingling his personal property with that of the Trust and by engaging in self-dealing by renting the property to himself at favorable rates. This self-dealing brought his personal interest in a favorable rental price into conflict with Linda's interest in profiting from the property.

Theodore also engaged in self-dealing by compensating himself for improvements he made to the property. He has given the Trust credit against its alleged debt in the form of free rent, but continues to claim that the Trust owes him compensation for his services.

Although his substantial improvements of the Trust property may have been in the best interests of the Trust, when Theodore is collecting compensation from the Trust for his actions, it is not clear that he is acting solely for the benefit of the Trust beneficiaries. Theodore's determination of his own level of compensation places his interests directly at odds with Linda's. His actions are akin to the trustee's actions in *Sherman, supra*, and therefore constitute a serious breach of trust.

In addition to the above, Theodore's failure to account for 6 months of rent from the Tri Street property also raises serious concerns about his ability to effectively fulfill his basic duties as the trustee. Failure to effectively administer the trust constitutes a separate ground for removal under § 30-3862(b).

Theodore's multiple failures to impartially perform the duties owed to the Trust beneficiaries are grounds for his removal. Because of these failures, removal of Theodore as the trustee was proper.

3. Failure to Appoint Special Administrator

In his brief, Theodore argues that even if the trial court had concerns about his ability to administer the estate and the Trust, the trial court should have appointed a special administrator to deal with the sale of the Hall County farm and compensation to Theodore for his improvements to the property rather than removing Theodore as the personal representative and as the trustee.

[11] A trial court has the authority to appoint a special administrator

> in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act.

Neb. Rev. Stat. § 30-2457 (Reissue 2008).

[12] After a special administrator is appointed, the administrator has the same powers as a personal representative, except the power is limited to the duties prescribed in the trial

court's order. *In re Estate of Wilson*, 8 Neb. App. 467, 594 N.W.2d 695 (1999).

Although the trial court had the authority to appoint a special administrator in this case, the trial court also had the discretion to make the determination to simply remove Theodore as the trustee. Section 30-2457 authorizes the trial court to appoint a special administrator to act in specific, limited situations where the general personal representative cannot properly fulfill his duty. The problem with appointing a special administrator in this case, however, is that the conflict of interest between Theodore and the duties of the personal representative and the trustee was so substantial that the limited order envisioned in *In re Estate of Wilson, supra*, would not remedy the problem.

Theodore argues that the trial court could have issued an order appointing a special administrator for the limited purposes of selling one property and compensating Theodore for his improvements to the property. Appointing a special administrator for these purposes would not remedy all of the issues the court considered in reaching its conclusion that it was in the best interests of the estate and the Trust that Theodore be removed.

We also note that if Theodore had remained the personal representative and the trustee, conflict likely would continue as a result of Theodore's personally repairing or further improving the Trust property. With a third-party personal representative and trustee, Theodore can continue to work to improve the property and be fairly compensated for those efforts if the personal representative and the trustee determine that doing so is in the best interests of the estate and the Trust.

Because Theodore committed a serious breach of trust, the trial court had the authority to remove him as the personal representative and as the trustee. In this case, where Theodore's conflict of interest permeated almost every aspect of his management of the estate and the Trust, we cannot find error in the trial court's decision to exercise its authority to remove Theodore as the personal representative and as the trustee rather than appointing a special administrator.

VI. CONCLUSION

The trial court did not err in removing Theodore from his positions as the personal representative and as the trustee, because his actions reveal that his interests irreconcilably conflicted with the interests of the estate and the Trust. Accordingly, the decision of the trial court is affirmed.

AFFIRMED.

IN RE INTEREST OF SARAH H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ALICIA F., APPELLANT, AND BRIAN H., INTERVENOR-APPELLEE.

838 N.W.2d 389

Filed October 22, 2013. No. A-12-1197.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 2008 & Cum. Supp. 2012), 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.
2. **Juvenile Courts: Appeal and Error.** In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's rulings.
3. **Juvenile Courts: Jurisdiction: Words and Phrases.** The Nebraska Juvenile Code defines "parties" as the juvenile over which the juvenile court has jurisdiction under Neb. Rev. Stat. § 43-247 (Reissue 2008) and his or her parent, guardian, or custodian.
4. **Interventions: Pleadings.** Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.
5. **Interventions.** Neb. Rev. Stat. § 25-328 (Reissue 2008) provides a right to intervene before trial has commenced.
6. **Interventions: Time.** A right to intervene should be asserted within a reasonable time, and the applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit.

7. **Judgments: Interventions: Trial: Time.** An intervenor may not unreasonably delay the original parties, unduly retard the trial of the case, or render nugatory a judgment without a compelling cause, and persons who otherwise would be granted leave to intervene are denied consideration where they sit by and allow litigation to proceed without timely requesting leave to enter the case.
8. **Interventions.** The language of Neb. Rev. Stat. § 25-328 (Reissue 2008) does not absolutely bar an otherwise entitled applicant from seeking to intervene after trial has commenced.
9. **Interventions: Juvenile Courts.** Intervention may be proper after the adjudication in a juvenile proceeding.
10. **Paternity: Presumptions.** In Nebraska, a child born during wedlock is presumed to be the legitimate offspring of the married parties.
11. **Paternity: Presumptions: Proof.** The presumption of legitimacy is not an irrebuttable presumption, and it may be rebutted by clear, satisfactory, and convincing evidence.
12. ____: ____: ____. Blood tests may be used to rebut the presumption that the husband is the biological father of children born during wedlock.
13. **Divorce: Paternity: Child Support: Res Judicata.** When a dissolution decree includes an order of child support, the issue of paternity is considered adjudicated and the issue of paternity cannot be relitigated between the parties because of the doctrine of res judicata, absent certain limited circumstances.
14. **Paternity: Child Support.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) provides a means to set aside an otherwise final legal determination of paternity, including an obligation to pay child support.
15. **Paternity: Evidence: Res Judicata.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father.
16. **Parent and Child.** In the absence of a biological or adoptive relationship between a husband and his wife's child, certain rights and responsibilities may arise where a husband elects to stand in loco parentis to his wife's child.
17. **Parent and Child: Intent: Proof: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation.
18. **Parent and Child.** It is a husband's desire to remain in an in loco parentis relationship with his wife's child that gives rise to the rights and corresponding responsibilities usually reserved for natural or adoptive parents.
19. ____. Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby.

Appeal from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Affirmed.

Joseph E. Dalton, of Dalton Law Office, P.C., L.L.O., for appellant.

Michael A. Greenlee, of Law Office of Michael Greenlee, for intervenor-appellee.

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

IRWIN, Judge.

I. INTRODUCTION

Alicia F. appeals an order of the separate juvenile court of Lancaster County, Nebraska, in which the juvenile court granted a petition to intervene filed by Brian H. and ordered placement of a juvenile, Sarah H., with Brian. We find no merit to Alicia's assertions on appeal, and we affirm.

II. BACKGROUND

Alicia and Brian began dating in September 1994 and were married in June 1995. Sarah was born in July 1995, and Brian was listed as Sarah's father on her birth certificate. Alicia and Brian were divorced in 1997.

Brian was ordered to pay child support to Alicia, and he was granted visitation rights with Sarah. The record suggests that Alicia and Brian had disagreements concerning visitation on more than one occasion, and the two participated in mediation on at least two occasions.

Sometime during mediation in 2004 or 2005, Alicia revealed that Brian was not Sarah's biological father. It appears that Brian continued to be obligated to pay child support and continued to enjoy visitation rights. During a second mediation, in 2009, Alicia again raised the issue of paternity, and Brian agreed to participate in voluntary genetic testing. The voluntary genetic testing revealed a 0-percent possibility that Brian was Sarah's biological father. At that point in time, Sarah was 14 years of age.

The record presented to us is conflicting concerning Brian's potential knowledge that he was not Sarah's biological father. The Department of Health and Human Services (DHHS) report filed in this case indicates that Alicia had been in a "bad

relationship" prior to her dating Brian, that she had told Brian she had been raped, that Brian "could tell that Alicia was pregnant from the beginning," and that "he always knew" she was pregnant. The DHHS report, however, also indicates that Brian told the caseworker that he had "always [been] under the impression that Sarah was his daughter." Brian also testified that Alicia had always held out that Brian was Sarah's biological father until she first raised the issue in September 2010, approximately 13 years after the parties' marriage was dissolved.

In January 2011, the district court that had jurisdiction over Alicia and Brian's marital dissolution entered a temporary order suspending Brian's child support obligation and parenting time with Sarah. The temporary order was specifically captioned as "temporary" and was entered pending a scheduled trial to be held later in January. The record presented to us does not indicate that any further action ever occurred in the district court, and there is no evidence to indicate that any parental rights Brian may have possessed were ever formally terminated or relinquished.

Brian testified that after the temporary order was entered, he did not have "any physical contact" with Sarah until July 2012, but that he did continue to maintain verbal contact with her.

In July 2012, the State filed a petition in the juvenile court, alleging that Sarah and three other juveniles were within the jurisdiction of the court because of the fault or habits of Alicia and her husband, Frederick F. The State alleged that Frederick had engaged in sexual touching of Sarah and that all four juveniles were in danger. The State also filed a motion for emergency custody, alleging that all four juveniles were seriously endangered. The court entered an ex parte order granting temporary custody of all four children to DHHS. At that point in time, Sarah was 17 years of age.

The record presented to us on appeal includes two different placement orders, both file stamped on the same date, which appear to conflict concerning placement of the four juveniles. One order, dated 4 days before the other, suggests that the other

three juveniles were being placed with Alicia and Frederick; the other order, however, suggests that all four juveniles were to be placed in out-of-home placements. In any event, DHHS placed Sarah in Brian's home.

The State filed an amended petition concerning Sarah, in which the State amended its assertions to indicate that Sarah was within the jurisdiction of the juvenile court through no fault of Alicia and Frederick. In the amended petition, the State indicated that the allegations that Frederick had engaged in sexual touching could not be proven.

In September 2012, an adjudication hearing was held and Alicia and Frederick entered no contest pleas to the assertion that Sarah was within the jurisdiction of the juvenile court. The adjudication order entered by the juvenile court indicates that Brian appeared at the adjudication hearing. The adjudication order indicated that a disposition hearing would be held on November 6.

On November 1, 2012, Brian filed a petition to intervene in the juvenile court proceedings. Brian alleged that he was Sarah's father, that his name appeared on her birth certificate, that she was born during Brian's marriage to Alicia, that he had a fundamental interest in the care and raising of Sarah, and that there had been no allegations made concerning himself.

The juvenile court conducted a hearing at which it considered both Brian's petition to intervene and the appropriate placement and disposition for Sarah. Concerning the petition to intervene, Brian testified that Sarah was born during Brian's marriage to Alicia, that his name appears on Sarah's birth certificate, that he parented Sarah and had a lasting relationship with her, and that Sarah was, at that time, placed in his home. He acknowledged that the voluntary genetic testing had demonstrated he was not Sarah's biological father and that a temporary order had been entered by the district court temporarily suspending his obligation to pay support and his rights to visitation, but he also testified that he had maintained verbal contact with Sarah since that temporary order was entered. The court sustained the petition to intervene, finding

that Brian had acted in the role of father to Sarah for a significant part of her life.

Concerning the appropriate placement and disposition for Sarah, the State presented evidence which included a report and live testimony from a DHHS caseworker and a report from a guardian ad litem. The caseworker testified that the State was not spending any money on Sarah's placement with Brian and that Brian, his mother, and Sarah herself paid for Sarah's needs. The caseworker testified that Sarah was enrolled in college and was working full time. The caseworker testified that Sarah wanted to remain placed with Brian or to live on her own and that Sarah did not want visitation with Alicia. The State's recommendation was that Sarah remain placed with Brian.

Alicia testified that she did not agree with the recommendation for Sarah to remain placed with Brian. Alicia alleged that the placement was not safe and that Brian had been abusive and was unable to support himself. She expressed concern that Sarah had obtained a vehicle since being placed with Brian and that Sarah had gone to a doctor for "things that she's never been sick with before." Alicia testified that she would prefer Sarah be placed with a relative in the State of Georgia or be placed in an apartment on her own, rather than remaining placed with Brian.

At the conclusion of the hearing, the juvenile court noted that there were "a lot of holes" in the evidence concerning what was going on with Sarah and concluded that she should continue to be placed with Brian. The court ultimately entered a disposition order, in which the court indicated that Brian was being allowed to intervene, indicated that Sarah's placement would remain with Brian, and set forth other disposition findings concerning therapy and services for Sarah that are not relevant to the appeal. Alicia appeals from that order.

III. ASSIGNMENTS OF ERROR

On appeal, Alicia has assigned two errors. First, she asserts that the juvenile court erred in allowing Brian to intervene. Second, she asserts that the court erred in continuing Sarah's placement with Brian.

IV. ANALYSIS

1. Standard of Review

[1,2] Cases arising under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 through 43-2,129 (Reissue 2008 & Cum. Supp. 2012), 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. *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013). In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's rulings. *In re Interest of Candice H.*, 284 Neb. 935, 824 N.W.2d 34 (2012).

2. Petition to Intervene

Alicia first assigns error to the juvenile court's granting of Brian's petition to intervene. She challenges both the timeliness of Brian's petition to intervene and the sufficiency of his legal interest in the proceedings to warrant granting intervention. We find that the petition was not untimely and that the juvenile court did not err in concluding that Brian had a sufficient interest to grant intervention.

[3] The Nebraska Juvenile Code defines "parties" as the juvenile over which the juvenile court has jurisdiction under § 43-247 and his or her parent, guardian, or custodian. § 43-245(12). The language of the statute, however, is not exclusive; it merely identifies necessary parties to a juvenile proceeding. *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

[4] The question of whether Brian has a right to intervene in this action is governed by Neb. Rev. Stat. § 25-328 (Reissue 2008), which provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons

> or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

(a) Timeliness of Petition to Intervene

Alicia first asserts that this statutory language renders Brian's petition to intervene untimely and that, as a result, it should be barred. She argues that the statutory language indicates the right to intervene must be exercised "before the trial commences" and that because Brian did not file his petition to intervene until after the adjudication hearing and adjudication order, it was untimely. Brief for appellant at 8. We disagree.

[5-7] In civil proceedings, the Nebraska Supreme Court has long recognized that § 25-328 provides a right to intervene before trial has commenced. See, *Pribil v. French*, 179 Neb. 602, 139 N.W.2d 356 (1966) (right to intervene may be exercised any time before trial commences); *Lincoln Bonding & Ins. Co. v. Barrett*, 179 Neb. 367, 138 N.W.2d 462 (1965) (petition in intervention may be filed as matter of right before trial). The court has noted that a right to intervene should be asserted within a reasonable time and that the applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit. *Lincoln Bonding & Ins. Co. v. Barrett, supra*. An intervenor may not unreasonably delay the original parties, unduly retard the trial of the case, or render nugatory a judgment without a compelling cause, and persons who otherwise would be granted leave to intervene are denied consideration where they sit by and allow litigation to proceed without timely requesting leave to enter the case. *Id*.

[8,9] Nonetheless, the Nebraska Supreme Court has also long recognized that the language of § 25-328 does not absolutely bar an otherwise entitled applicant from seeking to intervene after trial has commenced. See, *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 115 N.W.2d 796 (1962)

(intervention under statute is matter of right but does not prevent court of equity from allowing intervention after trial has begun); *County of Nance v. Thomas*, 146 Neb. 640, 20 N.W.2d 925 (1945) (party intervened in tax foreclosure proceeding after judgment of foreclosure but prior to confirmation of judicial sale); *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943) (trial court has discretion to allow intervention after commencement of trial). Most pertinent to the present proceeding, however, is that the Nebraska Supreme Court has recognized that intervention may be proper after the adjudication in a juvenile proceeding. See *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

In *In re Interest of Kayle C. & Kylee C., supra*, a petition was filed in the juvenile court in November 1994 concerning two sisters. The juvenile court adjudicated that it had jurisdiction over the sisters in December, and held disposition hearings and entered disposition orders throughout 1995 and 1996. In November 1996, nearly 2 years after adjudication and after a number of other disposition hearings and orders, the sisters' grandparents filed a motion for leave to intervene in the proceedings. The juvenile court denied the motion.

On appeal, the Nebraska Supreme Court discussed at length the legal sufficiency of the grandparents' interest in the litigation to support a claim of intervention. After finding the legal interest sufficient, the court specifically held that "under Nebraska law, grandparents have a sufficient legal interest in dependency proceedings involving their biological or adopted minor grandchildren *to entitle them to intervene in such proceedings prior to final disposition*." *Id.* at 691, 574 N.W.2d at 477 (emphasis supplied). The Supreme Court reversed the juvenile court's denial of the motion to intervene which was filed nearly 2 years after adjudication.

In the present case, Brian did not unreasonably delay the proceedings and did not sit by and allow litigation to proceed without timely seeking to intervene. Adjudication occurred in October 2012, and Brian filed his petition to intervene less than 1 month later, prior to the first disposition and placement hearing. He acted diligently and asserted his rights in

a timely fashion. The juvenile court did not err in rejecting Alicia's assertion that the petition to intervene should be barred as untimely.

(b) Sufficiency of Legal Interest for Intervention

Alicia next asserts that the juvenile court erred in granting Brian's petition to intervene because he is not Sarah's biological father, is not Sarah's stepfather, and did not enjoy a relationship in loco parentis to Sarah. We do not find error in the juvenile court's conclusion that Brian possessed a sufficient legal interest to intervene.

[10-12] In Nebraska, a child born during wedlock is presumed to be the legitimate offspring of the married parties. *Quintela v. Quintela*, 4 Neb. App. 396, 544 N.W.2d 111 (1996). The presumption of legitimacy is not an irrebuttable presumption, however, and it may be rebutted by clear, satisfactory, and convincing evidence. *Id*. Blood tests may be used to rebut the presumption that the husband is the biological father of children born during wedlock. *Id*.

[13] The Nebraska Supreme Court has held that when a dissolution decree includes an order of child support, the issue of paternity is considered adjudicated and the issue of paternity cannot be relitigated between the parties because of the doctrine of res judicata, absent certain limited circumstances. *Devaux v. Devaux*, 245 Neb. 611, 514 N.W.2d 640 (1994) (superseded by statute on other grounds as stated in *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012)). The court noted as a matter of policy that there is no more forceful example of the rationale underlying the doctrine of finality of judgments than the potential chaos and humiliation that would follow from allowing persons to challenge, long after a final judgment, the legitimacy of children born during their marriages. *Alisha C. v. Jeremy C., supra*; *Devaux v. Devaux, supra*.

[14,15] Subsequent to the court's decision in *Devaux v. Devaux, supra*, the Legislature passed 2008 Neb. Laws, L.B. 1014, and Neb. Rev. Stat. § 43-1412.01 (Reissue 2008), derived from that bill, provides a means to set aside an

otherwise final legal determination of paternity, including an obligation to pay child support. *Alisha C. v. Jeremy C., supra*. The Nebraska Supreme Court has concluded that § 43-1412.01 clearly overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father. *Alisha C. v. Jeremy C., supra*.

In the present case, Sarah was born during Brian's marriage to Alicia. As such, Sarah was initially presumed to be the legitimate offspring of Brian and Alicia. When Brian and Alicia were divorced, Brian was ordered to pay child support and was granted parenting time with Sarah. The issue of paternity was first raised, by Alicia, more than 13 years later. A blood test demonstrated that Brian is not the biological father, but the record before us does not demonstrate that his parental rights or responsibilities were ever finally terminated or relinquished; although a temporary order suspending support and parenting time was entered in the district court, the record before us does not indicate that a further hearing or final order was ever entered. On the record presented to us, it is not clear whether Brian's paternity was disestablished, consistent with § 43-1412.01 or *Alisha C. v. Jeremy C., supra*.

The juvenile court, in sustaining the motion to intervene, indicated that it believed there had been a clear showing that Brian possessed an interest as a legal parent "under the doctrine of parens patriae." The court found that Brian had acted "in the role of a parent for at least a significant part of [Sarah's] life."

[16,17] In the absence of a biological or adoptive relationship between a husband and his wife's child, Nebraska appellate courts have recognized that certain rights and responsibilities may arise where a husband elects to stand in loco parentis to his wife's child. *Quintela v. Quintela*, 4 Neb. App. 396, 544 N.W.2d 111 (1996). A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful

parent. *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002); *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *Quintela v. Quintela, supra*. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation. *Hickenbottom v. Hickenbottom, supra*; *Quintela v. Quintela, supra*.

[18,19] It is a husband's desire to remain in an in loco parentis relationship with his wife's child that gives rise to the rights and corresponding responsibilities usually reserved for natural or adoptive parents. *In re Interest of Destiny S., supra*; *Quintela v. Quintela, supra*. See *Cavanaugh v. deBaudiniere*, 1 Neb. App. 204, 493 N.W.2d 197 (1992) (case remanded for determination of ex-husband's desire to continue in loco parentis relationship with ex-stepchild). As a corollary, termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby. *Quintela v. Quintela, supra*. See, e.g., *Cavanaugh v. deBaudiniere, supra*; *Jackson v. Jackson*, 278 A.2d 114 (D.C. 1971) (trial court erred in ordering support when husband demonstrated intent to end in loco parentis relationship).

When Sarah was born, Brian and Alicia were married. Brian's name appears on Sarah's birth certificate. Brian and Alicia remained married until Sarah was approximately 2 years of age, and at the time of dissolution of the marriage, Brian was ordered to pay child support and granted parenting time. No issue of paternity was raised for approximately 13 years, until Alicia raised the issue in the course of mediation concerning Brian's parenting time. Then a temporary order was entered by the district court suspending support and parenting time, but the record before us does not indicate any final resolution of those matters and does not reveal that Brian took any steps to relinquish or have his parental rights terminated or to evince an intent to cease acting as Sarah's legal parent. The record does not establish that his paternity was disestablished. See, § 43-1412.01; *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

From the time the temporary order was entered in January 2011 until DHHS placed Sarah with Brian in July 2012, Brian

did not have physical contact with Sarah. He testified, however, that he did maintain verbal contact and that he maintained a lasting relationship with her. From July 2012 through the time of the hearing on Brian's petition to intervene in November, Sarah was in Brian's home and care.

In *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002), the Nebraska Supreme Court noted that once the person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis. Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby. *Id.*

In *In re Interest of Destiny S., supra*, the juvenile's biological maternal great-grandmother sought to intervene in juvenile proceedings in 2001. The juvenile's biological parents had relinquished their parental rights in 1998, and the juvenile had been adopted by another couple. In 2000, the State filed a petition alleging physical abuse of the juvenile by the adoptive father, and the adoptive parents subsequently also relinquished their parental rights. While DHHS explored potential adoptive placements for the juvenile, the juvenile was placed in her great-grandmother's care on a short-term basis pending future resolution of placement issues. The Nebraska Supreme Court determined that this placement did not give rise to in loco parentis status, emphasizing that it was clear the placement was intended to be a short-term foster placement pending professional evaluation of prospective adoptive parents and that the court had clearly informed the great-grandmother on the record of such. *Id.*

In the present case, Brian undoubtedly enjoyed in loco parentis status for the first 15 years of Sarah's life. She was born while Brian was married to Alicia, his name appears on her birth certificate, and it does not appear that any issue concerning paternity was raised until approximately 13 years after Brian and Alicia's divorce. The record indicates that Brian represented to the caseworker in this case that Alicia had represented that he was the biological father until she raised the issue in 2010. The parties' dissolution decree obligated him to pay child support and granted him parenting time, and the

record does not reflect that he has ever demonstrated any intent or desire to cease acting as a parent.

In July 2012, when she was 17 years of age, Sarah was placed in Brian's care by DHHS. She was in his care through the time of the hearing on Brian's petition to intervene in November. The evidence adduced at the hearing indicated that the State was not providing any financial assistance to Brian for any of Sarah's needs during that time. Instead, Brian, his mother, and Sarah herself were providing all necessary financial support. Unlike the factual situation in *In re Interest of Destiny S., supra*, the State in the present case was recommending that Sarah continue to be placed with Brian; the guardian ad litem concurred with this recommendation, and the record indicates that Sarah—who was 17 years of age at the time, and is 18 years of age now—desired to continue in the placement with Brian.

On the narrow facts of this case, where Sarah was born during Brian's marriage to Alicia, Brian was held out to be her biological father for the first 15 years of her life, and DHHS had placed Sarah with Brian for several months prior to the intervention hearing and was recommending continued placement with Brian for the foreseeable future, we do not find reversible error in the juvenile court's determination that Brian possessed a sufficient interest to be entitled to intervene in the proceedings. We find this assignment of error to lack merit.

3. Placement

Alicia next asserts that the juvenile court erred in placing Sarah with Brian. We disagree.

Alicia relies on Neb. Rev. Stat. § 71-1902 (Cum. Supp. 2012), which provides that "no person shall furnish or offer to furnish foster care for one or more children not related to such person by blood, marriage, or adoption without having in full force and effect a written license" to provide foster care. She asserts that Brian is not related to Sarah by blood, marriage, or adoption and that he does not possess a license to provide foster care.

The present case, however, does not present a typical foster care situation. As discussed above, Brian was Sarah's legal father for at least the first 15 years of her life as a result of Sarah's being born during the marriage and the issue of paternity never being raised by anyone. He has also stood in loco parentis to Sarah for the vast majority of her life. The placement with Brian, under the facts of this case, was not a foster care placement as contemplated by § 71-1902.

The evidence adduced in this case supported a determination by the juvenile court that Brian's home was an appropriate placement for Sarah. At the time of the hearing on placement, Sarah was 17 years of age, was enrolled in college full time, and was also employed full time. The State determined that Brian's home was a safe placement, and Sarah was doing well in it.

We find no merit to Alicia's assertion that "it is a scary proposition to allow ex husbands/wives who were stepparents to be allowed to care for a child who is not theirs and make the day to day decisions for that minor child." Brief for appellant at 14. Brian is not simply an ex-husband who was a stepparent and is caring for a child who is not his. He was and acted as the legal parent for at least 15 years and has stood in loco parentis.

The State recommended continuing placement with Brian. The guardian ad litem concurred with this recommendation. Alicia testified that her preference would be for Sarah to be placed with a relative in the State of Georgia or to be placed in an independent living situation in an apartment of her own. Based on the record presented to us, we do not find any reversible error in the juvenile court's determination that continuing Sarah's placement with Brian is in her best interests. We find no merit to Alicia's assertions to the contrary.

V. CONCLUSION

We find no reversible error concerning the juvenile court's granting of Brian's petition to intervene or the court's placement of Sarah with Brian. We affirm.

AFFIRMED.

In re Interest of Chloe P., a child under 18 years of age. State of Nebraska, appellee, v. Susan M., appellant, and Joseph P., appellee.

840 N.W.2d 549

Filed November 5, 2013. No. A-12-827.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretations or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with due process is a question of law.
4. **Juvenile Courts: Parental Rights: Final Orders.** An ex parte temporary custody order keeping a child's custody from his or her parent for a short period of time is not a final order.
5. **Juvenile Courts: Final Orders: Appeal and Error.** Unlike an ex parte temporary order, a detention order entered after a detention hearing is a final, appealable order.
6. **Juvenile Courts: Jurisdiction: Proof.** The juvenile court shall have jurisdiction over a juvenile if the State proves that the juvenile is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) by a preponderance of the evidence.
7. **Juvenile Courts: Proof.** While the State need not prove that the juvenile has suffered physical harm to find the juvenile to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the State must establish that without intervention, there is a definite risk of future harm.
8. ____: ____. In order to establish a definite risk of future harm, there must be an evidentiary nexus between the allegations of the petition and a definite risk of future harm.
9. **Rules of the Supreme Court: Appeal and Error.** Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.
10. ____: ____. Neb. Ct. R. App. P. § 2-101(E) (rev. 2010) instructs an appellee on how to assert a cross-appeal. It states that the proper filing of an appeal shall vest in an appellee the right to a cross-appeal against any other party to the appeal. The cross-appeal need only be asserted in the appellee's brief as provided by Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2012).

Appeal from the County Court for Madison County: Ross A. Stoffer, Judge. Affirmed.

Chelsey R. Hartner, Deputy Madison County Public Defender, for appellant.

Gail Collins, Deputy Madison County Attorney, for appellee State of Nebraska.

Patrick P. Carney, of Carney Law, P.C., for appellee Joseph P.

R.D. Stafford, of Brogan & Stafford, P.C., guardian ad litem.

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Chloe P. was removed from the care and custody of her biological parents, Susan M. and Joseph P., and was later adjudicated as being within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Susan appeals, and Joseph attempts to cross-appeal. We affirm Chloe's continued placement with the State and her adjudication, because we conclude that the State proved by clear and convincing evidence that a definite risk existed that Susan and Joseph would not provide for Chloe's medical needs. We also conclude that Joseph did not properly cross-appeal; therefore, we grant him no affirmative relief and consider his arguments only to the extent that they address an error assigned by Susan.

II. BACKGROUND

Chloe was born in January 2012 at a hospital in Norfolk. She soon developed electrolyte disturbances, hypoglycemia, and feeding issues. Her feeding issues were significant enough that she required the assistance of a nasogastric feeding tube to complete her feedings. Her overall medical condition required her temporary transfer to a neonatal intensive care unit at a children's hospital in Omaha. Chloe was hospitalized for 20 days before being discharged.

Chloe's doctor, Erin Pierce, placed her on a strict feeding schedule because she was at risk for failure to thrive. Dr. Pierce ordered a 48-hour monitoring period of Chloe prior

to her discharge to verify that Susan and Joseph were able to meet Chloe's needs. During this time, Susan and Joseph were to have total responsibility for taking care of Chloe. On two occasions during the 48-hour monitoring period, Chloe's nurse, Amanda Holcomb, had to wake Susan to complete Chloe's feedings. Holcomb did not chart these prompts, but reported them to a Department of Health and Human Services (DHHS) child protection worker, Traci Fox. Unaware of the prompts, Dr. Pierce determined Susan successfully completed the 48-hour monitoring period and discharged Chloe to her care on January 30, 2012.

On the day of discharge, the State filed a juvenile petition and motion for temporary care and custody of Chloe. In its petition, the State alleged that Chloe had feeding problems and that her parents lacked the skills to provide for her safety and well-being. The State further alleged, among other things, that the parents had been convicted in 2008 and 2009 for abuse to siblings of Chloe and that they subsequently relinquished their parental rights to those children. In her affidavit in support of the motion for temporary custody, the prosecutor erroneously alleged that Chloe had to be "life-flighted" to the children's hospital and that her feeding tube was not removed until January 29, 2012. In reality, Chloe was transported to the children's hospital by vehicle and her feeding tube was removed on January 27.

The county court issued an ex parte order authorizing DHHS to obtain temporary custody of Chloe and scheduled a placement hearing for February 21, 2012. As a result, DHHS removed Chloe from Susan's and Joseph's custody on January 30.

All parties appeared on February 21, 2012, at what appears to have been a combined placement hearing and first hearing on the State's adjudication petition. Susan and Joseph confirmed that they understood the State's allegations and the potential ramifications if those allegations were proved. Each parent denied the allegations. The State then requested that Chloe temporarily remain in the custody of DHHS. Neither Joseph nor the guardian ad litem had any objection to that placement. Susan, however, requested that the child be placed

with her. Following that request, Susan's counsel stated, "I'm not going to offer any evidence to support that." The county court took judicial notice of the State's affidavit that had been filed in support of its initial motion for temporary custody. Based on that evidence, the court found that reasonable efforts had been made to prevent or eliminate the need for removal and that Chloe required out-of-home placement.

Susan subsequently filed a motion, and then an amended motion, seeking the return of legal and physical custody of Chloe. The court determined that the adjudication and motion for return of legal and physical custody would be heard at the same time due to scheduling and the commonality of the issues.

In May and June 2012, the county court received evidence on the State's adjudication petition and Susan's motion for return of legal and physical custody. Susan stated a continuing objection to the court's refusal to hear her motion prior to receiving evidence on the State's petition. The county court overruled the objection, noting that if the evidence supported Susan's motion for the return of legal and physical custody of Chloe, the same evidence would support a denial of adjudicating Chloe.

III. TRIAL TESTIMONY

1. Background Testimony

As a backdrop for the current adjudication petition, the State adduced a substantial amount of evidence concerning Susan's and Joseph's parenting history. Much of the testimony addressed the State's involvement with Susan and her two older children, beginning in September 2009 when they were living in a tent. At that time, the children were approximately 3 years old and 6 months old. Both children were removed from Susan's care the following month. A family support worker who was assigned to the case from October 2009 through March 2011 testified that during supervised visitation, she had numerous safety and supervision concerns for the children. The service coordinator for the case testified that during her involvement, Susan and Joseph displayed a continual inability to feed the children properly, giving the older child coffee and

caffeinated soft drinks, despite his attention deficit disorder, and giving the younger child dairy products, despite her lactose intolerance. She further testified that the relationship between Susan and Joseph was volatile, resulting in a charge of third degree assault against Joseph and the issuance of a protection order against him.

According to the caseworkers, the children were returned to Susan's care for a short period of time in November 2010, but a month later, the State filed a motion to terminate the parental rights of Susan and Joseph. They voluntarily relinquished their parental rights in April 2011.

By way of further background, Dr. Mark Hannappel testified, over objection, that he performed psychological evaluations of both Susan and Joseph in July 2010. He diagnosed Joseph with a mood disorder and mild mental retardation. Dr. Hannappel testified that he thought Joseph had limited ability to become an adequate parent. He stated that Joseph's ability to parent could change if he showed interest and the motivation to alter the habitual patterns in his thinking and behavior. However, Dr. Hannappel testified that he would have serious concerns for the safety of a child in Joseph's care if Joseph did not receive therapy.

Dr. Hannappel stated that Susan had adjustment disorder, anxiety, and dependent personality features. His impression was that Susan had limited potential to change, and he recommended intensive services until she demonstrated the potential to adequately care for her children. He opined that Susan did not appear receptive to help. Although he felt she had the capacity to learn, her personality features interfered with her ability to incorporate information into the structure of her life and her children's lives. Dr. Hannappel testified that if Susan had not increased her understanding of childhood development, that would show she did not have the motivation to change her circumstances and would indicate that children in her care were at risk.

2. Testimony as to Chloe

The trial testimony reveals that about 6 months after relinquishing her parental rights to her two older children, Susan

sought prenatal assistance from "WIC," a supplemental food program, during her pregnancy with Chloe. A nurse who had worked at the "WIC" office testified that she counseled Susan to stop smoking, because smoking would result in a low birth weight. Susan responded that she would continue to smoke so that she would not need to "push out" a larger baby. The nurse suggested Susan become involved in the program "Operation Great Start," which helps educate new parents and provide them with baby supplies. Susan declined, stating that although she did not have baby supplies at the time, if need be, "she would steal them."

Dr. Pierce testified that shortly after birth, Chloe displayed electrolyte disturbances, hypoglycemia, and feeding issues. To address the feeding issues, she placed Chloe on a feeding schedule in which Chloe was to consume 60 cubic centimeters of formula within 30 minutes, every 3 hours. The remaining formula was to be gavaged through the nasogastric tube.

Several nurses and social workers from the hospital in Norfolk testified to concerns they had, based upon Susan's and Joseph's actions and comments while Chloe was hospitalized. In addition to her statement that Susan needed to be prompted to feed Chloe during the 48-hour monitoring period, Holcomb testified that both parents had difficulty following Chloe's feeding schedule. Holcomb recalled that Susan dismissed Chloe's inability to complete feeding in 30 minutes by stating that Chloe was a "slow eater" and that she just needed some extra time. Holcomb also testified that Joseph needed substantial encouragement to complete Chloe's feedings and that he would frequently become distracted by cartoons on television.

Several other medical professionals testified that Susan made concerning remarks about Chloe's feeding schedule. Susan commented that Chloe liked to "snack" in the afternoon, which showed an ignorance to the importance of Chloe's receiving each feeding properly; Susan repeatedly said that she did not need to burp Chloe because of the type of formula she was using; and Susan disclosed that she would not use sterile water for Chloe's bottles at home.

Several nurses testified that Susan was not able to keep herself or the room clean. On one occasion, a cockroach was found in the hospital room. The cockroach was believed to have been brought in with Susan's belongings. Nurses also testified that Susan allowed registered sex offenders in Chloe's hospital room and that she expressed no concern in having Chloe exposed to them. One of these offenders had been living with Susan and Joseph prior to Chloe's birth and was found at their home on several occasions afterward.

The child protection worker, Fox, testified that prior to discharge, she met with both Susan and Joseph to discuss their prior parental rights relinquishments and their plans to care for Chloe. Fox testified that when she discussed Chloe's medical condition with Susan, Susan complained about several of the medical recommendations. In particular, Susan stated that the hospital's desire for Chloe to eat every 3 hours seemed unreasonable and that she thought the hospital was requiring Chloe to eat too much. This concerned Fox because she was afraid Susan would not follow the doctor's orders.

Although Fox believed an adjudication was proper, she testified that she was aware of alternate arrangements being planned in case Chloe stayed at home. Had that happened, Chloe would have received the services of a family support worker in the home twice per day, 5 days per week, and from a home health nurse twice a week. Fox testified that she had concerns about sending Chloe home, even with those services, because they were insufficient to ensure Chloe consistently received each feeding. Fox believed Susan would not follow the feeding schedule because she did not demonstrate that she understood its importance and failed to follow it in the hospital.

Fox testified that she removed Chloe from Susan's and Joseph's custody in January 2012. She stated that the night she removed Chloe, Susan and Joseph had only a partial can of formula remaining. They said that they would not have money to buy more formula until Joseph received his Social Security check the next day at midnight. Fox noted that the amount of remaining formula was insufficient to feed Chloe until that time.

At the close of the State's evidence, Susan again objected to the court's failure to hear her motion for return of legal and physical custody before receiving evidence on the State's petition for adjudication. The county court overruled her objection, stating it would treat her motion as a defense to the petition and would not hold a separate hearing on it.

In August 2012, the trial court issued an order finding Chloe to be a juvenile within the meaning of § 43-247(3)(a). The trial court determined that Chloe faced a risk of not receiving feedings that were necessary for her development. The court determined that this constituted a definite risk of future harm. The trial court further found that Susan's actions while learning to care for Chloe, combined with her history of inadequate parenting, proved by a preponderance of the evidence that Chloe was a juvenile within the meaning of § 43-247(3)(a).

This appeal followed.

IV. ASSIGNMENTS OF ERROR

On appeal, Susan argues that the trial court erred in granting the State's motion for temporary custody, in failing to hear her motion for the return of legal and physical custody before the adjudication hearing, and in adjudicating Chloe as a juvenile within the meaning of § 43-247(3)(a). As noted above, Joseph's cross-appeal does not comport with the Nebraska court rules of appellate practice. Because Joseph's assigned error regarding the court's adjudication of Chloe under § 43-247(3)(a) overlaps with that of Susan's, we will consider his argument as support for Susan's assigned error, but disregard his remaining assignment of error.

V. STANDARD OF REVIEW

[1-3] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008). To the extent an appeal calls for statutory interpretations or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.* The determination of whether the procedures afforded an individual comport

with due process is a question of law. See *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008).

VI. ANALYSIS

1. Granting State's Motion for Temporary Custody of Chloe

[4] Susan argues that the trial court erred in granting temporary custody of Chloe to DHHS. She argues it was error to grant the ex parte order and to order continued placement with DHHS. We are without jurisdiction, however, to address any alleged error in the granting of the ex parte order. An ex parte temporary custody order keeping a child's custody from his or her parent for a short period of time is not a final order. See *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991). Because this court is without jurisdiction to consider orders which are not final in nature, we are without jurisdiction to consider Susan's argument that the court erred in granting the temporary ex parte custody order.

[5] Susan also argues that the court erred in granting the State's motion for continued custody of Chloe, because the court failed to conduct a contested detention hearing. Unlike an ex parte temporary order, a detention order entered after a detention hearing is a final, appealable order. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). Whether the February 21, 2012, hearing satisfied the due process requirements of a detention hearing is also reviewable. See *In re Interest of Borius H. et al.*, 251 Neb. 397, 558 N.W.2d 31 (1997). However, in order for us to review these matters, Susan was required to timely appeal from the February 21 order continuing placement of Chloe with DHHS. Since Susan did not file a notice of appeal until September 11, we are without jurisdiction to address errors relating to the February 21 hearing. See *In re Interest of Zachary L.*, 4 Neb. App. 324, 543 N.W.2d 211 (1996) (acknowledging we do not have jurisdiction to entertain appeal raising issues in juvenile case that settled substantial right

more than 30 days before appeal was perfected). Therefore, we do not address any issues raised regarding the temporary hearing of February 21.

2. Failing to Hear Susan's Motion for Return of Legal and Physical Custody Prior to Adjudication Hearing

Susan assigns as error the court's refusal to hear her motion for return of custody prior to the adjudication hearing. Susan filed her motion for return of custody on March 27, 2012, the day of the pretrial, and indicated that the hearing would take approximately half a day. The court's schedule, combined with that of counsel, could not accommodate Susan's request, and therefore the court set the hearing date for May 7—the same date as the hearing on the adjudication petition. Susan filed an amended motion for return of custody on April 18, and at an impromptu hearing on April 30, the court iterated that the hearing on Susan's motion and the State's petition would take place at the same time due to the commonality of witnesses and the court's time constraints. The hearing was ultimately commenced on May 7 and was carried over to additional days in May and June.

Although Susan argues that "[n]o other detention hearing was ever scheduled," brief for appellant at 19, the trial court did not deny Susan the opportunity to present evidence on her motion. Rather, the trial court simply required her to present the evidence at the same time evidence was presented for adjudication. The practicality of this decision is emphasized by the length of the adjudication hearing and the overlapping nature of the evidence supporting both the adjudication and the motion.

In this case, Susan had ample opportunity to present evidence to the trial court challenging Chloe's removal. Accordingly, she was not entitled to a separate hearing on her motion for the return of legal and physical custody after being afforded an opportunity to present evidence on the removal at the hearing in February.

3. Adjudicating Chloe as Juvenile Within Meaning of § 43-247(3)(a)

Susan argues that the trial court erred in finding Chloe to be a minor within the meaning of § 43-247(3)(a), and Joseph joins in this argument. In particular, they argue that the trial court failed to require the State to show a "definite risk of future harm," brief for appellant at 19, and to demonstrate the evidentiary nexus between its allegations and a definite risk of future harm. We disagree.

Section 43-247(3)(a) provides that the juvenile court shall have jurisdiction over any juvenile

> who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; . . . or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile[.]

[6-8] The juvenile court shall have jurisdiction over a juvenile if the State proves that the juvenile is within the meaning of § 43-247(3)(a) by a preponderance of the evidence. See *In re Interest of Heather R. et al.*, 269 Neb. 653, 694 N.W.2d 659 (2005). While the State need not prove that the juvenile has suffered physical harm to find the juvenile to be within the meaning of § 43-247(3)(a), the State must establish that "without intervention, there is a definite risk of future harm." *In re Interest of Anaya*, 276 Neb. 825, 838, 758 N.W.2d 10, 21 (2008). In order to establish a "definite risk of future harm," there must be an evidentiary nexus between the allegations of the petition and a definite risk of future harm. *In re Interest of Taeven Z.*, 19 Neb. App. 831, 839, 812 N.W.2d 313, 321 (2012).

(a) Definite Risk of Future Harm

Susan and Joseph argue that the trial court did not properly find a *definite* risk of future harm to Chloe. Susan argues that in order to find a definite risk, the risk needed to be "'free of all ambiguity, uncertainty, or obscurity.'" Brief for appellant

at 20. Susan argues that the risk in this case did not meet this standard because it was uncertain whether or not Chloe would suffer harm.

While the juvenile court must find that the juvenile's situation presents a definite risk of future harm, a juvenile court is not required to "'"'wait until disaster has befallen a minor child before the court may acquire jurisdiction. . . .'"'" *In re Interest of Gloria F.*, 254 Neb. 531, 537, 577 N.W.2d 296, 301 (1998) (quoting *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997)). Because the court is not required to wait for disaster, "identifying specific evidence of harm or risk of harm is unnecessary." *In re Interest of Gloria F., supra*.

The trial court defined "risk" as the "'possibility of loss or injury.'" To have a definite risk, the possibility of loss or injury must be free from ambiguity.

After carefully laying out the requirement that Chloe be at a "'definite risk of future harm,'" the county court stated:

> Here the risk that Chloe faced on January 30, 2012 was that she would not receive the proper feedings that the medical experts had stated she required to properly grow and would not be properly cared for in the ways appropriate for an infant. In evaluating the probability of such risks occurring the Court looked at the evidence of the failed "48 hour room-in"; the improper mixing of formula by the mother; the attitude of the mother demonstrated by the statement that infants "sleep when they want and eat when they want" in the face of the medical expert's requirement of a definite schedule of feedings and amount and manner of those feedings; the not having sufficient formula for Chloe on January 30, 2012 when DHHS came to remove Chloe; the refusal to seek or accept assistance from offered programs; the inability of the parents to grasp the importance and manner of the feedings despite repeated training; [and] the psychological testimony of the parents' habitual patterns of inadequate parenting, their inability to change and failure to recognize their need to change . . . .

The evidence provided to the court showed that there was a *definite* risk that Chloe would not receive the feedings or care that she needed. Susan claims that the State demonstrated only the "possibility" of risk, not a "definite risk." Brief for appellant at 21. As evidenced by the above, however, the trial court found that given all the circumstances, a "definite risk" existed. We agree.

(b) Failure to Demonstrate Evidentiary Nexus Between Allegations and Definite Risk of Future Harm

Susan and Joseph argue that the State failed to demonstrate an evidentiary nexus between its allegations and a definite risk of future harm. In particular, they note that Chloe did not have any specialized feeding needs at the time of her discharge and that the hospital and the State had arranged sufficient services to intervene before Chloe suffered actual harm. We disagree.

At the outset, we note that the State does not have to wait until a child suffers harm before intervening. See *In re Interest of Gloria F., supra*. In this case, there is a nexus between the evidence presented at the trial, the State's allegations, and harm to Chloe. Although many of Chloe's medical problems had resolved at the time of her discharge, she was still at risk for failure to thrive. The fact that she no longer required a feeding tube and that her electrolytes were stabilized did not diminish the importance of her prescribed feeding schedule. Dr. Pierce testified that maintaining this schedule was critically important.

The medical concern over Chloe's feeding schedule is evident from the fact that the hospital took the unusual step of conducting a 48-hour monitoring period to ensure Chloe's parents could properly care for her prior to her discharge. Dr. Pierce testified that if she had known Susan had to be prompted to feed Chloe during the 48 hours, she would have considered the 48-hour period a failure, and that the information regarding prompting would have affected her decision to discharge Chloe. Although the prompting was not documented in the nursing notes, Chloe's nurse, Holcomb, testified that it

occurred; that she reported it to the child protection worker, Fox, the next day; and that Fox included it in her letter to the court. There was no evidence presented disputing the prompts. Several health care providers testified that Susan's comments about the feeding schedule caused them concern about Chloe's well-being in Susan's care.

The evidence showed that Susan could not care for Chloe even in an optimal, supportive environment, where she knew she was being monitored. Given her failure to care for Chloe in that environment, it is unlikely she would be able to care for Chloe outside of that environment. Indeed, the evidence presented at trial showed that Susan has significant stressors, including financial and relationship stressors, that would inhibit her ability to care for Chloe.

The record revealed that the substantial support put in place by the State would not be enough to ensure that Chloe received all eight of the feedings that she needed each day. Although Dr. Pierce testified that medical intervention would be possible before Chloe failed to thrive, the record reveals that these circumstances created a definite risk that Chloe would not receive the feedings medically required. The risk that Chloe would not receive the feedings medically required is a definite risk of harm. It is not necessary that Chloe actually fail to thrive before becoming a juvenile within the meaning of § 43-247(3)(a).

Susan and Joseph also argue that none of the evidence presented about the voluntary relinquishment of her two other children showed a definite risk of future harm to Chloe. While the evidence presented about the prior relinquishments did not, on its own, show that Chloe was at risk of future harm, the evidence did provide the trial court with some insight into how Susan and Joseph dealt with stressors previously, which provided the court with some evidence of their parenting habits. The evidence of Susan's and Joseph's past struggles combined with the evidence about their reaction to Chloe's medical situation showed that there was a definite risk Chloe would suffer harm in the future in Susan's and Joseph's care.

4. Joseph's Cross-Appeal

Before addressing the deficiencies in Joseph's cross-appeal, we first set forth the chronology of the appeal. Susan filed a notice of appeal on September 11, 2012. Joseph filed a notice of appeal on September 28. In response to Joseph's notice of appeal, the clerk of the Nebraska Supreme Court sent a letter to the Madison County Court and copied all attorneys of record, advising them that pursuant to Neb. Ct. R. App. P. § 2-101(C) (rev. 2010), multiple appeals from the same case could not be docketed. The clerk advised, "Therefore, the notice of appeal filed by [Joseph] shall be treated as a second notice of appeal in the above-captioned matter." This is in accord with § 2-101(C), which states:

> Method of Docketing Case; Multiple Appeals from Same Case Prohibited. Upon receipt of the material required by § 2-101(B), the Clerk of the Supreme Court shall thereupon docket the case designating the party or parties first having filed the notice of appeal in the district court as appellant or appellants. All other parties shall be designated as appellees, and any attempt to appeal thereafter made by any party to the action shall be filed in the existing case and not separately docketed.

Susan filed a "Brief of Appellant" on February 1, 2013. The State filed a "Brief of the Appellee" on February 28. On that same date, Joseph filed a motion for a 30-day extension of his brief date, which was granted. The guardian ad litem filed a "Brief of Guardian Ad Litem" on March 4. Susan filed her reply brief on March 13. Thereafter, Joseph filed a brief entitled "Brief of Appellee, Joseph . . ." on March 15. No further briefing occurred.

[9] In Joseph's brief, he assigned errors and sought affirmative relief, but there is no designation of a cross-appeal on the cover of the brief, nor is a cross-appeal set forth in a separate division of the brief as required by Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2012), which section states in full:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be

prepared in the same manner and under the same rules as the brief of appellant.

In *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999), the Nebraska Supreme Court declined to consider a father's arguments appealing the termination of his parental rights, because he failed to properly designate his arguments as a cross-appeal. As in the present case, the father filed a notice of appeal after the mother did so, making him an appellee. The father set forth assignments of error in his brief, which he entitled simply "'Brief of Appellee.'" *In re Interest of Natasha H. & Sierra H.*, 258 Neb. at 144, 602 N.W.2d at 450. In its refusal to consider the father's assignments of error, the court explained that "the appellate courts of this state have always refused to consider a prayer for affirmative relief where such a claim is raised in a brief designated as that of an appellee," *id.* at 146, 602 N.W.2d at 451, and "have repeatedly indicated that a cross-appeal must be properly designated, pursuant to [§ 2-10]9(D)(4), if affirmative relief is to be obtained," 258 Neb. at 145, 602 N.W.2d at 450. The court further cautioned parties seeking appellate review of their claims to be aware of the rules governing appeals, noting that "[a]ny party who fails to properly identify and present its claim does so at its peril." *Id.* at 147, 602 N.W.2d at 451.

[10] We note that in the present case, after Joseph filed his notice of appeal, the appellate clerk notified him that his notice of appeal would be treated as a second notice of appeal and referred him to § 2-101(C). This rule advised Joseph that he would be designated as an appellee, and he correctly designated himself as an appellee on his brief. Therefore, this case is governed by *In re Interest of Natasha H. & Sierra H.*, and is distinguishable from *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (2004), and *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). In both *Knaub* and *In re Application A-16642*, the parties filing second notices of appeal mistakenly designated their briefs as briefs of appellants. Here, Joseph correctly identified his brief as that of an appellee, but he failed to comply with the proper filing of a cross-appeal. Section 2-101(E) instructs an appellee on how to assert a cross-appeal, stating: "Cross-Appeal. The proper

filing of an appeal shall vest in an appellee the right to a cross-appeal against any other party to the appeal. The cross-appeal need only be asserted in the appellee's brief as provided by § 2-109(D)(4)."

Based upon our court rules, Joseph, as an appellee, was required to identify his cross-appeal on the cover of his brief and in a separate section in compliance with § 2-109(D)(4). As in *In re Interest of Natasha H. & Sierra H., supra*, we decline to waive the rules on his behalf and to award him affirmative relief. Because Susan and Joseph both assigned as error the court's decision adjudicating Chloe, however, we consider Joseph's argument on this issue in addressing Susan's assigned error.

VII. CONCLUSION

We conclude that the State sufficiently proved that Chloe was within the meaning of § 43-247(3)(a) because there was a definite risk that her parents would not provide for her needs, resulting in harm. Because Joseph did not properly designate his brief as a cross-appeal, we do not address his assigned errors. Accordingly, we affirm the county court's order.

AFFIRMED.

IN RE INTEREST OF KEISHA G., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MICHAEL G., APPELLANT.

840 N.W.2d 562

Filed December 3, 2013. No. A-12-1203.

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.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.

3. **Juvenile Courts: Parental Rights: Notice.** Neb. Rev. Stat. § 43-279.01(2) (Reissue 2008), which governs juveniles in need of assistance or termination of parental rights, requires that adequate notice of the possibility of the termination of parental rights be given in adjudication hearings before the juvenile court may accept an in-court admission from a parent as to all or any part of the allegations of the petition before the juvenile court.
4. **Juvenile Courts: Final Orders: Appeal and Error.** Generally, it has been held that adjudication and disposition orders are final, appealable orders.
5. **Final Orders: Time: Appeal and Error.** An appeal of a final order must be made within 30 days after the entry of such order.
6. **Juvenile Courts: Parental Rights: Jurisdiction: Appeal and Error.** In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction.
7. **Juvenile Courts: Parental Rights: Due Process.** A defective adjudication does not preclude a termination of parental rights under Neb. Rev. Stat. § 43-292(1) through (5) (Cum. Supp. 2012), since no adjudication is required to terminate pursuant to those subsections, as long as due process safeguards are met.
8. **Parental Rights: Proof.** In Nebraska statutes, the bases for termination of parental rights are codified in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012). Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child.
9. **Juvenile Courts: Parental Rights.** Neb. Rev. Stat. § 43-292(4) (Cum. Supp. 2012) provides that a juvenile court may terminate parental rights when the parent is unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile.

Appeal from the County Court for Hall County: ARTHUR S. WETZEL, Judge. Reversed.

Jerry Fogarty for appellant.

Martin R. Klein, Deputy Hall County Attorney, for appellee.

Tanya J. Hansen, of Leininger, Smith, Johnson, Baack, Placzek & Allen, guardian ad litem.

MOORE, PIRTLE, and BISHOP, Judges.

BISHOP, Judge.

INTRODUCTION

Michael G. appeals from an order of the county court for Hall County, sitting as a juvenile court, terminating his parental

rights to his daughter, Keisha G., pursuant to Neb. Rev. Stat. § 43-292(4) and (6) (Cum. Supp. 2012). On appeal, Michael alleges deficiency of the pleadings, improper admission of evidence, failure to properly advise him of his rights, and insufficiency of evidence. We agree that Michael was not given a proper advisement of rights at the adjudication hearing before entering his plea of no contest. This defect during the adjudication phase excludes consideration of termination pursuant to § 43-292(6) and limits this court's review of the termination proceeding to the one remaining statutory ground for which we find insufficient evidence to terminate Michael's parental rights. We reverse.

PROCEDURAL BACKGROUND

Keisha was born in October 2010 and removed from her mother's care on September 19, 2011. Michael was incarcerated at the time of the removal and never had custody of Keisha. On February 8, 2012, Keisha was adjudicated as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Both parents attended the adjudication hearing and entered pleas of no contest after being advised of certain rights. Before entering his plea, Michael was not advised that the termination of his parental rights was a potential consequence of the proceeding.

A dispositional hearing was conducted on March 29, 2012. Michael attended. The juvenile court ordered a case plan.

On June 25, 2012, the guardian ad litem filed a motion to terminate Michael's parental rights. Although the statute was not cited, the motion alleged grounds for termination consistent with § 43-292(4) and (6):

> 1. [Michael] is unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is seriously detrimental to the health, morals, or well-being of the juvenile; and
>
> 2. Following the determination that the juvenile was one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the

> family have failed to correct the conditions leading to the determination.

The motion did not allege that termination of parental rights was in the child's best interests.

The mother relinquished her parental rights to Keisha on July 24, 2012. On the same date, Michael was present at the initial hearing on the motion to terminate his parental rights. The juvenile court advised Michael of certain rights, and Michael confirmed that he understood those rights. The juvenile court further advised Michael of the allegations in the motion to terminate, which advisement did not include a reference to Keisha's best interests. Michael did not attend any of the three subsequent hearings that took place, but he was represented by counsel.

On November 8, 2012, the juvenile court conducted a termination hearing. Witnesses testified, inter alia, whether termination of Michael's parental rights would be in Keisha's best interests. Michael's counsel had the opportunity to object and cross-examine witnesses on the issue. Michael's counsel objected on various grounds to all testimony concerning Keisha's best interests but did not raise any deficiency in the pleadings. Michael's counsel addressed Keisha's best interests during closing arguments.

The juvenile court terminated Michael's parental rights in an order entered on November 26, 2012. The juvenile court found sufficient grounds for termination consistent with § 43-292(4) and (6). The juvenile court made the following finding concerning best interests:

> This Court finds, based on the evidence presented, that it is in the best interest of [Keisha] for [Michael's] parental rights to be terminated. Specifically, this Court finds that there is no reasonable expectation that [Michael] will be in a position to provide permanency or stability to [Keisha] and that [Keisha] cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Michael appeals. We summarize additional relevant facts in the analysis portion of this opinion.

ASSIGNMENTS OF ERROR

Michael assigns, condensed and restated, that the trial court erred in (1) determining that termination of his parental rights was in Keisha's best interests when the motion to terminate made no such allegation, (2) finding that it had jurisdiction to hear allegations under § 43-292(4) and (6), (3) admitting certain evidence over Michael's objections, and (4) finding sufficient evidence to terminate Michael's parental rights.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

ANALYSIS

Insufficient Advisement of Rights at Adjudication Phase and Impact on Termination Pursuant to § 43-292(6).

Michael claims that the juvenile court did not have jurisdiction to terminate his parental rights under § 43-292(6), because he was not properly advised prior to entering his no contest response to the State's adjudication petition. He alleges that he was not advised that his parental rights could be terminated. At the adjudication hearing, the juvenile court advised Michael:

> A juvenile petition has been filed alleging that your child is within the jurisdiction of the juvenile court. Because of the nature of these allegations, you're entitled to certain rights. . . .
>
> . . . .

> Today you may be asked to either admit or deny the allegations contained in the juvenile petition. If you deny those allegations, you're entitled to a speedy adjudication hearing. We call that a trial. And that's what was originally scheduled for today's date.
>
> At that hearing the state's required to prove the allegation of this petition by a preponderance of the evidence. . . .
>
> If the state's able to prove the allegations of the petition or if you should admit those allegations, the court would find your child is within the jurisdiction of the juvenile court and we would proceed to the next stage of those proceedings.
>
> And that second stage is called the disposition stage. In other words, we decide how to dispose of the case or to — how to make proper decisions regarding the care and custody of your child.
>
> The court has a wide variety of options available to it. For example, the court can permit your child to remain in the home subject to supervision or make an order committing the child to the care of a suitable institution, to the care of a reputable citizen of good moral character.
>
> We can make placements to the care of an association willing to receive the child, to the care of a suitable family, or we can commit the child more — which is the common scenario, to the care and custody of the department of health and human services.
>
> If you're unsatisfied with any decision that the court makes, you have a right to appeal that decision to the Court of Appeals and to have a record made for purposes of that appeal.

Michael confirmed that he understood these rights.

According to Neb. Rev. Stat. § 43-279.01 (Reissue 2008):

> (1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 . . . the court shall inform the parties of the:
>
> (a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295 [sections 43-288 to 43-295

address orders as to juveniles, including possible termination of parental rights];

(b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;

(c) Right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the parent or custodian guilty of any crime;

(d) Right to confront and cross-examine witnesses;

(e) Right to testify and to compel other witnesses to attend and testify;

(f) Right to a speedy adjudication hearing; and

(g) Right to appeal and have a transcript or record of the proceedings for such purpose.

(2) After giving the parties the information prescribed in subsection (1) of this section, the court may accept an in-court admission . . . .

[3] In *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 583, 634 N.W.2d 290, 297 (2001), we said: "Section 43-279.01(2) means that a juvenile court should accept a parent's in-court admission only after informing the parties as to the nature of the proceedings and the possible consequences or dispositions, including termination of parental rights." And in *In re Interest of N.M. and J.M.*, 240 Neb. 690, 696, 484 N.W.2d 77, 81 (1992), the Nebraska Supreme Court said that "adequate notice of the possibility of the termination of parental rights must be given in adjudication hearings before the juvenile court may accept an in-court admission . . . from a parent as to all or any part of the allegations of the petition before the juvenile court."

[4-6] At the adjudication hearing, Michael was not informed that termination of his parental rights was a potential consequence of the court's finding that Keisha was a juvenile within the provisions of § 43-247(3)(a). Therefore, if he had appealed the original adjudication, the juvenile court's failure to inform Michael of the potential consequences of the juvenile proceeding before accepting his admission to the allegations would have been fatal to the adjudication, as the adjudication was based on Michael's no contest response. See

In re Interest of Brook P. et al., supra. However, Michael did not appeal the juvenile court's initial adjudication. Generally, it has been held that adjudication and disposition orders are final, appealable orders. See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003). An appeal of a final order must be made within 30 days after the entry of such order. See, Neb. Rev. Stat. § 25-1912 (Reissue 2008); Neb. Rev. Stat. § 43-2,106.01 (Cum. Supp. 2012). Further, in the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction. *In re Interest of Brook P. et al., supra*.

In *In re Interest of Brook P. et al., supra*, the parents were not advised at the adjudication hearing of the potential consequences of the juvenile proceeding before the court accepted their admission to the allegations. However, the parents did not file a direct appeal from the adjudication order. Therefore, on appeal, this court determined that the parents were unable to question the existence of facts upon which the juvenile court asserted jurisdiction. Nevertheless, we then proceeded to determine whether the juvenile court had jurisdiction to terminate parental rights without a prior advisement at the adjudication phase of the proceedings. We said: "Due to the defect in the adjudication proceedings, we treat the first proceeding as the functional equivalent of 'no prior adjudication' . . . ." *In re Interest of Brook P. et al.*, 10 Neb. App. at 586, 634 N.W.2d at 298.

[7] A defective adjudication does not preclude a termination of parental rights under § 43-292(1) through (5), since no adjudication is required to terminate pursuant to those subsections, as long as due process safeguards are met. See *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999). We note:

> Unlike § 43-292(6) and (7), § 43-292(1) through (5) do not require, imply, or contemplate juvenile court involvement, including adjudication, prior to the filing of the petition for termination of parental rights. Instead, subsections (1) through (5) each concern historical actions or conditions of the parents such as abandonment, neglect,

> unfitnesses, and mental deficiency. There is no requirement of longitudinal involvement of the juvenile court under § 43-292(1) through (5), much less a prior adjudication. Under § 43-291, an original petition may be filed seeking termination of parental rights and the juvenile court acquires jurisdiction of the termination proceeding brought on by an original action under § 43-247(6) without prior juvenile court involvement, except where required by the Nebraska Juvenile Code.

In re Interest of Joshua M. et al., 256 Neb. at 609-10, 591 N.W.2d at 566.

Accordingly, while § 43-292(6) requires a prior adjudication, subsection (4) does not. In this case, the State sought to terminate parental rights based upon both subsections (4) and (6). We conclude the adjudication was deficient because Michael was not advised that his parental rights could be terminated, and we thus treat it as the functional equivalent of no prior adjudication, depriving the juvenile court of jurisdiction to terminate Michael's parental rights pursuant to § 43-292(6). However, a termination pursuant to § 43-292(4) is permitted as an original action and is discussed below.

Advisement of Rights at Termination Proceeding.

Michael argues that the juvenile court did not have jurisdiction to terminate his parental rights under § 43-292(4), because his due process rights were violated by the juvenile court's failure to properly advise him at the termination phase that termination of his parental rights was a possible consequence.

Section 43-247(6) states that the juvenile court shall have jurisdiction of the proceedings for termination of parental rights as provided in the Nebraska Juvenile Code. Section 43-279.01(1) states that when "termination of parental rights is sought pursuant to subdivision (6) . . . of section 43-247," the juvenile court "shall" inform the parties of the nature of the proceedings and the possible consequences or dispositions, including termination of parental rights, as well as their rights (e.g., right to counsel, right to remain silent, right to

confront and cross-examine witnesses, right to testify and to compel other witnesses to attend and testify, and right to appeal).

At the initial hearing on the motion to terminate Michael's parental rights, the juvenile court advised him as follows:

> THE COURT: All right. All right. [Michael], I want to take a moment and visit with you about the rights that you have in this motion. The petition has been filed requesting the termination of your parental rights to the above-named minor child. Because of that you have certain rights.
>
> First and foremost amongst those you have the right to be represented by an attorney, and in this matter [one] has been appointed to represent you. You have a limited right to remain silent. And what I mean by that is the state can call you as a witness at these hearings. However, if you are making statements that would constitute other criminal violations, they can't go into that, and you have a right to basically remain silent as to that, but otherwise they have a right to call you concerning matters such as care given to Keisha and those types of things.
>
> You have a right at the hearing, if you denied these allegations, to confront and cross-examine all witnesses, to compel the attendance of witnesses through use of the subpoena power of the court. You have a right to testify yourself at these proceedings. If the court enters any orders that you disagree with, you have a right to appeal those decisions to the Nebraska Court of Appeals. You have a right to have a record made for purposes of the appeal.

Michael confirmed that he understood these rights. The juvenile court also advised Michael of the allegations in the motion to terminate:

> THE COURT: All right. I would advise you at this time, [Michael], the allegations contained in the motion to terminate parental rights are as follows: The petition alleges, comes now [the] Guardian ad Litem, and hereby moves the court for an order terminating the parental rights of Michael . . . to the above-named minor child for

> the following reasons: Number one, [Michael] is unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs or repeated lewd or lascivious behavior, which conduct is seriously detrimental to the health, morals or well-being of the juvenile, and, two, following the determination that the juvenile was one as described in Subdivision (3)(a) of Section 43-247, reasonable efforts to preserve and reunify the family have failed and that's failed to correct the conditions leading to that original determination.
>
> Wherefore, the guardian ad litem prays that a summons be issued and a hearing be held upon the motion and upon such hearing the court enter an order terminating the parental rights of Michael . . . .
>
> Do you understand the nature of the allegations contained in this motion to terminate parental rights?
>
> [Michael]: Honestly, I understand what it — what it says, yeah. I understand what it means. I just . . . .
>
> THE COURT: Yeah, and that's all we're trying to do at this time, [Michael]. I'm not asking you whether you agree with them.
>
> [Michael]: Right.
>
> THE COURT: I'm just asking you if you understand what's —
>
> [Michael]: And, yes, I do understand.
>
> THE COURT: — alleged.
>
> [Michael]: I'm sorry, Your Honor. Yes, I understand, yes, what's been . . . .
>
> THE COURT: Okay. All right. [Michael], I'll ask you at this time then, do the allegations contained in the motion to terminate your parental rights, do you admit or deny those allegations?
>
> [Michael]: I deny that.

We conclude that Michael was adequately advised of the nature of the proceedings and the possible consequences or dispositions as required by Neb. Rev. Stat. § 43-247.01(1) (Reissue 2008). The juvenile court advised Michael that a petition had been filed seeking termination of his parental rights and of the contents of that petition. See *In re Interest of*

A.D.S. and A.D.S., 2 Neb. App. 469, 471, 511 N.W.2d 208, 210 (1994) (mother was adequately advised of nature of proceedings and possible consequences where juvenile court stated, "'we are going to decide whether or not your rights as mother should be terminated'"). Further, the juvenile court advised Michael of his right to counsel, right to remain silent, right to confront and cross-examine witnesses, right to testify and to compel other witnesses to attend and testify, and right to appeal. Because Michael was given the required advisements under § 43-247.01(1), he was accorded his statutory due process rights, and therefore, we cannot say that the proceeding to terminate Michael's parental rights under § 43-292(4) was improper on this basis.

Sufficiency of Evidence.

[8] Michael assigns that the juvenile court erred in finding sufficient evidence to terminate his parental rights. In Nebraska statutes, the bases for termination of parental rights are codified in § 43-292. Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

The juvenile court based termination on § 43-292(4) and (6); however, as previously noted, our review is limited to whether there was sufficient evidence to terminate Michael's parental rights under the grounds set forth in § 43-292(4) and, if so, whether such termination was in Keisha's best interests.

[9] Section 43-292(4) provides that a juvenile court may terminate parental rights when the parent is "unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile."

The juvenile court received evidence of Michael's criminal record of drug and alcohol offenses. At the time of trial, Michael was 27 years old. The bulk of the evidence of Michael's drug and alcohol use occurred during the years

prior to Keisha's birth in October 2010. Between 2002 and 2010, Michael had five convictions for minor in possession (September 2002, August 2002, March 2004, April 2006, and June 2006); one conviction for possession of marijuana (January 2007); three convictions for possession of drug paraphernalia (January 2007 and two times in May 2008); and one conviction for possession of "legend drugs" (September 2008). Michael was also convicted of driving under the influence in March 2011; however, the offense occurred prior to Keisha's birth, as evidenced by the fact that Michael's bond was filed in August 2010. As stated previously, the foregoing evidence of Michael's drug and alcohol use occurred during the years prior to Keisha's birth in October 2010 and thus could not be seriously detrimental to the health, morals, or well-being of Keisha.

Also received into evidence at the termination hearing was an "Arrest/Detention Probable Cause Affidavit" showing that in June 2012, Michael was arrested for driving under suspension. During the arrest, the officer found marijuana and "a generic form of Vicodin." Michael was subsequently charged with possession of a controlled substance, driving under suspension, possession of "K2" or marijuana less than 1 ounce, and possession of drug paraphernalia. A bench warrant was issued in October after Michael failed to appear at a preliminary hearing related to the above charges. At the time of the termination hearing on November 9, Michael had been neither tried nor convicted of any offense stemming from his June arrest.

In re Interest of Carrdale H., 18 Neb. App. 350, 781 N.W.2d 622 (2010), involved a juvenile court adjudication of a child based upon the father's possession of illegal drugs, and this court reversed the adjudication order. We noted that the State failed to adduce any evidence regarding whether the father was charged with a crime, whether the father had any history of drug use in or out of the child's presence, whether the child was present when the father possessed the drugs, or whether the child was affected in any way by the father's actions. We held that the State failed to prove by a preponderance of the

evidence the petition's allegation that the father's use of drugs placed the child at risk for harm.

In *In re Interest of Carrdale H., supra*, we also noted that the father's offense, if he was in fact charged and convicted, could result in imprisonment or probation. The same is true in the instant case. Although Michael was charged with drug offenses stemming from his June 2012 arrest, he had been neither tried nor convicted at the time of the juvenile court trial. Additionally, if Michael should be convicted, either incarceration or probation is possible. The most serious of Michael's charged offenses is possession of a controlled substance, a Class IV felony, which is punishable by up to 5 years' imprisonment. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2012). Under the sentencing guidelines, should Michael be convicted of possession of a controlled substance, he could be placed on probation.

The only other evidence of Michael's alcohol or drug use during Keisha's lifetime is (1) one positive drug test in September 2012, wherein Michael tested positive for "Delta-9 Carboxy THC" (THC is the active component of marijuana and cannabis), and (2) the testimony of a court-appointed special advocate who testified that Michael admitted to commencing intravenous drug use after he was released from jail and had begun the proceedings to "get [Keisha] back." There was also some evidence that on one visit, a visitation worker thought Michael was "under the influence." However, that report was based on Michael's "odd" behavior of trying to put a jacket on over a bookbag. The worker was not "able to smell any alcohol or anything" on Michael. On the record before us, the State failed to adduce any evidence as to how Michael's drug use was detrimental to Keisha. There was no evidence that she was present during any drug use or that any drug use affected Michael's ability to care for Keisha.

In *In re Interest of Brianna B. & Shelby B.*, 9 Neb. App. 529, 614 N.W.2d 790 (2000), the juvenile court adjudicated the children because of a pattern of alcohol use by the parents. This court concluded that the State failed to adduce evidence to show that the children lacked proper parental care. Although

there was evidence that the parents had consumed alcohol in the presence of the children, there was no evidence to show that the children were impacted by the drinking.

In re Interest of Taeven Z., 19 Neb. App. 831, 812 N.W.2d 313 (2012), addressed a juvenile court adjudication where the mother had ingested a morphine pill that was not prescribed to her. This court found that there was no evidence that the child was affected by the mother's taking the nonprescribed pill or any evidence that the mother's taking the pill placed the child at risk. We held that there was no evidentiary nexus between the consumption of drugs by the mother and any definite risk of future harm to the child.

In re Interest of Justine J. et al., 286 Neb. 250, 835 N.W.2d 674 (2013), involved a juvenile court adjudication for four children because of the mother's and stepfather's drug use and domestic violence. The two oldest children had been living with the mother and stepfather, but the two youngest children were living with grandparents. It was uncontested that the State met its burden as to the adjudication of the two oldest children. The Nebraska Supreme Court found that there was no evidence that the two younger children were present for the mother's and stepfather's drug use or domestic violence. The court held that the State failed to prove by a preponderance of the evidence an evidentiary nexus between the neglect suffered by the older children and any definite risk of future harm to the younger children.

In *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999), the juvenile court terminated the mother's parental rights to her four children because of the mother's neglect and drug use. See § 43-292(2) and (4). The mother had a long history of illegal drug use. She admitted using "'[c]rystal, meth, and cocaine'" since the age of 17. *In re Interest of Joshua M. et al.*, 256 Neb. at 600, 591 N.W.2d at 561. She tested positive for drugs on at least three separate occasions while the juvenile proceedings were pending. She was repeatedly incarcerated for her drug use. The Nebraska Supreme Court held that the mother was unfit by reason of her drug use and consequent incarceration to provide the care, subsistence, and protection needed by her children and, in

fact, has neglected to provide for them. The court held that the evidence established that the mother had neglected the children and was unfit as defined by statute. See § 43-292(2) and (4).

In *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001), the juvenile court terminated the mother's and father's parental rights because they substantially and continuously or repeatedly neglected their children and because they were unfit to parent by reason of habitual use of intoxicating liquor or narcotic drugs. See § 43-292(2) and (4). The parents had a long history of drug use. The parents' drug use was associated with homelessness, joblessness, and domestic violence. On one occasion, the father called the State Patrol and said that he and the mother had used methamphetamines for the past few months and did not think they could care for the children. This court held the evidence clearly and convincingly showed that the use of drugs rendered the parents unfit and that it was in the children's best interests that parental rights be terminated. We held that the parents' insidious drug use substantially interfered with their ability to care for their family, hold jobs, and maintain housing for the family.

Although most of the cases cited above are adjudication cases, we still find them instructive. In adjudication cases filed under § 43-247(3)(a), the State need only prove the allegations in the petition by a *preponderance of the evidence*. See *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013). But in termination cases, the burden of proof is much greater. In order to terminate an individual's parental rights, the State must prove by *clear and convincing evidence* that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the children's best interests. See *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010). Thus, if the evidence of a parent's drug and alcohol use was insufficient to show that the child was at risk of harm for purposes of adjudication as described in some of the above-referenced cases, then that same evidence would certainly be insufficient to show that the parent's drug and alcohol use was detrimental to the juvenile

for purposes of termination of parental rights given the higher burden of proof.

In the instant case, the State failed to show how Michael's drug use was detrimental to Keisha. As noted previously, most of Michael's drug-related convictions occurred prior to Keisha's birth and therefore had no detrimental effect on her. Michael has had one drug-related arrest since Keisha's birth, but at the time of the termination hearing, he had been neither tried nor convicted of the charges stemming from his June 2012 arrest. A conviction and term of incarceration, while possible, are not in the record before us and therefore do not support a termination under § 43-292(4). Although the record supports that Michael has tested positive for drugs and has admitted to using drugs during the pendency of these juvenile proceedings, the State has failed to adduce any evidence, much less clear and convincing evidence, that Michael's drug use has affected or been detrimental to Keisha. Even the juvenile court noted the lack of evidence on this issue when, at the conclusion of the termination hearing, the judge stated: "[T]he evidence doesn't necessarily reflect that [Michael] has exposed this child to direct risks of drugs or alcohol." On our de novo review, we find that the State failed to prove by clear and convincing evidence that Michael's drug use renders him unfit. We therefore reverse the juvenile court's order terminating Michael's parental rights to Keisha.

Because we have concluded that there was insufficient evidence to support termination of Michael's parental rights pursuant to § 43-292(4), we need not determine whether termination of Michael's parental rights is in Keisha's best interests. We also do not need to address Michael's other assigned errors regarding the absence of "best interests" language in the motion to terminate and the admission of certain evidence. See *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case before it).

CONCLUSION

In summary, we find that the deficiency of the adjudication proceeding (failure to properly advise of potential

consequences) renders that proceeding the functional equivalent of "no prior adjudication," which eliminates consideration of § 43-292(6) as a ground for termination. Our review of the one remaining ground, § 43-292(4), reveals insufficient evidence in the record to support termination. Accordingly, we reverse the order of the juvenile court terminating Michael's parental rights to Keisha.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
NICHOLAS J. PODRAZO, APPELLANT.
840 N.W.2d 898

Filed December 10, 2013. No. A-12-257.

1. **Criminal Law: Trial: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning admissibility of that evidence.
2. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal.
3. **Trial: Evidence: Stipulations: Waiver.** A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact binding on the party making the same, as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
4. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. 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.
5. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.
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. **Warrantless Searches.** The warrantless search exceptions recognized by Nebraska courts include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest.
8. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
9. **Warrantless Searches: Search and Seizure: Motor Vehicles: Police Officers and Sheriffs.** The warrantless seizure of a vehicle is lawful when the officers could have immediately searched the vehicle without a warrant.
10. **Warrantless Searches: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** Whether a warrantless search of a vehicle could have been conducted is determined by whether the vehicle was readily mobile and the officers had probable cause to believe the vehicle contained contraband or evidence of a crime.
11. **Probable Cause: Words and Phrases.** Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.
12. ____: ____. Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.
13. **Probable Cause: Appeal and Error.** Appellate courts determine probable cause by an objective standard of reasonableness, given the known facts and circumstances.
14. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility.
15. **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.
16. **Constitutional Law: Criminal Law: Witnesses.** The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.
17. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy and prejudice, and a trial court's decision regarding them will not be reversed absent an abuse of discretion.
18. **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.
19. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy and admissibility under Neb. Rev. Stat.

§ 27-406 (Reissue 2008), and as a result, the trial court's decision will not be reversed absent an abuse of discretion.

20. **Trial: Evidence.** The precise contours of how frequently and consistently a behavior must occur to rise to the level of habit cannot be easily defined or formulated, and admissibility depends on the trial judge's evaluation of the particular facts of the case.
21. ____: ____. Evidence of a single incident, even if it is true, is an insufficient showing of a routine or habit.
22. **Pretrial Procedure: Appeal and Error.** A trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion.
23. **Physician and Patient: Evidence.** Generally, confidential communications made by a patient to a physician or professional counselor for the purposes of diagnosis and treatment are privileged.
24. **Physician and Patient: Evidence: Witnesses: Proof.** Before the testimony of a witness is excluded under Neb. Rev. Stat. § 27-504 (Reissue 2008), the defendant must make a showing that the failure to produce the privileged information is likely to impair the defendant's ability to effectively cross-examine the witness claiming the privilege. If the defendant succeeds in making such a showing, the court may then afford the State an opportunity to secure the consent of the witness for the court to conduct an in camera inspection of the claimed information and, if necessary, to turn over to the defendant any relevant material for the purposes of cross-examination. If the witness does not consent, the court may be obliged to strike the testimony of the witness.
25. **Trial: Expert Witnesses.** The trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
26. **Trial: Courts.** A trial court has broad discretion in determining how to perform its gatekeeper function.
27. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
28. **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.
29. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
30. **Jury Instructions.** A trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
31. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
32. **Jury Trials: Affidavits: Appeal and Error.** Errors predicated on occurrences during the course of voir dire examination cannot be shown by affidavit.
33. **Jury Trials: Records: Appeal and Error.** An appellate court will not undertake to resolve disputes about what is claimed to have happened, when a record of the voir dire examination could have been made.

34. **Motions for Mistrial: Appeal and Error.** An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the court has abused its discretion.
35. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
36. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
37. **Criminal Law: Juror Misconduct: Presumptions: Proof.** In a criminal case, when misconduct involves a juror and a nonjuror, it gives rise to a rebuttable presumption of prejudice to the defendant which the State has the burden to overcome.
38. **Witnesses: Juror Misconduct: Appeal and Error.** An appellate court reviews the trial court's determinations of witness credibility and historical fact for clear error and reviews de novo the trial court's ultimate determination whether the defendant was prejudiced by juror misconduct.
39. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
40. **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.
41. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.

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

Denise E. Frost and Clarence E. Mock, of Johnson & Mock, for appellant.

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

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Nicholas J. Podrazo appeals from his conviction in the district court for Douglas County for the first degree sexual assault and attempted first degree assault of A.T. Because we find no merit to Podrazo's arguments on appeal, we affirm.

II. BACKGROUND

1. Events Surrounding Charges

The events surrounding this case began on December 23, 2010. At that time, A.T. was living near 22d and Maple Streets in Omaha, Nebraska (Maple Street residence), with her friends Richard Gregory, Ellen Mruz, Brett Smith, and Ashley Forsman. A.T., Mruz, Smith, and Forsman began drinking alcohol sometime in the afternoon on December 23. Around 7 p.m., A.T. and Forsman left to have dinner with A.T.'s mother. While they were gone, Podrazo and two other men arrived at the Maple Street residence; Podrazo brought a bottle of rum and a box of "whip-it" canisters with him. When A.T. and Forsman returned from dinner, they joined everyone in drinking rum, "doing whip-its," and smoking marijuana.

Around 9:30 p.m., the partygoers noticed that A.T. and Podrazo were missing. They searched the inside and outside of the residence but could not find them. Mruz called Podrazo's cell phone numerous times, and when he finally answered, he told her that he was "just driving around." When Mruz asked to speak to A.T., the cell phone disconnected. Mruz and a couple of others noticed that A.T.'s car and keys were still at the house, but that Podrazo's white Chevrolet (Chevy) Blazer was missing. They drove around the neighborhood in A.T.'s car looking for her but were unable to find her.

Around 11:15 p.m. that night, a man and his fiance were returning to their home near 73d and Pratt Streets in Omaha (Pratt Street residence), when they noticed a white Chevy Blazer parked in the street near their driveway. The man attempted to look in the windows of the Blazer, but they were darkly tinted and fogged over, so he could not see anything inside except some clothing on the front seat. He went inside his house, and when he looked out the window 5 or 10 minutes later, the Blazer was gone. Shortly after that, passersby discovered a nude, unresponsive female lying on the side of the road near where the Blazer had been parked and called the 911 emergency dispatch service. An ambulance arrived a few minutes later and transported the female, later identified as A.T., to a hospital.

A.T. was initially kept sedated at the hospital, but after a few hours, she was allowed to wake up. She told the nurse that the last thing she could remember was returning to the Maple Street residence the previous night after eating dinner with her mother, and then taking a shot of rum. She did not remember seeing Podrazo or leaving the residence at all.

A.T. consented to a sexual assault examination. The examination revealed several bruises on her legs and a bruise near each eye, as well as abrasions on the back of her shoulder, the middle of her back, the side of her breast, and her cheek and nose. A.T. also had extensive injuries to her entire genital area. Her external vaginal area was reddened, and her hymen and anus were each torn in two places. She had petechial hemorrhaging, extensive purple bruising, and swelling throughout her entire vaginal canal, as well as bruising from the opening of the vagina up to and all the way around her cervix. The nurse who performed the examination testified at trial that A.T.'s injuries were "[s]evere" and caused by blunt force trauma. In addition to these injuries, A.T. was diagnosed with a concussion, mild hypothermia, and first-degree frostbite on one finger. Her blood alcohol content was .457 of a gram of alcohol per deciliter of blood.

Several of A.T.'s friends, including Smith and Joshua Phillips, visited her in the hospital the morning of December 24, 2010. After speaking with A.T. at the hospital, Smith, Phillips, and another friend went to Podrazo's house to confront him about what happened to A.T. Podrazo changed his story several times, but eventually admitted to them that he had sex with A.T. and that "it was rough." Podrazo then handwrote a note stating that he and A.T. left the Maple Street residence and ended up pulling over in a neighborhood and having sex in his vehicle. He wrote that it "got a little crazy" and that "it was pretty rough." Phillips gave that note to A.T.'s mother, who gave it to police.

2. Investigation

Detectives William Seaton and Kristine Love from the Omaha Police Department were assigned to investigate this

case. After speaking with the officers who responded to the scene at the Pratt Street residence and questioning A.T., Smith, Phillips, and Mruz at the hospital, the detectives were able to gather information on Podrazo. Specifically, they located his address and learned there was a 1999 white Chevy Blazer registered in his name. They went to Podrazo's residence, which was in Douglas County, but outside the city limits of Omaha, and at the request of Seaton, three additional Omaha police officers and a deputy from the Douglas County sheriff's office accompanied them. The law enforcement officers arrived at Podrazo's residence on the evening of December 24, 2010. They located a white Chevy Blazer that matched the witnesses' descriptions, and Seaton asked the Douglas County sheriff's deputy to tow the vehicle to the city-county impound lot so that it could be searched and processed.

Omaha police applied for and received a search warrant for the Blazer on December 27, 2010, and the search was conducted that day. Blood was found in several locations inside Podrazo's Blazer, and samples taken from the rear center seat cushion and the handle of an ice scraper found in the cargo compartment matched A.T.'s DNA. Podrazo was ultimately arrested and charged with first degree sexual assault and attempted first degree assault.

3. Motions

(a) Motion to Suppress

Prior to trial, Podrazo moved to suppress the evidence found in his Blazer. He argued that he did not consent to the search and seizure of his vehicle and that law enforcement did not have a warrant to search or seize the vehicle on December 24, 2010.

Love testified at the suppression hearing that when she first became involved in the case, she was informed that an occupant of the Pratt Street residence had told officers that he had seen a white 1990's Chevy Blazer with darkly tinted windows parked in front of his residence in the location where A.T. was later found lying in the street. Love stated she spoke with several of A.T.'s friends at the hospital on December 24,

2010, and learned that on the prior evening, Podrazo had been at the Maple Street residence with A.T., and that they both ended up missing along with Podrazo's white Chevy Blazer. Love testified Mruz told her the general location of Podrazo's residence and that he drove a "white utility vehicle." Love also recounted her conversation with Phillips, during which Phillips told her Podrazo said that A.T. had been in his vehicle the previous night and that they had a sexual encounter inside of the vehicle. Additionally, Love testified that she spoke with the nurse who performed A.T.'s sexual assault examination and learned of the nature and extent of A.T.'s injuries.

Love testified that after obtaining all of this information, she contacted Seaton and provided him with the information she had gathered. They located Podrazo's exact address, and she asked Seaton to go there to make contact with Podrazo and see whether the white Chevy Blazer was present at the residence. Love explained that she was interested in the vehicle because, at that time, there was enough information to establish that the Blazer was the crime scene. After learning that Podrazo and his vehicle had been located at the residence, Love went to the residence herself and observed the vehicle parked in the driveway. When she arrived at Podrazo's residence, the Douglas County sheriff's deputy and other Omaha police officers were already at the scene.

Love admitted that she was not given consent to take the Blazer, but decided to seize it because she considered it the crime scene based on the information she had received from witnesses. She expressed concern about preserving any evidence contained in or on the Blazer. Because it was wintertime, Love was concerned that biological evidence on the outside of the vehicle could be destroyed or altered by wet snow. In addition, there were three people in the residence that could have moved the vehicle from its location or disrupted any evidence contained inside the vehicle. The court overruled Podrazo's motion to suppress, concluding that police had probable cause to justify the warrantless seizure and subsequent search of the Blazer.

(b) Motion to Offer Evidence

Prior to trial, Podrazo also provided notice to the court of his intent to offer certain evidence at trial. Specifically, he intended to offer evidence that A.T. admitted she is "always drunk or 'high'" when she engages in sexual relations and that at least once prior to December 2010, A.T. had "'blacked out'" and later learned that she had engaged in voluntary sexual relations while drunk and/or high. He also notified the court that he intended to offer evidence that in the 12 to 18 months prior to December 2010, A.T. had been diagnosed with mental health issues, substance abuse, and cognitive difficulties and at least twice had received inpatient and intensive outpatient treatment for these conditions. The court denied Podrazo's request to introduce the proffered evidence.

(c) Motion for Access to Medical Records

Prior to trial, Podrazo requested access to A.T.'s medical and mental health records or, if A.T. refused to allow access to the records, he requested that A.T. be prohibited from testifying at trial. The court denied the request, concluding that A.T.'s records were privileged and that there was no showing that denial of access to the records would deny Podrazo his right to confront the witness.

(d) Motion to Offer Habit Evidence

After trial began, Podrazo moved to offer evidence under Neb. Rev. Stat. § 27-406 (Reissue 2008) of A.T.'s "habit" of alcoholic blackouts as well as wandering during intoxication while inappropriately dressed. Podrazo relied upon the fact that A.T. had been convicted of minor in possession after an incident that occurred in August 2011. On that date, police found A.T. walking barefoot in the street in the early morning hours, unsure of where she was or how she had gotten there. She was later determined to have a blood alcohol content of .252. Podrazo argued that this incident coupled with the December 2010 incident at issue here constituted a "habit." The court

denied Podrazo's motion, finding that two events separated by 8 months were not sufficient to constitute habit.

4. Trial

The witnesses at trial testified regarding the events on December 23 and 24, 2010. In his defense, Podrazo called a consulting toxicologist, Dr. Michael Corbett, to testify. Dr. Corbett explained the effects alcohol has on the human body; specifically, that alcohol can cause "disinhibition," which "makes you want to enjoy things that one probably wouldn't do in a sober state." According to Dr. Corbett, alcohol also impacts psychomotor skills and executive functioning, which is the function that will generally ensure that a person does not do things that "maybe one would like to do but shouldn't do because he knows better in . . . a social situation."

Dr. Corbett explained that some people will experience a "blackout" while drinking and that an alcoholic blackout is different from passing out, because blacking out is the inability to form long-term memories from short-term memories even though the person is totally conscious, whereas passing out refers to the onset of sleep. Stated more succinctly, a person is still conscious during a blackout, but there is no consciousness when one passes out. Dr. Corbett testified that other people cannot tell when a person is in a state of blackout. However, a person experiencing a blackout would most likely still display signs of intoxication.

Podrazo asked Dr. Corbett if he had an opinion as to whether A.T. experienced disinhibition from consumption of alcohol and whether her alcohol consumption impaired her judgment and executive functioning. The State objected, on the grounds of foundation and relevance, to Dr. Corbett's stating these opinions, and the court sustained the objections. Dr. Corbett was also asked for his opinion as to when A.T.'s blackout would have ended. The court again sustained the State's objections on the grounds of foundation and relevance.

5. Jury Instructions

At the jury instruction conference, Podrazo requested that the jury be given NJI2d Crim. 8.0, the instruction on the defense of intoxication. The court overruled Podrazo's

request, stating that instruction 8.0 relates to intoxication by the defendant and was not applicable in this case.

6. Verdict and Sentencing

The jury ultimately convicted Podrazo on both counts. He was sentenced to 40 to 50 years' imprisonment for the sexual assault conviction and a consecutive term of 10 to 16 years' imprisonment for attempted assault.

7. Posttrial Motions

After trial, Podrazo moved for a new trial. He argued he was entitled to a new trial, inter alia, because he was denied pretrial access to basic juror information and because of juror and prosecutorial misconduct during trial. We will describe the factual bases for these arguments more fully in our analysis below. The district court denied Podrazo's motion for new trial.

Podrazo now appeals to this court.

III. ASSIGNMENTS OF ERROR

Podrazo alleges, consolidated and restated, that the district court erred in (1) overruling his motion to suppress and admitting evidence from his Blazer; (2) refusing to allow him to introduce evidence of A.T.'s habits of blackouts and sexual relations during blackout, habitual intoxication connected with sexual activity, and memory impairment as a result of chronic substance abuse; (3) refusing him discovery access to A.T.'s mental health records; (4) refusing to allow Dr. Corbett to testify regarding the effect of A.T.'s alcohol consumption on her executive functioning and decisionmaking and when A.T.'s blackout ended; (5) refusing his proffered jury instruction; (6) refusing to admit into evidence certain exhibits offered in support of his motion for new trial; (7) overruling his motions for mistrial and new trial; and (8) imposing excessive sentences.

IV. ANALYSIS

1. Motion to Suppress

Podrazo argues that the district court erred in denying his motion to suppress the evidence found in his Blazer, because

the Omaha Police Department officers acted outside the geographic boundaries of their jurisdiction and the seizure did not meet any of the exceptions to the warrant requirement. Before addressing the merits of Podrazo's motion to suppress, we must address the State's arguments that this issue has not been properly preserved for appeal.

[1,2] The State contends Podrazo failed to properly preserve this issue, because he did not timely renew his motion to suppress at trial. In a criminal trial, after a pretrial hearing and order denying a motion to suppress, the defendant must object at trial to the admission of evidence sought to be suppressed to preserve an appellate question concerning admissibility of that evidence. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and that party will not be heard to complain of the alleged error on appeal. *Id*.

At trial, evidence of what was seized from Podrazo's Blazer was introduced through the testimony of two witnesses and the parties' stipulation to the DNA test results. Podrazo did not object to this evidence at the time it was introduced. After the State rested its case in chief, Podrazo renewed his motion to suppress. The trial court then stated:

> [M]y recollection is that we had talked in advance and the agreement was you needn't make your objections at the time. You could renew them the first time the jury was out of — the first reasonable time when the jury was not present with the same effect as if you had made them, and the basis was the suppression ruling briefly.
>
> . . . .
>
> . . . All of that is treated as if you had appropriately objected. My ruling would be that the objections were overruled consistent with my prior order in the suppression hearing.

Based on this comment, we understand the parties agreed that Podrazo was not required to object at the time the evidence was introduced, but, rather, that he could wait until the first reasonable time outside the presence of the jury. The parties' agreement, coupled with the fact that the trial court treated

Podrazo's renewal of his motion to suppress as if he had appropriately objected, is sufficient for us to address this assignment of error. We caution counsel, however, that any agreements between them or among them and the court should appear on the record and not be left to a regurgitation by the court as to what those agreements entailed.

[3] The State also alleges that even if Podrazo properly renewed his objection at trial, he still waived the objections made in his motion to suppress, because he stipulated to the admission of the DNA test results. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact binding on the party making the same, as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake. *State v. Davis*, 224 Neb. 205, 397 N.W.2d 41 (1986). Here, Podrazo stipulated only to the fact that blood found on the Blazer's rear seat cushion and an ice scraper found in the cargo area of the Blazer matched A.T.'s DNA. He did not stipulate that the blood was properly seized or otherwise waive any arguments made in his motion to suppress with respect to the manner in which the blood samples were collected. We will therefore address this assignment of error.

(a) Jurisdiction

Podrazo argues the evidence found in his Blazer should have been suppressed because the vehicle was seized by Omaha police officers from his residence, which is outside of the Omaha city limits. The State contends this argument has been waived for appellate review, because it was not raised in the trial court. We disagree because the record indicates the jurisdiction issue was raised at the hearing on Podrazo's motion to suppress and at the hearing on his motion for new trial.

At the suppression hearing, testimony was elicited from Love that Omaha police requested a Douglas County sheriff's deputy to accompany them to Podrazo's residence. Love testified that she and Seaton asked the deputy to tow the

Blazer because they knew the vehicle was located in Douglas County's jurisdiction.

At the posttrial hearing on Podrazo's motion for new trial, Podrazo repeated his argument that the evidence obtained from his Blazer should have been suppressed because Omaha police officers were outside their jurisdiction when the Blazer was seized. The court then asked the State whether it was prepared to address the "vehicle issue." The following colloquy then took place:

> [The State]: I was not considering it. I was here at the motion to suppress, Your Honor. I know that issue came up, and I believe it was addressed. I honestly don't recall.
>
> THE COURT: All right.
>
> [The State]: I know I briefed the matter. I'm — I apologize.
>
> THE COURT: That's okay. Your — your contention would be then that because they had a deputy sheriff there and were acting in concert, that that made everything okay?
>
> [The State]: Yes, Your Honor. I believe that's what was at the suppression hearing.

Based on the foregoing, we conclude that this issue was presented to the trial court via both the motion to suppress and the motion for new trial. It was therefore properly preserved for our consideration on appeal.

[4] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Bromm*, 285 Neb. 193, 826 N.W.2d 270 (2013).

Podrazo claims the seizure of his Blazer was unlawful because Omaha police officers acted outside the geographic boundaries of their jurisdiction. He cites to Neb. Rev. Stat. § 29-215 (Reissue 2008) to assert that "[t]he illegality of [Omaha police's] seizure was not cured by the mere presence of the Douglas County deputy sheriff" and that the State has

the burden to produce affirmative evidence of an interlocal agreement allowing law enforcement officers to act outside their jurisdiction. Brief for appellant at 27.

Podrazo is misconstruing the facts of this case. Section 29-215 authorizes law enforcement officers to act outside their primary jurisdiction in limited circumstances. But it was not Omaha police officers who performed the seizure of the Blazer; it was the Douglas County sheriff's deputy. Although Omaha police directed the sheriff's deputy to seize the Blazer, the sheriff's deputy was the officer who actually towed the vehicle. Podrazo cites to no authority supporting his argument that these actions were unlawful and that the officers who have proper jurisdiction must be the ones directing the investigation, nor did we find any indicating this to be true.

We noted in *State v. Hill*, 12 Neb. App. 492, 677 N.W.2d 525 (2004), that the detention of a suspect by an officer outside his jurisdiction was appropriate in part because the detention lasted for only a brief period before local law enforcement officers, whose authority was not at issue on appeal, arrived on the scene and effected a lawful arrest. Similarly, in this case, the Douglas County sheriff's deputy, whose authority to seize the Blazer is not at issue, arrived at Podrazo's residence before any property was seized and was the officer who towed the Blazer. While we recognize that the situation presented in *Hill* is distinguishable from the present case, we find our rationale relevant nonetheless. We therefore find that the seizure of the Blazer was lawful, and the district court properly denied Podrazo's motion to suppress on this basis.

(b) Warrant Exception

Podrazo also asserts that the district court erred in denying his motion to suppress, because his Blazer was seized without a warrant and none of the exceptions to the warrant requirement apply. The State contends that the vehicle was properly seized because it was readily mobile and officers had probable cause to believe it contained evidence of a crime.

[5-8] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.

State v. Smith, 279 Neb. 918, 782 N.W.2d 913 (2010). These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions. *Id*. 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. *Smith, supra*. The warrantless search exceptions recognized by Nebraska courts include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest. See *id*. In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *Id*.

[9,10] In *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012), the Nebraska Supreme Court upheld the warrantless seizure of a vehicle because it was supported by probable cause. In that case, police officers seized the defendant's vehicle and then later searched it after obtaining a search warrant. The Nebraska Supreme Court explained that the warrantless seizure of a vehicle is lawful when the officers could have immediately searched the vehicle without a warrant. See *id*. Whether a warrantless search of a vehicle could have been conducted is determined by whether the vehicle was readily mobile and the officers had probable cause to believe the vehicle contained contraband or evidence of a crime. See *id*.

In reaching this conclusion, the court relied on federal cases discussing the "automobile exception" to the warrant requirement. The court pointed out that in *Chambers v. Maroney*, 399 U.S. 42, 52, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), the U.S. Supreme Court first recognized:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Similarly, the *Alarcon-Chavez* court cited *U.S. v. Brookins*, 345 F.3d 231 (4th Cir. 2003), wherein the Fourth Circuit upheld the warrantless seizure of a vehicle from private property because the vehicle was readily movable, the officers had probable cause to search the vehicle at the time it was discovered, and the probable cause factor still existed at the time of the search.

In *Alarcon-Chavez*, the Nebraska Supreme Court found that both elements to the automobile exception were present. First, the defendant's vehicle was operational and therefore readily movable. In addition, probable cause supported an at-the-scene search, because officers knew that the victim had been severely injured with a knife, a knife was found in the victim's apartment, and a set of knives with one knife missing was clearly visible in the defendant's vehicle. Given probable cause to search the vehicle in the parking lot of the apartment, the court held that it was equally permissible for the officers to tow the vehicle and later obtain a warrant.

Podrazo argues that *Alarcon-Chavez* does not control this case, but we disagree and find that both requisites are met in this case. Podrazo claims his Blazer was not movable, because police officers had the keys and the vehicle was parked and locked with the windows up. Under *Alarcon-Chavez, supra*, and *Brookins, supra*, however, this is not the test for mobility. In *Brookins*, the district court concluded that on the facts presented—the ease with which officers could have blocked the defendant's automobile and the fact that the vehicle was unoccupied when discovered by the officers—a warrant was required to search and seize the vehicle because it was not "readily mobile." On appeal, the Fourth Circuit disagreed, viewing ready mobility as defining the nature of the *use* of the vehicle, rather than its ability to be moved by a defendant upon stop or seizure. Thus, the Fourth Circuit in *Brookins* and the Nebraska Supreme Court in *Alarcon-Chavez* found that a vehicle is readily movable when it is operational. This factor is present here.

Podrazo also argues that probable cause did not exist, because Podrazo made no statement, he was not arrested, officers did not see him commit a crime or with evidence

of a crime, and there was no evidence found in plain view. But those are not the only factors pertinent to a probable cause inquiry.

[11-13] Probable cause escapes precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010). Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. *Id*. We determine probable cause by an objective standard of reasonableness, given the known facts and circumstances. *Id*.

We conclude that probable cause existed in this case because, based on the facts available to police at the time, it was reasonable for them to believe the Blazer contained evidence of a crime. Love testified at the suppression hearing that on December 24, 2010, she knew the Blazer was registered to Podrazo and that witnesses who had been at the Maple Street residence the previous night told her that when they noticed Podrazo and A.T. were missing, they discovered the Blazer was missing as well. Additionally, Love knew that Podrazo had handwritten the note admitting that he and A.T. had had sexual contact in the Blazer on the previous night. Moreover, the nurse told Love of the extent and cause of A.T.'s injuries that had been discovered during the sexual assault examination. Based on this information, it was reasonable for police officers to believe the Blazer contained evidence of the possible sexual assault of A.T. Given probable cause to search the Blazer at Podrazo's residence, it was equally permissible for officers to tow the vehicle and later obtain a warrant. We therefore conclude that the district court did not err in overruling Podrazo's motion to suppress.

2. Evidence

Podrazo argues the district court erred in refusing to allow him to introduce evidence of A.T.'s habits of blackouts,

previous sexual relations during blackout, habitual intoxication connected with sexual activity, and memory impairment as a result of chronic substance abuse. As the State points out, this assignment appears to address three separate motions made by Podrazo. We will address each individually.

(a) Other Sexual Behavior

[14,15] Podrazo alleges the district court erred in denying his request to offer evidence that at least once prior to the events in question, A.T. engaged in voluntary sexual activity during an alcoholic blackout, and that she admitted during her deposition that she is "always" drunk or high when she engages in sexual relations. In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999). Where, as here, the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *Id.*

Under Nebraska's rape shield statute, evidence of a victim's prior sexual behavior or sexual predisposition is not admissible except under the following limited circumstances in a criminal case:

> (i) Evidence of specific instances of sexual behavior by the victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
>
> (ii) Evidence of specific instances of sexual behavior of the victim with respect to the accused offered by the accused to prove consent of the victim if it is first established to the court that such behavior is similar to the behavior involved in the case and tends to establish a pattern of behavior of the victim relevant to the issue of consent; and
>
> (iii) Evidence, the exclusion of which would violate the constitutional rights of the accused.

Neb. Rev. Stat. § 27-412(2)(a) (Cum. Supp. 2012). Subsection (i) does not apply here, because there was no evidence or allegation that anyone other than Podrazo was the source of A.T.'s injuries. Similarly, subsection (ii) is not applicable, because there was no evidence of a prior sexual history between A.T. and Podrazo.

[16] Podrazo argues that under § 27-412(2)(a)(iii) and the Nebraska Supreme Court's decision in *Lessley, supra*, the exclusion of his proffered evidence violated his right to confrontation and to present a full defense under the Sixth Amendment to the U.S. Constitution. The Sixth Amendment provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . .'" *Lessley*, 257 Neb. at 908, 601 N.W.2d at 526.

In *Lessley*, the Supreme Court found that even though evidence was inadmissible under the rape shield law, it was admissible on constitutional grounds because of a defendant's right to confront his accuser. In its direct examination of the victim, the State introduced evidence that she was a lesbian. The trial court refused to allow the defendant to introduce evidence to contradict the victim's denial that she told a coworker that she engaged in anal intercourse with men. On appeal, the Nebraska Supreme Court ruled that the defendant's Sixth Amendment right to confront his accuser on the dispositive issue of consent required that he be allowed to explore this matter, because the direct examination regarding the victim's sexual preference and experience permitted the jury to draw an inference that as a lesbian, she would not consent to sexual relations with the defendant. Finding that the evidence the defendant wanted to offer would have made this critical inference less probable and that the State had opened the door to the victim's sexual past, the Supreme Court reversed the trial court's decision not to allow its admission.

Lessley is distinguishable from the case at hand, because here, the State did not open the door by inquiring into A.T.'s sexual past. Any inference the jury could make that A.T. did not consent to sexual relations with Podrazo was based only on

A.T.'s testimony with respect to Podrazo himself. For example, A.T. testified that she had met Podrazo on only two prior occasions and that she did not even remember seeing him on December 23, 2010. The State did not adduce any testimony regarding A.T.'s prior sexual history, including whether she has previously engaged in sexual activity while under the influence or during an alcoholic blackout. Accordingly, Podrazo's right to confront A.T. was not impermissibly restricted, and we conclude that the district court did not abuse its discretion in refusing to allow Podrazo to introduce evidence of A.T.'s sexual history.

(b) Prior Substance Abuse and Mental Health Issues

[17,18] Podrazo alleges the district court erred in denying his request to offer evidence that A.T. had previously been diagnosed with mental health issues, substance abuse, and cognitive difficulties and had received treatment for these conditions. He argues this evidence was relevant to A.T.'s credibility and the issue of her consent. The exercise of judicial discretion is implicit in determinations of relevancy and prejudice, and a trial court's decision regarding them will not be reversed absent an abuse of discretion. See *State v. Aguilar-Moreno*, 17 Neb. App. 623, 769 N.W.2d 784 (2009). 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. Neb. Rev. Stat. § 27-401 (Reissue 2008).

A.T. admitted in her deposition that she was convicted of minor in possession when she was in high school in 2009. As a result, she was required to attend a treatment program, which she completed in 2009. As for the mental health issues and cognitive difficulties Podrazo references, A.T. testified during her deposition that while attending treatment for her minor in possession conviction, she was told that her "learning was off," but she stated that this did not make sense to her because she graduated from high school early with more credits than necessary. A.T. was also diagnosed with slight

anxiety and depression and was prescribed a low dose of an antidepressant, but she discontinued the medication in 2009 or 2010.

Podrazo admitted that the evidence he wanted to introduce occurred approximately 12 to 18 months prior to December 2010, when A.T. was still in high school. Although he argues this evidence is relevant to A.T.'s credibility, A.T. testified at trial that she could not remember anything between the time she returned to the Maple Street residence and the time she woke up in the hospital. We therefore cannot say the district court abused its discretion in refusing to allow Podrazo to introduce evidence of events that took place more than a year prior to the incident here and had no bearing on the events of that night or A.T.'s ability to recall them.

(c) Habit of Wandering and Intoxication

Podrazo argues the district court erred in denying his request to introduce evidence of A.T.'s "habit" of drinking to the point of blacking out and wandering around while intoxicated and inappropriately dressed.

Habit evidence is governed by § 27-406, which provides:

> (1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
>
> (2) Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

[19] The exercise of judicial discretion is implicit in determinations of relevancy and admissibility under § 27-406, and as a result, the trial court's decision will not be reversed absent an abuse of discretion. *Hoffart v. Hodge*, 9 Neb. App. 161, 609 N.W.2d 397 (2000).

[20,21] This court has previously noted that the "precise contours of how frequently and consistently a behavior must

occur to rise to the level of habit cannot be easily defined or formulated," and thus concluded that admissibility depends on the trial judge's evaluation of the particular facts of the case. *Id*. at 167, 609 N.W.2d at 403. The Nebraska Supreme Court, however, has concluded that evidence of a single incident, even if it is true, is an insufficient showing of a "routine" or "habit." See *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

In this case, Podrazo sought to establish that A.T. had a habit of wandering around during intoxication while inappropriately dressed, arguing this "habit" offered an alternative explanation for how she ended up in the position in which she was found near the Pratt Street residence. However, Podrazo was able to provide evidence of only one occasion on which A.T. performed this "habit." There was no evidence that A.T. wandered away from the Maple Street residence on the night of December 23, 2010. The August 2011 incident alone is insufficient to establish a habit, and therefore, the district court did not abuse its discretion in overruling Podrazo's motion. This assignment of error is without merit.

3. Access to Mental Health Records

[22] Podrazo argues the district court erred in refusing to allow him discovery access to A.T.'s medical and mental health records pursuant to *State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989). A trial court has broad discretion in granting discovery requests and errs only when it abuses its discretion. *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

At the outset, we note that the State claims this issue has not been properly preserved for appeal, because Podrazo did not renew his motion pursuant to *Trammell, supra*, prior to A.T.'s testimony at trial. The State argues that because Podrazo requested access to A.T.'s medical records or, in the alternative, that the court prevent A.T. from testifying, the motion should be considered a motion in limine to exclude A.T.'s testimony.

We disagree. In *Trammell*, the Nebraska Supreme Court held that in a situation where the defendant should be allowed

to inquire into the witness' current medical condition but the witness refuses to waive physician-patient privilege, the exclusion of the witness' testimony is the remedy. Thus, the issue is whether the defendant should be permitted to inquire about the witness' medical condition, not whether the witness' testimony should be excluded. Notably, on appeal, Podrazo assigns and argues only that the court erred in refusing to allow him access to A.T.'s medical records, not that the court erred in allowing A.T. to testify. Accordingly, the motion that Podrazo is appealing is the discovery motion, not a motion in limine. We will therefore address the merits of this assignment.

[23,24] Generally, confidential communications made by a patient to a physician or professional counselor for the purposes of diagnosis and treatment are privileged. See Neb. Rev. Stat. § 27-504 (Reissue 2008). In *Trammell, supra*, the Nebraska Supreme Court recognized that a problem arises when attempting to accommodate the witness' right to maintain the privilege and the defendant's right to confront the witnesses against him. The court determined that the result is that the testimony of the witness is inadmissible. Before this remedy is available, however, the defendant must make a showing that the failure to produce the privileged information is likely to impair the defendant's ability to effectively cross-examine the witness claiming the privilege. See *id*. If the defendant succeeds in making such a showing, the court "'may then afford the state an opportunity to secure the consent of the witness for the court to conduct an in camera inspection of the claimed information and, if necessary, to turn over to the defendant any relevant material for the purposes of cross-examination.'" *Id*. at 143, 435 N.W.2d 201. If the witness does not consent, "'the court may be obliged to strike the testimony of the witness.'" *Id*.

Following this procedure, the Supreme Court in *Trammell* found reversible error when the victim was allowed to testify without allowing the defendant to discover evidence concerning the victim's current mental health treatment. The victim in that case was 40 years old at the time of trial. She had been receiving mental health care since she was 13 and had

been institutionalized on three occasions, the last admission being when she was 27 years old. Since her last institutionalization and including at the time of the assault, the victim had been taking medication to control a psychosis. On appeal, the Supreme Court found that any inquiry into the victim's hospitalization or treatment while she was confined was too remote in time to have any relevance to the matter at hand. The victim's current treatment, however, was found to be relevant.

In this case, the trial court refused to allow Podrazo discovery access to A.T.'s medical records based on a finding that he had failed to show that denial of access to the records would deny his right to confront the witness. We conclude this was not an abuse of discretion. Podrazo argues that had the court granted his discovery motion, he "would have been able to ascertain if there were even more instances of [A.T.'s] conduct that would bolster evidence of her habits and practice regarding intoxication and sexual activities" as described above. Brief for appellant at 32. *State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989), does not authorize a "fishing expedition," however. See *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

In addition, the victim-witness in *Trammell, supra*, had a lengthy history of psychiatric problems and was taking medication at the time of the sexual assault to control them. In the present case, Podrazo never claimed that A.T.'s ability to recall or recount the events of December 23, 2010, was in any way impaired due to a mental condition or psychotropic medication, about which he was entitled to inquire. In fact, A.T. admitted she was unable to remember the events of December 23 anyway, so any medical condition or treatment would have no bearing on her testimony surrounding the events that occurred that evening. Accordingly, this assignment of error is meritless.

4. Expert Testimony

[25-28] Podrazo alleges the district court erred in restricting the testimony of Dr. Corbett. The trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an

expert's opinion. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). A trial court has broad discretion in determining how to perform its gatekeeper function. *Id*. The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

Specifically, Podrazo claims Dr. Corbett should have been allowed to state his opinion regarding the effect of A.T.'s alcohol consumption on her executive functioning and decisionmaking and regarding when A.T.'s blackout ended on December 23 or 24, 2010. The trial court sustained the State's objections to these opinions on the grounds of foundation and relevance. Through Dr. Corbett's testimony, Podrazo was attempting to establish that despite A.T.'s high blood alcohol content on the morning of December 24, because she was an experienced drinker with a high tolerance for alcohol, her decisionmaking was not nearly as affected as that of someone with a lower tolerance. This could then lead the jury to infer that A.T. still could have formed the capacity to consent to sexual activity with Podrazo.

Dr. Corbett explained that in general, people can develop a tolerance to alcohol and become less impacted by its effects. With respect to A.T.'s tolerance, however, the court granted the State's objection to Dr. Corbett's testifying that he read in A.T.'s deposition that she admitted she has a very high tolerance for alcohol. The court noted for the jury that any evidence relating to A.T.'s drinking was limited to the day of the incident. Thus, there was no admissible evidence regarding A.T.'s history of drinking and corresponding high tolerance upon which Dr. Corbett could base his opinion as to whether alcohol affected A.T.'s decisionmaking on December 23, 2010. Because Dr. Corbett did not demonstrate that he had any scientific way of determining whether A.T.'s decisionmaking was affected solely based on the data he reviewed and the admissible evidence, we cannot conclude that the district court abused

its discretion in finding there was insufficient foundation for this opinion.

Similarly, it was not an abuse of discretion for the district court to refuse to allow Dr. Corbett to opine as to when A.T.'s blackout ended. Dr. Corbett explained that most total blackouts end when a person has gone through a sleep cycle and wakes up. Based on A.T.'s deposition, Dr. Corbett knew that her blackout began shortly after she returned to the Maple Street residence after eating dinner. He also knew, based on the police reports, that she was found unconscious in the street shortly before midnight. Dr. Corbett testified that the unconscious condition in which A.T. was discovered was consistent with the "pass-out" that comes after a blackout. He admitted, however, that he was unable to determine when A.T.'s period of unconsciousness began. Based on this testimony, the trial court properly sustained the State's foundational objection to Dr. Corbett's opinion as to when A.T.'s blackout ended, and we reject this assignment of error.

5. Jury Instruction

[29,30] Podrazo claims the district court erred in refusing his proffered jury instruction. Podrazo requested that the jury be instructed on the defense of intoxication. This instruction provides:

> There has been evidence that the defendant was intoxicated at the time that the (here insert crime) with which (he, she) is charged was committed.
>
> Intoxication is a defense only when a person's mental abilities were so far overcome by the use of (alcohol, drugs) that (he, she) could not have had the required intent. You may consider evidence of (alcohol, drug) use along with all the other evidence in deciding whether the defendant had the required intent.

NJI2d Crim. 8.0. Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). A trial court is not obligated to instruct

the jury on matters which are not supported by evidence in the record. *Id*.

Podrazo argues the circumstantial evidence establishes that he was intoxicated on the night of December 23, 2010. He directs the court's attention to witness testimony that he was part of the group that night, drinking alcohol and using drugs, and to his handwritten note confirming that he and A.T. had been drinking, that things "got a little crazy," and that "it was pretty rough."

According to our review of the record, all of the witnesses who testified at trial remembered seeing Podrazo at the Maple Street residence on the night of December 23, 2010, but none were able to describe his condition. The only evidence about Podrazo's drinking came from Smith, who testified that he saw Podrazo "take some shots," and from Podrazo's note in which he confirmed that he had been drinking. While this evidence may support Podrazo's claim that he was drinking, it is insufficient to establish that he was intoxicated to the extent that his mental abilities were overcome by the use of alcohol or drugs.

[31] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004). Because the record does not establish that the tendered instruction was warranted by the evidence, the district court did not err in refusing to instruct the jury on the defense of intoxication.

6. Exhibits in Support of Motion for New Trial

Podrazo alleges the district court erred in refusing to admit into evidence exhibits 91 and 93 through 100, offered in support of his motion for new trial. At the outset, we note that the State argues we should decline to address this issue because it is not necessary to adjudicate the controversy before us. The State claims that the exhibits were offered in support of

Podrazo's argument that he was entitled to a new trial based on the fact that three jurors did not disclose certain information during voir dire, but, the State argues, Podrazo did not assign or argue that ground for a new trial on appeal.

We agree that Podrazo does not argue on appeal that he was entitled to a new trial based on nondisclosure of information by certain jurors. He does, however, argue that he is entitled to a new trial because he was denied pretrial access to basic juror information and that, had he received even just the names of potential jurors prior to trial, he could have discovered the information they failed to provide during voir dire. For this reason, we find it necessary to address this assignment of error.

At the hearing on his motion for new trial, Podrazo offered numerous exhibits. On appeal, he challenges the court's refusal to receive nine exhibits into evidence. He argues that because the exhibits were properly authenticated, the court should have received them. The ground on which the court sustained the State's objections, however, was relevance, not foundation. Therefore, we will address whether the district court erred in concluding these exhibits lacked relevance.

The record reveals that two of those exhibits (exhibits 93 and 100) were actually received without objection. The remaining exhibits include an affidavit of a senior certified law clerk regurgitating what occurred during voir dire, and court records regarding petitions for protection orders, protection orders, or criminal complaints involving three of the jurors.

The proffered affidavit is from a senior certified law clerk who assisted Podrazo's counsel during trial. In his affidavit, the law clerk describes matters he heard take place during voir dire, such as questions posed to the potential jurors and their responses or lack of responses. The court admitted portions of the affidavit into evidence, but excluded other portions as hearsay or irrelevant.

[32,33] In *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990), the Nebraska Supreme Court concluded that errors predicated on occurrences during the course of voir dire examination cannot be shown by

affidavit. The court stated that it "will not undertake to resolve disputes about what is claimed to have happened, when a record of the voir dire examination could have been made." *Id*. at 375, 405 N.W.2d at 585. The court, therefore, found no abuse of discretion when the trial court denied the defendant's request to present testimony regarding the voir dire examination of the jury.

Likewise here, Podrazo could have requested that a record of the voir dire examination be made, but he did not. He attempted, through the law clerk's affidavit, to recreate the record, but this is not permissible. The district court allowed portions of the affidavit into evidence, but refused other portions as inadmissible hearsay. The excluded portions attempted to re-create what occurred during voir dire, and the trial court did not abuse its discretion in refusing to receive those portions of the exhibit into evidence.

Similarly, we cannot find the district court abused its discretion in sustaining the objections to the court records on the basis of relevancy. At the hearing on the motion for new trial, Podrazo offered these exhibits in support of his argument that three jurors had failed to disclose during voir dire information regarding their involvement in domestic violence situations. Because we conclude that the voir dire examination not conducted on the record cannot be re-created through affidavit, these exhibits lack relevance to the matter before the district court. Without a record establishing what occurred during voir dire, any evidence attempting to show that certain jurors failed to disclose information is not relevant. Therefore, this assignment of error is without merit.

7. Motions for Mistrial or New Trial

[34,35] Podrazo argues the district court erred in overruling his motions for mistrial and new trial on three bases. We will address each separately. We will not disturb a trial court's decision whether to grant a motion for mistrial unless the court has abused its discretion. *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). Likewise, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion

is shown, the trial court's determination will not be disturbed. *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

(a) Juror Information

Podrazo claims he was entitled to a new trial because he was denied pretrial access to prospective juror questionnaires and basic information. In an attempt to obtain this information prior to trial, counsel contacted the office of the clerk of the district court and the jury commission office directly. Counsel admitted that she never moved the court for an order granting her access to juror information, and she did not present this issue to the district court until her motion for new trial. Accordingly, we cannot find the district court abused its discretion in refusing to grant Podrazo's motion for new trial on an issue that was not presented timely to the district court for consideration. See *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

(b) Jury Misconduct

Podrazo argues that the trial court erred when it overruled his motions for mistrial and new trial based on improper communications between a juror and an employee of the county attorney's office. One of the members of the jury was a former courthouse employee. At a recess during the second day of trial, the juror recognized an employee of the Douglas County Attorney's office, who was working as a victim advocate for the trial. The two shared a hug and engaged in a brief conversation concerning their families and personal lives but did not discuss the trial.

The morning of the fourth day of trial, Podrazo moved for a mistrial based on jury misconduct. Counsel explained the delay, stating that she did not become aware of the contact until after the third day of trial. The court initially stated that it was going to grant the mistrial based upon information of the contact's occurring in the midst of other jurors and the victim witness advocate being present. The State requested that the court poll the jurors to determine whether any of them had, in fact, observed the contact, because counsel for the State indicated that no other jurors were present at

the time of contact. Podrazo resisted that request. The court declined the State's request, stating that polling the jurors would reinforce the issue, which would create a larger problem. The court ultimately concluded that it would not grant a mistrial, based upon the court's impression of the jury as being conscientious of its duties. The court based its impression on a situation that occurred earlier in the trial in which a juror provided the court with a note alerting it to the fact that another juror was texting during testimony. The court concluded that this indicated the jury was aware of its duties and obligations. Based upon the admonitions to the jurors and the absence of any report from the jurors regarding the contact, the court denied the motion.

The court conducted a followup hearing on the motion for mistrial, at which time it questioned the county employee who had juror contact. Podrazo's counsel conducted cross-examination and elicited testimony from Podrazo's mother, who also observed the contact. The evidence revealed that the employee and the juror had contact in the rotunda area while A.T. and her mother were seated in the hallway outside the courtroom. After clarifying this information, the court restated its decision to deny the motion for mistrial.

At the hearing on the motion for new trial, the State offered an affidavit from the juror, wherein she admitted to the encounter but stated that she "did not further consider or think about this contact during any portion of the remainder of the trial or deliberations." The court overruled the motion for new trial.

[36-38] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). When the misconduct involves a juror and a nonjuror, it gives rise to a rebuttable presumption of prejudice to the defendant which the State has the burden to overcome. See *id*. We review the trial court's determinations of witness credibility and historical fact for clear error; we review de novo the trial court's

ultimate determination whether the defendant was prejudiced by juror misconduct. *Id.*

The Nebraska Supreme Court in *Thorpe* found the trial court had correctly denied the defendant's motion for mistrial based on alleged juror misconduct, even though the record clearly showed improper communication between a juror and a witness. The court concluded that the State had overcome the presumption of prejudice to the defendant, because the communication was unrelated to any issue before the jury, the communication was to one juror only who did not share that communication with the other jury members, and the juror indicated that the communication would not affect his ability to remain impartial.

Similarly, in the case at hand, the record shows improper communication between a juror and a nonjuror. Therefore, a rebuttable presumption of prejudice to Podrazo arose, which presumption the State had the burden to overcome. We conclude the State overcame its burden to prove that Podrazo was not denied a fair trial, and therefore, the district court correctly denied Podrazo's motions for mistrial and new trial.

Under our de novo review, we find the conversation between the juror and employee was not related to any of the issues at trial, and the juror later testified by affidavit that she did not further consider this contact during the trial or deliberations. We further find that although the jurors could have observed A.T. and the employee together at various times during trial, they were not together when the embrace occurred. A.T. was in the hallway outside of the courtroom, and the employee and juror were in the rotunda. Therefore, even if other jurors observed the embrace, it did not occur in the presence of A.T. Based upon the testimony elicited, we find that the State overcame the presumption of prejudice. As such, this argument is without merit.

(c) Prosecutorial Misconduct

[39,40] Based on the conversation between the county employee and the juror, Podrazo also alleges he was entitled to a mistrial or new trial on the basis of prosecutorial misconduct. 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. *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013). Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole. *Id*. 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*.

Assuming, without deciding, that the county employee's conduct was improper and could be considered prosecutorial misconduct, we conclude Podrazo has not shown that a substantial miscarriage of justice actually occurred or that he was prevented from having a fair trial. As stated above, the contact between the juror and the county employee was brief and they did not discuss the trial. The evidence is conflicting as to whether any of the other jurors actually witnessed the interaction, although it appears as though other jurors were in the area. It is undisputed, however, that A.T. was not present during the interaction. The juror involved in the interaction testified by affidavit that she did not further think about or consider the conversation during the remainder of the trial or deliberations. The evidence of A.T.'s injuries, her DNA found in Podrazo's Blazer, and his admission that they had had sexual contact on the night of December 23, 2010, supported the convictions. The district court did not abuse its discretion when it denied Podrazo's motions for mistrial and new trial.

8. Excessive Sentences

Podrazo alleges the court imposed excessive sentences. He acknowledges that it is difficult to "'color-match'" cases when reviewing sentences, but argues that his sentences "are impossibly out of step with sentences of imprisonment imposed in other first-degree sexual assault cases." Brief for appellant at 42-43.

Podrazo was convicted of first degree sexual assault, a Class II felony, and attempted first degree assault, a Class III felony. Neb. Rev. Stat. § 28-319 (Reissue 2008); Neb. Rev. Stat. § 28-308 (Cum. Supp. 2012); Neb. Rev. Stat. § 28-201(4)(b) (Cum. Supp. 2010). Class II felonies are punishable by 1 to 50 years' imprisonment, and Class III felonies are punishable by 1 to 20 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 2008). Podrazo was sentenced to 40 to 50 years' imprisonment on count I and a consecutive sentence of 10 to 16 years' imprisonment on count II. Thus, his sentences are within the statutory guidelines.

[41] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. See *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

The information contained in the presentence report indicates that Podrazo was 21 years old at the time of sentencing and led a relatively law-abiding life other than these charges. Other than traffic offenses, his criminal history includes a criminal mischief conviction and two driving under the influence convictions. During the pendency of this case, Podrazo attended an inpatient treatment facility for alcohol dependency. Podrazo graduated from high school, attended some college, and worked several construction jobs. The presentence report

contained eight letters of support for Podrazo from family and friends.

More important in this case, of the factors for consideration, are the nature of the offense and the amount of violence involved in the crime. The injuries Podrazo inflicted on A.T., who was only 19 years old at the time of the assault, are described above and were characterized by medical personnel as "[s]evere." A.T. testified that when she woke up in the hospital, she had pain everywhere, including in her vagina and anus. When she was released from the hospital on Christmas Day, she was still experiencing pain and had to use her hands to move her legs to get out of bed. She was sent home from the hospital with icepacks, wipes for her vaginal area to help with the pain, and pain medication. A letter written by A.T. and included in the presentence report describes the significant emotional, mental, and physical impact Podrazo's actions had on her life. Because the sentences are supported by competent evidence and within the statutory guidelines, we conclude the district court did not abuse its discretion in the sentences imposed.

V. CONCLUSION

For the foregoing reasons, we find no merit to Podrazo's assigned errors. We therefore affirm his convictions and sentences.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MATHEW W. WORKMAN, APPELLANT.
842 N.W.2d 108

Filed December 10, 2013. No. A-12-888.

1. **Due Process.** The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law.
2. **Probation and Parole: Due Process.** The minimal due process to which a parolee or probationer is entitled also applies to participants in the drug court program. This minimal due process includes (1) written notice of the time and place of the hearing; (2) disclosure of evidence; (3) a neutral factfinding body

or person, who should not be the officer directly involved in making recommendations; (4) opportunity to be heard in person and to present witnesses and documentary evidence; (5) the right to cross-examine adverse witnesses, unless the hearing officer determines that an informant would be subjected to risk of harm if his or her identity were disclosed or unless the officer otherwise specifically finds good cause for not allowing confrontation; and (6) a written statement by the fact finder as to the evidence relied on and the reasons for revoking the conditional liberty.

3. **Probation and Parole.** A probation revocation hearing is not part of a criminal prosecution or adjudication and therefore does not give rise to the full panoply of rights that are due a defendant at a trial or a juvenile in an adjudication proceeding. The same proposition should apply in a drug court termination hearing.
4. **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.
5. **Proof.** The standard of proof for termination from drug court participation is preponderance of the evidence.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.
7. ____. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
8. **Convictions: Sentences.** If a drug court participant is terminated from the program or withdraws before successful completion, then the conviction stands and the case is transferred back to the original court for sentencing.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Judgment reversed, sentence vacated, and cause remanded for further proceedings.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

I. INTRODUCTION

Mathew W. Workman appeals from the orders of the district court for Sarpy County that terminated his participation in a drug court program as a result of several violations of the conditions of his drug court contract and sentenced him to

concurrent terms of 20 months' to 5 years' imprisonment on his original drug charges. On appeal, Workman asserts that the district court did not comply with procedural and substantive due process safeguards in the termination proceeding and that imposition of a sentence for violation of his drug court contract was not authorized. Because we find that the district court failed to provide a written statement as to the evidence relied on and the reasons for terminating Workman's participation in the drug court program, we reverse, vacate, and remand for further proceedings.

II. BACKGROUND

On November 16, 2009, Workman pled guilty to three amended charges of possession of a controlled substance, all Class IV felonies. At the plea hearing, Workman was asked if he understood that if he cannot complete drug court, he could be found guilty of three Class IV felonies, each punishable by a fine of up to $10,000 or confinement for a period of up to 5 years, along with other consequences, to which he responded in the affirmative. Workman's pleas were accepted, and he was referred to Sarpy County's adult drug court.

On February 21, 2012, the State filed a motion to terminate Workman's participation in the drug court program for violations of his drug court contract—specifically, conditions 4, 5, 7, 11, and 15. The motion contained specific allegations of actions or inactions on the part of Workman to support termination. A hearing on the motion was held on March 6, at which Workman was present and represented by counsel.

The first phase of the hearing was to determine whether violations of Workman's drug court contract had occurred. Testimony was adduced by Workman's drug court supervision officer, Lisa Vetter. Vetter testified that she reviewed the drug court contract with Workman on November 17, 2009, in her office, at which time they went over each condition verbally and she explained how he could fulfill those conditions. The drug court contract, which was signed by Workman, Vetter, and the "Drug Court Judge" on November 16, along with an addendum signed on September 20, 2010, was received in evidence as an exhibit without objection. Vetter also gave

Workman Sarpy County's adult drug court policy and procedure manual, a copy of which was also received in evidence without objection.

Vetter testified to the conditions of the drug court contract that she believed Workman had violated. Condition 4 required Workman to timely pay the drug court fees. Vetter indicated that condition 4 was violated because Workman had not been keeping up on making payments toward his drug court fees, and as of February 22, 2012, he owed $580 in fees. An exhibit was offered by Workman's attorney and received in evidence showing fees of $585 owed by Workman as of February 27. Next, Vetter testified that condition 5 was violated when Workman failed to appear for an office appointment with her on September 14, 2011. Condition 5 requires participants to appear for scheduled appointments. Vetter learned on January 17, 2012, that Workman had been fired from his job approximately 1 week before. Workman failed to notify Vetter that he had been terminated from his employment until their next meeting on February 8. Condition 15 of the drug court contract required Workman to notify Vetter within 72 hours of losing his job, which Workman did not do. Finally, on February 4, Workman was discharged from the three-quarter-way house that he was required to reside at as a part of his treatment program and did not immediately notify Vetter. Vetter testified that this was a violation of both conditions 7 and 11 of the drug court contract. Condition 7 required Workman to be open and honest with the drug court team regarding his drug use and lifestyle, along with any changes in his lifestyle. Condition 11 required Workman to keep Vetter informed of his current address and telephone numbers and to report any changes within 2 calendar days. Workman declined to offer evidence at this phase of the proceeding. At the conclusion of this portion of the hearing, the district court made oral findings that Workman was in violation of conditions 4, 5, 11, and 15.

The court then proceeded to the termination phase of the hearing to determine whether Workman should be terminated from the drug court program. Vetter again testified about her supervision of Workman and to the various levels of treatment that he participated in. While Workman successfully

completed his initial pretreatment program and intensive outpatient treatment program, he did not graduate successfully from the continuing care or aftercare treatment program. Workman was "kicked out" of the three-quarter-way house where he was living while he was doing continuing care, because he was behind on rent. He was then told to move to a particular shelter, but instead, he was staying at his mother's house contrary to instructions. Because Workman had received the maximum benefit available through the continuing care program, he was discharged from that program and subsequently referred to a treatment house. Workman was eventually discharged from this treatment house, having reached maximum benefit but not having successfully completed all of the requirements. He was again sent to a three-quarter-way house from which he was asked to leave due to noncompliance with the rules and his dishonest behaviors. Vetter testified to Workman's continued dishonesty during his treatment programs. Finally, Vetter testified to three missed drug testing appointments by Workman.

Additional exhibits were received in evidence detailing sanctions received by Workman throughout his drug court program for his missing an office appointment, missing drug testing, continued dishonesty, and being late for an office appointment. The exhibits show various periods of unemployment and being fired from jobs. The exhibits also show inconsistent progress in the various treatment programs. After the State presented its evidence at the termination phase of the hearing, Workman was again given the opportunity to present evidence, which he declined. The district court verbally reviewed the evidence, noted the particular concern about Workman's dishonest behavior, and concluded that termination from the drug court program was appropriate.

A docket entry was made March 6, 2012, by the district court, finding that Workman was in violation of conditions 4, 5, 11, and 15 and that his participation in the drug court program should be terminated. The entry then set the matter for a later sentencing hearing. In case No. A-12-214, Workman filed an appeal from the March 6 docket entry, which appeal we dismissed on April 13 for lack of jurisdiction. After entry of

our mandate, Workman was sentenced on August 27, as recited above. Workman again appealed.

III. ASSIGNMENTS OF ERROR

On appeal, Workman assigns as error that (1) the district court did not comply with the procedural and substantive due process safeguards required by *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011), thereby rendering erroneous the termination of Workman's participation in the drug court program, and (2) even if the *Shambley* due process protections were honored, any violations by Workman of his drug court contract did not authorize imposition of a sentence, because he had agreed to the terms of a quasi-contract and not a sentence of probation.

IV. STANDARD OF REVIEW

[1] The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law. *State v. Shambley, supra*.

V. ANALYSIS

1. Was Workman Afforded Adequate Due Process in Drug Court Termination Proceeding?

In *State v. Shambley, supra*, the Nebraska Supreme Court considered for the first time what process is due in drug court termination proceedings. In that case, following several proceedings involving alleged violations of the defendant's drug court contract, the drug court team recommended that she be terminated from the program. A hearing on termination was held, and the court advised the defendant that it was her burden to go forward with showing why she should not be terminated from the program. The court received in evidence a letter, with attachments, from the drug court coordinator recommending the defendant's termination from the drug court program. No other evidence or testimony was presented by the State. Defense counsel objected to the court's consideration of the letter and attachments on the grounds of hearsay and lack of

foundation, and also argued that the manner in which the proceedings were conducted violated the defendant's rights to due process and confrontation. These objections were overruled. After the defendant offered testimony, the district court agreed with the recommendation to discharge her from the program, and thereafter sentenced her.

[2] On appeal, the Supreme Court in *State v. Shambley*, *supra*, concluded that the termination hearing did not comport with the minimal due process to which a drug court participant is entitled. In reaching this conclusion, the court reasoned that the minimal due process to which a parolee or probationer is entitled also applies to participants in the drug court program. This minimal due process includes (1) written notice of the time and place of the hearing; (2) disclosure of evidence; (3) a neutral factfinding body or person, who should not be the officer directly involved in making recommendations; (4) opportunity to be heard in person and to present witnesses and documentary evidence; (5) the right to cross-examine adverse witnesses, unless the hearing officer determines that an informant would be subjected to risk of harm if his or her identity were disclosed or unless the officer otherwise specifically finds good cause for not allowing confrontation; and (6) a written statement by the fact finder as to the evidence relied on and the reasons for revoking the conditional liberty. See *id*.

[3] We are also mindful that a probation revocation hearing is not part of a criminal prosecution or adjudication and therefore does not give rise to the full panoply of rights that are due a defendant at a trial or a juvenile in an adjudication proceeding. *In re Interest of Rebecca B.*, 280 Neb. 137, 783 N.W.2d 783 (2010); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008); *State v. Schuetz*, 18 Neb. App. 658, 790 N.W.2d 726 (2010). We find the same proposition should apply in a drug court termination hearing.

In the present case, Workman claims in his first assignment of error that he was not afforded adequate due process in two ways, corresponding to requirements (1) and (6) above. Workman concedes that minimum due process was complied with by the State with regard to disclosure of the evidence,

a neutral factfinding body, an opportunity to be heard and to present witnesses and documentary evidence, and the right to cross-examine adverse witnesses.

(a) Written Notice of Time and Place of Hearing

Workman first argues that there was no indication that he was served with the motion to terminate his participation in the drug court program or that he was arraigned on the motion. The transcript before us does not contain a certificate of service of the motion or an indication that Workman was served with the motion. However, Workman appeared at the hearing on the motion to terminate and was represented by counsel who participated in the hearing.

The State argues that Workman did not object at the hearing that he was not being provided adequate due process and that as such, he has waived the right to assert prejudicial error on appeal. Our careful review of the record confirms that at no point did Workman raise any issue with regard to the adequacy of the notice of the hearing. The Nebraska Supreme Court has noted numerous circumstances in which a defendant has been found to have waived both statutory and constitutional rights by failing to make a timely objection. See, *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012); *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011) (noting waiver in failure to raise unconstitutionality of statute, failure to object to confrontation issue, right of defendant to be present at trial, consideration of lesser-included offenses, voir dire procedure, jury selection, procedure for handling jury questions, and trial management).

We agree with the State that Workman has waived his right to assert a lack of written notice of the hearing on the motion to terminate his participation in the drug court program. At no time did Workman assert that he did not have written notice of the hearing. Clearly, Workman and his attorney had notice of the hearing as they appeared for the hearing, and it is clear from the record that Workman's attorney participated in the hearing through cross-examination of the State's witness and argument to the court.

As a part of his argument on lack of notice, Workman asserts that he was not aware of the termination policy or procedure. The minimum due process requirement of written notice of the time and place of hearing does not encompass such an explanation. We note that in *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011), the Supreme Court did not adopt the procedural requirements contained in Neb. Rev. Stat. § 29-2267 (Reissue 2008) for probation revocation cases, which includes the right of the probationer to receive, prior to the hearing, a copy of the information or written notice of the grounds on which the information is based. Rather, the court in *Shambley* adopted the minimal due process requirements noted above. We also note that the due process rights contained in *Shambley* do not require an arraignment prior to the hearing on the motion to terminate from drug court.

Finally, to the extent that Workman's argument is that he was not aware that termination from the drug court program was a possibility, the record refutes this assertion, and the argument is without merit. Workman was previously given a copy of Sarpy County's adult drug court policy and procedure manual, which contains a provision for termination. Workman was also provided a copy of his drug court contract, and the terms and conditions were previously reviewed with him by Vetter, his drug court supervision officer. The contract, immediately above Workman's signature, states that the participant's violation of any of the conditions contained in the contract may subject him to sanctions or to terminate his participation in the drug court program.

We conclude that Workman's argument that he was not provided with written notice of the hearing on the State's motion to terminate his participation in the drug court program is without merit.

(b) Written Statement by Fact Finder

Workman next argues that the district court failed to provide him with a written statement as to the evidence relied on and reasons for revoking the conditional liberty of participation in the drug court program and, as such, violated his right to

due process. The written journal entry from the district court merely sets forth the conditions of the drug court contract that it found were violated by Workman and the finding that his participation in the drug court program should be terminated. The journal entry did not contain a statement of the evidence relied on by the court or the reasons for revoking the conditional liberty of drug court participation. Although the bill of exceptions contains the oral findings by the trial court as to which provisions of the contract were violated by Workman and the reasons that the court found his termination from the drug court program to be appropriate, such does not satisfy the minimal due process requirement of a written statement by the fact finder. Further, Workman could not have waived this requirement by failure to object as the written journal entry was made after the hearing. Accordingly, we reverse the court's order of termination and remand the cause with instructions to the district court to enter an order which contains a written statement as to the evidence relied on and the reasons for revoking the conditional liberty of Workman's participation in the drug court program, based upon the record made at the previous hearing.

[4,5] Although Workman also included an argument that the State did not prove by clear and convincing evidence that his participation in the drug court program should be terminated for violations of his contract, the State correctly points out that Workman did not assign this as an error in his brief. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013). We further note that the standard of proof for termination from drug court participation is preponderance of the evidence. See *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011).

2. Did Court Err in Imposing Criminal Sentence?

[6-8] Workman's second assignment of error, although difficult to understand, seems to be that it was error to impose a criminal sentence as it was not authorized by the drug

court contract. Because we are reversing the order terminating Workman's participation in the drug court program and remanding the cause for entry of a new order which comports with due process, we also vacate the sentence imposed by the district court. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it. *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013). However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). We find it prudent to discuss this argument to the extent that it suggests the district court is without authority to impose a criminal sentence, because that issue is likely to resurface on remand. As noted in *State v. Shambley, supra*, if a drug court participant is terminated from the program or withdraws before successful completion, then the conviction stands and the case is transferred back to the original court for sentencing. That is what occurred in this case, and the district court clearly had authority to do so. This assigned error is without merit.

VI. CONCLUSION

Workman's claim that he was not afforded adequate due process in the termination of his participation in the drug court program due to lack of written notice of the hearing is without merit. However, the failure of the district court to provide a written statement as to the evidence relied on and reasons for revoking the conditional liberty of participation in the drug court program violated the minimum requirements of due process. Workman's argument that the district court did not have authority to impose sentence after termination of Workman's participation in the drug court program is without merit. We reverse the order of the district court which terminated Workman's participation in the drug court program, and we remand the cause with instructions to the district court to enter an order which contains a written statement as to the evidence relied on and the reasons for revoking

the conditional liberty of Workman's participation in the drug court program, based upon the record made at the previous hearing. The sentence imposed is vacated, and the cause is remanded to the district court for resentencing following the entry of the new order.

JUDGMENT REVERSED, SENTENCE VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

COLEEN McDONALD, APPELLEE, AND STATE OF NEBRASKA, INTERVENOR-APPELLEE, V. DEL McDONALD, APPELLANT.

840 N.W.2d 573

Filed December 10, 2013. No. A-12-1058.

1. **Modification of Decree: Visitation: Child Support: Appeal and Error.** Issues involving the modification of a divorce decree, parenting time, and the amount of child support are initially entrusted to the discretion of the district court, whose determinations in these matters are reviewed de novo on the record for an abuse of discretion.
2. **Child Support.** The trial court's discretion to award child support extends to its determination that the child support award should be retroactive.
3. **Attorney Fees: Appeal and Error.** An appellate court reviews a trial court's award of attorney fees for an abuse of discretion.
4. **Courts: Words and Phrases.** An abuse of discretion occurs when a trial court acts or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or just result.
5. **Modification of Decree: 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.
6. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
7. **Modification of Decree.** Changes in circumstances which were within the contemplation of the parties at the time of the decree are not material changes in circumstances for purposes of modifying a divorce decree.
8. **Modification of Decree: Child Custody: Proof.** Prior to the modification of a child custody order, two steps of proof must be taken by the moving party. First, the moving party must show a material change in circumstances that affects the best interests of the child. Second, the moving party must prove that changing the child's custody is in the child's best interests.

9. **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.
10. **Modification of Decree: Child Support: Proof.** A parent seeking to modify a child support award must show a material change in circumstances, including changes in the financial position of the parent obligated to pay support.
11. **Child Support: Rules of the Supreme Court.** Generally, child support payments should be set according to the guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 2008).
12. **Child Support: Rules of the Supreme Court: Presumptions.** Although the child support guidelines are not to be applied with blind rigidity, child support shall be established in accordance with the guidelines, unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.
13. **Modification of Decree: Child Custody.** If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.
14. **Child Custody: Child Support: Rules of the Supreme Court.** Where parties exercise joint physical custody, the trial court must use the joint custody worksheet of the child support guidelines to calculate support.
15. **Child Custody: Words and Phrases.** Joint physical custody is generally defined as joint responsibility for minor day-to-day decisions and the exertion of continuous physical custody by both parents over a child for significant time periods.
16. **Appeal and Error.** Generally, a party cannot complain of error which the party has invited the court to commit.
17. **Divorce: Minors: Stipulations.** Parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement.
18. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child.
19. **Child Support.** In determining whether to order retroactive support, a court must consider the parties' status, character, situation, and attendant circumstances. As part of that consideration, the court must consider whether the obligated party has the ability to pay the lump-sum amount of a retroactive award.
20. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
21. **Child Support: Child Custody.** In the determination of child support, the children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay.
22. **Taxation: Child Support: Alimony: Child Custody.** Because a tax dependency exemption is an economic benefit nearly identical in nature to an award of child support or alimony, a trial court may exercise its equitable powers to allocate dependency exemptions between the custodial and noncustodial parent.

23. **Taxation: Child Custody: Presumptions.** Although a custodial parent is presumptively entitled to a tax dependency exemption, a trial court may use its equitable powers to allocate the exemption to a noncustodial parent if the situation of the parties so requires.
24. **Attorney Fees.** Attorney fees are recoverable in Nebraska only when provided for by law or allowed by custom.
25. **Attorney Fees: Child Support.** Attorney fees and costs are allowed in child support cases brought by a child's mother, father, guardian or next friend, the county attorney, or other authorized attorney.
26. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and general equities of the case.
27. **Attorney Fees: Courts.** Trial courts and appellate courts are equally regarded as experts at determining the value of legal services.

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

Avis R. Andrews for appellant.

Ronald E. Frank and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellee.

Julie Fowler, of Child Support Enforcement Office, for intervenor-appellee.

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Del McDonald appeals from the decision of the district court for Douglas County modifying his child support obligation, awarding attorney fees to his former wife, and denying his request for custody modification. We determine that the district court did not abuse its discretion in refusing to modify child custody, in modifying Del's child support obligation, or in awarding attorney fees. Accordingly, we affirm the trial court's decision.

II. BACKGROUND

Del and Coleen Spencer, formerly known as Coleen McDonald, married in March 1999 and divorced in July 2009.

Two children were born during the marriage—a son born in 1999 and a daughter born in 2002.

In the original divorce decree, the court awarded Coleen sole legal and physical custody of the parties' two children, subject to Del's parenting time. Del's parenting time consisted of alternating weekends, Wednesday nights, rotating holidays, and extended time during the summer. Del's parenting rights also included a right of first refusal when Coleen worked overnight.

To facilitate their shared parenting responsibilities, the parenting plan established rules for Del and Coleen to aid them in communicating. The rules eliminated face-to-face interaction during custody exchanges, established that the parties would communicate professionally through e-mail or voice mail, and ordered the parties to sit apart from each other at school activities.

In addition to sole custody, the decree also awarded Coleen $69 per month in child support. The decree ordered Coleen to maintain health and medical insurance for the children unless it was available to Del at a lower rate. Del's child support obligations were calculated based on his status as a full-time student with minimal income.

About a year after the decree was entered, Del obtained full-time employment as a respiratory therapist at a Bellevue medical center and occasionally worked additional shifts at a hospital in Blair. Because Del's income increased, the State of Nebraska intervened in February 2011 to ask the court to recalculate Del's child support obligation. Del filed an answer and counterclaim alleging that there had been a material change in circumstances which warranted an award of full custody to him. He based his modification request upon contact that the children had with Coleen's then boyfriend, who Del claimed had a history of domestic abuse and who transported the children while he was consuming alcohol. He further claimed that Coleen was frustrating his relationship with the children by refusing telephone contact and denying him the right of first refusal to care for the children when Coleen was at work.

At trial, the parties addressed both child support and custody issues. To help determine the proper amount of child support, both parties submitted proposed calculations to the court. The State calculated Del's income as $24 per hour full time and Coleen's income as $23.67 per hour full time. Both parties stipulated to the exhibits containing the income calculations. Both parties showed they were providing the children with health insurance. The evidence showed that Del's health insurance premium is slightly lower, but Coleen testified that her insurance does not require her to make any copayments. The parties submitted exhibits as evidence of their income, and they stipulated to all of the exhibits. The stipulated exhibits included the parties' proposed child support calculations (all of which used the same income for the parties), tax returns, and pay stubs.

With respect to custody, at trial, Del requested the court to award him joint custody of the children on an alternating weekly basis, despite the request in his counterclaim that he be awarded "full custody." Under his proposed custody plan, the children would stay in their current school and he would move closer to their current residence. In support of his request, Del stated that he is involved in the children's lives: he attends school activities and exercises his parenting time. Del argued that a joint custody plan was warranted by material changes in circumstances. Specifically, he argued that circumstances have changed, because his work schedule has allowed him more time to parent, Coleen has prevented him from exercising the right of first refusal the way the parties envisioned at the time of the original decree, Coleen's new husband has driven the children while having open containers of alcohol in his car, and Coleen has informed the children that Del does not pay child support.

Del and Coleen's son testified that he did not want the custody schedule to change. Their daughter did not testify. Both parties admitted that they did not have a cordial relationship.

The trial court addressed the issues of custody, child support, health insurance, tax dependency exemptions, and attorney fees. The trial court determined that although no material

change supported a change in custody, Del's new employment status was a material change that supported increasing child support. The trial court increased Del's child support from $69 per month to $982 per month. It awarded the support retroactively from March 2011, resulting in $14,608 in past support. Although Del's income increased in June 2010, the State did not move to modify child support until February 2011; accordingly, the trial court could not award retroactive support until March 2011.

While increasing Del's support, the court determined that Coleen should continue to provide health insurance for the children. Although Coleen's premium was slightly more expensive than Del's, the court determined her plan was more economical because it did not require any copayments. Finally, the court determined that each parent could claim one child for tax exemption purposes but required Del to fulfill his child support obligation in order to claim the exemption.

The trial court also found that Del should have been paying an increased amount of child support since June 2010 and that Coleen incurred legal costs to prove this increase. The court noted that although the attorney fee statements did not distinguish how much of the fee was attributable to the claim for increased child support, a significant portion of the bill was devoted to that issue. Accordingly, the trial court required Del to pay Coleen $2,000 of her $5,046.50 legal bill.

Del timely appealed.

III. ASSIGNMENTS OF ERROR

Del argues on appeal, condensed, renumbered, and restated, that the trial court erred in (1) failing to modify Coleen's award of sole legal and physical custody, (2) modifying and calculating child support, (3) ordering support to be retroactive, (4) making the tax dependency exemption based on being current on support, and (5) awarding attorney fees.

IV. STANDARD OF REVIEW

[1-3] Generally, issues involving the modification of a divorce decree, parenting time, and the amount of child support are initially entrusted to the discretion of the district court,

whose determinations in these matters are reviewed de novo on the record for an abuse of discretion. See *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 614 N.W.2d 778 (2000). See, also, *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009). The trial court's discretion to award child support extends to its determination that the child support award should be retroactive. See *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005). An appellate court also reviews a trial court's award of attorney fees for an abuse of discretion. See *Boamah-Wiafe v. Rashleigh, supra*.

[4] An abuse of discretion occurs when a trial court acts or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or just result. See *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003).

V. ANALYSIS

1. Custody Modification

Del argues that the trial court abused its discretion in failing to modify the custody decree. In particular, Del argues that the trial court should have awarded him joint custody, increased parenting time, or the right of first refusal whenever Coleen is at work. We disagree.

[5-7] 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. *Adams v. Adams*, 13 Neb. App. 276, 691 N.W.2d 541 (2005). A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.* Changes in circumstances which were within the contemplation of the parties at the time of the decree are not material changes in circumstances for purposes of modifying a divorce decree. See *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992).

[8] Prior to modification, two steps of proof must be taken by the moving party. First, the moving party must show a material change in circumstances that affects the best interests

of the child. Second, the moving party must prove that changing the child's custody is in the child's best interests. See *Adams v. Adams, supra*.

In his counterclaim, Del claimed that Coleen has attempted to damage the children's relationship with him, frustrated his ability to have contact with them, and prevented him from exercising the right of first refusal contemplated in the initial decree, and that contact with Coleen's new husband has harmed the children. Del argued that these changes constitute a material change in circumstances.

At trial, Del testified that Coleen's husband had driven the children while having open containers of alcohol in his car and that Coleen had encroached on Del's parenting time by scheduling the children's activities during that time and did not allow him to make up all of the missed time. He also testified that his regular job allows him to have more time with his children.

The trial court determined that there was not a material change in circumstances. On a de novo review of the record, we agree. Although Del presented numerous allegations in his counterclaim, his argument is more limited on appeal. In his brief, Del claims that a material change in circumstances exists, because Coleen has "abuse[d her] power" and shut him out of the children's lives, Del has a flexible schedule and time to parent, and Del has not been able to exercise as much parenting time as the original decree contemplated. Brief for appellant at 24.

We address the arguments Del presented on appeal in turn.

Del argues that Coleen has marginalized his ability to parent by failing to communicate with him and that this failure to communicate places an "inordinate amount of control" in her hands. *Id*. Although we recognize that the parties' strained relationship necessarily makes parenting difficult, there is no evidence that their relationship has deteriorated from the time of the original divorce decree. The fact that Del and Coleen cannot get along with each other is not a new development; the original divorce decree recognized this when it ordered e-mail communication and segregated seating at the children's

activities. Del did not present persuasive evidence of a material change in the parties' relationship.

Similarly, Del did not present persuasive evidence that his new work schedule was a development not contemplated at the time of the divorce decree. At the time of the divorce decree, Del was a full-time student. The evidence shows that at the time of the divorce, Del was enrolled in a 2-year respiratory therapist program. Given the limited nature of the program, the parties certainly contemplated Del's completion of the program at the time of the divorce. Del's graduation from the program and acceptance of employment constitute a development that was certainly expected at the time of the divorce. See *McElyea v. McElyea*, No. A-09-716, 2010 WL 4237938 (Neb. App. Jan. 5, 2010) (selected for posting to court Web site).

Even if the parties had not contemplated the current situation, however, the evidence does not show that Del is currently more available to parent. The record does not reveal Del's schooling schedule at the time of the divorce decree. Del testified, however, that he should not have been required to reimburse Coleen for daycare during that time period, because he could have watched the children every day. Given Del's testimony and the lack of evidence regarding his schedule at the time of the decree, there is no basis to compare his parenting availability. Accordingly, the record presented to this court does not demonstrate a material change in circumstances based on the changes in Del's schedule.

Finally, Coleen's changed work schedule does not constitute a material change in circumstances. The original divorce decree awards Del a right of first refusal while Coleen worked the night shift. The parties did not provide evidence as to why they limited Del's right to time periods when Coleen worked at night as opposed to simply providing Del a right of first refusal when Coleen worked. While Coleen's change in work schedule may have prevented Del from exercising the right of first refusal, Del did not prove that the intention of the right was simply to provide him with increased parenting time and therefore did not show that Coleen's change has frustrated the intention of the provision in the decree. Accordingly, we do not

find a material change in circumstances based upon Coleen's changed schedule.

The evidence reveals that both parents are capable of providing their children with a stable home environment. They both love their children and support them academically, financially, and emotionally. There was no evidence that Coleen was unfit or that the children were not thriving in her care. Therefore, upon our de novo review of the record, we agree that there is not sufficient evidence to demonstrate that a material change in circumstances has occurred. Absent a material change in circumstances, Del is not entitled to a modification of custody.

[9] On appeal, Del argues that the trial court should have awarded him additional parenting time. Aside from requesting joint custody, however, Del did not request additional parenting time in his counterclaim or at trial. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Scurlocke v. Hansen*, 268 Neb. 548, 684 N.W.2d 565 (2004). Because the issue was not presented to the trial court, we do not consider it on appeal.

2. Child Support Modification

Del argues that the trial court erred in modifying child support and in its child support calculation. Del argues that the support was incorrectly calculated, because the trial court used the wrong worksheet and income level, improperly gave Coleen credit for providing health insurance, and should have awarded a deviation. We disagree.

(a) Modification

[10] A parent seeking to modify a child support award must show a material change in circumstances, including changes in the financial position of the parent obligated to pay support. See *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). Del's financial position changed drastically from the time of the divorce decree. At the time of the decree, Del was an unemployed student with minimal income. At the time of the request for modification, he worked full time as a respiratory therapist and earned a stable salary. The trial court did not err

in finding a material change supported modifying Del's child support award.

(b) Sole Custody Worksheet and Deviation

Del argues that the trial court abused its discretion in using the sole custody worksheet, because the parties are effectively exercising joint custody. Del notes that he has custody of the children 163 to 166 days per year, or 44 to 45 percent of the time. Alternatively, Del argues that the trial court abused its discretion in failing to deviate from the award produced using the joint custody worksheet because of Del's substantial parenting time.

[11,12] Generally, child support payments should be set according to the guidelines established pursuant to Neb. Rev. Stat. § 42-364.16 (Reissue 2008). *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). Although the guidelines are not to be applied with blind rigidity, child support shall be established in accordance with the guidelines, unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order. § 42-364.16; *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000).

[13,14] Neb. Ct. R. § 4-212 (rev. 2011) establishes a presumption of joint support when the trial court orders joint custody and each party's parenting time exceeds 142 days per year. If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement. *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). Where parties exercise joint physical custody, the trial court must use the joint custody worksheet to calculate support. See *Pool v. Pool, supra*.

[15] Joint physical custody is generally defined as "joint responsibility for minor day-to-day decisions and the exertion of continuous physical custody by both parents over a child for significant time periods." *Id.* at 457, 613 N.W.2d at 823. In *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304

(2013), we examined the line of Nebraska cases defining joint physical custody. (These cases are: *Elsome v. Elsome, supra*; *Pool v. Pool, supra*; *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001); and *Drew on behalf of Reed v. Reed*, 16 Neb. App. 905, 755 N.W.2d 420 (2008).) In *Hill*, we noted that Nebraska cases distinguish between a continuous alternating custody schedule and a more "'typical'" weekend, holiday, and summer visitation schedule. 20 Neb. App. at 535, 827 N.W.2d at 311. We explained that "the *amount* of time the children spend with each parent is less important than *how* the time is allocated when determining whether joint physical custody exists." *Id*. Part of the reason for this distinction is that the way parenting time is allocated relates to the expenses associated with that responsibility. See *Heesacker v. Heesacker, supra*. In *Heesacker*, for example, the court determined that a father's typical visitation schedule did not give rise to the same expenses as the mother's day-to-day schedule even though the father parented the children 35 percent of the time.

Del has custody of the children 163 to 166 days per year, which raises the presumption that he exercises joint custody with Coleen. His custody schedule, however, consists of alternating weekends, one weekday night, alternating holidays, and an extended time period in the summer. He did not testify that this schedule caused him to expend more money than any other noncustodial parent. His parenting time constitutes a typical visitation schedule. See *Pool v. Pool, supra*. Because his allocation of parenting time constitutes a typical visitation schedule, Coleen rebutted the presumption of joint custody. Accordingly, there was no reason for the trial court to use the joint support worksheet or to deviate from the child support guidelines based on the visitation schedule. The trial court did not abuse its discretion by failing to do so.

(c) Income Calculation

Del argues that the trial court erred in using an inflated income figure in calculating his child support obligation. Del argues that the evidence shows Del's monthly income as $3,692.52 and Coleen's as $3,744, both of which are lower

than the income amounts used by the trial court to calculate support. While we agree with Del's analysis of what the record reflects, we are mindful of the fact that the worksheets Del offered at trial contained the same gross income amounts contained in the State's proffered worksheets and used by the court in its calculations. Del claims the court erred in utilizing the very amounts that he suggested the court use.

[16-18] Generally, a party cannot complain of error which the party has invited the court to commit. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). However, parties in a proceeding to dissolve a marriage cannot control the disposition of matters pertaining to minor children by agreement. *Lawson v. Pass*, 10 Neb. App. 510, 633 N.W.2d 129 (2001). The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

Since Del utilized these same amounts on the worksheets he offered as evidence, and the use of these amounts does not detrimentally affect the children, we cannot say the court abused its discretion in relying upon these amounts to calculate child support.

(d) Health Insurance

Del argues that the trial court erred in failing to give him credit for providing the children health insurance and in giving Coleen credit for providing health insurance. The divorce decree ordered Coleen to provide the children health insurance unless Del could do so more economically. Coleen began providing the children with health insurance. Later, Del had the option to provide the children with health insurance that had a slightly lower premium rate and did so. Coleen maintained health insurance for the children, however, because her plan did not require the parties to make any copayments for health care.

The trial court determined that Coleen's insurance was more economical and ordered her to continue providing it to the children. Consequently, Del is not required to provide the

children with health insurance. Because Coleen was ordered to provide the children health insurance and Del was not, the trial court did not err in giving Coleen credit for providing the insurance and in failing to give credit to Del.

3. Awarding Retroactive Support

Del argues that the trial court erred in requiring him to pay retroactive child support, because he has been involved in raising the children, is beginning a new career, and cannot afford to pay such a large arrearage. We disagree.

[19-21] In determining whether to order retroactive support, a court must consider the parties' status, character, situation, and attendant circumstances. See *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999). As part of that consideration, the court must consider whether the obligated party has the ability to pay the lump-sum amount of a retroactive award. See *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005). Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification. *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005). The children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay. *Pursley v. Pursley*, 261 Neb. 478, 623 N.W.2d 651 (2001).

In this case, Del became employed in June 2010 and began earning a substantial salary. During this time, he was paying only $69 a month in child support. Despite his increased salary, he continued to pay only $69 in support without interference until February 2011, when the State petitioned the court to increase his child support obligation. The trial court awarded child support retroactively from March 2011, the first month after the filing of the modification application. This retroactive award keeps with the principle that a noncustodial parent should not gratuitously benefit from delays in the legal system when he or she should, and is able to, pay an increased amount of child support. Del did not explain why it would be inequitable for him to pay retroactive support, nor did

he explain why paying the lump sum would be a hardship. Accordingly, the trial court did not err in ordering the child support be awarded retroactively.

4. Tax Exemption

Del argues that the trial court erred in making his tax dependency exemption dependent on his being current in paying child support. We disagree.

[22,23] The federal government allows taxpayers to exclude from their income an exemption amount for each individual who is a dependent of the taxpayer in the taxable year. I.R.C. § 151(c) (2006). Because a tax dependency exemption is an economic benefit nearly identical in nature to an award of child support or alimony, a trial court may exercise its equitable powers to allocate dependency exemptions between the custodial and noncustodial parent. See *Prochaska v. Proschaka*, 6 Neb. App. 302, 573 N.W.2d 777 (1998). Although a custodial parent is presumptively entitled to a tax dependency exemption, a trial court may use its equitable powers to allocate the exemption to a noncustodial parent if the situation of the parties so requires. See, I.R.C. § 152(c)(4)(B)(i) (2006); *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004). If the situation of the parties does not require allocating a tax dependency exemption to the noncustodial parent, however, a trial court is not required to allocate it. For example, in *State ex rel. Wells v. Wells*, No. A-10-1161, 2011 WL 3689142 (Neb. App. Aug. 23, 2011) (selected for posting to court Web site), we found that the trial court abused its discretion in awarding a father a tax dependency exemption when he was paying a relatively low amount of child support.

The federal government grants a dependency exemption to a parent who provides support to a dependent minor. If Del is not current on his child support, then he is not supporting the minor in the way the court deemed necessary. Given the purpose of the tax dependency exemption and the trial court's discretion in awarding child support and tax exemptions, we cannot say that it was an abuse of discretion for the trial court

to order that Del be current in paying child support in order to claim a tax dependency exemption.

5. Attorney Fees

Del argues that the trial court abused its discretion in awarding Coleen attorney fees, because the parties have similar incomes and Coleen refused to cooperate with Del. We disagree.

[24-27] Attorney fees are recoverable in Nebraska only when provided for by law or allowed by custom. *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). Attorney fees and costs are allowed in child support cases brought by a child's mother, father, guardian or next friend, the county attorney, or other authorized attorney. See *id*. The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and general equities of the case. *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008). Trial courts and appellate courts are equally regarded as experts at determining the value of legal services. See *In re Interest of Antone C. et al.*, 12 Neb. App. 152, 669 N.W.2d 69 (2003). Because the trial court is in a better position to evaluate the award of attorney fees, however, an appellate court interferes only when the award is excessive or insufficient. See *id*. Our de novo review of the record did not reveal an abuse of discretion in ordering Del to pay $2,000 in attorney fees.

VI. CONCLUSION

We determine that the trial court did not abuse its discretion in failing to modify custody, in its determination that Del's child support obligation should be modified, or in awarding attorney fees. Accordingly, we affirm the trial court's decision.

Affirmed.

WAYNE G., APPELLANT, V. JACQUELINE W., APPELLEE.

842 N.W.2d 125

Filed December 17, 2013. No. A-12-1037.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Parental Rights: Evidence: Proof.** For a juvenile court to terminate parental rights under Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012), it must find that one or more of the statutory grounds listed in that section have been satisfied and that termination is in the child's best interests.
4. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
5. **Parental Rights: Evidence: Appeal and Error.** If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012), the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground.
6. **Parental Rights.** One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2012).
7. **Parental Rights: Proof.** In addition to proving a statutory ground for termination of parental rights, the State must show that termination is in the best interests of the child.
8. **Constitutional Law: Parental Rights: Proof.** A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.
9. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.
10. **Parental Rights: Words and Phrases.** Although the term "unfitness" is not expressly used in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012), the concept is generally encompassed by the fault and neglect subsections of that statute and through a determination of the child's best interests.
11. ____: ____. Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.

12. **Parental Rights.** The best interests analysis and the parental fitness analysis are fact-intensive inquiries, and although they are separate inquiries, each examines essentially the same underlying facts as the other.
13. ____. The best interests of a child require termination of parental rights when a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time.
14. ____. Children cannot, and should not, be made to await uncertain parental maturity.

Appeal from the County Court for Seward County: GERALD E. ROUSE, Judge. Affirmed.

Jerrod P. Jaeger, of Jaeger Law Office, P.C., L.L.O., for appellant.

Eric J. Williams for appellee.

Gregory C. Damman, of Blevens & Damman, guardian ad litem.

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

INBODY, Chief Judge.

INTRODUCTION

This case is different from the typical juvenile case we review on appeal, insomuch as the petition to terminate parental rights was brought by the minor child's mother, without participation by the State. The biological father, Wayne G., appeals the order of the Seward County Court, sitting as a juvenile court, terminating his parental rights to the minor child, Jaidyn G. For the reasons that follow, we affirm the order of the court.

STATEMENT OF FACTS

On September 27, 2011, Wayne filed a complaint in Seward County District Court to acknowledge paternity and to establish custody and parenting time. The complaint alleges that Wayne and Jacqueline W. were in a relationship while the two lived in California, but never married, and that the relationship resulted in the birth of Jaidyn in 2006, which occurred while Jacqueline was married to another man. Jacqueline filed an answer in which she alleged, among other things, that Wayne was not a fit person to have custody and that

he was barred from contact with Jaidyn as a result of a protection order that had been granted by the Seward County District Court.

On February 27, 2012, Jacqueline filed an amended petition in Seward County District Court to terminate Wayne's parental rights to Jaidyn pursuant to Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2012). The amended petition alleged that Wayne and Jacqueline are the biological parents of Jaidyn. The petition alleged that grounds for termination of Wayne's parental rights existed pursuant to Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012) and that termination was in Jaidyn's best interests. In April, the case was transferred to the county court for further proceedings on Jacqueline's amended petition to terminate Wayne's parental rights.

Trial was held on the amended petition to terminate Wayne's parental rights. Chantique H., Wayne's biological daughter, who at the time of trial was 24 years old, testified that she has a younger sister who is also Wayne's biological child. Chantique testified that Wayne's parental rights to her and her sister were terminated in California 8 years prior to the trial regarding Jaidyn, when Chantique was 16 years old. Chantique testified that the issues involved in that termination case involved multiple arrests, drug addiction, child abuse, anger and violence, and neglect. Chantique testified that she had witnessed Wayne and her mother smoking crack cocaine in their home. Chantique testified that when she was younger, on numerous occasions, she witnessed Wayne severely beat her mother and that he was very violent in their home. Chantique testified Wayne would hit, strangle, kick, and throw her mother. Chantique testified that Wayne had admitted to her that he suffered from a mental illness, and had showed her medical records indicating that he had been diagnosed with bipolar disorder and severe depression. Chantique testified she believed that Wayne had never taken responsibility for his actions in the termination of parental rights case regarding her and her sister and that he had continually blamed everyone else involved for his rights being terminated. Chantique testified that it was "a very traumatizing experience" having Wayne as a father.

Jacqueline testified that she had filed for the termination of Wayne's parental rights to Jaidyn. Jacqueline testified that she had three children besides Jaidyn, from a previous marriage. Jacqueline testified that around 2001 or 2002, she met Wayne in California while she had been separated from her first husband. Jacqueline was living at a motel when she met Wayne, and thereafter their relationship progressed quickly. After just a few months, Jacqueline and Wayne moved in together and Jacqueline began to see that Wayne had problems with drugs. Jacqueline testified that Wayne used crack cocaine in her apartment, where she was living with her three children. Jacqueline attempted to confront Wayne, and he told her that he needed the drugs to take care of his attention deficit hyperactivity disorder. Jacqueline testified that during the time she and Wayne lived together, she smoked marijuana, but did not ever use crack cocaine. Jacqueline testified that she and Wayne resided together for 3½ years, during which time Wayne attempted inpatient drug treatment and was incarcerated on several occasions. Jacqueline also testified that domestic violence had occurred during their relationship and that Wayne had been arrested for that violence. Jacqueline testified that throughout their relationship, Wayne pushed and shoved her, threatened her, and isolated her from outside contact, in addition to physically and mentally abusing her three children. Jacqueline testified that Wayne subjected her sons to emotional and physical abuse, calling one of her sons a "fat pig" and beating him with a paint stick and beating her other son with a wooden cane. Wayne threatened to hunt Jacqueline and her children down and harm them if she tried to leave him.

In 2005, Jacqueline became pregnant with Jaidyn, but Jacqueline testified that Wayne did not change his behavior and continued to engage in physical abuse with her and the children. The night Jacqueline came home from the hospital after giving birth to Jaidyn, Wayne continually yelled at her and forced her to clean the house. The next day, Wayne forced Jacqueline to return to work. When Jaidyn was very young, Wayne came home after taking drugs and did not see Jaidyn on the bed and sat on her. Jacqueline testified that in 2006,

shortly after Wayne had sat on Jaidyn, she left California with Jaidyn and her other children, because she could no longer handle Wayne's drug use and she feared more abuse and control of both her and her children. Jacqueline testified that Wayne removed wires from the engine in her car to prevent her from leaving. Wayne's father helped Jacqueline get a car to leave California, in addition to finding her a trailer to load with a few items for the children and providing her with money.

Jacqueline testified that she filed for a protection order against Wayne in Nebraska, after he left messages on her voice mail threatening her and the children. Jacqueline testified that she tried to make a relationship between Wayne and Jaidyn work by facilitating telephone calls and allowing him to come to Nebraska for a visit during Easter in 2009. Jacqueline testified that she had originally wanted to move back to California, but explained that she would move back only if Wayne could remain sober and free from drugs, but that he had repeatedly failed in his attempts to stop using drugs.

Jacqueline testified that she has remarried and that Jaidyn refers to Jacqueline's new husband as her "daddy." He is involved in Jaidyn's life and would like to adopt Jaidyn if Wayne's parental rights are terminated.

Jacqueline's sister testified that she first met Wayne in 2006, while he was incarcerated and while Jacqueline was pregnant with Jaidyn. Jacqueline's sister also stayed with Jacqueline at other times during the relationship and observed Wayne push and hit Jacqueline in the face on several occasions, both while Jacqueline was pregnant and after Jaidyn had been born. Jacqueline's sister testified that Wayne was "mean" and always angry, which made her feel threatened when she would stay with Jacqueline. On several occasions, Jacqueline asked her sister not to leave and Wayne would be gone for days at a time. Jacqueline's sister witnessed Wayne sit on Jaidyn when she was young and also witnessed Wayne forcing Jacqueline, just days after giving birth, to go outside and work for him, even though she had been ordered to have bed rest because her incisions from giving birth were not healing properly. Jacqueline's sister explained that Wayne called

Jacqueline names and would not allow Jacqueline to nurse Jaidyn because he felt she needed to be working instead. Jacqueline's sister also testified that Wayne had left her threatening voice mails which indicated that he was going to "gut me and hang me from my third floor balcony by my feet for the world to see because I wouldn't pick up my phone and tell him where [Jacqueline] was."

Jacqueline's daughter from her first marriage testified that she met Wayne in 2002, when she was 17 years old, before Jacqueline knew him. The daughter testified that after she had observed Wayne smoking crack cocaine on one occasion, he instructed her to not tell Jacqueline, because he was just going through a "quick relapse" and would not be smoking crack cocaine anymore. Jacqueline's daughter testified that Wayne spent at least half of the duration of his relationship with Jacqueline incarcerated for 6 to 8 months at a time. The daughter testified that Wayne was very violent and was physically and emotionally abusive. She specifically testified that she witnessed Wayne hit her brothers and Jacqueline with his hands and other objects. She testified that on one occasion, he grabbed her by the neck and pushed her against the wall. Wayne would tell her that she was worthless and lazy and, when she turned 18 years old, told her she was not welcome in their home any longer. Jacqueline's daughter also testified that Wayne threatened to drug her with heroin, take her to Mexico to use as a prostitute until he felt that she had "suffered enough," and then kill her himself.

Wayne testified that he was Jaidyn's biological father and that he was fit to be a father for Jaidyn. Wayne testified that he was "getting [his] chemical situation straightened out" and that he could be a positive influence upon Jaidyn's life. Wayne testified that when Jacqueline left California with Jaidyn, he was in no condition to be around her or the children, and that he did not blame her for moving to Nebraska, but that in the past 3 years, he had turned his life around and had not used cocaine in 2 years. However, later in Wayne's testimony, he indicated that earlier in 2012, he had been arrested and charged in California with attempted possession of a controlled substance. Wayne explained that he had been dropping

off one of his employees, when police officers were executing a "parole, probation sweep." Wayne testified that he was taken away by the police because he was a parolee in a gang/drug neighborhood and had a prior possession conviction. Wayne testified that he had been on probation in California and had it revoked, which meant that he would most likely not be put on probation for the pending charge. Wayne explained that he was offered a deal with the State of California for a 7-year prison sentence but was going to fight the charge.

Wayne testified that he had been prescribed psychotropic drugs for attention deficit hyperactivity disorder and that Narcotics Anonymous did not "apply to" him, because once he was "properly medicated," there was no need to self-medicate with cocaine to calm himself. Wayne testified that he is under the care of a psychiatrist and a psychologist and also takes legally prescribed medications for posttraumatic stress disorder and depression. Wayne also indicated that his business is now successful, he has a relationship with a "wonderful woman," and he has a home. Wayne testified that he had not been battling a drug addiction for the past 25 years, but really had been battling a "chemical issue" and that once the chemical issue had been addressed, everything else had been taken care of. Wayne testified that since 2006, he had received substance abuse treatment on one occasion, in 2008, after being released from prison for conspiracy to commit burglary and robbery.

Wayne testified that he had never been able to successfully raise a child and that he has had his parental rights terminated as to two other children in California. He testified, however, that one of those children was actually in a guardianship because of her age and that he had not lost his parental rights to her. Wayne testified that during those proceedings, he was incarcerated for domestic violence. Wayne testified that he had a criminal history which included, but was not limited to, several convictions related to drug possession. Wayne also testified that he had one felony conviction for domestic violence and one misdemeanor for verbal domestic violence. Wayne testified that he had an anger problem, but was never violent with children. Wayne explained that his ex-wife

had had a drug problem, that he had once grabbed her by the hair and dragged her into their home, and that their relationship had been volatile. Wayne also testified that he has been involved in several types of protection or harassment order proceedings which were filed against him and also a case involving elder abuse.

Wayne testified that he had been unable to leave California due to the terms of his parole and had seen Jaidyn only three times since Jacqueline and Jaidyn moved to Nebraska in 2006. Wayne testified that in 2009, he came to Nebraska for 3 or 4 days to see Jacqueline and Jaidyn because he wanted to reconcile with Jacqueline. Wayne testified that since then, he has sent letters to both Jacqueline and Jaidyn. Wayne also testified to giving Jacqueline $300 in September 2009, but that may have been money to pay Jacqueline back for financing his trip to Nebraska earlier in the year. Wayne estimated that he had given Jacqueline "maybe" $1,000 for Jaidyn since Jaidyn had been born. Wayne testified that all he wanted was to be able to communicate with Jaidyn, to be able to send her packages and letters, and to be able to have one visit a year with her when Jacqueline came to California.

Wayne's girlfriend testified that she has been in a romantic relationship with Wayne over the past year and that she currently lives with Wayne and her 19-year-old son in California. She testified that she met Wayne while visiting a friend at a recovery facility. She testified that she was familiar with his history and mental issues, and that over the past year, Wayne has consistently maintained his prescribed medications. She testified that she had witnessed Wayne with minors and that he acted appropriately and was helpful with children in her family. She testified that Wayne had not used any illegal drugs since she had known him, had not been in possession of illegal drugs, and had not been physically or emotionally abusive toward her or her family. She testified that Wayne spoke often of Jaidyn and was always buying Jaidyn gifts. She also testified that Wayne was not an unfit parent.

On October 3, 2012, the trial court entered an order on Jacqueline's amended petition for termination of Wayne's parental rights. The court found that clear and convincing

evidence had been presented that termination was proper pursuant to § 43-292(2), (4), (5), and (9), and also that termination was in Jaidyn's best interests due to the "substantial evidence including but not limited to the prior terminations of [Wayne's] parental rights to two prior biological children, [Wayne's] habitual use of crack cocaine, and the violent actions of [Wayne] in the home." It is from this order that Wayne has now timely appealed to this court.

ASSIGNMENTS OF ERROR

Wayne assigns that the trial court erred in determining that termination was warranted pursuant to § 43-292 and was also in the best interests of Jaidyn.

STANDARD OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *Id.*

ANALYSIS

Statutory Grounds.

The juvenile court terminated Wayne's parental rights under § 43-292(2), (4), (5), and (9). In his brief, Wayne admits that "[s]ubsections (2), (4), and (9) were supported by significant evidence of drug use, domestic abuse, and criminal behavior," but that that evidence extended only until 2006, with none to support those allegations thereafter. Brief for appellant at 21.

[3,4] For a juvenile court to terminate parental rights under § 43-292, it must find that one or more of the statutory grounds listed in that section have been satisfied and that termination is in the child's best interests. See *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006). The State must prove these facts by clear and convincing evidence. *Id.* Clear and convincing evidence is that amount of evidence

which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *Id*.

[5] If an appellate court determines that the lower court correctly found that termination of parental rights is appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence to support termination under any other statutory ground. *In re Interest of Justin H. et al.*, 18 Neb. App. 718, 791 N.W.2d 765 (2010).

As mentioned previously, this case differs from those that normally come on appeal before this court, because the petition to terminate parental rights was filed pursuant to § 42-364(5) by the other biological parent, not the State; nonetheless, we conclude that Jacqueline proved by clear and convincing evidence that termination was warranted.

Under § 43-292(2), grounds for termination exist when the parent has "substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection." The record in this case shows that Wayne has habitually abused narcotic drugs for the past 25 years, which has resulted in repeated arrests and convictions related to that drug abuse, the most recent of which was in May 2012. Wayne repeatedly testified that his involvement with illegal drugs was not his fault, but instead the result of his "chemical problems" and mental illnesses. The record indicates that Wayne has spent a significant amount of time incarcerated and, since Jaidyn was born in 2006, has spent very little time with Jaidyn.

The record is replete with testimony regarding Wayne's significantly violent anger problem, which has resulted in an alarming history of violent abuse in nearly all of his relationships, from his numerous romantic relationships with women, to elder abuse, and to violent abuse against children, both his own and Jacqueline's. Wayne's first two biological children realized the wrath of his violence and drug abuse which resulted in the termination of his parental rights. The record also reveals that Wayne has had numerous protection orders filed against him by various women and that one of those included Jacqueline and Jaidyn as a result of his repeated

threats to end Jacqueline and her children's lives. The record reveals that Jacqueline fled California in fear of both her and Jaidyn's lives and moved to Nebraska, where the two have remained. Even though Jacqueline was in such fear, she continued on various occasions to try to work things out with Wayne, including paying for him to visit Nebraska in 2009, which visit lasted only 3 or 4 days, with Wayne himself admitting that he spent little time with Jaidyn.

[6] Wayne argues that Jacqueline proved only one instance of neglect—when he sat on Jaidyn when she was very young—and that that alone is not enough to show substantial and continuous neglect. However, one need not have physical possession of a child to demonstrate the existence of the neglect contemplated by § 43-292(2). *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999). Most of Jaidyn's life, Wayne has been unable to visit her because of incarceration due to his own actions and then conditions of his parole, including that he not leave California—parole which was the direct result of Wayne's continued choice to engage in illegal and violent criminal actions. As set forth above, Wayne's most recent criminal arrest was in May 2012, and although Wayne testified that he was going to fight that charge, Wayne admitted that due to his criminal history, if found guilty, he would most likely again be incarcerated.

Wayne testified that he has attempted to send a few packages to Jaidyn and estimated that he had given Jacqueline only around $1,000 over the course of Jaidyn's life, some of which was to actually repay Jacqueline for money he had borrowed and not for Jaidyn's support. Further, although Wayne testified that he was fit to parent Jaidyn, he admitted that he was not ready to parent and did not want more than to be able to talk with Jaidyn on the telephone and to have one visit per year with her.

Based upon our review of the record, there is sufficient evidence in the record to support a finding that termination under § 43-292(2) was proper, and the juvenile court did not err in making this finding. Because we have found that termination was proper under § 43-292(2), we need not consider Wayne's arguments as to the remaining grounds for termination.

Best Interests.

Wayne argues that he has taken substantial steps to correct the problems that existed when Jacqueline fled with Jaidyn to Nebraska and that, as such, termination is not in Jaidyn's best interests. Specifically, Wayne relies on the testimony of his girlfriend that he is appropriately medicating his mental disease and now treats both adults and children appropriately.

[7-12] In addition to proving a statutory ground for termination of parental rights, the State must show that termination is in the best interests of the child. See, *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012); *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012). A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *In re Interest of Kendra M. et al., supra*. There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. *Id*. Although the term "unfitness" is not expressly used in § 43-292, the concept is generally encompassed by the fault and neglect subsections of that statute and through a determination of the child's best interests. See *In re Interest of Kendra M. et al., supra*. In the context of the constitutionally protected relationship between a parent and a child, the Nebraska Supreme Court has stated, "'"Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being."'" *Id*. at 1033-34, 814 N.W.2d at 761, quoting *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). The best interests analysis and the parental fitness analysis are fact-intensive inquiries, and although they are separate inquiries, each examines essentially the same underlying facts as the other. See *In re Interest of Kendra M. et al., supra*.

The record does indicate that, from the testimony of both Wayne and his girlfriend, Wayne is attempting to change his

past behaviors over the past year by regularly taking his medication and seeking help from a counselor. However, Wayne's testimony indicates that he has accepted little responsibility for his past actions. He testified that he acted inappropriately, but maintains that he does not have a drug problem and that he did not abuse children or treat women poorly. Throughout his testimony, he downplayed or entirely dismissed the testimony given that he was very violent with women; with his own children, to which his parental rights were terminated; with Jacqueline's other children; and also with an elderly woman whom he claims he was caring for. Witnesses recounted Wayne's severe physical and mental abuse, which continued with Jacqueline even after she moved to Nebraska, through numerous recorded telephone messages where he very frequently threatened to kill both her and her children. Furthermore, even though Wayne testified that he has turned his criminal tendencies around, in May 2012, he was arrested for attempted possession of a controlled substance, which he testified was not his fault. Clearly, based upon this record, it is not in Jaidyn's best interests to force her, after 6 years of little or no contact with Wayne, into a relationship with a man who has shown extremely dangerous behavior and who continues to make choices that result in incarceration which further prevents him from being available to be in Jaidyn's life.

[13,14] The best interests of a child require termination of parental rights when a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time. See *In re Interest of Emerald C. et al.*, 19 Neb. App. 608, 810 N.W.2d 750 (2012). Children cannot, and should not, be made to await uncertain parental maturity. See *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). To hold Jaidyn's life at a standstill for Wayne, with the hope that a positive relationship might develop at an unknown time in the future, is not in Jaidyn's best interests. Furthermore, the record contains evidence that Jaidyn has bonded with Jacqueline's new husband, who testified that he intends to adopt Jaidyn. Therefore, we conclude that Wayne is an unfit parent and that termination of Wayne's parental rights is in Jaidyn's best interests, and we affirm the order of the juvenile court finding the same.

CONCLUSION

Upon our de novo review of the record, we find that the evidence presented was sufficient to warrant termination of Wayne's parental rights to Jaidyn and that termination is in Jaidyn's best interests. Therefore, we affirm.

AFFIRMED.

STATE FARM FIRE & CASUALTY COMPANY, APPELLEE, V. JERRY DANTZLER, APPELLANT, AND DAVID CHUOL, INDIVIDUALLY AND AS FATHER AND NEXT FRIEND TO CHUOL GEIT, AND CHUOL GEIT, APPELLEES.

842 N.W.2d 117

Filed December 17, 2013. No. A-12-1042.

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. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
4. **Insurance: Contracts.** A pollution exclusion is unambiguous when it bars coverage for injuries caused by all pollutants, not just traditional environmental pollution.

Appeal from the District Court for Douglas County: KIMBERLY MILLER PANKONIN, Judge. Reversed and remanded for further proceedings.

Michael A. Nelsen, of Marks, Clare & Richards, L.L.C., for appellant.

David J. Stubstad and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellee State Farm Fire & Casualty Company.

MOORE, PIRTLE, and BISHOP, Judges.

PIRTLE, Judge.

INTRODUCTION

State Farm Fire & Casualty Company (State Farm) brought a declaratory judgment action to determine whether a rental dwelling insurance policy issued to Jerry Dantzler covered lead-based-paint claims made against him by his tenants David Chuol and Chuol Geit. The district court for Douglas County found that the policy excluded coverage of the claims against Dantzler based on a "pollution exclusion," and granted summary judgment in favor of State Farm. We conclude that there is a genuine issue of material fact as to whether there was a "discharge, dispersal, spill, release or escape" of the lead, as required for the policy's pollution exclusion to apply. Therefore, we reverse the judgment of the district court and remand the cause for further proceedings.

BACKGROUND

Dantzler owns a rental property in Omaha, Nebraska. In September 2006, Chuol and his minor child, Geit, moved into the property. In March 2011, Chuol filed a lawsuit against Dantzler in his own behalf and on behalf of his son, alleging that Geit was "exposed to high levels of lead poisoning" in the rental property due to high levels of lead paint contamination on the walls and elsewhere in the rental property, causing him serious and permanent injury. In the lawsuit, Chuol asserted claims for negligence, breach of implied warranty of habitability, nuisance, intentional infliction of emotional distress, negligent infliction of emotional distress, and a violation of 42 U.S.C. § 4852(d) (2006). At the time the lawsuit was filed against Dantzler, he had a "Rental Dwelling Policy" of insurance with State Farm for the rental property. Dantzler tendered defense of the claims against him to State Farm pursuant to his policy.

State Farm filed the instant declaratory judgment action seeking a declaration that the insurance policy does not provide coverage for claims made against Dantzler arising out of exposure to lead-based paint. Dantzler filed an answer and

counterclaim seeking an order declaring that the policy at issue provides coverage for the claims against him which State Farm had wrongfully denied.

The rental dwelling policy of insurance issued to Dantzler by State Farm contains a "pollution exclusion," which excludes from coverage, in pertinent part: "**bodily injury** or **property damage** arising out of the actual, alleged or threatened discharge, dispersal, spill, release or escape of pollutants . . . at or from premises owned, rented or occupied by the **named insured**." As used in the exclusion, the term "pollutants" is defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

Both Dantzler and State Farm filed motions for summary judgment. Dantzler alleged that there were no genuine issues of material fact in regard to whether the insurance policy provided coverage for the claims made against Dantzler because lead-based paint is not a "pollutant" under the policy. State Farm alleged that there were no genuine issues of material fact because the pollution exclusion precluded coverage of the claims asserted in the lawsuit against Dantzler.

The trial court found that the pollution exclusion was unambiguous and that lead is a pollutant within the meaning of the exclusion. It further found that Geit could have been exposed to the lead only if it was "'discharged, dispersed, released, or escaped'" from its location. Therefore, the trial court found that the pollution exclusion precluded coverage of the claims against Dantzler. The court granted summary judgment in favor of State Farm and denied Dantzler's motion for summary judgment.

ASSIGNMENT OF ERROR

Dantzler assigns that the trial court erred in finding that the lead-based-paint claims made against him were excluded from coverage under State Farm's insurance policy.

STANDARD OF REVIEW

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

show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (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.*

[3] The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Model Interiors v. 2566 Leavenworth, LLC*, 19 Neb. App. 56, 809 N.W.2d 775 (2011).

ANALYSIS

Pollution Exclusion.

The issue in this case is whether it can be decided as a matter of law that the pollution exclusion in State Farm's insurance policy excludes the lead-based-paint claims made against Dantzler from coverage. In determining this issue, we must first decide whether lead is a "pollutant" as defined in the policy. In making this determination, we are guided by the Nebraska Supreme Court's decision in *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001), a case involving a pollution exclusion similar to the one at issue.

In *Cincinnati Ins. Co.*, Becker Warehouse, Inc., owned a building where food products owned by various entities were stored. While constructing an addition to the warehouse, the construction company hired by Becker Warehouse applied a sealant to the concrete floor. The owners of the food products filed lawsuits against Becker Warehouse, alleging that xylene fumes from the sealant contaminated their food products. Becker Warehouse sought indemnity and defense from its insurer, the Cincinnati Insurance Company (Cincinnati). Cincinnati filed a petition for declaratory judgment seeking a declaration that Becker Warehouse's insurance policy did not provide coverage for the alleged contamination because of a pollution exclusion

clause and that Cincinnati was not obligated to defend Becker Warehouse. Both parties filed motions for summary judgment, and the trial court sustained Cincinnati's motion and overruled Becker Warehouse's motion. The insurance policy issued to Becker Warehouse by Cincinnati contained a pollution exclusion nearly identical to the one at issue in the present case. The definition of "pollutants" in the Cincinnati policy included the same language as that found in the State Farm policy at issue, followed by an additional sentence which stated, "'Pollutants include but are not limited to substances which are generally recognized in industry or government to be harmful or toxic to persons, property or the environment.'" *Id.* at 749, 635 N.W.2d at 116.

On appeal, Becker Warehouse alleged that the pollution exclusion in the policy was ambiguous, arguing in part that the exclusion applied only to traditional environmental claims. The Nebraska Supreme Court recognized that state and federal courts are split on whether an insurance policy's absolute pollution exclusion bars coverage for all injuries caused by pollutants or whether it applies only to injuries caused by traditional environmental pollution. It noted, however, that a majority of state and federal jurisdictions have held that absolute pollution exclusions are unambiguous as a matter of law and, thus, exclude coverage for all claims alleging damage caused by pollutants. *Cincinnati Ins. Co. v. Becker Warehouse, Inc., supra*, citing *Nat'l Elect. Mfrs. v. Gulf Underwriters Ins.*, 162 F.3d 821 (4th Cir. 1998) (applying District of Columbia law); *Technical Coating v. U.S. Fidelity & Guaranty*, 157 F.3d 843 (11th Cir. 1998) (applying Florida law); *Certain Underwriters at Lloyd's v. C.A. Turner Const.*, 112 F.3d 184 (5th Cir. 1997) (applying Texas law); *American States Ins. Co. v. Nethery*, 79 F.3d 473 (5th Cir. 1996) (applying Mississippi law); *Brown v. American Motorists Ins. Co.*, 930 F. Supp. 207 (E.D. Pa. 1996); *City of Salina, Kan. v. Maryland Cas. Co.*, 856 F. Supp. 1467 (D. Kan. 1994); *Madison Const. v. Harleysville Mut. Ins.*, 557 Pa. 595, 735 A.2d 100 (1999); *Deni Associates v. State Farm Ins.*, 711 So. 2d 1135 (Fla. 1998); *Truitt Oil & Gas Co. v. Ranger Ins. Co.*, 231 Ga. App. 89, 498 S.E.2d 572 (1998); *City of Bremerton*

v. Harbor Ins. Co., 92 Wash. App. 17, 963 P.2d 194 (1998); *TerraMatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. App. 1997).

The Supreme Court concluded as a matter of law that Cincinnati's pollution exclusion, though quite broad, was unambiguous. In response to Becker Warehouse's argument that the exclusion applied to only traditional environmental pollution claims, the court held as follows:

> The language of the policy does not specifically limit excluded claims to traditional environmental damage; nor does the pollution exclusion purport to limit materials that qualify as pollutants to those that cause traditional environmental damage. . . . An occurrence such as the release of xylene fumes in [Becker Warehouse's] warehouse clearly falls under Cincinnati's broad exclusion—to find otherwise would read meaning into the policy that is not plainly there. The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.

Cincinnati Ins. Co. v. Becker Warehouse, Inc., 262 Neb. 746, 755-56, 635 N.W.2d 112, 120 (2001). The Nebraska Supreme Court further concluded:

> The broad nature of the pollution exclusion may cause a commercial client to question the value of portions of its commercial general liability policy, but, as an appellate court reviewing terms of an insurance contract, we cannot say that the language of the pollution exclusion is ambiguous in any way. The language in the instant pollution exclusion is clear and susceptible of only one possible interpretation.

Id. at 756-57, 635 N.W.2d at 120.

[4] Based on the holding in *Cincinnati Ins. Co.*, we conclude that the pollution exclusion at issue in this case is unambiguous in that it bars coverage for injuries caused by all pollutants, not just traditional environmental pollution. The *Cincinnati Ins. Co.* court concluded that Cincinnati's pollution exclusion, including the definition of "pollutant," was unambiguous. The pollution exclusion in Cincinnati's policy

is nearly identical to State Farm's policy, and the definition of "pollutant" in Cincinnati's policy includes the exact language found in State Farm's policy. While the definition of "pollutant" in Cincinnati's policy had additional language not found in State Farm's policy, that does not change the fact that the court in *Cincinnati Ins. Co.* found the entire definition of "pollutant" to be unambiguous. We conclude that even without the additional language found in the Cincinnati policy, State Farm's definition of "pollutant" is clear, is susceptible of only one possible interpretation, and, thus, is unambiguous.

Lead as Pollutant.

We determine, as the trial court did, that lead is a pollutant as defined in State Farm's policy. The policy defines "pollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." A chemical toxicologist testified by affidavit that lead exposure is known to have adverse effects on humans and that children are more vulnerable to lead poisoning than adults. He also testified that lead is defined as a pollutant by the Environmental Protection Agency, the Nebraska Department of Environmental Quality, the Occupational Safety and Health Administration, the Omaha Municipal Code, and various regulatory agencies. There was no evidence offered to refute the chemical toxicologist's testimony. We conclude as a matter of law that the definition of "pollutant" in State Farm's policy unambiguously encompasses lead found in paint.

"Discharge, Dispersal, Spill, Release or Escape" of Pollutant.

Next, we consider whether the exclusion's requirement of a "discharge, dispersal, spill, release or escape" of the pollutant is unambiguous as it relates to how the lead-based paint became available for ingestion and/or inhalation. Dantzler argues that this is where *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001), can be distinguished from the present case. Dantzler contends that *Cincinnati Ins. Co.* involved a "'discharge'" of pollutants,

whereas in the present case, there is no evidence that there was a "'discharge, dispersal, spill, release, or escape of pollutants.'" Brief for appellant at 12.

The pollution exclusion at issue excludes from coverage bodily injury arising out of the actual, alleged, or threatened "discharge, dispersal, spill, release or escape" of pollutants. The pollution exclusion in *Cincinnati Ins. Co.* contained similar language.

Cincinnati Ins. Co. involved a sealant that was applied to the floor of an addition to a warehouse. Although the treated area was separated from the area where food was stored with layers of heavy plastic sheeting, xylene fumes from the sealant contaminated the food. The Supreme Court concluded that the only logical explanation for the alleged damage is that the xylene fumes "'discharged, dispersed, released or escaped'" from its intended location at the warehouse addition into the original part of the warehouse where food products were stored. 262 Neb. at 760, 635 N.W.2d at 122.

However, the application of the words "discharge, dispersal, spill, release or escape" with regard to lead-based paint on the walls of a home is not as clear as the xylene fumes in *Cincinnati Ins. Co.* The analytical framework in *Cincinnati Ins. Co.* provides guidance, but we must determine whether the clause is clear and unambiguous as applied to the particular facts of this case.

The question of whether exposure to lead-based paint constitutes a "discharge, dispersal, spill, release or escape" of pollutants is an issue of first impression in Nebraska. In looking to other jurisdictions, there is a split of authority on this issue. However, we find the analysis in *Danbury Ins. Co. v. Novella*, 45 Conn. Supp. 551, 727 A.2d 279 (Conn. Super. 1998), persuasive and applicable to the instant case.

In *Danbury Ins. Co.*, 45 Conn. Supp. at 561-62, 727 A.2d at 284, the Connecticut court stated:

> Under the terms of the policy, coverage is excluded only for damages resulting from the "actual, alleged or threatened discharge, dispersal, release or escape of pollutants." These terms limit the ways "by which the

pollutant must travel from a contained place to the injured person's surroundings and then cause injury." *Lefrak Organization, Inc. v. Chubb Custom Ins. Co.,* supra, 942 F.Supp. at 953. As applied to personal injuries alleged to have been caused by exposure to toxic levels of lead in lead-based paint, there is more than one reasonable interpretation of these terms. Although "it is arguable, and several courts have found, that the presence of lead dust or chips in an apartment qualifies as 'discharge,' 'dispersal,' or even more generally, as 'release,'"; *id.*, at 954; it is not necessarily clear that lead needs to be released into an apartment's environment for a child to be exposed. For example, a child may ingest lead by chewing on intact painted surfaces. As the *Sphere Drake* court observed: "These terms do not ordinarily encompass the type of 'movement' associated with lead paint poisoning." *Sphere Drake Ins. Co. v. Y.L. Realty Co.,* supra, 990 F.Supp. at 243. See *Generali-U.S. Branch v. Caribe Realty Corp.,* supra, 160 Misc.2d at 1062, 612 N.Y.S.2d 296 ("to the extent that Daniel Diaz suffered lead poisoning from eating paint chips, this court is not convinced that his injuries arise out of the discharge, disposal, seepage, migration, release or escape of a pollutant.") Cf. *Weaver v. Royal Ins. Co. of America*, 140 N.H. 780, 783, 674 A.2d 975 (1996) ("Whether the transporting of lead dust from the work site to the Weavers' car and home was the 'discharge, dispersal, release or escape' of a pollutant is not clear.") Since ambiguity exists regarding this aspect of the clause's application, Danbury cannot prevail on its motion for summary judgment.

Furthermore, Danbury has not come forward with supporting documentation; see Practice Book § 17-45; demonstrating the absence of a genuine issue of material fact regarding the method by which the minor plaintiff in the underlying action was exposed to toxic levels of lead to satisfy the court that the exposure would fall within the clause's limitations if the clause were not ambiguous. The underlying complaint in the present case alleges only that Kim, the minor plaintiff, was "exposed to dangerous,

> hazardous and toxic levels of lead paint" on intact and nonintact surfaces and was thereby injured. This court cannot determine the mechanism of Kim's exposure to lead or whether her alleged lead poisoning resulted from ingesting or inhaling lead dust or lead chips, chewing on intact surfaces, a combination of these mechanisms or some other source of exposure.

See, also, *Lititz Mut. Ins. Co. v. Steely*, 567 Pa. 98, 108, 785 A.2d 975, 980-81 (2001), wherein the Pennsylvania Supreme Court found the terms "'discharge, dispersal, release or escape'" of pollutants to be ambiguous with reference to the process by which lead-based paint becomes available for ingestion or inhalation. The court observed that "the process by which lead-based paint becomes available for human ingestion/inhalation does not, in the usual case, occur quickly. Rather, the process of surface degradation occurs continually, but at a slow rate." *Id.* at 109, 785 A.2d at 981.

> One would not ordinarily describe the continual, imperceptible, and inevitable deterioration of paint that has been applied to the interior surface of a residence as a discharge ("a flowing or issuing out"), a release ("the act or an instance of liberating or freeing"), or an escape ("an act or instance of escaping"). . . . Arguably such deterioration could be understood to constitute a "dispersal," the definition of which ("the process . . . of . . . spreading . . . from one place to another," . . .) may imply a gradualism not characteristic of the other terms. Any such inconsistency in meaning simply indicates, however, that the exclusionary language does not clearly include or exclude the physical process here at issue, but is, as to that process, ambiguous. Such ambiguity requires that the language be interpreted in favor of the insured.

Id. at 109-10, 785 A.2d at 982.

In the instant case, like *Danbury Ins. Co. v. Novella*, 45 Conn. Supp. 551, 727 A.2d 279 (Conn. Super. 1998), there is no evidence regarding the method by which the child in the underlying action was exposed to toxic levels of lead. The complaint against Dantzler alleges that Geit was "exposed to

high levels of lead poisoning" in the rental property due to high levels of lead paint contamination on the walls and elsewhere in the rental property. It further states that the Douglas County Health Department "found and confirmed high levels of lead-paint contamination in the residence especially on [the] walls." The complaint does not allege whether Geit inhaled lead dust, ingested chipped flakes, or both. Further, the complaint does not allege that there was a "discharge, dispersal, spill, release or escape" of the lead. State Farm's complaint for declaratory judgment does not make such an allegation either.

The chemical toxicologist's affidavit states that children are exposed to lead by inhaling dust or dirt that is contaminated with lead, or by ingesting items contaminated with lead, such as paint chips. However, this is a general statement and not specific to the child in this case.

We cannot determine how Geit was exposed to the lead or whether his alleged lead poisoning resulted from ingesting or inhaling lead dust or lead chips, chewing on intact surfaces, a combination of these, or some other source of exposure. The record does not demonstrate that Geit's injuries resulted from a "discharge, dispersal, spill, release or escape" of lead. Accordingly, there is more than one reasonable interpretation of these terms. Since ambiguity exists regarding the application of this clause, there is a genuine issue of material fact as to whether there was a "discharge, dispersal, spill, release or escape" of the lead, as required for the pollution exclusion to exclude coverage of the claims against Dantzler. As such, summary judgment in favor of State Farm was not appropriate.

CONCLUSION

Because we conclude that a genuine issue of fact exists in regard to the application of the pollution exclusion, the trial court erred in granting summary judgment in favor of State Farm. The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

TERI POPE-GONZALEZ, APPELLANT, V. HUSKER CONCRETE, LLC, APPELLEE.

842 N.W.2d 135

Filed December 24, 2013. No. A-12-915.

1. **Pretrial Procedure: Appeal and Error.** Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings on appropriate sanctions will not be disturbed on appeal absent a showing of an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, acting within effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result.
3. **Default Judgments: Motions to Vacate.** Unavoidable casualty, which rises to a sufficient ground to vacate a default judgment, must be one preventing a party from prosecuting or defending.
4. **Effectiveness of Counsel.** A pro se litigant is held to the same standards as one who is represented by counsel.
5. ____. Although people have a right to represent themselves, the trial court also has inherent powers to compel conformity to Nebraska procedural practice.
6. **Rules of the Supreme Court: Pretrial Procedure.** There is a difference between noncompliance with one of the discovery rules and noncompliance with an order of the trial court on a discovery matter, and this difference may impact the allowable sanction.
7. **Default Judgments: Pretrial Procedure.** Dismissal or default judgment is an appropriate sanction for failing to comply with a discovery order.

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

Teri Pope-Gonzalez, pro se.

Brian S. Kruse, of Rembolt Ludtke, L.L.P., for appellee.

IRWIN, PIRTLE, and BISHOP, Judges.

PIRTLE, Judge.

INTRODUCTION

Teri Pope-Gonzalez (Gonzalez) appeals the order of the district court for Lancaster County granting default judgment for Husker Concrete, LLC, and dismissing Gonzalez' complaint for failure to comply with discovery and the court's orders regarding discovery. For the reasons that follow, we affirm.

BACKGROUND

Gonzalez filed a complaint against Husker Concrete on November 25, 2008. On September 18, 2009, the district court held a status conference and entered a progression order in which the trial court ordered Gonzalez to provide Husker Concrete certain witness disclosures. Gonzalez failed to disclose any expert witnesses.

The district court granted summary judgment, and Gonzalez' appeal was heard by this court. See *Gonzalez v. Husker Concrete*, No. A-10-1144, 2011 WL 4905527 (Neb. App. Oct. 11, 2011) (selected for posting to court Web site). We found Gonzalez had presented evidence showing the existence of a material issue of fact; thus, the cause was remanded to the district court for further proceedings.

On January 17, 2012, the district court held a status conference and Gonzalez personally appeared. Husker Concrete's counsel informed the court that Gonzalez had not fully responded to or supplemented discovery requests. The court set a new discovery deadline for April 20 and scheduled a pretrial conference for May 17.

On April 20, 2012, Gonzalez filed a motion to extend the discovery deadline and pretrial conference, because she was pro se, ill, and unable to get the paperwork done.

On May 17, 2012, Gonzalez appeared, requesting "a couple more months" to conduct and respond to outstanding discovery. The trial court inquired as to whether Gonzalez still had discovery due to Husker Concrete. Husker Concrete's counsel informed the court that Gonzalez had outstanding discovery requests dating back to 2009 and that she had not complied with the April 20 discovery deadline. She had not responded to the witness disclosures, interrogatories, or requests for production.

The court asked whether Gonzalez would be able to respond to the requests within 60 days, and she said, "Yes, sir." The district court granted the motion and gave her 60 days, until approximately July 17, 2012, to complete discovery. During that status conference, the court specifically noted Gonzalez

would be subject to sanctions if she failed to comply with her discovery and disclosure obligations.

On May 17, 2012, the district court entered a progression order in which the court ordered Gonzalez to provide Husker Concrete, without further request, certain initial disclosures, and expert witness disclosures within 60 days of the date of the order. The court also required Gonzalez to supplement and/or respond to written discovery requests by Husker Concrete in March 2009. The progression order specifically states: "[Gonzalez'] answers to outstanding discovery requests of [Husker Concrete] are due 60 days from the date of this order or [Gonzalez] shall be subject to sanctions." On May 17, 2012, Husker Concrete's counsel resubmitted the necessary discovery requests to Gonzalez.

Gonzalez failed to comply with the district court's orders regarding discovery and disclosure within 60 days. On August 16, 2012, Husker Concrete filed a "Motion for Sanctions, Including Dismissal With Prejudice."

On August 22, 2012, the district court considered Husker Concrete's motion for sanctions. Husker Concrete asserted Gonzalez had not responded to discovery or disclosure requests, and Husker Concrete requested the case be dismissed with prejudice. Gonzalez did not appear at the hearing.

On August 28, 2012, the district court entered an order granting default judgment in favor of Husker Concrete, dismissing Gonzalez' case.

Gonzalez filed a motion to set aside the sanction. Gonzalez did not dispute her noncompliance with the district court's orders. She claimed the default judgment should be vacated, asserting that (1) she had not received notice of the hearing, (2) she had been ill, (3) she did not have an attorney, (4) she did not have copies of the discovery requests, (5) she gave copies of all of the evidence to opposing counsel, (6) Husker Concrete failed to depose her, and (7) dismissal of the action was overly harsh and unjust.

The district court denied Gonzalez' motion to set aside. Gonzalez timely appealed.

ASSIGNMENTS OF ERROR

Gonzalez assigns that the trial court's sanction was overly harsh and that the court should not have dismissed her claim.

STANDARD OF REVIEW

[1] Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings on appropriate sanctions will not be disturbed on appeal absent a showing of an abuse of that discretion. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

ANALYSIS

Gonzalez asserts that the sanction imposed, dismissing the action against Husker Concrete, was "overly harsh" and that the trial court abused its discretion.

[2] We review the imposition of a discovery sanction for abuse of discretion. A judicial abuse of discretion exists when a judge, acting within effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result. *Mandolfo v. Mandolfo, supra*.

Gonzalez asserts the sanctions were inappropriate because she did not receive notice of the August 22, 2012, hearing on Husker Concrete's motion for sanctions and because she was sick during the pendency of the case.

The record shows that Husker Concrete provided a copy of the "Motion for Sanctions, Including Dismissal With Prejudice," and the accompanying notice of hearing by mail on August 16, 2012. The record also shows that Gonzalez was aware of her responsibilities to comply with discovery—by April 20, per the district court's order on January 17, and within 60 days of the court's May 17 order. In addition, Gonzalez indicated on May 17 that she had been ill, yet at this same hearing, she also acknowledged that 60 days would be sufficient to complete discovery. Further, in her appeal, she does not claim to have complied with the court's orders. We find this assignment of error is without merit, and the trial court did not abuse its

discretion in imposing sanctions though Gonzalez was absent from the hearing.

With regard to her illness, Gonzalez alleges she was unable to respond to discovery requests within the allotted time. She further alleges her illness arises from the alleged nuisances which gave rise to the underlying complaint.

[3] The Nebraska Supreme Court has found that unavoidable casualty, which rises to a sufficient ground to vacate a default judgment, must be one preventing a party from prosecuting or defending. See *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984). In *Aetna Cas. & Surety Co.*, the Supreme Court found that a time period of 4 months from the date that production was ordered was "more than ample time in which to comply with the court's order," where the appellants, a husband and wife, claimed that they were unable to comply due to a head injury allegedly suffered by the husband. 216 Neb. at 663, 345 N.W.2d at 10.

There is little evidence in the record demonstrating how Gonzalez' health affected her ability to complete the requested discovery and disclosures. Regardless, the district court provided her with at least 120 days to comply. Despite this additional time, she failed to comply or respond at all, in violation of the court's order, and in spite of the warning that sanctions would apply if she failed to meet the deadline in July 2012. By August 2012, she still had not disclosed factual witnesses, expert witnesses, or categories of damages.

Upon our review, we find the district court did not abuse its discretion in finding that sanctions were appropriate as a result of Gonzalez' noncompliance.

[4,5] Further, at times during the pendency of this case, Gonzalez has asserted that she is a pro se litigant and that she required additional time to meet deadlines or to respond to opposing counsel's requests. We must note that a pro se litigant is held to the same standards as one who is represented by counsel. *Prokop v. Cannon*, 7 Neb. App. 334, 583 N.W.2d 51 (1998). Although people have a right to represent themselves, the trial court also has inherent powers to compel conformity to Nebraska procedural practice. *Id.* Those powers

might well be used to bring litigation to a timely and orderly conclusion. *Id.*

Having determined that sanctions were appropriate under the circumstances, we consider whether the court abused its discretion in dismissing the case, granting default judgment for Husker Concrete.

The district court has discretion to sanction parties to a lawsuit. Neb. Ct. R. Disc. § 6-337(b)(2) states that if a party fails to obey a court order to provide or permit discovery, the court may impose further "orders in regard to the failure as are just," including "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Determination of an appropriate sanction for failure to comply with a proper discovery order initially rests with the discretion of the trial court, and its rulings on appropriate sanctions will not be disturbed on appeal absent a showing of an abuse of that discretion. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

[6,7] This court has stated that "there is a difference between noncompliance with one of the discovery rules and noncompliance with an order of the trial court on a discovery matter and that this difference may impact the allowable sanction." *Whitney v. Union Pacific R. Co.*, No. A-97-410, 1998 WL 30266 at *12 (Neb. App. Jan. 27, 1998) (not designated for permanent publication), citing *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984) (where default judgment was found to be appropriate sanction for unjustifiable obstruction of discovery). The Nebraska Supreme Court has also noted that dismissal or default judgment is an appropriate sanction for failing to comply with a discovery order. See *Stanko v. Chaloupka*, 239 Neb. 101, 474 N.W.2d 470 (1991).

The evidence shows that Gonzalez repeatedly failed to respond to discovery requests. On January 17, 2012, she was granted until April 20 to respond to discovery, and her request for 60 additional days was granted on May 17. At that time, the court ordered compliance with the discovery requests and she was informed that sanctions would apply if she failed to respond. She failed to comply with any part of the trial court's

order without showing sufficient justification, and the court granted Husker Concrete's motion for sanctions, dismissing the case. Upon our review, we find this was not an abuse of discretion following Gonzalez' failure to comply with the district court's orders and the rules of discovery.

CONCLUSION

We find the district court did not abuse its discretion in determining that sanctions were appropriate under the circumstances and granting default judgment in favor of Husker Concrete.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
AARON J. CLARK, APPELLANT.
842 N.W.2d 151

Filed December 31, 2013. No. A-13-017.

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 finding 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. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
3. **Trial: Joinder: Proof: Appeal and Error.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
4. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.
5. ____: ____. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.
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. **Warrantless Searches: Probable Cause.** One of the exceptions to warrantless searches and seizures is a search or seizure supported by probable cause.
8. **Criminal Law: Search and Seizure: Probable Cause: Police Officers and Sheriffs: Motor Vehicles.** The odor of marijuana emanating from a vehicle provides probable cause to search the vehicle and arrest the occupants where there is sufficient foundation as to the expertise of the officer.
9. **Trial: Joinder.** There is no constitutional right to a separate trial. The right is statutory and depends upon a showing that prejudice will result from a joint trial.
10. **Trial: Joinder: Proof.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
11. **Trial: Joinder: Indictments and Informations.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
12. **Trial: Joinder.** Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Cavanaugh for appellant.

Jon Bruning, Attorney General, and Carrie A. Thober for appellee.

Inbody, Chief Judge, and Irwin and Moore, Judges.

Per Curiam.

INTRODUCTION

Aaron J. Clark appeals his conviction in the district court for Douglas County for possession with intent to deliver marijuana. He argues that the district court should have suppressed evidence found in the vehicle he was driving, because police lacked probable cause to arrest him and conduct the search. He also argues that the trial court erred in consolidating his trial with that of his codefendant, because he was prejudiced by the consolidation. Because we find no merit to Clark's arguments on appeal, we affirm.

BACKGROUND

On March 15, 2011, Omaha police officers Joseph Mraz and Cody Baines were patrolling the area of Park and Woolworth Avenues in Omaha, Nebraska. The officers consider this a "high-crime area" with a lot of prostitution, drug activity, motor vehicle theft, and graffiti. Around 12:37 a.m., the officers noticed a 2008 Dodge Avenger traveling north on Park Avenue. The Avenger turned into an apartment complex in the area, but the officers did not follow and continued on their way. Several minutes later, the officers observed the Avenger again, this time traveling eastbound on Poppleton Avenue. Officer Mraz, who was driving the police cruiser, observed the Avenger turn right onto Park Avenue without using a turn signal. The officers initiated a traffic stop using emergency lights, spotlights, and "takedown" lights.

Officer Mraz approached the driver's side of the Avenger, while Officer Baines approached the passenger side. The driver, later identified as Clark, rolled down his window as the officers approached, and Officer Mraz detected the odor of marijuana coming from the Avenger. As Officer Mraz was asking Clark for his driver's license and vehicle registration, Officer Baines shined his flashlight into the back seat and observed a clear, gallon-sized plastic baggie on the floor that appeared to contain marijuana. Officer Baines then instructed Officer Mraz to have Clark exit the vehicle because there was marijuana in the back seat.

Officer Mraz got Clark out of the vehicle and placed him in handcuffs. He searched Clark and found $1,720 in cash in Clark's pockets. Officer Mraz then put Clark in the back of the police cruiser. At the same time, Officer Baines got the passenger, later identified as Jeron Morris, out of the vehicle, placed him in handcuffs, and put him in the back of another police cruiser that had arrived at the scene.

After the officers had secured Clark and Morris, Officer Baines removed the baggie from the back seat and verified, through look and smell, that the substance inside the baggie was marijuana. The officers then searched the rest of the Avenger. A digital scale with marijuana residue on it was discovered in the center console. The officers found another

gallon-sized plastic baggie in the trunk that contained a larger amount of marijuana. Subsequent testing confirmed that the substance in both baggies was, in fact, marijuana, and the total amount was nearly 1½ pounds. Clark and Morris were both charged with possession with intent to deliver marijuana.

Prior to trial, the State moved to consolidate Clark's case with Morris' case. Over objections by both defendants, the district court granted the motion. Also prior to trial, Clark filed a motion to suppress the evidence found in the Avenger. After a suppression hearing, the district court overruled Clark's motion.

Officers Mraz and Baines testified at trial. As of the time of trial, both officers had been with the Omaha Police Department for approximately 7 years. Each officer testified that he had received training on the smell of marijuana while at the police academy and had come in contact with marijuana during his work as a police officer. Specifically, Officer Baines testified that he had come in contact with marijuana more than 100 times in his 7-year career. Officer Mraz stated that he "couldn't even put a number" on how many times he had come in contact with marijuana during his career, but that it had been "[m]any, many times."

At the close of the State's case in chief, Clark moved for a mistrial on the basis that his case and Morris' case should not have been joined together. Clark argued that the questions asked by Morris' counsel of "the officer" damaged both Morris and Clark and that there was nothing Clark could do about it because the trials had been consolidated. The court overruled the motion. Clark was found guilty of the charged offense and sentenced to 1 to 2 years' imprisonment.

ASSIGNMENTS OF ERROR

Clark assigns that the district court erred in (1) failing to grant his motion to suppress and (2) failing to grant separate trials to Clark and Morris.

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 finding for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

[2,3] A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced. *Id.*

ANALYSIS

Motion to Suppress.

Clark argues that the district court erred in failing to grant his motion to suppress. He claims that his arrest and the search of the Avenger were unlawful, because the officers lacked probable cause at the time. We disagree.

[4-7] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010). These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions. See *id.* 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. *Smith, supra*. One of the exceptions to warrantless searches and seizures is a search or seizure supported by probable cause. See *id.*

[8] The Nebraska Supreme Court has held that the odor of marijuana emanating from a vehicle provides probable cause to search the vehicle and arrest the occupants where there is sufficient foundation as to the expertise of the officer. See *State v. Daly*, 202 Neb. 217, 274 N.W.2d 557 (1979). In *Daly*, the court upheld the search of a vehicle conducted after an officer stopped the vehicle for speeding and smelled marijuana

coming from inside the vehicle. At trial, the officer testified that he had been a member of law enforcement for over 2 years at the time of the traffic stop and had received instruction in drug recognition, including marijuana, during basic training and on-the-job training. The officer also stated that he had made approximately 50 prior similar arrests for possession of marijuana, wherein he stopped a vehicle for a traffic violation and smelled marijuana.

Likewise, in this case, there was sufficient foundation as to the expertise of the officers to justify a finding of probable cause. Both officers have been with law enforcement for approximately 7 years. They received training on marijuana detection while at the police academy and have come in contact with marijuana numerous times while on the job. Officer Mraz testified that he smelled the odor of marijuana as Clark rolled down the window. Thus, this evidence alone was sufficient to support the seizure of Clark and the search of the vehicle.

The probable cause in this case, however, went beyond merely the odor of marijuana, because Officer Baines observed marijuana in the vehicle before Clark was arrested or the vehicle was searched. Officer Baines testified that he observed the marijuana in the back seat as Officer Mraz was talking with Clark. Officer Baines then told Officer Mraz that there was marijuana in the back seat and asked him to remove Clark from the vehicle. Based upon this evidence, we conclude that the officers had sufficient probable cause to arrest Clark and search the Avenger. As such, the district court did not err in overruling Clark's motion to suppress.

Consolidation of Trials.

Clark assigns that the district court erred in failing to grant Morris and him separate trials. We note for the record that the trials were consolidated upon a motion by the State, which motion the district court granted over objections from Clark and Morris. Thus, we understand Clark to be challenging the joinder of his trial with that of Morris.

[9-11] The consolidation of separate cases is governed by Neb. Rev. Stat. § 29-2002 (Reissue 2008), which provides:

> (2) The court may order two or more indictments, informations, or complaints . . . if the defendants, if there is more than one, are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The procedure shall be the same as if the prosecution were under such single indictment, information, or complaint.

There is no constitutional right to a separate trial. The right is statutory and depends upon a showing that prejudice will result from a joint trial. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced. *Id*. The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial. *Id*. We conclude that the trial court did not abuse its discretion in consolidating the trials of Clark and Morris.

[12] Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated. *Id*. There is no dispute that joinder was proper in the present case. Both defendants were charged with the same offense arising out of the same incident, and Clark concedes as much in his brief. Therefore, consolidation was proper.

We therefore turn to the second question: Would the defendants be prejudiced by the consolidation? In challenging consolidation, it was incumbent upon Clark to demonstrate how he would be prejudiced by the consolidation. Clark argues that he was prejudiced by Morris' counsel's accusing him of the crime while asserting that Morris was an innocent bystander and that through Morris' antagonistic defense strategy and prejudicial cross-examination of witnesses, Morris

was "relieving the State of establishing [its] burden." Brief for appellant at 12. In addition, Clark argues that he was prejudiced because the evidence was insufficient to convict him without help from Morris' counsel as evidenced by the fact that the jury acquitted Morris.

The Nebraska Supreme Court recently addressed this issue in *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013). In *Foster*, the trial court granted the State's motion to consolidate Jeremy D. Foster's trial with that of his codefendant. Foster and his codefendant each moved to sever the trials, arguing that both defendants would "'point the finger'" at each other. *Id.* at 829, 839 N.W.2d at 790. The court overruled the motions, and the trials were held jointly.

On appeal, Foster argued, inter alia, that he was prejudiced by the joint trial because his defense was irreconcilable with and mutually exclusive of his codefendant's defense. The *Foster* court, citing *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993), iterated that the existence of mutually antagonistic defenses is not prejudicial per se. Accordingly, even a defendant who is arguing that the existence of mutually exclusive or antagonistic defenses resulted in prejudice entitling him or her to severance must meet the high burden of showing that "'joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Foster*, 286 Neb. at 840, 839 N.W.2d at 797 (quoting *Zafiro, supra*).

The *Foster* court also noted that "[o]n the whole, the federal circuit courts have repeatedly found that defenses that are based on 'finger pointing' do not result in prejudice sufficient to mandate severance." 286 Neb. at 841, 839 N.W.2d at 798. In order to be entitled to severance based on mutually exclusive defenses, the defendant must show real prejudice, rather than merely note that each defendant is trying to exculpate himself while inculpating the other. *Foster, supra*.

The *Foster* court concluded that the codefendants' defenses were not so mutually exclusive so as to entitle them to severance, because the jury was presented with a scenario where it

could acquit one defendant based on his defense of innocence without simultaneously rejecting the defense of the other. Similarly, the court found that the defenses were not sufficiently antagonistic to merit severance, because they were no more than mere "finger pointing," which is insufficient to require separate trials. Finally, the court determined that despite the codefendants' "finger pointing," the State still adduced sufficient evidence for the jury to find both defendants guilty.

The Eighth Circuit has applied a similar standard for prejudice, concluding that the mere fact that one defendant tries to shift blame to another defendant does not mandate separate trials, as a codefendant frequently attempts to "'"point the finger," to shift the blame, or to save himself at the expense of the other.'" *U.S. v. Flores*, 362 F.3d 1030, 1040 (8th Cir. 2004). The Eighth Circuit also noted that a defendant does not have a right against having his codefendant elicit testimony which may be damaging to him. *Id.*

Even if there is some risk of prejudice that resulted from the joint trials, it can be cured with proper jury instructions. See *Zafiro, supra*. The *Zafiro* jury was instructed that the government had the burden of proving beyond a reasonable doubt that each defendant committed the crimes with which he was charged, that the jury must give separate consideration to each defendant and the charge against him, and that each defendant was entitled to have his case determined from his own conduct and from the evidence applicable against him. Finally, the district court had admonished the jury that opening and closing arguments were not evidence. On appeal, the Supreme Court found that these instructions sufficed to cure any possibility of prejudice.

Turning back to the case at hand, we conclude that Clark has failed to show that he was prejudiced by the joint trial based on Morris' antagonistic defense strategy and prejudicial cross-examination of witnesses. The fact that Morris "pointed the finger" at Clark and elicited testimony that was damaging to Clark does not establish that Clark was entitled to a separate trial, because their defenses were not mutually exclusive.

The jury could have found that neither Clark nor Morris possessed the marijuana, that only one of them had possession of it, or that they were both in possession of it. In other words, the jury's belief of Morris' claim of innocence did not necessarily lead to the conclusion that Clark's claim of innocence was false.

In addition, the evidence presented by the State alone was sufficient to support Clark's conviction, because the State established that Clark was the driver of the vehicle, the vehicle was registered to Clark's girlfriend, and the money was found in Clark's pocket. The State also elicited testimony from an Omaha police officer in the narcotics unit that the amount of marijuana found in the Avenger was consistent with distribution as opposed to personal use. Accordingly, Clark's and Morris' defenses were not prejudicial so as to require separate trials.

Moreover, the jury instructions were sufficient to cure any risk of prejudice that may have been present here. Similar to the instructions in *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993), the jury in this case was instructed that it must come to a separate decision regarding each defendant, that it must find each defendant not guilty unless and until it decided that the State had proved him guilty beyond a reasonable doubt, that the State has the burden of proving beyond a reasonable doubt each and every element of the crime, and that the statements and arguments of the lawyers are not evidence. As such, Clark has not met his burden of showing that he was prejudiced by the joint trial, and this assignment of error is without merit.

CONCLUSION

We conclude that the arrest of Clark and the search of the Avenger were undertaken with probable cause, because the officers smelled marijuana coming from the vehicle and saw a baggie full of marijuana on the floor of the back seat prior to the arrest and search. Thus, the district court did not err in overruling Clark's motion to suppress. Additionally, we find that Clark has failed to establish how consolidating his trial with that of Morris prejudiced him, and therefore, the

district court did not abuse its discretion in granting the State's motion to consolidate. Accordingly, we affirm Clark's conviction and sentence.

AFFIRMED.

IN RE INTEREST OF SHANE L. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. AMANDA L., APPELLANT, AND CAMERON L., APPELLEE AND CROSS-APPELLANT.

842 N.W.2d 140

Filed December 31, 2013. Nos. A-13-380 through A-13-383.

1. **Juvenile Courts: Judgments: Appeal and Error.** 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. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. ____: ____. Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
4. **Final Orders: Appeal and Error.** There are three types of final orders that may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made upon summary application in an action after a judgment is rendered.
5. **Indian Child Welfare Act: Jurisdiction: Final Orders.** An order denying a transfer of a case to tribal court affects a substantial right in a special proceeding and is, therefore, a final, appealable order.
6. **Jurisdiction: Final Orders: Time: Notice: Appeal and Error.** In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order.
7. **Final Orders: Time: Appeal and Error.** If a party fails to timely perfect an appeal of a final order, he or she is precluded from asserting any errors on appeal resulting from that order.
8. **Parental Rights: Proof.** To terminate parental rights, the State must prove by clear and convincing evidence that one or more of the statutory grounds listed in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012) have been satisfied and that termination is in the child's best interests.

9. **Indian Child Welfare Act: Parental Rights: Proof: Expert Witnesses.** Under the Nebraska Indian Child Welfare Act, in addition to the statutory grounds listed in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012), the State must prove two more elements before terminating parental rights in cases involving Indian children. First, the State must prove by clear and convincing evidence that active efforts have been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. Second, the State must prove by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.
10. **Indian Child Welfare Act.** The heightened standard applicable to certain elements of the Nebraska Indian Child Welfare Act is not applicable to all elements.
11. **Indian Child Welfare Act: Parental Rights: Proof.** In a case arising under the Nebraska Indian Child Welfare Act, the standard by which the State must prove that terminating parental rights is in the child's best interests is clear and convincing evidence, not beyond a reasonable doubt.
12. **Parental Rights.** When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights.
13. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.
14. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the County Court for Box Butte County: RUSSELL W. HARFORD, Judge. Affirmed.

Dave Eubanks, Box Butte County Public Defender, for appellant.

Kathleen J. Hutchinson, Box Butte County Attorney, for appellee State of Nebraska.

Dave Eubanks, Box Butte County Public Defender, for appellee Cameron L.

Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., guardian ad litem.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

The county court for Box Butte County, sitting as a juvenile court, terminated the parental rights of Cameron L. and

Amanda L. to their children, Shane L., Lena L., Hanna L., and Jadys L. The children are Indian children as defined by statute, and thus, the Nebraska Indian Child Welfare Act (NICWA) is applicable in this case. Cameron and Amanda argue that the juvenile court erred in denying the motion to transfer the case to tribal court and in finding that terminating their parental rights was in the children's best interests. For the reasons that follow, we affirm.

BACKGROUND

Cameron and Amanda are the parents of Shane, born in 2003; Lena, born in 2004; Hanna, born in 2007; and Jadys, born in 2008. This case is governed by NICWA, Neb. Rev. Stat. §§ 43-1501 through 43-1516 (Reissue 2008), because Cameron is an enrolled member of the Oglala Sioux Tribe and his children are eligible for enrollment.

In August 2009, Shane, Lena, Hanna, and Jadys were removed from Cameron and Amanda's care after police were called to the home and observed that both parents were intoxicated, the home was extremely filthy, and the children had unaddressed medical needs. The State filed a petition alleging that the children came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the faults or habits of Cameron and Amanda. The children were placed with their maternal grandmother under the supervision of the Nebraska Department of Health and Human Services (DHHS). Cameron and Amanda were each charged with felony child abuse as a result of the situation in which their children were found, but the charges were reduced to misdemeanors on the condition that Cameron and Amanda admit the allegations in the juvenile proceedings. They did so, and the children were adjudicated under § 43-247(3)(a).

The children remained in their grandmother's care until August 2011, when they were removed because there were at least 10 to 15 people living in the home, well over capacity; their grandmother was allowing Cameron and Amanda unsupervised parenting time with the children; and the children had severe untreated head lice. Hanna and Jadys were placed with their current foster parents. Shane and Lena were initially

placed with different foster parents, but in May 2012, they were also placed with Hanna and Jadys' foster parents.

Because the children were eligible for enrollment in the Oglala Sioux Tribe, DHHS sent notice to the tribe, pursuant to NICWA, in September 2009, that petitions involving these children had been filed. Notices were also sent at each stage of the juvenile proceedings, including sending case plans, court reports, and progress letters. On March 15, 2012, the Oglala Sioux Tribe moved to intervene in the case and transfer jurisdiction to the tribal court. On May 8, 2012, Cameron and Amanda also filed motions to transfer the cases to tribal court. A hearing was held that day, and the court orally granted the tribe's motion to intervene without objection. In a subsequent written order dated July 1, 2012, the juvenile court found that good cause existed not to transfer jurisdiction to the tribal court and denied the motions to transfer.

On November 7, 2012, the State filed a motion to terminate Cameron's and Amanda's parental rights to Shane, Lena, Hanna, and Jadys. The termination hearing was held on January 28, 2013. The evidence revealed that DHHS has been involved with Cameron and Amanda since 2006. In total, DHHS has received 33 allegations that Cameron and/or Amanda had physically neglected or abused their children, and of those 33 claims, 10 were substantiated by the court and 4 were substantiated by DHHS. Shane and Lena were first removed from their parents' care in July 2006, before the younger children were born, due to neglect. They were adjudicated under § 43-247(3)(a) at that time, but jurisdiction of the case was transferred to the tribal court, which returned custody of Shane and Lena to Cameron and Amanda.

Shane, Lena, Hanna, and Jadys were then removed from Cameron and Amanda's care in August 2009 pursuant to these cases. The initial case plan outcomes included that Cameron and Amanda maintain sobriety and that they provide basic needs for their children, including a safe and sanitary home. Cameron and Amanda never made significant progress on either outcome.

Amanda completed a pretreatment assessment at the North Eastern Panhandle Substance Abuse Center (NEPSAC) on

October 15, 2009. The recommendation was that she participate in short-term residential treatment for her alcohol dependence, and she entered such a program at NEPSAC on November 4. She was successfully discharged on December 14 and was noted to have made "slight progress," although her prognosis was described as "'guarded.'" Despite this progress, Amanda was arrested on January 1, 2010, and admitted she had been drinking.

Cameron was referred to NEPSAC for an evaluation, and it was recommended that he also complete a short-term residential treatment program. He entered the program at NEPSAC on January 7, 2010, but left against staff advice 3 days later.

After these initial attempts at treatment through NEPSAC, DHHS arranged and paid for additional evaluations for both Cameron and Amanda at a mental health center and a rehabilitation services company. Both evaluations recommended short-term residential treatment. DHHS contacted several treatment facilities in the area and assisted Cameron and Amanda in completing applications. They were unable to find a facility willing to accept them, however, because their needs were too high and because they had not cooperated with treatment in the past. Specifically, NEPSAC would not accept Amanda because additional testing concluded that she was "borderline mentally retarded." Another facility refused to accept Cameron because it was determined that he had not been truthful on his evaluation.

Although DHHS workers and the children's guardian ad litem repeatedly stressed the importance of addressing Cameron's and Amanda's alcohol issues, neither parent expressed a strong desire to attend treatment or to take the idea seriously. During team meetings, they both reacted negatively to the idea of treatment and believed "they were being made to go." They viewed treatment as a waste of time and laughed at the idea. Yet, their alcohol use continued to cause problems in their lives.

In January and February 2012, Amanda was hospitalized with lacerations to her forearms and suicidal ideations. She was intoxicated upon admission on both occasions. Despite this, on February 23, 2012, Amanda indicated to a visitation aide that

a 6- to 9-month treatment program was longer than she was willing to commit to.

Additionally, as a result of their alcohol use, Cameron and Amanda continued to violate the law. During the pendency of the case, Cameron was convicted of driving under suspension, obstructing a peace officer, trespassing, disturbing the peace twice, and driving under the influence twice. During that same time, Amanda was also convicted of driving under the influence and disturbing the peace twice. To date, neither Cameron nor Amanda has completed additional alcohol treatment.

Cameron and Amanda's other case plan outcome was to obtain the ability to provide for their children's basic needs, including a safe and sanitary home. The evidence presented at the termination hearing established that Cameron and Amanda were not able to secure stable housing for a consistent period of time, despite assistance from DHHS. In September 2010, Cameron and Amanda moved into an apartment. They lost the apartment, however, when the owner went into bankruptcy.

In May 2011, Cameron and Amanda moved into a trailer, which the support worker helped them repair so it would be suitable for visitation with the children. They were evicted a few months later, however, because Cameron was incarcerated and Amanda was unable to pay the rent on her own. Despite aid from the support worker to find a new residence, they were unable to do so. They applied for housing assistance but were denied because of their criminal records. At various times during the case, Cameron and Amanda lived with Amanda's mother or stayed with other family members or friends.

Neither parent was able to secure steady employment. The support worker took Cameron and Amanda to pick up job applications, helped complete the applications and return them, and informed them of job openings. The support worker also took them to sign up for "GED classes," but because there were people in the classes that Cameron did not like, they never attended any classes.

Although Cameron was not able to find consistent or full-time employment, he has worked periodically for the past 6 years for a local farmer, earning approximately $5,700 in

2012. Amanda also worked briefly at a hotel for 2 weeks in August 2011. At the time of the termination hearing, their situation had slightly improved. Cameron testified that Amanda was receiving "social security disability" benefits of $478 per month and that the amount was set to increase to $710 per month as of February 1, 2013. They were also receiving $400 per month in food stamps. At the time, they were living in a trailer, which they paid for using Amanda's disability benefits.

The DHHS case manager testified at the termination hearing that Cameron and Amanda had not completed any of the case plan goals that had been in place for over 3 years. She recounted much of the above history, including the assistance that DHHS provided to Cameron and Amanda to help them meet their case outcomes. She testified that the children are thriving in foster care and described them as "doing amazingly well." She noted that the current foster placement is a potential adoptive home for all four children and that the foster family has formulated a cultural plan to address the children's Native American heritage. In her opinion, Cameron's and Amanda's parental rights should be terminated because they had not made sufficient progress with their case plan, they had not found stable employment, they violated court orders throughout the pendency of the case, and they had not addressed their alcohol issues.

Jeanna Townsend, a licensed mental health practitioner and certified professional counselor, also testified at the termination hearing. She began providing counseling services to Shane and Lena in March 2012 and to Hanna and Jadys in April 2012. She generally sees the children every other week. All four children have been diagnosed with fetal alcohol syndrome, which occurs when a fetus is exposed to such a high quantity of alcohol that its development is affected. Townsend testified that all of the children seem to have some developmental delay, which can be attributed to their fetal alcohol syndrome and the environment in which they were raised by their parents.

Townsend diagnosed Shane with "adjustment disorder with disruption of mood and conduct." This diagnosis means that

when he is exposed to a stressor—for example, a chaotic environment—he has a "mal-adjusted response," meaning he might become chaotic in behavior, become depressed or aggressive, become anxious, or worry. Townsend diagnosed Lena with "adjustment disorder, with mixed depression and anxiety," and the two younger girls were diagnosed with adjustment disorder which cannot be associated with mood, conduct, or anxiety due to their young ages.

According to Townsend, predictability and stability are of the utmost importance for children who have fetal alcohol syndrome and an adjustment disorder. Safety, structure, routine, and predictability are vitally important because that is how they develop trust and comfort from their environment. Chaos tends to trigger "insecurities and behaviors," and halts their development because it puts them in "panic mode."

Townsend testified that Shane, Lena, Hanna, and Jadys have "flourished" in foster care since visitation with their parents ended in July 2012, and she attributed that improvement to the lack of chaos in their lives. Townsend expressed great concern that reintroducing the relationship between the children and their parents would cause duress to the children, so much that they would not be able to develop as fully as they would in a stable environment. This was particularly concerning to her because the children are already developmentally delayed. In Townsend's opinion, the children would be at great risk of further developmental delay and emotional harm if they were placed back with their parents or any potential familial caregivers.

Townsend testified that the children have bonded with their foster family and that it would be detrimental to them if the bond was disrupted. The children have made tremendous improvements while living with their foster parents. According to Townsend, "[The children] like to live [with their foster parents]. They like to have the consistent routine, and they like to have food and to take baths, and to have rooms that they can help decorate. They like all of those things about having a home." All of the children have expressed to Townsend that they want to live with their foster parents.

In an order dated March 22, 2013, the juvenile court terminated Cameron's and Amanda's parental rights to Shane, Lena, Hanna, and Jadys. The court found that the State had met its burden to prove that statutory grounds for termination existed under Neb. Rev. Stat. § 43-292(2), (4), (6), and (7) (Cum. Supp. 2012). The court further found that the State had proved by clear and convincing evidence that active efforts were made by DHHS to provide family support services, but that those efforts were unsuccessful in reunifying Cameron and Amanda with their children. In addition, the court found beyond a reasonable doubt that substantial emotional harm would result to the children if they were returned to the care and custody of their parents. Finally, the court found that it was in the best interests of the children to terminate the parental rights of their parents. Amanda filed a timely notice of appeal. Cameron filed a second notice of appeal and is designated as an appellee asserting a cross-appeal pursuant to Neb. Ct. R. App. § 2-101(C) (rev. 2012). However, they filed a brief together, so for ease of discussion, they will be treated in this opinion as appellants. We note that the parties have stipulated to the consolidation of the cases for consideration on appeal.

ASSIGNMENTS OF ERROR

Cameron and Amanda assign that the juvenile court erred in (1) denying transfer of the case to the tribal court and (2) finding that termination of their parental rights was in the children's best interests.

STANDARD OF REVIEW

[1,2] 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. In reviewing questions of law arising in such proceedings, an appellate court reaches a conclusion independent of the lower court's ruling. *In re Interest of Enrique P. et al.*, 14 Neb. App. 453, 709 N.W.2d 676 (2006). A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Id.*

ANALYSIS

Transferring Jurisdiction to Tribal Court.

[3-5] Cameron and Amanda argue that the juvenile court erred in denying the motions to transfer jurisdiction of the case to the tribal court. Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction. *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011). There are three types of final orders that may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made upon summary application in an action after a judgment is rendered. *Id.* We have previously determined that an order denying a transfer of a case to tribal court affects a substantial right in a special proceeding and is, therefore, a final, appealable order. See *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005).

[6,7] In order to vest an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order. *In re Interest of Jamyia M., supra*. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008). If a party fails to timely perfect an appeal of a final order, he or she is precluded from asserting any errors on appeal resulting from that order. See *In re Interest of Enrique P. et al., supra*.

In this case, Cameron and Amanda are asserting error from the juvenile court's order dated July 1, 2012, denying the motions to transfer the case to tribal court. Because neither party perfected an appeal within 30 days of entry of that order, we now lack jurisdiction to review Cameron and Amanda's argument that the case should have been transferred to tribal court.

Best Interests.

[8,9] Cameron and Amanda argue that the juvenile court erred in finding that terminating their parental rights was in the best interests of their children. To terminate parental rights, the State must prove by clear and convincing evidence

that one or more of the statutory grounds listed in § 43-292 have been satisfied and that termination is in the child's best interests. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). NICWA, however, adds two additional elements the State must prove before terminating parental rights in cases involving Indian children. First, the State must prove by clear and convincing evidence that active efforts have been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. Second, the State must prove by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. See *id*.

We note that although Cameron and Amanda have not assigned any error with respect to statutory grounds for termination, active efforts, or emotional or physical damage, we have reviewed the record and find no plain error as to these elements. The State proved by clear and convincing evidence that termination of Cameron's and Amanda's parental rights was warranted under § 43-292(7). The State also proved by clear and convincing evidence that active efforts were made to prevent the breakup of this family, as evidenced by the numerous services provided to the family over a number of years, but that the efforts were unsuccessful. Finally, upon our de novo review of the record, we conclude that the State proved by evidence beyond a reasonable doubt, through Townsend's testimony, that continued custody of these children by their parents or Indian custodian was likely to result in serious emotional or physical damage to the children.

Cameron and Amanda claim that the State failed to present testimony of a qualified witness and that Townsend was not qualified as an expert, but they did not assign these claims as error, and we find no plain error in the juvenile court's qualification of Townsend as an expert witness. The Bureau of Indian Affairs has set forth guidelines under which expert witnesses will most likely meet the requirements of NICWA, which include, "'"A professional person having substantial education and experience in the area of his or her specialty."'"

In re Interest of Ramon N., 18 Neb. App. 574, 584, 789 N.W.2d 272, 281 (2010).

Townsend is a licensed mental health practitioner and certified professional counselor who has had her own private practice since 2000. Approximately two-thirds of her practice is devoted to working with abused or neglected children or those with behavioral problems. She has worked with Indian children in her practice. Before working as a counselor, Townsend worked at a youth shelter and at a high school program designed for parenting and pregnant teenagers. Through this work, she also worked with Indian youth. Accordingly, the juvenile court did not err in finding that Townsend was qualified to provide expert testimony, and her testimony was sufficient to prove that these children were at risk for emotional harm.

[10,11] As to their assignment of error, Cameron and Amanda challenge only the best interests element and claim that the State failed to prove beyond a reasonable doubt that termination was in the children's best interests. We note that Cameron and Amanda's argument indicates an incorrect understanding of the State's burden with respect to the best interests element. The heightened standard applicable to certain elements of NICWA is not applicable to all elements. See *In re Interest of Ramon N., supra*. The standard by which the State must prove that terminating parental rights is in the child's best interests is clear and convincing evidence, not beyond a reasonable doubt. See *id*. We conclude the State has met its burden of proof in this case.

Shane, Lena, Hanna, and Jadys were in an out-of-home placement for 39 months before the State filed the motion to terminate parental rights. During that time period, Cameron and Amanda failed to make substantial, sustained progress on their goals. While they obtained housing for short periods of time, they were unable to maintain it due to unemployment and incarceration. DHHS provided considerable assistance to Cameron and Amanda in attempting to find stable housing and employment, to no avail.

Additionally, and more important, Cameron and Amanda failed to address the most critical aspect of this case: their

alcohol abuse. Cameron and Amanda argue that their inability to complete alcohol treatment was because "the system failed them." Brief for appellants at 19. Although Amanda cannot be blamed for her low cognitive functioning, the other reasons that no facility would accept them can be directly attributed to their behaviors and attitudes. The fact that both parents had been previously unsuccessful in treatment was a reason that facilities refused to accept them. In addition, Cameron's dishonesty in his evaluation caused another facility to deny him. Even if a suitable facility had been located, neither parent indicated a willingness to enter treatment and take recovery seriously. As the juvenile court observed in its order, "Both [parents] thought alcohol treatment was a joke and laughed about it at team meetings . . . ." They continued to drink and violate the law, leading to multiple convictions and periods of incarceration for both parents.

The children are happy and flourishing in their current home and have all expressed a desire to remain with their foster parents. As Townsend noted, all children, but particularly those with fetal alcohol syndrome and adjustment disorders, need consistency, stability, and permanency. This does not appear to be possible with Cameron and Amanda. We recognize that Cameron and Amanda had shown slight improvement at the time of the termination hearing; however, they have failed to address the primary concern leading to their children's removal, which was their alcohol abuse, more than 3 years after their children's removal.

[12,13] When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the child's best interests require termination of parental rights. *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *Id*. The evidence is clear that it is in the children's best interests that Cameron's and Amanda's parental rights be terminated.

[14] We note that Cameron and Amanda also assert that Wilson's testimony lacked sufficient foundation but do not assign this as error. Errors argued but not assigned will not be

considered on appeal. *Butler County Dairy v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013). We therefore decline to address this issue.

CONCLUSION

We conclude that Cameron and Amanda failed to timely appeal from the orders denying the motions to transfer the cases to tribal court. As such, this court is without jurisdiction to address Cameron and Amanda's argument that the juvenile court erred in that respect. Upon our de novo review, we find that the State presented clear and convincing evidence that termination of Cameron's and Amanda's parental rights to Shane, Lena, Hanna, and Jadys was in the children's best interests. Accordingly, we affirm the orders of the juvenile court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOHN T. WARRACK, APPELLANT.
842 N.W.2d 167

Filed January 7, 2014. No. A-13-025.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.
3. **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.
4. **Constitutional Law: Search and Seizure: Words and Phrases.** Although every trespass, by definition, invades someone's right of possession, not every trespass violates the Fourth Amendment.

5. **Constitutional Law: Search and Seizure.** The Fourth Amendment protects people, not places.
6. ____: ____. To determine whether a person has an interest protected by the Fourth Amendment, one must question whether the person has a legitimate expectation of privacy in the invaded space.
7. ____: ____. A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable.
8. **Police Officers and Sheriffs: Warrants.** A police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.
9. **Search and Seizure: Streets and Sidewalks.** Our society does not reasonably expect a sidewalk leading to one's front door to be private in the absence of evidence to the contrary.
10. **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.
11. **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.
12. ____: ____: ____. The relevant question for an appellate court in reviewing a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
13. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
14. ____: ____. Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.
15. **Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an 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 or herself possessed such.
16. **Criminal Law: Intent.** The question whether the defendant had the required criminal intent is a fact question for the jury.
17. ____: ____. A direct expression of intention by the actor is not required in determining criminal intent, because the intent with which an act is committed involves a mental process and intent may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
18. **Criminal Attempt.** Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact.

19. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
20. **Criminal Law: Effectiveness of Counsel.** A trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.
21. **Effectiveness of Counsel: Appeal and Error.** In addressing the "prejudice" component of the test to determine ineffective assistance of counsel, an appellate court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
22. **Effectiveness of Counsel: Proof.** To show prejudice in an ineffective assistance of counsel claim, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
23. **Proof: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
24. **Effectiveness of Counsel: Proof: Appeal and Error.** When an appellant does not allege both prongs of an ineffective assistance of counsel claim, deficient performance and prejudice, resolution of his or her assertions of ineffective assistance of counsel hinges not on the adequacy of the record before the appellate court, but on his or her failure to provide the appellate court with sufficient allegations of ineffective assistance of counsel.
25. ____: ____: ____. When an appellant does not sufficiently allege his or her ineffective assistance of counsel claims, an appellate court is constrained to find that the assertions of ineffective assistance of counsel are without merit.

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

Michelle M. Mitchell, of Mitchell Law Office, for appellant.

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

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

John T. Warrack appeals from his convictions in the district court for Lancaster County on aiding and abetting delivery of methamphetamine within 1,000 feet of a school and attempted delivery of methamphetamine. He argues that the district

court erred in failing to grant his motion to suppress, that his foundational objection to certain testimony should have been sustained, that the evidence was insufficient to sustain the convictions on both counts, and that he received ineffective assistance of counsel. We affirm the convictions in all respects.

II. BACKGROUND

Jordan Wilmes is an investigator with the Lincoln-Lancaster County narcotics task force. In May 2011, a confidential informant (CI) informed Wilmes that an individual with the street name "Chicago" was involved with methamphetamine sales. The CI provided Wilmes with a telephone number for Chicago. The CI placed a recorded call to Chicago on May 23, indicating that he was looking for an "eight ball" for a client. The term "eight ball" refers to one-eighth of an ounce of drugs.

In response to the CI's request, Chicago stated that his "guy" could get what the CI wanted for "three and a quarter." Wilmes testified at trial that "three and a quarter" referred to a price of $325 for the quantity of drugs requested. Wilmes testified that the recorded call was a typical conversation arranging for a drug purchase, where the individuals discuss whom the drugs are for, a price, and a quantity.

The CI placed another recorded call to Chicago on May 27, 2011, and indicated that his client was "still looking for that ice cream." The term "ice cream" is a common term for methamphetamine. Chicago asked whether the CI was still looking for the same amount, an "eight ball." The CI confirmed that he was.

On May 31, 2011, the CI again placed a recorded telephone call to Chicago. During that call, the CI told Chicago that he was going to have his client, "Chris," who was really Wilmes working undercover, contact Chicago. Shortly thereafter, Wilmes, acting as Chris, placed a recorded call to Chicago. Wilmes asked Chicago for a "t-shirt" and a "'T.'" These terms represent one-sixteenth of an ounce of drugs. Chicago indicated the price for a "T" would be $210. After this series of telephone calls, Wilmes understood that he was

going to be meeting with Chicago for the purpose of purchasing methamphetamine.

After the telephone calls, Wilmes exchanged text messages with Chicago, and they established a lower price for the drug and a place to meet. After Wilmes arrived at the agreed-upon location, he received a telephone call from Chicago changing the location. Wilmes provided a description of his vehicle to Chicago, and Chicago asked Wilmes to park at the northeast corner of 14th and C Streets and wait for him.

Once Wilmes was parked at the intersection of 14th and C Streets, he observed a middle-aged black male and a middle-aged white female approaching his vehicle. The male opened the passenger door of Wilmes' vehicle and told Wilmes that he was going to have the female "hook [him] up with what [he] was trying to get." Wilmes recognized the man's voice from the telephone calls he had exchanged with the individual known as Chicago. The male then left, and the female, later identified as Rabbeca Seaman, got into Wilmes' vehicle.

Seaman told Wilmes her name was "Becca," and Wilmes introduced himself as "Chris." Wilmes informed Seaman of his dealings with Chicago and told her that he was looking to acquire "drugs or dope." Wilmes gave Seaman $200, and she left her purse in the vehicle as collateral. Seaman got out of the vehicle and entered a house on the southeast corner of 14th and C Streets. She returned to the vehicle shortly thereafter and gave Wilmes a bag containing a substance later confirmed to be methamphetamine.

On June 14, 2011, Wilmes placed another recorded telephone call to Chicago. In the call, Wilmes reminded Chicago that he was "[w]hite boy Chris in the green car," and indicated that he was "trying to get something tonight" but that he was unable to reach Seaman. Wilmes asked to purchase an "eight ball," and they arranged to meet at the "same place."

Wilmes arrived at the intersection of 14th and C Streets, where a man with a tattoo on his neck that read "Chicago" got into Wilmes' vehicle. It was the same man Wilmes had met on May 31, 2011. Warrack directed Wilmes to drive to an apartment complex near 14th and D Streets. Wilmes indicated that he had $200, and they discussed the quantity that Wilmes

wanted to buy. Warrack then asked Wilmes to "front him the money" so that he could go purchase the methamphetamine. Wilmes asked Warrack to leave collateral to ensure that he would return with the methamphetamine, so Warrack gave Wilmes a set of keys. Warrack then took the $200, got out of Wilmes' vehicle, and began walking northbound across D Street. Wilmes waited for approximately 30 to 45 minutes, but Warrack never returned. Wilmes' subsequent telephone calls to Warrack went unanswered.

In early November 2011, Lincoln police officer Timothy Cronin was directed to arrest Warrack for the theft of $200 from Wilmes. On November 11, Cronin and Lincoln police investigator Jeff Sorensen were driving in Lincoln, when they observed Warrack sitting on the porch of his home. Cronin and Sorensen parked their vehicle and approached the residence on foot. Cronin walked up onto the porch and identified himself as a police officer. Sorensen was standing either on the porch or on the steps leading from the sidewalk up to the porch. Cronin asked Warrack to step down off the porch so they could talk on the sidewalk, and he did so. Once Warrack was on the sidewalk, he was arrested for theft and transported to jail.

Warrack was booked into jail and placed in an interview room, advised of his *Miranda* rights, and questioned by Cronin and Sorensen. With respect to the May 31, 2011, incident, Warrack told the officers that someone named "Chris" had contacted him, looking to purchase an "eight ball" of methamphetamine. Warrack stated that he told Chris that he knew someone from whom Chris could purchase methamphetamine, in reference to Seaman. Warrack said that he agreed to meet Chris at 14th and C Streets and pointed him out to Seaman upon arrival. Warrack stated that that was the extent of his involvement and commented that Chris called him first, that he only "'hooked [Chris] up with [Seaman],'" and that he "'never touched anything.'" Cronin testified that Warrack stated two or three times, "'All I did was set it up.'"

The officers also asked Warrack about the June 14, 2011, incident, and initially, he denied any involvement. When Cronin told Warrack that he had personally observed Warrack

meeting with Wilmes, Warrack admitted that he did meet with Wilmes but denied taking any money from him. Warrack stated to Cronin that he did not sell methamphetamine to Wilmes because he knew Wilmes was an undercover officer.

Warrack was subsequently charged with aiding and abetting delivery of methamphetamine within 1,000 feet of a school and attempted delivery of methamphetamine. Prior to trial, Warrack filed a motion to suppress the statements he made to the officers, arguing that the statements were the result of an illegal arrest. The district court denied Warrack's motion, concluding that he was lawfully arrested.

A jury trial was held on November 5 and 6, 2012. The jury ultimately found Warrack guilty of both offenses, and he was sentenced to 3 to 6 years' imprisonment on count I and a consecutive sentence of 1 to 2 years' imprisonment on count II. Warrack timely appeals to this court.

III. ASSIGNMENTS OF ERROR

Warrack assigns, summarized and renumbered, that the district court erred in (1) overruling his motion to suppress, (2) overruling his foundational objection to certain testimony, and (3) finding sufficient evidence to sustain the convictions on both counts. He also assigns that he received ineffective assistance of counsel.

IV. ANALYSIS

1. Motion to Suppress

[1] Warrack argues that the district court erred when it failed to grant his motion to suppress evidence based on an illegal arrest. 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 finding for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

[2,3] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals

against unreasonable searches and seizures by the government. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010). 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. *Smith, supra*.

[4-7] Although every trespass, by definition, invades someone's right of possession, not every trespass violates the Fourth Amendment. *State v. Ramaekers*, 257 Neb. 391, 597 N.W.2d 608 (1999). The "'"Fourth Amendment protects *people, not places*."'" 257 Neb. at 394, 597 N.W.2d at 611 (emphasis in original) (quoting *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). Therefore, to determine whether a person has an interest protected by the Fourth Amendment, one must question whether the person has a legitimate expectation of privacy in the invaded space. *Ramaekers, supra*. A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable. *Id*.

Warrack cites *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), to argue that Cronin and Sorensen effectuated an unlawful arrest when they physically entered and occupied an area immediately surrounding his home, which is curtilage and protected by the Fourth Amendment. In *Jardines*, police officers took a drug-sniffing dog onto the defendant's porch and the dog alerted the officers to narcotics inside the home. One of the officers then received a warrant to search the residence. The trial court granted the defendant's motion to suppress based upon an illegal search.

The U.S. Supreme Court granted certiorari, limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment. On appeal, the Court confirmed that the porch area where the officers were gathering information is an area that enjoys protection as part of the home itself. Despite this protection, tradition in our country allows a visitor to approach a home by the front path, knock

promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. See *Jardines, supra*. However, the Court found that introducing a trained police dog to explore this area in hopes of discovering incriminating evidence was "something else." 133 S. Ct. at 1416. The Court stated that "the background social norms that invite a visitor to the front door do not invite him there to conduct a search." *Id*. Based on this finding, the Court concluded that the defendant's motion to suppress was properly granted.

[8] *Jardines* is distinguishable from the present case. The use of the drug-sniffing dog on the defendant's porch was found to be a trespassory invasion because it was being used to discover evidence and, thus, constituted a "search" for Fourth Amendment purposes. In this case, the officers did not conduct a search or seizure on Warrack's porch. Rather, they merely stepped onto the porch to request that Warrack step down to the sidewalk, which he did willingly. As the Supreme Court iterated in *Jardines*, "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" 133 S. Ct. at 1416 (quoting *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011)). As such, the officers' mere presence on Warrack's porch was permissible.

We conclude that Warrack's arrest was lawful, because the officers were authorized to step onto Warrack's porch and speak with him and Warrack willingly left his porch and was arrested on the sidewalk, a location in which he had no reasonable expectation of privacy. In *State v. Boysaw*, 228 Neb. 316, 422 N.W.2d 346 (1988), the Nebraska Supreme Court upheld the warrantless arrest of the defendant. Based on the trial court's findings of fact, the defendant was inside his home when he observed police officers arrive. He went to the doorway as the officers came onto the porch, he opened the door, and he asked whether he could help them. The officers asked the defendant to step outside; the defendant did so and was arrested. The trial court determined that although officers asked the defendant to step outside, he had not been intimidated into leaving his residence, and that he was not arrested until he left the protection of his residence, at which time

he no longer had a reasonable expectation of privacy. Upon finding support in the record for the trial court's factual findings, the Supreme Court concluded that the defendant's arrest was lawful.

Likewise, in this case, Warrack was not intimidated into leaving his porch and he was arrested in a location where he had no reasonable expectation of privacy. Cronin and Sorensen asked Warrack to step onto the sidewalk, and he did so cooperatively. The district court found that although the officers identified themselves as police officers, they did not draw their guns, touch Warrack in any way, or otherwise try to intimidate or coerce him. These factual findings are consistent with the testimony of Cronin and Sorensen.

[9] Once Warrack was on the sidewalk, he was placed under arrest. As the Nebraska Supreme Court recognized in *State v. Ramaekers*, 257 Neb. 391, 597 N.W.2d 608 (1999), our society does not reasonably expect a sidewalk leading to one's front door to be private in the absence of evidence to the contrary. There is nothing in the record to indicate Warrack attempted to make the sidewalk leading to his home private. In fact, Cronin testified that he and Sorensen were able to freely walk from the sidewalk up to the porch. We therefore conclude that Warrack did not have a reasonable expectation of privacy in the location at which he was arrested. As such, his arrest was lawful, and the district court did not err in denying his motion to suppress.

2. Foundational Objection

Lincoln police officer Todd Kozian testified at trial regarding his involvement in this case. Kozian assisted Wilmes in measuring the distance from the elementary school located at 11th and C Streets to the location where the drug transaction between Wilmes and Seaman occurred. An aerial map depicting the area from approximately 11th Street to 14th Street and A Street to D Street was received into evidence.

Kozian testified that he obtained the measurements using a "Lidar" device, which is a laser that measures speed and distance. From the northeast corner of 14th and C Streets, the location where Wilmes told Kozian the transaction occurred,

Kozian was unable to get a clear line of sight to the school because there were houses obstructing his view. To get a clear view, he moved into the intersection to obtain the distance. At trial, he marked the aerial map with a red "x" to show the location where he was standing.

During direct examination, Kozian was asked to use the legend on the aerial map to estimate the approximate distance from his marked location to the location of the house that Seaman entered to purchase the methamphetamine. Warrack asserted a foundational objection to the question, which the court overruled. Kozian then estimated the distance as approximately 100 feet. On appeal, Warrack claims the district court erred in overruling his objection.

[10] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion. *State v. Richardson*, 285 Neb. 847, 830 N.W.2d 183 (2013).

Warrack cites *Richardson* to argue that there was insufficient foundation establishing the accuracy of Kozian's estimate, that Kozian's ability to estimate distance and the aerial map were not compared to a standard, and that there was no evidence that the scale of the map was accurate. The principles discussed in *Richardson* apply only to electronic or mechanical measuring devices, and Warrack urges us to find that Kozian himself and the aerial map were "measuring devices." We decline to do so, because witnesses and maps are not electronic or mechanical. Thus, *Richardson* is not applicable for the issue at hand.

We conclude that the district court did not abuse its discretion in overruling Warrack's foundational objection to Kozian's estimate. The map from which Kozian estimated the distance was offered into evidence by the State on three occasions and received each time without objection from Warrack. Any concerns Warrack had regarding the accuracy of the legend should have been resolved through objection to admission of the exhibit, not objection to Kozian's testimony based on the map. Thus, the map was properly before the jury as an exhibit and available for the jury's consideration during deliberations. Whether Kozian's estimated distance using the

map's legend was accurate was simply a matter of whether the jury found his testimony credible, and any questions concerning the credibility of a witness are solely for the jury as finder of fact to resolve. See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). Accordingly, this assignment of error is without merit.

3. Sufficiency of Evidence

[11,12] Warrack argues that there was insufficient evidence to support his convictions. In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013). 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*. Because we have detailed the facts in the background section of this opinion, we do not restate them in detail below.

(a) Aiding and Abetting

Warrack was charged with aiding and abetting delivery of methamphetamine within 1,000 feet of a school, in violation of Neb. Rev. Stat. §§ 28-416(4)(a)(ii) (Cum. Supp. 2012) and 28-206 (Reissue 2008). Section 28-416(4)(a)(ii) prohibits any person 18 years of age or older from knowingly or intentionally delivering a controlled substance within 1,000 feet of the real property comprising a public elementary school. Section 28-206 provides that a person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he or she were the principal offender.

Warrack claims that the State failed to prove three essential elements of the charged offense: (1) that he was "Chicago," (2) that he possessed the required knowledge or intent to commit the charged offense, and (3) that the drug transaction occurred within 1,000 feet of a school. In general, Warrack argues that

"unreliable, inconsistent and conflicting testimony" along with Kozian's unreliable estimated distance resulted in the State's failure to meet its burden. Brief for appellant at 43. We reject Warrack's arguments and find that the State adduced sufficient evidence so that a rational jury could have found all elements of the offense beyond a reasonable doubt.

(i) Identity

Warrack first argues that the evidence was insufficient to show that he was the person with whom Wilmes exchanged telephone calls and text messages. We conclude the evidence was sufficient for a rational jury to find that Warrack was "Chicago."

As set forth above, Wilmes exchanged multiple telephone calls and text messages with an individual with the street name "Chicago." When Wilmes arrived at the designated location on May 31 and June 14, 2011, he had contact with an individual whose voice he recognized as the man on the telephone with whom he made arrangements for a drug deal.

Seaman testified that she and Warrack used to be neighbors and that she knows him by the names "John," "Travante," and "Chicago." She testified that Warrack picked her up on May 31, 2011, so that she could buy methamphetamine from a man named "Jessie" and provide the drugs to Warrack to sell to someone else. On the way to Jessie's house, Warrack was talking on his cell phone, asking the person with whom he was speaking what type of vehicle he or she was driving. Seaman and Warrack then met up with Wilmes. Warrack told Wilmes that Seaman would "hook [him] up," and Seaman ultimately sold methamphetamine to Wilmes. We also note that Warrack has a tattoo on his neck that reads "Chicago."

In addition to the above testimony, Warrack, himself, made admissions to Cronin and Sorensen about his conversations with someone named "Chris" and the steps he took to meet him at 14th and C Streets. Based on the foregoing, we conclude that the evidence was sufficient for a rational jury to conclude that Warrack was the person who exchanged telephone calls and text messages with Wilmes.

(ii) Knowledge or Intent

[13-15] Warrack also claims the State failed to prove that he intended for Seaman to deliver methamphetamine or that he knew she intended to do so. Aiding and abetting requires some participation in a criminal act which must be evidenced by some word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor; however, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999). Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory. *Id*. When a crime requires the existence of a particular intent, an 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 or herself possessed such. *Id*.

Seaman's testimony that she accepted $200 from Wilmes and, in exchange, provided him with methamphetamine constitutes direct evidence that she knowingly or intentionally delivered methamphetamine to Wilmes. Because the offense requires a specific intent, in order to convict Warrack as an aider and abettor, the State was required to prove either that he intended to deliver methamphetamine or that he knew Seaman possessed such an intent prior to committing the act. See *id*.

[16,17] The question whether the defendant had the required criminal intent is a fact question for the jury. *State v. Scott*, 225 Neb. 146, 403 N.W.2d 351 (1987), *disapproved on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989). A direct expression of intention by the actor is not required, because the intent with which an act is committed involves a mental process and intent may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Curlile*, 11 Neb. App. 52, 642 N.W.2d 517 (2002).

Viewing the evidence in a light most favorable to the State, we conclude that there is sufficient evidence for a rational jury to find that Warrack intended to deliver methamphetamine or knew that Seaman possessed such an intent. From the testimony of Wilmes and Seaman outlined above, the jury could infer that the sale of methamphetamine from Seaman to Wilmes occurred because Warrack arranged it.

Moreover, the statements Warrack made to Cronin and Sorensen after he was arrested provides sufficient evidence that Warrack knew Seaman intended to deliver methamphetamine. His comments that "'[Chris] called me first,'" "'All I did was set it up,'" and "'I hooked him up with [Seaman]'" provide sufficient evidence to support the jury's finding that Warrack intended to deliver methamphetamine or knew that Seaman possessed such an intent.

(iii) Distance From School

Warrack also alleges that the State failed to prove that Seaman delivered methamphetamine within 1,000 feet of a school. He argues that the discrepancies between Seaman's and Wilmes' testimony along with Kozian's estimated distance rendered the evidence doubtful and lacking as to the element of "within 1,000 feet of a school."

Wilmes testified that the drug transaction with Seaman occurred on the northeast corner of 14th and C Streets. An elementary school is located at 11th and C Streets. Kozian attempted to measure the distance from the school to the northeast corner of 14th and C Streets, but he had to move out into the intersection in order to have a clear line of sight to the school. The distance from the intersection to the northeast corner of the school building was 888 feet. The distance from the intersection to the northeast corner of the school property line was 623 feet. We conclude that this evidence is sufficient for a rational jury to have found that Seaman delivered the methamphetamine to Wilmes within 1,000 feet of a school.

In general, in support of this assignment of error, Warrack makes several arguments as to why he believes the evidence was insufficient to support his conviction, but what he is

asking us to do is reweigh the evidence presented to the jury. This we cannot do. See *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). Viewing the evidence in the light most favorable to the State, we conclude that the evidence was sufficient for the jury to find Warrack guilty of aiding and abetting delivery of methamphetamine within 1,000 feet of a school.

(b) Attempted Delivery

[18] Warrack was charged with attempted delivery of methamphetamine in violation of § 28-416(1) and Neb. Rev. Stat. § 28-201 (Cum. Supp. 2010). Section 28-416(1) prohibits any person from knowingly or intentionally delivering a controlled substance. Under § 28-201(1)(b), a person is guilty of an attempt to commit a crime if that person "engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime." Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact. *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

Warrack argues that the State failed to prove that he intended the result of his actions to be the delivery of methamphetamine, if the circumstances were as he believed them to be, and failed to prove that he took a substantial step toward that end. He claims that it was not possible for him to complete a methamphetamine delivery, because he did not have methamphetamine on his person.

We are not persuaded that the absence of methamphetamine on Warrack's person at the time he was in Wilmes' vehicle made it impossible for him to commit the offense. The facts reveal that the process by which Warrack delivered methamphetamine was by arranging a meeting via telephone, arriving at the agreed-upon location, accepting money either personally or through Seaman, leaving collateral, going elsewhere to obtain the methamphetamine, and then returning to deliver the drugs to Wilmes.

When we view the evidence most favorable to the State, the record shows that Warrack completed all of the above steps, with the exception of returning to the vehicle to deliver the drugs.

Warrack argues that "[t]heft of money cannot be said to be strongly corroborative of a person's intent to deliver methamphetamine." Brief for appellant at 50. Theft of money alone may not be sufficient evidence from which to infer an intent to deliver drugs, but the theft must be viewed in the context of the circumstances surrounding this incident. By Warrack's agreeing to meet with Wilmes after Wilmes indicated he was looking for an "eight ball," arriving at the agreed-upon location, discussing the transaction, and accepting money while leaving collateral behind, a jury could find that Warrack intended to deliver methamphetamine.

Warrack also claims the State failed to prove that Warrack intended to deliver methamphetamine, specifically. Again we must look at the facts surrounding the incident and consider the totality of the circumstances. When the CI and Warrack communicated in May 2011, the CI indicated that his client, Chris, was looking for some "ice cream," a common term used to describe methamphetamine. Warrack arranged for the delivery of methamphetamine to Wilmes through Seaman. When Wilmes contacted Warrack again, on June 14, Wilmes indicated that he was looking to "get something" and they arranged to meet at the "same place." According to Wilmes, after Warrack got into Wilmes' vehicle, they "had a conversation regarding methamphetamine." Wilmes testified that Warrack told him that he needed Wilmes to "front him the money first to get the methamphetamine and bring it back to [Wilmes]." This evidence was sufficient to support the jury's finding that Warrack intended to deliver methamphetamine, specifically.

Based on the foregoing, we conclude that the State adduced sufficient evidence so that a rational jury could find that Warrack intentionally engaged in conduct that constituted a substantial step toward the delivery of methamphetamine. Accordingly, this assignment of error is without merit.

4. Ineffective Assistance of Counsel

[19] Warrack claims that he received ineffective assistance of counsel in six respects. To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order. See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[20-23] A trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law. *Id.* In addressing the "prejudice" component of the test, an appellate court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. See *id.* To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Warrack alleges that he received ineffective assistance of counsel in six respects. His brief on these claims is limited to the general argument that trial counsel was ineffective and a brief recitation of how his counsel's performance was deficient. In a conclusory, general statement, Warrack claims that these six failures of trial counsel prejudiced him; he does not, however, allege *how* any of these actions prejudiced him or how the result would have been different but for his counsel's deficient performance.

[24,25] The issue with respect to these claims is not the sufficiency of the record, but the sufficiency of the allegations. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by such deficiency. See *State v. Derr*, 19 Neb. App. 326, 809 N.W.2d 520 (2011). When an appellant does not allege both prongs of an ineffective assistance of counsel claim, "resolution of his

assertions of ineffective assistance of counsel hinge[s] not on the adequacy of the record before us, but on his failure to provide this court with sufficient allegations of ineffective assistance of counsel." *Id*. at 329, 809 N.W.2d at 523. As we held in *Derr*, when an appellant does not sufficiently allege his or her ineffective assistance of counsel claims, we are constrained to find that the assertions of ineffective assistance of counsel are without merit. Accordingly, we find Warrack's allegations to be insufficient because he fails to allege how he was prejudiced by his counsel's performance.

(a) Failure to Question Jurors on Racial Bias

Warrack claims his trial counsel was ineffective for failing to question prospective jurors in a manner in which to identify any racial bias. He does not identify, however, how this failure prejudiced him or how the outcome would have been different had his counsel posed such questions. This assertion is therefore meritless.

(b) Failure to Confer and Consult With Warrack

Warrack alleges his trial counsel was ineffective for failing to confer and consult with him regarding his case so as to allow him to make informed decisions regarding his defense. Warrack concedes that the communication between trial counsel and him is not contained in the record, but he does not direct our attention to any specific decisions on which he was not consulted or explain how this failure prejudiced him. Accordingly, we reject this claim.

(c) Failure to Ensure Mental Competency

Warrack claims his trial counsel was ineffective for failing to ensure his mental competency prior to trial and sentencing. He fails to indicate how the result of the proceeding would have likely been different but for counsel's deficient performance. Thus, this assertion has no merit.

(d) Failure to Request Limiting Jury Instruction

Warrack alleges his trial counsel was ineffective for failing to request a limiting jury instruction regarding each offense. Warrack simply explains that trial counsel filed a motion to sever the two counts contained in the second amended information, and the district court overruled the motion. He notes that trial counsel renewed the motion to sever at the beginning of trial, but did not request a limiting jury instruction. Again, Warrack failed to allege how he was prejudiced by this action. As such, we must reject this claim.

(e) Failure to Obtain Ruling on Motion in Limine

Warrack claims his trial counsel was ineffective for failing to obtain a ruling on the State's motion in limine. Prior to trial, the State filed a motion in limine seeking to prohibit Warrack from making any efforts to change or conceal the tattoo on his neck. The State also requested the court's permission to photograph the tattoo. Warrack's trial counsel indicated that she was unsure of her position on the request to photograph the tattoo, and the court directed her to file either an objection or no objection so that the court could issue an order. Trial counsel never made either filing, and the State's photographs of the tattoo were received into evidence at trial with no objection.

As discussed above, there was sufficient evidence presented for the jury to find that Warrack was "Chicago." More important, in his ineffectiveness claim, Warrack does not allege how he was prejudiced by the introduction of the photographs. Accordingly, this assertion is without merit.

(f) Failure to File Motion for New Trial

Warrack alleges his trial counsel was ineffective for failing to file a motion for new trial. He notes that trial counsel moved for a dismissal of both counts or, in the alternative, a directed verdict of acquittal on both counts based upon insufficiency of the evidence, yet failed to file a motion for new trial based

upon the same grounds. As we previously concluded, the evidence was sufficient to sustain Warrack's convictions on both counts. Because Warrack fails to allege how he was prejudiced by this action, we reject this claim.

V. CONCLUSION

We conclude Warrack's arrest was lawful, because he was not arrested until he had willingly stepped from his porch onto the sidewalk and he had no reasonable expectation of privacy on the sidewalk. Therefore, the district court did not err in denying his motion to suppress. In addition, the court properly overruled Warrack's foundational objection to Kozian's testimony, because Kozian's credibility was a matter solely for the jury to determine. We also find that the State adduced sufficient evidence to support Warrack's convictions on both counts. Finally, we reject all six of Warrack's claims of ineffective assistance of counsel because he failed to allege how he was prejudiced by trial counsel's actions. Accordingly, we affirm Warrack's convictions for aiding and abetting delivery of methamphetamine within 1,000 feet of a school and attempted delivery of methamphetamine.

AFFIRMED.

IN RE INTEREST OF ATHINA M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DARWIN M., APPELLANT.

842 N.W.2d 159

Filed January 7, 2014. No. A-13-189.

1. **Juvenile Courts: Evidence: Appeal and Error.** 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.
2. **Parental Rights: Proof.** Neb. Rev. Stat. § 43-292 (Cum. Supp. 2012) provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child.

3. **Parental Rights: Words and Phrases.** A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights.
4. **Parental Rights.** Parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.
5. **Parental Rights: Evidence: Proof.** To terminate parental rights, the State must prove by clear and convincing evidence that termination is in the child's best interests.
6. **Parent and Child.** The law does not require perfection of a parent; instead, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Reversed and remanded for further proceedings.

Angelica W. McClure, of Kotik & McClure Law, for appellant.

Joe Kelly, Lancaster County Attorney, and Maureen Lamski for appellee.

IRWIN, PIRTLE, and BISHOP, Judges.

BISHOP, Judge.

Darwin M. appeals from the decision of the separate juvenile court of Lancaster County terminating his parental rights to his daughter, Athina M. Upon our de novo review, we find that the State failed to prove by clear and convincing evidence that termination is in Athina's best interests. We therefore reverse, and remand for further proceedings.

BACKGROUND

Darwin is the biological father of Athina, born in September 2010. Although it was undisputed that Darwin was Athina's father, his paternity was confirmed via genetic testing in June 2011. Karla M. is the biological mother of Athina. Darwin and Karla were not married when Athina was born, but were married 3 days after her birth. Athina was removed from Karla's care 2 days after her birth because Karla had had two other children removed from her care and had not corrected the conditions leading to the adjudication of those two children. We note that Darwin is not the biological father of Karla's other

children. Darwin was interviewed following Athina's birth, and it was determined he did not have a stable residence for Athina. Athina was placed in the temporary custody of the Nebraska Department of Health and Human Services (DHHS), which placed her in foster care.

Athina was adjudicated in November 2010, due to the faults or habits of Karla. The court found that Athina should remain in the custody of DHHS.

Athina's case came before the juvenile court for numerous review and permanency hearings throughout 2011 and 2012. The parents were provided with numerous services. Karla did not cooperate with services, and her visits with Athina were not productive. Darwin, however, was cooperative with services, including individual therapy, coparenting counseling, parenting classes, and supervised visitation. During the spring and summer of 2012, Darwin's visitations progressed from supervised to monitored to overnight. He made so much progress that Athina was placed in his physical custody on August 9, 2012.

On September 8, 2012, Darwin was arrested and jailed. Athina was returned to the foster home in which she resided prior to her brief placement with Darwin. Darwin eventually pled no contest to making terroristic threats, a Class IV felony. He remained in jail pending his sentencing, which was scheduled for February 26, 2013. Darwin did not have visitation with Athina while he was in jail, because a glass barrier would have separated Darwin and Athina during visits and DHHS did not think it was in Athina's best interests to have visits in this manner due to her young age.

On November 13, 2012, the State filed a motion to terminate Darwin's parental rights to Athina pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2012). The State alleged that Darwin had substantially and continuously or repeatedly neglected and refused to give the child necessary parental care and protection, that reasonable efforts had failed to correct the conditions leading to the adjudication, that the child had been in an out-of-home placement for 15 or more of the most recent 22 months, and that termination was in the child's best interests.

The State also moved to terminate Karla's parental rights to Athina, which motion the juvenile court ultimately granted. But because Karla has not appealed that decision, we will not discuss any evidence presented as to her at the termination hearing. We simply note that at the time of the termination hearing, Darwin and Karla were separated and Darwin testified that their final divorce hearing was scheduled for the following month.

The termination hearing was held on February 11, 2013. Katy Rawhouser, a children and family services specialist with DHHS, was the only witness for the State. Rawhouser began working with Darwin and Athina in May 2012. Rawhouser testified that Darwin's parental rights should be terminated because he was incarcerated at that time and was unable to provide care for Athina. Rawhouser stated that Athina was able to be placed with Darwin for only approximately 30 days "despite a good deal of effort made on the part of [DHHS] to get her there" and that "at this time, [Athina is] in need of permanency."

On cross-examination, Rawhouser testified that Darwin had done everything that he was asked to do; he completed individual therapy, couple's counseling, a parenting class, and supervised and monitored visits. She stated that in May 2012, Darwin had supervised visits with Athina two times each week, and he progressed to having monitored visits and then overnight visits. Rawhouser acknowledged that Darwin was appropriate with Athina, that he had a bond with her, and that there were no safety concerns. When asked the following by Darwin's counsel: "[I]f [Darwin] were to get released at the end of this month, would that change your opinion in regards to terminating his parental rights?" Rawhouser responded, "If he was already released I think we'd be looking at possibly re-evaluating, but given that he's not currently released, no it doesn't change my position."

The court then questioned Rawhouser as follows:

> Q . . . at the time of the removal at Athina's birth, [Darwin] was interviewed, and at that time, he did not have a stable residence or the ability to provide for her; is that your understanding?

A Correct.

Q And it took over approximately two years from birth until he was in a position where you could recommend that — or [DHHS] could recommend Athina be placed in his care?

A That's correct. She was not quite two years old at the time.

Q And do you know when the date of the offense is for the terroristic threat that he is incarcerated for and pending sentencing? Did that occur during the month that Athina was with him?

A I believe so, yes.

. . . .

Q And since he was arrested in September of 2012, has he been incarcerated continuously since that time?

A Yes.

. . . .

Q Does he have a criminal history?

A Yes.

Q Do you know what that is?

A It's a lengthy criminal history. I don't know exactly what's all —

Q Does that — does that include prison sentences; do you know?

A I — I do believe he's got a felony criminal history.

Q And if he were to be released on February 26th of 2013, first of all, nobody as part of this case, know if that's going to happen; is that fair to say?

A That's true.

. . . .

Q And even if the District Court Judge made a decision to release [Darwin], you wouldn't necessarily be asking for Athina to be placed in his care upon his release from incarceration; would that be fair to say?

A That's true.

Q You'd want to do some further assessments in terms of the entirety of [Darwin] and see where things are, where he's living, where he's working, how'd he support her, resuming visitation and contact; is that right?

A Right.

Q And he hasn't had any since he's been arrested, any contact or visitation?

A That's true.

Q So you indicated there are no safety concerns regarding [Darwin]. There could be one in terms of the terroristic threat occurring while he was providing her care?

A There could be.

Darwin also testified at the termination hearing. He stated that he was incarcerated in the Lancaster County jail and was awaiting sentencing on a Class IV felony. Darwin indicated that his criminal defense attorney did not think he would be sentenced to more than a year, "which would be time served because I've been in for six months." Darwin testified that this was his first felony and that his criminal history included misdemeanors, mainly driving violations such as driving on suspension, but did not include assaults or an "aggressive criminal history."

Darwin testified that Athina was with him when he was arrested and when the act was committed. Darwin stated that at the time, he and Athina were with a neighbor and her children, and that when he was arrested, he left Athina with his mother.

Darwin testified that when he is released from jail, he would have housing and a job. He would return to his apartment; he had prepaid several months' rent, and his mother had moved into the apartment temporarily to keep it occupied and to take care of any additional rent. Darwin also testified that his friend owned a tile company and would employ him when he is released from jail.

In its order filed on February 11, 2013, the juvenile court terminated Darwin's parental rights to Athina pursuant to § 43-292(2), (6), and (7) and found that termination was in Athina's best interests. Darwin has timely appealed the juvenile court's termination of his parental rights.

ASSIGNMENT OF ERROR

Darwin assigns that the juvenile court erred in finding that terminating his parental rights was in Athina's best interests.

STANDARD OF REVIEW

[1] 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. *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013).

ANALYSIS

Grounds for Termination.

[2] In the Nebraska statutes, the bases for termination of parental rights are codified in § 43-292. Section 43-292 provides 11 separate conditions, any one of which can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

In its order terminating Darwin's parental rights to Athina, the juvenile court found that Darwin substantially and continuously neglected to give the child necessary parental care and protection (§ 43-292(2)), that reasonable efforts failed to correct the condition which led to the adjudication (§ 43-292(6)), and that the child had been in an out-of-home placement for 15 or more months of the most recent 22 months (§ 43-292(7)).

Darwin does not contest the juvenile court's finding that grounds for terminating his parental rights exist. And having reviewed the record, we find that grounds did exist. Section 43-292(7) provides for termination of parental rights when "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." Athina was removed from parental care in September 2010, 2 days after her birth. Other than being placed with Darwin from August 9 to September 8, 2012, Athina has remained in foster care. At the time the motion to terminate parental rights was filed on November 13, Athina had been in an out-of-home placement for nearly 25 out of 26 months. Our de novo review of the record clearly and convincingly shows that grounds for

termination of Darwin's parental rights under § 43-292(7) were proved by sufficient evidence. Once a statutory basis for termination has been proved, the next inquiry is whether termination is in the child's best interests.

Best Interests.

[3,4] Darwin argues that the juvenile court erred in finding that terminating his parental rights was in Athina's best interests. Section 43-292 requires that parental rights can be terminated only when the court finds that termination is in the child's best interests. A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights. *In re Interest of Crystal C.*, 12 Neb. App. 458, 676 N.W.2d 378 (2004). Therefore, with such severe and final consequences, parental rights should be terminated only "'[i]n the absence of any reasonable alternative and as the last resort . . . .'" See *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 467, 598 N.W.2d 729, 741 (1999). However,

> [w]here a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of Andrew M. et al.*, 11 Neb. App. 80, 643 N.W.2d 401 (2002). Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of Phyllisa B.*, 265 Neb. 53, 654 N.W.2d 738 (2002).

In re Interest of Stacey D. & Shannon D., 12 Neb. App. 707, 717, 684 N.W.2d 594, 602 (2004).

Initially, we note that the bill of exceptions in this case is composed of only 43 pages, of which 26 pages were testimony. The State's case for termination of Darwin's parental rights was based on Darwin's incarceration and Athina's need for permanency. Regarding Darwin's incarceration, Darwin pled no contest to making terroristic threats. However, no details about the crime or the context in which it occurred were set forth in the juvenile court record. We know only that Darwin and Athina were with a neighbor and her children at the time of the incident.

Darwin was scheduled to be sentenced 2 weeks after the termination hearing; however, no motion appears in the record to continue the termination hearing until after Darwin's sentencing in the criminal case. Terroristic threats is a Class IV felony, which is punishable by up to 5 years' imprisonment. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2012). Under the sentencing guidelines, Darwin could be placed on probation. Moreover, Darwin testified that his lawyer did not think he would be sentenced to more than 1 year's imprisonment, which would mean he would be released for time served. Rawhouser testified that if Darwin had already been released, DHHS would possibly reevaluate terminating his parental rights. Since Darwin was not released at the time of the termination hearing, Rawhouser recommended terminating his parental rights.

The visitation reports that were received into evidence at the termination hearing show that Darwin is a loving parent to Athina and that there were no safety concerns. He did have a 3-month period of time in the summer and fall of 2011 when he was incarcerated and was unable to see Athina (the underlying reason for his incarceration does not appear in our record). After his release in October 2011, Darwin resumed visitations with Athina. Darwin was also cooperative with services provided to him. In fact, he made so much progress that Athina was placed with him on a full-time basis in August 2012. Rawhouser acknowledged that without Darwin's September 2012 incarceration, there would be no other reason to remove Athina from his care.

[5] The State must prove by clear and convincing evidence that termination is in Athina's best interests. See *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010). After our review of the record, we find the State failed to meet its burden. The State's only reasons for wanting to terminate Darwin's rights are that he was incarcerated at the time of the termination hearing and that Athina needs permanency. However, there was a possibility that Darwin would have been released just 2 weeks later, which Rawhouser testified would merit a possible reevaluation of termination. Darwin has always been a loving parent to Athina, and by all accounts,

they have a strong bond. Rawhouser testified that there were no safety concerns regarding Darwin, and it was only upon the court's questioning that she stated that there "could be" safety concerns in terms of the terroristic threat occurring while Darwin was providing care for Athina. However, "could be" does not rise to the level of clear and convincing evidence. And we note again that no details about the crime or the context in which it occurred were set forth in the juvenile court record, except to say that Athina was present at the time of the incident. The evidence put forth by the State in this case does not meet the clear and convincing standard necessary to prove that it is in Athina's best interests to terminate Darwin's parental rights, particularly in light of Rawhouser's equivocal testimony.

We note that in its order terminating Darwin's parental rights, the juvenile court gave great weight to Athina's time in an out-of-home placement in this case, noting that Athina had spent 28 of 29 months in an out-of-home placement. The court also stated that Darwin faced a possible period of incarceration of up to 5 years, that Darwin would need to establish he can remain a law-abiding citizen, and that Darwin would need to demonstrate he can maintain a suitable residence and a legal means of support, all of which will take time and result in Athina's spending even more time in an out-of-home placement.

"Regardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody." *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 1006, 767 N.W.2d 74, 92 (2009). In cases that address best interests based on the length of time the child has been in an out-of-home placement, other factors, such as the parent's lack of involvement or inability to make progress, are also present. See *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006) (termination of parental rights was in child's best interests when father knew child was in out-of-home placement since October 2002 but had no face-to-face contact with child until September 2004, 4 months after the

motion to terminate parental rights was filed and 24 months after child was placed in foster care). See, also, *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007) (termination of parental rights was in children's best interests because mother was unwilling or unable to rehabilitate herself; children were removed because of mother's drug use; and more than 3 years after removal, mother tested positive for methamphetamine, missed three subsequent drug tests, and failed to appear for her therapy sessions).

The instant case is distinguishable in that Darwin was a loving and involved parent to Athina. Furthermore, Darwin made significant progress in this case. Between May and August 2012, he transitioned from having fully supervised visits to having Athina placed in his home on a full-time basis. This is not a case in which best interests can be based solely on the length of time Athina has been in an out-of-home placement.

[6] Darwin did plead no contest to making terroristic threats, but we have already established that any potential prison time is speculative and thus should not be a basis for terminating Darwin's parental rights. Although he faced a possible period of incarceration of up to 5 years, he could have been sentenced to probation or released on time served. And Darwin testified that upon his release, he will be moving back into his previous residence and working for a friend. Thus, it appears that Darwin already has a plan in place for getting his life back on track. The law does not require perfection of a parent; instead, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child. *In re Interest of Jacob H. et al.*, 20 Neb. App. 680, 831 N.W.2d 347 (2013). As stated previously, Darwin did make significant progress in this case, and Rawhouser testified that Darwin is a loving parent to Athina, that he is appropriate with her, that he has a bond with her, and that there are no safety concerns. It was only upon the court's questioning that Rawhouser stated that there "could be" safety concerns in terms of the terroristic threat occurring while Darwin was providing care for Athina. But, as we stated previously, the circumstances surrounding the September 2012 incident are

not set forth in our record. We do not know what impact, other than temporary separation from Darwin, the incident had on Athina. The evidence put forth by the State in this case does not meet the clear and convincing standard necessary to prove that it is in Athina's best interests to terminate Darwin's parental rights. Accordingly, we find that the juvenile court erred in terminating Darwin's parental rights to Athina.

CONCLUSION

For the reasons stated above, we reverse the order of the juvenile court terminating Darwin's parental rights to Athina and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PAMELA PFLUEGER-JAMES AND MICHAEL JAMES, HUSBAND AND WIFE, APPELLANTS, V. POPE PAUL VI INSTITUTE PHYSICIANS, P.C., DOING BUSINESS AS POPE PAUL VI INSTITUTE, ET AL., APPELLEES.

842 N.W.2d 184

Filed January 14, 2014. No. A-12-802.

1. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
2. **Malpractice: Physician and Patient: Negligence: Informed Consent.** An allegation that a medical provider breached a duty of care by deviating from the accepted standard of care in negligently performing unnecessary and unwarranted surgery on a patient, without the proper informed consent of the patient, is sufficient to state a claim for negligence through lack of informed consent.
3. **Informed Consent: Words and Phrases.** Informed consent is defined as consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers.
4. **Informed Consent: Proof: Proximate Cause.** Neb. Rev. Stat. § 44-2820 (Reissue 2010) requires a plaintiff claiming lack of informed consent to prove by a preponderance of the evidence that a reasonably prudent person in the plaintiff's position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.

5. **Pleadings: Appeal and Error.** In reviewing whether a trial court erred in denying a motion to amend a pleading, an appellate court views the record as it existed at the time the motion was filed.
6. **Pleadings.** Leave of court to amend a pleading shall be freely given when justice so requires.
7. ____. A district court's denial of leave to amend a pleading is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated. Delay alone is not a reason in and of itself to deny leave to amend; the delay must have resulted in unfair prejudice to the party opposing amendment.
8. **Pleadings: Proof.** The burden of proof of prejudice is on the party opposing the amendment of a pleading. Prejudice does not mean inconvenience to a party, but instead requires that the nonmoving party show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely.
9. **Actions: Pleadings: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. Thus, two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action.
10. **Informed Consent.** A claim for lack of informed consent based upon the same set of facts alleged in an existing complaint is a theory of recovery, not a new cause of action.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Reversed and remanded for a new trial.

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

David D. Ernst and Lisa M. Meyer, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees.

RIEDMANN, Judge, and MULLEN, District Judge, Retired.

PER CURIAM.

INTRODUCTION

Pamela Pflueger-James and Michael James, plaintiffs, sued Pope Paul VI Institute Physicians, P.C., doing business as Pope Paul VI Institute; Thomas W. Hilgers, M.D.; and John or Jane Doe, defendants, to recover damages arising from the

actions of Dr. Hilgers. After allowing plaintiffs to amend their complaint once, the district court denied any further amendments. The court granted defendants' motion to dismiss one of plaintiffs' claims, and a jury found in favor of defendants on the remaining claim. Plaintiffs appeal. We conclude that the district court erred in denying plaintiffs' motion to file a second amended complaint. Accordingly, we reverse, and remand for a new trial.

PROCEDURAL BACKGROUND

On May 16, 2007, plaintiffs filed the original complaint, in which they designated two "causes of action." The first was for medical malpractice; the second was for James' loss of consortium.

On September 3, 2009, plaintiffs filed a first amended complaint, alleging in their "first cause of action" that Dr. Hilgers was negligent in performing surgery on Pflueger-James and in providing care for her postsurgery. In their "second cause of action," plaintiffs alleged that Dr. Hilgers was negligent in misrepresenting the procedures he would be performing. The "third cause of action" was for James' loss of consortium as a result of the injuries to Pflueger-James.

In September 2010, plaintiffs' fourth attorney of record filed a motion to file a second amended complaint. The reason given in support of the motion was the assertion that this action was a medical malpractice claim brought pursuant to the Nebraska Hospital-Medical Liability Act (NHMLA), but that compliance with more than one of the requirements of the NHMLA was not properly pled in the first amended complaint. A more detailed explanation of the NHMLA is not necessary to understand the disposition of this appeal. The second amended complaint would have presented the issues of an act of professional negligence and lack of informed consent, together with general damages, special damages, and loss of consortium. The trial court denied the motion in October 2010, but allowed plaintiffs to designate additional expert witnesses and conduct written discovery. Trial was set for July 6, 2011.

Expert medical depositions were taken in December 2010 and in January, April, and September 2011. Each of those

expert witnesses was questioned on the issue of informed consent. Trial was continued upon plaintiffs' motion.

In December 2011, defendants filed a motion for summary judgment or, in the alternative, motion to dismiss, moving the court for an order dismissing the "second cause of action" for negligent misrepresentation. On December 29, plaintiffs again filed a motion to file a second amended complaint, stating that this was a medical malpractice claim now brought pursuant to the NHMLA, that the NHMLA was the exclusive remedy, that no new causes of action would be added, and that informed consent would be added as an additional allegation.

The court granted defendants' motion to dismiss plaintiffs' claim of negligent misrepresentation and denied leave to file the second amended complaint.

Trial commenced on July 23, 2012. The jury returned a verdict for defendants. Plaintiffs appeal.

ASSIGNMENTS OF ERROR

Plaintiffs assign as error, restated and simplified, that the court erred by not allowing plaintiffs to file the second amended complaint and in dismissing their "second cause of action."

STANDARD OF REVIEW

[1] Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion. *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

ANALYSIS

[2] Plaintiffs' primary argument on appeal is that lack of informed consent was in fact alleged in the first amended complaint. Plaintiffs cite to American Jurisprudence Pleading and Practice Forms Annotated, which provides that the operative allegation necessary to state a claim for negligence through lack of informed consent need only state that the defendant "breached [a duty] in one or more of the following ways, any one of which was a departure from the accepted standard of care: . . . (k) In negligently performing unnecessary and unwarranted surgery on plaintiff, *without the proper informed*

consent of plaintiff[.]" 19B Am. Jur. Pl. & Pr. Forms Annot. *Physicians, Surgeons, and Other Healers* § 85 at 22-23 (2007) (emphasis supplied).

Plaintiffs contend the following portions of the first amended complaint compose an allegation of harm resulting from lack of informed consent:

> 20. Dr. Hilgers had a duty, in the course of his profession as a medical doctor, to supply accurate information to the [sic] guide his potential patients, including Plaintiffs, who comprised his target audience in his presentations. Dr. Hilgers knew or should have known that the members of his audience would justifiab[ly] rely on the materials he presented and he failed to exercise reasonable care, specifically, in the following:
>
> 20.1. In presenting and advocating medical procedures to vulnerable couples, including Plaintiffs, incapable of achieving natural reproduction, which procedures were presented as having prior histories of increased fertility. Defendant Hilgers knew or should have known that these procedures were not supported by independent medical research, medically-acceptable practices, or other sound medical principles known to, accepted and practiced by gynecologists and/or reproductive medicine physicians, though he represented them as such.

Plaintiffs claim the first amended complaint adequately alleged that Pflueger-James suffered bodily injury, that she was not fully informed about the procedure, and that she suffered damages as a result, which plaintiffs assert is all that is required to state a claim for lack of informed consent.

[3,4] Informed consent is defined as "consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers." Neb. Rev. Stat. § 44-2816 (Reissue 2010). Neb. Rev. Stat. § 44-2820 (Reissue 2010) requires a plaintiff claiming lack of informed consent to prove by a preponderance of the evidence that a reasonably prudent person in Pflueger-James' position would not have undergone the treatment had he or she been properly informed and that the lack of informed consent was the proximate cause of the injury and damages claimed.

Plaintiffs' first amended complaint asserted that Dr. Hilgers gave presentations and solicited participation in the technology and fertility programs advanced by him and the Pope Paul VI Institute and that plaintiffs attended one such presentation in 2005. Plaintiffs claimed that after the presentation, Dr. Hilgers personally urged Pflueger-James to participate in a hormone study he advocated and encouraged her to visit Omaha for a hormone panel and later wrote to her to recommend surgery. Plaintiffs alleged that these interactions with Dr. Hilgers prompted them to consult with him about the recommended procedures.

[5] Further, the first amended complaint alleged that Dr. Hilgers had a duty to give accurate information and guidance to potential patients present at his presentations and that he knew or should have known that audience members would rely on the materials presented. Plaintiffs averred that Dr. Hilgers failed to exercise reasonable care by presenting and advocating to plaintiffs medical procedures which Dr. Hilgers purported had resulted in increased fertility. According to paragraph 20.1 of the first amended complaint, Dr. Hilgers knew or should have known that these procedures were not supported by independent medical research, medically acceptable practices, or other sound medical principles known to, accepted by, and practiced by gynecologists and/or reproductive medicine physicians, although he represented them as such. Plaintiffs concluded that defendants' negligent misrepresentations directly and proximately caused Pflueger-James to undergo treatment for infections. At the hearing on their motion to amend the first amended complaint in 2010, plaintiffs stated that their case was "primarily one of unwarranted surgery, one not supported in scientific fact. The First Amended Complaint actually says unwarranted surgery. If we're stuck with that, we can make it work and we'll ignore the fraud charge." Counsel claimed that the amendment "doesn't change things, really." We are mindful that counsel's interpretation of the allegations contained in the first amended complaint changed, as evidenced by counsel's agreement in 2011 that the motion to dismiss the claims of negligent misrepresentation should be dismissed, but in reviewing whether the district court erred in denying the motion to

amend in 2010, we view the record as of that date. Analyzing plaintiffs' complaint as the district court should have in 2010, we find plaintiffs' argument that lack of informed consent was pled persuasive.

Plaintiffs' first amended complaint alleged that Dr. Hilgers failed to inform Pflueger-James the treatment she received was not generally accepted in the field of obstetrics and gynecology and that Dr. Hilgers' medical claims in support of the treatment were not subject to proper peer review. Plaintiffs averred that as a result, Pflueger-James underwent unnecessary treatment.

[6-8] Plaintiffs assert that allowing them to file the second amended complaint in 2010 would not have caused undue delay and prejudice and that, therefore, the district court erred in denying their motion to amend. We agree. *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012), is instructive in this case. The court in *InterCall, Inc.* held:

> When a party seeks leave of court to amend a pleading, our rules require that "leave shall be freely given when justice so requires." A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated. . . . "[D]elay alone is not a reason in and of itself to deny leave to amend; the delay must have resulted in unfair prejudice to the party opposing amendment." The burden of proof of prejudice is on the party opposing the amendment. "Prejudice does not mean inconvenience to a party," but instead requires that the nonmoving party "'show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.'"

284 Neb. at 811, 824 N.W.2d at 21.

[9] In evaluating whether granting a motion to amend would have occasioned prejudice, the court in *InterCall, Inc.* distinguished between a cause of action and a theory of recovery:

> "A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory

> of recovery is not itself a cause of action. Thus, two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action."

284 Neb. at 812, 824 N.W.2d at 22, quoting *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008). The court in *InterCall, Inc.* concluded that the district court did not abuse its discretion in allowing the defendant to amend its counterclaim to include an additional theory of recovery on the eve of trial.

It is clear from the district court's comments at the 2010 hearing that it considered informed consent a new cause of action, even though plaintiffs' counsel argued that it was not. On appeal, plaintiffs argue that defendants were not prejudiced, because, like the defendant in *InterCall, Inc.*, trial counsel was attempting merely to plead lack of informed consent as a theory of recovery arising out of the same general malpractice cause of action. No Nebraska cases explicitly label lack of informed consent as either a theory of recovery or a cause of action, but in *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003), the Nebraska Supreme Court noted, without comment, the trial court's designation of informed consent as a theory of recovery.

[10] Other jurisdictions have treated informed consent as a theory of recovery. See, *Rainer v. Community Memorial Hosp.*, 18 Cal. App. 3d 240, 254, 95 Cal. Rptr. 901, 909 (1971) ("[w]here additional investigation and discovery is not required to meet the new issue, it would appear that it would constitute an abuse of discretion not to permit the amendment of a complaint [to add a claim of lack of informed consent] even at the outset of a trial, where the amendment merely adds a new theory of recovery on the same set of facts constituting the cause of action"); *Miller-McGee v. Washington Hosp. Center*, 920 A.2d 430 (D.C. 2007) (because patient's amended complaint at least arguably encompassed claim of lack of informed consent, she did not unduly delay by never seeking leave to amend her complaint to add more definite statement of that claim; there was no evidence of bad faith or dilatory motive or repeated failure to cure deficiencies; lack of

informed consent rested on same set of facts alleged in existing amended complaint; and discovery put doctor and hospital on notice of informed consent issue); *Rodgers v. Higgins*, 871 P.2d 398 (Okla. 1993) (claims against doctor for fraud and misrepresentation, breach of warranty, and execution of blood transfusion without informed consent all arose out of one pathogenic blood transfusion, and thus constituted nothing more than three distinct and alternative theories of recovery, rather than separate causes of action).

As we have already observed, plaintiffs pled operative facts supporting informed consent in their first amended complaint. Based on the foregoing authority, under the facts of this case, informed consent was a theory of recovery.

Under the standard set forth in *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012), we conclude that defendants would not have been prejudiced by granting plaintiffs' motion to amend the first amended complaint in 2010. In this case, informed consent was a theory of recovery, rather than a new cause of action, and the factual basis of informed consent was already pled in the first amended complaint. Moreover, there is no evidence that plaintiffs were dilatory or exhibited bad faith in curing any deficiencies in the pleadings. Rather, the amendment sought was the result of plaintiffs' retaining new counsel who entered their appearance 2 weeks before the motion was filed. Although the district court denied the motion for leave to amend on the basis of untimeliness, it granted an enlargement of time for purposes of allowing plaintiffs to add additional experts and issue written discovery. The court recognized that by allowing this additional discovery, defendants' strategy in defending the case may change, but recognized that such a change does not necessarily equate to prejudice. The district court noted:

> I understand this is a tough call for me in the sense that I understand your argument that you possessed a certain strategy all along. However, when I look at that, I'm looking for expenses you've expended. If you're going to change your strategy because I have a different expert, I thought about it and I would give you the appropriate amount of time.

As stated above, delay, alone, is an insufficient reason to deny a motion for leave to amend a pleading. Since defendants failed to show they would be unduly prejudiced if the amendment were granted, the trial court abused its discretion in disallowing it.

Having found that the district court should have allowed the amendment in 2010, we need not address plaintiffs' remaining assignments of error.

CONCLUSION

We find that the district court abused its discretion in denying plaintiffs' motion to amend the first amended complaint in 2010. Accordingly, we reverse, and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

IRWIN, Judge, participating on briefs.

PHILIP SHEAR, APPELLANT, V. CITY OF WAYNE CIVIL SERVICE COMMISSION AND THE CITY OF WAYNE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEES.

842 N.W.2d 603

Filed January 14, 2014. No. A-12-830.

1. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.
4. ____: ____. The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
5. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did from the testimony and exhibits contained in the record before it.
6. **Public Officers and Employees: Termination of Employment: Due Process.** Under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct.

1487, 84 L. Ed. 2d 494 (1985), a public employee possesses certain due process rights when state law grants a property right to continued employment.

7. ____: ____: ____. When a state deprives a public employee of the right to continued employment, the deprivation must be preceded by notice and an opportunity for hearing appropriate to the nature of the case.
8. **Termination of Employment: Due Process.** Deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate posttermination due process.
9. ____: ____. An impartial decisionmaker is not required at the pretermination stage so long as the employee has access to posttermination proceedings before an impartial adjudicator.

Appeal from the District Court for Wayne County: ROBERT B. ENSZ, Judge. Affirmed.

Steven M. Delaney and Richard Whitworth, of Reagan, Melton & Delaney, L.L.P., for appellant.

Jerry L. Pigsley and Karen A. Haase, of Harding & Schultz, P.C., L.L.O., for appellees.

MOORE and BISHOP, Judges.

MOORE, Judge.

Following termination from his position as a lieutenant for the Wayne Police Department, Philip Shear filed a written demand for an investigation and public hearing with the City of Wayne Civil Service Commission (the Commission). After the Commission upheld the termination, Shear filed a petition in error in the district court for Wayne County. The district court also affirmed the Commission's decision to terminate Shear's employment. Shear now appeals to this court, asserting that his due process rights were violated in his pretermination hearing, that the Commission's decision was arbitrary and capricious, and that the Commission erred in allowing undisclosed testimony at the hearing. Finding no merit to these assignments of error, we affirm.

FACTUAL BACKGROUND

The City of Wayne, Nebraska (the City), employed Shear as a lieutenant in the Wayne Police Department. As lieutenant, Shear acted in a supervisory capacity within the department. In a letter dated February 17, 2011, Lowell Johnson, in his

position as city administrator for the City, filed written accusations with the Commission, alleging Shear had engaged in misconduct. Specifically, Johnson alleged that Shear had committed the following acts:

> 1. Created and tolerated an environment within the Wayne Police Department in which employees were hostile to other staff members, to other members of law enforcement and to the community; he further failed to demand the unquestionable integrity, reliability, and honesty from Wayne Police Department employees that would be consistent with public expectations, undermining the efficiency, morale and good order of the Wayne Police Department.
>
> 2. Engaged in an extramarital affair with an employee he supervised in the Wayne Police Department.
>
> 3. Made sexual advances to employees in the Wayne Police Department he supervised.
>
> 4. Used his City-issued cell phone for excessive personal calls and texts, and failed to supervise the use of City-issued cell phones and computers for personal use by Wayne Police Department employees and non-employees.
>
> 5. Advised Wayne Police Department employees to not go to the Wayne Police Chief with any problems, concerns or questions.
>
> 6. Advised Wayne Police Department employees to not go to [Johnson] because [Johnson] is not [their] friend or friend of the Wayne Police Department and to be careful what [they] tell him.

In these allegations, Johnson claimed that Shear's conduct was cause for disciplinary action under two provisions of the Wayne city code:

> 1. Incompetency, inefficiency, or inattention to or dereliction of duty;
>
> 2. Dishonesty, prejudicial conduct, immoral conduct, insubordination, discourteous treatment of the public or a fellow employee, any act of omission or commission tending to injure the public service, any willful failure on the part of the employee to properly conduct himself, or

> any willful violation of this chapter or the rules and regulations adopted pursuant to this chapter.

See Code of Ordinances for the City of Wayne, Nebraska, art. II, § 26-45(b) (2010). Johnson also stated in the letter that he was immediately suspending Shear with pay.

On March 7, 2011, Johnson sent Shear a 12-page letter explaining Johnson's decision to suspend Shear. Johnson included a number of exhibits to support this explanation. At the end of the letter, Johnson informed Shear of his right to schedule a meeting with Johnson, during which Shear could present his side of the story. Shear immediately objected to Johnson's decision to preside over this meeting, noting that he believed Johnson's participation violated his right to due process. Shear demanded that an independent administrator be appointed to review the allegations.

Despite receiving Shear's objections, Johnson presided over the meeting with Shear and his attorney on April 22, 2011. At the outset of this meeting, Shear objected on the record to Johnson's participation. Johnson again refused to recuse himself. Having noted his objection, Shear's attorney then proceeded to refute Johnson's allegations through oral argument, during which he denied each of the accusations. Other than Shear's offering of Johnson's March 7 letter, no other evidence was produced at this meeting.

In a letter dated April 28, 2011, Johnson terminated Shear from his position with the police department. In this letter, Johnson informed Shear of his right to demand an investigation and public hearing before the Commission. Shear exercised this right on May 6 by filing a written demand for investigation and hearing.

The Commission held a public hearing from October 31 through November 4, 2011. By stipulation of all parties involved, Shear's hearing was consolidated with that of the police chief, whose employment was also terminated by Johnson. After the City presented its consolidated case, both Shear and the police chief presented their own evidence. The resulting record in this case is extensive and includes a bill of exceptions of nearly 1,500 pages and 141 received exhibits. This court has conducted an extensive review of the record

and will summarize the evidence that relates to Shear's termination. In our summary, we discuss only the evidence relating to the allegations which the Commission ultimately found supported Shear's termination.

The majority of the evidence the City presented to the Commission involved Shear's interactions with Rena Alonso, a former dispatcher with the Wayne Police Department. Alonso's testimony was presented through a deposition of over 6 hours in length which was received in evidence. Alonso claimed that while she was employed with the police department, Shear attempted to initiate a sexual relationship with her. Alonso testified that although the relationship was never consummated by any sexual act, Shear kissed her twice, hugged her, and put his hands on her thighs in an intimate fashion. Alonso also testified that she exchanged numerous personal text messages and had many personal telephone calls with Shear. The City introduced usage records from Shear's cell phone issued by the City, which records showed numerous calls and text messages between Shear and Alonso. Several of these calls were nearly an hour in length.

Alonso highlighted one particular event during which Shear attempted to use his desire for a sexual relationship with Alonso to affect her employment with the department. While on duty as a dispatcher, Alonso was instructed to contact the Norfolk, Nebraska, police to dispatch an officer to obtain a blood sample from the driver of a vehicle after an injury accident. Ultimately, Alonso did not have the officer dispatched, but instead contacted a hospital to have the blood draw completed. This error negatively affected the outcome of the case against the driver.

After the department discovered this error, Shear informed Alonso that she would be reprimanded, which included a 2-day unpaid suspension. Alonso claimed that when she became upset about the 2-day suspension, Shear offered to recommend to the police chief that the suspension be reduced to 1 day without pay. However, she claimed that Shear then told her that she would personally "owe" him a day. Alonso also testified that Shear told her he would kiss her if she began to cry and that Shear did in fact hug her when she began to cry.

The City also adduced evidence relating to a division among the employees within the police department. During her testimony, Alonso testified that she was aware of an "in group" and an "out group" within the police department. Alonso claimed that Shear told her that she did not want to be in the "out group." Alonso stated that if there was something that did not meet police department approval, it would go "bye-bye." A Wayne police officer confirmed the existence of this division. He testified that he became a part of this outer group after he and a Wayne police sergeant decided not to sign a "lack of confidence" letter directed against Johnson in his position as city administrator. The City presented evidence to suggest that Shear did not intervene in this division, but, rather, participated in it.

In addition to division within the department, the City focused on the department practice to refer to white persons as "number ones" and to black persons as "number twos." During his testimony, a former Wayne police officer admitted that this system existed, but stated that it was taken out of context. He maintained that this was a communication system to ensure officer safety and was not a discriminatory practice. The City claimed that as a supervisor, Shear should have corrected this practice, but did not.

Shear presented extensive evidence to attempt to contradict the City's case. As the City did during its case, Shear also focused on Alonso. He introduced the severance and settlement agreement Alonso signed with the City in an attempt to show her bias. Additionally, a number of police department employees and former employees testified on his behalf that Alonso was often the person making sexual comments and further testified that they did not witness any inappropriate conduct by Shear directed toward Alonso. Shear also introduced messages that he sent to Alonso which he claimed demonstrated his rejection of her sexual advances. During his testimony, Shear was adamant that he had a "personal relationship" with all employees in the police department and that his relationship with Alonso was no different than his interaction with anyone else in the department.

Besides focusing on Alonso, Shear also highlighted his achievements as a lieutenant with the police department. Various department employees and former employees testified that Shear was a good police officer and made the department feel as though it were a family. These same witnesses claimed that morale in the department had declined after Shear was terminated.

After reviewing the evidence, the Commission issued its decision on December 16, 2011, affirming Shear's termination. The Commission first found that Shear had attempted to maintain a sexual relationship with Alonso, that Shear failed to correct Alonso's inappropriate behavior, that Shear had intimate physical contact with Alonso, that Shear offered to influence a reduction of her suspension in exchange for a sexual relationship, and that Shear excessively communicated with Alonso, using his cell phone issued by the City. The Commission determined this to be prejudicial conduct, immoral conduct, insubordination, discourteous treatment of a fellow employee, an act of omission or commission tending to injure the public service, a willful failure to properly conduct himself, inattention to or dereliction of duty, and in violation of policy and procedure.

The Commission then addressed the "'inner circle'" dynamic within the department, finding that Shear did nothing to intervene regarding the practice, but, rather, reinforced it. The Commission found that this practice tended to undermine the overall efficiency and effectiveness of the department and that Shear's failure to intervene to address this dynamic and his reinforcement of it constituted incompetency, inefficiency or inattention to or dereliction of duty, prejudicial conduct, discourteous treatment of fellow employees, an act of omission or commission tending to injure the public service, a willful failure on the part of Shear to properly conduct himself, and in violation of policy and procedure.

Finally, the Commission found that Shear created and tolerated, and failed to address or correct, an environment within the department in which officers referred to "'black guys as #2'" and "'white guys as #1.'" The Commission

found that Shear's failure to address or correct the practice undermined the overall efficiency and effectiveness of the department and constituted prejudicial conduct, discourteous treatment of the public, an act of omission or commission tending to injure the public service, incompetency, inefficiency or inattention to or dereliction of duty, and in violation of policy and procedure.

The Commission thereafter stated that to the extent that Shear's testimony and evidence were not consistent with its findings, the Commission found Shear's testimony and evidence not credible. After so finding, the Commission noted that its findings and conclusions, whether considered independently or in the aggregate, constituted cause for Shear's termination. The Commission concluded that Johnson's action in terminating Shear's employment was supported by a preponderance of the evidence and was made in good faith for cause, that termination was based on competent evidence and was neither arbitrary nor capricious, and that Shear's claim that he was denied due process of law was without merit.

Shear perfected an appeal to the district court on January 13, 2012. Although Shear's notice of appeal was lengthy, the district court determined that he had essentially raised two assignments of error: (1) His due process rights were violated in his pretermination hearing, and (2) the Commission's decision was arbitrary and capricious and, therefore, not made in good faith for cause. The district court found each of the assigned errors to be without merit and affirmed the Commission's decision. Shear timely appeals.

ASSIGNMENTS OF ERROR

Shear assigns, consolidated and restated, three errors in his brief. He contends that (1) he was denied his pretermination due process rights, because there was not an impartial decisionmaker at his pretermination hearing; (2) the Commission's order affirming his termination was not made in good faith for cause, but was arbitrary and capricious; and (3) the Commission should not have allowed undisclosed testimony at the hearing.

STANDARD OF REVIEW

[1,2] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

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

[4,5] The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Id.* The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did from the testimony and exhibits contained in the record before it. *Id.*

ANALYSIS

Pretermination Procedures.

[6,7] In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the U.S. Supreme Court held that a public employee possesses certain due process rights when state law grants a property right to continued employment. When a state deprives a public employee of this right to continued employment, the deprivation must "'"be preceded by notice and opportunity for hearing appropriate to the nature of the case."'" *Scott v. County of Richardson*, 280 Neb. 694, 700, 789 N.W.2d 44, 50 (2010), quoting *Cleveland Board of Education v. Loudermill, supra*. After *Loudermill*, courts have concluded that procedural due process claims are divided into three stages: pretermination process, actual termination, and posttermination process. See, *Scott v. County of Richardson, supra*; *Parent v. City of Bellevue Civil Serv. Comm.*, 17 Neb. App. 458, 763 N.W.2d 739 (2009).

In the present case, there is no dispute that Shear had a property right in his continued employment with the Wayne Police Department and could not have been discharged without due process. See Code of Ordinances for the City of Wayne, Nebraska, § 26-1 et seq. (2010). However, the parties disagree as to the necessary extent of the pretermination process. Shear argues that the pretermination procedures were insufficient because there was a biased decisionmaker. He claims that because city administrator Johnson was both the complaining party and the adjudicator in the pretermination hearing, Johnson effectively served as "the accuser, the judge, and the executioner," rendering the pretermination process a nullity. Brief for appellant at 12.

In interpreting *Cleveland Board of Education v. Loudermill, supra*, the Nebraska Supreme Court has adopted the view that only limited pretermination process is required, especially if posttermination proceedings are available and extensive. *Scott v. County of Richardson, supra*, citing *Krentz v. Robertson*, 228 F.3d 897 (8th Cir. 2000). In adopting this view, the court noted that the purpose of a pretermination proceeding is not to resolve the propriety of the discharge, but, rather, to serve as an initial check against mistaken decisions. *Scott v. County of Richardson, supra*. Thus, pretermination proceedings need not be elaborate. *Id*. Informal meetings with supervisors are sufficient pretermination proceedings. *Id*.

[8] Despite the foregoing, Shear claims that his case is distinct because Johnson brought the charges and also functioned as the decisionmaker in the pretermination process. This argument fails. The Nebraska Supreme Court in *Scott* held that "deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate posttermination due process." 280 Neb. at 703, 789 N.W.2d at 52 (overruling *Martin v. Nebraska Dept. of Public Institutions*, 7 Neb. App. 585, 584 N.W.2d 485 (1998)).

[9] Although no Nebraska appellate court appears to have confronted this specific scenario, we find the Eighth Circuit's holding in a similar case to be convincing and in line with the Nebraska Supreme Court's decision in *Scott*. The Eighth Circuit, in adopting the prevailing view in the federal circuits

on this issue, specifically rejected the argument that biased decisionmakers in the pretermination process violate due process. The court held that "[a]n impartial decisionmaker is not required at the pre-termination stage so long as the employee has access to post-termination proceedings before an impartial adjudicator." *Sutton v. Bailey*, 702 F.3d 444, 449 (8th Cir. 2012).

In the present case, there is no question that Johnson was not an impartial decisionmaker at the pretermination stage. Johnson not only investigated Shear and brought the charges against him, but he also conducted the pretermination hearing. However, the record reveals extensive posttermination proceedings occurred. After Shear was terminated, he exercised his right to a hearing before the Commission, an impartial adjudicator. At this hearing, which extended approximately 5 days, Shear was represented by an attorney and had the opportunity not only to contradict the City's evidence, but also to present extensive evidence of his own. Following this hearing, the Commission reviewed the evidence and made its decision to uphold the termination. These posttermination procedures provided the required measure of due process. This assigned error is without merit.

Was Commission's Decision Made in Good Faith for Cause?

For the majority of his brief, Shear attacks the Commission's decision, claiming that it was not supported by a "preponderance of the relevant and competent evidence contained in the record." Brief for appellant at 14. Shear argues that the evidence in the record is decidedly in his favor and that the Commission disregarded the facts and circumstances of the case when it made its decision.

The record in this case contains significantly conflicting evidence. In his hearing before the Commission, Shear responded to every allegation the City raised with his own evidence that supported his cause. The Commission reviewed both parties' evidence and determined that Shear's evidence was not credible. Shear now asks this court to essentially reweigh the evidence and the Commission's findings of fact, substituting

our own judgment. However, as explained above, we do not reweigh evidence or make independent findings of fact when reviewing an administrative agency's decision. See, *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012); *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004). The record of the hearing demonstrates that the City produced sufficient, relevant evidence to support its decision to terminate Shear's employment and from which the Commission could reasonably find the facts as it did. In our review, we have focused on only those allegations upon which the Commission based its findings to support the termination of Shear's employment. In sum, there was sufficient relevant evidence to support the Commission's findings regarding Shear's inappropriate conduct with Alonso, Shear's involvement in the department practices regarding the "'inner circle,'" and Shear's failure to correct the "number one" and "number two" references.

We agree with the district court that the Commission's decision to affirm Shear's termination was made in good faith for cause. This assigned error is without merit.

Did Commission Improperly Allow Testimony at Hearing?

In his final assignment of error, Shear argues that the Commission improperly allowed the City to expand the basis of his employer's evidence at the hearing without giving him notice. Citing both the Wayne city code and Nebraska's Civil Service Act, Shear argues that he was not properly informed that Amy Miller would testify to additional reasons that would support the City's decision to terminate his employment. See, Neb. Rev. Stat. § 19-1833(1) (Reissue 2012); Code of Ordinances for the City of Wayne, Nebraska, art. II, § 26-46(a). He claims that because the City relied on this testimony in reaching its decision, the result is flawed and must be reversed.

Miller is a deputy county attorney for Wayne and Pierce Counties. At the hearing before the Commission, the City called Miller as a witness to testify regarding her experiences as a county attorney interacting with the Wayne Police

Department. Miller testified that there was a general lack of cooperation between the county attorney's office and the police department, that officers and dispatchers were uncooperative in providing reports, that reports were not timely provided, and that instructions were ignored.

At the hearing, both Shear and the police chief objected to Miller's testimony, arguing that it was not disclosed prior to the hearing. The special counsel overruled these objections, finding that the City disclosed Miller as a witness and that both parties had an adequate opportunity to depose her during the lengthy discovery period prior to the hearing.

We find Shear's argument to be without merit. Although Miller was not mentioned in the City's statement of charges against Shear, she was included as a potential witness in the charges related to the police chief's termination. Further, both Shear and the police chief agreed to have one consolidated hearing related to these two terminations. Therefore, during the hearing, there were a number of times when testimony was given that related to the charges against only one of the individuals. Finally, despite Shear's contention to the contrary, the Commission did not rely upon Miller's testimony in its decision to uphold Shear's termination. In fact, the Commission's findings of fact do not contain any reference to Shear's involvement with the county attorney's office as a ground for his termination. We agree with the district court's conclusion that the Commission did not err when allowing Miller's testimony.

CONCLUSION

The district court determined that Shear was afforded due process and that the Commission's decision was made in good faith for cause. This was not made in error, and we affirm.

AFFIRMED.

IRWIN, Judge, participating on briefs.

In re Interest of Brianna B., a child under 18 years of age. State of Nebraska, appellee, v. May Lynn L., appellant.

In re Interest of Mariella B., a child under 18 years of age. State of Nebraska, appellee, v. May Lynn L., appellant.

842 N.W.2d 191

Filed January 14, 2014. Nos. A-13-054, A-13-055.

1. **Juvenile Courts: Jurisdiction: Minors.** Under the juvenile code, once a minor is adjudged to be within the definition of Neb. Rev. Stat. § 43-247(3) (Reissue 2008), the juvenile court acquires exclusive jurisdiction over the juvenile and the parent who has custody of the juvenile.
2. ____: ____: ____. Neb. Rev. Stat. § 43-285(3) (Supp. 2011) authorizes a juvenile court to establish guardianships for juveniles in the custody of the Nebraska Department of Health and Human Services without resorting to a proceeding under the probate code.
3. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created tribunal, a juvenile court has only such authority as has been conferred on it by statute.
4. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests.
5. ____: ____. The juvenile code must be construed to ensure the rights of all juveniles to care and protection.
6. **Juvenile Courts: Child Custody.** Juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected and to serve the best interests of the children involved.
7. **Juvenile Courts: Jurisdiction: Parental Rights: Visitation.** The continuing jurisdiction of the juvenile court allows the court to order supervised visitation after terminating a mother's parental rights when the order is in the best interests of the children.
8. **Juvenile Courts: Child Custody: Jurisdiction.** The juvenile court has the authority to devise unique foster care situations not set out in the checklist of statutory options when a unique arrangement will be in the best interests of the child.
9. **Juvenile Courts: Jurisdiction: Guardians and Conservators.** The juvenile court retains jurisdiction over a juvenile in a guardianship.
10. **Guardians and Conservators: Parent and Child: Adoption.** A guardianship does not achieve the same degree of permanency as parenthood or adoption.
11. **Juvenile Courts: Guardians and Conservators: Parental Rights.** When a guardianship is established, a parent retains the right to petition the court for restoration of custody and full parental rights in the event of a change in the

circumstances which justified the guardianship and supported the finding of the parent's unfitness.

12. **Juvenile Courts: Jurisdiction: Guardians and Conservators: Visitation.** The juvenile court maintains the authority to create visitation arrangements within the context of a guardianship, so long as those arrangements are in the best interests of the juvenile.

Appeals from the County Court for Lincoln County: MICHAEL E. PICCOLO, Judge. Affirmed in part, and in part reversed and remanded with directions.

Felicia K. Fair, of Fair Law Office, P.C., L.L.O., for appellant.

Eric M. Stott, Special Assistant Attorney General, Tanya Roberts-Connick, Chief Deputy Lincoln County Attorney, and Jay B. Judds, of Nebraska Department of Health and Human Services, for appellee.

Amanda M. Speichert, Lincoln County Public Defender, guardian ad litem.

INBODY, Chief Judge, and RIEDMANN, Judge.

RIEDMANN, Judge.

I. INTRODUCTION

These cases involve the establishment of guardianships for Mariella B. and Brianna B., two juveniles who were placed in the custody of the Nebraska Department of Health and Human Services (DHHS) after coming within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). On appeal, their biological mother, May Lynn L., argues that the letters of guardianship were issued improperly and that the trial court erred in determining it lacked authority to award her visitation rights. We determine that the letters of guardianship were issued properly, but that the trial court erred in determining it did not have authority to award visitation. Accordingly, we affirm the establishment of the guardianships, but reverse in part, and remand to the juvenile court for a determination of May Lynn's visitation rights.

II. BACKGROUND

Mariella and Brianna were removed from May Lynn's care in February 2008. At the placement hearing in May, the court appointed a guardian ad litem for May Lynn based upon her diminished intellectual abilities. In July, May Lynn pled no contest to the charge that the girls were within the meaning of § 43-247(3)(a). Accepting her plea, the court granted custody of the girls to DHHS and placed them in foster care. Initially, DHHS sought to reunify May Lynn and the girls. In a May 2009 case plan, DHHS recommended reunification as the primary plan, concurrent with permanency through an alternative plan of guardianship. In October 2009, DHHS recommended changing the goal of the case plan from reunification to guardianship after determining that May Lynn had made no progress toward reunification. DHHS noted that May Lynn consistently demonstrated an eagerness and desire to parent her daughters, but also demonstrated she could not provide for their health and safety needs. Mariella has Down syndrome, and Brianna suffers from attention deficit hyperactivity disorder. All parties agreed that guardianship was a better option than termination of parental rights.

Because many of the potential guardianship placements were disrupted, the girls lingered in foster care for several years while DHHS worked to establish guardianships. During this time, May Lynn continually objected to the case plans, asked for increased visitation, and requested physical custody. In June 2010, DHHS first identified a potential guardian and asked for the goal of the case plan to be guardianship with that individual. May Lynn objected, and the matter was set for an evidentiary hearing. By February 2011, the potential guardian had become "wishy-washy" due to the girls' behaviors after visits with May Lynn. The parties attempted mediation, but the mediation failed. In May 2011, the potential guardian decided to move to another state and requested that DHHS remove the girls from the home.

After an extensive search, DHHS found a second potential guardian and sought to place the girls with her. In July 2011, the juvenile court heard evidence on DHHS' motion for

a change of placement. At that hearing, May Lynn opposed guardianship because she loved her daughters and wanted "to have say in their life." At the end of the hearing, the juvenile court granted DHHS' motion and also suggested that May Lynn's attorney inform her of how visits would work under a guardianship. Her attorney said he had tried to go over it with her several times to no avail. By November 2011, DHHS expressed concern for the girls because the second potential guardian's interest had become conditional. The second potential guardian would consider guardianship only if Brianna's behavior improved. Brianna's therapist opined that Brianna's behavior would improve only if her contact with May Lynn decreased. May Lynn opposed the guardianship again, noting that she had not been happy with guardianship once she understood its meaning. Visitation with May Lynn continued. The next month, the second potential guardian requested that the girls be removed. DHHS moved to place them with the only potential guardian remaining on its list, and the juvenile court approved the change.

In March 2012, placement with the third potential guardian was going well and DHHS moved to appoint the guardian and have the order completed. DHHS noted that it recommended May Lynn receive visitation in the event guardianship was approved. The juvenile court decided to table the motion to establish guardianship in order to make sure the correct procedures were being followed. The judge requested that DHHS file the appropriate paperwork and schedule a hearing on the motion.

The next week, DHHS filed a motion to establish guardianship through alternative disposition, pursuant to § 43-247(3)(a) and (10); Neb. Rev. Stat. § 43-284(3) and (5) (Reissue 2008); and Neb. Rev. Stat. § 43-285(1), (3), and (5) (Supp. 2011). The juvenile court held a hearing on the motion in July 2012. May Lynn objected on the ground that the elements set forth in the probate code needed to be established. The juvenile court overruled the objection and proceeded. Due to the volume of testimony and the time constraints, hearing on the motion occurred on three separate dates in July, September, and November 2012. At the November hearing, May Lynn

testified that she loved her daughters and wanted to parent them. She opposed guardianship. May Lynn also requested mediation regarding visitation in the event that guardianships were established.

In December 2012, the juvenile court issued orders approving guardianships. The court noted its exclusive jurisdiction over juveniles as described in § 43-247 and the grant of authority over guardianships of individuals within its jurisdiction as outlined in § 43-247(9). The juvenile court relied on *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000), to determine § 43-285(3) authorized it to award custody to a family designated by DHHS as suitable guardians without resort to the probate code.

The juvenile court then found that continuing the girls in May Lynn's home was contrary to their best interests, that reasonable efforts had been made to reunify the girls with May Lynn, and that due diligence had been used to attempt to locate and notify the girls' father. The court then sustained the State's motion for guardianship and wrote that DHHS should "commence filing its Petition for the Appointment of a Guardian for Mariella . . . and Brianna . . . . Following the entry of an Order approving the Guardianship and the acceptance by the proposed guardians, [DHHS] and all court-appointed attorneys shall be dismissed . . . ." The court noted this was a "bitter-sweet resolution to a distressing slice of life's reality" and informed May Lynn that she could petition the court for restoration of custody upon changed circumstances. Finding it was not authorized to order visitation, the court strongly encouraged May Lynn and the guardian to negotiate a suitable schedule.

The letters of guardianship were issued in January 2013. May Lynn timely appealed.

III. ASSIGNMENTS OF ERROR

On appeal, May Lynn argues that the letters of guardianship were improperly issued and that the trial court erred in failing to award visitation.

IV. STANDARD OF REVIEW

Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent

of the juvenile court's findings. *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witness and accepted one version of the facts over the other. *Id.*

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

V. ANALYSIS

1. Letters of Guardianship Were Issued Properly

May Lynn's first assignment of error is that the letters of guardianship were issued contrary to the trial court's order and in violation of her constitutional right to procedural due process. We disagree.

(a) Juvenile Court Order

In its order approving guardianship in December 2012, the juvenile court sustained the State's motion to establish guardianship and then wrote that DHHS should "commence filing its Petition for the Appointment of a Guardian for Mariella . . . and Brianna . . . . Following the entry of an Order approving the Guardianship and the acceptance by the proposed guardians, [DHHS] and all court-appointed attorneys shall be dismissed . . . ."

In January 2013, the letters of guardianship were issued. Although the juvenile court's language requiring the State to file a petition creates confusion, in the context of the rest of the juvenile court's order and the proceedings prior to the order, it is evident that the juvenile court intended its order to establish guardianship. The juvenile court manifested its intent by carefully informing the parties on the record that it was holding a hearing on the State's motion to establish guardianship, making the requisite findings, sustaining the motion, and then issuing the letters of guardianship. Given all the steps the juvenile court took to establish guardianship, its statement that

the State should file a petition for guardianship is insufficient to prove the court did not intend to sustain guardianship and issue the letters.

(b) Probate Code Procedures

May Lynn next argues that the juvenile court erred in issuing letters of guardianship because it did not follow the appropriate proceedings for establishing guardianship. Specifically, May Lynn argues that DHHS was required to follow the procedures outlined in Neb. Rev. Stat. § 30-2608 (Reissue 2008) in order to establish guardianship. Section 30-2608 requires a party seeking to establish guardianship to file a petition in county court. May Lynn argues that the failure to follow this procedure deprived her of notice. We have previously established, however, that a juvenile court does not need to resort to the probate code to establish a guardianship over a minor within its jurisdiction. Moreover, in this case, the procedures followed in juvenile court afforded May Lynn sufficient notice of the guardianship proceedings.

[1,2] Under the juvenile code, once a minor is adjudged to be within the definition of § 43-247(3), the juvenile court acquires exclusive jurisdiction over the juvenile and the parent who has custody of the juvenile. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000). Section 43-247(9) provides the juvenile court jurisdiction over the guardianship proceedings of a juvenile described elsewhere within the code. In *In re Guardianship of Rebecca B. et al., supra*, the Nebraska Supreme Court held that § 43-285(3) authorized a juvenile court to establish guardianships for juveniles in the custody of DHHS without resorting to a proceeding under the probate code. In this case, because Mariella and Brianna were both in the custody of DHHS, the juvenile court had authority to establish guardianship under the juvenile code.

May Lynn argues that even if the trial court were authorized to establish guardianship under the juvenile code, she was still entitled to procedures that afforded her notice of guardianship. The record in this case establishes, however, that May Lynn had ample notice of the guardianship hearing. DHHS established guardianship as the permanency goal in the case

plan years before the hearing, that change was approved by the court, and guardianship was discussed at almost every status meeting after October 2009. If these discussions did not provide May Lynn sufficient notice, she was certainly on notice after DHHS filed a motion to establish guardianship. A hearing was held on that motion prior to the court's approving guardianship. For these reasons, we find May Lynn's argument without merit.

2. Failure to Establish Visitation

May Lynn's second assignment of error is that the trial court erred in failing to establish a visitation plan for her after sustaining DHHS' motion for guardianship. We determine that the juvenile court erred in finding it lacked authority to order visitation for May Lynn. Accordingly, we reverse in part, and remand to the juvenile court for a determination of May Lynn's visitation rights.

[3] May Lynn argues that the juvenile court erred in finding it lacked statutory authority to order visitation and in failing to order the visitation. DHHS notes that no statute specifically authorizes a juvenile court to award visitation in an established guardianship. As a statutorily created tribunal, the juvenile court has only such authority as has been conferred on it by statute. *In re Interest of Jaden H.*, 263 Neb. 129, 638 N.W.2d 867 (2002). At the same time, the purpose of the juvenile court is to protect and promote the welfare of juveniles. The court's "powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficient purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms." *Stewart v. McCauley*, 178 Neb. 412, 418, 133 N.W.2d 921, 925 (1965). Rather than creating a new court, the juvenile court law "merely gave a court with general common law and equity jurisdiction new and additional powers. These powers do not supersede its original jurisdiction but are supplemental to it." *Id.*

[4-6] The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests. *In re Interest of Veronica H.*, 272 Neb. 370, 721

N.W.2d 651 (2006). Accordingly, the juvenile code must be construed to ensure the rights of all juveniles to care and protection. See *id*. The Nebraska Juvenile Code must be liberally construed to serve the best interests of juveniles who come within the provisions of the act. *In re Interest of Veronica H., supra*. As such, juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected and to serve the best interests of the children involved. *Id*.

[7,8] Although no statute explicitly authorizes awarding visitation within the context of a guardianship, we have previously determined that the continuing jurisdiction of the juvenile court allowed the court to order supervised visitation after terminating a mother's parental rights when the order was in the best interests of the children. See *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004). We have also found that the juvenile court has the authority to devise "unique" foster care situations not set out in the "'checklist'" of statutory options when a unique arrangement would be in the best interests of the child. *In re Interest of Holley*, 209 Neb. 437, 444, 445, 308 N.W.2d 341, 346 (1981).

[9-11] As was the case in *In re Interest of Stacey D. & Shannon D., supra*, the juvenile court retains jurisdiction over a juvenile in a guardianship. A guardianship does not achieve the same degree of permanency as parenthood or adoption. *In re Interest of Antonio S. & Priscilla S.*, 270 Neb. 792, 708 N.W.2d 614 (2005). Legal custody is not parenthood or adoption and the person appointed guardian is subject to removal at any time. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). When a guardianship is established, a parent retains the right to petition the court for restoration of custody and full parental rights in the event of a change in the circumstances which justified the guardianship and supported the finding of the parent's unfitness. *In re Interest of Amber G. et al., supra*.

[12] Given our holding in *In re Interest of Stacey D. & Shannon D., supra*, and the broader purposes of the juvenile

code, we determine that the juvenile court maintains the authority to create visitation arrangements within the context of a guardianship, so long as those arrangements are in the best interests of the juvenile. In this case, the juvenile court was operating under the misconception that it was without authority to order visitation. Because we determine that the juvenile court does have the authority to order visitation between the mother and the affected juvenile, we reverse in part, and remand to the juvenile court for a determination of May Lynn's visitation rights.

VI. CONCLUSION

We determine that the juvenile court properly issued the letters of guardianship, and therefore, we affirm that portion of the juvenile court's decision. The juvenile court erred, however, in determining that it lacked authority to award visitation rights in a guardianship proceeding. Accordingly, we reverse in part, and remand to the juvenile court for a determination of May Lynn's visitation rights.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

PIRTLE, Judge, participating on briefs.

IN RE INTEREST OF JAYDEN D. AND DAYTEN J., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. YOLANDA W., FORMERLY KNOWN AS YOLANDA O., APPELLANT.

842 N.W.2d 199

Filed January 14, 2014. No. A-13-193.

1. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court under the Indian Child Welfare Act is reviewed for an abuse of discretion.
2. **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. **Indian Child Welfare Act: Jurisdiction: Proof.** The party opposing a transfer of jurisdiction to the tribal courts has the burden of establishing that good cause not to transfer the matter exists.
4. **Indian Child Welfare Act: Words and Phrases.** Under the definitional sections of the Indian Child Welfare Act and the Nebraska Indian Child Welfare Act, the term "child custody proceeding" includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.
5. **Indian Child Welfare Act.** A foster placement proceeding and a subsequent termination of parental rights proceeding involving an Indian child are separate and distinct under the Indian Child Welfare Act and the Nebraska Indian Child Welfare Act.
6. **Indian Child Welfare Act: Child Custody: Jurisdiction.** The courts of this state should not apply the "best interests of the child" standard in deciding whether good cause exists to deny motions to transfer child custody proceedings to tribal court.
7. **Indian Child Welfare Act: Jurisdiction.** Regarding the Indian Child Welfare Act, in determining whether the doctrine of forum non conveniens should be invoked, the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Reversed and remanded with directions.

Patrick T. Carraher, of Legal Aid of Nebraska, for appellant.

Joe Kelly, Lancaster County Attorney, and Maureen E. Lamski for appellee.

MOORE, PIRTLE, and BISHOP, Judges.

MOORE, Judge.

INTRODUCTION

Yolanda W., formerly known as Yolanda O., appeals from the decision of the separate juvenile court of Lancaster County, which denied her motion to transfer the termination of parental rights proceeding in this juvenile case to tribal court. Because we find that the State failed to establish good cause to deny the transfer, we conclude that the juvenile court abused its discretion in denying the motion to transfer. Accordingly, we reverse the order of the juvenile court and remand the cause to the

juvenile court with directions to sustain the motion to transfer to the tribal court.

BACKGROUND

Yolanda is the mother of Jayden D. and Dayten J. Because neither child's father is involved in this appeal, we discuss the issues only as they relate to Yolanda, Jayden, and Dayten. The children were removed from Yolanda's care on December 2, 2010, when they were placed in the temporary legal custody of the Nebraska Department of Health and Human Services (the Department). The children have remained in placements outside the family home since that time.

On December 3, 2010, the State filed a petition in the juvenile court, alleging that Jayden and Dayten were persons as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) in that they lacked proper parental care by reason of the fault or habits of their mother, Yolanda.

The children were apparently adjudicated on January 4, 2011, although the adjudication order is not included in our record on appeal. On that date, the juvenile court also found that the provisions of the Nebraska Indian Child Welfare Act (NICWA) apply to this case. On April 15, following a dispositional hearing, the court found that expert testimony had been provided as required under NICWA and found clear and convincing evidence that being under Yolanda's care was likely to result in serious emotional or physical damage to the children. The court also found that active efforts had been made in the form of case management, service coordination, pretreatment assessment, supervised visits, intensive outpatient treatment, transportation, clothing, medication consultation, and monthly team meetings to eliminate out-of-home placement.

The record shows that on April 6, 2012, the State filed a motion seeking to terminate Yolanda's parental rights to both children, although our record does not include a copy of that motion or any filings that may have been made after it and prior to the termination hearing. A formal hearing was held on the termination motion on December 7 and 10. The record shows that no motion to transfer the case was made prior to

that time, either by Yolanda or by the Oglala Sioux Tribe (the Tribe). At the hearing, the State apparently moved to dismiss the termination allegations relating to Jayden and the matter was submitted only on the allegations relating to Dayten.

On December 12, 2012, the juvenile court entered an order dismissing the motion to terminate Yolanda's parental rights. The order indicated that Dayten's father had relinquished his parental rights on December 10. The court recited several findings regarding Yolanda, including that she had made minimal progress, had been inconsistent in family therapy and visitation, had attempted to commit suicide in her home and was discovered by Dayten, had "great instability" in her personal life, and had been homeless and without means of support during periods of the preceding year. However, because the motion for termination did not include allegations that conformed to NICWA, the court found that dismissal was required due to the State's failure to state facts sufficient to constitute a cause of action for termination of parental rights under NICWA. The court noted, however, that had the case not been governed by NICWA, the outcome would likely have been different.

On January 2, 2013, the State filed a second motion, seeking to terminate Yolanda's parental rights only with respect to Dayten. The State alleged that grounds for termination existed under Neb. Rev. Stat. § 43-292(2), (4), (6), and (7) (Cum. Supp. 2012). The State also alleged that termination of Yolanda's parental rights was in Dayten's best interests and included the required NICWA allegations.

An affidavit and notice filed January 8, 2013; an order dated January 4, 2013; and a copy of the second termination motion were sent to the Tribe. The record shows that the Tribe received the notice on January 23.

On January 16, 2013, Yolanda filed a motion seeking to transfer the proceedings with respect to Dayten to tribal court. Among other things, she alleged that Dayten was eligible for membership in the Tribe and that she was unaware of any facts supporting good cause not to transfer. The State filed an objection to Yolanda's motion on February 12, alleging that the motion failed to state the tribal court would accept the

case, that the case was at an advanced state of the termination proceeding, that the transfer was not in Dayten's best interests, that the tribal court was an inconvenient forum, and that good cause existed not to transfer the case.

On February 14, 2013, the juvenile court heard Yolanda's motion to transfer. The court received into evidence a voluntary consent to temporary foster care placement signed by Yolanda in January 2011, which Yolanda offered in order to show tribal affiliation. The consent form shows that Yolanda is an enrolled member of the Tribe, but the portion of the form relating to Dayten's enrollment in or eligibility for tribal membership was left blank. The Department caseworker assigned to the case testified that she had not ever had any contact with the Tribe in connection with this case and was not aware of whether the Tribe would accept a transfer. She was also not aware of whether the Department had had any such contact.

According to the caseworker, before Dayten's initial placement, the Department looked for a Native American home, but there were none available. Since his removal from Yolanda's home, Dayten has been in at least three different foster homes, none of which have been Native American foster homes. The caseworker also testified about Dayten's behavioral issues, which have sometimes made it difficult to find placement for him. The current foster family had not indicated a willingness to adopt, but as far as the caseworker knew, Dayten was doing "okay" in his current placement.

On March 4, 2013, the juvenile court entered an order overruling the motion to transfer. The court found that good cause had been shown to deny the motion to transfer the proceedings as to Dayten because the court would continue to exercise jurisdiction over Jayden. The court also found that the motion to transfer was filed at a late stage of the proceeding in that the case had been pending for over 2 years and a formal hearing had already been held on the first motion for termination that was filed nearly a year before. Yolanda subsequently perfected her appeal to this court.

ASSIGNMENT OF ERROR

Yolanda asserts that the juvenile court erred in denying her motion to transfer the termination of parental rights proceeding in this juvenile case to tribal court.

STANDARD OF REVIEW

[1,2] A denial of a transfer to tribal court under the federal Indian Child Welfare Act (ICWA) is reviewed for an abuse of discretion. *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012), *cert. denied sub nom. Nebraska v. Elise M.*, ___ U.S. ___, 134 S. Ct. 65, 187 L. Ed. 2d 28 (2013). 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. *In re Interest of Samantha L. & Jasmine L.*, 284 Neb. 856, 824 N.W.2d 691 (2012).

ANALYSIS

Yolanda asserts that the juvenile court erred in denying her motion to transfer the termination of parental rights proceeding in this juvenile case to tribal court.

[3] NICWA provides in Neb. Rev. Stat. § 43-1504(2) (Reissue 2008):

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, except that such transfer shall be subject to declination by the tribal court of such tribe.

See, also, 25 U.S.C. § 1911 (2006) (corresponding ICWA provision regarding transfer of proceedings). The party opposing a transfer of jurisdiction to the tribal courts has the burden of establishing that good cause not to transfer the matter exists. *In re Interest of Zylena R. & Adrionna R., supra*. Because the

State opposed Yolanda's motion to transfer, it bore the burden of establishing good cause in this case.

Neither ICWA nor NICWA defines "good cause," but the Bureau of Indian Affairs has published nonbinding guidelines (BIA Guidelines) for determining whether good cause exists. The appellate courts of this state have looked to the BIA Guidelines in the past in determining good cause. See, *In re Interest of Zylena R. & Adrionna R., supra*; *In re Interest of Melaya F. & Melysse F.*, 19 Neb. App. 235, 810 N.W.2d 429 (2011).

Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (Nov. 26, 1979) (not codified), states in part:

> C.3. Determination of Good Cause to the Contrary
>
> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by [ICWA] to which the case can be transferred.
>
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
>
> (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
>
> (ii) The Indian child is over twelve years of age and objects to the transfer.
>
> (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
>
> (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
>
> (c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

With respect to the timeliness of transfer requests, the commentary to the BIA Guidelines states:

> Although [ICWA] does not explicitly require transfer petitions to be timely, it does authorize the court to refuse

> to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost complete to ask that it be transferred to another court and retried, good cause exists to deny the request.

44 Fed. Reg., *supra*, 67,590, C.1, commentary. The commentary further states, "Application of th[e] criterion" in subsection (b)(iii) of the guidelines, quoted above, "will tend to limit transfers to cases involving Indian children who do not live very far from the reservation." 44 Fed. Reg., *supra*, 67,591, C.3, commentary.

[4,5] The Nebraska Supreme Court recently considered whether there was good cause not to transfer a case to tribal court in *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012), *cert. denied sub nom. Nebraska v. Elise M.*, ___ U.S. ___, 134 S. Ct. 65, 187 L. Ed. 2d 28 (2013). The court in *In re Interest of Zylena R. & Adrionna R.* first considered what constitutes a "proceeding" for purposes of ICWA and NICWA in order to determine whether the proceeding in that case was at such an advanced stage as to justify denial of the motion to transfer. The court determined that "[u]nder the definitional sections of ICWA and NICWA, the term 'child custody proceeding' includes foster care placement, termination of parental rights, preadoptive placement, and adoptive placement." 284 Neb. at 845, 825 N.W.2d at 181. The court concluded:

> ICWA and NICWA contemplate four different types of child custody proceedings, two of which must be transferred from a state court to a tribal court upon proper motion in the absence of good cause to the contrary. Thus when the BIA Guidelines state that good cause may exist when "[t]he proceeding was at an advanced stage" at the time a petition to transfer is received, they can only be referring to one of the two proceedings subject to transfer: foster care placement *or* termination of parental rights. The State's argument that a foster care placement proceeding and a termination of parental rights proceeding are a single "proceeding" for purposes of the "advanced stage" analysis is inconsistent with the plain language of ICWA and NICWA, which defines them as separate

> proceedings. The fact that Nebraska law permits both objectives to be pursued sequentially in a single-docketed case is entirely irrelevant to the question of whether they are separate "proceedings" under the plain statutory language of ICWA and NICWA.

284 Neb. at 846, 825 N.W.2d at 182. The court held that a foster placement proceeding and a subsequent termination of parental rights proceeding involving an Indian child are separate and distinct under ICWA and NICWA, disapproving prior Nebraska case law, specifically *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), to the extent it could be read as holding that such proceedings are not separate and distinct. In *In re Interest of Zylena R. & Adrionna R.*, the tribe requested transfer less than a month after the State filed its termination motions and prior to the parents' pleas and any substantive hearing on the termination. Accordingly, the Supreme Court found it clear that the case was not at an advanced stage of the termination proceeding.

[6] The court in *In re Interest of Zylena R. & Adrionna R.* also held that the courts of this state should not apply the "best interests of the child" standard in deciding whether good cause exists to deny motions to transfer child custody proceedings to tribal court, further overruling *In re Interest of C.W. et al.*, *supra*, in this regard.

The initial adjudication petition in this case was filed in December 2010. The first motion for termination of parental rights was filed in April 2012. In December 2012, a 2-day formal termination hearing was held. This termination motion was dismissed for failure to include NICWA allegations. On January 2, 2013, the State filed the second termination motion, which included NICWA allegations, and Yolanda filed her motion to transfer on January 16. In overruling Yolanda's motion, the court found that good cause had been shown to deny Yolanda's motion to transfer, in part because it was filed at an advanced stage of the proceeding. The court observed that the case had been pending for over 2 years and that a formal hearing had already been held on the first termination motion. The court also relied on the fact that Yolanda's motion

to transfer was filed nearly a year after the State filed the first termination motion.

The Nebraska Supreme Court's decision in *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012), *cert. denied sub nom. Nebraska v. Elise M.*, ___ U.S. ___, 134 S. Ct. 65, 187 L. Ed. 2d 28 (2013), makes it clear that foster care placement proceedings and termination of parental rights proceedings are separate proceedings for purposes of "advanced stage" analysis. Thus, the amount of time between the initial adjudication petition and Yolanda's motion to transfer is not relevant. Here, Yolanda's motion to transfer was filed very shortly after the current termination motion was filed, and as such, this termination proceeding cannot be said to be at an advanced stage. We recognize that this case presents a somewhat unique procedural posture in that a previous termination proceeding was completed but was ultimately dismissed because of a pleading deficiency. Yolanda did not seek to transfer the previous termination proceeding despite the prior court acknowledgment that NICWA applied to this case. In its oral findings made at the conclusion of the hearing, the juvenile court acknowledged the holding in *In re Interest of Zylena R. & Adrionna R.*, but essentially found that this case was still at an advanced stage because it was a second termination motion within the same case, filed nearly a year after the first termination motion, and was therefore not a new proceeding. The court also noted that the second termination motion included basically the same allegations as the first termination motion, with the addition of the NICWA allegations.

We disagree with the juvenile court's determination that the second termination motion is not a new proceeding. To the contrary, the first termination motion was dismissed and a new trial will need to be held on the second termination motion. Additional evidence will likely be necessary at the second termination trial in order to attempt to prove the NICWA allegations. Under the dictates of *In re Interest of Zylena R. & Adrionna R., supra*, the second termination motion is a separate and distinct proceeding, and as such, Yolanda's motion to transfer was not made at an advanced

stage. Accordingly, the juvenile court abused its discretion in finding otherwise.

The juvenile court also denied the motion to transfer the termination proceeding involving Dayten because the court still had continuing jurisdiction over Jayden. This is essentially a forum non conveniens matter, which may be a valid basis for good cause to deny transfer. See, *In re Interest of Leslie S. et al.*, 17 Neb. App. 828, 770 N.W.2d 678 (2009), *abrogated on other grounds, In re Interest of Zylena R. & Adrionna R., supra*; *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005). The consideration of forum non conveniens essentially involves the question of whether presentation of the matter in the tribal court would be an undue hardship to the parties or witnesses under the BIA Guidelines noted above.

In *In re Interest of Leslie S. et al., supra*, the State filed a petition, alleging that the mother's six children were within the meaning of § 43-247(3)(a). The mother and all six children were enrolled members of the Omaha Tribe of Nebraska. The father of the youngest two children was also a tribe member. After the original juvenile petition was filed, there were several additional petitions filed in juvenile court involving some of the children. A delinquency case was filed involving one child. A truancy case involving a second child was filed. That child also had a child of her own, who was not eligible for tribal membership but who had been made a ward of the State in another juvenile case. The tribe filed an initial motion to transfer to tribal court, which was denied based on the mother's objection. Subsequently, the tribe filed a second motion to transfer and the father of the youngest two children also filed a motion to transfer. The juvenile court found good cause to deny the transfer based on the facts that a previous motion had been denied, that the case was at an advanced stage, that the court had jurisdiction over multiple cases involving several of the children, and that the transfer would not be in the children's best interests. The father appealed in this case predating *In re Interest of Zylena R. & Adrionna R.*, 284 Neb. 834, 825 N.W.2d 173 (2012), *cert. denied sub nom. Nebraska v. Elise M.*, ___ U.S. ___, 134 S. Ct. 65, 187 L. Ed.

2d 28 (2013), and this court affirmed, relying on the fact that the father had not filed his motion until more than 2 years after the filing of the original juvenile court petition. We also relied on the fact that several other cases involving some of the children would remain in the juvenile court.

While it is true in this case that if Dayten's case were transferred to tribal court, the juvenile court would presumably retain jurisdiction over Jayden's case, we find that this case is nevertheless distinguishable from *In re Interest of Leslie S. et al.*, which involved numerous children and proceedings. Further, the motion in *In re Interest of Leslie S. et al.* was denied for the additional reason that it was filed at an advanced stage. Here, the proceeding sought to be transferred is for termination of parental rights as to Dayten only, which does not affect, and is not affected by, the remaining case regarding Jayden. We note that the State initially sought termination of Yolanda's parental rights as to both children but that during the hearing on that motion, the State apparently moved to dismiss the termination allegations relating to Jayden. A bill of exceptions from that hearing was not included in our record on appeal, so it is unclear why the State chose not to proceed with termination as to Jayden at that time or why Jayden was not included in the second termination motion. Having already found that the motion to transfer Dayten's case was not at an advanced stage of the second termination proceeding, we also conclude that the fact that Jayden's case remains in the juvenile court is not a sufficient reason to deny the transfer. Under the circumstances of this case, the juvenile court abused its discretion in finding that its retention of jurisdiction over Jayden's case supported a finding of good cause to deny transfer of Dayten's termination proceeding.

[7] As to additional factors that might support invoking the doctrine of forum non conveniens, the record is devoid of any such evidence. Prior case law has noted:

> In determining whether the doctrine of forum non conveniens should be invoked, the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of

> access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process.

In re Interest of C.W. et al., 239 Neb. 817, 828, 479 N.W.2d 105, 113 (1992), *disapproved and overruled on other grounds, In re Interest of Zylena R. & Adrionna R., supra*. Accord, *In re Interest of Melaya F. & Melysse F.*, 19 Neb. App. 235, 810 N.W.2d 429 (2011); *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005).

For example, in *In re Interest of Brittany C. et al.*, there was evidence at the hearing on the motion to transfer that neither the mother nor her children were living on the reservation. There was evidence that the mother had lived in Scotts Bluff County since 1984 and that the children had lived in the area for most of their lives. There was testimony about which witnesses would be needed to present the case, as well as testimony that it took about 2 hours to travel between the location of the parties and witnesses and the location of the tribal court. Although the evidence was unclear, there was some evidence about the process used to call witnesses to appear in tribal court.

In this case, no such evidence was presented. A review of the transcript shows that the Tribe is located in South Dakota and that at least at the time the juvenile petition was filed, Yolanda and the children resided in the Lincoln, Nebraska, area. There was no evidence presented at the hearing on the motion to transfer regarding the current location of Yolanda and the children, what witnesses might be called in the termination proceeding, where those witnesses were located, where the tribal court was located, or the ease with which evidence might be presented in the tribal court. We find that the juvenile court abused its discretion in determining that transferring the termination proceeding involving Dayten to the tribal court would result in a forum non conveniens.

The State had the burden of establishing good cause not to transfer the proceedings regarding Dayten to tribal court, and it failed to do so. The juvenile court abused its discretion in finding otherwise. Accordingly, we reverse the order of the juvenile court and remand the cause to the juvenile

court with directions to sustain the motion to transfer to the tribal court.

CONCLUSION

Because the State did not meet its burden of establishing good cause to deny transfer to tribal court, the juvenile court abused its discretion in denying Yolanda's motion to transfer. We reverse the order of the juvenile court and remand the cause with directions to sustain the motion to transfer.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
RONALD L. LANTZ, SR., APPELLANT.
842 N.W.2d 216

Filed January 21, 2014. No. A-12-1012.

1. **Search Warrants: Affidavits: Probable Cause.** To be valid, a search warrant must be supported by an affidavit which establishes probable cause.
2. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
3. **Search Warrants: Probable Cause: Proof.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
4. **Search and Seizure: Probable Cause.** Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found.
5. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
6. **Search Warrants: Affidavits: Appeal and Error.** As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of an affidavit in support of a search warrant.
7. **Probable Cause: Affidavits: Time.** There is no bright-line test for determining when information is stale. Whether the averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case, and the vitality of probable cause cannot be quantified by simply

counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit. Time factors must be examined in the context of a specific case and the nature of the crime under investigation.

8. ____: ____: ____. Where the facts contained in an affidavit indicate an isolated violation of the law, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time; however, where the facts contained in an affidavit indicate protracted and continuous criminal activity or, in other words, a course of conduct, the passage of time becomes less significant.
9. **Search Warrants: Affidavits.** Omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit.
10. **Search and Seizure: Search Warrants: Motions to Suppress: Proof.** A defendant who seeks to suppress evidence obtained under a search warrant has the burden of establishing that the search warrant is invalid so that evidence secured thereby may be suppressed.
11. **Search Warrants: Affidavits: Probable Cause: Courts: Appeal and Error.** The role of an appellate court is to determine whether the affidavit used to obtain a search warrant, if it contained the omitted information, would still provide a magistrate or judge with a substantial basis for concluding that probable cause existed for the issuance of the warrant. If a substantial basis for probable cause would still exist, then the defendant's argument fails.
12. **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.
13. **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.
14. **Trial: Jurors.** The issue of the retention of a juror after the commencement of trial is a matter of discretion for the trial court.
15. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
16. **Trial: Jurors: Presumptions: Proof.** The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise.
17. **Juror Qualifications: Judges.** A trial judge is not required to excuse a juror when the juror is able to decide the case fairly and impartially.
18. **Juror Qualifications: Appeal and Error.** An appellate court defers to the trial court's decision whenever a juror is unequivocal that he or she can be fair or impartial. This rule applies both to the issue of whether a potential juror should be removed for cause prior to trial and to the situation of whether a juror should be removed after the trial has commenced.
19. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.

20. ____. Consideration of plain error occurs at the discretion of an appellate court.
21. ____. 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.
22. **Statutes.** To the extent there is a conflict between two statutes, the specific statute controls over the general statute.
23. **Convictions: Sentences.** The sentence for any conviction carrying a mandatory minimum sentence must be ordered to be served consecutively.
24. ____: ____. 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.
25. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
26. **Sentences.** 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.
27. **Judgments: Records.** When there is a conflict between the record of a judgment and the verbatim record of the proceedings in open court, the latter prevails.

Appeal from the District Court for Jefferson County: PAUL W. KORSLUND, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

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

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

Ronald L. Lantz, Sr., was convicted of three counts of first degree sexual assault of a child after a jury determined that he had digitally penetrated his 14-year-old stepdaughter and her friend during a sleepover. He has appealed these convictions, contending that the district court erred (1) in denying his motion to suppress, (2) in admitting evidence of prior sexual assaults, and (3) in failing to remove a juror who overtly demonstrated sympathy and bias.

II. STATEMENT OF FACTS

1. Background

On the evening of January 10, 2011, 14-year-old best friends A.M. and M.C. had a sleepover at A.M.'s house. Also at A.M.'s home were A.M.'s mother; A.M.'s stepfather, Lantz; and A.M.'s younger brother and younger sister. At around 10 or 10:30 p.m., A.M., M.C., Lantz, and A.M.'s younger sister were in the living room and A.M. and M.C. began watching a "scary" movie. A.M.'s mother and younger brother were already asleep in other areas of the home.

During the movie, Lantz gave M.C. a neck and back massage. During the back massage, M.C. was lying on her stomach on a couch and Lantz was kneeling on the floor. Around the time that Lantz was in the middle of giving M.C. the back massage, A.M. was asleep. During the back massage, Lantz said to M.C., "[D]on't worry, I'm not going to do anything stupid." As M.C. began to drift off to sleep, she noticed that Lantz was starting to massage her lower calves and was working his way up her legs. When Lantz got to her lower back, he stuck his hands down her pants at her waistline along her back. Lantz' hands continued to go lower until he put a finger inside of M.C.'s vagina. M.C. could feel what was happening, but because she believed Lantz thought that she was sleeping, she acted like she was stretching and getting ready to wake up. At that point, M.C. felt Lantz pull his hand out of her pants and turn around quickly, and by the time that she sat up, Lantz was sitting on his bottom, not his knees, and was facing the television.

M.C. complained that she had a headache and asked Lantz to get her a washcloth and some Tylenol; when Lantz left to go to the kitchen, she moved from the couch to the recliner. After Lantz brought her the washcloth and Tylenol, he sat on the couch and put A.M.'s feet over his lap. M.C. observed Lantz' hand under a blanket that was covering A.M., and to M.C., he appeared to extend his hand up toward the area of A.M.'s crotch; M.C. could see the blanket moving. According to A.M., she fell asleep watching the movie and the next thing that she remembered was waking up to find that Lantz had

put his hand down the back of her sweatpants, underneath her underwear, and that his finger was in her vagina.

At about 7 a.m., A.M. got up and went upstairs to her room to get ready for school and checked her cellular telephone. There was a text message that M.C. had sent at 2:38 a.m., stating that she had something to talk to A.M. about. A.M. stated that her first thought was of Lantz and that she was scared and shocked and "didn't want to believe it at first." A.M. continued getting ready for school, and about 5 or 10 minutes later, M.C. came upstairs to A.M.'s room. M.C. told A.M. that Lantz had "fingered [M.C.]," and A.M. responded that it had been happening to A.M. for a while and that she was sorry it happened to M.C. M.C. asked A.M. why she had not said anything, and A.M. began crying and responded that she was scared. M.C. called her stepfather and told him what had happened. He responded that he was on his way to A.M.'s house.

After that telephone call, A.M. and M.C. told A.M.'s mother, who did not believe them. Shortly thereafter, A.M.'s grandmother arrived to take the girls to school, so A.M. and M.C. went outside, got in her van, and told her that Lantz had touched them inappropriately. She told A.M. to go pack a bag because A.M. was going to stay with her for a while. A.M. and M.C. went back inside the house, where A.M. packed a bag full of clothes. A.M. began living with her grandmother that day and continued to reside with her up until the time of the trial.

After the girls exited the house again, M.C.'s stepfather had arrived and they all went to the police station, where A.M. and M.C. gave statements that Lantz had sexually assaulted them. After giving those statements, A.M. and M.C. were taken to a hospital for sexual assault examinations. A.M. and M.C. provided consistent statements to hospital personnel that Lantz had sexually assaulted them and that the sexual assaults had consisted of digital penetration of the vagina with Lantz' finger.

At the hospital, the underwear of both A.M. and M.C. was collected as evidence because they were still wearing the underwear that they had been wearing when they were assaulted. The

presence of sperm cells, or semen, was confirmed on the inside crotch area of A.M.'s underwear, and Lantz was included as a major contributor of the sperm cells.

As part of the investigation into A.M.'s and M.C.'s allegations, Fairbury police officer David Schmehl interviewed Lantz on the afternoon of January 11, 2011. Schmehl read Lantz his *Miranda* rights and then asked Lantz if he understood why he was being interviewed, to which Lantz responded that his wife, A.M.'s mother, had told him that his stepdaughter, A.M., and her friend, M.C., had accused him of touching them. Lantz denied the allegations. That afternoon, Schmehl arrested Lantz for two counts of misdemeanor sexual assault. Lantz was eventually charged with three counts of first degree sexual assault of a child, each count a Class IB felony.

As part of his followup investigation, Schmehl, along with Investigator Kerry Crosby of the Nebraska Department of Justice, Office of the Attorney General, executed a search warrant at the address in Fairbury, Nebraska, where the assaults allegedly occurred. During this search, executed on March 29, 2012, Crosby used an alternative light source, or black light, to identify biological evidence, resulting in Schmehl and Crosby's seizing three sections of carpet that were cut from the room that was identified as A.M.'s bedroom and a brick that had some "detailing" done to it. A.M. had stated that she placed a decorated brick in front of her bedroom door after she suspected that Lantz was coming into her bedroom at night while she was asleep.

2. Motion to Suppress

Lantz filed a motion to suppress evidence obtained during the search of "his living quarters," which was the residence where A.M. and M.C. had alleged that the sexual assaults occurred. A suppression hearing was held on May 17, 2012. Lantz argued that the evidence sought by the affidavit to search his residence was not relevant to the alleged crimes of digital penetration, that the information contained in the affidavit was stale, that the affidavit omitted material facts, and that therefore, there was no probable cause for issuance of the search warrant.

At the suppression hearing, testimony was adduced from Schmehl and Crosby and a certified record containing the affidavit for the search warrant, the search warrant, the return, and an inventory was received into evidence. Crosby's affidavit in support of the search warrant set forth that based upon his experience—which included hundreds of previous investigations dealing with child sexual assaults, child abuse or neglect, and child pornography cases—biological evidence such as semen, blood, vaginal secretions, and epithelial cells can be located years after being placed on items such as fabric or carpet. The biological evidence in places that are climate controlled, such as a house, apartment, or commercial space such as an office building, can be found by using the technology referred to above as an "alternative light source." Crosby also verified that 2 days prior to the search warrant's being sought, the utilities for the house to be searched were in the name of A.M.'s mother.

The district court denied Lantz' motion to suppress in a written order filed on June 21, 2012. The court specifically addressed Lantz' arguments that there was no probable cause for issuance of the warrant because the affidavit was not relevant to the crimes alleged and that the information contained in the affidavit was stale because of a delay of more than a year in seeking the warrant. The district court rejected Lantz' relevancy argument by noting that it was significant that Lantz' semen was found in the underwear that A.M. was wearing during the alleged sexual assault on January 11, 2011, and that A.M. had reason to believe that Lantz was coming into her bedroom at night while she slept and was watching her while she showered. The court also noted that "[i]t is also very significant that A.M. believed Lantz was coming into her room at night while she slept, over a long period of time, she having recalled the first incident to have occurred on December 10, 2009."

The court likewise rejected Lantz' staleness argument, noting that the time span was significant, but that a determination of staleness depends upon the particular circumstances of the case. In the case at hand, the district court evaluated the time

> in light of . . . Crosby's statement in his affidavit that biological evidence such as semen can be found years after being deposited within the living quarters of a residence with normal climate control. This fact increases the likelihood of discovering probative DNA evidence a year later when Crosby came into the case and reviewed the investigation done by the Fairbury Police Department. Also, the decorative brick which A.M. described in detail is the type of item which is not likely to be removed from a room.

Thus, the district court found that the county judge could conclude there was a fair probability of finding biological and physical evidence in the areas to be searched at the time the search warrant was to be executed and, under the totality of the circumstances in the case, that the county judge had a substantial basis for finding the affidavit established probable cause. The court rejected Lantz' claim that there were material facts omitted from Crosby's affidavit and further found that even if probable cause was lacking, the evidence would be admissible under the good faith exception of *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

3. Trial

Trial was held from August 6 through 9, 2012. The evidence established that Lantz was born in May 1968 and that A.M. and M.C. were born in July 1996. The carpet samples which were seized pursuant to the search warrant, the DNA extracts prepared by the Nebraska State Patrol crime laboratory from the carpet samples, and the DNA report that was prepared by the Nebraska State Patrol crime laboratory were admitted at trial over defense objection. On each of the three carpet samples, Lantz was included as a source for the sperm fraction and as a major source for the epithelial fraction of the DNA recovered. The probability of randomly selecting an unrelated individual with a DNA profile matching that of the contributor of the sperm and epithelial fractions in the carpet samples, and of the sperm cells located on the inside of A.M.'s underwear, was calculated at approximately 1 in 18.02 sextillion in the

U.S. Caucasian population, 1 in 12.09 septillion in the African American population, and 1 in 30.45 sextillion in the U.S. Southwest Hispanic population.

A.M. testified as to the previous occasions that Lantz had sexually assaulted her. According to A.M., the first time that Lantz sexually assaulted her was on December 28, 2009. She remembered the date of that first assault clearly because, that same day, she had gotten a text message from her ex-boyfriend saying "'I love you,'" which message was special to her and which she had saved on her cellular telephone for a while. A.M. testified that similarly to the January 2011 incident, the December 2009 assault also happened at night in the living room. A.M. testified that she was lying on her stomach on the couch watching television and had fallen asleep and that when she woke up, Lantz was "fingering [her] vagina." A.M. stated that she was scared during the incident, so she did not let Lantz know that she was awake. A.M. estimated that the assault lasted 5 or 6 minutes, until Lantz went outside to smoke a cigarette. A.M. stated that she did not tell anyone about what had happened because she was scared that if Lantz found out that she had told, he would "do something to [A.M.] and [her] family."

A.M. estimated that between the December 28, 2009, and January 11, 2011, sexual assaults, there were approximately 20 to 25 other similar incidents, all taking place in the living room, where A.M. would wake up and find Lantz' finger was in her vagina. Each time that A.M. would wake up during an assault, she would pretend that she was still sleeping, because she was scared. Other interactions with Lantz also troubled A.M., such as when he gave her a leg massage, when he appeared to be looking through a crack in the bathroom door to watch her shower, and when she woke up from sleeping, in her bed in her bedroom, and found Lantz was leaning over her. After the incident where Lantz was leaning over her in her bedroom, A.M. put a brick in front of her closed bedroom door so that she would be able to tell if Lantz was entering her room while she slept. A.M. testified that she made the brick at Bible camp as a craft project and that it had a church, a cross, and a heart on it. A.M. stated that she was able to determine

that Lantz was entering her room while she slept because the brick was moved a couple of times, and when she and Lantz talked about it, Lantz told her not to put the brick in front of her bedroom door.

4. Alleged Prior Sexual Assault Evidence

The State sought to offer evidence of similar offenses of sexual assault by Lantz through testimony from Lantz' ex-wife and his former stepdaughter, K.H. Prior to trial, an evidentiary hearing as required by Neb. Rev. Stat. § 27-414 (Cum. Supp. 2012) was held on March 27, 2012. Based upon the evidence presented at the § 27-414 hearing, the district court determined that the State had met its burden of establishing the credibility of K.H.'s testimony by clear and convincing evidence and that the probative value of the evidence outweighed the danger of unfair prejudice. The court also found that statutory factors under § 27-414(3) supported admission of the evidence. Thus, the court determined that K.H.'s testimony was admissible at trial.

When the State sought to introduce testimony from Lantz' ex-wife and K.H. at trial, Lantz objected to his ex-wife's testimony based upon "Rules 403, 404, [and] 414"; the "August [sic] 27," 2012, evidentiary hearing; relevance and "related rules"; and Lantz' rights to due process and a fair trial. Lantz further objected to K.H.'s testimony on the basis of violation of "Rule 403, Rule 404, and Rule 414"; the March 27, 2012, evidentiary hearing; and the violation of Lantz' rights to due process and a fair trial. Additionally, Lantz objected to the trial court's proposed limiting instruction on the basis that the limiting instruction denied Lantz' rights to due process and a fair trial. These objections were all overruled, and Lantz was given a continuing objection to both his ex-wife's and K.H.'s testimony.

Lantz' ex-wife testified that she was married to Lantz from May 2002 to November 2003. At the time of her marriage to Lantz, she had three daughters; the youngest was K.H., who was approximately 5 years old at that time. During her marriage to Lantz, there were times that she and Lantz had to work

different shifts for their jobs and K.H. would be left alone in Lantz' care while his ex-wife worked the day shift.

Prior to bringing K.H. before the jury, the court gave the jury a limiting instruction regarding K.H.'s testimony which provided, "The testimony of [K.H.] relates to [Lantz'] alleged commission of other instances of sexual assault of a child and may be considered for any relevant matter. However, evidence of an alleged prior offense on its own is not sufficient to prove [Lantz] guilty in this case." K.H. was then brought before the jury, where she testified that she was born in August 1997 and that Lantz had been her stepfather. According to K.H., during a time when she was between 4 and 6 years old, when she was home alone with Lantz because her siblings were in school and her mother was at work, Lantz touched her vagina with his hand. K.H. could not remember if Lantz touched her vagina more than once, if Lantz put his finger inside her vagina, or if he touched her inside or outside of her underwear, and she could not remember what season it was when Lantz touched her inappropriately. She also testified that Lantz made her hold his penis with her hand and that "white stuff" came out of his penis. This happened when Lantz was sitting in a recliner in the living room at their house and K.H. was in front of the recliner. K.H. could not remember if Lantz had her hold his penis more than once.

On cross-examination, K.H. testified that she remembered being interviewed at a child advocacy center in February 2012, but that she did "[n]ot really" remember telling the interviewers nothing came out of Lantz' penis when she held it in her hand and that she "[s]omewhat" remembered telling the interviewers that Lantz had touched her vagina over her clothing, not via skin-to-skin contact. K.H.'s interview at the child advocacy center was observed by Schmehl, who testified K.H. reported in that interview that Lantz touched her over her clothing, not via skin-to-skin contact, and that nothing came out of his penis when she held it.

5. Alleged Juror Misconduct

During the trial, defense counsel brought to the court's attention that, after the conclusion of the direct examination of

A.M., prior to the start of cross-examination, and just before a break in the trial, Lantz' mother witnessed a concerning interaction between a female juror and A.M. A hearing was held in the court's chambers with Lantz' mother, the court, counsel for the State, and defense counsel present and Lantz not present. Lantz' mother testified under oath that she saw the female juror look at A.M. and give a "big smile and kind of a half nod" and that then, when the juror turned her face back and saw Lantz' mother, the juror acted like she had not "done anything." According to Lantz' mother, she felt like the juror "acknowledged to [A.M.] that she did a good job." Upon questioning by the State, Lantz' mother admitted that she had been in attendance throughout the entire trial but that this was the first type of interaction or exchange between this juror and A.M. that she had witnessed.

Based upon the concerns raised by Lantz' mother, the juror was questioned in chambers regarding potential bias or improper communication. The following colloquy occurred between the district court and the juror, who was placed under oath:

> THE COURT: During the testimony this morning of [A.M.], did you have any nonverbal communication with [A.M.] while she was on the witness stand?
>
> [Juror]: No. The only thing: If she would have looked at me, I would have smiled in comfort. She looked like someone in pain, and I would smile to comfort someone in pain to support her. So if she looked at me — I don't know if she — I would have smiled, yes, and I might have done that. (Juror getting teary-eyed.)
>
> . . . .
>
> THE COURT: . . . During the whole process we had with jury selection and so on, one of the things that was mentioned, and I think also in the preliminary instructions, was to make sure that you listened to all of the evidence.
>
> [Juror]: Uh-huh.
>
> THE COURT: And not make up your mind until you have heard all of the evidence. Do you still feel you're able to do that?

> [Juror]: Uh-huh.
>
> THE COURT: That's a yes?
>
> [Juror]: Yes, yes. If I seem emotional, I am. I had no prior knowledge to this. So when I'm hearing this, this is for the first time and I am emotional. So it's not —
>
> . . . .
>
> THE COURT: . . . What you are telling me at the [sic] point is if there was any gesture on your part directed towards [A.M.], it may have been a smile at the conclusion of the testimony before we took the break as a comfort —
>
> [Juror]: Yes, yes. . . .

The attorneys were also given the opportunity to ask the juror questions, and defense counsel did, in fact, cross-examine the juror. Upon cross-examination by defense counsel, the juror stated that she did not have a recollection of nodding her head or smiling at A.M. and that she did not mean to nod at her; however, she stated that she was not denying having done so, she just "didn't make a point to."

After the juror was escorted out of the judge's chambers, defense counsel moved to disqualify the juror and replace her with an alternate. The district court denied the request, stating:

> I don't see sufficient grounds at this point for disqualification of the juror. I think a juror expressing some emotion during a trial, particularly, one such as this, is only being human. We ask a lot of jurors to — we don't ask them to be robots, and so the motion is denied.

Defense counsel responded to the district court's ruling with a clarifying statement: "I am not moving to disqualify this juror because she has emotion. I am doing so because of her intent to communicate with a witness. That is my position." In response, the district court stated, "[Y]ou have a point in the testimony of [A.M.] that there was some, perhaps, intent on [the juror's] part, as she put it, to comfort, but I don't think it rises to the level of disqualification."

The trial then resumed with the cross-examination of A.M. Following the completion of A.M.'s testimony, the trial was recessed for a lunch break. Following the lunch break, the

court, outside of the presence of the jury, was informed by counsel that the same juror had given the bailiff a handwritten note. The parties agreed that because the jury had been kept waiting, the issue raised by the juror's note would be taken up at the next break.

During the next break, the issue of the juror's handwritten note was addressed. The note set forth:

> In closed quarters I was asked about a head nod as I was leaving the court room. I really had no recollection of this at the time.
>
> After thinking back I did recall making a head nod. As I stood to leave the jury chair I noticed the juror behind me had stood and left her water bottle. I recall gesturing including a nod to draw her attention to her water bottle. She quietly responded — "I think I'll just leave it[.]"
>
> I feel this gesture may have been misconstrude [sic] as a gesture to [A.M.]
>
> I just wanted to make you aware of this.

Defense counsel renewed his motion to disqualify the juror and replace her with the alternate juror. The district court again overruled the motion, stating, "[T]he Court stands by the previous ruling, if anything, I believe this exhibit is further basis not to grant the motion, and that the juror can continue and be fair and impartial." Following this ruling, defense counsel moved for a mistrial on the bases that the court's ruling on the disqualification of the juror denied Lantz the right to 12 unbiased jurors, in violation of his rights to due process and a fair trial, and that the evidentiary ruling admitting the testimony of Lantz' ex-wife and K.H. invited the jury to make a decision based upon reasons outside the trial of the elements, thereby denying Lantz his rights to due process and a fair trial. The motion for mistrial was overruled, and the trial continued.

6. Conclusion of Trial and Sentencing

After the State rested its case in chief, Lantz renewed his motion to suppress and moved to strike "the evidence in this case, the testimony and exhibits concerning the search"

of Lantz' residence, on the basis that they violated Lantz' Fourth Amendment rights under both the U.S. and Nebraska Constitutions. The district court overruled this motion. Lantz then renewed his motion for mistrial on the grounds previously stated, i.e., that the testimony of his ex-wife and K.H. and the refusal of the disqualification of the juror denied him his rights to due process and a fair trial, which motion was overruled. Lantz then presented evidence in his defense, including testifying in his own behalf. Lantz denied sexually assaulting A.M. and M.C.

The jury convicted Lantz of the charged offenses, and thereafter, he was sentenced to an aggregate term of imprisonment of not less than 30 years, mandatory minimum term, nor more than 50 years. Specifically, on count I, Lantz was sentenced to 15 to 25 years' imprisonment with credit for 149 days served. On count II, Lantz was sentenced to 15 to 25 years' imprisonment with the sentence ordered to run consecutively to that for count I. On count III, Lantz was sentenced to 15 to 25 years' imprisonment with the sentence ordered to run concurrently with the sentences for counts I and II. However, the written order of sentence differed from the oral pronouncement of sentence in that in the written order, in addition to being given credit for 149 days served on count I, Lantz was also granted credit for 149 days served on count III.

III. ASSIGNMENTS OF ERROR

On appeal, Lantz contends that the district court erred (1) in denying his motion to suppress, (2) in admitting evidence of prior sexual assaults, and (3) in failing to remove a juror who overtly demonstrated sympathy and bias.

IV. ANALYSIS

1. Denial of Motion to Suppress

Lantz contends that the district court erred in denying his motion to suppress evidence obtained in a search of his residence. He contends that the search, conducted more than 14 months after Lantz was arrested, was illegal because it was based upon a warrant (1) issued upon stale allegations and (2) which omitted material facts, i.e., that A.M. had already

testified under oath that she was never assaulted in her bedroom, but only when she slept in the living room.

[1-4] To be valid, a search warrant must be supported by an affidavit which establishes probable cause. *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003); *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *State v. Lee, supra*; *State v. Ortiz, supra*; *State v. Craven*, 253 Neb. 601, 571 N.W.2d 612 (1997). Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time. *State v. Lee, supra*. Probable cause to search is determined by a standard of objective reasonableness, that is, whether known facts and circumstances are sufficient to warrant a person of reasonable prudence in a belief that contraband or evidence of a crime will be found. *Id.*; *State v. Craven, supra*.

[5,6] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" rule whereby the question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *State v. Ortiz, supra*. As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of the affidavit. *Id.*

(a) Staleness

[7,8] Lantz' first argument regarding probable cause in issuing the search warrant is that the information in the affidavit to support the warrant was stale based upon the approximate 14-month time period between his January 11, 2011, arrest and the execution of the search warrant on March 29, 2012.

> "'"[T]here is no bright-line test for determining when information is stale. Whether the averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case,

> and the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit. Time factors must be examined in the context of a specific case and the nature of the crime under investigation." . . .'"

State v. Bossow, 274 Neb. 836, 848, 744 N.W.2d 43, 53 (2008), quoting *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). Where the facts contained in an affidavit indicate an isolated violation of the law, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time; however, where the facts contained in an affidavit indicate protracted and continuous criminal activity or, in other words, a course of conduct, the passage of time becomes less significant. See, *State v. Bossow, supra*; *State v. Faber, supra*.

> "The ultimate criterion in determining the degree of evaporation of probable cause . . . is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime . . . , of the criminal . . . , of the thing to be seized . . . , of the place to be searched . . . , etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed."

State v. Groves, 239 Neb. 660, 680, 477 N.W.2d 789, 802-03 (1991) (Shanahan, J., concurring; Caporale, J., joins), quoting *Andresen v. State*, 24 Md. App. 128, 331 A.2d 78 (1975). Thus, staleness must be determined by the character or nature of the evidence sought.

For example, in *State v. Bossow, supra*, the Nebraska Supreme Court held that a delay between information in the affidavit establishing that three individuals saw marijuana plants growing under a heat lamp at the defendant's residence and the issuance of a search warrant approximately 1 month

later did not render the search warrant too stale to establish probable cause. The affidavit in support of the search warrant set forth that marijuana plants can take up to 22 weeks to mature and can grow to over 8 feet tall. The largest marijuana plant described in the affidavit was approximately 4 feet tall, with the other plants much smaller than that, indicating that the plants were in the early stages of development and unlikely to be harvested in the near future or removed from the defendant's residence. Thus, the Nebraska Supreme Court held that given the particular circumstances of the defendant's case, the passage of time was not fatal to the trial court's finding of probable cause.

Conversely, in *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (1996), *overruled on other grounds, State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000), the Nebraska Supreme Court held that information in an affidavit regarding the defendant's alleged prior drug activities which dated from 4 months to 10 years in the past was stale information and could not be used to support probable cause for a warrant. Relying on *State v. Reeder*, this court held similarly in *State v. Valdez*, 5 Neb. App. 506, 562 N.W.2d 64 (1997), finding that information detailing a defendant's alleged drug activities dating 6 months to 5 years prior to the affidavit was not so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.

Unlike the aforementioned cases, which concerned drug activities, in the instant case, we are dealing with an affidavit seeking biological or DNA evidence. By its nature, such evidence is of a type that may be found years after its deposit. See *People v. Miller*, 75 P.3d 1108, 1113 n.3 (Colo. 2003) ("[t]he type of evidence and activity involved is important[; s]ome types of evidence the police seek to obtain through a search warrant may be relatively immune from becoming stale, for example, DNA evidence at the specified location"). Although Nebraska appellate courts have not considered the issue of the staleness of information contained in the affidavit for a search warrant seeking DNA or other biological evidence, the question has been addressed by other state courts. For example, in *State v. Daniels*, 234 Or. App. 533, 228 P.3d 695 (2010),

the Oregon Court of Appeals held that facts contained in an affidavit which included the defendant's alleged sexual abuse of adopted and biological daughters over 20 years prior and a statement by a male foster child who, for a period of time ending 9 months prior to the warrant application, had regularly witnessed the defendant sexually abusing the child's 13-year-old sister by rubbing her crotch and vaginal area were sufficient to justify a search warrant for photographs and videotapes. The Oregon Court of Appeals noted that evidence of inculpatory sexual activity, such as fluids on bedding or undergarments, "unlike drugs, is not consumable or marketable, nor is it likely to dissipate (DNA, for example, lasts for millennia); therefore, it is not necessarily 'stale' after a short time." *Id.* at 539, 228 P.3d at 699. Likewise, in *State v. Lejeune*, 277 Ga. 749, 594 S.E.2d 637 (2004), the Georgia Supreme Court held that facts contained in an affidavit justifying a warrant to search a home for a vise and for blood evidence were not stale where an alleged murder occurred more than 5 years prior and where the affidavit stated that there was a reasonable belief that the blood evidence would still be found because blood does not degrade when protected from the elements.

Lesser time periods between the crime and the affidavit to obtain the search warrant were approved in *Carruthers v. State*, 272 Ga. 306, 528 S.E.2d 217 (2000), *overruled on other grounds, Vergara v. State*, 238 Ga. 175, 657 S.E.2d 863 (2008); *People v. Cullen*, 695 P.2d 750 (Colo. App. 1984); and *State v. Veley*, 37 Or. App. 235, 586 P.2d 1130 (1978). In *Carruthers v. State, supra*, an affidavit used to obtain a warrant to search a murder defendant's residence for a leather jacket, a handgun, and bloodstained clothing was not stale, even though the crime had occurred 6 months earlier, where the affidavit stated specifically that the affiant had interviewed the defendant's accomplice 4 days earlier and had learned that on the night of the murder, the defendant wore a leather jacket to conceal blood on him, had washed bloody clothes rather than discarding them, and had possessed a handgun and stated specifically that the defendant had been incarcerated for most of the time since the murder, suggesting that he would have had limited opportunity to dispose of evidence. Likewise, in

People v. Cullen, supra, facts contained in an affidavit justifying a warrant to search sites for evidence, including scientific evidence such as hair, fibers, blood, and fingerprints, was not stale even though the crimes were perpetrated 8 months prior to the application for the search warrants. Similarly, in *State v. Veley, supra*, the Oregon Court of Appeals found that an affidavit used to obtain a warrant authorizing a search of a car for semen stains on its seats was not stale even though the last sexual act occurred over 90 days prior to the application for the warrant, because semen stains were a condition that was likely to continue for a prolonged period of time.

In the instant case, there were approximately 14 months between the time of the last alleged sexual assault, which occurred on January 11, 2011, and the execution of the search warrant on March 29, 2012. Crosby's affidavit in support of the search warrant set forth that based upon his experience, which included hundreds of previous investigations dealing with child sexual assaults, child abuse or neglect, and child pornography cases, biological evidence such as semen, blood, vaginal secretions, and epithelial cells can be located years after being placed on items such as fabric or carpet. The affidavit further set forth that biological evidence can be found in places that are climate controlled, such as a house, apartment, or commercial space such as an office building, by using technology referred to as an "alternative light source." Because the search warrant sought DNA evidence inside a residence, which evidence was not likely to be degraded, the information contained in the affidavit was not stale even though there had been over 14 months between the last alleged sexual assault and the execution of the search warrant. Therefore, this assignment of error is without merit.

(b) Omission of Material Facts

Lantz' second argument regarding probable cause in issuing the search warrant is that Crosby's affidavit in support of the search warrant materially omitted the fact that A.M. testified at the pretrial hearing, 4 months before the issuance of the search warrant, that Lantz sexually assaulted her in the living room only.

[9-11] Omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit. *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009). However, a defendant who seeks to suppress evidence obtained under a search warrant has the burden of establishing that the search warrant is invalid so that evidence secured thereby may be suppressed. *State v. Thomas, supra*. The role of an appellate court is to determine whether the affidavit used to obtain a search warrant, if it contained the omitted information, would still provide a magistrate or judge with a substantial basis for concluding that probable cause existed for the issuance of the warrant. *Id*. If a substantial basis for probable cause would still exist, then the defendant's argument fails. *Id*.

As Crosby set forth in his affidavit in support of the search warrant, A.M. believed that Lantz was coming into her bedroom at night while she was asleep and she had placed a brick by her bedroom door to try to determine if Lantz was entering her bedroom at night while she was sleeping. Additionally, Lantz' semen was found on the inside crotch area of the underwear A.M. wore at the time of the last sexual assault, which occurred on January 11, 2011. Based upon these facts, the omission that A.M. had testified at the preliminary hearing that no sexual assaults had occurred in her bedroom was not misleading and a substantial basis for probable cause for issuance of the search warrant existed. Consequently, Lantz' argument is without merit.

2. Admission of Evidence of Prior Sexual Assaults

Lantz also contends that the district court erred in admitting evidence of prior sexual assaults under "Rule 414" where there was no clear and convincing evidence that the prior sexual assaults occurred.

[12,13] Section 27-414 is a new Nebraska evidentiary rule that became operative on January 1, 2010. *State v. Craigie*, 19

Neb. App. 790, 813 N.W.2d 521 (2012). In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013); *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012). 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. *State v. Valverde, supra*; *State v. Kibbee, supra*.

Under § 27-414(1), evidence of a criminal defendant's commission of another sexual assault offense is admissible "if there is clear and convincing evidence otherwise admissible under the Nebraska Evidence Rules that the accused committed the other offense or offenses. If admissible, such evidence may be considered for its bearing on any matter to which it is relevant."

Lantz contends that the State failed to establish by clear and convincing evidence that the prior sexual assaults occurred, because K.H. could not place the alleged sexual assaults in context by season, date, or hour, except to state that the assaults occurred before she started kindergarten at age 6; she made inconsistent statements regarding whether Lantz touched her via skin-to-skin contact or over her clothing and whether Lantz ejaculated; and she delayed in reporting the alleged assaults for over 8 years.

However, despite K.H.'s inability to provide details regarding the exact timing of the assaults, which is common in the testimony of a child attempting to recount traumatic events, there were notable similarities between the prior acts involving K.H. and the acts involving A.M.: Both victims were Lantz' stepdaughters, both victims were under the age of majority at the time the sexual assaults occurred, both victims were sexually abused while they were alone with Lantz (except for the last sexual assault alleged against A.M., which occurred in the presence of M.C.), and the sexual assaults occurred in the living rooms of the victims' respective houses. Finally, although the incidents with K.H. occurred at least 6 years prior

to the first time that Lantz sexually assaulted A.M., the question of whether evidence of other conduct "'"is too remote in time is largely within the discretion of the trial court. While remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence."'" *State v. Valverde*, 286 Neb. at 295, 835 N.W.2d at 744, quoting *State v. Kibbee, supra*. Thus, the district court did not abuse its discretion in finding that the State met its burden by clear and convincing evidence and this assignment of error is without merit.

3. Failure to Remove Juror

Lantz contends that the district court erred in refusing to remove a juror who had overtly demonstrated sympathy and bias during his trial, thereby denying him his constitutional right to an impartial jury.

[14] The issue of the retention of a juror after the commencement of trial is a matter of discretion for the trial court. See *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009).

[15] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. *State v. Harris*, 264 Neb. 856, 652 N.W.2d 585 (2002); *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002); *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998); *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997) (specifically overruling *State v. Owen*, 2 Neb. App. 195, 508 N.W.2d 299 (1993), which had set forth heightened "clear and convincing" evidentiary standard for proving prejudice in criminal jury misconduct cases). But see, *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) (in criminal case involving juror behavior only, burden to establish prejudice rests on party claiming misconduct, which must be demonstrated by clear and convincing evidence); *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002) (also setting forth "clear and convincing evidence" standard).

[16-18] The competency of a juror is generally presumed, and the burden is on the challenging party to establish otherwise. *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998). A trial judge is not required to excuse a juror when the juror is able to decide the case fairly and impartially. See *id*. An appellate court defers to the trial court's decision whenever a juror is unequivocal that he or she can be fair or impartial. *Howe v. Hinzman*, 14 Neb. App. 544, 710 N.W.2d 669 (2006). This rule applies both to the issue of whether a potential juror should be removed for cause prior to trial and to the situation of whether a juror should be removed after the trial has commenced. See *id*.

In the instant case, once the concerns regarding the juror were brought to the trial court's attention, the court immediately addressed the issue by holding a hearing. The juror stated, under oath, that she may have smiled at the witness, A.M., but that she was not certain she did so and that she would not make up her mind until she had heard all of the evidence in the case. Further, in her note to the court, the juror denied nodding at A.M., stating that she was gesturing to a fellow juror who had forgotten a water bottle.

Because Lantz has alleged jury misconduct, he bears the burden of proving, by a preponderance of the evidence, both the existence of misconduct and prejudice to the extent that he was denied a fair trial. He fails in both respects: He cannot establish misconduct, because the juror denied nodding at A.M. and could not remember if she smiled at A.M., and he cannot establish prejudice, because the juror unequivocally stated that she would not make up her mind as to Lantz' guilt or innocence until she heard all of the evidence in the case. The district court held a hearing and carefully exercised its discretion on this matter, and no abuse of that discretion is evidenced by the record.

4. Plain Error Regarding Sentencing

[19-21] In its brief and at oral argument, the State brought to this court's attention errors regarding Lantz' sentencing, which we address under our authority to note plain error. An

appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012); *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009). Consideration of plain error occurs at the discretion of an appellate court. *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 2359, 185 L. Ed. 2d 1082 (2013); *State v. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012). 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. *State v. Reinpold*, 284 Neb. 950, 824 N.W.2d 713 (2013).

Lantz was convicted of three counts of first degree sexual assault of a child, all Class IB felonies, which are punishable by 20 years' to life imprisonment. See, Neb. Rev. Stat. § 28-105 (Reissue 2008); Neb. Rev. Stat. § 28-319.01 (Cum. Supp. 2012) (first degree sexual assault of child). However, although classified as a Class IB felony, first degree sexual assault of a child carries a mandatory minimum sentence of 15 years' imprisonment for the first offense. § 28-319.01(2).

On count I, Lantz was sentenced to 15 to 25 years' imprisonment with credit for 149 days served. On count II, Lantz was sentenced to 15 to 25 years' imprisonment with the sentence ordered to run consecutively to that for count I. On count III, Lantz was sentenced to 15 to 25 years' imprisonment with the sentence ordered to run concurrently with the sentences for counts I and II.

The State argued at oral argument that because Class IB felonies carry a 20-year minimum term of imprisonment, Lantz' sentences, which contain a 15-year mandatory minimum term of imprisonment, were not within the statutory sentencing range. The State contends that the sentencing statutes require the minimum portion of Lantz' sentences to be 20 years' imprisonment, of which 15 years is a mandatory minimum sentence *not subject to good time*. We disagree with the State's argument.

[22] Although § 28-105 sets forth that a Class IB felony is punishable by 20 years' to life imprisonment, § 28-319.01(2) provides that even though classified as a Class IB felony, first degree sexual assault of a child carries a mandatory minimum sentence of 15 years' imprisonment for the first offense. Since the statutes provide for different minimum sentences for the same offense, there is a conflict between the two statutes regarding the minimum sentence for a conviction of first-offense first degree sexual assault of a child. When there is a conflict between statutes, we are guided by the principle that to the extent there is a conflict between two statutes, the specific statute controls over the general statute. *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012). In this circumstance, the Legislature has made a specific provision that the offense of first-offense first degree sexual assault of a child, even though classified as a Class IB felony, carries a mandatory minimum sentence of 15 years' imprisonment. This specific statute controls over the general statute regarding sentences providing for a 20-year minimum term of imprisonment. See *State v. Fleming*, 280 Neb. 967, 982, 792 N.W.2d 147, 159 (2010) (defendant's 20- to 40-year sentences for two convictions of first degree sexual assault of child were not excessive where minimum sentence was "just 5 years more than the mandatory minimum for the crimes for which he was convicted").

[23,24] Although each of the sentences imposed was within the statutory sentencing range, the portion of the sentencing order providing that the sentence for count III was to run concurrently with the sentences for counts I and II contradicts the Nebraska Supreme Court's holding in *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), which provides that the sentence for any conviction carrying a mandatory minimum sentence must be ordered to be served consecutively. "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." *Id.* at 191, 826 N.W.2d at 268. Thus, we must remand with directions that the district court resentence Lantz on count III to provide that this sentence

must be served consecutively to those for counts I and II. See, *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006) (appellate court has power on direct appeal to remand cause for imposition of lawful sentence where erroneous one has been pronounced); *State v. Wilson*, 16 Neb. App. 878, 754 N.W.2d 780 (2008).

[25-27] Additionally, we note that the written sentencing order differs from the court's oral sentencing pronouncement by providing that Lantz is to receive credit for 149 days served on count III. A sentence validly imposed takes effect from the time it is pronounced. *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006). 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. *Id*. When there is a conflict between the record of a judgment and the verbatim record of the proceedings in open court, the latter prevails. *State v. Herngren*, 8 Neb. App. 207, 590 N.W.2d 871 (1999). Because the district court orally pronounced valid sentences, the oral pronouncement controls and, upon remand, Lantz will not receive credit for time served on count III.

V. CONCLUSION

Having considered and rejected Lantz' assignments of error, we affirm his convictions. Additionally, Lantz' sentences are affirmed with the following exception: We vacate the portion of Lantz' sentence on count III where the court ordered the sentences to run concurrently and remand the cause with directions for the court to order the sentences to be served consecutively.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED FOR RESENTENCING.

IN RE INTEREST OF JOSEPH S. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. KERRI S., APPELLEE.

842 N.W.2d 209

Filed January 21, 2014. No. A-13-339.

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. **Parental Rights.** The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.
3. **Constitutional Law: Parental Rights: Due Process.** The fundamental liberty interest of natural parents in the care, custody, and management of their children is afforded due process protection.
4. **Parental Rights: Due Process.** State intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause.
5. **Parental Rights: Due Process: Final Orders: Appeal and Error.** Due process rights are of such importance that a parent's failure to appeal from an adjudication order, dispositional order, or other final, appealable order leading to the termination of parental rights will not preclude an appellate court from reviewing the entire proceeding for a denial of due process in an appeal from a termination order.
6. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Affirmed.

Donald W. Kleine, Douglas County Attorney, and Jennifer Chrystal-Clark for appellant.

Thomas C. Riley, Douglas County Public Defender, Christine D. Kellogg, and Zoë Wade for appellee.

Maureen K. Monahan, guardian ad litem.

IRWIN, PIRTLE, and BISHOP, Judges.

PIRTLE, Judge.

INTRODUCTION

The State of Nebraska appeals the order of the separate juvenile court of Douglas County finding that the three minor children of Kerri S. did not come within the meaning of Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2012) and finding that it was not in the children's best interests to terminate Kerri's parental rights. This appeal presents us with an apparent issue of first impression, that being whether a parent's noncompliance with State-offered services which are voluntary in nature may serve as a basis to terminate the parent's rights under § 43-292(2). The juvenile court answered that question in the negative. Because we agree with the juvenile court, we affirm.

BACKGROUND

Kerri is the biological mother of Joseph S., born in January 2000; William S., born in November 2005; and Steven S., born in December 2006.

Kerri and the children came to the attention of the Nebraska Department of Health and Human Services (DHHS) on March 16, 2009. In that case, Kerri was found to have completed the court-ordered and court-monitored plan. The children were returned to her care, and the case was closed successfully in November 2011.

Kerri's family attracted the attention of DHHS a few months later, and she cooperated with services on a voluntary basis. Kerri had tested positive for cocaine, and she began voluntary urinalysis (UA) testing. The "voluntary" stage of DHHS' involvement with Kerri lasted until August 2012, approximately 8 months.

On August 9, 2012, the State filed a petition alleging the children were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) by reason of the faults or habits of Kerri. The State also filed a motion for temporary custody and an affidavit for removal of the minor children from the home. The juvenile court ordered DHHS to take immediate custody of the minor children.

The petition alleged the children came within the meaning of § 43-247(3)(a) in that (1) Kerri's use of alcohol and/or controlled substances placed the children at risk for harm; (2) Kerri had been offered voluntary services with DHHS and the Nebraska Families Collaborative (NFC), but she failed to participate or engage in services; (3) Kerri failed to put herself in a position to appropriately parent the children; (4) Kerri failed to provide safe, stable, and/or appropriate housing; (5) Kerri failed to provide proper parental care and support for the children; and (6) due to the above allegations, the children were at risk for harm.

On December 19, 2012, the State filed an amended petition. Count III alleged the children were within the meaning of § 43-292(2) because Kerri substantially and continuously or repeatedly neglected and refused to give the children or a sibling of the children necessary parental care and protection. Count IV alleged termination of Kerri's parental rights was in the best interests of the children.

An adjudication hearing took place in this case on March 13, 2013.

Melissa Misegadis, a family permanency supervisor with NFC, testified that she began working with Kerri in July 2010 as the family's service coordinator. Misegadis testified that the children were out of the home during the first case for 1 year, between July 2010 and July 2011. Misegadis testified that the family was offered supervised visitation; family support; peer-to-peer mentoring; mental health services, including individual and family therapy; random drug testing; and psychotropic medication management.

Misegadis testified that during the pendency of the case, Kerri was not consistently compliant with the services, but that "Kerri would always end up doing as we had asked her to do." Misegadis said Kerri's biggest issue was "follow-through," consistently attending every visit, completing all UA testing, and participating in every appointment. Despite these issues, Misegadis recommended that the children be returned to Kerri's home because Kerri had been demonstrating a sober lifestyle and the ability to make appropriate decisions regarding whom she would allow her children to be around. Kerri

was visiting with the children consistently, was compliant with her medication management, and had positive reports from her therapist. Misegadis testified that Kerri completed "family support," as well as individual therapy and family therapy. She also testified that Kerri had a positive UA test in September or October 2010, but did not have another through the close of that case on November 28, 2011.

At that time, Misegadis referred the family to aftercare through NFC, because she was concerned about a possible relapse. Misegadis had no further contact with the family until an intake occurred on December 20, 2011. DHHS investigated the intake and determined it was unfounded.

On January 12, 2012, DHHS received another intake with allegations that the children were left with a relative and that Kerri was unreachable. There was also concern that there was a lack of supervision and that Kerri was using methamphetamine. Misegadis said that DHHS transferred the case to NFC and that Kerri indicated she was willing to work with DHHS on a voluntary basis. Misegadis testified a parent can ask that his or her children be returned to the home at any time. She stated that if a parent requests the return of the children to the home and that there are safety concerns, there is a possibility DHHS will file for removal in juvenile court.

Misegadis attended team meetings, and Kerri agreed to UA testing to alleviate concerns about drug use. Kerri admitted to using marijuana and indicated it was an isolated incident. Kerri signed a voluntary placement agreement, placing the children in foster care and making them wards of the State. Misegadis testified that the timeframe for voluntary placement is 180 days and that the parent can request that a child be returned to them at any time during the 180-day timeframe. Misegadis testified Kerri did not consistently take part in the requested UA testing during the voluntary period. She testified that in August 2012, the NFC staff learned the voluntary placement was to end, so it made the decision to file for removal due to safety concerns which would arise if the children were to return to Kerri's home.

Anne Petzel, a family permanency specialist employed by NFC, testified that she worked with Kerri and the children

between August 6 and 13, 2012. Petzel testified that she conducted a drop-in visit to Kerri's home on August 6 and found that the home was in disarray. Petzel testified there were piles of clothes around the home; beds "propped against the wall, unmade"; and people in the home who did not belong there. She testified that she saw a woman sleeping on one of the beds with no sheets, graffiti on the walls, and empty alcohol bottles around the home. Petzel said that there were approximately five adults in the house and that Kerri described these adults as friends who were there to help her paint and get the home ready for the children to return.

Petzel said that Kerri stated she would remove the alcohol bottles before the children returned to the home and that they discussed safety guidelines and the expectation that the home must be clean. Kerry told Petzel that the home would be ready for the children to return on August 15, 2012. Petzel stated that the kitchen was clean, although there was little food in the refrigerator, and that there were no foul odors throughout the residence. Petzel said that the case was then transferred to a court-specific team; such teams are employed after a voluntary case goes to court.

Brenda Alvarado, a drug test specialist, testified that Kerri became her client in November 2011 and remained her client at the time of the adjudication.

Alvarado testified that in January 2012, Kerri was tested on a weekly basis, and that her frequency increased to eight times per month in June 2012. Alvarado testified that Kerri consistently submitted to UA testing four to five times per month until July. Between January and July 2012, Kerri tested positive for amphetamines during the first test; a mixture of amphetamines, THC, and methamphetamine during the second test; and methamphetamine during the third test.

There were a few tests between July and December 2012, and the results were negative. During this time period, the UA testing was voluntary. Alvarado testified that during that period, she frequently had trouble contacting Kerri by telephone, and that when that happened, she would either proceed to Kerri's home or notify Kerri's family permanency supervisor.

The frequency of the UA testing decreased to once a month in March 2013. Alvarado stated that she received one UA test from Kerri in 2013 and that she was unsuccessful two other times because she did not have reliable contact information for Kerri. The preliminary test in March 2013, which was taken the Saturday before the hearing, was negative.

Tiffany Martin, a family permanency specialist employed by NFC, testified that she began working with Kerri in August 2012 and was the family permanency supervisor at the time of adjudication. Martin testified that she met with Kerri on September 6 at NFC and that they discussed visitation and Kerri's mental health. At the time of the meeting, visits had ceased because of lack of consistency. Martin testified that by the next team meeting in November 2012, Kerri was living with a friend and no longer had her own residence. Kerri accepted family support services, but Martin said they were not set up. Martin testified that UA testing was still in place and that Kerri was attending Alcoholics Anonymous meetings. Martin testified that she had difficulty making contact with Kerri and that team meetings did not occur in October or December 2012.

At a team meeting in January 2013, Kerri reported that she started participating in an intensive outpatient program through a family service organization and that she had a psychiatric evaluation set up through a doctor. Martin testified that she was later informed that Kerri was on the waiting list. Martin testified that Kerri "was on her medication" and that she "seemed to be in a very positive place." After the team meeting in January, Kerri attended one visit with the children, and Martin testified Kerri did not make progress or engage in services. Martin testified that there may have been more visits, but that she had not talked with all of the individuals who were approved for visits. Martin testified that Kerri's parental rights should be terminated because of her lack of progress and the length of time the children had been in foster care. Martin testified that Kerri was supposed to set up a psychiatric evaluation, but Martin did not hear from Kerri about whether the appointment was scheduled, and that she was not able to

contact Kerri "to follow up." Martin testified she relied on Kerri to set up her own services because it is important for parents to make efforts in their own behalf.

The juvenile court found the children to be within the jurisdiction of the court and found the children to be within the meaning of § 43-247(3)(a) by a preponderance of the evidence. The juvenile court found that the children did not come within the meaning of § 43-292(2) and that it was not in the best interests of the children to terminate Kerri's parental rights. The juvenile court dismissed counts III and IV of the amended petition for failure to present a prima facie case. The court ordered the children to remain in the temporary custody of DHHS.

The State timely appeals.

ASSIGNMENTS OF ERROR

The State asserts that the juvenile court erred in not finding clear and convincing evidence Kerri's parental rights should be terminated under § 43-292(2) and that termination of parental rights was in the children's best interests.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

ANALYSIS

[2,3] The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). The fundamental liberty interest of natural parents in the care, custody, and management of their children is afforded due process protection. *Id.*

[4,5] State intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause. *In re Interest of Mainor T. & Estela T., supra*. Due process rights are of such importance that a parent's failure to appeal from an adjudication order, dispositional order, or other final, appealable order leading to the termination of parental rights will not preclude this court from reviewing the entire proceeding for a denial of due process in an appeal from a termination order. See *id*.

This is not an appeal of a termination order, but, rather, an appeal of an order of the juvenile court which did not terminate a mother's parental rights for want of clear and convincing evidence that the statutory provisions of § 43-292 were met and that termination was in the children's best interests.

The evidence shows that in January 2012, Joseph, William, and Steven were not under the jurisdiction of the juvenile court, but that they were removed from Kerri's home because she had agreed to cooperate with services of NFC on a voluntary basis. The voluntary basis period was to last for a term of 180 days. After the voluntary period, the State filed pleadings to adjudicate the children, bringing them under the jurisdiction of the juvenile court. Shortly after doing this, the State filed an amended petition seeking termination of Kerri's parental rights. The facts supporting the termination consisted of evidence from a previous juvenile case which had been satisfactorily completed and closed, as well as evidence of Kerri's actions during the voluntary basis period.

As stated earlier, this is a case of first impression, because this court and the Nebraska Supreme Court have not previously considered any cases where the removal of children and the eventual petition to terminate parental rights stem from a "voluntary basis" agreement. Though the nuances of a voluntary basis agreement have not been considered by Nebraska courts, the law with regard to due process is well established.

[6] Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse

witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

The Nebraska Juvenile Code provides for such due process protections for both parents and children. The code specifically cites that it is to "provide a judicial procedure through which these purposes and goals are accomplished and enforced in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced." Neb. Rev. Stat. § 43-246(7) (Cum. Supp. 2012).

Based upon our review of the record, there is little evidence that Kerri or the children were afforded due process at the beginning, or throughout the voluntary phase, of this case. The voluntary placement agreement was not entered into evidence, so we cannot determine whether Kerri was made aware that concerns about her alleged drug use and alleged inability to appropriately and safely provide for the children placed them at risk for harm. There is no evidence that Kerri was advised to consult with an attorney about voluntarily placing her children in the care of the State, which effectively gave the State legal custody of the children.

It is unclear whether Kerri was informed that she had the right to request the return of the children to the home at any time during the 180-day voluntary period or whether she was aware that requesting the return of the children could trigger a filing for removal in the juvenile court.

Also, there is no evidence that she was represented by an attorney during the voluntary period, nor did she have a hearing to address or refute the allegations before an impartial decisionmaker. While it is likely that Kerri was aware of the allegations of drug use, because she agreed to participate in UA testing, the testing was voluntary and was not part of a court-ordered plan. There is no evidence that she was advised to consult with an attorney before voluntarily participating in services. Further, there is no evidence Kerri was aware that making such an agreement could result in evidence of her level of compliance with the plan, which evidence could then

be used against her when the children were adjudicated and a petition was filed to terminate her parental rights.

Once a case is adjudicated under § 43-247(3)(a), the State is charged with identifying a plan for the family and establishing services to achieve the goals of the plan. DHHS has the duty to file a report and a case plan within 30 days after a juvenile has been placed in its custody and every 6 months thereafter. Neb. Rev. Stat. § 43-285(3) (Cum. Supp. 2012). The prosecutor, attorneys, and guardian ad litem all have the opportunity to agree, disagree, or ask for additions to or deletions from the plan, and the guardian ad litem submits a report. In addition, unless the case comes under a specific exception, when children are removed from the parental home, a court must make a finding that the State has made reasonable efforts to preserve and reunify the family under Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2012).

The voluntary placement agreement in this case circumvented the established statutory processes for removal and petitions for termination of parental rights, and we find Kerri was denied due process of law. As a result, Kerri's compliance during the voluntary basis period is not acceptable evidence to be used to satisfy the statutory requirements to terminate her parental rights.

CONCLUSION

We find the evidence used to support the termination of Kerri's parental rights to her children was a violation of her due process rights. We find the juvenile court did not err in finding there was not clear and convincing evidence to support the termination of Kerri's parental rights under § 43-292(2).

AFFIRMED.

KATHLEEN BELITZ, NOW KNOWN AS KATHLEEN MONACO, APPELLEE, V. JOHN F. BELITZ, JR., APPELLANT.

842 N.W.2d 613

Filed January 28, 2014. No. A-12-461.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which the trial court's (1) resolution of issues of law is reviewed de novo, (2) factual findings are reviewed for clear error, and (3) determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **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.
5. ____: ____. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
6. **Child Custody.** A proceeding regarding a child custody determination is considered a special proceeding under Nebraska law.
7. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
8. **Final Orders.** When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a party, the order affects a substantial right.
9. **Parental Rights: Final Orders.** Whether a substantial right of a parent has been affected by an order is dependent upon both the object of the order and the length of time over which the parent's relationship with the child may reasonably be expected to be disturbed.
10. **Child Custody: Final Orders.** Where child custody is modified on a permanent basis, the order clearly affects a substantial right.
11. **Final Orders: Appeal and Error.** When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.

12. **Contempt: Words and Phrases.** When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
13. **Contempt: Proof.** Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.
14. **Jurisdiction: Appeal and Error.** Once an appeal has been perfected, the trial court from which the appeal was taken no longer has jurisdiction.
15. **Jurisdiction: Time: Appeal and Error.** A party's failure to timely appeal from a final order prevents an appellate court from exercising jurisdiction over the issues raised and decided in that order.

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

Joan Watke Stacy for appellant.

Joni Visek for appellee.

MOORE, PIRTLE, and BISHOP, Judges.

MOORE, Judge.

John F. Belitz, Jr., appeals following three orders of the district court for Douglas County which, among other things, modified the custody arrangement in the parties' decree of dissolution and awarded custody of the parties' youngest daughter, Katherine Belitz, to Kathleen Belitz, now known as Kathleen Monaco. John asserts the district court committed a number of errors in its orders, including in modifying custody, allowing the parties' older daughters to testify at trial, improperly calculating child support, awarding Kathleen attorney fees, failing to find Kathleen in contempt, and entering an order releasing garnished funds after John had filed his notice of appeal.

For the reasons that are set out in our analysis below, we find that we do not have jurisdiction to address John's arguments related to the modification order or the garnishment proceedings. We also conclude that the district court did not abuse its discretion when it declined to find Kathleen in contempt of previous orders.

I. FACTUAL BACKGROUND

This protracted custody dispute now makes its fourth appearance in this court. Due to the extensive history of this case, we will not recount the entire factual background in this opinion, but instead focus on the facts pertinent to this decision. For a full account of the proceedings in this case, we direct the reader to our three previous opinions. See *Belitz v. Belitz*, 8 Neb. App. 41, 587 N.W.2d 709 (1999); *Belitz v. Belitz*, No. A-02-973, 2003 WL 21648118 (Neb. App. July 15, 2003) (not designated for permanent publication); and *Belitz v. Belitz*, 17 Neb. App. 53, 756 N.W.2d 172 (2008).

During their marriage, John and Kathleen had three daughters: the first daughter, born in October 1994; the second daughter, born in March 1996; and the third daughter, Katherine, born in July 1997. After the parties' divorce in 1998, Kathleen moved to Chicago, Illinois, and is now remarried with four additional children. Following their divorce, John and Kathleen have engaged in substantial litigation over custody and parenting time.

In the decree of dissolution, Kathleen was originally granted custody and given permission to remove the parties' three daughters to Illinois. She later lost her rights as custodial parent after the district court granted John's application to modify in July 2002. After that modification, the parties' daughters returned to Omaha, Nebraska, and have been living with John since. Kathleen has remained living in Chicago with her subsequent family.

The present appeal relates to a series of events that began during Kathleen's parenting time with the parties' three daughters in the summer of 2010. Under the custody order in effect at the time, the parties' daughters frequently traveled to Chicago to visit Kathleen. At some point during that summer, the parties' youngest child, Katherine, believed that John had agreed to allow her to move to Chicago to live with Kathleen. John disagreed that he had given Katherine permission to move to Chicago to live with her mother, but stated that he agreed to consider Katherine's wishes if he and Kathleen could come to agreement on a number of matters. However, communication between John and Kathleen soon

broke down and no mutual agreement was reached by the end of the summer.

At the beginning of August 2010, the two older daughters returned to Omaha after being with Kathleen as scheduled, but Katherine did not. Upon their return, the older daughters informed John that Katherine was not coming back to Omaha. On August 11, John initiated contempt proceedings against Kathleen by filing an application for an order to show cause. In his application, John alleged that Kathleen should be found to be in contempt of court because she had not paid his attorney fees as mandated by the previous modification order and because she failed to return Katherine to Omaha within the time specified by the court order. On August 12, the district court signed an order to show cause and an ex parte order requiring Kathleen to return Katherine to Omaha within 24 hours of service of the order; however, the ex parte order was not filed until August 30. Kathleen filed a motion for modification on August 13, seeking custody of Katherine.

Despite four attempts, the sheriff's office of DuPage, Illinois, was not able to personally serve Kathleen with the ex parte order. This prompted John to file a motion for alternate service and for an ex parte order, requesting the district court order Katherine's return. In response, Kathleen filed a motion for temporary allowances, asking the court to award her temporary custody of Katherine. On August 30, 2010, the district court granted John's motion for alternate service, issued an ex parte order commanding Kathleen to return Katherine to Omaha by 6 p.m. on September 1, and issued an order requiring Kathleen to appear and show cause as to why she should not be held in contempt. The hearing on the order to show cause was later continued until the trial on Kathleen's complaint to modify. Kathleen returned Katherine to Omaha on September 1. After her return, Katherine continued living with John, completing the eighth grade and beginning her freshman year of high school.

Trial was held on August 22 and September 23, 2011. During the trial, the parties adduced evidence regarding the complaint to modify custody as well as the order to show cause regarding Kathleen's alleged contempt. On March 2,

2012, the district court issued its order of modification, finding a "sufficient change in circumstance" and finding that Katherine's best interests required that Kathleen be awarded custody. In its order, the court also noted that it did not find awarding Kathleen custody of Katherine constituted a removal as defined under Nebraska law, but stated that the requirements for removal would have been met. In addition to granting Kathleen custody of Katherine, the district court granted John the same parenting time rights as Kathleen received when she was the noncustodial parent and ordered John to pay $431.26 per month to Kathleen in child support and $7,500 of Kathleen's attorney fees. John did not directly appeal from that order.

Following the modification order, John apparently attempted, unsuccessfully, to electronically file a motion for a new trial. However, the court noted no evidence was adduced to support this assertion. Thus, the court denied John's request to consider John's alleged electronically filed motion for new trial and would not allow John to submit a motion for new trial out of time.

Because the district court's modification order did not address his contempt application, John filed a pleading styled as "Motions in the Alternative" on April 19, 2012. In this single filing, John included three alternative motions: (1) a motion for "entry of a final order or judgment to include final determinations and findings as to all the claims between the parties"; (2) a motion requesting an "express finding that although not all claims between the parties has [sic] been made there is no just reason for delay and an express direction for the entry of judgment"; and (3) a motion for "correction of the record." The basis of John's argument in this filing was that the modification order was not a final, appealable order because it did not address the two contempt issues. Thus, he requested that the district court enter a final order on the contempt issues, certify a final judgment pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008), or utilize its statutory power under Neb. Rev. Stat. § 25-2001 (Reissue 2008) to correct the record and find that his motion for new trial was timely filed.

On April 20, 2012, the district court entered an order finding that Kathleen was not in contempt of court for failing to pay John's attorney fees as required by the prior modification order. The court concluded that Kathleen did not have the ability to make the payments as required by the order and, therefore, did not willfully disobey the order.

On May 7, 2012, John filed another motion requesting that the district court enter an amended order resolving all issues that were presented to the court. In this motion, John asserted that the district court had not resolved the issue of whether Kathleen had violated the previous order of modification by refusing to send Katherine back to Omaha at the end of Kathleen's summer parenting time in 2010. John requested that the district court enter an amended order containing findings from all issues before the court. After a hearing on this motion on May 11, the court entered an order on May 22, finding that Kathleen was not in contempt for failing to return Katherine at the conclusion of Kathleen's parenting time in 2010. The court noted that the order resolved all issues raised at trial.

To recover the attorney fees John was ordered to pay in the March 2, 2012, modification order, Kathleen's attorney began garnishment proceedings. On May 11, the district court entered an order to deliver nonexempt funds from John's bank to the court for payment to Kathleen's attorney. On May 17, John filed a motion for an injunction to prohibit Kathleen from executing on the judgment, to vacate the order to deliver nonexempt funds, and to demand the return of the funds delivered. The court denied this motion in an order filed on May 29.

On May 22, 2012, John filed a notice of intention to appeal in which he indicated that he was appealing from the orders dated March 2, 2012; April 20, 2012; and May 22, 2012.

II. ASSIGNMENTS OF ERROR

In his brief, John assigns and argues nine errors. However, because of our conclusion regarding jurisdiction, we discuss only two of these errors in order to resolve this appeal. John contends, restated, that the district court erred in not finding

Kathleen in contempt for either (1) failing to pay attorney fees from a 2007 modification order or (2) failing to return Katherine to Omaha at the end of her summer parenting time in 2010.

III. STANDARD OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law. *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013).

[2] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which the trial court's (1) resolution of issues of law is reviewed de novo, (2) factual findings are reviewed for clear error, and (3) determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

IV. ANALYSIS

1. Jurisdiction Over Modification Order

[3,4] 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. *Sutton v. Killham, supra*. 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. *Selma Development v. Great Western Bank*, 285 Neb. 37, 825 N.W.2d 215 (2013).

Without noting any distinction in the various orders, Kathleen argues that we are without jurisdiction to hear this entire appeal. Citing prior case law which establishes that proceedings regarding modification of a marital dissolution and custody determinations are considered special proceedings, Kathleen argues the March 2, 2012, modification order affecting child custody was a final order from which John had 30 days to appeal. See *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009). Because John did not file his notice of appeal until May 22, Kathleen argues, it was untimely and

should be dismissed. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008) (appeal must be filed within 30 days of entry of judgment, decree, or final order).

[5,6] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. As Kathleen correctly states in her brief, a proceeding regarding a child custody determination is considered a special proceeding under Nebraska law. See *Steven S. v. Mary S., supra*.

[7-10] Because this child custody proceeding was a special proceeding, we move on to consider whether a substantial right was affected. A substantial right is an essential legal right, not a mere technical right. *Id*. When an order affects the subject matter of the litigation, by diminishing a claim or defense available to a party, the order affects a substantial right. *Id*. Whether a substantial right of a parent has been affected by an order is dependent upon both the object of the order and the length of time over which the parent's relationship with the child may reasonably be expected to be disturbed. *McCaul v. McCaul*, 17 Neb. App. 801, 771 N.W.2d 222 (2009). Where child custody is modified on a permanent basis, the order clearly affects a substantial right. *Id*. Because the district court's order of modification in this case permanently awarded Kathleen custody of Katherine, John's substantial right as a custodial parent was affected. Thus, the March 2, 2012, order of modification was a final and appealable order. See *id*.

[11] However, John contends that the modification order was not a final and appealable order because it did not dispose of all the issues that were presented to the court during the trial. Specifically, John argues there was no final judgment until the district court entered its order on the final contempt issue on May 22, 2012, which resolved the last remaining issue brought by the parties. To support his position, John directs us to case law which holds that when multiple issues are presented to a

trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of fewer than all the issues is an interlocutory order and is not a final order for the purpose of an appeal. See *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008). *Wagner* concluded that a trial judge's letter to the parties' attorneys following a divorce trial did not constitute a final order because not all issues were determined in the letter, such as the actual dissolution of the marriage. The case before us involves a custody modification action filed by one party and a contempt action filed by the other, and it therefore presents a jurisdictional matter not addressed in *Wagner*.

We conclude that we do not have jurisdiction to address John's appeal as it relates to the modification order. Our decision in *Michael B. v. Donna M.*, 11 Neb. App. 346, 652 N.W.2d 618 (2002), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), effectively determines this outcome. In that case, the district court held a trial on the father's motion for contempt on the same day as his motion for change of custody. Following the trial, the district court entered an order in which it found the mother in contempt for failing to allow the father's visitation and also took legal custody of the couple's minor child. *Id*. The district court also ordered a further hearing to determine the appropriate sanctions for the mother's contempt, making the contempt portion of the order not final. *Id*. After that hearing, the court issued a subsequent order with sanctions against the mother. *Id*. The mother filed a timely notice of appeal from each order. *Id*.

In that case, we consolidated the two appeals and determined that the order taking legal custody of the minor child was a final, appealable order even though the contempt portion of the order was not final. We reasoned that the trial court was presented with two separate issues and simply chose to address both at the same trial. Thus, the order that took legal custody of the minor child was a final, appealable order because it was an order affecting a substantial right made during a special

proceeding. *Id*. The fact that the contempt portion of the order was not final was of no consequence. *Id*.

In the present case, Kathleen's application to modify custody of Katherine and John's application for an order to show cause were two separate pleadings and presented separate issues. Kathleen sought new relief in her cause of action to change custody of Katherine. When filing his contempt action against Kathleen, John did not seek new relief; rather, he sought to enforce relief he had previously been granted. The district court heard evidence on both issues at the same hearing. On March 2, 2012, the court issued an order which disposed of all issues that were raised in Kathleen's application to modify. Thus, that order was a final, appealable order. Because John did not file his notice of appeal until May 22, outside the 30-day requirement in § 25-1912(1), we are without jurisdiction to address the portion of his appeal that relates to that order.

2. Jurisdiction Over Contempt Orders

We conclude that we have jurisdiction to address John's arguments as they relate to both of the district court's orders on his contempt application. Although the district court entered two separate orders related to the issues John raised in his application, he was not required to separately appeal from each order. Because John's application contained two discrete claims of Kathleen's alleged contempt, the contempt issues were not appealable until the court disposed of all claims raised in John's application. See, *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990) (when multiple issues are presented to trial court for simultaneous disposition in same proceeding and court decides some of issues, while reserving some issue or issues for later determination, court's determination of fewer than all issues is interlocutory order and is not final order for purpose of appeal).

3. Contempt Findings

John argues that the district court erred when it failed to find Kathleen in contempt for violating the prior modification

order. As stated above, John raised two separate issues in his application for an order to show cause: (1) Kathleen's failure to pay the attorney fee award entered in his favor from the prior modification proceeding and (2) Kathleen's failure to timely return Katherine to Omaha following summer parenting time in 2010.

[12,13] Before separately addressing each of these issues in our analysis below, we set out some general principles regarding contempt proceedings. When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order. *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012). Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence. *Id.*

(a) Kathleen's Failure to Pay Attorney Fee Award From Prior Modification Order

Following its order of modification, the district court first addressed Kathleen's failure to pay the $10,000 attorney fee award entered against her from the 2007 modification order. The court entered an order on April 20, 2012, in which it declined to find Kathleen in contempt for failure to pay that award. In so ruling, the court noted that because Kathleen did not have the financial means to satisfy the entire award, her failure to pay the award cannot be considered willful contempt of court.

We agree with the trial court's conclusion. After our review of the record, we find that Kathleen has been making consistent, albeit small, monthly payments against this attorney fee award. Kathleen also testified at trial that she struggles to make these payments because she is a stay-at-home mother caring for her four children from her subsequent marriage. Although her payments have been small, and interest continues to accrue on this amount, we conclude that Kathleen is attempting to fulfill her obligation to pay. We further note that

the 2007 modification order does not contain any time limitation for paying the attorney fee award. Therefore, her failure to satisfy the entire award was not willful disobedience of the 2007 order. The district court did not abuse its discretion when it found that Kathleen was not in contempt of court. This assigned error is without merit.

(b) Kathleen's Failure to Return Katherine to Omaha After 2010 Parenting Time

At the May 11, 2012, hearing, the district court determined that Kathleen did not commit willful contempt relating to Katherine's return to Omaha after the 2010 summer parenting time. An order memorializing this ruling was entered on May 22, but no specific findings of fact were made. John takes issue with that decision, contending that the evidence at trial was sufficient to sustain a finding that Kathleen was in contempt.

As we noted at the outset of this opinion, John's initial willingness to consider Katherine's move to Chicago to live with her mother seems to have been the triggering event for this modification proceeding. According to John's testimony, however, Katherine misconstrued his willingness to consider the move for explicit permission allowing the move to take place. To attempt to clarify his position, John sent subsequent e-mails to Kathleen explaining the situation and his concerns about Katherine's move. When communication between John and Kathleen broke down later that summer, before any final agreement on Katherine's living situation was reached, John expected Katherine's return to Omaha. Upon being informed by his other daughters that Katherine was not coming back to Omaha, John sent a series of e-mails to Kathleen demanding Katherine's return. Although the order and parenting plan in the record do not contain an exact date for the end of Kathleen's summer parenting time, according to the testimony at trial, both parties agreed their daughters were to return to Omaha on August 9, 2010.

At trial, Kathleen testified that she tried to get Katherine to return to Omaha on August 9, 2010, but "couldn't get her on the plane." Kathleen stated that because she "felt bad" for

Katherine, she did not force her to return to Omaha at the end of the summer. Kathleen also admitted to having registered Katherine as a student at the local public high school, despite knowing that John demanded she not do so. According to her testimony, Kathleen registered Katherine for school because she did not want Katherine to be truant during the dispute with John about her return. Kathleen claimed that she was finally able to convince Katherine to return only because she assured Katherine of an opportunity to speak in court regarding her preference to move to Chicago. Katherine was returned to Omaha on September 1.

Although Katherine was not returned to Omaha on August 9, 2010, our de novo review of the record leads us to conclude that the district court did not abuse its discretion in failing to find Kathleen in contempt. There was no court order which specifically required Kathleen to return Katherine on a date certain, although there was testimony to an agreed-upon date. There was ongoing discussion during the summer between the parties regarding the possibility of Katherine's remaining in Kathleen's custody in Chicago. A few days after the previously agreed-upon return date, Kathleen filed an application to modify custody. Kathleen was not served with the original ex parte order to return Katherine to Omaha, obtained by John on August 12, which order was not filed until August 30. Another order was entered on August 30, requiring Kathleen to return Katherine on September 1, which Kathleen complied with. Under the particular facts of this case, we affirm the district court's determination that Kathleen's actions did not amount to a clearly willful violation of prior court orders.

4. Order Releasing Garnished Funds

John finally argues that the district court erred when it entered an order releasing garnished funds on May 29, 2012. He argues the court lacked jurisdiction to enter this order because he had filed his notice of appeal and posted the required supersedeas bond on May 22.

In addressing this assigned error, we initially note that John's characterization of the May 29, 2012, order is not completely accurate. The district court entered an order on May 11

to deliver nonexempt funds. On May 17, John filed a motion for an injunction to prohibit Kathleen from executing on the judgment, to vacate the order to deliver nonexempt funds, and to demand the return of the funds delivered. The district court denied John's motion on May 29. Kathleen also filed a receipt of garnished funds on May 29.

[14,15] Subject to few exceptions, once an appeal has been perfected, the trial court from which the appeal was taken no longer has jurisdiction. See *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012). However, a party's failure to timely appeal from a final order prevents an appellate court from exercising jurisdiction over the issues raised and decided in that order. *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013).

As we concluded above, Kathleen's application for modification of custody and John's contempt application were two separate proceedings. Thus, John was required to perfect an appeal within 30 days of the March 2, 2012, modification order to obtain review of those issues. Because he did not file a notice of appeal within 30 days of that order, John's appeal did not divest the district court of jurisdiction over the modification proceedings.

Under § 25-1902, Kathleen's motion for release of nonexempt funds is properly considered as a summary application in an action after judgment is rendered. See *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002) (order made on summary application in action after judgment is ruling on postjudgment motion in action). Further, we conclude that the May 11, 2012, order releasing the funds to Kathleen's attorney affected one of John's substantial rights and was a final, appealable order. Thus, John was required to separately appeal from that order.

However, John filed a motion on May 17, 2012, to vacate that order. We conclude this motion was a valid motion to alter or amend judgment, which tolled the time to perfect an appeal. See Neb. Rev. Stat. § 25-1329 (Reissue 2008) (motion seeking substantive alteration of judgment must be filed no later than 10 days after entry of judgment). When the district court entered its May 29 order overruling this motion, the order

releasing the funds became final and appealable. John has not perfected an appeal from that order.

Because John has not separately appealed from the order releasing nonexempt funds, we do not have jurisdiction to consider his arguments related to that order.

V. CONCLUSION

For the reasons stated herein, we do not have jurisdiction of John's appeal as it relates to the modification order, due to his failure to timely appeal from that order. We also find that we are without jurisdiction to review John's arguments as they relate to the garnishment proceedings. Finally, we affirm the district court's decisions regarding John's contempt application.

AFFIRMED IN PART, AND IN PART DISMISSED.

CRAIG LYNN BARTHEL ET AL., COPERSONAL REPRESENTATIVES OF THE ESTATE OF DOROTHY BARTHEL, DECEASED, APPELLANTS, V. CHARLES A. LIERMANN, INDIVIDUALLY AND AS SUCCESSOR TRUSTEE OF THE GENE W. LIERMANN LIVING REVOCABLE TRUST, AND ERNA E. LIERMANN, TRUSTEE OF THE ERNA E. LIERMANN LIVING REVOCABLE TRUST, APPELLEES.

842 N.W.2d 624

Filed January 28, 2014. No. A-12-745.

1. **Statutes.** The meaning and interpretation of a statute are questions of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Statutes: Appeal and Error.** When an appellate court confronts a statute, it gives statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **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.
5. **Real Estate: Waters: Time.** Neb. Rev. Stat. § 31-224 (Reissue 2008) imposes upon a landowner the duty to clean a drainage ditch once a year, between March 1 and April 15.

6. **Real Estate: Waters: Time: Words and Phrases.** In Neb. Rev. Stat. § 31-224 (Reissue 2008), the phrase "at least" prior to "once a year" indicates that a landowner may have a duty to clear the ditch more than once during the specified period of March 1 to April 15, if the flow of water again becomes obstructed during this period.
7. **Real Estate: Waters: Time.** There is nothing in Neb. Rev. Stat. § 31-224 (Reissue 2008) that can be interpreted to require a landowner to clean a drainage ditch outside the March 1 to April 15 period if the flow of water becomes obstructed at any other time during the year.

Appeal from the District Court for Holt County: MARK D. KOZISEK, Judge. Affirmed.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellants.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellees.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

MOORE, Judge.

INTRODUCTION

Craig Lynn Barthel, Keith Alan Barthel, and Kerry Louis Barthel, as copersonal representatives of the estate of Dorothy Barthel, deceased, and having been substituted as parties, appeal from a judgment entered by the district court for Holt County. Following a bench trial, the district court ruled that the appellees, Charles A. Liermann and Erna E. Liermann, had not breached their duty to clean a shared drainage ditch and that Dorothy had not sufficiently proved her damages. Finding no error in that decision, we affirm the district court's judgment.

FACTUAL BACKGROUND

The parties in this case are neighboring landowners in Holt County, Nebraska. A drainage ditch that runs west to east through the Barthels' property and onto the Liermanns' property before eventually joining the Elkhorn River forms the center of this ongoing dispute. Dorothy claimed that the Liermanns had failed to clear obstructions from this ditch,

causing her hay meadow to flood and thereby preventing significant hay production.

This seemingly ordinary drainage ditch has been the subject of significant litigation, in both state and federal courts, during the past 20 years. While not all of the history is germane to the present appeal, a short summary of the more important events is necessary to give context to the current matter. This court's decision in *Barthel v. Liermann*, 2 Neb. App. 347, 509 N.W.2d 660 (1993), is the appropriate starting point. After that decision, a series of events transpired that culminates with this current appeal.

In the years preceding *Barthel v. Liermann, supra*, the Liermanns had allowed Keith and Dorothy to bring a dragline onto their property to dredge the ditch on the various occasions when the waterflow in the ditch became obstructed. In 1988, the Liermanns denied the Barthels' request to dredge and the Barthels filed suit, asking that an injunction issue requiring the Liermanns to clear the ditch. The district court denied the Barthels' request for injunctive relief and damages, concluding that they had not established that the Liermanns obstructed the waterflow in the ditch. *Id*. The Barthels appealed that decision to this court.

We reversed the district court's decision. In so ruling, we determined that the outcome of the case was dependent on interpreting Neb. Rev. Stat. § 31-224 (Reissue 2008). *Barthel v. Liermann, supra*. In interpreting § 31-224, we stated that "it is the duty of a landowner to clean from this type of ditch once a year all weeds or other substances obstructing the flow of the water, provided the landowner knows of the obstruction." *Barthel v. Liermann*, 2 Neb. App. at 356, 509 N.W.2d at 665 (emphasis omitted). We concluded the statute obligated the Barthels to show that the Liermanns' acts caused the ditch obstruction or that the obstruction occurred with the Liermanns' knowledge or consent. *Barthel v. Liermann, supra*. We also found that the evidence clearly established that the obstruction occurred with the Liermanns' knowledge or consent. Therefore, we determined that the trial court erred when it refused to grant the injunction, and we remanded the cause to

the district court to issue a mandatory injunction requiring the Liermanns to clean out the ditch. *Id*.

On remand, the district court issued the mandated injunction. The injunction required the Liermanns to clean the ditch of all substances obstructing waterflow beginning and ending at specified stations. The Liermanns were also required to hire a surveyor to establish a grade to which the ditch would be excavated and to hire a dragline operator to excavate the ditch according to the completed survey. The court specified that the grade needed to be set at or below the level of the bottom of the culvert installed by Holt County in the county road in 1988.

Because the cleaning and maintenance of this ditch affected a potential wetland area (the Barthels' meadow), the federal government became involved. To maintain their eligibility for federal farm-assistance programs sponsored by the U.S. Department of Agriculture (USDA), the Barthels were required to comply with the "Swampbuster" provisions of the federal Food Security Act (the Act). See *Barthel v. U.S. Dept. of Agriculture*, 181 F.3d 934, 935 (8th Cir. 1999). The relevant Swampbuster provisions, aimed at preserving wetland areas, denied eligibility for these federal programs if wetlands were converted to agricultural use. *Id*. However, the Act also allowed exemptions for wetlands that had been converted before the Act became effective in 1985. *Barthel v. U.S. Dept. of Agriculture, supra*. The Barthel hay pasture was classified as an "'other wetland area'" under the Act because it seasonally flooded or ponded but had been converted to agricultural use prior to December 23, 1985. *Barthel v. U.S. Dept. of Agriculture*, 181 F.3d at 936.

A dispute soon arose between the Barthels and the USDA and the National Resources Conservation Service (NRCS), a division of the USDA, as to how the Act affected the depth of the ditch. The Barthels contended that the land had been used for hay production and pasture prior to the Act and should be maintained in that state. Thus, they argued the ditch should be dredged to a depth that allowed the water to drain from the meadow and permitted hay production. *Barthel v. U.S. Dept.*

of Agriculture, supra. The NRCS, however, determined that the level of the ditch at the time of litigation should be preserved, no matter the effect on the Barthels' land. *Id*.

After making their way through the various administrative reviews of this determination, the Barthels eventually initiated suit in the U.S. District Court for the District of Nebraska. *Id*. In a memorandum opinion, the U.S. District Court affirmed the USDA's decision, concluding that the USDA appropriately construed the law and made adequate findings of fact.

Following the adverse decision from the federal district court, the Barthels appealed to the Eighth Circuit Court of Appeals. *Id*. The Eighth Circuit reversed the decision of the federal district court, finding that the USDA had misinterpreted the focus of the Swampbuster provisions, namely that the Act's purpose is to preserve wetlands or, if wetlands were altered, to preserve the altered conditions. *Barthel v. U.S. Dept. of Agriculture, supra*. The court held that the Barthels were entitled to utilize their land as they did before the Act, "'so long as the previously accomplished drainage or manipulation is not significantly improved upon, so that *wetland characteristics* are *further* degraded in a significant way.'" *Barthel v. U.S. Dept. of Agriculture*, 181 F.3d at 939 (emphasis in original), quoting *Gunn v. U.S. Dept. of Agriculture*, 118 F.3d 1233 (8th Cir. 1997). The matter was then remanded to the district court with directions that it remand the matter to the USDA for a hearing and determination of the state of the Barthels' land prior to the Act and the necessary dredging and cleaning of the ditch to maintain the land in its pre-Act state. *Barthel v. U.S. Dept. of Agriculture, supra*.

When the matter returned to the NRCS after remand, it conducted tests to determine the proper depth of the ditch. After those tests were completed, the NRCS concluded that the ditch could be dredged to the level directed by the 1994 injunction entered by the district court for Holt County, which level was at or below the level of the bottom of the culvert. This final determination by the NRCS was not appealed. Since that time, the Liermanns have used the USDA-commissioned survey when cleaning the ditch to the allowed depth.

In the time following the previous litigation, Keith, Dorothy's husband, died and Dorothy became sole owner of the Barthels' property. On December 16, 2011, Dorothy filed her operative complaint in the district court for Holt County. In her complaint, she alleged that the Liermanns failed to properly clean the ditch as required by § 31-224, preventing the flow of water through the ditch and causing her hay meadow to flood. Dorothy sought damages for lost hay profits, lost milk production profits, and costs to repair the land. Dorothy's complaint also included an additional count entitled "Interference With Easement" which related to a road that Dorothy utilized for ingress onto and egress from her property. This additional count is not at issue in this appeal and need not be discussed further.

Trial was held on March 27 and 28, 2012. Dorothy testified that her hay meadow had continued to experience consistent flooding. She attributed this flooding to the Liermanns' failure to properly clean their portion of the ditch. To support this claim, Dorothy introduced a number of photographs from various years which showed the flooded hay meadow. Dorothy also introduced photographs which she alleged depicted various obstructions to the waterflow at several locations in the Liermanns' portion of the ditch.

In addition to her own testimony, Dorothy also presented expert witness testimony from Don Etler, an agricultural engineer who specializes in agricultural drainage and wetlands. According to Etler, the NRCS made a number of mistakes when establishing the ditch grade that the Liermanns have since followed when cleaning the ditch. These alleged mistakes resulted in an irregular, sawtooth grade that, in Etler's opinion, an engineer would not produce in standard practice. Etler testified that this inconsistent grade created standing water in certain places. He proposed an alternative, gently sloping grade for the ditch which he believed would provide better drainage for the hay meadow.

On cross-examination, Etler conceded that he had not made any inspection of the ditch that would allow him to determine whether the Liermanns had been complying with cleaning the

ditch to the NRCS gradeline. In fact, Etler testified that he last visited the Barthels' property in 2000. When questioned about the Liermanns' cleaning of the ditch, Etler stated that it was important that they clean the ditch as required, but he also acknowledged that the entire drainage system, not just that portion located on the Liermanns' property, needed to be addressed in order for the hay meadow to properly drain.

Charles testified to the procedures the Liermann family utilized when cleaning the ditch. He stated that he cleans the ditch to comply with the NRCS survey in its current form. When the time comes to clean the ditch every year, Charles surveys the ditch himself, performs the necessary calculations to determine the depth, and then digs out or fills in the ditch accordingly. He indicated that he makes an effort to ensure the ditch is 8 feet wide to allow proper waterflow. Charles added that his family has hired companies to excavate the ditch in certain years, but that he has also done the cleaning himself in years where the ditch does not require extensive attention.

Charles offered evidence to show the yearly schedule of maintenance on the ditch since 1995. This document reflected that the ditch was surveyed every year during the March 1 to April 15 statutory period to determine whether maintenance was necessary. If maintenance was necessary, it was completed during the March 1 to April 15 statutory period, with the exception of 2006 and 2008, when the maintenance was performed on April 27 and April 22, respectively.

Following the parties' introduction of evidence, and upon agreement of the parties, the trial judge viewed the ditch in question. After viewing the premises, the court noted on the record that it had observed the ditch from the eastern end of the Liermanns' property to the northern part of the Barthels' hay meadow.

On July 16, 2012, the district court entered judgment in favor of the Liermanns on all counts. Among its findings, the district court concluded that § 31-224 did not mandate a continuing, yearlong obligation to keep the ditch clean. The court also concluded that Dorothy did not prove, by a preponderance of the evidence, that the Liermanns failed to perform their

statutory duty in cleaning the ditch. The court found that water was flowing through the ditch based on the evidence adduced at trial and its own observations of the ditch. For completeness, the court also addressed the issue of damages and found that Dorothy had not sufficiently proved any of her damage claims. Dorothy timely appealed from this order.

On January 26, 2013, while this current appeal was pending, Dorothy passed away. Craig, Keith, and Kerry have since been appointed as copersonal representatives of Dorothy's estate and have been substituted as the party plaintiffs. They proceed with the current appeal.

ASSIGNMENTS OF ERROR

The Barthels argue that the district court abused its discretion by (1) finding that the Liermanns had complied with their obligations under § 31-224, (2) determining that the Barthels had failed to adequately prove damages, and (3) failing to award damages to the Barthels.

STANDARD OF REVIEW

[1,2] The meaning and interpretation of a statute are questions of law. *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013). An appellate court independently reviews questions of law decided by a lower court. *Fox v. Whitbeck*, 286 Neb. 134, 835 N.W.2d 638 (2013).

ANALYSIS

Should § 31-224 Be Interpreted to Require Landowner to Perform Year-Round Cleaning of Drainage Ditch?

The Barthels claim that the Liermanns have failed to clean the ditch in compliance with § 31-224. This statute provides:

> It shall be the duty of landowners in this state, or tenants of such landowners when in possession, owning or occupying lands through which a watercourse, slough, drainage ditch or drainage course lies, runs or has its course, to clean such watercourse, slough, drainage ditch or drainage course at least once a year, between March 1 and April 15, of all rubbish, weeds or other substance

> blocking or otherwise obstructing the flow of the water in such watercourse, slough, drainage ditch or drainage course, whenever such obstruction is caused by any of the acts of said owner or tenant, or with his knowledge or consent; *Provided, however*, this and sections 31-225 and 31-226 shall not apply to drainage ditches under control of any drainage company or corporation.

The Barthels interpret § 31-224 to require the Liermanns to clean the ditch throughout the year on an "'as needed'" basis in order to ensure proper waterflow. Brief for appellants at 12. The Barthels also argue that the district court erred in finding that the Liermanns properly cleaned the ditch when they undertook the yearly cleaning.

[3] When an appellate court confronts a statute, it gives statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

[4] As was the case for the parties' first appearance before this court, the outcome of this case hinges on our reading of § 31-224. The language of this statute has not been changed since our decision in 1993. See *Barthel v. Liermann*, 2 Neb. App. 347, 509 N.W.2d 660 (1993). 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. *State v. Policky*, 285 Neb. 612, 828 N.W.2d 163 (2013).

[5-7] Based upon our independent review of § 31-224, we reject the Barthels' proposed interpretation. This section clearly imposes upon a landowner the duty to clean a drainage ditch once a year, between March 1 and April 15. In § 31-224, the phrase "at least" prior to "once a year" indicates that a landowner may have a duty to clear the ditch more than once during the specified period of March 1 to April 15, if the flow of water again becomes obstructed during this period. However, nothing in the statute can be interpreted to require a landowner to clean a drainage ditch outside the March 1 to April 15 period if the flow of water becomes obstructed at any other time during the year.

We agree with the district court's finding that the statute does not mandate a continuing, yearlong obligation to keep the ditch clean. This assignment of error is without merit.

Did Liermanns Comply With Their Obligation to Clean Ditch?

At trial, Charles gave extensive explanation of the procedures his family utilizes when cleaning out the ditch in order to comply with the statute and the previous injunction. He testified that every year, he surveys the ditch, calculates the necessary depth, and then excavates or fills the ditch as required according to the NRCS grade. Charles testified that his family hires a professional excavator to handle the cleaning when extensive work is necessary. A yearly schedule of the maintenance performed by the Liermanns on the ditch was also received in evidence.

Although Dorothy contended that the Liermanns had not properly cleaned the ditch, she failed to present evidence to contradict the Liermanns' evidence regarding their compliance with the statute. Dorothy did not offer evidence of the actual grade of the ditch after the Liermanns' annual maintenance in order to show whether they had complied with the statute or the NRCS survey. While Dorothy's photographic evidence showed a flooded hay meadow, these photographs showed the condition of the ditch outside of the required March 1 to April 15 cleaning period. Furthermore, Etler's testimony did not address whether the Liermanns had complied with their statutory duty; rather, his testimony focused on what he found to be problems with the NRCS survey establishing the grade in 2000 and the need for systemwide changes to the ditch. However, this issue was not before the district court.

Based on our review of the evidence, we conclude that the district court did not err when it determined that the Liermanns had complied with their obligation to clean the ditch.

Damages.

Having found that the Liermanns complied with their obligation to clean the ditch, we do not reach the Barthels' damages arguments. An appellate court is not obligated to engage

in an analysis that is not necessary to adjudicate the case and controversy before it. *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

CONCLUSION

Having determined that the district court properly construed § 31-224 and did not err when finding the Liermanns had complied with this section, we affirm the district court's judgment.

AFFIRMED.

T. SIDNEY THURSTON AND JEAN THURSTON, APPELLANTS, V. ROBERT NELSON, DOING BUSINESS AS NELSON CONSTRUCTION, AND NELSON CONSTRUCTION & CUSTOM HOMES, INC., APPELLEES.

842 N.W.2d 631

Filed February 4, 2014. No. A-13-056.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been 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. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
4. **Trial: Witnesses.** In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.
5. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
6. ____: ____: ____. An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.
7. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.

8. **Jury Instructions: Appeal and Error.** If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
9. **Jury Instructions: Pleadings: Evidence.** A trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence.
10. **Actions: Pleadings: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action.
11. **Actions: Pleadings.** Two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action.
12. **Election of Remedies.** Pleading alternative theories of recovery is permitted, and ordinarily, an election between theories of recovery will not be required unless the theories are so inconsistent that a party cannot logically choose one without renouncing the other.
13. **Negligence: Complaints: Contracts: Torts.** In order to decide the form of redress, whether contract or tort, it is necessary to know the source or origin of the duty or the nature of the grievance, and the character of the action must be determined from what is asserted concerning it in the complaint.
14. **Actions: Breach of Contract: Torts: Words and Phrases.** Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property.
15. **Contractors and Subcontractors: Warranty.** As a general rule, a contractor constructing a building impliedly warrants that the building will be erected in a workmanlike manner.
16. ____: ____. The implied warranty of workmanlike performance provides the owner with an action against the contractor if the contractor's work is not of good quality and free from defects.
17. **Contracts: Contractors and Subcontractors.** In building and construction contracts, in the absence of an express agreement to the contrary, the law implies that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose.

Appeal from the District Court for Grant County: TRAVIS P. O'GORMAN, Judge. Affirmed.

Gregory J. Beal for appellants.

James L. Zimmerman, of Zimmerman Law Firm, P.C., L.L.O., for appellees.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

MOORE, Judge.

I. INTRODUCTION

T. Sidney Thurston and Jean Thurston filed suit in the district court for Grant County against Robert Nelson, doing business as Nelson Construction, and Nelson Construction & Custom Homes, Inc. (referred to herein individually and collectively as "Nelson"), seeking damages for alleged construction defects resulting from Nelson's work in building an addition to and remodeling their house. Following a jury trial, the jury found in favor of Nelson. The Thurstons have appealed, assigning error to the court's exclusion of certain expert witness testimony and its refusal to give requested jury instructions. Finding no abuse of discretion in the district court's exclusion of expert witness testimony and no error in the instructions given to the jury, we affirm.

II. BACKGROUND

In their operative complaint, the Thurstons set forth claims for breach of contract, negligence, and breach of the implied warranty of workmanlike performance. Specifically, the Thurstons alleged that as a result of the parties' contact in February 2009, they entered into an oral agreement for Nelson to construct a substantial addition to the Thurstons' house in rural Grant County and to make certain improvements to the existing structure. They alleged that Nelson held himself out as an experienced homebuilder, that he represented he could and would build the addition in accordance with industry standards and building codes within a reasonable time, and that they relied upon Nelson's representations and promises. They further alleged that Nelson worked on their house between May and October, that Nelson removed his tools and equipment from the construction site in November and never returned to complete the project, and that they had paid Nelson $42,024.43 and had incurred $90,479.39 in material and inspection costs.

With respect to breach of contract, the Thurstons alleged that Nelson breached the contract by not completing the agreed

construction within a reasonable time, by not performing the work in a workmanlike manner, and by leaving both the old structure and the new structure unprotected from the elements, resulting in damage to the property. They alleged that they had suffered damages to the new construction totaling approximately $132,503.82. They further alleged that they had suffered personal injury due to dampness and mold existing in both the old structure and the new structure, which dampness and mold would require removal and replacement of the new structure at an estimated cost of $116,000 and an estimated additional $250,000 in damages if the old structure required replacement. The Thurstons alleged consequential damages in the nature of loss of use and occupancy of their house, severe emotional distress and mental anguish, and other allowed consequential damages. They alleged that their damages from Nelson's breach of contract were continuing and increasing due to structural inadequacies or defects and continued exposure to the elements.

With respect to negligence, the Thurstons alleged that Nelson had a duty to use reasonable and workmanlike practices and procedures in the construction work and that he breached his duty to do so. Specifically, they alleged that Nelson failed to construct the foundation according to building code and workmanlike practices; supervise the work of subcontractors; protect the property from the elements; use proper-dimension lumber, beams, or support systems for the structure; assess load-bearing capacity of the existing structure or provide adequate structural support for new construction joining the existing structure; and use venting where reasonably required. The Thurstons alleged Nelson's negligence was the sole and proximate cause of damages sustained to both the new and existing structure in excess of $10,000. They alleged that they suffered personal injury to their health due to mold on the premises and also repeated their claim for consequential damages.

Finally, with respect to breach of warranty, the Thurstons alleged that Nelson represented himself to be an experienced, qualified homebuilder who was competent and experienced enough to do the contemplated construction work and that

based on his representations and the Thurstons' reliance on those representations, Nelson began to construct an addition and to make certain alterations to the existing house. The Thurstons alleged that Nelson failed to perform the construction in a workmanlike manner and that there were numerous structural and cosmetic defects in Nelson's work. They alleged that as a result of Nelson's breach of the implied warranty, they had been damaged in the minimum amount of $250,000. The Thurstons again repeated their claim for consequential damages.

In his answer, Nelson alleged that the work performed was completed in a good and workmanlike manner in compliance with construction standards in the area and that any claims made by the Thurstons were the result of their interference and refusal to allow Nelson to complete the contract. Nelson denied any negligence and alleged that he was not responsible for the hiring, supervision, or payment of any other contractors or subcontractors who performed labor or provided material to complete the construction. Nelson denied the nature and extent of the damages alleged by the Thurstons and denied that they suffered any personal injury to their health by reason of any mold on the premises.

A jury trial was held in the district court beginning on December 17, 2012, and over the course of the 5-day trial, the jury heard testimony from the parties and various witnesses as to the construction work performed by Nelson for the Thurstons and the alleged structural defects and mold damage. The court received numerous photographs and other documentary exhibits into evidence as well. The bill of exceptions, excluding exhibits, is nearly 1,200 pages long. For the sake of brevity and due to the nature of the assignments of error on appeal, we decline to further summarize the evidence here. We have set forth additional facts as necessary to our resolution of this appeal in the analysis section below. We note that Nelson made a motion for directed verdict, which the court granted only to the extent that the Thurstons sought personal injury damages for severe emotional distress, because it found no evidence supporting such a claim.

On December 21, 2012, the jury returned a verdict for Nelson. The district court accepted the verdict and entered judgment in favor of Nelson and against the Thurstons. The Thurstons subsequently perfected their appeal to this court.

III. ASSIGNMENTS OF ERROR

The Thurstons assert that the district court erred in (1) excluding testimony from a particular expert witness, (2) failing to give separate or alternate jury instructions on their claims for negligent construction and implied warranty, and (3) giving instructions that did not allow the jury to find for the Thurstons on a theory of recovery other than breach of contract.

IV. STANDARD OF REVIEW

[1,2] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012). 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. *Fox v. Whitbeck*, 286 Neb. 134, 835 N.W.2d 638 (2013).

[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).

V. ANALYSIS

1. Expert Witness Testimony

The Thurstons assert that the district court erred in excluding testimony from their expert Darin Wilkerson as to whether Nelson's work was performed in a workmanlike manner.

Wilkerson is a general contractor, is a member of a professional builders' association, and has been in the construction business since 1988. Wilkerson testified that he was generally acquainted with the workmanship of homebuilders in western Nebraska. He was contacted by the Thurstons in February 2011, and as a result of that contact, he made a visual

inspection of the perimeter and the interior of both the addition and the existing residence. Wilkerson inspected the premises in greater detail a couple of weeks after his initial visit and again in November 2012.

When the Thurstons' attorney asked Wilkerson if, based on his inspection, he reached any conclusion as to whether Nelson's work was completed in a workmanlike manner, Nelson's attorney requested a bench discussion, which was held outside the hearing of the jury. During the discussion, Nelson's attorney represented to the court that, based on the expert witness report, Wilkerson was supposed to be called to testify as to the cost of remediation and that no opinions about workmanship were disclosed in the report. At the conclusion of the discussion, the court stated, "All you have in here is cost, there's nothing about workmanship. Just limit it to that." Wilkerson then proceeded to testify that his estimate of costs to reconstruct the addition and return the existing structure to its original condition would be $240,360. He also opined that it would not be economically feasible to repair the addition. An exhibit received in evidence from Wilkerson's company included descriptions of proposed construction work on the Thurstons' home and the cost of such work, but it did not include any opinions regarding the nature of Nelson's work.

After the conclusion of Wilkerson's testimony, the Thurstons' counsel sought permission to recall Wilkerson, directing the court's attention to previously filed expert witness lists, which disclosed that Wilkerson was expected to opine, among other things, about the construction work that was not done in a workmanlike manner. After further argument from the parties, the court denied the motion to recall Wilkerson as a witness, finding that even if the matter was adequately disclosed, the testimony would be cumulative because two previous expert witnesses called by the Thurstons had already testified on the issue of workmanship. The record shows that two separate structural engineers testified at trial about the workmanship issues with Nelson's construction. Additionally, a masonry contractor opined that the foundation work was not done in a workmanlike manner.

[4] The Thurstons did not make an offer of proof with respect to the exact testimony they sought to elicit from Wilkerson. Neb. Rev. Stat. § 27-103 (Reissue 2008) provides that error may not be predicated upon a ruling admitting or excluding evidence unless a substantial right of the party is affected and, in case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked. The Nebraska Supreme Court has stated that in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

In their brief on appeal, the Thurstons argue that Wilkerson's testimony "would have outlined to the jury that [Nelson] breached his duty of care which he owed to the [Thurstons]." Brief for appellants at 22. However, the substance of this asserted evidence was not made known to the trial judge, and it is not apparent from the record before us. As mentioned previously, the exhibit from Wilkerson did not include any discussion of the standard or duty of care allegedly owed to the Thurstons or allegedly breached by Nelson. Further, when the trial judge noted the cumulative testimony previously given by two other expert witnesses on the issue of Nelson's workmanship, the Thurstons did not make an offer of proof indicating how Wilkerson's testimony might differ.

[5,6] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012). An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection. *Cotton v. State*, 281 Neb. 789, 810 N.W.2d 132 (2011).

The Thurstons have not shown how they were prejudiced by the district court's denial of their motion to recall Wilkerson to testify about Nelson's workmanship. Because there was no offer of proof made and the evidence disallowed was not

apparent from the context of the questions asked, we cannot say that the district court erred in excluding Wilkerson's testimony regarding workmanship and in finding that such testimony would have been cumulative to other substantially similar evidence which was admitted without objection. This assignment of error is without merit.

2. Jury Instructions

The Thurstons assert that the district court erred in failing to give separate or alternate jury instructions on their claims for negligent construction and implied warranty. They also assert that the court erred by giving instructions that did not allow the jury to find for the Thurstons on a theory of recovery other than breach of contract.

[7,8] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012). If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal. *Id.*

A jury instruction conference was held on December 21, 2012. The final instructions prepared by the district court included the following statement of the case instruction, instruction No. 2, to which the parties had no objection:

Instruction No. 2

STATEMENT OF THE CASE - BREACH OF CONTRACT

I. Plaintiff's Claims

A. ISSUES

> This case involves the construction of an addition to an existing home. The [Thurstons] claim [Nelson] entered into an oral contract under which [he] would construct an addition to the existing home and make certain improvements to the structure which already exists.

The [Thurstons] claim that [Nelson] breached the contract in one or more of the following ways[:]

1. By not completing the construction agreed to in a reasonable time;

2. By failing to complete the construction in a good and workmanlike manner and in conformance with construction standards in the following particulars:

A. Failing to construct the foundation according to building code and workmanlike practices;

B. Failing to supervise subcontractors;

C. Failing to protect the property from elements, particularly rain, when construction work left the property exposed to elements;

D. Failing to use proper dimension lumber, beams or support systems for the structure;

E. Failing to assess load bearing capacity of existing structure or providing adequate structural support for new construction or joining existing structure;

F. Failure to use venting where reasonably required[.]

The [Thurstons] also claim that they were damaged as a result of this breach of contract, and they seek a judgment against [Nelson] for these damages.

[Nelson] admits that the parties entered into a contract, but alleges that [the Thurstons] contracted with [Nelson] to provide for the construction of the addition, excluding plumbing, heating, air conditioning, electrical and shingling the new addition and the old home.

[Nelson] denies that he did not complete the work in a good and workmanlike manner and in conformance with construction standards in the area that the work was performed.

[Nelson] alleges that the [Thurstons] interfered with and frustrated his ability to complete the contract and [that the Thurstons] thereby breached the contract between the parties. [Nelson] further alleges that the [Thurstons] were the general contractor on the project and were responsible for hiring, supervision and payment of any other contractors or subcontractors who performed labor or provided material to complete the construction.

B. Burden of Proof

Before the [Thurstons] can recover against [Nelson] on their claim, [they] must prove, by the greater weight of the evidence, each and all of the following:

1. That the [Thurstons] and [Nelson] entered into the contract;

2. The terms of the contract;

3. That [Nelson] breached the contract in one or more ways claimed by [the Thurstons];

4. That the breach of contract was a proximate cause of some damage to [the Thurstons]; and

5. The nature and extent of that damage.

C. Effect of Findings

If the [Thurstons] have not met this burden of proof, then your verdict must be for [Nelson], and you should cease any further deliberations.

On the other hand, if the [Thurstons] have met this burden of proof, then you must consider [Nelson's] affirmative defense.

The remaining portion of instruction No. 2 outlined the issues, burden of proof, and effect of findings with respect to Nelson's defenses.

The final instructions prepared by the court also included instruction No. 3, which provided:

If you find that there was a contract, then the law makes the following terms part of the contract:

1. Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done. A failure to observe any of these conditions is a breach of contract.

2. The law implies that a building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for its intended purpose.

3. Every contract for work or services includes an implied duty to perform skillfully, carefully, diligently, and in a workmanlike manner, and by taking a job, one contracts that he has the requisite skill to perform it.

4. The implied covenant of good faith and fair dealing exists in every contract and requires that none of

> the parties to the contract will do anything which will injure the right of another party to receive the benefit of the contract.

Neither party objected to instruction No. 3.

We note that instruction No. 2 as given defines the case as a breach of contract case and requires that the Thurstons prove the existence of a contract (which Nelson admits), the terms of the contract, its breach, and damages that were proximately caused by the breach. However, instruction No. 2, under paragraph I.A.2. regarding the claimed failure of Nelson to complete the construction in a workmanlike manner, also included specific allegations of such failure in subparagraphs A. through F., which directly correspond to the allegations of negligence in the Thurstons' complaint. And instruction No. 3 included the allegations of breach of the implied warranty of workmanlike performance contained in the Thurstons' complaint. Thus, the court essentially combined the various allegations of the Thurstons' breach of contract, negligence, and breach of implied warranty of workmanlike performance into this one jury instruction.

The Thurstons proposed certain additional instructions with respect to negligent construction and implied warranty, which instructions we address further below.

(a) Negligent Construction

[9] The Thurstons assert that the district court erred in failing to give separate or alternate jury instructions on their claim for negligent construction. A trial court, whether requested to do so or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence. *Centurion Stone of Nebraska v. Trombino*, 19 Neb. App. 643, 812 N.W.2d 303 (2012).

At the instruction conference, the Thurstons first requested an instruction on professional negligence, pursuant to NJI2d Civ. 12.04. We find no error in the district court's decision not to give an instruction on professional negligence in this case. See *Churchill v. Columbus Comm. Hosp.*, 285 Neb. 759, 830 N.W.2d 53 (2013) (professional act or service defined as arising out of vocation, calling, occupation, or employment

involving specialized knowledge, labor, or skill, and labor or skill involved is predominantly mental or intellectual, rather than physical or manual).

The Thurstons also requested an instruction on damages to property in negligence cases found at NJI2d Civ. 4.20 to 4.24 (alternative instructions depending on whether repairs will restore property at cost lower than property's predamage value). The district court denied the requested instructions, finding that this case, as pled, is a contract action and that the damages were contract damages. On appeal, the Thurstons assert that they were prejudiced by not having a separate or alternative instruction on negligence in the event the jury found that a contract was not proved.

[10-12] The Thurstons set forth in their complaint "causes of action" for both breach of contract and negligence. A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012). Thus, two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action. *Id.* In this case, Thurstons' complaint contained separate legal theories of recovery, because their claims all arose out of the same operative facts and involved the same parties. In Nebraska, pleading alternative theories of recovery is permitted, and ordinarily, an election between theories of recovery will not be required unless the theories are so inconsistent that a party cannot logically choose one without renouncing the other. See *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980).

While the Thurstons pled the alternative theories of breach of contract and negligence, the question becomes whether the court was required to instruct the jury on both theories of recovery.

[13,14] In order to decide the form of redress, whether contract or tort, it is necessary to know the source or origin of the duty or the nature of the grievance, and the character of the action must be determined from what is asserted concerning

it in the complaint. *Moglia v. McNeil Co.*, 270 Neb. 241, 700 N.W.2d 608 (2005). Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). In the case before us, the Thurstons' negligence allegations relate to Nelson's construction work, which work is the object of the agreement forming the basis for the breach of contract claim.

The district court in this case determined that the breach of contract encompassed negligent construction and that based on the damages requested, it was a contract action. The Nebraska Supreme Court recently discussed the coexistence of tort and contract actions in *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012). In that case, the district court granted summary judgment to the defendant on the plaintiffs' negligence claim, finding that based upon the economic loss doctrine, the plaintiffs could only proceed under contractual theories of relief. On appeal, the Supreme Court recognized the general economic loss doctrine as a "'judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses.'" *Id.* at 118-19, 808 N.W.2d at 80. The court clarified the economic loss doctrine in Nebraska, however, limiting its application to the products liability context and to situations where the alleged breach is only of a contractual duty, and no independent tort duty exists. The court stated:

> [W]hen the alleged breach is of a purely contractual duty—a duty which arises only because the parties entered into a contract—only contractual remedies are available. . . . Thus, the doctrine serves to "weed[ ] out cases involving nothing more than an allegedly negligent failure to perform a purely contractual duty—a duty that would not otherwise exist."

Id. at 122, 808 N.W.2d at 82.

The court in *Lesiak* concluded that where a plaintiff is suing for breach of a contractual duty which would not have existed but for the contractual relationship, it should be brought as a breach of contract action and not as a tort claim. The court recognized that this conclusion was somewhat at odds with past statements in some of its case law. The court noted that under Nebraska law, with each contract comes an accompanying duty "'"to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done."'" *Id.*, quoting *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000). The court in *Lesiak* also noted that it had previously stated that a breach of that duty may give rise to a breach of contract action or a tort action for negligent performance of the contract. The court indicated that it was now qualifying that statement to hold:

> Where only economic loss is suffered and the alleged breach is of only a contractual duty . . . , then the action should be in contract rather than in tort. In other words, the doctrine would apply to bar a tort action for the negligent performance of a contract when only economic losses were incurred.

Lesiak v. Central Valley Ag Co-op, 283 Neb. 103, 123, 808 N.W.2d 67, 83 (2012). In sum, the court concluded that the primary purpose of the economic loss doctrine is to maintain the separateness of tort law and contract law. "Generally speaking, the doctrine limits a party's ability to recover for economic losses (or commercial losses), unaccompanied by personal injury or damage to other property, allowing recovery only under contract law." *Id.* The court expressly restricted the application of the doctrine to where economic losses are (1) caused by a defective product or (2) caused by an alleged breach of a contractual duty, where no tort duty exists independent of the contract itself. *Id.* The court went on to define economic losses as commercial losses, unaccompanied by personal injury or "'other property'" damage. *Id.* at 124, 808 N.W.2d at 83. The phrase "other property" means property other than the property that was the subject of the contract. *Id.*

In connection with their negligence theory of recovery, the Thurstons alleged that they suffered damages to the new

addition and to the existing structure in excess of $10,000; personal injury to their health, as well as consequential damages which included the loss of use and occupancy of their home; and severe emotional distress. However, the evidence adduced at trial related only to the economic losses allegedly resulting from Nelson's alleged failure to perform the work that he had agreed to do in a workmanlike manner. In other words, these are economic damages which can only be sought in a breach of contract action. See *Lesiak, supra*. Although the Thurstons' complaint sought damages for emotional distress and mental anguish, as well as personal injury to their health, there was no evidence adduced to support these damages and these claims were properly not submitted to the jury.

We conclude that the district court did not err in failing to give separate or alternate jury instructions on the Thurstons' claim for negligent construction. The basis of the Thurstons' negligence theory of recovery was Nelson's allegedly negligent failure to perform a purely contractual duty, which duty would not otherwise exist without the oral contract between the parties in this case. The damages for which evidence was adduced in this case were purely related to economic losses. In short, the evidence did not establish any duty or damages based on negligence that was not "coextensive with those encompassed" by the breach of contract theory on which the jury was instructed. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 353, 754 N.W.2d 406, 430 (2008).

This assignment of error is without merit.

(b) Implied Warranty

The Thurstons assert that the district court erred in failing to give separate or alternate jury instructions on their claim for implied warranty.

[15,16] As a general rule, a contractor constructing a building impliedly warrants that the building will be erected in a workmanlike manner. *Moglia v. McNeil Co.*, 270 Neb. 241, 700 N.W.2d 608 (2005). The implied warranty of workmanlike performance provides the owner with an action against the contractor if the contractor's work is not of good quality and free from defects. *Id.*

[17] In building and construction contracts, in the absence of an express agreement to the contrary, the law implies that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993); *Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925 (1974).

The Thurstons argue that they pled breach of the implied warranty to perform in a workmanlike manner as a separate cause of action and that, as such, an alternate instruction was justified. During the jury instruction conference, they directed the district court's attention to NJI2d Civ. 11.44. The court rejected the Thurstons' proposed instruction, concluding that the instructions as written adequately injected the issue of breach of implied warranty into the case on a breach of contract theory. The court also observed that NJI2d Civ. 11.44 concerns the sale of goods, which is not at issue in this case.

Pattern jury instruction NJI2d Civ. 11.44 addresses the burden of proof with respect to breach of an implied warranty of fitness for a particular purpose in the context of the sale of goods. The comments to the instruction show that it deals with only the implied warranty of fitness for a particular purpose under Neb. U.C.C. § 2-315 (Reissue 2001). Because this case does not involve the sale of goods or a claim under Nebraska's Uniform Commercial Code, the tendered instruction was not warranted in this case. As noted above, the district court instructed the jury that if it found there was a contract, the law made certain terms a part of that contract, including the implied warranty that a building would be erected in a reasonably good and workmanlike manner and would be reasonably fit for its intended purpose. The instructions given were a correct statement of the law and adequately covered the issues. We find no error.

(c) Conclusion

The court did not err in refusing to give separate or alternative instructions on the negligence or implied warranty theories of recovery.

VI. CONCLUSION

The district court did not abuse its discretion in limiting the testimony of one of the expert witnesses and did not err in refusing to give separate jury instructions on the negligence or implied warranty theories of recovery.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
PATRICK L. COX, APPELLANT.
842 N.W.2d 822

Filed February 11, 2014. No. A-13-137.

1. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
2. **Rules of Evidence: Expert Witnesses.** A trial judge acts as a gatekeeper for expert scientific testimony, and must determine (1) whether the expert will testify to scientific evidence and (2) if that testimony will be helpful to the trier of fact. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology may properly be applied to the facts in issue.
3. **Trial: Expert Witnesses.** *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), does not create a special analysis for answering questions about the admissibility of all expert testimony.
4. ____: ____. If a witness is not offering opinion testimony, that witness' testimony is not subject to an inquiry pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
5. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
6. **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.

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

John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

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

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

INBODY, Chief Judge.

INTRODUCTION

Patrick L. Cox was charged in Buffalo County District Court with strangulation and third degree domestic assault. After a trial on the matter, a jury found Cox guilty on both counts. The district court sentenced Cox to 4 years' probation for the strangulation conviction and to 1 year's imprisonment for the third degree domestic assault conviction, with 7 days' credit for time served. On appeal to this court, Cox assigns error to the district court's determinations regarding expert testimony given by a registered nurse. As such, we limit our review of the facts to those relevant to the assignments of error raised by Cox.

STATEMENT OF FACTS

Cox and Laura Conner had been in a romantic relationship that lasted approximately 18 months. During that relationship, Cox briefly resided with Conner and her two children from a previous marriage in Conner's home, but Cox moved out of the home when the relationship ended in November 2011. On February 24, 2012, Conner was home with her children when Cox came to her home between 10:30 and 11 p.m. According to Conner, Cox was angry and began yelling at her because she had added male friends to her "Facebook" account and he demanded that she give him her cell phone. Cox lunged at Conner, who was in her bedroom, and she grabbed her cell phone and jumped off of the bed. Cox continued coming toward her with a knife that had been sitting on the kitchen table. Conner grabbed a different knife, which had been in her bedroom next to her cell phone, in reaction to Cox's coming toward her with a knife. Cox attempted to stab at her with the knife he held, which attempts she tried to stop with her cell phone. Conner testified that Cox then grabbed her and threw her against the doorframe, after which he grabbed her throat, slammed her into the bathroom floor, and strangled her until she became unconscious. When Conner regained consciousness, Cox was sitting on the edge of the bathtub "going

through [her cell] phone," reading text messages and her "Facebook" account.

Eventually, the police arrived, and the next day, Conner was taken to a hospital. Several photographs that had been taken by the police on the night of February 24, 2012, were received into evidence. Those photographs show significant red marks, bruising, and cuts on Conner's body. Police and hospital personnel testified to observing red marks, bruising, and cuts on Conner, including redness around her neck.

An emergency physician at the hospital examined Conner on February 25, 2012, and testified that Conner had "superficial injuries," but nothing more serious. The doctor testified that Conner told him that she had been "choked," but that she most likely meant that she had been strangled. He observed some "faint redness across the mid to anterior neck," but testified that she did not exhibit other symptoms which he would look for in a patient who had been strangled, such as injury to the airway, sore throat, or subconjunctival hemorrhaging. He testified, to a reasonable degree of medical certainty, that Conner's injuries "possibly could have been due to strangulation."

At trial, Conner explained that on January 3, 2012, a prior incident occurred between herself and Cox, when Cox arrived at her home angry, took her cell phone, and threatened to call her ex-husband to come take her children away. Conner explained that because she could not get her cell phone back from Cox, she opened a pocketknife and threatened to commit suicide in order to get the cell phone back. Conner explained she did not know what else to do in order to get her cell phone back from Cox. Conner testified that once Cox gave Conner her cell phone back, he grabbed her arm, jerked it behind her back, and slammed her face and shoulder into the floor. Conner testified that she believed Cox took those actions to get the knife away from her. Conner further testified that she had been in an abusive relationship with her ex-husband and continued to go to counseling to work on fear, posttraumatic stress disorder, and relationships.

At trial, the State sought to introduce Sue Michalski to the stand as an expert witness, to which Cox objected and

requested a *Daubert* hearing. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). At the *Daubert* hearing, Michalski testified that she is a licensed registered nurse who is self-employed in providing expert testimony in domestic assault, strangulation, custody, and sexual assault cases. For 30 years, Michalski had also been the training and education director for a domestic violence coordinating council in Omaha, Nebraska. Michalski was employed as a registered nurse in health and hospice work and "tele-health," as well as a staff nurse in a long-term acute care center. Michalski testified that she had received various types of specialized training related to critical care, strangulation, and domestic violence. As an educator, Michalski had given training sessions and symposiums regarding domestic violence, specifically the dynamics of intimate partner violence from a noninjury perspective to identifying domestic violence injuries. Michalski also testified that she provides training for law enforcement and fire departments, medical students, and hospital personnel in the Omaha and surrounding areas. Michalski testified that through her work, she had articles published twice, had worked with a researcher at a university, and had interviewed over the past 30 years approximately 8,000 to 10,000 victims of domestic violence.

Michalski testified that there were particular characteristics that define victims of interpersonal or domestic violence, including minimization and denial of being in such a relationship, feelings of being trapped, and methodic isolation. Michalski also testified that there are often characteristics of offenders as well, such as getting involved intimately very early on in the relationship, engaging the partner to make them feel good and safe, minimizing and denying accountability for behaviors, exhibiting signs of entitlement such that the offender is actually looking out for the victim, and exhibiting control.

Michalski testified that her methods were accepted within the scientific community, which in her case included "the medical community, the American Medical Association, and International Association of Forensic Nurses, the American Nursing Association, [and] ALSOVER." Michalski further

testified that making a medical diagnosis was not in the scope of her practice as a registered nurse.

Michalski testified that she had neither met with nor interviewed Conner or Cox, but had reviewed police reports and photographs relating to them. Based solely on her review of those materials, Michalski testified that she could not form an opinion as to whether Conner had been the victim of domestic violence by Cox. However, Michalski testified that the pictures of Conner received into evidence did allow her to make an opinion that Conner had been strangled and that it was significant because, in a situation where there is any kind of neck compression, it becomes an immediately potentially lethal situation.

The district court found that Michalski was qualified as an expert, such that

> we had the issue before the Court as to the nature and extent of . . . Michalski's testimony, primarily concerning the general issues involved in domestic violence. It would appear — Counsel for [Cox] has advised the Court that they will be seeking both a self-defense and a lesser-harm instruction concerning the incident in question.
>
> It would appear to the Court that the testimony of . . . Michalski would be of benefit to the jurors to decide whether or not a domestic abuse relationship existed, and to utilize that determination in determining the intent of [Cox] or the nature of the aggressions between the two parties, both of which are important issues in the self-defense instructions.

In Michalski's trial testimony before the jury, she reiterated all of the educational training and background mentioned above, in addition to discussing the characteristics of both parties involved in domestic violence relationships. At that time, Cox renewed the objection to her testimony made previously at the *Daubert* hearing, which was overruled by the court. Michalski indicated that the scope of her licenses do not include diagnosing medical injuries or making psychiatric or psychological diagnoses. Michalski explained that domestic violence involves the power, control, and balance found within an intimate relationship, indicating that the core issues are

power, control, and methodic isolation. Michalski testified that there is a wide range in the types of control exhibited which often progress to more threatening tactics. Michalski testified that the physical level of controlling behavior most often occurs "when the person offending [sic] the other person feels like their power is being taken away from them."

Michalski testified that initially, offenders will present in the relationship as being very kind, nice, and entertaining, and that as the relationship progresses, the offender discovers what is important to the victim and isolates the victim from those things, which often include family, children, faith, finances, and even animals. Michalski testified that victims often feel powerless, let down, and to blame, while the offenders often feel as though they "can do no wrong," such that they are the "center of the universe and everything revolves around [them]." Michalski also testified that there is often a "public [and] private face" and that the offender will often cast himself or herself as a victim in order to put the offender in a positive light.

Michalski further testified about strangulation and how the act of strangulation is generally carried out. Michalski testified that the medical signs and symptoms of strangulation varied depending on the condition, size, and age of the victim. Michalski testified that initially there is not a lot of outward appearance, but that there could be "redness," "petechial hemorrhage," loss of consciousness, "pain in [the] neck area," headache, difficulty swallowing or speaking, vomiting, or the occurrence of urination or a bowel movement, and that strangulation is potentially lethal. Michalski testified that many times, victims will not report to having been strangled, because they do not feel as though they have sustained a type of injury requiring diagnosis, and that due to the loss of oxygen, victims can sometimes suffer from a loss of memory. Michalski testified that she had not met or interviewed either Cox or Conner and did not have any opinion specifically with regard to their circumstances.

Cox testified in his own behalf, indicating, as did Conner, that the two were involved in a romantic relationship. Cox testified that the relationship began to have issues when he had

been gone frequently to complete "training with the National Guard." In November 2011, Cox moved out of the home which he and Conner had been residing in. Cox testified that Conner's father told him the relationship was over, but that he continued to correspond with Conner and moved back into the home in late December through January 2012. Cox testified that he decided to give Conner some time to get through her divorce from her ex-husband, paid her rent for February, continued to support her and her children, but rented his own apartment as well. Cox testified that he continued to help Conner by fixing dinner for her and her children and by washing dishes. Cox testified that on January 30, he and Conner got into a fight because he was "hanging out with [another] girl" and he then accused her of cheating and asked to see her cell phone. Cox testified that she gave him her cell phone, he began to "look[] through it," and Conner got mad and began to "throw a temper tantrum." Cox testified that he had previously given Conner a "cold-steel knife" he had purchased on his last deployment to Iraq and that she pulled it out of her purse, threatened to hurt him, and then threatened to kill herself. Cox testified that he immediately ran at Conner, pulled the knife away from her neck, and threw her to the ground. Cox testified that he was trained "in the Marine Corps" on how to take knives away from people. Cox testified that after that incident, he no longer stayed with Conner, although he retained a key to her home so that he could go there when she was not home.

Cox testified that earlier in the day on February 24, 2012, he and Conner had been text messaging back and forth and he had asked her about "all the guys she had on Facebook." Cox testified that Conner got defensive about one of those men and that he became curious. Cox testified that because Conner had never specifically ended the relationship, he wanted to know if he had any reason to stay around as Conner's boyfriend and continue to pay her rent.

Cox testified that at approximately 10:30 p.m. on February 24, 2012, he went to Conner's home and unlocked the door with his key, but that he did not knock or ring the doorbell because her children were sleeping. Cox testified that he

went to the home to apologize, but that he raised the issue of the other men again with Conner. Cox asked to see her cell phone to make sure there was nothing going on with another man, and Conner became upset. Cox testified that there was a knife on the headboard of the bed and that he was going to place it on the dresser, when he saw Conner in the bathroom holding a knife. Cox testified that he had previously taught Conner how to defend herself with a knife, so he moved toward her, grabbed her knife hand, and pushed her through the bathroom door so that he could pull the knife away from her. Cox testified that he tossed his knife into the bathtub after he grabbed Conner's hand. Cox testified that Conner was trying to "slash at [his] face and [his] throat and [his] organs" with the knife.

Cox testified that he pushed Conner to the bathroom floor and straddled her while trying to get the knife away from her. Cox testified that Conner was "clawing at [him]" with her free arm, that he tried to pin that arm down with his leg, and that he then put his right hand on her throat and applied pressure for about 4 seconds until she started to "black out." Cox testified that when she began to "black out," he "ripped the knife out of her hands" and threw it into the bathtub with the other knife. Cox testified that he grabbed Conner's throat because she was going to hurt him. Cox testified that once Conner regained consciousness, he continued to restrain her, although she was screaming and trying to get him off of her. Cox testified that he did not want Conner to wake up the children, so he continued to pin her arms down with his legs and applied pressure to her throat again, this time with both hands. Cox testified that he "choked her out again." Cox explained, "I applied just enough pressure so that she would pass out, but not to kill her. And I applied just enough pressure so that I wouldn't crack her trachea, I wouldn't completely cut off the blood flow to her brain." Cox testified that when she regained consciousness a second time, she began crying and asked for her inhaler, so he got off of her, and that she immediately apologized to him and told him she loved him.

On cross-examination, Cox testified that he "deemed it necessary" to strangle her twice, even though she weighed

approximately 115 pounds and he was "a 219-pound U.S. Marine," and that although she had previously on one occasion threatened suicide, she did not do so on this evening.

The matter was submitted to the jury, which returned unanimous guilty verdicts on both counts. The district court later sentenced Cox to 4 years' probation for the strangulation conviction and 1 year's imprisonment for the third degree domestic assault conviction, with 7 days' credit for time served.

ASSIGNMENTS OF ERROR

Cox assigns that the district court erred by admitting the testimony of the State's expert witness, Michalski; by overruling his *Daubert* objection, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); and by overruling his objection based on Neb. Rev. Stat. § 27-403 (Reissue 2008).

ANALYSIS

All three of Cox's assigned errors revolve around the testimony given by Michalski regarding domestic violence. Cox argues that her testimony should have been excluded under the principles of *Daubert* and that her testimony regarding strangulation should have been excluded under § 27-403.

[1] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013); *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

Daubert *Hearing*.

Cox argues that Michalski's testimony should have been excluded because it does not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra*, which standards were adopted by the Nebraska Supreme Court in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[2] A trial judge acts as a gatekeeper for expert scientific testimony, and must determine (1) whether the expert will testify to scientific evidence and (2) if that testimony will be helpful to the trier of fact. See *id.* This entails a preliminary assessment whether the reasoning or methodology underlying

the testimony is scientifically valid and whether that reasoning or methodology may properly be applied to the facts in issue. See *id*.

Cox argues that Michalski's testimony fails to meet the standards required by *Daubert* because her theory unfairly cast Cox as the abuser and deprived him of a just result. We disagree with Cox's argument.

[3,4] The Nebraska Supreme Court has found that *Daubert* does not create a special analysis for answering questions about the admissibility of all expert testimony. See *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008). If a witness is not offering opinion testimony, that witness' testimony is not subject to an inquiry pursuant to *Daubert*. *State v. Schreiner, supra*; *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).

In *State v. Schreiner, supra*, the defendant sought, through a *Daubert* argument, to exclude the expert witness testimony of a sexual assault nurse examiner who performed an examination of the victim, but did not offer any specific opinion as to what caused the injuries observed during the examination. The court found that the witness testified regarding observations about the victim and that although she was qualified to offer expert testimony, she testified to matters within her personal knowledge. *Id*. The court concluded that "this is simply not the sort of expert testimony that demands a *Daubert* inquiry." *State v. Schreiner*, 276 Neb. at 405, 754 N.W.2d at 754. See, also, *State v. Robinson, supra*; *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996) ("expert witness" who testified about flying was testifying not as to opinions based upon his expertise, but as to personal knowledge).

Although *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992), was decided prior to the *Daubert*/*Schafersman* line of cases, it is also instructive. In *State v. Roenfeldt, supra*, the defendant objected to the expert testimony of a physician who testified to the symptoms, behavior, and feelings generally exhibited by children who had been sexually abused. That expert testimony was not premised upon an examination of the victim, and the expert did not testify as to whether the

victim had been sexually abused. The Nebraska Supreme Court found that the testimony was admissible because it assisted the trier of fact in understanding and determining the issues related to the case. *Id.*

Assuming without specifically deciding whether Michalski's testimony necessitates a *Daubert* analysis, we find that the nature of Michalski's testimony regarding domestic abuse relationships and common characteristics of both abusers and victims was helpful to the jury because it assisted them in understanding and determining the issues closely related to the case. See *State v. Roenfeldt, supra*. Therefore, the trial court did not abuse its discretion by overruling Cox's motion to exclude Michalski's testimony.

Objection Under § 27-403 and Strangulation Testimony.

Cox argues that Michalski's specific testimony regarding strangulation should have been excluded under § 27-403 because her testimony of the definition of strangulation differed from the definition set forth under Nebraska laws. The State contends that, at trial, the § 27-403 objection was not raised regarding strangulation, but only later when Michalski was questioned as to why a victim may threaten self-harm.

[5,6] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012). 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. *State v. Kibbee, supra*.

The record indicates that, contrary to Cox's assertion in his brief that a § 27-403 objection was made at the *Daubert* hearing, no specific § 27-403 objection was made until Michalski's trial testimony in front of the jury and was regarding a victim's threat of self-harm as follows:

> [The State:] Michalski, let me paint a hypothetical picture for you. If a domestic violence victim had just been

— if her telephone, if her cell phone had just been taken from her and she wanted it back, and the offender refused to give it back, and the victim, in response, threatened to harm herself, what do you make of that?

[Cox's counsel]: Object on relevancy and [§ 27-]403.

THE COURT: Sustained.

[The State:] If a victim threatened self-harm under a crisis-type situation, or something she perceived as a crisis, could you explain her rationale for doing so?

[Cox's counsel]: I'd make the same objection, Judge; [§ 27-]403.

THE COURT: Overruled. You may answer.

With regard to testimony given regarding strangulation, the following colloquy occurred between the State and Michalski at trial, before the above-mentioned testimony and specific § 27-403 objections:

Q . . . Michalski, I'm going to switch gears now and ask you about strangulation.

A Okay.

Q Can you define strangulation for us?

A Yes. Strangulation is pressure placed on the vessels of the neck and the airway.

[Cox's counsel]: I'm going to pose an objection. I believe that strangulation is a defined term under Nebraska law.

[Michalski]: Yes, it is.

THE COURT: Overruled. You may proceed.

A It's — by pressure, what that pressure does is it impedes or blocks the blood flow and the air flow to and from the brain, the heart and the rest of the system.

As indicated in the excerpts from Michalski's trial testimony, Cox did not specifically object to the strangulation testimony under § 27-403. However, even though Cox did not explicitly identify § 27-403 as his objection, his reference to strangulation as a legally defined term is sufficient for us to address the assignment of error under § 27-403.

Section 27-403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Neb. Rev. Stat. § 28-310.01(1) (Reissue 2008) provides that "[a] person commits the offense of strangulation if the person knowingly or intentionally impedes the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck of the other person." Michalski started to define strangulation as "pressure placed on the vessels of the neck and the airway," during which Cox interposed an objection. Once the objection was overruled, Michalski continued with her definition, explaining that "[i]t's — by pressure, what that pressure does is it impedes or blocks the blood flow and the air flow to and from the brain, the heart and the rest of the system."

Michalski's complete definition of strangulation is almost identical to the statutory definition set forth in § 28-310.01, and its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Therefore, we conclude that the district court did not abuse its discretion by overruling Cox's objection to Michalski's testimony regarding strangulation.

For completeness in addressing Cox's arguments contained within this assignment of error, we also note that Cox briefly alleges that Michalski's testimony improperly characterized him as an offender. The record indicates that Michalski, throughout her testimony at both the *Daubert* hearing and testimony before the jury, specifically referred to the abuser in a domestic violence relationship as an offender and to the person receiving the abuse as a victim, with not one objection as to that characterization. Specifically, before the jury, the State indicated to Michalski that "for simplicity, we will call those people victims, and the opposite party, offenders. Fair enough?" Michalski replied, "Yes."

No objection was ever made regarding the terminology used by Michalski, and therefore, Cox has waived any objection to its use. See *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012) (failure to make timely objection waives right to assert prejudicial error on appeal).

CONCLUSION

In conclusion, we find that the trial court did not abuse its discretion by allowing Michalski to testify as an expert over Cox's objection and allowing her testimony regarding strangulation over his objection. Therefore, we affirm.

AFFIRMED.

MARK J., APPELLEE, V. DARLA B., FORMERLY KNOWN AS DARLA J., APPELLANT.

842 N.W.2d 832

Filed February 11, 2014. No. A-13-394.

1. **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.
2. **Divorce: Modification of Decree: Visitation.** Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children.
3. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
4. **Visitation.** The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child.
5. **Visitation: Parent and Child.** Visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor children of a marriage which has been legally dissolved.
6. **Visitation.** The best interests of the children are primary and paramount considerations in determining and modifying visitation rights.
7. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
8. **Courts: Child Custody: Visitation.** It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests, which is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties or by third parties.

Appeal from the District Court for Garfield County: KARIN L. NOAKES, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Chris A. Johnson, of Conway, Pauley & Johnson, P.C., for appellant.

John A. Wolf and Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

INBODY, Chief Judge.

INTRODUCTION

Darla B., formerly known as Darla J., appeals the order of the Garfield County District Court modifying the decree dissolving her marriage to Mark J. and terminating her visitation with the parties' minor child, Jacey J.

STATEMENT OF FACTS

Darla and Mark's marriage was dissolved by a decree of the district court on May 17, 2005, in which Mark was awarded custody of Jacey and Darla was awarded visitation. On May 4, 2009, Mark filed a petition for a modification of visitation, alleging that visitation with Darla was "placing [Jacey] in great harm" and requesting that visitation be returned from unsupervised to supervised visitation at the recommendation of Jacey's psychologist and therapist. Darla denied the allegations and filed a counterclaim seeking custody of Jacey.

In December 2009, the district court granted Darla specific visitation and ordered that the visitation was to be supervised until further order of the court. In 2010, Darla filed a motion to terminate supervised visitation, alleging that she posed no threat to Jacey and that there had been no issues with supervised visitation, while Mark filed a motion indicating that the visitations needed to be more strictly supervised. In May 2010, the district court denied Darla's motion and ordered that all other terms of visitation remain in effect.

In October 2010, Mark filed an application for termination of visitation, alleging that visitation between Darla and Jacey was placing Jacey in great harm. The application indicated that in June 2010, Jacey was taken to a Nebraska State Patrol office by the individual supervising Darla's visitation, whereupon Jacey reported that she was being sexually abused

by Mark, which report had led to the initiation of a juvenile action. The petition further alleged that shortly thereafter, Jacey recanted her statements and admitted that Darla had coached her to make false statements by threatening and intimidating Jacey. Mark's petition indicates that the reports of sexual abuse were unfounded. Darla denied the application and requested that it be dismissed.

In October 2011, Darla filed a complaint for contempt, alleging that Mark had cut off all visitation between her and Jacey, in violation of the court's previous orders. A hearing was held on the complaint for contempt, after which the court found that there was insufficient evidence to hold Mark in contempt.

At trial, Mark testified that since the parties separated, there had been a long history of manipulation on Darla's part and problems with allegations of Mark's sexually abusing Jacey. Mark recounted several occasions of Darla's reporting to law enforcement that Mark was abusing Jacey, which reports resulted in Jacey's being removed from Mark's custody while he was investigated. Each time, the allegations came back unfounded. Mark testified that Jacey recanted the allegations of sexual abuse she made in 2010.

Mark admitted that he had stopped visitation between Darla and Jacey based upon the advice of a psychologist. Thereafter, supervised visitations were ordered, and Mark explained that Jacey began coming home from visitations with Darla with tape recorders and cell phones given to her by Darla, with which, Jacey explained, Darla had told her to record what was going on at Mark's home. On another occasion, Jacey began receiving notes left by Darla in Jacey's locker at her high school.

Jacey took the stand and testified that she was 13 years old and attended high school. Jacey testified that she lived with Mark and her stepmother and siblings. Jacey testified that one of the supervised visitation workers, Darla's husband, and a family friend took her to the State Patrol office, where she told the State Patrol that Mark had sexually abused her. Jacey testified that Darla told her on several occasions to tell the lie and that she complied because she was scared of Darla, who had

threatened to kill her and her family members. Jacey testified that Darla would give her a note at visitations and tell her to memorize the note "so [Jacey] could say it." Jacey testified that she eventually told the truth that Mark had not hurt her and that Darla had told her to make the accusations. Jacey explained that visitations with Darla "go okay," but that she no longer wanted to have visitation with her because she wanted "a normal life."

Darla's current husband, Tim B., testified that he saw Jacey during her visitations with Darla, beginning in 2008. Tim testified that Darla and Jacey's relationship was good and that Darla and Jacey had fun together. Tim described Jacey as fun-loving and outgoing and said Darla and Jacey are very similar. Tim testified that he was very surprised at Jacey's testimony in court, because Jacey always referred to Darla as "[M]om" and usually referred to Mark as only "Mark" and not "[D]ad." Tim testified that Darla is very upset at not being able to see Jacey and that he and Darla still attend Jacey's activities, but keep their distance.

Tim testified that in the week before he and Darla took Jacey to the State Patrol office, Jacey had not directly told Darla and him what was going on with Mark, but was giving them hints such as telling them that Mark was showering with her and threatening her by putting a gun to her head. Tim testified that Jacey told them Mark had threatened to kill Darla, Jacey, and Tim. Tim testified Jacey made statements that Mark had shaved her legs and that she was afraid. Tim testified that on the day they went to the State Patrol office, Jacey indicated that she was ready to tell the truth, but that Darla did not want her to go because Darla was afraid. Tim testified that Jacey's testimony about the note and what happened on that day was not accurate and that no note was given to Jacey. Further, Tim testified that there was no discussion in the vehicle about what Jacey should report to law enforcement.

A friend of Tim and Darla's testified that he traveled with Tim, Jacey, and the supervised visitation worker to take Jacey to speak with the State Patrol. The friend testified that he had been aware there was a possibility that at some point during one of Jacey's visits, they would take her to law enforcement.

The friend testified that he was aware of Darla's and Tim's concerns about sexual abuse for several months. He testified that Jacey was not given a note to review and that they did not stop on the way to the State Patrol office. He explained that on the way, Jacey was happy and acted normally.

A clinical psychologist testified that she had twice evaluated Darla and, in the past, had conducted counseling sessions with her. She testified that the evaluations were completed in November 2003 and January 2013. She explained that in 2013, Darla requested a psychological evaluation because Darla was concerned about an upcoming court date and visitation. The clinical psychologist concluded that Darla did not meet the criteria for any specific clinical diagnosis and was not in need of any further counseling. She testified that the evaluation did not provide any specific information regarding risk to a child. She further explained that there was no indication of sociopathic or antisocial personality features which would indicate mistruths and that there was no evidence of depression or anxiety.

Erika Williams, a family support and supervised visitation worker, testified that she began supervising visits with Darla and Jacey in December 2009 and continued through June 2010, which end coincided with a trip to the State Patrol office with Jacey, Tim, and Tim and Darla's friend. Williams testified that as a supervised visitation worker, she has the responsibility to make sure that the child remains safe during the visit.

Williams testified that Darla was always prepared for Jacey's visits and was always accommodating of Jacey's activities. Williams described Darla as involved and active with Jacey during the visits. Williams testified that on two occasions in 2010, Jacey had told her that something was going on between her and Mark and also that Mark had shaved Jacey's legs, although Williams later testified that June 2010 was the first time she had heard about allegations regarding Mark and that any other incident she had heard about, she heard about from Darla. Williams testified that on June 29, 2010, Jacey told Williams that because of the incident of Mark's shaving her legs, she wanted to go speak with law enforcement. Williams

testified that Jacey was never given a note to study as to what she should say and also that on the way to the State Patrol office, they did stop at a gas station, as Jacey had testified, but that Jacey did not get out of the vehicle. Williams submitted her visitation records as an exhibit, but testified that the records from June 29 had gone missing and that she did not know where they were. On cross-examination, Williams testified first that the group did not stop at a gas station on the way to the State Patrol office and later that she did not remember if they had or not.

Several of Darla's friends testified on her behalf, each indicating that Darla and Jacey had a close relationship and loved each other. Many of those friends testified that they observed no hesitation or fear in the relationship between Darla and Jacey, and none had ever heard Darla threaten or speak poorly to Jacey.

Darla testified that there have been problems with her and Mark's relationship regarding Jacey. Darla testified that Mark made it difficult for her to see Jacey and that he refused her visitation on several occasions. Darla explained that after so many refusals, she initiated a contempt proceeding, and that she had since agreed to other visitation options.

Darla testified that in 2003, she walked in on Jacey, who was 4 years old at the time, fondling herself and that Jacey said "she was doing what her daddy does." Darla testified that upon the recommendation of a lawyer, she took Jacey to a child advocacy center where Jacey was interviewed, but that she did not specifically discuss with the center's personnel what Jacey had said. In 2005, Darla testified, Jacey told her that Mark had "used a Barbie leg and put it [into Jacey's] bottom." Darla testified that another lawyer told her to go to Iowa to talk to someone in connection with this incident and that Jacey was interviewed, but not taken into protective custody. In 2010, as set forth above, Jacey was taken to a State Patrol office for allegations regarding Mark. Darla did not go with Jacey on that occasion because she did not like the idea of Jacey's going to the State Patrol office, because Jacey had already reported Mark on three occasions and the blame ended on Darla. Darla explained that over the years, Jacey had told

her that Mark was shaving her legs and would refer to Mark as only "Mark" and not "[D]ad."

Darla testified that Jacey was very happy and excited prior to leaving with Tim and Williams to go make the report to law enforcement. Darla testified that she had not given Jacey a note providing things to say and had never told Jacey what to report. Darla further testified that she had never threatened Jacey with bad consequences and had not threatened Mark or his family. Darla testified that Jacey was removed from both Darla's and Mark's homes for several weeks and that a juvenile case was initiated, although it was later dismissed and Jacey was placed back in Mark's custody.

Darla explained that after that time, Jacey responded differently to Darla; for example, instead of grinning at Darla when she came to Jacey's activities, Jacey would glare at her and did not wave. Darla testified that these actions were because of Mark, who had always tried to keep Jacey away from her. Darla testified that she had supervised visitations with Jacey and that the visitations went "[g]reat." Darla testified that none of the visits were bad but that in the fall of 2012, she had to stop visitations because paying for supervision was expensive. Darla testified that Jacey began to cut visits short because of her activities. Darla testified that Mark "guards" Jacey at activities, not allowing her to be near Darla. Darla requested that the supervised visitation be terminated, and she submitted a proposed parenting plan for visitation.

Darla testified that she wanted to take Jacey to Hawaii, but that she did not communicate in any way to Jacey that she was going to kidnap her and take her to Hawaii to hide. Darla admitted that she sent Jacey home with a tape recorder and a cell phone. Darla explained that in the summer of 2010, Jacey asked Darla for a cell phone so she could text and call Darla whenever she wanted to. Darla further explained that the tape recorder was given to Jacey before any of the court orders, in the spring of 2009, because Jacey wanted to have it to record what happened in the bathroom in order to prove what happened. Darla testified that she did not like the idea, but eventually gave in. The tape recorder was not returned to Darla, and she did not receive any recordings.

Darla testified that on one occasion, she went into Jacey's school and left her a note in her locker, which note Darla explained was a Thanksgiving card. Darla also testified that she had asked others to put cards in Jacey's locker on other occasions. Darla testified that she believed Jacey was lying when she testified that she no longer wanted visitation with Darla and that Jacey also lied about Darla's giving her a note which told her what to say at the State Patrol office.

The district court entered an order modifying the dissolution decree, finding that there had been a material change of circumstances since the entry of the decree, such that the relationship between Darla and Jacey had deteriorated and Jacey no longer wished to have contact with Darla. The court found that Jacey was 13 years old and had admitted that when she was 9 or 10, Darla convinced her to report that Mark had sexually abused her after Darla made "various threats" to Jacey. The court found that there was evidence that Darla coached Jacey and gave her a note to memorize before reporting to law enforcement. The court noted that Darla had denied threatening or coaching Jacey, but found that her testimony was evasive, contradictory, and misleading. The court found that Darla had demonstrated an ability and inclination to secretly and inappropriately communicate with Jacey without the knowledge of the court, Mark, the school system, and the visitation supervisor. The court found that Jacey had matured since the reports of abuse, had attended therapy, and was doing well in her current placement. The court found that Jacey was getting along with her siblings and had a close relationship with Mark and her stepmother. The court found that the "mental anguish and distress this child has suffered since her parent[s'] separation and divorce due to the actions of her mother [are] extreme and abusive."

The court ordered that visitation with Darla was not in Jacey's best interests and modified the decree by disallowing any further visitation between Darla and Jacey. The court ordered that should Jacey desire contact or parenting time with Darla, it may occur at Mark's discretion, with conditions which may include that any such visitation be supervised or that it occur in or near the city in which they live and which

must include that Jacey be given the authority to end the visit at any time.

ASSIGNMENT OF ERROR

Darla assigns, consolidated and rephrased, that the district court abused its discretion by terminating her visitation rights.

STANDARD OF REVIEW

[1] 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. *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009); *Rouse v. Rouse*, 18 Neb. App. 128, 775 N.W.2d 457 (2009).

ANALYSIS

Darla has alleged five assignments of error, all of which revolve around her contention that the district court abused its discretion by modifying the dissolution decree to terminate her parental visitation with Jacey. Specifically, the district court modified the dissolution decree by terminating any further visitation by Darla with Jacey, unless Jacey wished to have visitation, at which time it would be allowed at Mark's discretion. In making this modification, the district court found that Darla and Jacey's relationship had deteriorated as a result of Darla's forcing Jacey to lie, by threats and manipulation. The court further found that Darla was engaging in secret communication with Jacey.

[2-4] Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children. *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001). A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Donscheski v. Donscheski*, 17 Neb. App. 807, 771 N.W.2d 213 (2009). The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child. See *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991).

[5,6] Visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor children of a marriage which has been legally dissolved. *Walters v. Walters*, 12 Neb. App. 340, 673 N.W.2d 585 (2004). The best interests of the children are primary and paramount considerations in determining and modifying visitation rights. *Fine v. Fine, supra*.

The record indicates that the testimony adduced at trial presented the court with two completely contradictory stories. On one hand, the testimony of Darla and her witnesses indicates that Darla and Jacey have a normal, happy, and healthy mother-daughter relationship. Darla testified that she had never forced Jacey to lie about allegations of sexual abuse and had never threatened Jacey to force her to make said allegations. On the other hand, Jacey testified that Darla forced her to memorize statements regarding sexual abuse to report to law enforcement and threatened her if she did not. Jacey testified that she wants to have a "normal" life and does not want any further contact with Darla because of her actions and manipulation.

[7] When the evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Edwards v. Edwards*, 16 Neb. App. 297, 744 N.W.2d 243 (2008). We give weight to the district court's findings, and particularly the district court's determination that Darla's testimony was evasive, contradictory, and misleading.

The primary material change in circumstances in this case revolves around Darla's manipulation and failure to follow court orders. The record indicates that Darla has secretly placed notes in Jacey's locker and, on numerous occasions over the past several years, has facilitated or directly reported allegations that Mark has sexually abused Jacey, all of which reports have been investigated and determined to be unfounded and which in the meantime resulted in Jacey's being taken out of both parents' homes and temporarily placed into foster care. At trial, Jacey, who was 13 years old, testified that she had reported to the State Patrol that Mark had sexually abused

her, but admitted that it was a lie and that she had been forced by Darla to tell that lie. Jacey described how Darla secretly gave her a note and threatened her to force her to memorize its contents or face the possibility of Darla's hurting Jacey or her family. This has resulted in extreme distress and confusion for Jacey and in the quick deterioration of her relationship with Darla, so much so that Jacey testified that she no longer wishes to have any contact with Darla.

While Darla clearly made bad decisions that resulted in numerous attempts to detrimentally interfere with Jacey and Mark's relationship, we find that the district court's modification of the dissolution decree is inequitable. The district court modified the decree to disallow Darla any parenting time. We affirm this portion of the district court's order. However, the court further determined that if Jacey wished to have contact or parenting time with Darla, such may occur at Mark's discretion and in accordance with any terms and conditions which Mark "deems are in [Jacey's] best interest." This is an unlawful delegation of the district court's responsibility.

[8] It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests. This is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties or by third parties. See, *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002); *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978).

In *Deacon*, the Supreme Court reversed an order which granted a psychologist the authority to effectively determine visitation and to control the extent and time of such visitation, concluding that such an order was "not the intent of the law and is an unlawful delegation of the trial court's duty. Such delegation could result in the denial of proper visitation rights of the noncustodial parent." *Id.* at 200, 297 N.W.2d at 762. As authority for its conclusion, the *Deacon* court cited *Lautenschlager*. In *Lautenschlager*, the court observed:

> The rule that custody and visitation of minor children shall be determined on the basis of their best interests,

> long established in case law and now specified by statute, clearly envisions an independent inquiry by the court. The duty to exercise this responsibility cannot be superseded or forestalled by any agreements or stipulations by the parties.

201 Neb. at 743-44, 272 N.W.2d at 42. The Supreme Court in *Deacon* specifically took note that the reasoning of *Lautenschlager* was being extended to third parties.

The reasoning of *Deacon* has, in turn, been applied in several contexts. In *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988), the Supreme Court disapproved of a district court order in a divorce proceeding authorizing a child custody officer to control custody of a minor child and the visitation rights of the parents and found it was a delegation of judicial authority unauthorized in Nebraska law. In *In re Interest of Teela H.*, 3 Neb. App. 604, 529 N.W.2d 134 (1995), this court held that the order of a juvenile court granting a psychologist the authority to determine the time, manner, and extent of a parent's visits with a minor child was an improper delegation of judicial authority. In doing so, we cited, inter alia, *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). In the latter case, the Supreme Court held that it was plain error for a juvenile court to require that a parent participate in a particular support group on a regular basis and follow all directions of a counselor. *Id.* The *In re Interest of D.M.B.* court emphasized, "It is the court's duty, not that of counselors, Department of Social Services workers, social workers, child protection workers, or probation officers to fix the terms and limitations of a rehabilitation provision." 240 Neb. at 362, 481 N.W.2d at 914-15.

We are aware that a custodial parent, by the nature of most custody circumstances, exercises significant control over a noncustodial parent's visitation rights, but that does not include carte-blanche authority as to parental visitation and contact. We conclude that the district court abused its discretion by determining that if Jacey wished to have contact or parenting time with Darla, such may occur at Mark's discretion and in accordance with any terms and conditions which Mark "deems are in [Jacey's] best interest." Therefore, we remand

this matter to the district court for the purpose of holding a hearing within 30 days of the mandate for entry of an order in conformity with this opinion. Furthermore, we order that Jacey be appointed a guardian ad litem to assist Jacey in the future in determining matters related to whether or not it is in her best interests to renew visitation with Darla.

CONCLUSION

For the reasons set forth above, we affirm in part, and in part reverse the decision of the district court and remand the cause for further proceedings consistent with this opinion.

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

STATE OF NEBRASKA, APPELLEE, V. RONNIE DUBRAY, JR., APPELLANT.

843 N.W.2d 681

Filed February 25, 2014. No. A-13-246.

1. **Sentences: Prior Convictions: Habitual Criminals.** Anyone who has been twice convicted of a crime, sentenced, and committed to prison, in Nebraska or any other state or by the United States, for terms of not less than 1 year each shall, upon conviction of a felony committed in Nebraska, be deemed to be a habitual criminal.
2. **Habitual Criminals: Indictments and Informations.** When punishment of an accused as a habitual criminal is sought, the facts with reference thereto shall be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted.
3. **Sentences: Prior Convictions: Habitual Criminals.** The statutory provisions concerning habitual criminals do not create a new or separate offense, but provide merely that the repetition of criminal behavior aggravates guilt and justifies a greater punishment than would otherwise be considered.
4. **Sentences: Prior Convictions: Habitual Criminals: Indictments and Informations.** The essential allegations which an information must contain to sufficiently set forth a charge that a defendant is a habitual criminal are that the defendant has been (1) twice previously convicted of a crime, (2) sentenced, and (3) committed to prison for terms of not less than 1 year each.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and Carrie A. Thober for appellee.

INBODY, Chief Judge, and IRWIN and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Ronnie Dubray, Jr., appeals an order of the district court for Lancaster County, Nebraska, allowing the State to amend the information related to a habitual criminal charge at the habitual criminal hearing. On appeal, Dubray asserts that it was error to allow amendment of the information at that point and that the court erred in failing to specifically rule on the admissibility of one of four prior offenses proffered by the State to demonstrate that Dubray is a habitual criminal. We find that the allowed amendment concerned only historical facts and not information necessary to the pleading and that there was sufficient properly considered evidence to support the habitual criminal finding. We affirm.

II. BACKGROUND

Dubray was charged by information with possession of a controlled substance and being a habitual criminal. With respect to the habitual criminal charge, the State alleged in the information that Dubray had "been twice convicted of a crime, sentenced and committed to prison, in this or any other state or by the United States . . . for terms of not less than one year each." The State also made more specific assertions, indicating particular timeframes, counties of origin, underlying charges, docket numbers, and particular ranges of sentences for three alleged prior convictions.

Dubray ultimately entered a plea to possession of a controlled substance. Subsequently, a hearing was held on the assertion that Dubray is a habitual criminal. At that hearing, the State moved to file an amended information. The State specifically requested to amend the particular assertions concerning the first proffered prior conviction to reflect a different

county of origin and docket number and to add a fourth proffered prior conviction.

The State provided exhibits consisting of e-mail exchanges between Dubray's counsel and the State indicating that the State had provided notice to Dubray about the particular prior offenses it intended to rely upon. The State had notified Dubray about the specific first three prior offenses asserted in the original information more than 5 months prior to the habitual criminal hearing, and had specifically indicated that the wrong county of origin had been pled more than 2 months prior to the habitual criminal hearing. The State notified Dubray about the fourth prior offense, sought to be added in the amended information, more than 1 month prior to the habitual criminal hearing. Dubray's counsel acknowledged that he had no objection to the sufficiency of notice provided concerning the specific prior offenses the State was relying on to demonstrate that Dubray is a habitual criminal.

Dubray objected to the State's motion to amend the information. Although Dubray acknowledged having notice of the specific prior convictions the State was alleging, he nonetheless objected to the State's being allowed to change the county of origin for one of the proffered prior convictions and to its being allowed to add an additional prior conviction. Dubray also objected to the court's use of one of the other proffered prior offenses because the State's evidence indicated a sentence of "one year" without specifying a minimum sentence.

The district court ultimately overruled Dubray's objections to the State's request to amend the information. The court specifically found that the State was not required to plead the specific details related to alleged prior offenses and that the subject of the State's amendment to the information was not related to information required to be pled. The court noted that Dubray had notice of the specific proffered prior convictions well in advance of the hearing and that there was no due process issue. The court declined to specifically rule on the admissibility of the one prior offense for which the evidence indicated a sentence of "one year" and to which Dubray had objected, but the court found that the evidence related to the

other three proffered prior convictions was sufficient to establish that Dubray is a habitual criminal. The court sentenced Dubray, and this appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Dubray has assigned two errors. First, he asserts that the district court erred in permitting the State to amend the information at the habitual criminal hearing. Second, he asserts that the court erred in failing to rule on the admissibility of the prior offense for which he had received a sentence of "one year."

IV. ANALYSIS

There is little dispute about the appropriate authority to guide our resolution of this case. In the district court and in briefs on appeal to this court, the parties have cited to and urged use of *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974), as being dispositive. The parties differ on the outcome suggested by that case. We agree that the case sets forth the appropriate analysis and resolution, and we conclude that there is no merit to Dubray's assertion on appeal that it was error to allow the State to amend the information.

[1,2] Neb. Rev. Stat. § 29-2221(1) (Reissue 2008) provides that anyone who "has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal." Section 29-2221(2) provides that "[w]hen punishment of an accused as a habitual criminal is sought, the facts with reference thereto shall be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted . . . ."

In *State v. Harig, supra*, the Nebraska Supreme Court addressed a substantially similar factual situation. In that case, the State charged the defendant with being a habitual criminal. The State alleged the basic language of § 29-2221(1), alleging that the defendant had been convicted of two prior crimes and sentenced and committed to prison to terms of not less

than 1 year on each. The State also alleged more particular information about the prior offenses, including the specific dates of the prior convictions. The State, however, misstated the date of one prior offense. Based on the evidence adduced at the habitual criminal hearing, the State sought to amend the information to correct the mistaken date of the proffered prior offense, and the court allowed the amendment over the defendant's objection.

[3] The Nebraska Supreme Court iterated that the statutory provisions concerning habitual criminals do not create a new or separate offense, but provide merely that the repetition of criminal behavior aggravates guilt and justifies a greater punishment than would otherwise be considered. See *State v. Harig, supra*. The court recognized that any mistake concerning details of an alleged prior offense would have no impact on the allegation of the underlying current felony or felonies. See *id*.

[4] The court recognized that "the time of a prior conviction is only a historical fact." *Id*. at 55, 218 N.W.2d at 889. The court iterated that under Nebraska law, the essential allegations which an information must contain to sufficiently set forth a charge that a defendant is a habitual criminal are that the defendant "has been (1) twice previously convicted of a crime, (2) sentenced, and (3) committed to prison for terms [of] not less than 1 year each." *Id*. The court specifically held that "[*t*]*hese* are 'the facts with reference thereto' referred to in [§] 29-2221." *Id*. (emphasis supplied). The court continued and recognized that although "it is undoubtedly desirable and helpful to have the dates of the prior felonies alleged in the" charging document, the absence of such allegations would not render the pleading insufficient. *State v. Harig*, 192 Neb. 49, 55, 218 N.W.2d 884, 889 (1974).

In *State v. Harig, supra*, the Supreme Court found that the State's mistake regarding the date of one of the proffered prior offenses set forth in the information was not a violation of the requirement in § 29-2221(2) that the facts with reference to the alleged prior offenses needed to be set forth. The court also found that there would be no constitutional deficiency from failing to make such an assertion in the information

"so long as means are and were provided for the defendant to obtain the information relative to the specific dates of the offenses relied upon as prior felonies" to support the habitual criminal charge. *State v. Harig*, 192 Neb. at 57, 218 N.W.2d at 890. In *State v. Harig, supra*, the fact that the defendant had been "aware for at least 2 weeks prior to the [habitual criminal] hearing that the State was going to ask leave to amend the information" and the trial court's willingness to offer a continuance if needed by the defendant demonstrated that the defendant was not prejudiced by the motion to amend the information. *Id.*

The present case is substantially similar, and the outcome should be the same. As in *State v. Harig, supra*, the State in the present case specifically pled the language of § 29-2221(1) to allege that Dubray had twice previously been convicted, sentenced, and committed to prison for terms of not less than 1 year each. As the Supreme Court specifically held, *those* are the facts that are required to be pled. Also, as in *State v. Harig, supra*, the State in the present case elected to provide more specific information to Dubray by alleging details about the prior offenses it intended to use to support the habitual criminal charge. Those allegations, however, were unnecessary and amounted to historical facts, not essential items that were required to be pled.

As in *State v. Harig, supra*, Dubray was well aware, for a substantial time before the habitual criminal hearing, of precisely which prior offense the State was intending to use to support the habitual criminal charge and was aware for several weeks prior to the hearing that the State would seek to amend the information to remedy the mistaken details it had pled. As in *State v. Harig, supra*, there is no showing or assertion that Dubray was in any way prejudiced by the mistake or by the State's motion to amend the information.

As such, as the Supreme Court held in *State v. Harig, supra*, we conclude that there was no error by the district court in allowing the State to amend the information. Dubray's assertions to the contrary are meritless.

In light of our conclusion that the district court did not err in allowing the State to amend the information, the evidence

adduced concerned four specific prior convictions. One of those is a prior conviction to which Dubray has raised no challenge whatsoever. The remaining three alleged prior convictions include the one prior conviction for which the State amended and changed the county of origin, the new prior conviction for which the State amended and added to the information, and the one prior conviction for which the evidence indicates that Dubray was sentenced to a term of "one year." Other than his assertions that the court should not have allowed the State to amend the information, Dubray has raised no challenge to the sufficiency of the evidence concerning the prior conviction for which the State amended and changed the county of origin or the new prior conviction for which the State amended and added to the information. In light of our conclusions above, having found no error in the court's allowing the amendment, the evidence thus demonstrates that the State adduced evidence of three prior convictions for which Dubray was sentenced and committed to terms of not less than 1 year.

Like the district court, we decline to further address Dubray's assertions concerning the remaining proffered prior offense for which the evidence indicates he was sentenced to a term of "one year." Section 29-2221 provides that the State is required to demonstrate two prior convictions, and regardless of the admissibility of the prior conviction for which he was sentenced to "one year," the State has adduced sufficient evidence of three prior offenses. Thus, there is no need to consider the fourth prior offense or whether it could appropriately be considered.

V. CONCLUSION

We find no merit to Dubray's assertions on appeal. The district court did not err in allowing the State to amend the information at the habitual criminal hearing, and the State adduced sufficient evidence to demonstrate that Dubray is a habitual criminal. We affirm.

AFFIRMED.

Sean Busch, appellant and cross-appellee, v. Civil Service Commission for the City of Alliance, Nebraska, appellee and cross-appellant.

844 N.W.2d 324

Filed February 25, 2014. No. A-13-391.

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. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
3. **Administrative Law: Appeal and Error.** The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
4. **Administrative Law: Words and Phrases.** Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.
5. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
6. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
7. **Civil Service: Administrative Law: Termination of Employment.** Neb. Rev. Stat. § 19-1832(3) (Reissue 2012) permits an employee to be discharged for physical unfitness for the position which the employee holds.
8. **Civil Service: Administrative Law: Termination of Employment: Municipal Corporations: Ordinances.** The Civil Service Act, Neb. Rev. Stat. § 19-1825 et seq. (Reissue 2012), provides that no person in the civil service shall be discharged except for cause and then only upon a written accusation. The governing body of a municipality shall establish by ordinance procedures for acting upon such written accusations.
9. **Administrative Law.** Agency action taken in disregard of the agency's own substantive rules is arbitrary and capricious.
10. **Civil Service: Administrative Law: Termination of Employment: Time.** Neb. Rev. Stat. § 19-1833 (Reissue 2012) provides that a written accusation is required and that after discharge, the employee may, within 10 days after being notified of the discharge, file with the commission a written demand for an investigation, followed by a hearing.

11. **Constitutional Law: Public Officers and Employees: Termination of Employment: Due Process.** When a public employer deprives an employee of a property interest in continued employment, constitutional due process requires that the deprivation be preceded by (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity for the employee to present his or her side of the story.
12. **Termination of Employment: Due Process.** Deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate posttermination due process.
13. **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.
14. **Civil Service: Administrative Law: Records: Appeal and Error.** Neb. Rev. Stat. § 19-1833(5) (Reissue 2012) requires that on appeal from the Civil Service Commission to the district court, a certified transcript of the record and all papers on file in the office of the commission affecting or relating to the judgment or order on appeal be provided.
15. **Civil Service: Administrative Law: Legislature: Attorney Fees: Costs: Appeal and Error.** In enacting the Civil Service Act, the Legislature did not authorize the award of fees or costs except when the appealing party was the governing body.

Appeal from the District Court for Box Butte County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka, Longoria & Kishiyama, P.C., L.L.O., for appellant.

Howard P. Olsen, Jr., and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

The city manager of the City of Alliance (City) terminated the employment of Sean Busch, a police sergeant, following Busch's long-term absence from his job due to a non-work-related injury. The civil service commission (Commission) for the City upheld the termination, and Busch sought review by the district court for Box Butte County, which affirmed the Commission's decision. Busch appeals the termination, and

the Commission cross-appeals the denial of its motion to tax certain costs to Busch. We affirm.

FACTUAL BACKGROUND

Busch began his employment as a patrol officer in January 1999. His employment record has largely been exemplary, and he was promoted to sergeant in 2008. His job duties required him to investigate crimes, make patrol stops, chase down suspects, operate heavy equipment, and shoot a weapon. There is a minimum lifting requirement of 100 pounds, and it takes 5½ pounds of force to pull the trigger on the Glock semi-automatic weapon currently used by employees of the police department.

Busch began experiencing pain in his right hand in March 2012. It was initially believed he had fractured his hand, and on March 20, he was restricted to lifting no more than 2 pounds. Further investigation resulted in a diagnosis of a cyst in Busch's right wrist requiring surgery. A "Return to Work" form dated April 23, 2012, indicated that the 2-pound lifting restriction was still in effect until surgery scheduled for May 2, after which Busch would be unable to work for 2 to 6 weeks. By June, physicians permitted Busch to return to work with a restriction of lifting or carrying no more than 5 pounds. Busch requested light duty, and John Kiss, the City's police chief, recommended a light-duty position at full pay, but J.D. Cox, the City's manager, did not approve. Instead, Cox offered a light-duty office position in a different department to Busch at about half his normal pay, an offer that Busch declined.

Busch had exhausted his paid leave time in early May 2012 and was granted an additional 12 weeks' leave pursuant to the Family and Medical Leave Act of 1993, which leave was scheduled to expire on August 5, 2012. On July 24, Busch submitted a written request to Cox and Kiss for a minimum of 2 months' additional unpaid leave of absence. The following day, July 25, Busch obtained a release from his physician to return to work on August 1 with no restrictions. It is undisputed that Busch did not immediately inform Cox or Kiss of

the July 25 appointment and the attendant release to return to work.

Unaware of Busch's medical appointment, Kiss submitted a memorandum to Cox on July 25, 2012, recommending that Busch's latest request for extended leave be denied. Kiss cited hardships to the police department caused by Busch's extended absence, noting that the department had been without a supervisor since March 2012 and that other officers had been performing his duties, resulting in overtime pay and "comp time." Kiss had a conversation with Busch on August 1 in which Busch told him that his next medical appointment was the following week, on August 8, and did not inform Kiss that, in fact, he had already had an appointment on July 25 and knew he had been released to return to work on August 1.

Meanwhile, having received no response to his request for additional unpaid leave, Busch visited Cox unannounced at Cox's office on August 3, 2012, in an agitated state, demanding to know if Cox planned to fire him. Cox told Busch that he planned to extend his leave until August 8, which he believed to be Busch's next medical appointment. Busch then admitted to Cox that he had actually seen his doctor on July 25—but he told Cox that his work restrictions remained in place. Surprised to learn that the appointment had already taken place, Cox inquired about the "Return to Work" form that was typically provided to the City following Busch's medical appointments. Busch responded that "it hadn't made its way over [there] yet," despite the fact that Busch was in possession of the form. Cox testified that he lost confidence in Busch following Busch's admission that his medical appointment had already taken place and Cox's subsequent discovery that no departments of the City had received a copy of the "Return to Work" form such as they had routinely received following past appointments.

Cox stated that this loss of confidence in Busch prompted him to request that Busch sign a release of his medical records so that Cox could determine why additional leave was needed. Busch refused to permit access to his medical records. The record contains a copy of Cox's August 3, 2012, e-mail to Busch sent after the impromptu meeting recounted above:

> Dear [Busch],
>
> You have asked for 30 days of extended leave pursuant [to] "7.04 of City of Alliance Personnel Manual - Leave without Pay outside of [Family and Medical Leave Act] Provisions." In order to grant that request, I must show good cause and that the request is in the best interest of the City.
>
> You have been off almost five months as the result of surgery to remove a cyst in your hand. I would be remiss in granting your request without an opportunity to review your medical records in hopes of understanding what has happened with your hand necessitating the expiration of all leave afforded you by the City . . . .
>
> I am disappointed that you have declined our request for a release of medical records.
>
> I would like to discuss with you at 8:00 am Monday morning the status of your employment.
>
> Feel free to bring a representative with you.

At the subsequent meeting on Monday, August 6, Busch again declined Cox's request for access to his medical records. Cox asked for Busch's resignation, and Busch declined. The meeting ended with Cox's stating that he would "get back with" Busch about his employment status. Cox called Busch later that day to inform him that the City would pursue termination of his employment upon the filing of the required documents with the secretary of the Commission.

PROCEDURAL BACKGROUND

On August 10, 2012, Cox sent a written "Accusation" to the secretary of the Commission in which he extensively detailed the history of Busch's injury and the resulting work restrictions and time off work. The "Accusation" concluded that the needs of the organization and the department took primary precedence; that Busch had expired all leave banks; that Busch elected not to take a temporary alternate position; that Busch failed to produce any documentation to show that he could fulfill the essential functions of his job within a reasonable amount of time; and that after all leave banks were expired, Busch refused to grant the release of his medical records upon

his request for an extraordinary further extension of leave. On the same date, the Commission forwarded a copy of the "Accusation" to Busch, along with a letter informing him of his right to appeal within 10 days and of the requirement that he then provide to the Commission and to Cox a written demand for an investigation and public hearing. Busch complied, and the public hearing was held on October 1 and 11.

The secretary of the Commission, who was a City employee, testified that she was present at the August 3 and 6, 2012, meetings between Cox and Busch. She stated that Busch had not been forthcoming about his July 25 medical appointment and that she was shocked when he admitted that he had seen the doctor on July 25. She testified that at the August 6 meeting, Busch wanted an answer as to whether his employment was to be terminated, but that Cox said he needed time to consider the matter. The secretary stated that Busch was asked to relate why his employment should not be terminated and that Busch replied that he was tired of "the game playing" and stated that if he had been placed on light duty, he would not have had to use all of his leave banks. She testified that Busch told Cox that it would be at least another month before he could return to fulfill the essential requirements of his job.

The secretary claimed that the medical release Busch was asked to sign would have been limited to issues related to his wrist, but she admitted that the document present in the room at the August meetings contained no restrictions on the information that could be requested. She acknowledged that the City had no policy requiring the release of medical records and that Busch was never told that refusal to sign the medical release would be held against him. The secretary further conceded that she was unaware of any meeting that took place after the August 10, 2012, "Accusation" that gave Busch the opportunity to present his version of the circumstances that resulted in the filing of the "Accusation." She stated that she did not receive from Kiss a written recommendation following the "Accusation" and did not receive from Cox a copy of a decision made following Kiss' written recommendation.

Kiss acknowledged that he did not receive a copy of the August 10, 2012, "Accusation" and therefore did not conduct an investigation of it. He stated that after August 10, he had never met with Busch to explain the "Accusation," given Busch an opportunity to present his version of the facts, or recommended in writing to Cox that Busch's actions warranted "removal." He stated that he did, however, review draft copies of the "Accusation."

In an order dated October 15, 2012, the Commission affirmed the actions of Cox in terminating Busch's employment with the City. The Commission found that Cox's conclusions, set forth in the "Accusation" of August 10, were supported by competent evidence, were made in good faith for cause, and were not based upon any political or religious reasons. The Commission stated that Cox's conclusion and decision were based on competent evidence that existed prior to August 10 and were properly confirmed by evidence presented at the appeal hearings after August 10. Busch timely filed his petition in error with the district court.

In its April 3, 2013, memorandum order, the district court recounted the facts of Busch's case at length, noting that there was not much factual dispute in the case. The court mistakenly stated that the decision of the Commission was not in its record but that it was nonetheless able to address Busch's assigned errors. The district court affirmed the Commission's decision affirming Busch's discharge from his employment. Later realizing its error in overlooking the Commission's written decision, the court entered a supplemental order on April 5 in which it stated that it had now read the decision and reaffirmed its conclusion to affirm the Commission's decision.

On appeal to the district court, the Commission sought to recover $2,588.55, the cost of transcribing and certifying the record of the proceedings. Finding no statutory authority for the assessments of these costs, the district court denied the motion.

Busch timely appealed from the district court's order affirming the Commission's decision. The Commission properly

cross-appealed under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2012) with regard to the district court's denial of its motion for costs.

ASSIGNMENTS OF ERROR

Busch contends, restated and summarized, that the district court erred in applying an incorrect standard of review to the Commission's decision, in concluding that the Commission's decision was made in good faith for cause, and in failing to find that the Commission acted in an arbitrary and capricious manner by applying the technical rules of evidence.

In its cross-appeal, the Commission assigns error to the district court's denial of its motion to recover the cost of transcribing and certifying the verbatim record of the proceedings before it.

STANDARD OF REVIEW

[1-4] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011). The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Id.* The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Id.* Finally, agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion. *Id.*

[5,6] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Id.* On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Did District Court Apply Correct Standard of Review?

Busch first asserts that the district court applied an incorrect standard of review when it reviewed the Commission's decision on Busch's petition in error. Busch points to the district court's initial mistaken belief that the Commission's order was not in the record.

With regard to appeals from a civil service commission, Neb. Rev. Stat. § 19-1833(5) (Reissue 2012) sets forth the scope of the district court's review:

> The district court shall proceed to hear and determine such appeal in a summary manner. The hearing shall be confined to the determination of whether or not the judgment or order of removal, discharge, demotion, or suspension made by the commission was made in good faith for cause which shall mean that the action of the commission was based upon a preponderance of the evidence, was not arbitrary or capricious, and was not made for political or religious reasons.

In *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 1015, 792 N.W.2d 871, 875 (2011), the Nebraska Supreme Court set forth the standard of review applicable to a district court reviewing a decision by a civil service commission: "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."

The district court's order sets forth the language of both § 19-1833(5) and *Fleming, supra*. Busch contends, however, that because the district court did not review the Commission's decision prior to issuing its first order, it could not have applied the proper standard of review. Busch is correct that a district court, sitting as the reviewing court in an error proceeding, does not make independent findings of fact. Due to the district court's mistaken belief that it did not have the Commission's report, it made findings of fact, pointing out that the facts were largely undisputed. The district court corrected

its mistake, however, when it issued its supplemental order. It specifically reaffirmed its conclusion that the Commission's decision should be affirmed. It is the supplemental order that is the final, appealable order.

Moreover, in an appeal of an agency decision to this court, we review the agency decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency. Upon our review of the Commission's decision, we find that it was within its jurisdiction and that sufficient, relevant evidence supported its decision, as more fully set forth below.

Was Commission's Decision Arbitrary and Capricious?

[7] The Civil Service Act, Neb. Rev. Stat. § 19-1825 et seq. (Reissue 2012), regulates the hiring, suspension, and discharge of certain employees of the fire and police departments in the cities where it is applicable. It prohibits the suspension or discharge of employees for political or religious reasons, but provides that employees may be suspended or discharged for cause for any of the reasons which are listed in § 19-1832. Section 19-1832(3) permits an employee to be discharged for "physical unfitness for the position which the employee holds." Neb. Rev. Stat. § 19-646 (Reissue 2012) vests city managers with authority to make employment decisions subject to the civil service provisions of the Civil Service Act.

[8] The Civil Service Act further provides that no person in the civil service shall be discharged except for cause and then only upon a written accusation, and that the governing body of a municipality shall establish by ordinance procedures for acting upon such written accusations. See § 19-1833(1) and (2). The City established such procedures in ordinance No. 1855, art. III, § 5, passed October 24, 1985, which are summarized as follows, in relevant part: A written accusation must be filed with the secretary of the Commission, who shall deliver a copy within 72 hours to the police chief, the city manager, and the employee. Prior to the decision of the city manager, the police chief shall, within a reasonable time, investigate the alleged misconduct, charges, or grounds against the employee

and provide the employee an opportunity to present his or her version of the circumstances. Upon completion of the investigation, the police chief shall recommend, in writing, whether he or she agrees that the alleged misconduct, charges, or grounds warrant removal or discharge or a lesser penalty. Within 5 days of the police chief's written recommendation, the city manager can accept or reject the recommendation and then file his or her decision within 4 calendar days with the secretary of the Commission, who will then file a copy with the police chief and the employee. The employee then has 10 days to file a written demand for an investigation and public hearing.

[9] Busch contends that the ordinance constitutes a substantive rule and that the failure to strictly follow it results in a decision that is arbitrary and capricious. Busch is correct that agency action taken in disregard of the agency's own substantive rules is arbitrary and capricious. See *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011). However, the ordinance upon which Busch relies is procedural, not substantive. Section 19-1833(1) and (2) authorizes the governing body to establish *procedures* for acting upon an accusation. The City's ordinance No. 1855, art. III, § 5(c), established those procedures. Therefore, the failure to follow the steps set forth in the ordinance does not necessarily result in an arbitrary and capricious decision.

Our decision is supported by *Sailors v. City of Falls City*, 190 Neb. 103, 206 N.W.2d 566 (1973), in which the Nebraska Supreme Court held that the failure of a civil service commission of a city to promulgate *any* procedural termination rules and regulations, in violation of statute, did not negate an employee's termination. In *Sailors*, the court stated that despite the absence of statutorily mandated rules and regulations, the employee was not prejudiced, because his employment was terminated "in accordance with the procedures spelled out in the statutes." 190 Neb. at 109-10, 206 N.W.2d at 570.

[10] We likewise determine that although several of the procedural steps outlined in the ordinance were omitted in the course of Busch's case, his employment was terminated in accordance with the procedures spelled out in the statute.

Section 19-1833 provides that a written accusation is required and that after discharge, the employee may, within 10 days after being notified of the discharge, file with the commission a written demand for an investigation, followed by a hearing. Cox filed the "Accusation" in this case on August 10, 2012. On August 17, Busch filed a demand for an investigation, which was conducted. The Commission held a subsequent hearing, as required by statute. As in *Sailors*, we find no prejudice in the failure to strictly comply with the procedures set forth in the ordinance. We further determine that Busch was provided adequate due process in his termination proceeding.

[11] In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the U.S. Supreme Court held that when a public employer deprives an employee of a property interest in continued employment, constitutional due process requires that the deprivation be preceded by (1) oral or written notice of the charges, (2) an explanation of the employer's evidence, and (3) an opportunity for the employee to present his or her side of the story. See *Hickey v. Civil Serv. Comm. of Douglas Cty.*, 274 Neb. 554, 741 N.W.2d 649 (2007).

[12] In *Scott v. County of Richardson*, 280 Neb. 694, 789 N.W.2d 44 (2010), the Nebraska Supreme Court held that notwithstanding a person's due process rights set forth above, deficiencies in due process during pretermination proceedings may be cured if the employee is provided adequate post-termination due process. In *Scott*, the employee was given neither adequate notice of the charges, an explanation of his employer's evidence, nor an opportunity to explain his side of the story before his employment was terminated. After the termination, the employee was given a hearing before a county grievance board. The Nebraska Supreme Court pointed out that prior to the termination, the employee had met with his supervisor and was advised of the reasons why he was being placed on paid suspension. He also was given an opportunity to tell his side of the story. Following the termination, he was given an extensive hearing in which he was allowed to present testimony. The Nebraska Supreme Court reversed the

district court's order reinstating the employee, finding that his posttermination proceeding cured the pretermination due process violations.

Likewise, in the present action, although the procedures outlined in the ordinance were not followed, Busch was well aware of the reason for his termination as a police officer. The meetings with Cox on August 3 and 6, 2012, involved extensive conversations about Busch's employment status as a result of his extended leave, including his existing restrictions and Cox's request for his medical records. By the end of the August 6 meeting, Cox had asked for Busch's resignation. The secretary of the Commission testified that Busch was asked at one of the August meetings why his employment should not be terminated and that he answered the question. Following the termination, he was provided a full hearing before the Commission which lasted 2 days. We determine that Cox's failure to strictly follow the procedural rules set forth in the ordinance does not necessitate a finding that the decision to terminate Busch's employment was arbitrary and capricious.

Was Commission's Decision Made in Good Faith for Cause?

Busch contends that the Commission's order was not based on competent evidence. He points to his history of good performance evaluations which were recently downgraded as a result of his absence from work, according to Kiss. Busch asserts that this downgrade was evidence of bad faith. He complains that neither Cox nor Kiss conducted any investigation as to whether he could perform the essential functions of his job, noting that he is ambidextrous and that his restriction was limited to his right hand. We find these arguments unpersuasive. There was no evidence that the recent downgrading of Busch's performance evaluations had any bearing on his termination of employment, while there was significant evidence that Cox and Kiss were told only that Busch required additional leave from his job. Notwithstanding his claimed proficiency with both hands, it was clear that the significant

restrictions on Busch left him largely unable to perform his regular job duties in the eyes of Cox and Kiss in the early days of August 2012.

Busch additionally argues that his termination of employment was based, in part, on his refusal to provide his medical records to Cox, someone with no medical training or ability to properly review and analyze them. However, there is adequate evidence to show that his employment was terminated primarily because he had requested additional leave time following an already extended period of leave and that he did not inform Cox or Kiss that he was then fit to carry out the job duties as a police sergeant.

Busch contends that the Commission's order was not reasonably necessary for effectual and beneficial public service, an argument related to Cox's denial of Busch's request for light-duty work as a police officer. The Commission found that Cox had denied Busch's request based upon his discretionary authority as the City's manager. Although Busch notes that other employees had been granted such privileges, the record contains no indication that the City was required to permit Busch to return to work at light duty.

[13] Busch directs us to provisions in article II, § 10(f), of the City's ordinance No. 1855, which state that the Commission is not bound by the technical rules of evidence at its hearings. He contends that the Commission acted in an arbitrary and capricious manner by applying the technical rules of evidence at the October 2012 hearing. Although Busch claims that objections were improperly sustained to some of his proffered evidence, he does not guide us to specific instances of such erroneously suppressed evidence. 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. *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013). Busch further complains of the admission of other evidence, most notably of an exhibit which contains a copy of the July 25 "Return to Work" form that released him to return to work on August 1 without restrictions. Busch asserts that this evidence should not have been considered by the Commission,

because it was not known to Cox when he made his decision to terminate Busch's employment. Indeed, the record reflects that when he decided to terminate Busch's employment, Cox was unaware that Busch had actually been released to return to work without restrictions. Nonetheless, Busch had, by that time, admitted to Cox that he had had a medical appointment on July 25, an admission that very much surprised Cox and resulted in a loss of trust in Busch. It was this act of omission by Busch that set in motion the final chain of events, starting with Cox's request for additional medical records and ending with Cox's filing the August 10 "Accusation." Notwithstanding the admission of evidence related to the release permitting Busch to return to work August 1, there remained sufficient evidence for the Commission to uphold Busch's termination of employment on the basis that he was physically unfit to perform his job. This assigned error is without merit.

CROSS-APPEAL

In a cross-appeal, the Commission asserts that the district court erred in failing to tax to Busch the costs of preparing the transcript of the proceedings before the Commission. In its order, the district court noted that on the same date as Busch filed his petition in error, he filed a request for the Commission to prepare a verbatim record of the hearing before the Commission and file it with the district court. The court cited § 19-1833(5), which governs an appeal to that court from an order of a civil service commission, including the requirement for the appealing party to demand that "a certified transcript of the record and all papers, on file in the office of the commission affecting or relating to such judgment or order, be filed by the commission with such court." That subsection further provides:

> If such appeal is taken by the governing body and the district court affirms the decision of the commission, the municipality shall pay to the employee court costs and reasonable attorney's fees incurred as a result of such appeal and as approved by the district court.

> If such appeal is taken by the governing body and the district court does not affirm the decision of the commission, the court may award court costs and reasonable attorney's fees to the employee as approved by the district court.

The district court found that § 19-1833(5) presupposes the court would have the evidence from the hearings for review and that for the statute to make sense, the documents contemplated in the phrase "transcript of the record" in subsection (5) would include a verbatim transcription of the record, including witness testimony and exhibits. The court further noted that the statute specifically authorizes the awarding of fees and costs when the appeal is taken by the "governing body," i.e., the Commission, but that the statute did not extend that authority when the appeal is taken by the "accused," i.e., Busch. Finding no statutory authority to award fees and costs in this case, the court denied the Commission's request.

On appeal to this court, the Commission attempts to distinguish between a transcript and a bill of exceptions for purposes of § 19-1833(5), arguing that it is not required to pay for the costs of the transcript of witness testimony and the like. The Commission further contends that payment for the bill of exceptions in this case is governed not by § 19-1833(5), but, rather, by Neb. Rev. Stat. § 25-1140.08 (Reissue 2008), which pertains to cases where specific provision is not made by law for a bill of exceptions in all appeals and petitions in error. We disagree.

[14,15] Section 19-1833(5) clearly governs appeals to the district court from an order of a civil service commission and the production of the record before the commission. The statute requires a certified transcript of the record "and all papers, on file in the office of the commission affecting or relating to such judgment or order." In addition, as pointed out by the district court, the Legislature did not authorize the award of fees or costs except when the appealing party was the "governing body." The only meaningful reading of § 19-1833(5) is that it required the Commission to provide to the district court a verbatim transcription of the proceedings before it on October 1 and 11, 2012, including all witness testimony and exhibits

offered at the hearing. There is no means of assessing related costs to Busch. The Commission's assigned error on cross-appeal is without merit.

CONCLUSION

We conclude that none of Busch's assignments of error have merit. The record reflects that the Commission acted within its jurisdiction in affirming Busch's termination from his job, and its decision was supported by sufficient, relevant evidence. We find that the Commission's cross-appeal is also without merit.

AFFIRMED.

CITY OF BEATRICE, STATE OF NEBRASKA, APPELLEE, v. DANIEL A. MEINTS, APPELLANT.

844 N.W.2d 85

Filed March 11, 2014. Nos. A-12-1083 through A-12-1107.

1. **Constitutional Law: Search and Seizure: Appeal and Error.** Whether historical 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: Judgments: Appeal and Error.** The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which an appellate court is obligated to reach conclusions independent of those reached by the court below.
4. **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.
5. **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.
6. **Warrantless Searches: Search and Seizure: Proof.** In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.

7. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
8. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
9. **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.
10. **Search and Seizure: Probable Cause.** Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.
11. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.
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. **Ordinances: Presumptions.** All ordinances are presumed to be valid.
14. **Municipal Corporations: Ordinances: Statutes.** The power of a municipality to enact and enforce any ordinance must be authorized by state statute.
15. ____: ____: ____. Where there is a direct conflict between a municipal ordinance and a state statute, the statute is the superior law. However, if the ordinance and statute in question are not contradictory and can coexist, then both are valid.
16. **Municipal Corporations: Courts.** The general rule is that courts should give great deference to a city's determination of which laws should be enacted for the welfare of the people.
17. **Statutes.** The meaning of a statute is a question of law, and statutory language is given its plain and ordinary meaning.
18. **Criminal Law: Statutes.** Whether a particular course of conduct involves one or more distinct offenses under a statute depends on how a legislature has defined the allowable unit of prosecution.
19. **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.

Appeals from the District Court for Gage County, DANIEL E. BRYAN, JR., Judge, on appeal thereto from the County Court for Gage County, STEVEN B. TIMM, Judge. Judgment of District Court affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Gregory A. Butcher, Beatrice City Attorney, for appellee.

MOORE, PIRTLE, and BISHOP, Judges.

PIRTLE, Judge.

INTRODUCTION

Daniel A. Meints appeals the order of the district court for Gage County affirming in part and reversing in part an order of the Gage County Court.

BACKGROUND

Meints was charged on June 21, 2011, with 12 separate counts of violating Beatrice City Code § 16-623 (2002) on 25 separate dates in the months of May and June 2011. On September 19, Meints filed a "corrected" motion to suppress evidence, and the matter was heard in the county court for Gage County on October 3. All matters were consolidated for the purpose of the hearing.

Steve Printy, a code enforcement officer for the City of Beatrice, testified. One of his job requirements is to look for or monitor unregistered motor vehicles. Printy testified that on March 15, 2011, he observed Meints' Beatrice property from the public street. He found motor vehicles with expired license plates, motor vehicles with no license plates, and motor vehicles whose engines, wheels, or parts had been removed, altered, damaged, or otherwise allowed to deteriorate so that the motor vehicle was not capable of being driven on its own power. He did not observe a residence, fencing, or closed buildings on March 15. He took pictures of the property from the public street, the adjacent alley, and the adjacent property not owned by Meints. Printy did not enter Meints' property and did not seize any objects or evidence. Printy repeated this process on 15 separate dates between May 23 and June 17. Printy testified that the purpose for the visits was to observe the property and reinspect for junk or unlicensed motor vehicles.

Joe McCormick of the Beatrice Police Department testified that on March 15, 2011, he was dispatched to Meints'

Beatrice property and observed motor vehicles with expired license plates, vehicles with no license plates, and vehicles in an inoperable condition. McCormick testified he made these observations from the public street and did not observe a residence, fencing, closed buildings, or "no trespassing" signs. McCormick testified that he believed Meints was in violation of the Beatrice City Code regarding unregistered motor vehicles and that he had probable cause to enter the property. He entered the property, took photographs of the motor vehicles at issue, and recorded vehicle identification numbers (VIN numbers). McCormick did not enter any vehicles, open any car doors, enter any structures, move any items, or seize any objects while obtaining VIN numbers and taking photographs.

McCormick returned to Meints' Beatrice property on May 23, 2011, and made similar observations. He testified that the condition of the property was the same except that there was a "no trespassing" sign attached to a tree. Meints was present and informed McCormick he did not want him on his property. On that day also, McCormick believed Meints was in violation of the city code and he had probable cause to enter. He entered the property to take photographs and record VIN numbers to determine whether there were violations of the city code. Again, McCormick did not enter any vehicles, open any car doors, enter any structures, move any items, or seize any objects while obtaining VIN numbers and taking photographs. McCormick issued a citation to Meints for violations on May 23 and subsequently repeated this process, with the same observations for probable cause and further citations issued, on 10 additional dates between May 23 and June 16.

Meints cross-examined Printy and McCormick and offered evidence, including a copy of a discovery response by Meints containing McCormick's police reports from May 15 to 23, 2011, photographs of the motor vehicles in question, and registration printouts for the vehicles based upon VIN numbers. The trial court overruled Meints' motion to suppress after the submission of briefs by the parties.

On January 18, 2012, Meints filed a "Motion for Leave to Withdraw Plea," a "Motion to Quash," and a "Plea in Bar," 2 days prior to trial. The trial court overruled the motion for leave to withdraw on January 20, noting Meints had ample opportunity to raise the issue prior to trial.

At trial on January 20, 2012, McCormick and Printy both testified, as did several other officers. McCormick testified that on March 15, 2011, he was dispatched to Meints' Beatrice property and there witnessed vehicles with expired or no license plates. He believed that he had probable cause to obtain VIN numbers which were in plain view, and he ran those numbers through the "NCJIS" computer system of "Beatrice communications" to review Department of Motor Vehicles records. The court received an exhibit which contained an image log and photographs taken by McCormick on March 15. McCormick returned to the property on May 23, 24, and 27 through 29 and June 6, 7, 10 through 12, and 16 to inspect the property, take photographs, and record VIN numbers of the 10 vehicles in continual violation of the city code.

Printy testified he observed the same 10 vehicles in violation on May 23 through 27 and 31, 2011, as well as June 3, 6 through 10, and 15 through 17. Two other officers made similar observations on June 8 and 9 and on May 25, 26, 30, and 31, as well as June 3, 4, 13, and 14, respectively.

On March 30, 2012, the trial court found Meints guilty on all counts across all dates and overruled Meints' motion to quash and plea in bar. Meints appealed this matter to the district court for Gage County on May 16. The matter was heard in the district court on September 6. Evidence was adduced, exhibits were offered and received, and arguments were submitted by brief. On October 19, the district court affirmed the trial court's decisions on counts I through X across all 25 dates. The district court reversed the trial court's findings of guilt as to counts XI and XII across all 25 dates and ordered that the case be remanded to the county court with directions to dismiss on those latter two counts. Meints appealed the decision of the district court on November 19.

The 25 cases were consolidated at trial and on appeal to the district court. Cases Nos. A-12-1083 through A-12-1107 are also consolidated for purposes of this appeal.

ASSIGNMENTS OF ERROR

Meints asserts the court erred in overruling Meints' suppression motion, finding that the city's proof was sufficient to find him guilty, failing to find that § 16-623 of the Beatrice City Code is invalid, and finding that Meints' multiple prosecutions under the city code did not violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution.

Meints also asserts the court erred in overruling Meints' plea in bar, overruling Meints' motion to quash, overruling Meints' motion for leave to withdraw his earlier plea, and not finding that § 16-623 is unconstitutional. However, these issues were not addressed in Meints' brief and will not be addressed on appeal. See *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

STANDARD OF REVIEW

[1] An appellate court applies a two-part standard of review to suppression issues. With regard to historical facts, the court reviews the trial court's findings for clear error. "[W]hether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination." *State v. Bromm*, 285 Neb. 193, 197, 826 N.W.2d 270, 274 (2013).

[2] The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 2359, 185 L. Ed. 2d 1082 (2013).

[3] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below. See *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

[4] 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. Ross*, 283 Neb. 742, 811 N.W.2d 298 (2012).

ANALYSIS

Motion to Suppress.

Meints asserts the county court should have granted his motion to suppress the observations and photographic evidence collected by the officers on his property. Meints asserts that he did not give consent for anyone, including code enforcement or police officers, to enter his property and that he had a reasonable expectation of privacy. He asserts the property containing the motor vehicles was subject to an unlawful search and seizure. Therefore, he asserts, all photographs and observations of his property should have been suppressed.

There is no dispute that the officers entered the property without a warrant to record VIN numbers and take photographs. The trial court in this case found, and the district court affirmed, that the warrantless entry and "seizure" of VIN numbers were justified under the open fields exception.

The open fields exception states that the special protection accorded by U.S. Const. Amend. IV to the people in their "persons, houses, papers, and effects" is not extended to open fields. *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924). The U.S. Supreme Court has held that neither probable cause nor a warrant is required to carry out police searches of open fields. *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). The Court held that the touchstone of Fourth Amendment analysis is the question of whether a person has a constitutionally protected, reasonable expectation of privacy. *Id.* The Nebraska Supreme Court has held that the asserted expectation of privacy in open fields is not an expectation that society recognizes as reasonable, as these lands are usually accessible to the public and police in ways that a home, an office, or a commercial structure would not be. *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986). The court in *Havlat* applied the exception to a warrantless

search of a grain and livestock operation on a fenced property. In doing so, the court discussed the open fields exception in the context of rural areas where the cultivation of crops, hunting, and fishing occur.

Meints argues that the open fields exception is inapplicable here because the property in question was located within the city. Without deciding whether the open fields exception applies here, we approach this appeal by first examining the law with regard to warrantless searches and seizures.

[5,6] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions, which must be strictly confined by their justifications. *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). In the case of a search and seizure conducted without a warrant, the State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement. *Id.*

[7] The warrantless search exceptions recognized by the Nebraska Supreme Court include (1) searches undertaken with consent or with probable cause, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *Id.*

The city asserts the search of Meints' Beatrice property was appropriate, because the vehicles and license plates were in plain view and the officers had probable cause to enter the property.

[8] A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *Id.*

While the vehicles and some of the license plates were observable in plain view from the sidewalks where the officers had a legal right to be, VIN numbers were not. The plain view doctrine would not justify the recording of VIN numbers and the taking of photographs, because such were obtained only after the officers went onto Meints' property. We therefore turn to an examination of whether law enforcement in this case

had probable cause to conduct the warrantless search without Meints' consent.

[9,10] 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. *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013), citing *State v. Borst, supra*. 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).

Beatrice City Code § 16-621 (1999) defines a "junked motor vehicle" as follows:

> A motor vehicle on which the engine, wheels or other parts have been removed, altered, damaged or otherwise so treated or allowed to deteriorate that the motor vehicle is incapable of being drawn under its own power. A motor vehicle which does not have an unexpired license plate or plates affixed thereto shall be presumed to be a junked motor vehicle; provided, that such presumption may be rebutted.

McCormick testified that when he arrived at Meints' Beatrice property, he stood on a public street. From this location, he could observe motor vehicles with expired license plates, vehicles with no license plates, and vehicles in inoperable condition. These vehicles fit the definition in § 16-621 of junked motor vehicles, and there is a presumption based on such observations that the property owner was in violation of the city code. McCormick testified that he believed Meints was in violation of the Beatrice City Code regarding unregistered motor vehicles and that he believed he had probable cause to enter the property to take photographs and record VIN numbers of the vehicles, which VIN numbers were to be used to search for the corresponding records within the Department of Motor Vehicles' database to confirm the registration status of each vehicle.

In light of these facts, and the provisions in the city code, it was reasonable for McCormick to believe that expired license

plates and the associated VIN numbers on the corresponding vehicles could be evidence of a crime, therefore affording him probable cause to lawfully enter the property to record this information.

McCormick testified that once he entered the property, he did not enter any vehicles, open any doors, enter any structures, move any items, or seize any objects while recording VIN numbers and photographing the property.

[11] Based upon our review of the evidence, we find McCormick and the Beatrice police officers had a legal right to be on a public street to observe the vehicles and the associated license plates. Several vehicles on the property could be observed from the street and could be presumed to be in violation of the city code. As stated above, McCormick's observations of expired license plates gave him probable cause to enter the property to record VIN numbers and take additional photographs to determine whether the photographs and observations were evidence of a crime; thus, he had a lawful right of access to the "seized" evidence. We find the county court properly overruled Meints' motion to suppress the photographs and observations of the officers, although for a reason which differs from that found by the trial court. Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009).

[12] Having found that the warrantless search was undertaken with probable cause, we need not address the lower courts' findings that the open fields exception to the prohibition of warrantless searches and seizures existed in this case. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *State v. Jimenez*, 283 Neb. 95, 808 N.W.2d 352 (2012).

Sufficiency of Evidence.

Meints was charged with violating § 16-623 of the Beatrice City Code ("[p]arked, junked or unregistered motor vehicles") on occasions constituting 12 counts over 25 separate days.

Section 16-623(a) of the city code states, in part:

> It shall be unlawful for any person to park, store, leave or permit the parking, storing or leaving of any junked motor vehicle, or parts of a motor vehicle, on private property within the city for a period of time in excess of twenty-one (21) days. It shall be unlawful for any person in charge or control of any private property within the city, whether as owner, tenant, occupant, lessee or otherwise, to allow any motor vehicle which has been unregistered for more than twenty-one (21) days to remain upon any private property. Any motor vehicle allowed to remain on private property in violation of this subsection shall constitute a nuisance and shall be abated.

Meints asserts the city has not proved beyond a reasonable doubt that the vehicles were unregistered. He does not challenge that these were motor vehicles, upon his private property, all there in excess of the 21-day period, or that they remained there on 25 separate days after the expiration of the 21-day period. He also concedes that each vehicle on each date had either an expired license plate or no license plate at all. While he concedes the vehicles were not licensed, he asserts that the charge is lack of registration of the vehicles and that there is no evidence they were not registered.

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. Ross*, 283 Neb. 742, 811 N.W.2d 298 (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 a crime beyond a reasonable doubt. *Id.*

In addressing this argument, both the county court and the district court found that the fact that a vehicle does not have a valid license plate is strong circumstantial evidence that the vehicle is also unregistered.

The Nebraska Revised Statutes provide that motor vehicle registration and license plates are regulated by the Motor

Vehicle Registration Act. Neb. Rev. Stat. § 60-389 (Reissue 2010) states that when a person applies for registration of a motor vehicle, "the department shall, upon registration, assign to such motor vehicle or trailer a distinctive registration number in the form of a license plate." Neb. Rev. Stat. § 60-3,100 (Reissue 2010) also states that the Department of Motor Vehicles shall issue to every person whose motor vehicle or trailer is registered two fully reflectorized license plates to be displayed on the front and back of each registered motor vehicle or trailer. The certificate of registration contains the same registration number denoted on the license plates. Neb. Rev. Stat. § 60-390 (Reissue 2010).

Several officers testified that they observed the lack of up-to-date license plates and that from that information, one could infer that the relevant vehicles on Meints' Beatrice property were unregistered. In addition, Beatrice police officers testified that they obtained VIN numbers for the vehicles observed on the property and searched a computer system for corresponding Department of Motor Vehicles records. Some of the vehicles were unregistered, some of them did not have identifiable VIN numbers, and some VIN numbers did not produce records within the system to obtain registration records.

The lack of up-to-date license plates, taken together with the condition of the vehicles, the lack of information in the Department of Motor Vehicles system, and the photographs and observations of the police officers on March 15, 2011, and continuing through May and June 2011, are sufficient for a rational trier of fact to find the essential elements of the crimes charged beyond a reasonable doubt. The district court did not err in affirming the decision of the trial court.

Validity of § 16-623.

Meints alleges the city code is invalid because it criminalizes conduct which is not criminal under the Nebraska Revised Statutes. He argues that the time limit in the state statute regulating unregistered vehicles is 30 days, that the limit in the Beatrice City Code regulating the same is 21 days, and that there is therefore an irreconcilable conflict which makes the city ordinance unenforceable.

[13-15] All ordinances are presumed to be valid. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). However, the power of a municipality to enact and enforce any ordinance must be authorized by state statute. *State v. Loyd*, 265 Neb. 232, 655 N.W.2d 703 (2003). Where there is a direct conflict between a municipal ordinance and a state statute, the statute is the superior law. See *id*. However, if the ordinance and statute in question are not contradictory and can coexist, then both are valid. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002).

As it is written, § 16-623 of the Beatrice City Code prohibits the storage of junked or unregistered vehicles for more than 21 days and labels any vehicle so stored as a nuisance.

Meints asserts the city's ordinance reflecting a 21-day period for storage of unregistered motor vehicles is in conflict with the Nebraska Revised Statutes. He cites to five Nebraska statutes which permit the operation, towing, or parking of motor vehicles or trailers without registration for up to 30 days: Neb. Rev. Stat. §§ 60-362 (Reissue 2010), "[r]egistration required; presumption"; 60-365 (Reissue 2010), "[o]peration of vehicle without registration; limitation; proof of ownership"; 60-366 (Reissue 2010), "[n]onresident owner; registration; when; reciprocity"; 60-376 (Reissue 2010), "[o]peration of vehicle without registration; In Transit sticker; records required; proof of ownership"; and 60-3,164 (Reissue 2010), "[o]peration or parking of unregistered vehicle; penalty."

Meints fails to take into account that §§ 60-362, 60-365, and 60-3,164 apply to motor vehicles or trailers operated, parked, or towed *on the highways of this state*; § 60-366 governs registration requirements for a narrow group of nonresidents of this state; and § 60-376 governs the operation of a vehicle without registration while the vehicle is in transit. The city ordinance is not in conflict with the Nebraska statutes cited by Meints, because the ordinance is specifically geared toward vehicles parked, stored, or left on private property within the city, not on public roads within the state. As the city ordinance is not in conflict with the statutes, they may coexist.

Meints also alleges the ordinance criminalizes that which is not criminal under the Nebraska Revised Statutes. Meints concedes that the city has discretion to determine what constitutes a nuisance, but asserts that the city may not categorize something that is lawful under the Nebraska statutes to be a nuisance in Beatrice.

[16] The city is authorized by Neb. Rev. Stat. § 18-1720 (Reissue 2012) to "define, regulate, suppress and prevent nuisances, and to declare what shall constitute a nuisance, and to abate and remove the same." The Nebraska statutes do not address or regulate the placement or open storage of unlicensed, unregistered, or junk motor vehicles upon private property. This falls within the discretion of the city, as authorized by § 18-1720. In addition, the district court also notes that a similar ordinance regulating and prohibiting junked vehicles was upheld by the Nebraska Supreme Court in *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993). The general rule is that courts should give great deference to a city's determination of which laws should be enacted for the welfare of the people. See *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).

For the reasons stated above, we find that this assignment of error is without merit.

Double Jeopardy.

Meints asserts his multiple prosecutions for violations of § 16-623 of the Beatrice City Code violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. Meints questions the city's authority to pass an ordinance which allows a separate offense for each day a violation occurs, but cites no authority for this assertion.

As we noted, previously, § 18-1720 grants all cities in Nebraska the power and authority to define, regulate, suppress, and prevent nuisances; to declare what shall constitute a nuisance; and to abate and remove the same. Every city and village is authorized to exercise such power and authority within its zoning jurisdiction.

[17] The meaning of a statute is a question of law, and statutory language is given its plain and ordinary meaning. See *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012). An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id*.

The plain meaning of § 18-1720 is that the Legislature gives permission to each city to define, regulate, suppress, and prevent nuisances as they are defined by each city. Beatrice chose to define a nuisance as one existing on each separate day in excess of a 21-day period, and its city code stated that each day's violation thereof is a distinct offense.

We note that Meints was on notice that the vehicles on his property constituted a violation of the city code. Code enforcement officer Printy and Beatrice police officers visited Meints' Beatrice property on March 15, 2011. On March 23, Printy sent Meints a "Notice to Remove" letter informing him that he was in violation of the Beatrice City Code. The letter contains the language of § 16-623(a) and the definition in § 16-621 of a "junked motor vehicle" discussed above. The letter concludes with a warning, stating:

> If the vehicle is not removed by the date specified . . . a citation will be issued requiring you to appear in court. The penalty for this offense is a fine of a minimum of $100 up to a maximum fine of $500.00 per vehicle. A different citation may be issued for each day that the violation continues.

Beatrice police returned to the property on May 23, 2011, well after the designated 21 days had passed, and the officers found that the property remained in the same condition. After ascertaining that the same vehicles were present, McCormick issued a citation. This process continued on 10 additional dates through June 16.

Meints had ample notice that he was in violation of the city code, and he was informed that each day could, and often did in fact, result in another citation. Meints was aware that Printy visited the property and that Beatrice police officers

entered the property and issued citations. Meints was given over 2 months to abate the cited nuisance, and he failed to do so.

Meints asserts acts constituting a course of conduct are not punishable separately if the Legislature intends to punish the course of conduct. See *U.S. v. Horodner*, 993 F.2d 191 (9th Cir. 1993). He cites to *U.S. v. Jones*, 403 F.3d 604 (8th Cir. 2005), which states the court's belief that Congress intended the crime of possession to refer to a course of conduct, rather than individual acts of dominion, and its ultimate conclusion that the continuous possession of the same firearm constitutes a single offense.

[18] The Nebraska Supreme Court has stated that whether a particular course of conduct involves one or more distinct offenses under a statute depends on how a legislature has defined the allowable unit of prosecution. *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004). The Nebraska Supreme Court considered whether two separate counts of possession of the same firearm were two distinct violations, based on the statutory language, in *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982). The court stated:

> Neither the statute itself nor the history leading to its enactment gives us any indication as to whether the Legislature intended that each day constitute a separate offense or whether the offense is one which is considered in the law as a continuing offense. Certainly it would have been easy enough for the Legislature to have so provided if that was its intent.

State v. Williams, 211 Neb. at 655, 319 N.W.2d at 751.

In this case, the intent of the drafters of the Beatrice City Code is clear, and the "allowable unit of prosecution" is clearly defined. The ordinance explicitly states that each day a violation of any of its provisions continues shall constitute a distinct offense and be punishable as such.

Further, multiple sections of the Nebraska Revised Statutes contain provisions detailing separate offenses for each day upon which they continue. The following are a few examples: Neb. Rev. Stat. §§ 12-512.08 and 12-618 (Reissue 2012) (perpetual care), 71-5733(3) (Reissue 2009)

(Nebraska Clean Indoor Air Act), 46-266 (Reissue 2010) (irrigation works), 60-6,373 (Reissue 2010) (vehicle emissions), 71-6329 and 71-6331 (Reissue 2009) (Residential Lead-Based Paint Professions Practice Act), and 71-6312 (Reissue 2009) (Asbestos Control Act). As the trial court pointed out, if such provisions were not in place, the practical effect would be that one who once pays a fine has been granted license to maintain a perpetual nuisance.

Meints also asserts the Double Jeopardy Clause was violated by citing him for multiple vehicles based upon identical 21-day periods without registration. The language of the city code states, "Any motor vehicle allowed to remain on private property in violation of [§ 16-623(a)] shall constitute a nuisance and shall be abated." By stating that any vehicle so stored constitutes a nuisance, it appears that the drafters intended to allow each nuisance to be separately cited and abated.

We find that Meints' prosecution for the continual violation of the city code by storing multiple vehicles beyond the 21-day period specified in the city code did not violate the Double Jeopardy Clause of the Fifth Amendment.

Remaining Assignments of Error.

[19] 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. *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

Meints also asserts the trial court erred in overruling Meints' plea in bar, overruling Meints' motion to quash, overruling Meints' motion for leave to withdraw his earlier plea, and not finding that § 16-623 is unconstitutional. These errors were assigned but not argued in Meints' brief; therefore, we do not consider these errors upon appeal.

CONCLUSION

Upon our review, we find that the district court did not err in affirming the decision of the trial court finding Meints guilty of 10 counts of violating § 16-623 of the Beatrice City Code on 25 separate days. We find that Meints' Fourth Amendment

rights were not violated and that there was sufficient evidence to support the trial court's finding that Meints was guilty on such counts beyond a reasonable doubt. We find that the Beatrice City Code does not contradict state law and does not criminalize conduct which is lawful under any state statute. We also find that multiple prosecutions for the violations of the Beatrice City Code do not violate the Double Jeopardy Clause of the Fifth Amendment. We affirm the decision of the district court.

AFFIRMED.

STACY BOLLES, WIFE OF GREGORY BOLLES, DECEASED, ON HER BEHALF AND ON BEHALF OF OTHERS ELIGIBLE FOR BENEFITS PURSUANT TO NEB. REV. STAT. § 48-122 ET SEQ., APPELLEE, V. MIDWEST SHEET METAL CO., INC., APPELLANT.

844 N.W.2d 336

Filed March 11, 2014. No. A-13-203.

1. **Workers' Compensation: Judgments: Evidence: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2010), a judgment of the Workers' Compensation Court may 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.
2. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, an appellate court will not disturb the findings of fact of the trial judge unless clearly wrong.
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 is considered in the light most favorable to the successful party, every controverted fact is resolved in favor of the successful party, and the successful party has the benefit of every inference that is reasonably deducible from the evidence.
4. **Workers' Compensation: Judgments: Evidence: Appeal and Error.** Workers' Comp. Ct. R. of Proc. 11(A) (2011) requires the Workers' Compensation Court to write decisions that provide the basis for a meaningful appellate review.
5. ____: ____: ____: ____. Workers' Comp. Ct. R. of Proc. 11(A) (2011) requires the judge to specify the evidence upon which the judge relies.

6. **Workers' Compensation.** When a workers' compensation claimant has suffered a heart attack, the foremost and essential problem is causation, that is, whether the employment caused an employee's injury or death from a heart attack.
7. **Workers' Compensation: Appeal and Error.** The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous.
8. **Workers' Compensation.** In workers' compensation cases, the heart injury causation issue consists of two elements: (1) legal causation and (2) medical causation. Under the legal test, the law must define what kind of exertion satisfies the test of arising out of the employment. Under the medical test, the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused the collapse.
9. **Workers' Compensation: Proof.** An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.
10. ____: ____. If it is claimed that an injury was the result of stress or exertion in the employment, medical causation is established by a showing by the preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury.

Appeal from the Workers' Compensation Court: JOHN R. HOFFERT, Judge. Affirmed.

Darla S. Ideus, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

John C. Fowles, of Fowles Law Office, P.C., L.L.O., and John F. Vipperman, of Anderson, Vipperman & Kovanda, for appellee.

IRWIN, PIRTLE, and BISHOP, Judges.

IRWIN, Judge.

I. INTRODUCTION

Gregory Bolles suffered a heart attack while working for Midwest Sheet Metal Co., Inc. (Midwest), and died as a result. Midwest appeals an award of the Nebraska Workers' Compensation Court awarding benefits to Bolles' wife, Stacy Bolles (Stacy). On appeal, Midwest asserts that the compensation court's award did not comply with Workers' Comp. Ct. R. of Proc. 11 (2011), because it contained insufficient factual findings, and asserts that the compensation court erred in

finding that Stacy met her burden of proof with regard to both factual and legal causation. We affirm.

II. BACKGROUND

1. Work and Incident

The events giving rise to this cause of action occurred on or about July 27, 2011. On that date, Bolles was employed by Midwest as a foreman. Evidence adduced at trial indicated that Bolles began work on that date at the Midwest shop in Grand Island, Nebraska, at approximately 7 a.m. Bolles ran some errands and picked up some necessary materials, and Bolles and a coworker picked up a compressor for an air-conditioning unit at a supply shop in Grand Island.

There was conflicting evidence about what time Bolles and the coworker arrived at the jobsite for that date, which was in Harvard, Nebraska. There was evidence that they arrived at the jobsite between 9:15 and 9:30 a.m.; there was also evidence that it may have been as late as "around noonish."

Bolles and his coworkers were to replace the compressor in an air-conditioning unit at a nursing home. The evidence adduced at trial indicated that this was a big and time-consuming job. The air-conditioning unit was a large unit, with sheet metal panels on the outside; was situated on two metal rails on concrete slabs; and was located several feet off the ground. The unit was located in a fenced area, with the fencing mostly obscuring the unit from view and shielding it from wind.

When Bolles arrived at the worksite, some of the side panels had been removed. Bolles began working with a screw gun to detach other metal panels. Bolles then climbed up and into the unit and worked inside of it for approximately 1 to 1½ hours. Bolles worked to remove bolts and flanges that kept the compressor in place, and he utilized hand wrenches, ratchets, and screwdrivers to remove the bolts and flanges. There was evidence that Bolles spent the time inside the unit bent over and squatting while removing the bolts and flanges.

Once the compressor was disconnected, Bolles and a coworker attached chains and manipulated the compressor out

of the air-conditioning unit while another coworker operated a front-end loader to actually lift the compressor. The evidence indicates that the compressor that had to be removed weighed as much as 400 pounds. The evidence indicated that Bolles "had to shove it around to clear the pipes" and guide it out of the air-conditioning unit. The process of maneuvering the compressor out of the air-conditioning unit took approximately 30 minutes.

After the compressor was successfully lifted out of the air-conditioning unit, it was placed on the ground. Bolles and his coworkers then removed a variety of other parts, which involved more use of handtools and wrenches.

Parts were then attached to the new compressor, the new compressor was lifted with the front-end loader, and Bolles worked to guide the new compressor into the air-conditioning unit. Bolles was again inside the air-conditioning unit to guide the new compressor into place.

Once the new compressor was inside the air-conditioning unit, all of the bolts and flanges had to be replaced to connect and secure the new compressor. During that time, Bolles was inside the air-conditioning unit and, for the majority of the time, bent over and using handtools to connect the bolts and flanges. Connecting the new compressor took approximately another hour.

After the new compressor was connected and secured, it was discovered that nitrogen was needed. Bolles left the worksite and drove to meet another Midwest employee to pick up additional nitrogen. Bolles met the other employee approximately halfway between Harvard and Hastings, Nebraska; the evidence indicates that the distance between Harvard and Hastings was approximately 18 miles, or approximately a 30-minute drive. Bolles then returned to the worksite in Harvard. Bolles then climbed back up on the air-conditioning unit and worked on reattaching the sheet metal panels on the outside of the unit. Bolles was replacing screws.

A coworker estimated that Bolles had been back at the worksite for anywhere from 15 minutes to 1 hour before he suffered the heart attack. Bolles collapsed and fell from the

air-conditioning unit. Evidence adduced at trial indicates that an ambulance was dispatched to the worksite at approximately 4:20 p.m. Bolles subsequently died.

2. Weather Conditions

Evidence adduced at trial demonstrated that the date of this incident, July 27, 2011, was an "extremely hot" day. One of Bolles' coworkers testified that it was "[p]robably one of the hottest days of the year" and that there was "[n]o wind" on that date. He testified that it was "pretty nasty" outside and that it felt "very" humid. He also testified that "[t]here was no air flow in" the area where the air-conditioning unit was located and that there was no shade where Bolles would have been working on the air-conditioning unit.

One of Bolles' coworkers testified that Bolles had worked "pretty much" the whole time that he was at the jobsite, although the workers "took a break and stood in the shade a little bit and drank a little water" on a couple of occasions. Additionally, the work on preparing the new compressor to be installed was performed in a shaded area. The evidence indicates that when Bolles left the worksite to get nitrogen, he drove in an air-conditioned company truck.

One of Bolles' coworkers testified that it was "probably 95 to a hundred" degrees on the date in question. There was evidence adduced concerning the actual meteorological conditions on the date in question, with data presented from Grand Island, Hastings, and Clay Center, Nebraska, all in the geographic vicinity of Harvard. The air temperature in Grand Island between 1 and 6 p.m. on the date in question was consistently between 88 and 89 degrees, which, combined with relative humidity, yielded heat index values of approximately 100 degrees. The air temperature in Hastings between 1 and 6 p.m. on the date in question was consistently between 87 and 89 degrees. A heat index chart indicates that the heat index values in Hastings during that time would have been between 90 and 100 degrees. The air temperature in Clay Center between 1 and 6 p.m. on the date in question was consistently between 87 and 90 degrees, with heat index values between 93 and 102 degrees. The evidence indicates that the heat index numbers

reflected in charts in the record were likely lower than the actual heat index values, because the charts included in the record were based on shaded conditions and because the actual heat index values would be higher in direct sunlight; there was testimony that direct sunlight could actually increase the index values by up to 15 degrees.

3. Medical Evidence

The evidence adduced at trial demonstrated that Bolles had a prior history of cardiac health issues. He had suffered a prior heart attack in May 2008, which had resulted in angioplasty and insertion of a stent. Stacy testified that Bolles had suffered from high blood pressure and high cholesterol and that he had been a smoker. She also testified that although he exercised for a couple of months after the 2008 heart attack, he then stopped regularly exercising.

Bolles' daughter testified that Bolles was not involved in aerobic activities. She testified that Bolles liked to sit on the couch and watch television and that she would not have called him an "active person outside of work." She testified that he did not take out the garbage or mow the yard. Bolles' son testified similarly.

There were two medical expert opinions presented to the compensation court. Stacy presented the opinion of Dr. Vincent Di Maio, while Midwest presented the opinion of Dr. Michael Del Core. These two medical expert opinions differed on the question of whether Bolles' work on the date in question constituted a material and substantially contributing factor to his heart attack and death.

Dr. Di Maio's report indicates that he reviewed depositions of Bolles' coworkers, climatological data, Bolles' medical records, and the ambulance records from the date in question. Dr. Di Maio noted the work performed by Bolles on the date in question, as well as the heat and humidity on the date in question. He opined that the stress of working in direct sunlight and the high temperatures and humidity on the date in question were contributing causes to Bolles' heart attack. He opined that "[t]he elevated temperature and humidity put stress on [Bolles'] heart as it tried to counteract the environmental

factors and maintain normal body temperature." Dr. Di Maio opined that Bolles' "body would have taken steps to prevent developing severe hyperthermia" and that "[a] large portion of his blood supply would have been shuttled to vascular complexes under the skin." He opined that Bolles' "[h]eart rate and stroke volume would have been elevated" and that "[t]he strain on the heart would have been sufficient to aggravate an existing heart disease and cause death." Thus, he opined that Bolles' "working in an environment of elevated temperature and humidity was a material and substantial cause in his death."

Dr. Del Core's report indicates that he reviewed Stacy's deposition, Bolles' medical records, weather data, and Dr. Di Maio's report. Dr. Del Core placed emphasis on Bolles' medical history and noted that "[h]is blood pressure and cholesterol were not well controlled, he continued to smoke and he appeared non-compliant with his medications." He also placed emphasis on the evidence that Bolles had spent some amount of time in an air-conditioned vehicle prior to the heart attack. He opined that 15 to 20 minutes of work after being in the air-conditioned vehicle "is simply not enough time to cause an increase in body temperature sufficient to contribute to his heart attack." He indicated that he could not "say with any degree of medical certainty that . . . Bolles' activity on June [sic] 27 was a significant factor." He opined that Bolles' preexisting medical conditions and risk factors "materially and substantially contributed to [his] fatal heart attack" and that he "[did] not believe heat or humidity on that day contributed to his fatal heart attack."

4. Award

The compensation court noted in its award that the parties had stipulated to Bolles' employment and his average weekly wage. The court noted the specific applicable case law in Nebraska concerning recovery of benefits in compensation cases involving heart attacks suffered at work. The court noted the dual issues of legal and medical causation. The court cited numerous authorities and discussed the standards applicable to legal and medical causation in such cases.

The compensation court also made a number of specific factual findings and findings regarding credibility of witnesses in its award. The court made findings about the specific work performed by Bolles on the date in question and about the weather conditions on the date in question. The findings are consistent with the above factual background, including findings about Bolles' use of various handtools, in a bent-over position inside the air-conditioning unit, in direct sunlight and without airflow, and on a date on which the heat index value "hovered around 100 [degrees] or more" and may have "exceeded 100 degrees." The court also made factual findings about Bolles' nonemployment life and activities, concluding that Bolles lived a largely sedentary life, again consistent with the above factual background.

The compensation court concluded that there had been sufficient evidence adduced to demonstrate that Bolles' employment life involved greater exertion and stress than he experienced in his nonemployment life. The court also concluded that the work activities on the date in question were greater than that experienced in the ordinary nonemployment life of an average person. The court thus concluded that sufficient evidence had been adduced to demonstrate legal causation.

The compensation court evaluated the conflicting medical expert opinions. The court made specific findings concerning some of Dr. Del Core's conclusions, noting that Dr. Del Core's emphasis on concerns about whether Bolles was sufficiently caring for his own "physical well-being" was not shared by a cardiologist who had examined Bolles approximately 3 months prior to this heart attack and had concluded that "'if [Bolles] continue[d] to do well,'" the cardiologist would start seeing Bolles only on an annual basis, rather than twice a year. The court did not find this determinative, but did note that it impacted the weight to be given to Dr. Del Core's opinions. The compensation court also noted that Dr. Del Core had emphasized whether Bolles had been performing work exertion which was greater than his normal work exertion, and it noted some perceived inconsistencies in Dr. Del Core's deposition testimony concerning whether the

heat and humidity were contributing factors or may have been contributing factors.

The compensation court made a credibility determination that Dr. Di Maio's expert opinion "enjoys more persuasive value" and found that although it, too, had some shortcomings, "the Court [found] his overall opinion to be convincing." The court thus concluded that there had been sufficient evidence adduced to demonstrate medical causation.

Having found sufficient evidence to support findings of both legal and medical causation, the compensation court awarded benefits. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Midwest asserts that the compensation court's award did not satisfy rule 11 and that the court erred in finding sufficient evidence to support findings of legal and medical causation.

IV. ANALYSIS

Midwest asserts that the compensation court failed to provide a well-reasoned opinion under rule 11 because the court did not make sufficient factual findings to support its conclusions about causation. Midwest also asserts that the court erred in finding sufficient evidence to support a finding of both legal and medical causation. We find no merit to either assertion.

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2010), a judgment of the Workers' Compensation Court may 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. *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013); *Roness v. Wal-Mart Stores, ante* p. 211, 837 N.W.2d 118 (2013). Competent evidence means evidence that tends to establish the fact in issue. *Id.*

[2,3] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, an appellate court will not disturb the findings of fact of the

trial judge unless clearly wrong. *Roness v. Wal-Mart Stores, supra*. See *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013). In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence is considered in the light most favorable to the successful party, every controverted fact is resolved in favor of the successful party, and the successful party has the benefit of every inference that is reasonably deducible from the evidence. *Roness v. Wal-Mart Stores, supra*. See *Pearson v. Archer-Daniels-Midland Milling Co., supra*.

1. Rule 11 Challenge

Midwest first asserts that the the compensation court failed to provide a well-reasoned opinion under rule 11 because the court did not make sufficient factual findings to support its conclusions about causation. We disagree.

[4,5] Rule 11(A) requires the Workers' Compensation Court to write decisions that "provide the basis for a meaningful appellate review." *Jurgens v. Irwin Indus. Tool Co.*, 20 Neb. App. 488, 825 N.W.2d 820 (2013). In particular, rule 11(A) requires the judge to "specify the evidence upon which the judge relies." *Jurgens v. Irwin Indus. Tool Co., supra*.

In the present case, Midwest asserts that the compensation court did not make specific findings about precisely how long Bolles spent working in the heat and humidity on the date in question, how much of the time was in direct sunlight, the length of time spent in the air-conditioned truck while getting nitrogen shortly before the heart attack, and the length of time and duties performed after he returned and before the heart attack.

Although the compensation court did not make specific findings on each of these points, the court did make factual findings concerning the work performed by Bolles on the date in question. The court made specific findings concerning the nature of the work as requiring the removal of the bolts and flanges with handtools, being inside the air-conditioning unit, being in a bent-over position, and being "essentially performed in the direct sun with little to no shade." Those findings are

all consistent with evidence adduced at trial, as set forth in the above factual background.

The compensation court made specific findings that Bolles worked in this fashion for 1 to 1½ hours during the portion of the job that involved removing the old compressor. The court made specific findings that the old compressor weighed "approximately 350 pounds" and was located in an area limiting exposure to wind. The court made specific findings that Bolles also engaged in "manual manipulation of the compressor" as it was being lifted out of the air-conditioning unit with a front-end loader. The court made specific findings that the old compressor was placed on the ground, that additional components were removed, and that Bolles engaged in similar activities all over again in placing the new compressor in place and reattaching the bolts and flanges with handtools.

The court also made specific findings that it found Dr. Di Maio's report and conclusions to be more persuasive and more credible than Dr. Del Core's report and conclusions. Dr. Di Maio's report specifically indicated that he had reviewed depositions of Bolles' coworkers, as well as medical records, climatological data, and the ambulance records in reaching his opinions and conclusions.

The compensation court's award in this case provides sufficient detail and explanation of how and why the court reached its decision to allow meaningful review. The court sufficiently specified the facts and evidence upon which it based its decision. We find no merit to the assertion that this award did not comply with rule 11.

2. Sufficiency of Evidence on Causation

Midwest next asserts that the compensation court erred in finding that sufficient evidence had been adduced to demonstrate both legal and medical causation. We disagree.

[6,7] When a workers' compensation claimant has suffered a heart attack, the foremost and essential problem is causation, that is, whether the employment caused an employee's injury or death from a heart attack. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997); *Rosemann*

v. County of Sarpy, 237 Neb. 252, 466 N.W.2d 59 (1991). See, also, *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995). The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous. *Zessin v. Shanahan Mechanical & Elec., supra*; *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991).

[8] In workers' compensation cases, the heart injury causation issue consists of two elements: (1) legal causation and (2) medical causation. *Zessin v. Shanahan Mechanical & Elec., supra*; *Toombs v. Driver Mgmt., Inc., supra*; *Leitz v. Roberts Dairy, supra*. Under the legal test, the law must define what kind of exertion satisfies the test of "arising out of the employment." *Id*. Under the medical test, the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused the collapse. *Id*.

(a) Legal Causation

[9] When a preexisting disease or condition is present, the Nebraska Supreme Court has adopted the following test for legal causation: An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person. *Id*.

In the present case, there was evidence adduced to demonstrate that Bolles arrived at the worksite in Harvard between 9:15 and 9:30 a.m. Bolles, along with two coworkers, engaged in physical labor to remove a 350- or 400-pound compressor from an air-conditioning unit, which included climbing up into the unit and using handtools for 1 to 1½ hours in a bent-over position to remove numerous bolts and flanges, physically helping to guide and maneuver the compressor out of the air-conditioning unit as it was lifted by a front-end loader, removing additional parts while the compressor was on the ground, attaching parts to a new compressor, climbing up into the unit again and physically helping to guide and maneuver the new compressor into the air-conditioning unit as it was lifted by a

front-end loader, and using handtools for at least another hour in a bent-over position to replace numerous bolts and flanges. There was evidence to suggest that Bolles performed much of this work in direct sunlight, that the air temperature and the heat index values were extremely high throughout the day in question, and that there was little or no airflow where Bolles was working. Although Bolles left the jobsite and traveled in an air-conditioned vehicle to get nitrogen, he had returned to the worksite and worked with handtools to replace metal sheeting for anywhere from 15 minutes to 1 hour immediately prior to the heart attack.

The evidence adduced at trial demonstrated that in his nonemployment life, Bolles did not exert himself. The testimony established that he did not engage in aerobic activity, did not perform tasks such as mowing or taking the garbage out, and generally preferred to sit on the couch and watch television. Although he enjoyed watching his son play baseball, there was evidence that he primarily sat in the bleachers during games and that many of the games were during evening hours and not in the hottest portions of the day.

We determine that the compensation court was not clearly wrong in concluding that Bolles' work activities on the date in question constituted an exertion or stress greater than that experienced during the ordinary nonemployment life of Bolles or any other person. Thus, there is no merit to Midwest's assertion that the evidence was insufficient to support the court's conclusion on legal causation.

(b) Medical Causation

[10] While legal causation is established by satisfying the "stress greater than nonemployment life" test, a claimant must still establish medical causation. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997). If it is claimed that an injury was the result of stress or exertion in the employment, medical causation is established by a showing by the preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury. *Id.*; *Leitz v. Roberts Dairy*, 237 Neb. 235, 465

N.W.2d 601 (1991). See, also, *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995).

To establish medical causation, Stacy introduced the expert medical opinion of Dr. Di Maio. As noted, in his report, Dr. Di Maio indicated that he had reviewed depositions of Bolles' coworkers, climatological data, Bolles' medical records, and the ambulance records from the date in question. Dr. Di Maio noted the work performed by Bolles on the date in question, as well as the heat and humidity on the date in question.

Dr. Di Maio opined that the stress of working in direct sunlight and the high temperatures and humidity on the date in question were a contributing cause to Bolles' heart attack and that "[t]he elevated temperature and humidity put stress on [Bolles'] heart as it tried to counteract the environmental factors and maintain normal body temperature."

Dr. Di Maio opined that Bolles' "body would have taken steps to prevent developing severe hyperthermia" and that "[a] large portion of his blood supply would have been shuttled to vascular complexes under the skin." He opined that Bolles' "[h]eart rate and stroke volume would have been elevated" and that "[t]he strain on the heart would have been sufficient to aggravate an existing heart disease and cause death." Dr. Di Maio specifically opined that Bolles' "working in an environment of elevated temperature and humidity was a material and substantial cause in his death."

Although Midwest introduced an opposing expert medical opinion, the compensation court made specific findings and specifically concluded that it found Dr. Di Maio and his opinions to be more credible and entitled to more weight. Thus, the court found that, according to Dr. Di Maio's findings and opinion, sufficient evidence had been adduced to demonstrate medical causation. As previously stated, causation is a factual issue to be determined by the trier of fact, whose determination will not be reversed unless it is clearly erroneous. *Zessin v. Shanahan Mechanical & Elec., supra*. See *Leitz v. Roberts Dairy, supra*.

We conclude that the compensation court did not clearly err in finding that the evidence was sufficient to establish medical

causation. Midwest's assignment of error to the contrary is without merit.

V. CONCLUSION

We find no merit to Midwest's assertions on appeal that the compensation court failed to provide a well-reasoned opinion under rule 11 and that the evidence was insufficient to demonstrate legal and medical causation. We affirm.

AFFIRMED.

CECIL L. HAYES ET AL., APPELLANTS, V. COUNTY OF THAYER, NEBRASKA, APPELLEE.

844 N.W.2d 347

Filed March 18, 2014. No. A-12-903.

1. **Pleadings.** A party may amend the party's pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may amend it within 30 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires.
2. ____. Once a responsive pleading has been filed, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.
3. ____. A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
4. **Pleadings: Appeal and Error.** Courts generally review the denial of a motion for an abuse of discretion.
5. **Pleadings: Proof.** If leave to amend is sought before discovery is complete and neither party has moved for summary judgment, futility is judged by a liberal standard and an amendment is not deemed futile as long as the proposed amended complaint sets forth a general scenario which, if proven, would entitle the plaintiff to relief on some cognizable theory.
6. **Pleadings: Summary Judgment: Proof.** If leave to amend is not sought until after discovery is closed and a motion for summary judgment has been docketed, the proposed amendment must be not only theoretically viable but also solidly grounded in the record and supported by substantial evidence.
7. **Pleadings: Evidence: Summary Judgment.** The proposed amendment to a pleading may be considered futile when the evidence in support of the proposed

new claim creates no triable issue of fact and would not survive a motion for summary judgment.

8. **Pleadings: Evidence: Summary Judgment: Proof.** Where summary judgment has been filed for, the standard is that the party seeking to amend must demonstrate sufficient evidence to show an entitlement to relief, which requires substantial evidence that shows a triable issue of fact sufficient to survive summary judgment.
9. **Equity: Estoppel.** The six elements that must be satisfied for the doctrine of equitable estoppel to apply are (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.
10. **Estoppel: Limitations of Actions.** The first prong of the test to satisfy the doctrine of equitable estoppel is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.
11. ____: ____. The mere pendency of negotiations, conducted in good faith with a view toward ultimate compromise, is not itself sufficient to establish estoppel.

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

Joseph F. Chilen, of Denney & Chilen, for appellants.

Vincent Valentino and Brandy R. Johnson, of Valentino Law Office, for appellee.

IRWIN, PIRTLE, and BISHOP, Judges.

IRWIN, Judge.

I. INTRODUCTION

Cecil L. Hayes, Robert D. Hayes, and Harold L. Hayes (collectively Hayes) brought this action against Thayer County, Nebraska (County), seeking damages allegedly caused by the re-ignition of a controlled burn started by the County. After the district court found that Hayes' complaint was barred by the statute of limitations and granted the County summary

judgment, Hayes sought to amend the complaint to allege an estoppel claim. Hayes now appeals the district court's denial of that motion to amend the complaint. We find no merit to the appeal and affirm.

II. BACKGROUND

The events giving rise to this action occurred in February and March 2009. In early February, the County started a fire in a ditch to burn vegetation, brush, and scrub trees. Hayes owns real property located north and east of where the controlled burn was conducted. In late March, the area experienced sustained winds and a fire ignited and caused damage to Hayes' property.

In early April 2009, Hayes retained the services of an investigative firm to conduct an inquiry to determine the source and cause of the March fire. The investigators opined that the fire was caused by negligent acts of the County and was the result of a re-ignition of the February controlled burn.

In late August 2009, Hayes filed a claim with the County, seeking compensation for the damages caused to Hayes' property. A claims adjuster for the County swore in an affidavit that the County conducted a good faith investigation into various claims filed as a result of the March fire and that the County ultimately settled some claims, but did not reach a settlement on Hayes' claims. The adjuster also swore in his affidavit that the settlements reached by the County did not include an acknowledgment of liability on the part of the County.

In April 2011, Hayes withdrew the pending claim with the County. Hayes then filed a complaint in district court, seeking damages for negligence. Hayes alleged facts in the complaint concerning when Hayes discovered the cause of the fire, in an apparent attempt to plead facts suggesting that the statute of limitations should not have run on the legal claim—even though the complaint was filed more than 2 years after the fire occurred.

The County filed a motion to dismiss, citing a lack of jurisdiction and an alleged failure to state a claim upon which relief could be granted. The district court denied the motion

to dismiss. In the order denying the motion to dismiss, the court found that Hayes' complaint, although filed more than 2 years after the fire, was not barred by the statute of limitations because the complaint was filed within 2 years after Hayes discovered the cause of the fire.

The County later filed a motion for summary judgment. The County offered a variety of exhibits in support of the motion for summary judgment, including a deposition of Cecil, various discovery documents, and affidavits.

The district court granted the motion for summary judgment. The district court found that Hayes discovered the injury when the fire occurred and that the evidence adduced at the summary judgment hearing indicated that Hayes was almost immediately suspicious about the cause of the fire, that Hayes knew the applicable time limitations and filed the claim with the County within the applicable time limitations, and that the statute of limitations was not tolled by the discovery rule. The ruling on the motion for summary judgment has not been appealed.

Hayes filed a motion for new trial. In the motion, Hayes alleged that the grant of summary judgment was not sustained by sufficient evidence or was contrary to law.

Approximately a month after filing the motion for new trial, Hayes filed a motion seeking to amend the complaint. Hayes requested the court's permission to file an amended complaint to include assertions that the County should be estopped from asserting the statute of limitations. Hayes asserted that the County should be estopped from raising the statute of limitations, because the County had led Hayes to believe the claim would be settled and had caused Hayes to postpone retaining counsel and filing the complaint. Without receiving leave of court to file an amended complaint, Hayes filed the proposed amended complaint.

The district court granted a hearing on Hayes' motions for new trial and for leave to file an amended complaint. In its order granting the hearing, the court noted that Hayes had not filed any motion to amend upon the County's raising of the issue of the statute of limitations and that Hayes had not argued or raised any issue of estoppel at the hearing on the County's

motion for summary judgment. The court concluded that Hayes had gambled on winning on the discovery rule argument, had lost, and now had sought to raise an entirely different theory. The court held that Hayes' delay in raising the estoppel issue "would certainly appear [to] constitute 'undue delay.'" The court also noted that Hayes had failed to "mention any facts in support of its motions that would allow it to prevail on a motion for equitable estoppel."

After a hearing, the district court entered an order denying Hayes' motions for new trial and for leave to file an amended complaint. The court held that Hayes had not moved to amend the complaint to raise estoppel until after discovery had been complete and summary judgment had been entered, and that, accordingly, Hayes was required to present substantial evidence to support the estoppel claim. The court noted that the evidence adduced at the summary judgment hearing demonstrated there were clearly differences between Hayes and the County, that negotiation on the claim had been ongoing, and that no offer for settlement had ever been made by the County. The court cited evidence indicating that Hayes had consulted with legal counsel prior to the running of the statute of limitations, and it concluded that there was no evidence of actions by the County to lull Hayes into delaying filing the complaint. Concluding that Hayes had gambled on a last minute settlement that never happened, the court denied Hayes' motions for new trial and to file an amended complaint. This appeal followed.

III. ASSIGNMENTS OF ERROR

Hayes has assigned three errors on appeal, all of which challenge the district court's denial of Hayes' motion to file an amended complaint and raise estoppel.

IV. ANALYSIS

Hayes' assertions on appeal challenge the district court's denial of Hayes' motion to file an amended complaint raising the issue of estoppel. We find that the district court correctly concluded that because discovery had been completed and a judgment entered before Hayes moved to amend, the

appropriate standard was that Hayes had the burden to present substantial evidence demonstrating a likelihood of success on the proposed estoppel claim. We also find that the court did not err in finding that Hayes failed to meet that burden.

This court addressed a similar situation in *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), in assessing whether a district court properly denied a request to amend a complaint after summary judgment had been requested. In that case, we set forth the relevant legal standards and propositions that should guide a district court's decision on a motion to amend the pleadings.

In *Bailey, supra*, the defendants filed a motion for summary judgment in an action concerning loan guaranties. After the defendants filed their motion for summary judgment but before the district court had ruled on the motion, the plaintiffs filed a motion to amend the complaint, seeking to add additional theories of recovery to the theories set forth in the initial complaint. The district court denied the motion, and we reversed.

[1,2] Neb. Ct. R. Pldg. § 6-1115(a) provides, in relevant part, as follows:

> A party may amend the party's pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may amend it within 30 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires.

As we noted in *Bailey, supra*, Nebraska's rule in this regard has been similar to Fed. R. Civ. P. 15(a), which provides that once a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

[3] In interpreting this language in the context of the federal rule, federal courts have concluded that a district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith

on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated. See *Roberson v. Hayti Police Dept.*, 241 F.3d 992 (8th Cir. 2001), citing *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). In *Bailey, supra*, we adopted those federal standards.

[4] Federal courts generally review the denial of a motion for an abuse of discretion. See *In re K-tel Intern., Inc. Securities Litigation*, 300 F.3d 881 (8th Cir. 2002). This is consistent with the standard of review usually employed in reviewing such motions in Nebraska. See *Rudd v. Debora*, 20 Neb. App. 850, 835 N.W.2d 765 (2013). The Eighth Circuit, however, reviews de novo the underlying legal conclusion of whether a proposed amendment would have been futile. See *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748 (8th Cir. 2006).

[5] In *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), we discussed the appropriate standard to be used in assessing whether the proposed amendment should be denied on the basis of its futility. We adopted the rationale expressed by the First and Second Circuit Courts of Appeals that if leave to amend is sought before discovery is complete and neither party has moved for summary judgment, futility is judged by a liberal standard and an amendment is not deemed futile as long as the proposed amended complaint sets forth a general scenario which, if proven, would entitle the plaintiff to relief on some cognizable theory. See, *Hatch v. Department for Children, Youth & Families*, 274 F.3d 12 (1st Cir. 2001); *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104 (2d Cir. 2001).

[6,7] In *Bailey, supra*, we quoted *Hatch, supra*, in which the First Circuit expressed that if leave to amend is not sought until after discovery is closed and a motion for summary judgment has been docketed, the proposed amendment must be not only theoretically viable but also solidly grounded in the record and supported by substantial evidence. We also quoted the Second Circuit's expression that in such a situation, the proposed amendment may be considered futile when the evidence in support of the proposed new claim creates no triable issue of fact and would not survive a motion for summary

judgment. *Bailey, supra*, quoting *Milanese, supra*. In *Bailey*, we specifically held that "the explanations and rationale used and applied *by the First and Second Circuits*" were sound and held that if leave to amend is sought after a motion for summary judgment has been filed and all relevant evidence presented, the amendment may be denied as futile when the evidence in support of the proposed amendment creates no triable issue of fact. 16 Neb. App. at 169, 741 N.W.2d at 196-97 (emphasis supplied).

[8] Both the notion that "substantial evidence" must be presented and the notion that the evidence must be such as would create a "triable issue of fact" that could survive summary judgment are expressions of the same standard. Compare *Bailey, supra* (amendment futile if evidence in support creates no triable issue of fact), with *Nielsen v. Daubert*, No. A-08-206, 2009 WL 306243 (Neb. App. Feb. 10, 2009) (selected for posting to court Web site) (amendment futile if not supported by substantial evidence). Of note, in *Bailey, supra*, when we quoted the First Circuit's use of the "substantial evidence" phrasing in *Hatch, supra*, we specifically cited as additional support the Seventh Circuit's decision in *Bethany Pharmacal Co., Inc. v. QVC, Inc.*, 241 F.3d 854 (7th Cir. 2001), and noted in a parenthetical that the *Bethany Pharmacal Co., Inc.* opinion stood for the proposition that amendment of a complaint is futile if the added claim would not survive a motion for summary judgment. In so doing, we implicitly recognized that the standards employed by both the First and Second Circuits, although using different terminology, were the same standard: In this context, where summary judgment has been filed for, the standard is that the party seeking to amend must demonstrate sufficient evidence to show an entitlement to relief, which requires "substantial evidence" that shows a "triable issue of fact" sufficient to survive summary judgment. See, also, *Thimjon Farms v. First Intern. Bank & Trust*, 837 N.W.2d 327 (N.D. 2013) (holding that if leave to amend is not sought until after discovery closed and summary judgment docketed, amendment is futile unless supported by substantial evidence that would survive summary judgment motion).

In the present case, the litigants have not made any assertion that there is a difference between "substantial evidence" and evidence sufficient to give rise to a "triable issue of fact" that could survive summary judgment. Rather, Hayes asserts only that the standard to be used should be the same as the standard prior to the close of discovery and the docketing of a summary judgment motion, where Hayes would need only to set forth a general scenario that suggests a cognizable theory.

Consistent with our reasoning set forth in *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), we conclude that in the present case, the appropriate standard for assessing whether Hayes' motion to amend should be determined futile is that the proposed amendment must be not only theoretically viable but also solidly grounded in the record and supported by substantial evidence sufficient to give rise to a triable issue of fact. In the present case, discovery had closed and a motion for summary judgment had already been docketed. In fact, the district court had actually already sustained the County's motion for summary judgment and entered judgment in favor of the County.

Hayes argues on appeal that discovery was not closed because the discovery conducted prior to the filing of the motion for leave to amend was focused on the discovery rule and the possible tolling of the statute of limitations, not on a potential claim for estoppel. On the record presented to us, we have no way of knowing whether anyone conducted discovery on a possible estoppel claim. What is apparent, however, is that this case had progressed to a point where a motion for summary judgment was appropriately filed and the district court specifically held that discovery had already closed.

It is arguable that waiting until after summary judgment has been entered on a statute of limitations claim and one proposed defense to the limitations claim (i.e., application of the discovery rule) to posit a completely different theory of defense to the limitations claim (i.e., estoppel) is undue delay. There is no indication in the record of any excuse or explanation for why Hayes did not consider, raise, or pursue discovery on the estoppel theory until after the court had already granted summary judgment. The district court concluded that Hayes

gambled on a favorable outcome on the discovery rule and, only after losing that gamble, then explored estoppel.

Nonetheless, and without specifically finding that there was undue delay in Hayes' filing of the motion to amend, we conclude that the district court did not abuse its discretion in denying the motion for leave to amend because, on a de novo review, we agree that the proposed amendment was futile. Hayes failed to demonstrate that the proposed amendment was not only theoretically viable but also solidly grounded in the record and supported by substantial evidence sufficient to give rise to a triable issue of fact.

Hayes' motion for leave to amend sought permission to add assertions supporting a theory that the County should be equitably estopped from asserting the statute of limitations as a defense because the County had acted in a fashion to lull Hayes into not filing the action in court until after the statute of limitations had already expired. In *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999), the Nebraska Supreme Court held that political subdivisions can be equitably estopped from relying on a statute of limitations upon a showing that the elements of equitable estoppel have been met, as well as compelling circumstances, where right and justice so demand in the interest of preventing manifest injustice. Thus, in addition to showing, supported by substantial evidence, that Hayes can demonstrate all of the elements of equitable estoppel, Hayes also must demonstrate compelling circumstances and a risk of manifest injustice if not allowed to amend the pleadings after summary judgment was entered on behalf of the County.

[9,10] The six elements that must be satisfied for the doctrine of equitable estoppel to apply are (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and of the means of knowledge of the truth as to

the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel. *Woodard, supra*. The first prong of the test to satisfy the doctrine of equitable estoppel is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Id*.

In the present case, Hayes has not demonstrated substantial evidence that all of these elements can be satisfied and has not demonstrated a triable issue of fact. In *Woodard, supra*, a representative of the defendant had met with the plaintiffs and allegedly encouraged them not to retain counsel. The plaintiffs swore in an affidavit that they had agreed to negotiate a settlement upon condition that they not retain counsel. Negotiations between the parties had resulted in a letter of understanding in which the parties specifically represented that the plaintiffs' rights to claim damages in the future were being reserved. The defendant made a variety of settlement offers to the plaintiffs and actually made a series of voluntary payments to the plaintiffs. The plaintiffs swore in an affidavit that the defendant made repeated assurances that the defendant would voluntarily settle without litigation.

[11] The Nebraska Supreme Court did not conclude as a matter of law that all of those facts necessarily demonstrated a claim for equitable estoppel, but did conclude that whether estoppel should be applied was a question of fact which prevented summary judgment on the issue from being entered in favor of the defendant. *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999). The court specifically distinguished situations where the evidence demonstrates mere attempts to settle, however, and noted that the mere pendency of negotiations, conducted in good faith with a view toward ultimate compromise, is not itself sufficient to establish estoppel. *Id*. Rather, it was the presence of evidence suggesting that the defendant conveyed the impression that litigation would not be necessary, lulling the plaintiffs into not filing a legal

claim until after the expiration of the statute of limitations, that, if proved to the finder of fact, could establish the level of misrepresentation necessary for estoppel.

In the present case, there was no evidence adduced to demonstrate anything comparable to the evidence and factual circumstances present in *Woodard, supra*. Hayes offered affidavits in support of the motion for leave to amend, but the affidavits do not indicate any evidence of any settlement offer ever being made by the County, do not indicate any evidence of an admission of liability by the County, do not indicate any evidence of any statements or suggestions that Hayes forgo seeking counsel or pursuing legal remedies, and do not indicate any discussions concerning the statute of limitations. See *Keene v. Teten*, 8 Neb. App. 819, 602 N.W.2d 29 (1999) (no estoppel where plaintiff was never discouraged from seeking counsel, plaintiff did consult with counsel before running of statute, and no agreement ever existed for settlement). Hayes has not offered evidence of any action on behalf of the County, beyond mere settlement negotiations, to suggest any action that could be construed as having lulled Hayes into forgoing commencement of litigation within the statute of limitations.

Indeed, even a review of Hayes' proposed amended complaint does not reveal allegations of any action on behalf of the County that could be construed as having lulled Hayes into forgoing commencement of litigation within the statute of limitations. Hayes sought to allege in the amended complaint that the County periodically requested documents and evidence to support Hayes' claim, contacted Hayes about setting a meeting to discuss the claim and obtain insurance information, actually met with Hayes, disagreed with Hayes about the appropriate value of damages that could be sought, and indicated an intention to contact Hayes' insurance company to discuss the subrogation process. Hayes sought to allege that the County's actions and words conveyed and created the impression that litigation would not be necessary. These assertions, even aside from not being supported by substantial evidence, do not rise to the level of demonstrating a viable estoppel claim. See, *Woodard, supra* (mere negotiation does

not support estoppel); *Keene, supra* (investigation of claim is not sufficient to support estoppel).

In this case, Hayes has not alleged or provided substantial evidence to demonstrate the elements of estoppel and has not demonstrated a triable issue of fact. Hayes has not alleged or provided substantial evidence to demonstrate any action on behalf of the County that could be considered to have lulled Hayes into not pursuing legal redress before the expiration of the statute of limitations. Hayes has really alleged and presented evidence only of the County's having engaged in settlement negotiations and investigation. There has been no showing of any compelling circumstances where right and justice demand granting leave to amend in the interest of preventing a manifest injustice. Rather, the record presented to us demonstrates that Hayes pursued a theory that the statute of limitations should not bar the claim because of the discovery rule and, upon losing on that claim, sought to pursue a completely different theory: estoppel. We agree with the district court that the proposed amendment would be futile, and we find no abuse of discretion by the court in denying leave to amend.

V. CONCLUSION

We find no merit to Hayes' assertions on appeal that the court erred in denying the motion for leave to amend the pleadings. We affirm.

AFFIRMED.

BISHOP, Judge, concurring.

The Nebraska Supreme Court has stated that "[a] district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, *futility of the amendment*, or unfair prejudice to the nonmoving party can be demonstrated." *Intercall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 811, 824 N.W.2d 12, 21 (2012) (emphasis supplied). I write separately to address the majority opinion's discussion on the futility of the amendment issue in this case. I am concerned that the majority opinion blurs the distinction between "substantial evidence" and "sufficient evidence" and a "triable issue of

fact" in the standard it articulates for considering the futility of a proposed amendment to pleadings after a summary judgment motion has been docketed.

The majority states that "[b]oth the notion that 'substantial evidence' must be presented and the notion that the evidence must be such as would create a 'triable issue of fact' that could survive summary judgment are expressions of the same standard," and that "where summary judgment has been filed for, the standard is that the party seeking to amend must demonstrate sufficient evidence to show an entitlement to relief, which requires 'substantial evidence' that shows a 'triable issue of fact' sufficient to survive summary judgment." The majority then states:

> Consistent with our reasoning set forth in *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), we conclude that in the present case, the appropriate standard for assessing whether Hayes' motion to amend should be determined futile is that the proposed amendment must be not only theoretically viable but also solidly grounded in the record and supported by substantial evidence sufficient to give rise to a triable issue of fact.

I do not see this standard as being consistent with *Bailey*. The standard articulated in *Bailey* is consistent with the long-established standard in Nebraska for proof on summary judgment; whereas, the standard articulated by the majority in this case represents an unnecessary and perhaps misleading departure from that standard.

CLARIFICATION OF STANDARD

In *Bailey*, in examining the futility of an amendment to pleadings, our court noted initially that "[s]everal federal courts hold that at a certain point in pretrial proceedings, a motion to amend the complaint should be judged under a standard comparable or identical to the standard for summary judgment." 16 Neb. App. at 167, 741 N.W.2d at 195. *Bailey* then looked specifically at cases from the First and Second Circuits and noted that cases from the Eighth Circuit indicate that "leave to amend may be denied if the amended pleading could be

defeated by a motion for summary judgment or dismissal." *Id.* at 168, 741 N.W.2d at 196. *Bailey* then held that if a motion to amend a pleading is sought at the time a summary judgment motion is filed

> and the parties have presented all relevant evidence in support of their positions, then the amendment should be denied as futile only when the evidence in support of the proposed amendment creates no triable issue of fact and the opposing party would be entitled to judgment as a matter of law.

16 Neb. App. at 169, 741 N.W.2d at 196-97. The holding in *Bailey* is consistent with Nebraska's statute on summary judgment and Nebraska appellate precedent which holds:

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

Peterson v. Homesite Indemnity Co., 287 Neb. 48, 54, 840 N.W.2d 885, 891 (2013) (emphasis supplied). See, also, Neb. Rev. Stat. § 25-1332 (Reissue 2008). I see "no triable issue of fact" and "no genuine issue as to any material fact" as being the same standard, a summary judgment standard, whereas the majority's standard, especially the incorporation of "substantial evidence," suggests a different, higher burden of proof.

A discussion on summary judgment is well articulated in *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012), and notably, the word "substantial" is not contained anywhere in the court's discussion of "sufficient" evidence for summary judgment. In that case, the Nebraska Supreme Court stated:

> [C]onsideration of a motion for summary judgment also requires a court to consider the quantitative sufficiency of the evidence. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. This standard explicitly invokes

> the idea of sufficiency of evidence. Furthermore, "[a]fter the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion." Courts also speak in terms of "sufficiency" when considering whether the nonmoving party met this burden. In fact, this court has defined the decisive question on appeal from summary judgment as "whether [the nonmoving party] produced sufficient evidence to present a genuine issue of material fact." Indeed, any burden of proof necessarily requires a court to determine whether the party with the burden of proof adduced sufficient evidence to meet that burden. In claiming that the district court erred in finding that there was insufficient evidence to find that [appellee] tortiously interfered with the 107th Avenue lease, appellants overlook the evidentiary burdens applicable in the summary judgment procedure.
>
> In the instant case, appellants were in the position of the nonmoving party, and thus, once [appellee] adduced sufficient evidence to show that it was entitled to judgment as a matter of law if [appellee's] evidence remained uncontroverted at trial, they had the burden of showing the existence of material issues of fact that would have precluded judgment as a matter of law in favor of [appellee], the moving party. Because appellants had a burden of proof in the summary judgment hearing, the district court did not err in considering whether appellants produced sufficient evidence to meet that burden of proof.

Id. at 788-89, 826 N.W.2d at 234. The Supreme Court in *Lund Co.* went on to state that the appellee had established a prima facie case for summary judgment, so the burden shifted to the appellants to "produce sufficient evidence to establish the existence of a material issue of fact that prevented judgment" for the appellee. 284 Neb. at 792, 826 N.W.2d at 236.

The Supreme Court further noted that although "appellants' evidence did call into question [appellee's] evidence on certain factual matters," "not all issues of fact preclude summary judgment, but only those that are material. In the summary judgment context, a fact is material only if it would affect the outcome of the case." *Id*.

In this case, the majority concludes that "Hayes has not alleged or provided substantial evidence to demonstrate the elements of estoppel and has not demonstrated a triable issue of fact." I disagree that Hayes had to prove estoppel by "substantial" evidence; rather, Hayes had to "produce sufficient evidence to establish the existence of a material issue of fact," see *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 792, 826 N.W.2d 225, 236 (2012), that would preclude judgment for the County. In this case, in support of the estoppel argument, Hayes asserts that the County lulled Hayes into a false sense of security resulting in the delay in filing the complaint. The only alleged factual basis to support this position is a meeting that took place between Hayes and John Christensen, a claims adjuster for the County's self-insurance pool, on November 10, 2010, 4 months before the statute of limitations would have run. Hayes claims the discussion included the request to restore the property based on a fair market value approach as used by the Internal Revenue Service, whereas Christensen suggested an actual cash value approach. Christensen stated that the costs of the private investigator hired by Hayes would not be reimbursed. Christensen requested the name and address of Hayes' insurance company and contact person to initiate the subrogation process, and according to Hayes, Christensen also indicated that he would be in contact with Hayes' insurance company to initiate that process. Hayes claims that Christensen delayed contacting the insurance company until March 18, 2011, and that Hayes' insurance company responded to Christensen on March 28. As noted in the majority opinion, there was no evidence of any settlement offer or any evidence that Christensen suggested that Hayes forgo seeking legal counsel or remedies. As noted by the majority, the Nebraska Supreme Court has previously held that "'[t]he mere pendency of negotiations during the period of a statute of limitations,

which are conducted in good faith with a view to ultimate compromise, is not of itself sufficient to establish an estoppel,'" and that "ordinary settlement negotiations contain the implicit notion that if settlement is not reached, then litigation may be necessary." *Woodard v. City of Lincoln*, 256 Neb. 61, 69, 588 N.W.2d 831, 837 (1999). Additionally, conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment. *Cartwright v. State*, 286 Neb. 431, 837 N.W.2d 521 (2013). Hayes did not produce sufficient evidence to establish the existence of a material issue of fact that would support estopping the County from raising the statute of limitations defense. Accordingly, I concur in the majority's determination that the district court did not abuse its discretion in denying the amended complaint.

MOTION FOR NEW TRIAL FOLLOWING SUMMARY JUDGMENT ORDER

The majority did not address a procedural issue in this case that I believe warrants mention. The district court entered a summary judgment order on February 24, 2012. Hayes filed a "Motion for New Trial" on March 2, stating specifically that it was being filed pursuant to Neb. Rev. Stat. § 25-1142 (Reissue 2008), "for the reason that the verdict, report, or decision is not sustained by sufficient evidence or is contrary to law." We note that the motion language is quoting directly from § 25-1142, the new trial statute. Hayes then filed a "Motion to Amend Complaint" on April 4; on August 30, the motion to amend complaint and the motion for new trial were both overruled. Hayes appealed to this court on September 28. If the March 2 motion for new trial cannot be converted to a motion to alter or amend the judgment, Hayes' appeal would not be timely.

In *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 638, 694 N.W.2d 832, 838 (2005), the court stated, "As our recent jurisprudence makes clear, a motion purportedly seeking a new trial is not a proper motion to file after a motion for summary judgment is sustained and does not toll the time

for filing a notice of appeal." The *Allied Mut. Ins. Co.* court further stated:

> However, a postjudgment motion must be reviewed based on the relief sought by the motion, not based upon the title of the motion. *When the statutory basis for a motion challenging a judgment on the merits is unclear*, the motion may be treated as a motion to alter or amend the judgment.

Id. (emphasis supplied). In *Allied Mut. Ins. Co.*, the motion for new trial was based on an alleged "irregularity in the proceedings of the court, an insufficiency of evidence, and an error of law." *Id.* The *Allied Mut. Ins. Co.* court concluded, "This motion is similar to a motion for reconsideration, which is treated as a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Cum. Supp. 2002)," and, if filed within 10 days of the final order, tolls the time to file an appeal. 269 Neb. at 638, 694 N.W.2d at 838.

In this case, the motion for new trial cites specifically to the new trial statute, § 25-1142, and quotes directly from that statute. *Allied Mut. Ins. Co.* indicates that we may treat a motion for new trial as a motion to alter or amend the judgment "[w]hen the statutory basis for a motion challenging a judgment on the merits is unclear." 269 Neb. at 638, 694 N.W.2d at 838. In this case, the statutory basis is clearly stated—it cites to the new trial statute and quotes directly from that statute. Accordingly, *Allied Mut. Ins. Co.* seems to say that the motion for new trial in this case would not have effectively tolled the time for filing an appeal.

That said, however, it appears the appellate courts have been generous in allowing appeals to move forward regardless of the title or substance of a postjudgment motion. In a case decided just months before *Allied Mut. Ins. Co., supra*, the Nebraska Supreme Court addressed a motion for new trial filed after a motion to dismiss was sustained. The Supreme Court stated that the "motion for new trial was not a proper motion and would not toll the time for filing a notice of appeal." *Weeder v. Central Comm. College*, 269 Neb. 114, 119, 691 N.W.2d 508, 513 (2005). The Supreme Court went on to note that "to qualify for treatment as a motion to alter or

amend the judgment, the motion must be filed no later than 10 days after the entry of judgment, as required under § 25-1329, and must seek substantive alteration of the judgment." *Weeder*, 269 Neb. at 119, 691 N.W.2d at 513. The Supreme Court observed that the motion in that case contained the language "'reexamine its decision to dismiss . . . and reinstate the action as previously filed,'" and the Supreme Court concluded that the "language seeks substantive alteration of the judgment," "qualifies as one to alter or amend the judgment under § 25-1329, and tolled the time for filing a notice of appeal." *Weeder*, 269 Neb. at 120, 691 N.W.2d at 513. The Supreme Court went on to state:

> We pause briefly to note that since Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2002) was amended in 2000, see 2000 Neb. Laws, L.B. 921, this court or the Court of Appeals, on repeated occasions, has found it necessary to determine whether an improperly filed motion for new trial could be viewed as one to alter or amend a judgment. See, *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004); *Central Neb. Pub. Power v. Jeffrey Lake Dev.*[, 267 Neb. 997, 679 N.W.2d 235 (2004)]; *DeBose v. State*, 267 Neb. 116, 672 N.W.2d 426 (2003); *State v. Bellamy*[, 264 Neb. 784, 652 N.W.2d 86 (2002)]; *Vesely v. National Travelers Life Co.*, 12 Neb. App. 622, 682 N.W.2d 713 (2004). In the future, we request the practicing bar to carefully consider the nature of the proceeding prior to filing any motion calling into question a court's judgment.

Weeder, 269 Neb. at 120, 691 N.W.2d at 513.

Other than the sentence emphasized from *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005), the Nebraska Supreme Court appears to direct us to convert an improperly filed postjudgment motion into a motion to alter or amend a judgment to allow for the tolling of the time to file an appeal. So although the language in *Allied Mut. Ins. Co.* gives me pause, I join with the majority in its apparent decision to allow the appeal to be decided on its merits rather than dismissing on jurisdictional grounds.

CLINTON M., APPELLEE, V. PAULA M., APPELLANT.

844 N.W.2d 814

Filed April 1, 2014. No. A-12-920.

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. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. **Child Custody: Proof: Intent.** In circumstances where parents share joint legal and physical custody and one parent seeks to remove a child from the state, the parent seeking modification must first prove a material change in circumstances affecting the best interests of the child by evidence of a legitimate reason to leave the state, together with an expressed intention to do so; once the party seeking modification has met this threshold burden, the separate analyses of whether custody should be modified and whether removal should be permitted become intertwined.
5. **Child Custody.** In cases where a noncustodial parent is seeking sole custody of a minor child while simultaneously seeking to remove the child from the jurisdiction, a court should first consider whether a material change in circumstances has occurred and, if so, whether a change in custody is in the child's best interests. If this burden is met, then the court must make a determination of whether removal from the jurisdiction is appropriate.
6. ____. 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.
7. **Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a material change in circumstances.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Justin A. Quinn and Casey J. Quinn for appellant.

Gerald D. Johnson and Maxwell Crawford, Senior Certified Law Student, of Johnson & Pekny, L.L.C., for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

INBODY, Chief Judge.

INTRODUCTION

Paula M. appeals the decision of the Sarpy County District Court denying her request to modify the parties' dissolution decree to grant her sole legal and physical custody of the parties' minor child and denying her request to remove the child from Nebraska to California.

STATEMENT OF FACTS

Clinton M. and Paula were married on March 21, 1998. They had one child, Alexis M., who was born earlier that year in February. The parties' marriage was dissolved by a decree entered on August 8, 2002, by the 26th Judicial District Court, Bossier Parish, Louisiana. The decree granted the parties joint legal and physical custody of Alexis. The decree was modified in December 2006 by the Circuit Court of Pulaski County, Arkansas, to award sole custody of Alexis to Clinton, with Paula's visitation restricted to Arkansas. Another modification occurred in July 2008, wherein the Arkansas court granted Paula specific parenting time with Alexis.

On April 2, 2009, Clinton filed a complaint to register these foreign judgments in the Sarpy County District Court. He contemporaneously filed a complaint to modify the parties' dissolution decree, requesting that Paula's parenting time be restricted to the State of Nebraska and that Paula be ordered to provide support in accordance with the Nebraska Child Support Guidelines. Paula filed a countercomplaint to modify, requesting sole legal and physical custody of Alexis and requesting that she be allowed to remove Alexis from Nebraska to California, where Paula resides. Trial on both Clinton's complaint and Paula's countercomplaint was held on August 30, 2012. The parties stipulated prior to the start of trial that due to the significant travel involved with parenting time, regardless of who had custody of Alexis, a deviation from the child support guidelines down to a support amount of zero was appropriate.

The evidence at trial established that Alexis suffers from serious mental health issues. Due to these issues, in January 2008, Clinton, a member of the U.S Air Force, was reassigned

to Nebraska from Germany because Alexis' mental health providers at the Air Force base did not feel that they could properly care for her there. The record reflects that Alexis, now 16 years old, has been diagnosed with bipolar mood disorder, posttraumatic stress disorder, attention deficit hyperactivity disorder, reactive attachment disorder, oppositional defiant disorder, and cerebral dysrhythmia, which is abnormal electrical activity in the brain which could contribute to a mood disorder and anger outbursts. Alexis has also suffered from depression, explosive anger outbursts, and a mood disorder.

Alexis' conditions have required professional assistance, which she has received from various providers, including Dr. Jamie Ryder, a psychologist who provided individual therapy every other week for Alexis from September 2009 until June 2012; Bridgette Maas, who provided weekly family therapy from December 2010 until January 2012; and Amy Jackson, Alexis' primary therapist from April 13 through July 11, 2012. Each of these providers testified at trial.

As a result of her mental health issues, Alexis has exhibited symptoms of racing thoughts, mood swings, and low motivation, and she has major difficulties with impulse control and emotional regulation. Her behaviors have included lying, manipulation, refusing to follow rules, hoarding food, stealing, wetting and defecating herself, destroying property, making self-harm statements, and exhibiting aggressive behavior toward others, including Clinton's wife and Alexis' younger half sister, and generally displaying out-of-control, noncompliant, and defiant behaviors. Clinton testified that throughout the majority of her life, Alexis' behaviors have been "up and down"; she has some "good" days, while on other days, she is angry, disobedient, and difficult to manage.

Alexis' behaviors reached a critical point in the spring of 2011, when the following event occurred: Alexis and Clinton's wife were arguing when Alexis allegedly pushed her down a flight of stairs, rendering her unconscious, and then Alexis proceeded to leave the home without notifying anyone of Clinton's wife's condition. This event resulted in Alexis' being admitted into an acute treatment facility and the recommendation that Alexis receive treatment at a residential

facility due to her increasing violent tendencies. Pursuant to this recommendation, in mid-March, Alexis began residential treatment at a children's treatment center in Kansas City, Missouri, which provides intensive inpatient behavioral treatment. Alexis was discharged from the treatment center in September 2011.

After being discharged from the treatment center, Alexis did very well, initially: She went back to school and started running in cross-country and swimming. However, Alexis then became depressed and started getting angry, isolating herself, not listening, and having problems at school. In October 2011, after a disagreement with Clinton and his wife, Alexis went into her room, cut her hair with a box cutter, and crawled onto the roof of the home, with the end result of police searching for her. After this episode, Alexis was admitted into an acute treatment facility. Throughout the fall of 2011, Alexis' behaviors continued.

Despite Alexis' behaviors, Ryder felt that a trial visit allowing Alexis to visit Paula in California would be beneficial, so it was arranged for Alexis to visit Paula over Christmas break. Although Alexis ended up attending the visit as scheduled, there were two significant incidents prior to her leaving for the visit. The first incident occurred in a family therapy session with Maas in which Alexis stated that she was not sure whether she could stay safe at Paula's home and that she was worried she might kill Paula's 2½-year-old disabled son. Maas and Alexis came up with a safety plan, which Alexis took with her to California, and Maas spoke with Paula about how to make sure Alexis was safe at Paula's home. The second incident occurred the day before Alexis was supposed to leave for California. Alexis got a kitchen knife and attempted to stab her way into her 4-year-old half sister's room, carved scratches into the door, and left the knife stuck in the door. Alexis told Maas that she was very angry, that she was mad at her younger half sister because she got a lot of attention, that Alexis herself wanted attention, and that she wanted to hurt her half sister. She also said that she was scared to go to Paula's home and that if she had been able to get her half sister's locked door open, she would have hurt her.

As a result of Alexis' threatening behavior toward her younger half sister, Clinton sought to have Alexis admitted to an acute treatment facility; however, Alexis' treating psychiatrist felt that Alexis was attempting to sabotage her visit with Paula and recommended that Alexis visit Paula in California as planned. Following this recommendation, Alexis was not admitted to the facility and went to California for the visit as planned. At the conclusion of the visit, it was reported by both Paula and Alexis that the visit went well and that there were no problems. Despite telling her family therapist that she had fun and was excited about the visit, after returning, Alexis became angry and ripped up pictures of Paula, Paula's older daughter, and Paula's son. Alexis told Maas that she was angry at Paula's son because he was "cute" and "got so much attention" and that she did not get the same attention when she was a child.

Although the California visit went well, due to Alexis' behaviors, Clinton pursued another residential placement for Alexis. The residential placement recommended by Clinton's insurance was Meridell Achievement Center (Meridell) in Liberty Hill, Texas. Alexis was admitted to Meridell, a 24-hour nursing psychiatric facility/residential program, on January 23, 2012. Therapists at Meridell initiated the idea of Clinton's requesting the Air Force for a transfer to Texas in order to more fully participate in Alexis' therapy. Clinton requested a transfer in March 2012, due to medical necessity. His request was approved in mid-June, and later that month, he relocated to Texas, arriving on June 30. Paula testified that although Clinton had decided to place Alexis in residential treatment in Texas, she was not consulted prior to Alexis' admission at Meridell, that Paula was initially informed about Alexis' admission from Ryder, and that Clinton informed her only after Alexis had already been admitted to Meridell.

While at Meridell, Alexis received individual, family, recreational, and group therapy, as well as medication management. Jackson, Alexis' primary therapist at Meridell, saw Alexis for therapeutic treatment, providing individual therapy at least once per week, family therapy twice per week, and group therapy four times per week from April through

July 2012. Jackson testified that during Alexis' treatment at Meridell, Alexis made progress in terms of mood management, developing better coping skills to deal with depression and anger, developing better peer relationships, and developing a better working relationship with her family. However, Jackson felt that even after Alexis was released, she would probably need to go back into residential treatment, which Jackson testified was not unusual for children when they have had long-term difficulties and reach different stages of development.

In fact, after being discharged from Meridell on July 11, 2012, Alexis spent approximately 6 days at home and began a partial program where she would spend the day in therapy and then return home in the evening. However, on July 17, Alexis was admitted into an acute treatment facility due to homicidal threats and her unwillingness to agree to a safety plan. Alexis was released from the facility on July 23, and returned to the partial program the following day. On August 6, after returning home after spending the day at the partial program, Alexis was readmitted to the acute treatment facility after she told Clinton that she was feeling very depressed and that she thought she might hurt herself and requested that Clinton take her to the facility to be evaluated. Alexis was transferred from the acute treatment facility to the residential treatment program, where she remained up until the time of trial.

Ryder testified that throughout Alexis' therapy, she had patterns and mood swings where she would alternate between idolizing one parent and vilifying the other and, depending on her mood, would alternate between wanting to live with Paula and not wanting to live with her. Alexis' mood swings could change from hour to hour, she would sabotage situations in her life, and when things were going well or her mood changed or something upset her, she was likely to react very negatively. Alexis admitted to sabotaging when she was uneasy or nervous or unsure of herself. Additionally, Ryder acknowledged that Alexis could be extremely violent when she is angry. Alexis' anger was described by Maas as a rage: When angry, Alexis becomes impulsive and irrational,

and has mood swings ranging from crying to anger to being very violent.

An example of Alexis' mood swings was a spring 2010 in-person visit to Ryder's office by Paula and her older daughter and son. Ryder testified that prior to the visit, Alexis seemed to be very happy and excited; then, the day prior to the visit, she became resistant, running away from school the day of the visit, and then refusing to see Paula's other children. Ryder reported that despite this, once Alexis was convinced to come into the office for the visit, the visit went very well from all outward appearances: Alexis seemed happy, she was very engaged, and she was "[v]ery loving" with both Paula and her other children. However, the morning after the visit, Alexis left Ryder a voice mail in which she stated that she was scared and worried that Paula was going to try to "kidnap" her again and in which she refused to come to another visit that had been scheduled. When Ryder called to speak to Clinton, he reported that almost immediately after Alexis got home from the visit, she became very upset and distraught and "broke down," saying that she had been uncomfortable and anxious and that the visit "went horribly." Ryder testified that there was no actual danger to Alexis posed by Paula, but that the problem was caused by Alexis' perception of the events and her fluctuating moods.

Ryder testified that stability and consistency in the home and cooperation with the therapist are essential in the treatment of a child like Alexis, and both Ryder and Jackson agreed that Clinton and Paula actively participated in Alexis' therapy. Paula participated in family therapy telephonically, and she traveled for in-person family therapy, often at her own expense. Ryder testified that Clinton tried very hard to cooperate and provide stability and consistency in Alexis' treatment, that Alexis was always at her appointments and always on time, that Clinton provided updates and participated in Alexis' treatment, and that he worked very hard to look at different ways of parenting and different ways of dealing with the situation to try to help Alexis. Additionally, Ryder testified that she believes that Clinton loves Alexis very much, has her best interests at heart, and, to the best of his ability, has tried a lot of the things that

have been recommended as far as parenting Alexis. Ryder testified that Clinton expressed he wanted Alexis to have a good relationship with Paula and to have contact with her and that he never did anything to suggest he was trying to keep Alexis from having a relationship with Paula. Similarly, Maas testified that she was never concerned about Clinton's "shutting out" Paula or keeping her from participating in Alexis' therapy and that he has always been positive about Alexis' treatment and "staying on top of the goals."

Ryder noted that Alexis has exhibited behaviors in multiple settings, both in Clinton's home and in residential treatment, although the behaviors exhibited at home were more severe. Ryder explained that this would not be unusual, because residential treatment environments are significantly more structured environments than a home setting and, additionally, there is peer pressure to behave because if a child misbehaves, not only is the child punished, but all of the child's peers are punished. There can also be a "honeymoon period" which can last for several months when children go into residential treatment; this "honeymoon period" can also be exhibited on a visit with a noncustodial parent.

Jackson testified that when transitioning a child from residential treatment back into the home, the most important support is for the parent to provide the child a home environment that is consistent and safe, to make sure there are opportunities for ongoing therapy to assist in the transition, to be mindful of the child's psychiatric difficulties and understand the possible impact on parenting, and to be mindful of the parent's frustrations and feelings and evaluate whether he or she is doing what is best for the child. However, Maas testified that based upon Alexis' history, Alexis will probably continue to struggle more with her custodial family members than her noncustodial family, because she resides with them and they can see her moods fluctuate, they deal with her behaviors, and they are working with her school and physicians and are implementing rules.

Both Clinton and Paula testified that they thought it was in Alexis' best interests to be with their respective families. Paula testified that she believed that it is in Alexis' best

interests to be with her, because although Alexis has been in Clinton's home for the past 3½ years, her behaviors have continued to get worse and there continue to be safety concerns regarding people in the home. Therefore, Paula believes that Alexis should be given the opportunity to live with her to see whether Alexis can do better. Paula testified that if the court were to grant her custody, she would want Alexis to remain at the inpatient treatment center until her doctors determine that she could return home. Paula testified that she has investigated the possibility of Alexis' receiving treatment in California and has found that similar programs such as day programs, inpatient programs, acute treatment hospitals, residential facilities, and therapists are available. Paula conceded that it was possible that Alexis would act out in her home, but she stated that "[n]obody knows." She further stated that Alexis, who was 14 years old at the time of trial, is very close with Paula's older daughter, who was 17 years old and a senior in high school at the time, and that her older daughter is a positive influence on Alexis.

Clinton testified that he and his wife are best suited to care for Alexis, stating:

> We've gone through every therapy session with [Alexis]. We've talked to all the providers. We do exactly what they tell us to do. I mean we're best suited. We do our best to always be consistent with her. And we love her. And all we want is her to just have a more normal life.

Further, upon being asked about the ongoing behaviors and violence that Alexis has displayed in his home and why he wants Alexis to remain in his home, Clinton testified:

> I love [Alexis], and we've been trying to help her through this very tough situation. And we've grown to be able to — the way I look at it is we're handling it. We're taking care of her. We're doing our best for her. We're trying to give her the kind of home that she needs, the stability and consistency.

On September 5, 2012, the district court entered an order noting that in April 2009, Clinton registered the aforementioned foreign orders from Louisiana and Arkansas in the Sarpy County District Court. The order denied both Clinton's

complaint to modify and Paula's countercomplaint to modify, which had requested sole custody of Alexis and removal of Alexis to California. Regarding Paula's countercomplaint, the court specifically found that the evidence reflected Clinton was a fit parent and that the evidence was insufficient to find that a change in custody would be in Alexis' best interests. The district court's order also stated:

> [T]he State of Nebraska has not issued any permanent order in regard to custody. . . . As a result . . . this matter is controlled by State ex rel. Pathammavong v. Pathammavong, 268 Neb. 1 (2004), where the Supreme Court held that removal is an issue only when there has been a previous order of custody entered in this State.

Paula has timely appealed to this court.

ASSIGNMENT OF ERROR

Paula contends that the district court erred in denying her countercomplaint to modify custody and to allow removal of Alexis from Nebraska.

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. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013). 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. *Id.*

ANALYSIS

We note that the instant case presents an unusual factual situation wherein the noncustodial parent is seeking sole custody of a minor child while simultaneously seeking to remove the child from the jurisdiction.

[3,4] In most cases in which a parent is seeking to remove a child from the jurisdiction, the parent is the custodial parent. Our removal jurisprudence provides that in order to prevail on a motion to remove a minor child to another jurisdiction, the

custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). The standard is modified where parents share joint legal and physical custody and one parent seeks sole custody and simultaneously seeks removal of the child from the jurisdiction. See *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). In circumstances where parents share joint legal and physical custody, the parent seeking modification must first prove a material change in circumstances affecting the best interests of the child by evidence of a legitimate reason to leave the state, together with an expressed intention to do so; once the party seeking modification has met this threshold burden, the separate analyses of whether custody should be modified and whether removal should be permitted become intertwined. See *id*.

However, another approach was suggested in a concurrence in *Brown*, authored by Justice Wright and joined by Justice Connolly. Justice Wright noted that relocation of a child would obviously result in a modification of custody by transferring physical custody to the parent who desired to relocate. Thus, Justice Wright expressed that where parties have joint legal and physical custody, custody is the first issue which should be decided, with the burden of proof on the party seeking to relocate to first show there had been a material change in circumstances that would justify a change in the custody arrangement. *Brown v. Brown, supra* (Wright, J., concurring; Connolly, J., joins).

[5] Additionally, we recently considered a case which presented a factual situation similar to that presented in the instant case. In *State on behalf of Savannah E. & Catilyn E. v. Kyle E., ante* p. 409, 838 N.W.2d 351 (2013), the noncustodial parent filed a motion requesting to be awarded primary physical custody of the parties' two minor children and simultaneously requesting to remove the minor children from the jurisdiction. We held that in cases where a noncustodial parent is seeking sole custody of a minor child while simultaneously

seeking to remove the child from the jurisdiction, a court should first consider whether a material change in circumstances has occurred and, if so, whether a change in custody is in the child's best interests. If this burden is met, then the court must make a determination of whether removal from the jurisdiction is appropriate. *Id*. We affirmed the decision of the district court modifying custody and granting permission to remove the minor children from the jurisdiction.

In the instant case, since Paula has requested both to modify custody and to remove Alexis from the jurisdiction, we first consider whether custody should be modified, prior to a determination of the removal issue.

Denial of Countercomplaint to Modify Custody.

Paula contends that the district court erred in denying her countercomplaint to modify custody.

[6,7] 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. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013); *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004). The party seeking modification of child custody bears the burden of showing a material change in circumstances. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Wild v. Wild*, 13 Neb. App. 495, 696 N.W.2d 886 (2005).

The evidence at trial established that Clinton is a parent who has been actively engaged in seeking out, and participating in, the appropriate mental health treatment for Alexis. He has provided, to the best of his ability, a stable and consistent home environment for Alexis and implemented suggestions from therapists for parenting Alexis. Further, although there is room for improvement in the communication between Clinton and Paula, there is no evidence that Clinton has either interfered with Paula's parenting time with Alexis or prevented or otherwise interfered with Paula's participation in Alexis' mental health treatment. Thus, Paula failed to show that Clinton was an unfit parent.

Further, the evidence presented established that Alexis suffers from severe mental health conditions which have been ongoing for an extended period of time; these issues do not appear to be specifically related to her environment. Alexis has exhibited behaviors both at home and at residential treatment, and, although her behaviors at home are more severe, Ryder pointed out that residential treatment, by its nature, is a significantly more structured environment than a home setting and that there is also peer pressure to behave because if a child misbehaves, the child and all of the child's peers are punished. Ryder also referenced a "honeymoon period" which can take place when a child enters a new environment such as residential treatment or a visit with a noncustodial parent. Further, the evidence establishes that concern for the safety of Alexis' family cannot be limited to Clinton's family; although the record does not show that Alexis has physically assaulted anyone in Paula's home, the record did reflect that Alexis expressed an ideation of killing Paula's son. Although Paula points to evidence that Alexis wants to reside with her, the evidence is clear that Alexis has mood swings and routinely changes her position on Clinton and Paula, alternating between idolizing one parent and vilifying the other. Alexis, while in Clinton's custody, has been provided a stable and consistent home and has been provided mental health care consistently. The difficulties faced by Alexis are not a product of a lack of effort by Clinton; they are a product of the disease from which she suffers. Paula has failed to establish that it would be in Alexis' best interests for custody to be modified. Having concluded Paula failed to prove a material change in circumstances showing that Clinton is unfit or that Alexis' best interests require such action, we find that this assignment of error is without merit.

Denial of Motion to Remove Alexis From Jurisdiction.

Because we have determined that the district court properly denied Paula's motion to modify custody, it follows that we must also find that her motion to remove was properly denied because Paula does not have custody of Alexis.

CONCLUSION

Based upon our de novo review of the record, the district court properly denied Paula's countercomplaint to modify, which had requested sole custody of Alexis and removal of Alexis to California. Therefore, the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM W. MATTHEWS, APPELLANT.
844 N.W.2d 824
Filed April 1, 2014. No. A-12-1052.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
5. **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.
6. **Self-Defense.** To successfully assert a claim of self-defense as justification for the use of force, the defendant must have a reasonable and good faith belief in the necessity of such force and the force used must be immediately necessary and must be justified under the circumstances.
7. ____. A determination of whether the victim was the first aggressor is an essential element of a self-defense claim.
8. **Self-Defense: Evidence: Proof.** Evidence of a victim's violent character is probative of the victim's violent propensities and is relevant to the proof of a self-defense claim.
9. **Rules of Evidence.** Neb. Rev. Stat. § 27-404 (Reissue 2008) provides that a defendant may present evidence of a pertinent trait of a victim's character to show that the victim acted in conformity therewith on a particular occasion.

10. **Rules of Evidence: Testimony.** In situations where testimony is allowed about a person's character trait, that trait may be shown by reputation and opinion testimony.
11. **Rules of Evidence: Proof.** Neb. Rev. Stat. § 27-405(2) (Reissue 2008) provides for proof of specific instances of conduct regarding a person's character or trait of character when the character or trait of character is an essential element of a charge, claim, or defense.
12. **Criminal Law: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
13. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
14. ____: ____: ____: ____. Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
15. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested jury instruction, an appellant has the burden to show that the tendered instruction is a correct statement of the law, that the tendered instruction was warranted by the evidence, and that the appellant was prejudiced by the court's refusal to give the tendered instruction.
16. **Self-Defense.** To successfully assert a claim of self-defense, one must have a both reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances.
17. **Jury Instructions: Evidence.** The trial court is not required to give the instruction where there is insufficient evidence to prove the facts claimed; however, it is not the province of the trial court to decide factual issues even when it considers the evidence produced in support of one party's claim to be weak or doubtful.
18. **Jury Instructions: Self-Defense: Evidence.** It is only when the evidence does not support a legally cognizable claim of self-defense or the evidence is so lacking in probative value, so as to constitute failure of proof, that the trial court may properly refuse to instruct the jury on the defendant's theory of self-defense.
19. **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.
20. **Convictions: Weapons: Intent.** When 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.

21. **Jury Instructions: Pleadings: Evidence.** Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. Because of this duty, the trial court, on its own motion, must correctly instruct on the law.
22. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from an erroneous jury instruction, a defendant has the burden to show that the instruction was prejudicial or otherwise adversely affected a substantial right of the defendant.
23. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
24. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Hall County: WILLIAM T. WRIGHT, Judge. Affirmed in part as modified, vacated in part, and in part reversed and remanded for a new trial.

Gerard A. Piccolo, Hall County Public Defender, and Matthew A. Works for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

William W. Matthews appeals his jury convictions in Hall County District Court for attempted first degree murder, two counts of terroristic threats, and three counts of use of a deadly weapon to commit a felony. Matthews assigns that the district court erred by not allowing certain witness testimony and in the jury instructions tendered to the jury.

II. STATEMENT OF FACTS

In August 2011, the State filed an information charging Matthews with six felonies involving several different victims in this case: count I, attempted first degree murder, and count II, use of a deadly weapon to commit a felony, involving

a victim, Kevin Guzman; count III, terroristic threats, and count IV, use of a deadly weapon to commit a felony, involving a second victim, Maira Sanchez; and count V, terroristic threats, and count VI, use of a deadly weapon to commit a felony, involving a third victim, Mariel Betancourt. In August 2012, the matter went to a jury trial, which lasted several days and included the testimony of numerous witnesses.

On April 21, 2011, Frank Casita Moreno, a deacon at a church in Grand Island, Nebraska, was driving to a rehearsal at his church when he observed a large crowd of Hispanic men and women in the alley between 11th and 12th Streets and two other people standing near a garage in the same vicinity. Within that group, Moreno observed an individual waving a gun at a woman, and Moreno then called the 911 emergency dispatch service. Moreno circled his vehicle around the block to get a better look at the scene, and the group had moved to the center of the street, where a Caucasian man pulled out a gun, waved it, and fired shots at the group standing on the east side of the street near the garage. Moreno described the shooter as a Caucasian man with "dirty blond" hair, wearing a gray sweater or hoodie, whom Moreno identified as Matthews. Moreno saw that the first man he observed with a gun still had the gun out, but that it was at his side and no longer pointed at the woman.

Helen Whitefoot also observed some of the activity discussed above on that day, indicating at trial that she saw guns waving and heard screaming, yelling, and an "intense" argument which led her to call 911. Whitefoot was waiting in a vehicle with her mother in the area and testified that she was looking down the alley toward Eddy Street when she noticed a male and female arguing and yelling and the male lifting his shirt to "flash the gun." Whitefoot explained that the couple was standing on the sidewalk near the front of a garage. Whitefoot testified that the man on the side of the street near the garage yelled, "'Bring it on . . . I'm packing,'" and removed a gun from his waistband, pointing it in the direction of the other side of the street. As she was dialing 911, two individuals ran into the middle of Eddy Street and one of them started shooting a gun into the air. Whitefoot saw one man fire one shot into the air, then drop the

gun down to "chest level" and point and shoot the gun at the male and female couple near the garage. Whitefoot first testified that she could not remember what the couple was doing at the time shots were fired, because she was focused on the man with the gun in the air. She later testified that the couple was facing the shooter as the gun was shot. During cross-examination, Whitefoot testified that she was unsure whether the couple proceeded down the alley before the shots were fired. Whitefoot observed that the shooter was male, wearing a gray, hooded sweatshirt and light-blue baggy jeans, and she identified the individual as Matthews.

On that same day, Dana Mora was at his home on the southwest corner of Eddy and 11th Streets when he heard a gunshot. Mora observed a man with a "nickel-plated, real shiny" gun, wearing a gray sweater with a "'U'" on the back, running away from a group of people. Mora testified that he saw this man raise his hand into the air, fire the gun two more times, and run off in a southwesterly direction. Mora observed that this man had "short, stubbly hair, [and a] goatee."

At trial, Guzman—the individual whom witnesses described as the first individual to show a gun at the scene on April 21, 2011, and one of the individuals standing near a garage in the alley—was a witness for the State, but near the beginning of his testimony, he stated, "You know something, I plead the 5th." After a short break and discussion regarding immunity, Guzman returned to the stand and testified that he had absolutely no recollection of being in Grand Island on April 21 and did not have any recollection of any of the events which took place at that time. Thereafter, Guzman's February 3, 2012, deposition was received into evidence in place of his testimony and was read to the jury.

Guzman's deposition testimony set forth that on April 21, 2011, Guzman and his girlfriend, Betancourt—the alleged victim in count V, terroristic threats, and count VI, use of a deadly weapon to commit a felony—decided to go to her cousin's house, which was located near 11th and 12th Streets, to relax. Guzman and Betancourt then walked to a gas station, and upon their return, Guzman noticed a large group of people, approximately 10 to 12 individuals, whom Guzman observed

to be around the ages of 18 and 19 years old. Guzman testified that the group "had been starting like all these problems with me and all that" and testified that the group was picking on him because its members did not like him. Guzman also indicated that one of the individuals had seen him earlier at the gas station and was talking "smack." The group was talking back and forth, threatening him, and Guzman indicated that a friend told him by telephone that members of the group were "going to get" him. Guzman testified that he wanted to take care of the matter by fighting the group. Guzman approached the group and began yelling and threatening its members. Guzman and Betancourt "went up to . . . Eddy Street" with several other individuals, both male and female. Guzman indicated that he had a gun with him on that day because members of the other group had previously threatened to kill him and he wanted to be prepared.

Guzman testified that as he and his group, which included Betancourt and two of her female friends whom Guzman referred to as "Air" and "Puerto Rican," stood near the garage, members of the group opposite him, with whom he had been talking back and forth, had a gun pointed toward him and were passing the gun back and forth amongst them. Guzman later identified the person referred to as "Air" as Betancourt's cousin, Sanchez, the alleged victim in count III, terroristic threats, and count IV, use of a deadly weapon to commit a felony. Guzman testified that the group opposite him consisted of three men, whom he referred to as "Julio," "MJ," and "Matthews," and that they were handling the gun. Guzman described that Matthews was wearing a gray sweater and blue pants. Guzman indicated that when Julio, MJ, and Matthews began to cross the street toward Guzman, Guzman showed his gun, and that when the group came closer to him, he pulled his gun from his waistband. Guzman testified that MJ pointed the other group's gun at Guzman and that Matthews attempted to knock Guzman's gun out of his hand and then took the other group's gun from MJ. Guzman testified that he was holding his gun in his right hand and was pointing it back and forth between Julio, MJ, and Matthews. Matthews came closer to Guzman and pointed the other group's gun at Guzman's face.

Guzman also testified that the three men of the other group were "talking shit to [Betancourt] too."

Guzman testified that he heard the police were on their way and that he then dropped his gun, turned his back, and began to walk away from the other group, when he heard gunshots and saw leaves falling from nearby bushes. Guzman testified that he heard MJ say to Matthews, as the groups were dispersing, "'Shoot it, so they can see we don't play around.'" On cross-examination, Guzman admitted that he was the first to show his gun during the incident, but stated that he did not fire his weapon at any time.

Miguel Lemburg, Jr., testified that his nickname was "MJ" and that most of his friends referred to him that way. Lemburg testified that he was friends with Matthews but did not frequently hang out with him because in April 2011, Lemburg was on house arrest. However, Lemburg explained that on April 21, he went with Matthews and another friend he called Jaime to the intersection of 11th and Eddy Streets because there was going to be a fight, not between any specific people but "just like people going back and forth, talking shit to each other." Lemburg and numerous others, including Matthews, went to the location to look for someone named "Kevin," i.e., Guzman. Eventually, Guzman arrived on the scene and started threatening Lemburg and his group, which threats were reciprocated. Lemburg testified that Guzman flashed his gun by lifting up his shirt, showing that the gun was tucked in his waistband. Lemburg testified that Guzman was by himself when Lemburg, Matthews, and Jaime crossed the street, walking toward Guzman. Lemburg testified that he was trying to get Guzman to put the gun down and fight, but that another gun "came out" first. Lemburg testified that he did not know who had the second gun, but that he, Matthews, and Jaime were the only people in the street. Lemburg testified that on that day, he was wearing a "Freddy's" shirt. Lemburg testified that Matthews was wearing a gray shirt or sweater and blue pants and that Jaime was wearing a black shirt or sweater.

Lemburg recalled giving testimony at a deposition that Matthews had the gun, but did not remember having made a

similar statement that he saw Matthews both hold and shoot the gun. Lemburg then indicated that he had stated in his deposition that he had seen, out of the corner of his eye, Matthews shooting the gun and that Guzman was not in the area when the gun was fired.

Betancourt, who was Guzman's girlfriend at the time of the incident, testified that on April 21, 2011, Guzman had gotten into a fight with a group of men, including Matthews. Betancourt testified that she did not see either Guzman or Matthews with a gun on that day. As she and Guzman were walking away, Betancourt heard gunshots and saw leaves falling from a nearby bush. Betancourt's cousin indicated that Sanchez and another woman were also with Betancourt and him on April 21. Betancourt's cousin also testified that the group was walking back to his home when he heard gunshots.

An investigator who was with the Grand Island police department in April 2011 testified that approximately a week after the shooting, he interviewed Matthews. Matthews initially denied any involvement in the incident, but eventually admitted that he was at the scene. Matthews told the investigator that there was supposed to be a fight between Jaime and Guzman near 11th and Eddy Streets. Matthews indicated that Guzman came down the alley and that Guzman produced a semiautomatic pistol from his waistband. Matthews then indicated that he and Lemburg walked across the street to confront Guzman, who began waving his gun around at people, and that Guzman pointed his gun directly at Matthews' face. Matthews eventually also indicated to the investigator that Jaime had produced a gun and crossed the street toward Guzman with the gun, which led to Jaime's shooting the gun. Matthews reported that no one else had handled the second gun at any time during the incident. The investigator testified that Matthews gave him three different stories about the events that unfolded. The investigator testified that he responded to the scene on April 21 and that no bullet holes were found and no bullets retrieved, but that three bullet casings were found near the middle of Eddy Street.

The matter was submitted to the jury, which returned a unanimous verdict finding Matthews guilty of all six charges.

On count I, attempted first degree murder of Guzman, the district court sentenced Matthews to 3 to 5 years' imprisonment to be served concurrently with the sentences for counts III and V, but consecutively to those for counts II, IV, and VI. On counts II, IV, and VI, use of a deadly weapon to commit a felony, the district court sentenced Matthews to 5 to 5 years' imprisonment to be served consecutively to all other sentences pursuant to the statutory mandatory minimum. On counts III and V, terroristic threats against Sanchez and Betancourt, respectively, the district court sentenced Matthews to terms of 20 to 60 months' imprisonment to be served concurrently with each other and the sentence for count I and consecutively to the sentences for counts II, IV, and VI. The district court further ordered that Matthews was entitled to 562 days' credit "for time already served on each Count." Matthews has now timely appealed to this court.

III. ASSIGNMENTS OF ERROR

Matthews assigns that the trial court erred by not allowing one of the witnesses to testify about aggressiveness and violence and by not including a self-defense element within the terroristic threats jury instructions.

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 such discretion a factor in determining admissibility. *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012); *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Scott, supra*; *State v. Vigil, supra*. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[4,5] Whether jury instructions given by a trial court are correct is a question of law. *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

V. ANALYSIS

1. Character Evidence

Matthews argues that the district court erred by not allowing Guzman to testify as to his own aggressive and violent characteristics and references the following colloquy:

> [Matthews' counsel:] . . . [Y]ou had mentioned before that you were under the — well, you were constantly under the influence of alcohol and drugs in April of 2011. Am I correct?
>
> [Guzman:] Yes.
>
> [Matthews' counsel:] In your opinion, did that state of affairs in April of 2011 make you aggressive?
>
> [The State]: Objection, Your Honor. Improper character evidence, improper opinion, it's irrelevant, improper under 404, and unfairly prejudicial over 403.
>
> THE COURT: Objection is sustained.
>
> [Matthews' counsel to Guzman:] . . . [A]gain, in April of 2011, did those circumstances, being under the influence of drugs and alcohol, make you, in your opinion, violent?
>
> [The State]: Objection, Your Honor.
>
> THE COURT: Sustained.

In Matthews' offer of proof to the court, he sought to introduce testimony by Guzman, who was the alleged victim in count I, attempted first degree murder, that in Guzman's own opinion, being under the influence of drugs in April 2011 had made him aggressive. In support of his argument, Matthews relies on the case of *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983), for his proposition that Neb. Rev. Stat. § 27-405 (Reissue 2008) allows for evidence of a victim's character,

specifically evidence of the victim's tendencies of violence and aggression, to be admissible in a self-defense case.

[6,7] To successfully assert a claim of self-defense as justification for the use of force, the defendant must have a reasonable and good faith belief in the necessity of such force and the force used must be immediately necessary and must be justified under the circumstances. *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009). A determination of whether the victim was the first aggressor is an essential element of a self-defense claim. *State v. Kinser*, 259 Neb. 251, 609 N.W.2d 322 (2000). Matthews defended on the basis that he shot his gun in self-defense; that is, his actions in shooting the gun were justified because he used only such force as he believed necessary to protect himself.

[8-11] Evidence of a victim's violent character is probative of the victim's violent propensities and is relevant to the proof of a self-defense claim. *State v. Lewchuk*, 4 Neb. App. 165, 539 N.W.2d 847 (1995). Neb. Rev. Stat. § 27-404 (Reissue 2008) provides that a defendant may present evidence of a pertinent trait of a victim's character to show that the victim acted in conformity therewith on a particular occasion. *State v. Lewchuk, supra*. In situations where testimony is allowed about a person's character trait, that trait may be shown by reputation and opinion testimony. § 27-405(1); *State v. Lewchuk, supra*. Section 27-405(2) provides for proof of specific instances of conduct regarding a person's character or trait of character when the character or trait of character is an essential element of a charge, claim, or defense. *State v. Lewchuk, supra*.

Under § 27-405(2), proof of Guzman's propensity for aggressiveness and violence is relevant to whether he was the first aggressor, which is an essential element of Matthews' self-defense claim, and, as such, may be proved by evidence of Guzman's conduct. Therefore, the proffered testimony of Guzman was relevant to, and probative of, the question as to whether Guzman was the first aggressor. The trial court erred in not admitting Guzman's testimony.

[12-14] In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the

State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *Id*. Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Id*.

In Matthews' case, the jury was presented with conflicting evidence about the events surrounding the shooting; on one hand, the jury was presented with facts that Guzman was walking away from Matthews when the shots were fired, and on the other hand, the jury was also provided with facts that indicated that Guzman was standing directly in front of Matthews at the time of the shooting. The trial court found that there was enough evidence to instruct the jury as to the issue of self-defense and the use of deadly force, to which instruction the State did not object. Given the conflicting testimony that was presented to the jury, the exclusion of the testimony that, in Guzman's own opinion, his being under the influence of drugs in April 2011 had made him aggressive was prejudicial to Matthews. The State has failed to demonstrate that the error was harmless beyond a reasonable doubt. Therefore, Matthews did not receive a fair trial on counts I and II and his convictions on count I, attempted first degree murder, and count II, use of a deadly weapon to commit a felony, are reversed; the sentences are vacated; and we remand the cause for a new trial on those counts.

2. Jury Instructions

(a) Self-Defense and Terroristic Threats

Matthews contends that the district court also erred by failing to include a self-defense element in the terroristic threats jury instructions. Matthews argues that he was defending himself with the gun against Guzman and that in the course of

defending himself against Guzman, he committed terroristic threats against the two female bystanders standing in the group near Guzman, namely Sanchez and Betancourt.

[15] To establish reversible error from a court's refusal to give a requested jury instruction, an appellant has the burden to show that the tendered instruction is a correct statement of the law, that the tendered instruction was warranted by the evidence, and that the appellant was prejudiced by the court's refusal to give the tendered instruction. See *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997).

[16-18] To successfully assert a claim of self-defense, one must have a both reasonable and good faith belief in the necessity of using force. *State v. Kinser, supra*; *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). In addition, the force used in defense must be immediately necessary and must be justified under the circumstances. *State v. Kinser, supra*. The trial court is not required to give the instruction where there is insufficient evidence to prove the facts claimed; however, it is not the province of the trial court to decide factual issues even when it considers the evidence produced in support of one party's claim to be weak or doubtful. *Id*. It is only when the evidence does not support a legally cognizable claim of self-defense or the evidence is so lacking in probative value, so as to constitute failure of proof, that the trial court may properly refuse to instruct the jury on the defendant's theory of self-defense. See *id*.

At the jury instruction conference, Matthews requested that an element of self-defense be added to the instructions regarding the two counts of terroristic threats, against Sanchez and Betancourt. Matthews did not offer any proposed instructions for self-defense because he thought it should be applied to terroristic threats. Matthews' counsel argued that Matthews was going either to be shot by Guzman or to commit terroristic threats by shooting his gun toward Sanchez and Betancourt and that he chose the lesser of two evils. The district court overruled the motion, finding that such additions were inappropriate because the victims named in the terroristic threats were two women, Sanchez and Betancourt, who were in

the area at the time of the incident, and not Guzman, who had allegedly been pointing his gun at Matthews. In its jury instructions, the district court included a separate jury instruction regarding self-defense, but that instruction was as to deadly force and the attempted murder charge, not the terroristic threats charges.

As to the terroristic threats charges in counts III and V, the jury instruction given by the district court was as follows:

COUNT III

The elements of Terroristic Threats that the State must prove are:

1. That . . . Matthews . . . threatened to commit a crime of violence, that is, threatened [the victim].

2. That . . . Matthews . . . did so with the intent to terrorize [the victim] or in reckless disregard of the risk of causing such terror.

3. That . . . Matthews. . . did so on or about April 21, 2011, in Hall County, Nebraska.

The two jury instructions for counts III and V regarding terroristic threats are identical, with the exception of a change in the name of the victim.

The specific issue of jury instructions involving self-defense and terroristic threats has not often been discussed in Nebraska case law, although in *State v. Oldenburg*, 10 Neb. App. 104, 628 N.W.2d 278 (2001), the issue was indirectly touched upon. In *State v. Oldenburg*, the defendant was charged with making terroristic threats, first degree assault, and use of a deadly weapon in the commission of those crimes, which stemmed from an incident in which the defendant pointed a gun at her husband while he was charging her and, while doing so, shot and seriously injured him. Prior to deliberations, the jury was instructed on the elements of terroristic threats, and a self-defense instruction was given for the terroristic threats charge, which instruction was the self-defense instruction for instances where no deadly force was used. *Id*. The Nebraska Court of Appeals did not address the possible error of instructing the jury on self-defense, because no error had been assigned on appeal, although the court did find that "the pointing of a gun, even if doing so is not the use of deadly force, can be a threat

to commit a crime of violence and hence can be a terroristic threat under § 28-311.01." *State v. Oldenburg*, 10 Neb. App. at 121, 628 N.W.2d at 290.

In Matthews' case, a review of the record indicates that the instructions tendered for the terroristic threats charges were a correct statement of the law and were also warranted by the evidence presented at trial, such that the record indicates that Matthews was waving and pointing his gun toward the group in which Sanchez and Betancourt were standing, and there was not a single piece of evidence presented that either of those victims was, at any time, in possession of any weapon.

Based upon the facts of this case, we find that the self-defense instructions were not warranted as they pertain to the terroristic threats charges, and the district court's refusal to add an additional element of self-defense to the terroristic threats instructions did not prejudice Matthews. Matthews' argument that he did not intend to execute his threats, but merely intended to show that he would defend himself, is irrelevant because the crime of terroristic threats does not require intent to execute the threats made and does not require that the victim be actually terrorized. See *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990). Furthermore, pointing a gun at a person can constitute criminal assault. See, generally, *State v. Kistenmacher*, 231 Neb. 318, 436 N.W.2d 168 (1989); *State v. Machmuller*, 196 Neb. 734, 246 N.W.2d 69 (1976); *State v. Brauner*, 192 Neb. 602, 223 N.W.2d 152 (1974). Therefore, we find that the district court did not commit prejudicial error by refusing to add an additional element of self-defense to the terroristic threats instructions.

(b) Plain Error

Although not asserted on appeal by either Matthews or the State, upon our review of the record, it is apparent that further inquiry into Matthews' convictions for use of a deadly weapon to commit a felony in counts IV and VI is necessary.

[19] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the

integrity, reputation, and fairness of the judicial process. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011); *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

[20] When 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. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013); *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009). Therefore, the problem arises that if an unintentional act by Matthews was the predicate felony for the charges of use of a firearm to commit a felony, Matthews could not be convicted of those charges.

In *State v. Rye*, 14 Neb. App. 133, 705 N.W.2d 236 (2005), a jury found the defendant guilty of terroristic threats and use of a weapon to commit a felony. The trial court instructed the jury that the defendant could be guilty of terroristic threats if he threatened to commit any crime of violence, either with the intent to terrorize the victim or in reckless disregard of the risk of terrorizing the victim. *Id.* The jury was further instructed that if it found the defendant guilty of terroristic threats, but without any differentiation between intentional and reckless threats, then the defendant could be found guilty of use of a weapon to commit a felony if he used the firearm to commit the terroristic threats. *Id.* This court affirmed the terroristic threats conviction, but determined that because the trial court's instructions to the jury did not require a specific finding that the underlying felony for the use of a weapon charge was an intentional crime, the conviction on the use charge should be reversed and the cause should be remanded for a new trial on that charge. *Id.* Specifically, the court found that "because a reckless terroristic threat is an unintentional crime, it cannot be the underlying felony for the use of a weapon charge." *Id.* at 140, 705 N.W.2d at 244.

[21] "Whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence." *State v. Contreras*, 268 Neb. 797, 804, 688 N.W.2d 580, 585 (2004). "Because of this duty, the trial court, on its own motion, must correctly instruct on the law." *State v. Weaver*, 267 Neb. 826, 832, 677 N.W.2d 502, 508 (2004).

In the case at hand, the jury instructions regarding terroristic threats for counts III and V provided that the State was required to prove that Matthews made such threats "with the intent to terrorize another person or in reckless disregard of the risk of causing such terror" and did not require that the jury specifically make a separate finding as to whether the threats were intentional or reckless in accordance with the terroristic threats statute. See Neb. Rev. Stat. § 28-311.01 (Reissue 2008). Therefore, the trial court erred in giving jury instructions that allowed the jury to convict Matthews of the charges of use of a deadly weapon to commit a felony without finding that he threatened to commit a crime of violence with the intent to terrorize the victims.

[22] However, to establish reversible error from an erroneous jury instruction, a defendant has the burden to show that the instruction was prejudicial or otherwise adversely affected a substantial right of the defendant. See *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013). Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013); *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

In this case, evidence was presented that during the confrontation between the two groups, Matthews had a gun in his hand which he was waving back and forth at the individuals standing with Guzman. A jury could find that this act was intended to terrorize the victims. However, Matthews asserted the defense of self-defense and in doing so admitted that he was defending himself with the gun against Guzman and that in the course of defending himself against Guzman, he committed terroristic threats against the two female bystanders standing in the group near Guzman, namely Sanchez and Betancourt; this may permit a fact finder to conclude that Matthews had threatened to commit a crime of violence in reckless disregard of the risk of terrorizing the victims. Because the evidence presented in this case is sufficient to convict Matthews of either intentional or reckless terroristic threats, a differentiation that does not

impact the statutory penalty, the terroristic threats jury instructions did not prejudice Matthews and were harmless error. Therefore, we affirm Matthews' convictions on counts III and V, terroristic threats.

While the failure to differentiate between whether Matthews acted intentionally or recklessly did not affect the terroristic threats charges, as was the case in *State v. Rye*, 14 Neb. App. 133, 705 N.W.2d 236 (2005), it is not harmless error as to the use of a deadly weapon charges in counts IV and VI. Because the underlying crime for a use of a deadly weapon conviction must be intentional, and no such finding was made, it was error for the trial court not to instruct the jury that in order to find Matthews guilty of the use of a deadly weapon charges, the jury must first determine that the terroristic threats were intentional.

[23,24] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Rye, supra*. The Double Jeopardy Clause does not forbid retrial if the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Haltom*, 263 Neb. 767, 642 N.W.2d 807 (2002), *disapproved on other grounds, State v. McCulloch, supra*.

Although there is evidence in this case to sustain a conviction on either reckless or intentional threats, the use of a deadly weapon convictions must be reversed, because only a conviction of intentional terroristic threats will serve as a predicate underlying felony for such a conviction. Therefore, we reverse Matthews' convictions for use of a deadly weapon on counts IV and VI, vacate his sentences thereon, and remand the cause for a new trial on those counts. See *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999) (if trial court fails to adequately instruct jury but reviewing court finds sufficient evidence to convict, cause may be remanded to trial court for new trial).

3. Credit for Time Served

In its brief, the State asserts that the district court committed plain error by applying 562 days of credit for time served to each of Matthews' sentences. The State contends that the court should have applied the credit against only one sentence and requests that the sentence be modified to show only one credit of the 562 days. Therefore, we shall review Matthews' sentences for plain error.

Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011); *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

At the sentencing hearing, on count I, attempted first degree murder, the district court sentenced Matthews to 3 to 5 years' imprisonment to be served concurrently with the sentences for counts III and V, but consecutively to those for counts II, IV, and VI; on counts II, IV, and VI, use of a deadly weapon to commit a felony, the district court sentenced Matthews to 5 to 5 years' imprisonment to be served consecutively to all other sentences pursuant to the statutory mandatory minimum; and on counts III and V, terroristic threats, the district court sentenced Matthews to terms of 20 to 60 months' imprisonment to be served concurrently with each other and the sentence for count I and consecutively to the sentences for counts II, IV, and VI. The district court then indicated that Matthews was "entitled to credit on all counts, or on each count individually of 562 days." After the pronouncement, the State questioned the credit portion of the sentences, but did not formally object. The sentencing order further indicates that the district court ordered Matthews to be "given 562 days credit for time already served on each Count." (Emphasis in original.)

Neb. Rev. Stat. § 83-1,106(1) (Reissue 2008) provides that "[c]redit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence

is imposed or as a result of the conduct on which such a charge is based." In *State v. Banes*, 268 Neb. 805, 811-12, 688 N.W.2d 594, 599 (2004), the Nebraska Supreme Court determined that under § 83-1,106, "an offender shall be given credit for time served as a result of the charges that led to the sentences; however, presentence credit is applied only once." See, also, *State v. Williams, supra*.

Instead of crediting Matthews' time served against each count as the district court did, the court in this case should have credited the 562 days served against only the first count, thereby crediting 562 days against the aggregate of the minimum and the aggregate of the maximum sentences imposed. We therefore modify the sentencing order to state that Matthews is entitled to a credit for time served in the amount of 562 days against the aggregate of the minimum and the aggregate of the maximum sentences of imprisonment. See, *State v. Williams*, *supra*; *State v. Banes, supra*.

VI. CONCLUSION

In sum, we conclude that the district court committed error by failing to allow Guzman to testify as to his violent and aggressive tendencies and that the error was prejudicial to Matthews. Therefore, we reverse the judgments of conviction for count I, attempted first degree murder, and count II, use of a deadly weapon to commit a felony; vacate the two sentences thereon; and remand the cause for a new trial on both charges.

We affirm Matthews' terroristic threats convictions and sentences and the district court's denial of Matthews' request to include an element of self-defense in the terroristic threats jury instructions for counts III and V. However, we find that the trial court failed to instruct the jury that in order for it to find Matthews guilty of the two charges of use of a deadly weapon in counts IV and VI, the underlying felonies of terroristic threats must have been intentional crimes and not just crimes in reckless disregard. As such, we also reverse the use of a deadly weapon convictions as to counts IV and VI, vacate those sentences, and remand the cause for a new trial on those use of a deadly weapon charges. Further,

we modify the sentencing order to state that Matthews is entitled to credit for time served in the amount of 562 days against the aggregate of the minimum and the aggregate of the maximum sentences of imprisonment and not as to each sentence individually.

AFFIRMED IN PART AS MODIFIED, VACATED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

OAK HILLS HIGHLANDS ASSOCIATION, INC., APPELLANT, V. SCOTT LEVASSEUR, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM LEVASSEUR, SR., ET AL., APPELLEES.

845 N.W.2d 590

Filed April 1, 2014. No. A-12-1173.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
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.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded for further proceedings.

Ben Thompson, of Thompson Law Office, P.C., L.L.O., for appellant.

Albert M. Engles and James C. Boesen, of Engles, Ketcham, Olson & Keith, P.C., for appellee Scott LeVasseur, as personal representative.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

INBODY, Chief Judge.

INTRODUCTION

Oak Hills Highlands Association, Inc. (the Association), appeals the order of the Douglas County District Court which entered summary judgment in favor of the appellees. In this case, the Association claims that its adoption of the Nebraska Condominium Act (NCA) allowed for the Association to assess certain special assessments against the owner of a condominium for expenses incurred as a result of a fire caused by the owner's misconduct. See Neb. Rev. Stat. §§ 76-825 to 76-894 (Reissue 2009 & Supp. 2013). The district court determined that the Association's "Revised Declaration and Master Deed" (Revised Declaration) and bylaws did not expressly adopt the NCA and rejected the claims of the Association.

STATEMENT OF FACTS

The circumstances of this case stem from a fire which destroyed the condominium owned by William LeVasseur, Sr. LeVasseur owned the real estate referred to as "apartment #10" of the Oak Hills Highlands condominium property, regime 3, in Omaha, Nebraska, and he was a member of the Association. On October 11, 2009, a fire occurred at LeVasseur's condominium, allegedly beginning after LeVasseur fell asleep smoking a cigarette near his oxygen tank. The fire caused an estimated $243,683.43 in damages. The Association claims that as a result of the fire, their insurance premiums increased significantly. The Association claims that the fire was caused by LeVasseur's misconduct and that, as a result of the alleged misconduct, the increase in the Association's insurance premiums was solely due to LeVasseur. The Association imposed a special assessment against LeVasseur for the total amount of its increased premiums.

The Association's annual insurance premium increased from $39,120 to $65,325, which the Association alleges was an increase of $15,648 for a claim record related to the fire and a $10,557 increase as a result of a statewide increase for all condominiums. The Association alleges that the 3-year premium increase totals $46,944, in addition to interest in

the amount of $14,482.17 and attorney fees and other charges of $16,691.37, all of which the Association indicates that LeVasseur, who passed away in February 2010, and now his estate, refused to pay. The Association filed a notice of assessment with the Douglas County register of deeds, which placed a lien on the property.

On October 20, 2010, the Association filed a complaint in equity for a foreclosure of the assessment lien seeking a decree of foreclosure of liens imposed as a result of the Association's special assessments against LeVasseur totaling $37,945. The complaint alleges that LeVasseur is the record owner of real estate referred to as "apartment #10" of the Oak Hills Highlands condominium property, regime 3, and that the special assessments were imposed and not paid by LeVasseur, nor were they paid by his estate upon his passing. The complaint further indicates that 18 percent interest, prelitigation lien filing charges, and attorney fees had also accrued.

Scott LeVasseur, the personal representative of LeVasseur's estate and also LeVasseur's son, filed an answer in his capacity as personal representative generally denying the Association's complaint and requesting that it be dismissed. Scott and his siblings filed an answer as individuals also generally denying the Association's complaint and seeking its dismissal.

In August 2011, Scott, as personal representative, filed a motion for summary judgment indicating the Association alleged that LeVasseur violated the terms of the Association's covenants from which the special assessments were imposed, but that the special assessment was invalid. The Association also filed a motion for summary judgment, and the matter was set for hearing.

The district court entered an order overruling both parties' motions for summary judgment. The district court found that the language in the bylaws was not as expansive as the language of the NCA, which the Association had not adopted, and instead "limit[ed] the exposure for misconduct" to that enumerated in the bylaws. The court concluded that it was not satisfied the bylaws allowed for a special assessment such as was levied against LeVasseur and that, furthermore, there was a question as to the meaning of what the phrase "the

reasonable expenses incurred" encompassed as set forth in the Association's bylaws.

Thereafter, Scott, as personal representative, filed a motion for reconsideration alleging that the only expenses the Association actually incurred was the $2,000 insurance deductible which was paid by LeVasseur. The Association also filed a motion for reconsideration indicating that any question as to whether or not the NCA had been adopted by the Association was answered in the bylaws which specifically state that "the Association desires to adopt the provisions of the [NCA] in its entirety." The Association further alleged in the motion that under the NCA, it had the authority to assess special assessments for misconduct and that "'reasonable expenses incurred in the reconstruction or repair'" included the increase to insurance premiums.

On June 20, 2012, a hearing was held on the parties' motions to reconsider. The district court issued an order on the motions setting forth that the Association argued that the NCA was adopted by the Association in the Revised Declaration, which contains the statement, "WHEREAS, the Association desires to adopt the provisions of the [NCA] in its entirety." The court found that although the Revised Declaration states the Association desired to adopt the NCA, the court could not find that it did in fact adopt the NCA. The court further found that even if the Association did adopt the NCA in the Revised Declaration, the bylaws did not reference the NCA or the Revised Declaration nor did the bylaws state that the Revised Declaration was to be used in the interpretation of the bylaws. The court explained that the bylaws specifically set forth, in "Article XII, Common Expenses," under what circumstances there can be assessments, but then reference the "Act" in regard to other broad assessments. The court found that the specific language of the bylaws limiting the assessment applied. Specifically,

> the Court could not find where in the Revised Declaration . . . that it accepted the Act; and even if it did, there was no reference to this Revised Declaration . . . in the By-Laws; and this Court is of the opinion that these By-Laws limited the assessment authority of the Association and

> did not grant it the full powers as the [NCA] would have allowed.

The court reaffirmed its prior order as to the interpretation of the Association's bylaws and assessment authority. The court further found that there were no further issues in the matter because all assessments that could have been assessed had been paid and that there were no disputes that all payments and damages pursuant to the bylaws had been paid by the Association or its insurance carrier. The district court sustained the motion for summary judgment filed by Scott, as personal representative, and dismissed the matter, with costs to the Association. It is from this order that the Association has timely appealed.

ASSIGNMENTS OF ERROR

The Association assigns that the district court erred (1) by finding that the Revised Declaration and bylaws were ambiguous, (2) by granting summary judgment if there were ambiguities concerning material facts, (3) by failing to conclude that the Association adopted the NCA, (4) by finding that § 76-873 does not apply, (5) by finding that the Association's Revised Declaration and bylaws did not permit the Association to assess increased common expenses caused by the misconduct of the homeowner, and (6) by failing to order foreclosure of the Association's lien for special assessments unrelated to the fire.

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Westin Hills v. Federal Nat. Mortgage Assn.*, 283 Neb. 960, 814 N.W.2d 378 (2012); *Howsden v. Roper's Real Estate Co.*, 282 Neb. 666, 805 N.W.2d 640 (2011).

[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. *Westin Hills v. Federal Nat. Mortgage Assn.*, *supra*; *Doe v. Board of Regents*, 283 Neb. 303, 809 N.W.2d 263 (2012).

ANALYSIS

The Association argues that the "Act" referred to in the bylaws was explicitly adopted. In granting the motion for summary judgment filed by Scott, as personal representative, the district court concluded that the Association's Revised Declaration did not contain specific language in which the NCA was adopted and that the NCA was not specifically referenced in the bylaws. Thus, the district court concluded that the Association did not have the power to assess any special assessments that it might have been otherwise allowed to under the NCA.

In Nebraska, the Condominium Property Act governs those condominium regimes created prior to 1984. See Neb. Rev. Stat. §§ 76-801 to 76-824.01 (Reissue 2009). Condominium regimes created after January 1, 1984, are subject to the NCA. See § 76-826. The Association's original master deed was recorded on February 24, 1977, thus originally subjecting the Association to the Condominium Property Act. In June 1998, the Association filed its Revised Declaration. The Revised Declaration, as indicated in the statement of facts, sets forth that "WHEREAS, the Association desires to adopt the provisions of the [NCA] in its entirety."

The district court's determination essentially rested upon the Association's use of the word "desires" in the Revised Declaration. However, in reviewing the Condominium Property Act, specifically § 76-803, the language of the statute utilizes the word "desire" in reference to establishing a condominium property regime, such that,

> [w]henever a sole owner or the co-owners of property expressly declare, through the recordation of a master deed, which shall set forth the particulars enumerated in section 76-809, their desire to submit their property

> to the regime established by sections 76-801 to 76-823, there shall thereby be established a condominium property regime.

Section 76-826(b) of the NCA specifically provides that amendments to the master deed, bylaws, and plans of any condominium regime created before January 1, 1984, are not invalidated by the Condominium Property Act if the amendment is permitted by the NCA. Further, § 76-826(b) provides that any such "amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by sections 76-801 to 76-824." The plain language of § 76-803 establishes that a condominium regime is established through a recordation of the master deed.

In this case, the pleadings and admissible evidence offered at the hearing show that the Association's bylaws provided that the bylaws may be changed with 66⅔ percent of the votes cast by members and shall be operative upon the recording of the amendment with the register of deeds. The Revised Declaration and the revised and restated bylaws were both adopted by "more than seventy-five (75%) percent of the total basic value of the Unit Owners in the Condominium." The Revised Declaration set forth the unit owners' desire to adopt the NCA, and the Revised Declaration was registered with the register of deeds on June 3, 1998. Throughout the Revised Declaration, the Association required that certain actions be made in accordance with the "Act" and defined the "Act" as the NCA.

Therefore, in viewing the evidence in the light most favorable to the Association, and giving the Association the benefit of all reasonable inferences deducible from the evidence, we find that the Revised Declaration was adopted in conformity with the procedures and requirements specified in §§ 76-801 to 76-824.01 and that, as such, the Association, by recording the master deed, adopted the provisions of the NCA in its entirety as indicated in the Revised Declaration and in the Association's bylaws. The district court erred by finding to the contrary and by granting the motion for summary judgment filed by Scott, as personal representative, because genuine

issues of material fact remain. Having made this determination, we need not address the Association's remaining assignments of error.

CONCLUSION

In conclusion, we find that the district court erred by granting the motion for summary judgment filed by Scott, as personal representative. Therefore, we reverse the district court's determination and remand the matter for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RODNEY D. EDWARDS, SR., DOING BUSINESS AS THE HOME IMPROVEMENT STORE LLC, APPELLEE, V. MOUNT MORIAH MISSIONARY BAPTIST CHURCH, APPELLANT.

845 N.W.2d 595

Filed April 8, 2014. No. A-12-932.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives the party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom and show the moving party is entitled to judgment as a matter of law.
3. **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.
4. **Contracts: Pleadings.** To recover for breach of contract, a plaintiff must show proof of the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty.
5. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
6. **Parol Evidence: Contracts.** The general rule is that unless a contract is ambiguous, parol evidence cannot be used to vary its terms.

7. **Rules of the Supreme Court: Pleadings.** The key inquiry of the rule for express or implied consent to trial of an issue not presented by the pleadings is whether the parties recognized that an issue not presented by the pleadings entered the case at trial.
8. **Courts: Pleadings: Pretrial Procedure.** In determining whether to allow amendment of pleadings to conform to the evidence, a court initially should consider whether the opposing party expressly or impliedly consented to the introduction of the evidence. Express consent may be found when a party has stipulated to an issue or the issue is set forth in a pretrial order.
9. **Pleadings.** Implied consent to trial of an issue not presented by the pleadings may arise in two situations. First, the claim may be introduced outside of the complaint—in another pleading or document—and then treated by the opposing party as if pleaded. Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.
10. **Pleadings: Proof.** Implied consent to trial of an issue not presented by the pleadings may not be found if the opposing party did not recognize that new matters were at issue during the trial. The pleader must demonstrate that the opposing party understood that the evidence in question was introduced to prove new issues.
11. **Expert Witnesses.** An individual may qualify as an expert by reason of knowledge, skill, experience, training, or education.
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: LEIGH ANN RETELSDORF, Judge. Affirmed.

Michael B. Kratville for appellant.

Matthew P. Saathoff and Cathy R. Saathoff, of Saathoff Law Group, P.C., L.L.O., for appellee.

IRWIN, PIRTLE, and BISHOP, Judges.

PIRTLE, Judge.

INTRODUCTION

Mount Moriah Missionary Baptist Church (Mount Moriah) appeals the rulings of the district court for Douglas County granting the motion for summary judgment of Rodney D. Edwards, Sr., doing business as The Home Improvement Store LLC, and overruling Mount Moriah's motion to alter or amend judgment. For the reasons that follow, we affirm.

BACKGROUND

Mount Moriah carries property insurance through Church Mutual Insurance Company (Church Mutual). Church Mutual hired Robert A. Olson to estimate the damage done to the church's roof by a windstorm on June 27, 2008. Olson is the owner of Accurate Insurance Adjusters, LLC, and has been an adjuster since 1986. Olson did the initial inspection of the church's roof in the summer and fall of 2010.

Olson prepared an initial estimated statement of loss based on a visual inspection of the damage to the building and roof. The statement estimated the cost of repair to be $29,922.45.

On or about October 28, 2010, Edwards, the sole owner of The Home Improvement Store, entered into a contract with Mount Moriah to replace the roof of the church. The contract stated:

> For the contract price(GRAND TOTAL) reflected in the Accurate Insurance Adjusters . . . final estimate,* [The Home Improvement Store] will furnish all labor and material according to the following specifications, thereinafter referred to as the work detail. Any additional unforeseen and /or omitted work needed in the completion, of this job will be documented, approved and invoiced to CHURCH MUTUAL . . . and subsequently remitted to [The Home Improvement Store] by [Mount Moriah].
>
> . . . .
>
> *FOR ROOF REPLACEMENT

The contract identified Mount Moriah as the purchaser and owner of the premises at issue in Omaha, Nebraska. Under the contract, the church was to have no out-of-pocket expenses and a $500 deductible was to be waived if the church displayed a yard-sign advertisement for The Home Improvement Store for 60 days.

The contract identified The Home Improvement Store as the contractor, and the contract required a downpayment equal to 50 percent of the grand total upon the start of work, with the remaining balance to be remitted by the church upon completion of the work. Edwards obtained the necessary permits on November 3, 2010, and began work.

Edwards issued a "Revised Invoice for Roof" indicating Church Mutual had paid a total of $15,776.04 for all items completed by The Home Improvement Store. This included receipt of the downpayment of $9,827.27 and an additional payment of $5,948.76. The invoice indicates, "The remaining balance is subject to final approval of [Accurate Insurance Adjusters] and Church Mutual."

During the course of the roof replacement, Edwards determined that additional work was needed beyond the amount estimated in the original statement of loss. His recommendation was reviewed by Olson. Olson stated that on or about November 5, 2010, Edwards informed him of additional square footage not accounted for in the estimate, additional layers of old shingles requiring removal, damage to underlying decking, and additional items that needed to be completed to repair the church's roof.

Olson's affidavit stated that it is common and customary that when repair work is started, additional work may be necessary to complete all of the required repairs for proper replacement and repair of a roof. Olson personally inspected the roof and found Edwards' recommendation to be accurate.

Olson prepared a second statement of loss on November 29, 2010, reflecting the additional repairs. The amended total cost of repair was $38,210.74. The second statement also reflects discounts for certain charges, because these services were included in the original statement. The second statement was provided to Church Mutual, and the cost was approved as charged. The second statement shows that Church Mutual initially paid Mount Moriah $18,970.05 and that the remaining amount to be paid to cover the repair contract was $17,328.69. On November 29, Olson requested that Church Mutual make a final payment in the amount of $17,328.69, payable to both Mount Moriah and Edwards.

Olson stated that the increase between the first statement of loss and the second statement of loss reflected necessary increases in square footage, linear footage, and additional work and that Edwards did not ask for Olson to "double bill" for any work completed. He stated that the charges were normal

and customary charges for the type of work completed and that they were fair and reasonable.

The work was completed on or about November 12, 2010. Edwards stated Mount Moriah informed him that the church did not want certain siding and trim or gutter work to be completed and that the church did not want certain awnings replaced; this work was not completed, and Edwards did not charge for these services. The value of this work, as set out in the second statement of loss, was subtracted from the total in Edwards' final invoice, sent December 16. The "grand total" reflected in the final invoice was $34,602.74. The final invoice acknowledged the previous payments by Mount Moriah of $9,827.27 and $5,948.76 and requested payment of the remaining amount due, $18,826.71.

After receipt of the final invoice, Mount Moriah submitted a partial payment of $9,425.86 to Edwards; however, the check was returned to Edwards by the church's bank because the account had insufficient funds on January 20, 2011. The bank sent Edwards a letter stating that Mount Moriah's account also had insufficient funds on December 28, 2010, the date the check was issued.

Edwards attempted to collect from the church the amount reflected in the final invoice, and he alleges he suffered a financial loss as a result of the church's nonpayment. Edwards sent an e-mail to the pastor at Mount Moriah, requesting payment of the church's remaining balance. The e-mail indicated Olson told Edwards that Mount Moriah had received the final check from Church Mutual, payable to the church and The Home Improvement Store. The pastor sent e-mails to Edwards indicating the church did not intend to pay the amount in the final invoice. He stated that the church "never agreed to turn over the complete settlement from [Church Mutual] to [The Home Improvement Store]" and that the church would not pay, just because the insurance company had paid, for work that was not done.

Edwards filed his complaint on January 3, 2011, alleging Mount Moriah refused to pay the outstanding balance of the contract for roof repairs. Though the final invoice total was $18,826.71, Edwards' complaint requested payment of

$18,226.71, subtracting $600 for air-conditioning repairs which Edwards determined were not necessary and therefore were not completed.

Mount Moriah's answer denied the amount owed to Edwards and alleged that Edwards "may be owed some amount but that the fair and reasonable value of said additional services is likely less than $1,000.00." Mount Moriah denied Edwards' allegation that the project was completed in a good and workmanlike manner. Mount Moriah stated the amount charged was not fair and reasonable. Mount Moriah did not file a counterclaim or plead any affirmative defenses.

Edwards filed a motion for summary judgment on February 21, 2012, and the matter came before the district court for Douglas County on May 14.

Mount Moriah's answers to interrogatories allege that there was no breach of contract, because Church Mutual paid for work which Edwards did not complete, and that the church paid Edwards for all work actually completed. The pastor's affidavit in opposition to the motion for summary judgment also alleged Mount Moriah was not given credit for work not completed by Edwards, including replacement of gutters and combing of air-conditioning units. The pastor's affidavit also alleged the church was entitled to a deductible of $500 provided in the contract.

Edwards' affidavit alleged his final invoice did not include the costs associated with the gutters because he was asked not to do this work by the church. Edwards' affidavit stated that he had planned to comb the air-conditioning units after that time, but that he subsequently opined the units had not suffered enough damage to require combing, and that as such, the units were not combed. Edwards stated that he informed an agent of the church that the final amount he requested was $600 less than the amount reflected in the final invoice, an amount attributable to the charged cost for combing the air-conditioning units.

Edwards also alleged he did not provide the $500 deductible because it was contingent on Mount Moriah's displaying a yard-sign advertisement for The Home Improvement Store for 60 days. Edwards alleged that he attempted to place a sign

in Mount Moriah's lawn on a number of occasions but that the church removed the sign every time.

At the hearing, Mount Moriah offered an affidavit of Addie Hardrick. Hardrick's affidavit alleged he looked at the roof of Mount Moriah in 2012 and found that certain of the repairs claimed to have been made by Edwards were not done, or were not done properly. Hardrick alleged that as a result of Edwards' work, Hardrick made additional repairs in the amount of $7,984 and Mount Moriah would be expected to make additional repairs for approximately $1,500.

Edwards objected on foundation, as Hardrick's affidavit did not correctly identify the address of Mount Moriah. Edwards also objected on competency, as Mount Moriah attempted to qualify Hardrick as an expert. The affidavit does not identify Hardrick's position, employer, or experience. The court considered the evidence and found Hardrick's affidavit was not relevant on the claims framed by the complaint and answer, because Mount Moriah did not "affirmatively allege accord and satisfaction, setoff, breach of contract or negligence" and did not raise these issues on counterclaim. The court found that affidavits of two Mount Moriah church volunteers were not relevant to the claims framed by the complaint and answer. The district court also found that Mount Moriah submitted no evidence on the fair and reasonable value of the services provided by Edwards to contradict the evidence supplied by Edwards and Olson. The district court granted summary judgment on July 10, 2012.

Mount Moriah filed a "Motion to Alter and/or Amend Judgment" on July 17, 2012. The matter came before the district court on September 7, and Mount Moriah's motion was denied. Mount Moriah timely appeals.

ASSIGNMENTS OF ERROR

Mount Moriah asserts the trial court erred in granting Edwards' motion for summary judgment and in denying Mount Moriah's motion to alter or amend the judgment. The church also asserts the trial court erred in raising and sustaining sua sponte objections to the church's proffered expert testimony of Hardrick.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives the party the benefit of all reasonable inferences deducible from the evidence. *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

[2] Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom and show the moving party is entitled to judgment as a matter of law. *Id.*

[3] 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. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

ANALYSIS

[4] In order to recover for breach of contract, a plaintiff must show proof of the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty. See *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 352 N.W.2d 145 (1984).

[5] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

The district court found that the parties entered into a valid contract for roof replacement and that the contract was not ambiguous. The district court found the contract contained clear terms for determining the final contract price for the services and materials to be provided by Edwards. The court also found there was no evidence of the fair and reasonable value of the services to contradict the evidence supplied by Edwards and by Olson of Accurate Insurance Adjusters. The court found there were no material facts in dispute and granted summary judgment.

Value of Contract.

Mount Moriah asserts there is a genuine issue of material fact regarding whether Mount Moriah paid the contract in full. Mount Moriah asserts the parties agreed in the contract to a grand total of $19,654.54 and paid half of that amount as a downpayment. Mount Moriah asserts that the other half was "compromised by the parties downwards to $5948.76" and that the church paid that amount to Edwards. Brief for appellant at 1. The church's internal "accounts payable approval voucher" is marked "payment in full."

Our review of the evidence shows the contract states that the contract price shall be the final estimate of Accurate Insurance Adjusters. The initial statement of loss prepared by Olson of Accurate Insurance Adjusters and submitted to Church Mutual for approval was $29,922.45. The contract stated, "Any additional unforeseen and /or omitted work needed in the completion, of this job will be documented, approved and invoiced to CHURCH MUTUAL . . . and subsequently remitted to [The Home Improvement Store] by [Mount Moriah]."

When Edwards began work on the church, he discovered additional square footage not accounted for in the estimate, additional layers of old shingles requiring removal, damage to underlying decking, and additional items that needed to be completed to repair the church's roof. Olson inspected the roof; prepared a second, revised statement of loss to reflect the additional work, for a new total of $38,210.74; and submitted it to Church Mutual for approval. That amount was paid to Mount Moriah, according to Olson.

[6] The general rule is that unless a contract is ambiguous, parol evidence cannot be used to vary its terms. *Stackhouse v. Gaver*, 19 Neb. App. 117, 801 N.W.2d 260 (2011). Mount Moriah's assertion that the parties compromised downward is an attempt to introduce parol evidence, but the terms of the contract were clear and unambiguous.

Viewing the evidence in the light most favorable to Mount Moriah and giving it the benefit of all reasonable inferences deducible from the evidence, we find there was no material issue of fact in dispute with regard to the total value of the

agreed-upon contract. See *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

Mount Moriah also asserts there is an issue of fact as to whether it should be billed for 67 square feet, as reflected in the second statement of loss, or whether the amount should be for 52⅓ square feet, as reflected in the first statement of loss.

As stated above, the parties provided for additional and unforeseen work in the terms of the contract. After Edwards discovered the difference in square footage, he submitted the change to Olson, who inspected the property to verify the accuracy of Edwards' claim. Olson's affidavit states that the change in square footage was necessary, that he was not asked to double bill for any work completed, and that the charges were customary, fair, and reasonable.

However, there is evidence that some of the work contemplated in the original contract was not completed, and the total contract price was to be adjusted downward to reflect such work.

Work Not Completed.

Mount Moriah asserts that there is an issue of fact as to whether Mount Moriah should get credit for work not completed by Edwards and whether it is entitled to the $500 deductible included in the contract.

There is no dispute that Edwards did not complete certain work on the gutters, siding, trim, and air-conditioning units. The evidence shows Edwards' invoice does not include a charge for gutters, siding, or trim. Though a $600 charge attributed to combing the air-conditioning units was included in the final invoice issued to Mount Moriah in December 2010, Edwards' affidavit states that he does not seek payment for that work because it was not performed. As a result, the amount requested in this case is equal to the amount requested in the final invoice, minus $600, or $18,226.71. All other work reflected in the final invoice, with the exception of the air-conditioning work, was work that was completed. The value of this work, as set out in the second statement

of loss, is equal to the amount requested by Edwards in this case.

There is no issue of fact as to whether Mount Moriah is entitled to a credit for work not performed, because Edwards did not request payment for the work not performed.

Mount Moriah also asserts that it is entitled to a $500 credit for the deductible. The contract states, "[T]he $500.00 deductible is waived for 60 day yard sign display." The only evidence in the record with regard to the placement of the yard sign is that Edwards' affidavit alleges, "[The Home Improvement Store] attempted to place a sign in [Mount Moriah's] yard on a number of different occasions, but [Mount Moriah] kept removing the said sign." Based upon the evidence, there is no issue of fact regarding whether Mount Moriah is entitled to the deductible; the yard sign was not displayed for 60 days, and therefore, Edwards was within his right to withhold the deduction for the yard-sign display.

Affirmative Defenses Not Raised in Pleadings.

Mount Moriah also asserts that Edwards charged for certain work and that the church found upon later inspection that the work was allegedly not completed to a satisfactory standard, or was not completed at all. Mount Moriah alleges that this work caused damage to the church and that as a result, Mount Moriah incurred $7,984 to pay for repairs and expects to incur another $1,500 to remedy such defects. Mount Moriah submitted this evidence through the affidavit of Hardrick. At no time prior to the district court hearing was Hardrick, or any other proffered expert, disclosed by Mount Moriah during discovery.

The trial court excluded Mount Moriah's evidence about Edwards' alleged nonconforming work, because it was outside of the scope of the pleadings. The court found Mount Moriah did "not affirmatively allege accord and satisfaction, setoff, breach of contract or negligence. Neither were those theories raised in counterclaim." The trial court also found Edwards properly objected that the evidence was not sufficient to establish Hardrick's qualifications as an expert.

Neb. Ct. R. Pldg. § 6-1112(b) states, "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required," except for the enumerated defenses which may be made by motion. Mount Moriah's answer failed to allege any affirmative defenses, and Mount Moriah did not file a counterclaim.

The court does not consider evidence submitted by a party on issues and claims not set forth in the pleadings; therefore, we would not consider Hardrick's affidavit with regard to the damages allegedly sustained, unless another specific provision or exception applied.

Neb. Ct. R. Pldg. § 6-1115(b) allows amendment of the pleadings if certain conditions are met. The Nebraska Supreme Court has assumed, without deciding, that § 6-1115(b) can be properly applied to summary judgment. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006). Accordingly, we apply § 6-1115(b) in the instant case. That subsection of the rule provides, in part, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Here, Mount Moriah asserts the issue of the alleged defective work was tried by implied consent.

[7-10] The Nebraska Supreme Court has stated that the key inquiry of the rule for "'express or implied consent'" is whether the parties recognized that an issue not presented by the pleadings entered the case at trial. *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. at 817, 708 N.W.2d at 244.

> "In determining whether to allow amendments to conform to the evidence, a court initially should consider whether the opposing party expressly or impliedly consented to the introduction of the evidence. Express consent may be found when a party has stipulated to an issue or the issue is set forth in a pretrial order.
>
> "Implied consent may arise in two situations. First, the claim may be introduced outside of the complaint — in another pleading or document — and then treated by the

> opposing party as if pleaded. Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.
>
> "Implied consent may not be found if the opposing party did not recognize that new matters were at issue during the trial. The pleader must demonstrate that the opposing party understood that the evidence in question was introduced to prove new issues."

Id., quoting 3 James Wm. Moore et al., Moore's Federal Practice § 15.18[1] (3d ed. 2005) (emphasis omitted).

It is clear that the parties did not expressly consent to the amendment of the pleadings to include defective work or other affirmative defenses.

The remaining question is whether the issues were raised by implied consent. The record shows Edwards objected on competency and foundation grounds to Mount Moriah's offering Hardrick's affidavit at the summary judgment hearing. Edwards also asked for rebuttal when Mount Moriah asserted that the trial court should take Hardrick's affidavit into account on the issue of defective work. Edwards' counsel asserted that defective work was not at issue and stated, "You have to raise it in an affirmative defense or file a counterclaim."

We find, upon our review of the evidence, that the pleadings were not amended under § 6-1115(b) here, because the issues of defective work or accord and satisfaction were not tried by express or implied consent.

Further, Hardrick's affidavit is not sufficient to meet the requirements to qualify an individual as an expert. Ordinarily, an expert's opinion is admissible under Neb. Rev. Stat. § 27-702 (Reissue 2008) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact, (3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination. *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011). It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his opinion about an issue in question. *Id.*

[11] Under § 27-702, a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert. *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007). An individual may qualify as an expert by reason of knowledge, skill, experience, training, or education. See *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979).

Upon our review, Hardrick's affidavit fails to set forth sufficient foundation for his opinion, because he includes no references to his occupation, training, experience, qualifications, or education. He also fails to accurately describe the property he inspected and the methodology he employed during such inspection. He merely states that he was hired to "look at the structure" after a rainstorm and gave his opinion that the damage was attributable to Edwards' work. Therefore, Hardrick's affidavit does not support Mount Moriah's assertion that there are genuine issues as to any material fact.

Failure to Object to Proffered Expert Testimony on Relevance.

Mount Moriah asserts that Edwards' failure to object that Hardrick's affidavit was not relevant waived the objection, and Mount Moriah asserts that it was outside of the province of the court to exclude the evidence on a sua sponte objection. Edwards did object to the affidavit on foundation and competency and asserted at the hearing that Mount Moriah must raise the right to setoff as an affirmative defense or file a counterclaim and that this was not done.

The trial court's order found the affidavit was excluded as evidence of issues not relevant to the claims framed by the complaint and answer. The trial court noted that Edwards objected to the evidence during the hearing, and it stated that it would not consider evidence submitted on issues and claims not set forth in the pleadings. Further, the trial court stated Mount Moriah could not interject new theories of recovery that would substantially change the nature of the case as well as reopen concluded discovery to first present the theories at a motion for summary judgment.

[12] As discussed above, Hardrick's affidavit was properly excluded from evidence because it lacked the foundation to qualify him as an expert and failed to demonstrate his competence, both objections raised by Edwards at the hearing. Having found that the affidavit was properly excluded, we decline to discuss whether the court made a sua sponte objection with regard to the affidavit's relevance. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Hill v. Hill*, 20 Neb. App. 528, 827 N.W.2d 304 (2013).

CONCLUSION

Upon our review of the evidence, we find that there are no genuine issues of material fact and that Edwards was entitled to judgment as a matter of law.

AFFIRMED.

WILLIAM BURNETT, APPELLANT AND CROSS-APPELLEE, V. TYSON FRESH MEATS, INC., APPELLEE AND CROSS-APPELLANT.

845 N.W.2d 297

Filed April 8, 2014. No. A-13-278.

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 the award.
2. ____: ____. 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.
3. **Workers' Compensation.** The statutory scheme found in Neb. Rev. Stat. § 48-121 (Reissue 2010) compensates impairments of the body as a whole in terms of loss of earning power or capacity, but compensates impairments of scheduled members on the basis of loss of physical function.
4. ____. The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury.

5. **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.
6. **Trial: Expert Witnesses.** When there is a conflict in testimony of expert witnesses, the trial court is entitled to accept the opinion of one expert over another.
7. **Workers' Compensation: Expert Witnesses.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
8. **Workers' Compensation.** The determination of causation is, ordinarily, a matter for the trier of fact.
9. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.

Appeal from the Workers' Compensation Court: JOHN R. HOFFERT, Judge. Affirmed.

Holly Theresa Morris, of Shasteen & Morris, P.C., L.L.O., for appellant.

Joseph F. Bachmann, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and PIRTLE and RIEDMANN, Judges.

INBODY, Chief Judge.

INTRODUCTION

William Burnett appeals the order of the Nebraska Workers' Compensation Court awarding him temporary total disability benefits and outstanding medical and mileage expenses, but denying him permanent partial disability benefits. The appellee, Tyson Fresh Meats, Inc. (Tyson), has also cross-appealed the trial court's reliance upon certain medical expert testimony and determination regarding causation. For the following reasons, we affirm the order of the trial court in its entirety.

STATEMENT OF FACTS

Burnett, who was 44 years old at the time of the trial, began working for Tyson in February 2010 as a "chucks operator," which involved cutting meat with a "chuck saw." In the 1980's, Burnett underwent hip surgery, but had not experienced any

pain, impairment, or work restrictions since that time. On June 11, 2010, Burnett was leaving the processing floor where he worked to go on break and slipped down a small set of stairs. Burnett explained that he slipped on debris from cow "scraps" in the doorway, which caused him to put his weight all on his left side. Burnett immediately felt pain in his hip, and he reported it to the Tyson safety representative.

Burnett was seen by a doctor through "Tyson's healthcare" and was referred to Dr. Michael L. McCarty. Burnett testified that Dr. McCarty explained that the pain he was having was from slipping and falling and not because he needed a hip replacement. Dr. McCarty's June 22, 2010, report indicates that "[Burnett's] pain is from the degenerative arthritis of the hip with the acute trauma caused from the fall." The report further indicates that "there is no urgency or emergency but long term I think the only thing that is really going to help his hip is going to be a total hip replacement." Dr. McCarty's followup report on July 6 continues to indicate that Dr. McCarty wanted approval from Tyson's insurance carrier for a total hip replacement and that there were "not any other good alternatives when [Burnett] has such advanced degenerative arthritis." Thereafter, in a letter seeking clarification of Dr. McCarty's diagnosis from Tyson's insurance carrier, Dr. McCarty indicated that the "findings of advanced degenerative joint disease" were not caused by the June 11 accident and were personal in nature.

Thereafter, in December 2010, Burnett sought out an evaluation by Dr. Brent Adamson for a second opinion, because although he was told by the Tyson doctors that he was not injured, his pain continued at the same level of intensity. Dr. Adamson diagnosed Burnett with severe degenerative arthritis of the left hip and recommended a "left total hip arthroplasty."

Burnett underwent the recommended surgery on December 23, 2010. Burnett testified that he paid for the surgery and that some expenses were covered by health insurance. Burnett missed work from December 22, 2010, through March 1, 2011. Burnett returned to work on March 1, and he testified that he has had no problems or pain since that time. On June 7,

2012, Dr. Adamson opined that Burnett suffered a strain and contusion of his left hip when he slipped and fell on June 11, 2010. Dr. Adamson further opined that "the degenerative arthritis that he sustained was pre-existing his injury and that the x-rays did not look any different before the injury than they did after the injury." Dr. Adamson opined that Burnett reached maximum medical improvement, that there were no permanent work restrictions, and that he sustained a 23-percent impairment to his left hip.

In October 2012, Dr. D.M. Gammel was asked to review the medical reports and documentation regarding Burnett's hip pain related to the accident. Dr. Gammel opined that the June 11, 2010, accident caused a permanent aggravation of his preexisting left hip degenerative joint disease. Dr. Gammel further opined that Burnett had no work restrictions and had reached maximum medical improvement, and he concurred with the 23-percent permanent impairment, but identified the impairment to Burnett's left lower extremity. Dr. Gammel further explained that the December 23 surgery was reasonable and necessary as a result of the June 11 accident, because there had not been any abrupt clear change in Burnett's condition until that time.

Prior to trial, the parties stipulated that Burnett sustained an injury in an accident arising out of and in the course and scope of his employment with Tyson, that notice and venue were proper, that the average weekly wage was not in dispute, that Tyson had paid benefits, and that the following were not at issue: attorney fees, interest, penalties, vocational rehabilitation, and medical expense fee scheduling.

At trial, Burnett testified in his own behalf as indicated above and numerous exhibits were received into evidence, with objections made as to only exhibit 4, a letter from a chiropractic office, and exhibit 9, medical bills. In the award, the trial court found that it had been given two competing opinions as to the nature and extent of Burnett's injury. The court found that Dr. Gammel opined that the accident caused a permanent aggravation of a preexisting left hip degenerative joint disease and that the surgery performed by Dr. Adamson on December 23, 2012, was reasonable and necessary as a

result of the June 11, 2010, accident. On the other hand, the trial court reviewed the opinion of Dr. Adamson which indicated that he did not agree with Dr. Gammel's conclusions and that Burnett's left hip pain was the natural progression of degenerative osteoarthritis and was not a result of the incident at work.

The trial court found Dr. Gammel's opinion more persuasive and found that "the fact that [Burnett] may well have needed the subject surgery *eventually* does not serve to absolve [Tyson] of liability." The trial court found that if it were to adopt the opinion of Dr. Adamson, it would in essence be resurrecting "the enhanced degree or burden of proof specifically rejected by the Nebraska Supreme Court," and that Dr. Adamson's "concept of *inevitability*" detracted from his persuasive value. (Emphasis in original.)

The court found that Burnett was entitled to temporary disability benefits from the date of his surgery, December 23, 2010, until his release to return to work on March 1, 2011, and that based upon the stipulated average weekly wage, he was entitled to $331.92 for "each of the 9.8571 weeks of temporary total disability." The trial court found that due to the nature of the injury and surgery, the injury qualified as a whole body injury and not as a scheduled member injury, but that there was no evidence of any permanent impairments or work restrictions. The court denied any award of permanent partial disability benefits. The court further denied any award of future medical benefits and found that Tyson was entitled to a credit for disability payments paid. It is from this order that Burnett has appealed.

ASSIGNMENTS OF ERROR

Burnett assigns, rephrased and consolidated, that the trial court erred by failing to apply the appropriate legal test for determining whether a disability is to a scheduled member or the body as a whole and for not awarding him permanent disability benefits for a scheduled member disability. Tyson has also filed a cross-appeal assigning that the court erred in adopting Dr. Gammel's opinion and by finding that the June 11,

2010, accident caused an aggravation resulting in a compensable injury.

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 the award. *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013).

[2] 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. *Id.*

ANALYSIS

Scheduled Member or Body as Whole.

Burnett argues that the trial court erred in failing to apply the appropriate legal test for determining whether a disability is to a scheduled member or the body as a whole. Burnett argues that the appropriate test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment and not the situs of the injury, pursuant to *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999). Burnett contends that the trial court erred in relying upon *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977).

[3,4] The statutory scheme found in Neb. Rev. Stat. § 48-121 (Reissue 2010) compensates impairments of the body as a whole in terms of loss of earning power or capacity, but compensates impairments of scheduled members on the basis of loss of physical function. *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983). The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury. *Ideen v. American Signature Graphics, supra.*

The question that Burnett presents is whether his impairment is to his hip or to his body as a whole. In the case of *Jeffers v. Pappas Trucking, Inc., supra*, as relied upon by the trial court in the case at hand, the question presented was whether a hip injury resulted in a leg disability or body as a whole disability. The employee suffered an injury to his right hip as a result of a work-related motor vehicle accident that aggravated a preexisting hip injury which ultimately resulted in a total arthroplasty (a replacement of the ball and socket of the hip joint). The employee attempted to return to work; however, because of the severe pain in his beltline and back, the employee was unable to withstand the long periods of sitting required in his job. The trial court found that the employee suffered a scheduled member injury. See *Jeffers v. Pappas Trucking, Inc., supra*.

On appeal, the employee in *Jeffers v. Pappas Trucking, Inc.* argued that he had suffered a whole body injury rather than an injury to a scheduled member. The Nebraska Supreme Court determined that the test for determining whether the injury was a scheduled member injury or injury to the body as a whole was not the situs of the injury, but, rather, the location of the residual impairment. *Id.* The Nebraska Supreme Court found that the employee's injury was to both the ball and the socket of his hip joint—requiring a total hip replacement, and not merely a replacement of the head of the femur—and that since the disabling pain was at his beltline and back, areas other than the site of his hip or leg injury, it compelled a whole body award rather than a specific member award. See *Jeffers v. Pappas Trucking, Inc., supra*. In finding that the employee's injury was not a scheduled injury to the leg, the Supreme Court explained:

> The issue as to whether the plaintiff's injury was a schedule injury is largely one of law, as the facts are undisputed in regard to the nature and location of the injury. Therefore, we need not weigh the evidence and reach our own conclusion, but need only find that the lower court came to an incorrect conclusion of law based on the facts presented to it. We have repeatedly held that the compensation act is to be liberally construed so that

> its beneficent purposes may not be thwarted by technical refinements of interpretation. [*Haler v. Gering Bean Co.*, 163 Neb. 748, 81 N.W.2d 152 (1957)]. As previously stated, compensation for schedule injuries under subdivision (3) of section 48-121, R. S. Supp., 1976, is limited to the amount provided for in that subdivision, but can be recovered regardless of whether industrial disability is present. Compensation for non-schedule injuries under subdivisions (1) and (2) is not as limited as that provided in subdivision (3), and depends on loss of earning capacity or employability. In this case it would clearly be a technical refinement of interpretation to hold that an injury to the hip joint is a schedule member injury to the leg, and thus the beneficent purposes of the compensation act would be thwarted. The plaintiff should be given the opportunity to prove the industrial disability caused by his injury under subdivisions (1) and (2).

Jeffers v. Pappas Trucking, Inc., 198 Neb. 379, 391-92, 253 N.W.2d 30, 36-37 (1977).

In *Ideen v. American Signature Graphics*, 257 Neb. 82, 595 N.W.2d 233 (1999), the claimant sought review of the trial court's determination that the claimant did not suffer a whole body injury as to the injury to her right arm. The claimant's treating physician assigned her a 12-percent permanent partial impairment to the upper right arm. *Id.* Another physician agreed with the 12-percent impairment to the upper right arm, in addition to a 5-percent impairment to her spine, and opined that the claimant had a 12-percent impairment to her person as a whole. *Id.* The trial court found the first physician's opinion to be the most persuasive and found that the disability was as to the arm only. *Id.* The claimant argued that the Nebraska Supreme Court abandoned the residual impairment test because the application of the test gave different results depending on whether the injury was to the upper or lower extremity. *Id.*

The Nebraska Supreme Court reiterated that the residual impairment test was the appropriate test for determining disability. See *id.* Specifically, as to the facts of the case, the Supreme Court found that the residual impairment test did

not distinguish between leg and arm injuries and an injury to the arm could result in an impairment to the body as a whole, but that the specific evidence presented to the trial court in the claimant's case was conflicting. *Id*. The compensation court is granted great discretion in determining factual issues, such as choosing to credit one expert opinion over another. *Id*.

Therefore, in both cases, the residual impairment test was determined to be the appropriate test for determining disability, with the difference in the cases being the application of that test to the facts presented in each case. In this case, the issues of whether Burnett's injury is a scheduled member injury or not are largely ones of law, because the facts are undisputed in regard to the nature and location of the injury. Therefore, we need not weigh the evidence and come to our own conclusion, but need only determine whether the trial court came to an incorrect conclusion of law based on the facts presented to it in order to find the error Burnett urges.

The record indicates that in its award, the trial court found that both Dr. Adamson and Dr. Gammel opined that Burnett sustained a 23-percent medical impairment as a result of the total hip arthroplasty. Dr. Adamson, the physician who performed Burnett's surgery, assigned the impairment to Burnett's left hip, and Dr. Gammel assigned the impairment to the lower left extremity. The trial court concluded that Burnett's surgery involved a total hip replacement and qualified as a whole body injury. The evidence clearly indicates that Burnett injured his hip and underwent a total hip replacement, and as such, the injury was not limited to his leg and was not a scheduled member injury pursuant to § 48-121(3). Therefore, we find that the trial court came to the correct conclusion of law that Burnett's injury was to the whole body based upon the facts presented to it.

Permanent Disability Benefits.

[5] Burnett also argues that the trial court erred by failing to award him permanent partial disability benefits based upon his contention that his injury was a scheduled member injury and not a whole body injury. Having determined that

the trial court was correct in determining that Burnett's injury was a whole body injury, we need not address this 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. *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

Cross-Appeal: Expert Medical Opinion.

On cross-appeal, Tyson argues that the trial court erred by relying upon the opinion of Dr. Gammel that Burnett's June 11, 2010, injury was an aggravation of his preexisting hip condition. We note for purposes of completeness in our review of this cross-appeal that at trial, Tyson did not raise any objections to the admission of Dr. Gammel's opinion.

[6,7] When there is a conflict in testimony of expert witnesses, the trial court is entitled to accept the opinion of one expert over another. As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. See *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

There is sufficient evidence to support the trial court's adoption of Dr. Gammel's opinion. The record indicates that Burnett's treating physician, Dr. Adamson, gave differing opinions as to Burnett's injury. In one opinion, Dr. Adamson indicated that Burnett's fall aggravated his hip pain, and in another, Dr. Adamson opined that the hip pain would have been worse with or without the injury. Dr. Adamson then later opined that any aggravation to the hip was only temporary and that Burnett "returned to baseline" shortly after the accident. The record before this court clearly indicates that Dr. Adamson's various opinions are in conflict with each other, whereas Dr. Gammel's opinions remained consistent that Burnett's injury aggravated his preexisting condition and required surgery.

Furthermore, we disagree with Tyson's assertion that the mere fact that Dr. Gammel was not Burnett's treating physician diminishes any weight which could be given to his opinion, because it is clear that Dr. Gammel had access to and reviewed all of Burnett's medical records and history. In

light of this record and the deference given to the trial court, we cannot say that the compensation court erred in relying upon Dr. Gammel's opinion. This assignment of error is without merit.

Cross-Appeal: Aggravation.

Implicit in Tyson's argument that the trial court erred in relying upon the opinion of Dr. Gammel, is Tyson's contention that the injury to Burnett's hip was not an aggravation of a preexisting condition. Instead, Tyson argues that because of the advanced degenerative condition of Burnett's hip joint, the injury sustained on June 11, 2010, was only temporary.

[8,9] The determination of causation is, ordinarily, a matter for the trier of fact. *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005). In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Sherwood v. Gooch Milling & Elevator Co.*, 235 Neb. 26, 453 N.W.2d 461 (1990).

The record before us indicates that in the early 1980's, Burnett underwent a hip surgery, after which, Burnett testified, he suffered virtually no further pain until the June 11, 2010, accident. The medical records indicate that subsequent to that surgery, Burnett developed degenerative joint disease in the hip in which he underwent surgery. Dr. Gammel opined that there was a clear change in Burnett's condition which persisted after the June 11 accident. As indicated above, we will not substitute our judgment for that of the compensation court, and, as such, we find that the trial court did not err in determining that Burnett's June 11 accident aggravated his preexisting hip condition.

CONCLUSION

In sum, we find that the trial court did not err in its determinations, and we affirm the order of the court in its entirety.

AFFIRMED.

In re Interest of Laticia S., a child under 18 years of age. State of Nebraska, appellee and cross-appellee, v. Stacy S., appellant, and Michael S., appellee and cross-appellant.

844 N.W.2d 841

Filed April 8, 2014. No. A-13-461.

1. **Rules of the Supreme Court: Appeal and Error.** Headings in the argument section of a brief do not satisfy the requirements of Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2012). Under that rule, a party is required to set forth the assignments of error in a separate section of the brief, with an appropriate heading, following the statement of the case and preceding the propositions of law, and to include in the assignments of error section a separate and concise statement of each error the party contends was made by the trial court.
2. ____: ____. Where a brief of a party fails to comply with the mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012), an appellate court may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error.
3. **Juvenile Courts: Judgments: Appeal and Error.** 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.
4. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Juvenile Courts: Schools and School Districts: Statutes.** Compulsory education statutes and juvenile code statutes regarding the neglect of children generally do not pertain to the same subject matter and should not be construed in pari materia.
6. **Juvenile Courts: Jurisdiction.** Under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) of the juvenile code, the juvenile court in each county has jurisdiction of any juvenile whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile.
7. **Schools and School Districts: Parent and Child.** Neb. Rev. Stat. § 79-201 (Cum. Supp. 2010) of the compulsory education laws generally provides that every person residing in a Nebraska school district who has legal or actual charge or control of any child who is of mandatory attendance age or is enrolled in a public school shall cause such child to regularly attend a public, private, denominational, or parochial day school which meets the legal operation requirements each day that such school is open and in session, except when excused by school authorities.

8. **Schools and School Districts: Criminal Law.** Neb. Rev. Stat. § 79-210 (Reissue 2008) makes a violation of Neb. Rev. Stat. § 79-201 (Cum. Supp. 2010) a Class III misdemeanor.
9. **Juvenile Courts: Jurisdiction: Schools and School Districts: Parent and Child.** Essentially, Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) establishes the juvenile court's jurisdiction over a minor child, while Neb. Rev. Stat. §§ 79-201 (Cum. Supp. 2010) and 79-210 (Reissue 2008) make the minor child's parents or legal guardians culpable for the child's truancy. The county attorney is free to decide whether to proceed utilizing the juvenile code or the compulsory education laws.
10. **Juvenile Courts: Jurisdiction.** The purpose of the adjudication phase is to protect the interests of the child.
11. **Juvenile Courts: Jurisdiction: Proof.** At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247.
12. **Schools and School Districts: Criminal Law: Juvenile Courts: Jurisdiction.** The school's duty to provide services in an attempt to address excessive absenteeism comes from Neb. Rev. Stat. § 79-209 (Supp. 2011), relating to compulsory attendance and the possibility of a parent's being subjected to a criminal sanction. The school has no duty to provide reasonable efforts before an adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) of the juvenile code.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Affirmed.

Jane M. McNeil, of McNeil Law Office, for appellant.

Donald W. Kleine, Douglas County Attorney, Sarah Graham, and Mary Stiles, Senior Certified Law Student, for appellee State of Nebraska.

Rita L. Melgares for appellee Michael S.

IRWIN, MOORE, and BISHOP, Judges.

BISHOP, Judge.

Stacy S. appeals, and Michael S. cross-appeals, from the decision of the separate juvenile court of Douglas County which adjudicated their minor child, Laticia S., pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), after finding that Stacy and Michael neglected Laticia's education. We affirm.

BACKGROUND

Stacy and Michael are the biological parents of Laticia, born in August 2005. Laticia was 6 years old during the 2011-12 school year.

On September 25, 2012, the State filed a petition with the juvenile court, alleging that Laticia was a child within the meaning of § 43-247(3)(a) by reason of the faults or habits of her parents. The State alleged that (1) Laticia did not attend school 22.2 school days out of 117 possible school days while enrolled at Edward Babe Gomez Heritage Elementary School (Gomez Elementary) between August 2011 and February 2012, (2) the parents failed to actively assist Laticia in attending school and failed to work with school authorities, and (3) due to the above allegations, Laticia was at risk for harm.

An adjudication hearing was held on April 17, 2013. The only witness at the adjudication hearing was Anne MacFarland, a student personnel assistant with Omaha Public Schools. MacFarland monitors students' attendance and is responsible for working with families to improve attendance. She said:

> Attendance is gathered in a variety of ways. Certainly the daily attendance is monitored by the direct staff in [the] school building. However, we also have a process in place where there's an automatic generation in five days of attendance to the school personnel and then also at 12 days to me as the student personnel assistant and then at 20 days to me in communication and collaboration with the school, and then at that point I refer it to the County Attorney.

MacFarland is the recordkeeper for attendance records. The school secretary documents information in the data management system, which MacFarland has access to and relies on in carrying out her duties.

MacFarland took over the position of student personnel assistant for Gomez Elementary in April 2011. Approximately 1 week later, Laticia's name appeared on a "20-day" list for absences. MacFarland stated that at that time, the school believed that Laticia was "too young" for a referral to the county attorney's office. MacFarland continued to monitor Laticia's absences for the 2011-12 school year.

MacFarland testified that Laticia had over 22 absences between August 2011 and February 2012, none of which were medically excused. MacFarland said that on several occasions, the school secretary was able to contact either Stacy or Michael about the absence, and then the parent would report the reason for the absence.

On January 23, 2012, MacFarland learned from the school counselor that there had been a fire at Laticia's home; MacFarland did not know when the fire actually occurred. MacFarland testified that it was Laticia's grandmother who notified the school about the fire. Laticia and her parents moved in with the grandmother after the fire. MacFarland spoke with the grandmother about transportation issues. Neither Stacy nor Michael contacted the school regarding transportation for Laticia; rather, it was the grandmother who worked with school officials. A request for transportation was made on January 24, and transportation was set to begin on February 8. The transportation was never utilized, and the absences continued.

MacFarland testified that she contacted the grandmother and was informed that transportation was no longer needed because the family was moving to the Millard Public Schools district. Again, neither Stacy nor Michael contacted the school about a move. MacFarland testified that a student must continue to attend his or her current school until the records have been requested by the new school district. Millard Public Schools never requested Laticia's records. Thus, Laticia was required to continue attending Gomez Elementary.

Laticia missed 14 days of school between January 5 and February 27, 2012, 5 days of which were between January 24 and February 8, when transportation arrangements were being made. In total, Laticia had over 22 absences between August 2011 and February 2012. Laticia was also absent for 13 full or partial days in March and April 2012. In April, Laticia transferred to another elementary school in the Omaha Public Schools district.

MacFarland testified that prior to the fire, the school counselor attempted a home visit, but no one was home. After being notified of the fire, MacFarland made several attempts

to contact Stacy and Michael, via Michael's cell phone number that had been provided to the school, but those attempts were unsuccessful. MacFarland testified that attendance letters had been "generated" from the school. And although MacFarland typically sends out a "12-day" letter, she did not do so in this case, because she had been in communication with the grandmother and accomplished the letter's purpose (to notify the family of the attendance policy and absences, schedule a conference to discuss the absences, and see how the school can assist). MacFarland eventually filed a report with the county attorney regarding Laticia's absences.

MacFarland testified that Laticia is at risk of harm due to the number of school days missed and the consistency of absences over a 2-year period.

In its order filed on April 19, 2013, the juvenile court found the allegations in the petition to be true by a preponderance of the evidence and adjudicated Laticia to be within the meaning of § 43-247(3)(a) due to the faults or habits of Stacy and Michael. The juvenile court placed Laticia in the temporary custody of the Nebraska Department of Health and Human Services for appropriate care and placement, which may include the parental home. Stacy has timely appealed, and Michael cross-appealed.

ASSIGNMENTS OF ERROR

[1,2] Stacy's brief does not contain a separate "assignments of error" section stating the assigned errors completely apart from the arguments in her brief. The Nebraska Supreme Court recently emphasized that headings in the argument section of a brief do not satisfy the requirements of Neb. Ct. R. App. P. § 2-109(D)(1) (rev. 2012). Under that rule, a party is required to set forth the assignments of error in a separate section of the brief, with an appropriate heading, following the statement of the case and preceding the propositions of law, and to include in the assignments of error section a separate and concise statement of each error the party contends was made by the trial court. *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013). Where a brief of a party fails to comply with the mandate of § 2-109(D)(1)(e),

we may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error. *In re Interest of Samantha L. & Jasmine L., supra*.

On cross-appeal, Michael assigns that the juvenile court erred in determining that (1) he had failed or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of Laticia and (2) reasonable efforts were provided by the school to cure deficiencies leading to the alleged insufficient subsistence, education, or other care necessary for the health, morals, or well-being of Laticia.

STANDARD OF REVIEW

[3] 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. *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013).

[4] Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Samantha L. & Jasmine L., supra*.

ANALYSIS

Testimony of MacFarland.

Stacy argues in her brief that the State failed to lay proper foundation as to MacFarland's knowledge of "missed days." Brief for appellant at 11. Because Stacy failed to comply with § 2-109(D)(1) regarding assignments of error, our review is limited to an examination of the record for plain error. See *In re Interest of Samantha L. & Jasmine L., supra*. MacFarland was the student personnel assistant assigned to Gomez Elementary, where Laticia was enrolled. MacFarland testified that she monitors students' attendance and is the recordkeeper for attendance records. She stated that the school secretary documents attendance information in the data management

system, which MacFarland has access to and relies on in carrying out her duties. MacFarland testified that she monitored Laticia's absences for the 2011-12 school year. Under our plain error review, MacFarland's testimony regarding "missed days" had sufficient foundation to be admitted.

Juvenile Code Versus Compulsory Education Laws.

[5] Laticia's absences from school ostensibly fall under two different statutory provisions: one, the juvenile code statutes regarding neglect of children, and the other, statutes relating to compulsory education. Compulsory education statutes and juvenile code statutes regarding the neglect of children generally do not pertain to the same subject matter and should not be construed in pari materia. See *State v. Rice*, 204 Neb. 732, 285 N.W.2d 223 (1979). See, also, *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014) (reaffirming that those two statutory enactments are not pari materia and need not be construed conjunctively).

[6-9] Under § 43-247(3)(a) of the juvenile code, the juvenile court in each county has jurisdiction of any juvenile whose parent neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile. The version of Neb. Rev. Stat. § 79-201 (Cum. Supp. 2010) (compulsory education laws) in effect during the 2011-12 school year generally provides that every person residing in a Nebraska school district who has legal or actual charge or control of any child who is of mandatory attendance age or is enrolled in a public school shall cause such child to regularly attend a public, private, denominational, or parochial day school which meets the legal operation requirements each day that such school is open and in session, except when excused by school authorities. Neb. Rev. Stat. § 79-210 (Reissue 2008) makes a violation of § 79-201 a Class III misdemeanor. Essentially, § 43-247(3)(a) establishes the juvenile court's jurisdiction over Laticia, while §§ 79-201 and 79-210 make her parents or legal guardians culpable for her truancy. The county attorney was free to decide whether to proceed utilizing the juvenile

code or the compulsory education laws. See Neb. Rev. Stat. § 79-209 (Supp. 2011) (version of statute in effect during 2011-12 school year). See, also, *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995) (when single act violates more than one statute, prosecutor is free to choose to prosecute under any applicable statute so long as selection is not deliberately based upon any unjustifiable standard such as race, religion, or other arbitrary classification). Here, the county attorney opted to proceed only under a statute which establishes the juvenile court's original jurisdiction over Laticia, rather than under a statute which holds Laticia's parents criminally responsible for her truancy. Therefore, we turn to whether the evidence was sufficient under the juvenile code.

Sufficiency of Evidence Under § 43-247(3)(a).

[10,11] The purpose of the adjudication phase is to protect the interests of the child. *In re Interest of Cornelius K.*, 280 Neb. 291, 785 N.W.2d 849 (2010). At the adjudication stage, in order for a juvenile court to assume jurisdiction of a minor child under § 43-247(3)(a), the State must prove the allegations of the petition by a preponderance of the evidence, and the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Cornelius K., supra*. Section 43-247(3)(a) states that the juvenile court shall have jurisdiction of "[a]ny juvenile . . . whose parent . . . neglects or refuses to provide proper or necessary subsistence, *education*, or other care necessary for the health, morals, or well-being of such juvenile." (Emphasis supplied.) This is the subsection specifically alleged by the State in its petition.

Michael argues that the juvenile court erred in finding that he had failed or refused to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of Laticia. Stacy similarly argues that the juvenile court erred in finding that she neglected Laticia's education. Again, our review of Stacy's appeal is limited to an examination of the record for plain error. See *In re Interest*

of Samantha L. & Jasmine L., 286 Neb. 778, 839 N.W.2d 265 (2013).

Laticia was on the "20-day" list for absences during the 2010-11 school year. Her attendance continued to be monitored during the 2011-12 school year. Laticia had over 22 absences between August 2011 and February 2012, none of which were medically excused. On several occasions, the school secretary contacted the home (because neither parent called to report the absence), spoke with a parent, and was then given a reason for the absence. Neither Stacy nor Michael informed the school about the house fire; it was the grandmother who notified the school. After being informed of the fire, the school arranged transportation for Laticia beginning February 8, 2012, yet transportation was never utilized and Laticia continued to miss school. Laticia was absent for 13 full or partial days in March and April 2012. Stacy and Michael had a parental, and legal, duty to make sure that Laticia attended school each day that school was open, unless excused by school authorities. See § 79-201. They failed to do so.

Stacy argues in her brief that public policy indicates that the school district should have excused the missed days after the family home was destroyed by fire. Again, because Stacy failed to comply with § 2-109(D)(1) regarding assignments of error, our review is limited to an examination of the record for plain error. See *In re Interest of Samantha L. & Jasmine L.*, *supra*. Because neither Stacy nor Michael informed the school of the fire and because the transportation arranged by the school district after the school learned of the fire was never utilized (yet Laticia continued to miss school), we find no plain error.

MacFarland testified that she is concerned about Laticia's academic achievement and that Laticia is at risk of harm due to the number of school days missed and the consistency of absences over a 2-year period. We agree. After our de novo review, we find the State proved by a preponderance of the evidence that Michael neglected or refused to provide proper or necessary education for the health, morals, or well-being of Laticia. And we find no plain error with regard to the juvenile court's finding that Stacy neglected Laticia's education. See

M.C. v. Com., 347 S.W.3d 471 (Ky. App. 2011) (court not persuaded that good grades precluded finding of educational neglect; providing adequate education for child's well-being necessarily requires parent to ensure child attends school each day to participate in educational instruction; and mother's repeated inability to ensure child attended school each day presented threat of harm to child's welfare by denying child right to educational instruction).

Reasonable Efforts.

[12] Michael also argues that the juvenile court erred in finding that reasonable efforts were provided by the school to cure deficiencies leading to the alleged insufficient subsistence, education, or other care necessary for the health, morals or well-being of Laticia. In his brief, Michael acknowledges that § 79-209 is "not to be construed as having any relation to this 43-247(3)(a) filing," but he relies on § 79-209 to argue that the school failed to provide "reasonable efforts" to address Laticia's absenteeism. Brief for cross-appellant at 14. The school's duty to provide services in an attempt to address excessive absenteeism comes from § 79-209, relating to compulsory attendance and the possibility of a parent's being subjected to a criminal sanction. But Stacy and Michael are not being prosecuted for violating the compulsory education laws. They are alleged to have neglected Laticia or refused to provide her with the proper or necessary education under the juvenile code. The school had no duty to provide reasonable efforts before an adjudication under § 43-247(3)(a) of the juvenile code. See, generally, *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014).

Stacy similarly argued that the school district failed to assist the family with attendance issues. Again, our review of Stacy's appeal is limited to an examination of the record for plain error, and we find no such error. See *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265 (2013).

To clarify further on the matter of "reasonable efforts" by the school under compulsory education laws and "reasonable efforts" by the State under the juvenile code, we note that the

juvenile code requires the State to make reasonable efforts to preserve and reunify families prior to placement of a juvenile in foster care to prevent or eliminate the need for removing the juvenile from the juvenile's home and to make it possible for a juvenile to safely return to the juvenile's home. Neb. Rev. Stat. § 43-283.01 (Cum. Supp. 2012). Reasonable efforts also come into play when termination of parental rights is sought under Neb. Rev. Stat. § 43-292(6) (Cum. Supp. 2012). There is no evidence in the record, and the parents do not argue, that Laticia was removed from her home, and no motion for termination of parental rights has been filed. Thus, any discussion of reasonable efforts under the juvenile code is not warranted at this time.

CONCLUSION

For the reasons stated above, we find that the juvenile court properly adjudicated Laticia as a child under § 43-247(3)(a) because her parents neglected her education.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. YAI D. BOL, ALSO KNOWN AS DANIEL MATIT, APPELLANT.

845 N.W.2d 606

Filed April 15, 2014. No. A-13-319.

1. **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. **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. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
4. **Criminal Law: Police Officers and Sheriffs.** A person is guilty of criminal impersonation if that person knowingly provides false personal identifying

information or a false personal identification document to a court or a law enforcement officer.

5. **Words and Phrases.** Personal identifying information includes names, dates of birth, and addresses.
6. ____. "Knowingly" means "willfully" as distinguished from "accidentally or involuntarily." In other words, to commit an act knowingly, a defendant must be aware of what he is doing.
7. ____. A personal identification document is defined to include a state identification card.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Elizabeth Elliott for appellant.

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

INBODY, Chief Judge, and PIRTLE and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Yai D. Bol, also known as Daniel Matit, appeals from his conviction in the Lancaster County District Court for criminal impersonation. He alleges that there was insufficient evidence to support the conviction and that his sentence is excessive. Finding no merit to Bol's arguments, we affirm the conviction and sentence.

BACKGROUND

Bol was questioned by Lincoln police officers on three separate occasions. During the third contact, Bol provided personal identifying information that conflicted with the information he gave the first two times. On February 12, 2012, Lincoln police officer Russell Schoenbeck responded to a report of an automobile accident and found a silver Chevrolet Tahoe "stuck on a snowbank and a fencepost." After running the license plate information, Officer Schoenbeck identified the registered owner of the vehicle as "Yai Bol." Officer Schoenbeck then searched the interior of the vehicle and found a citation to "Daniel Matit" in the center console.

Two individuals approached Officer Schoenbeck at the scene, and when asked if they knew "Yai Bol" or "Daniel Matit," they replied no and left the scene. Officer Schoenbeck later made contact with one of those individuals again, and at that time, the man produced a State of Nebraska identification card bearing the name "Daniel Matit" and a birthdate of January 1, 1989. Officer Schoenbeck ran the name "Daniel Matit" through the system the police use to obtain information and came up with a purportedly true person named "Daniel Matit" that was a person different than "Yai Bol." At trial, Officer Schoenbeck identified the defendant, Bol, as the man who provided him with the identification card. The officer also testified that the photograph of a man marked as exhibit 1 at trial was the man with whom he had contact on February 12, 2012.

On March 5, 2012, Lincoln police sergeant Benjamin Miller made contact with the driver of the same Tahoe that was involved in the February 12 incident. The driver told Sergeant Miller that his name was "Daniel Matit" and provided a State of Nebraska identification card bearing that name. Sergeant Miller completed a police report with the information provided by the driver, including the name "Daniel Matit"; a birthdate of January 1, 1989; and an address of 107 West 7th Street in Grand Island, Nebraska.

At trial, Sergeant Miller identified the defendant, Bol, as the driver of the Tahoe with whom he had contact on March 5, 2012. Sergeant Miller also testified that the man depicted in the photograph marked as exhibit 3 was the driver of the Tahoe and identified the defendant, Bol, as the man in the photograph.

The third occasion upon which the criminal impersonation charge is based occurred on May 7, 2012. Sergeant Miller stopped the same Tahoe and made contact with the driver, who told Sergeant Miller on that occasion that his name was "Yai Bol"; that his birthdate was January 1, 1986; and that he resided at 108 West 8th Street in Grand Island. At trial, Sergeant Miller identified the defendant, Bol, as the driver of the Tahoe with whom he made contact on May 7. Sergeant Miller testified that the man depicted in the photograph

marked as exhibit 5 was the driver of the Tahoe on May 7 and was the defendant, Bol.

Sergeant Miller testified that he later attempted to confirm the driver's identity, because he knew that the driver was the same man he had encountered on March 5, 2012, but that the driver had given him a different name on that date. Sergeant Miller ran the names "Yai Bol" and "Daniel Matit" through the police information system, and each search result came up with an actual person. Sergeant Miller testified that through his investigation, he determined that the individual's "real name" was "Yai Bol." The manner in which Sergeant Miller confirmed Bol's identity was not explained at trial, nor was Sergeant Miller able to confirm whether there was another person named "Daniel Matit" in Grand Island with a birthdate of January 1, 1989.

The State rested after the testimony of the officers, and Bol presented no evidence. The jury found Bol guilty of criminal impersonation, a Class IV felony. Bol was sentenced to 1 to 1 year's imprisonment, with credit for 180 days served. Bol timely appealed to this court.

ASSIGNMENTS OF ERROR

Bol assigns that the evidence adduced at trial was insufficient to sustain a conviction for criminal impersonation and that the sentence imposed by the district court was excessive.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

[2,3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly

depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Parminter*, 283 Neb. 754, 811 N.W.2d 694 (2012).

ANALYSIS

Before addressing Bol's assignments of error, we digress to provide background on the criminalization of providing false information to law enforcement. In 1977, the Nebraska Legislature enacted a law that criminalized false reporting. See Neb. Rev. Stat. § 28-907 (Reissue 2008). This statute identified false reporting as "[f]urnish[ing] material information he or she knows to be false to any peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter." § 28-907(1)(a). Under this statute, false reporting is a Class I misdemeanor. See § 28-907(2)(a).

In 2009, the Nebraska Legislature enacted 2009 Neb. Laws, L.B. 155. According to the Introducer's Statement of Intent, the purpose of the bill was to protect the public from organized crime, widespread theft schemes, and identity theft. See Judiciary Committee, 101st Leg., 1st Sess. (Jan. 9, 2009). The bill amended the crime of criminal impersonation and defined it as "[k]nowingly provid[ing] false personal identifying information or a false personal identification document to a court or a law enforcement officer." Neb. Rev. Stat. § 28-638(1)(c) (Cum. Supp. 2012). Under § 28-638(2)(e), criminal impersonation is a Class IV felony. Because the bill became law effective on August 30, 2009, there is currently no published case law addressing the subsection of the criminal impersonation statute at issue here.

Sufficiency of Evidence.

Bol alleges that the evidence was insufficient to sustain his conviction. He claims that the State failed to prove beyond a reasonable doubt that he knowingly provided false personal identifying information or documents to a police officer, because the State failed to prove that the information provided by Bol was not truthful. Bol contends that merely providing "different" information to police officers does not

equate to providing "false" information. Brief for appellant at 11.

[4-6] A person is guilty of criminal impersonation if that person "[k]nowingly provides false personal identifying information or a false personal identification document to a court or a law enforcement officer." § 28-638(1)(c). Personal identifying information includes names, dates of birth, and addresses. Neb. Rev. Stat. § 28-636(2) (Cum. Supp. 2012). The word "knowingly" is not defined under this statute, but the Nebraska Supreme Court has noted that its meaning in a criminal statute varies in the context and commonly imports a perception of facts requisite to make up crime. See *R. D. Lowrance, Inc. v. Peterson*, 185 Neb. 679, 178 N.W.2d 277 (1970). In *State v. Lotter*, 255 Neb. 456, 523, 586 N.W.2d 591, 636 (1998), the Nebraska Supreme Court synonymized "'"knowingly"'" with "'"willfully"'" and distinguished it from "'accidentally or involuntarily.'" The court stated that "to commit an act knowingly, the defendant must be aware of what he is doing." *Id.*

According to the evidence presented at trial, on separate occasions, Bol provided police officers with two names ("Daniel Matit" and "Yai Bol"); two dates of birth (January 1, 1986, and January 1, 1989); and two addresses (107 West 7th Street and 108 West 8th Street). Bol argues that the State never proved his "real name," that the dates of birth were off by only one number, and that he could have moved in the 3-month time period between his contacts with police.

Although all of these arguments are plausible, there is sufficient evidence that a rational jury could have found that Bol provided information to police officers that he knew was false. During Bol's initial encounter with Officer Schoenbeck on February 12, 2012, he denied that he knew either "Daniel Matit" or "Yai Bol," when in fact, he had used both names in the past. In addition, while it is possible for a person to have two names or two addresses, he cannot have two dates of birth. Thus, the jury could have found that by providing two different dates of birth, Bol knowingly provided false information.

[7] Bol further claims that the State failed to adduce any evidence of any other person by the name "Yai Bol" or "Daniel Matit" and that therefore, the State's evidence was insufficient. We note that in order to be guilty of criminal impersonation, a person must knowingly provide either false personal identifying information or a false personal identification document to a law enforcement officer. A "[p]ersonal identification document" is defined to include a "state identification card." § 28-636(1). Given the testimony of Officer Shoenbeck that the defendant's "real name" was "Yai Bol," and given Bol's presentation of the state identification card bearing the name "Daniel Matit" and the birthdate of "January 1, 1989," there was sufficient evidence for a jury to convict Bol of criminal impersonation under this prong of the statute.

Excessive Sentence.

Bol claims the sentence imposed by the district court is excessive. Criminal impersonation under § 28-638(1)(c) is a Class IV felony, punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. See, Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2012); § 28-638(2)(e). Bol was sentenced to 1 to 1 year's imprisonment, with credit for 180 days served, and thus, the sentence imposed is within the statutory limits.

At the time Bol was sentenced on the criminal impersonation conviction, he was also sentenced for two other cases, which included convictions for fourth-offense driving under the influence (DUI) with refusal of a chemical test, driving during revocation, and third-offense aggravated DUI. Bol has a lengthy criminal history, including convictions for numerous DUI offenses and driving during suspension or revocation, burglary, providing false information to a police officer, making a false statement to a police officer, cocaine possession, issuing a bad check, criminal mischief, theft by unlawful taking, and domestic assault.

Bol was placed on probation for DUI in Vermont in 2005 but violated his probation. In 2009, he was placed on probation again in Vermont for possession of cocaine. Whether he

successfully completed this probation term is unknown. He was placed on 6 months' probation in Nebraska in June 2011 for DUI and refusal to submit to a chemical test. The presentence investigation report indicates that it is not known whether Bol successfully completed this probation term, but he was convicted of driving without a license in August 2011, criminal mischief and theft by unlawful taking in November 2011, and third-offense DUI in December 2011.

At sentencing in this case, the district court took into consideration the nature and circumstances of the crimes and the history, character, and condition of Bol. Based on those factors, the court found that imprisonment was necessary for protection of the public, because of the substantial risk that based upon his history, Bol would engage in additional criminal conduct during any period of probation, and because a lesser sentence would depreciate the seriousness of the crimes and promote disrespect for the law. Based on the foregoing, we cannot find that the sentence was an abuse of discretion.

We note that Bol's actions could have subjected him to prosecution for false reporting under § 28-907, which, as a Class I misdemeanor, would have carried the potential for a lesser sentence. However, the enactment of §§ 28-636 and 28-638 allows the State to charge Bol with the crime of criminal impersonation, and under the facts of this case, we find no error in the State doing so.

CONCLUSION

We conclude the evidence was sufficient to support a conviction for criminal impersonation, because a rational jury could have found that Bol knowingly provided false information to police officers. In addition, we find that the sentence imposed was not excessive. We therefore affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. IRVIN D. BEAL, APPELLANT.

846 N.W.2d 282

Filed April 22, 2014. No. A-12-1175.

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. **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.
3. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.
4. **Motor Vehicles.** Neb. Rev. Stat. § 60-399(2) (Reissue 2010) provides that all letters, numbers, printing, writing, and other identification marks upon a vehicle's license plates shall be kept clear and distinct so that they shall be plainly visible at all times.
5. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants.
6. ____: ____: ____. In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop.
7. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** To detain a motorist for further investigation past the time reasonably necessary to conduct a routine investigation incident to a traffic stop, an officer must have a reasonable, articulable suspicion that the motorist is involved in criminal activity unrelated to the traffic violation.
8. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances.

9. **Probable Cause: Words and Phrases.** Reasonable suspicion entails some minimal level of objective justification for detention; it is something more than an inchoate and unparticularized hunch—but less than the level of suspicion required for probable cause.
10. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Regarding an officer's reasonable suspicion, factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively.
11. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.
12. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to a few specifically established and well-delineated exceptions.
13. **Warrantless Searches.** The warrantless search exceptions recognized by Nebraska courts include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest.
14. **Motor Vehicles: Warrantless Searches: Probable Cause.** A warrantless search of a vehicle is permissible upon probable cause that the automobile contains contraband.
15. **Police Officers and Sheriffs: Probable Cause.** A law enforcement officer has probable cause to search when it is objectively reasonable.
16. **Search and Seizure.** A search is objectively reasonable when known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that he will find contraband or evidence of a crime.
17. **Probable Cause.** Probable cause depends on the totality of the circumstances.
18. **Criminal Law: Choice of Evils Defense.** The justification or choice of evils defense is codified in Nebraska at Neb. Rev. Stat. § 28-1407 (Reissue 2008). That statute specifies that conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged. The statute also mandates that a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
19. **Criminal Law: Choice of Evils Defense: Public Policy.** The justification or choice of evils defense authorized by Neb. Rev. Stat. § 28-1407 (Reissue 2008) reflects the Nebraska Legislature's policy decision that certain circumstances excuse conduct that would otherwise be criminal.
20. **Criminal Law: Choice of Evils Defense.** The justification or choice of evils defense operates to legally excuse conduct that would otherwise subject a person to criminal sanctions.
21. **Choice of Evils Defense.** If the harm which will result from compliance with the law is greater than that which will result from violation of it, a person is justified in violating it.

22. ____. The justification or choice of evils defense requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediately imminent harm; and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, actual or reasonably believed by the defendant to be certain to occur.
23. ____. For the justification or choice of evils defense to be factually available to a defendant, he or she must factually establish that his or her actions were efforts to prevent a specific and immediate harm to at least one reasonably identifiable person.
24. ____. A generalized belief, even if apparently well founded, that the alleged greater harm might occur and might involve an unidentified person is insufficient to supply a factual basis for application of the justification or choice of evils defense.
25. ____. Sincere belief and fervor, resulting in impatience with the alternative and frequently time-consuming process for change in a democracy subject to a constitution, do not supply a legal basis for the justification or choice of evils defense.
26. **Criminal Law: Choice of Evils Defense.** For the justification or choice of evils defense to be available, a defendant's responsive criminal conduct must relate only to an interest that the community is willing to recognize and that is not specifically denied recognition by the legal system.
27. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed on appeal only if the sentences complained of were an abuse of judicial discretion.
28. **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.
29. **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.
30. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
31. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Glenn A. Shapiro, of Schaefer Shapiro, L.L.P., for appellant.

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

IRWIN, MOORE, and BISHOP, Judges.

IRWIN, Judge.

I. INTRODUCTION

Irvin D. Beal appeals his conviction and sentence for possession with intent to deliver marijuana, a Class III felony offense. On appeal, Beal challenges the district court's denial of his motion to suppress, the court's refusal to allow Beal to present evidence on his proposed defense of justification or choice of evils, and the sentence imposed. We find no merit to the assertions on appeal, and we affirm.

II. BACKGROUND

The events giving rise to this case occurred on or about September 30, 2009. At approximately 10:30 that night, Officer Christopher Engel, a law enforcement officer for the Ashland Police Department, was in uniform in a marked patrol car in Ashland, Nebraska. He observed a van approaching him and "abruptly" slowing as it passed. Engel initially was unable to see a rear license plate on the van, and he followed the van to effect a traffic stop.

Engel testified that as he got closer to the van, he was able to observe there was a rear license plate, but that he was unable to read the plate. He testified that there was a "ball hitch" blocking part of the plate and also a license plate bracket that obscured the portion of the plate indicating what state the van was registered in. Engel activated his patrol car's emergency lights and conducted a traffic stop.

Engel testified that as he approached the van, he observed that the windows on the van had "blinds pulled down" and that he "could detect the odor of raw marijuana." Engel called for backup and made contact with the driver of the van, Christopher Ryan. Beal was a passenger in the van, as was a third individual.

Engel had Ryan accompany him to Engel's patrol car, where he questioned Ryan about the group's travel. According to Engel, Ryan was "vague with his answers" and provided "short vague answers when he was responding." Engel questioned Ryan about the other occupants of the van, and Ryan indicated

that they were "his friends, comrades," and that they were "acquaintances." Ryan was unable to accurately provide the second passenger's last name, although he was able to correctly identify Beal.

Engel issued a warning to Ryan for driving with an obscured rear license plate and "ran a records check . . . and completed a criminal history" on all three individuals. Engel then returned to Ryan the license and paperwork he had provided Engel, explained the warning citation to Ryan, and informed Ryan that Engel was waiting for information to come back from dispatch. Engel then made contact with Beal and the other passenger. Engel testified that because he had smelled marijuana, he was investigating and wanted to speak with the two passengers "to see if they knew who the driver was and to see where they were coming from, to see if their stories would match up or if they were different." Engel testified that the passengers' stories were "somewhat similar" to Ryan's, although the second passenger "just couldn't really answer" any questions, "didn't really know where they [had been]," and "really didn't have any idea what was going on." While speaking with the passengers, Engel observed air fresheners and four or five cell phones and again detected the odor of marijuana.

Another officer, Deputy Jeffrey Hermanson, arrived on the scene. Hermanson was a canine unit officer and had his canine with him. The record indicates that although the canine had previously been certified as a drug detection canine, its certification was not current on the date in question.

Engel then attempted to create a consensual encounter with the occupants of the van. Engel told Ryan that he was free to go and allowed Beal and the other passenger to return to the van. As Ryan was returning to the van, Engel asked if he would answer some additional questions. Engel testified that Ryan was not actually free to go and that Engel believed he "had enough indicators of criminal activity" to proceed with his investigation, but that he had been trained to attempt to secure a consensual encounter if possible.

Engel received information from dispatch indicating that all three occupants of the van had committed prior drug

violations and that Beal had "a history of prior weapons violations." Hermanson also heard this information dispatched over the radio.

Ryan initially indicated that "perhaps he would talk to" Engel, and Engel explained that he was going to ask for consent to search the van. Hermanson had approached the van to have Beal and the other passenger exit the van again so that the canine could be deployed around the van. During this process, Hermanson observed "something shiny" sticking out of Beal's boot, where Beal's pant leg was tucked into the boot. Hermanson testified that he issued several commands and questions to Beal, asking what the item in his boot was, and that Beal was unresponsive. Engel and Hermanson directed all three occupants to the ground and handcuffed them "for safety reasons." The object in Beal's boot was then determined to be "a cellophane baggy of marijuana."

A search of the van resulted in the discovery of 154.9 pounds of marijuana.

Prior to trial, Beal sought to suppress the evidence seized during the traffic stop. The court denied the motion to suppress, finding that Engel validly conducted a traffic stop based on the van's having an obscured rear license plate and that Engel had sufficient reason to suspect additional criminal activity based upon his observations during the traffic stop, warranting extending the stop and searching the van.

Prior to trial, the State sought a motion in limine to prevent Beal from presenting evidence or argument in support of a justification or choice of evils defense. At a hearing on the motion, Beal argued that he should be allowed to present evidence and argument that he was transporting the marijuana for distribution to a "buyers club" in New York and that the marijuana was for medicinal purposes for patients who would suffer a greater harm or evil from illness than the harm or evil of his possession with intent to distribute.

Beal made an offer of proof in support of his argument. In the offer of proof, Beal asserted that he would have testified that he had cofounded a nondenominational religious organization with a New York City tax number that runs a "cannabis Patients Registry" and works with a "Buyers Club" in New

York. Beal would have testified that his organization provides medicinal marijuana for patients with a medically diagnosed condition recognized to benefit from cannabis. Beal would have testified about other states' passing laws to permit medical marijuana use, about how marijuana is the best therapeutically active medicine for many conditions, and about how it is not addictive. He also would have testified that the marijuana seized in this case was for use by specific individuals known by him to be afflicted with AIDS and cancer and that marijuana provides treatment for these patients. He also would have testified that the marijuana otherwise available to his organization was not suitable. In the offer of proof, Beal also asserted that a doctor would have testified about the medicinal benefits of marijuana.

The district court granted the motion in limine and ordered that Beal would not be allowed to present evidence or argument in support of his justification or choice of evils defense.

After a stipulated bench trial, the district court found Beal guilty of possession with intent to distribute marijuana. The court sentenced Beal to 48 to 72 months' imprisonment. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Beal assigns as error that the district court erred in denying his motion to suppress, in refusing to allow him to present evidence and argument in support of his justification or choice of evils defense, and in imposing an excessive sentence.

IV. ANALYSIS

1. Motion to Suppress

Beal first asserts that the district court erred in denying his motion to suppress. He asserts that there was not probable cause for the initial stop, was not sufficient cause to expand the initial stop, and was not probable cause for a search of the van. We find no merit to these assertions.

[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. *State*

v. Au, 285 Neb. 797, 829 N.W.2d 695 (2013). 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. *Id.*

(a) Initial Stop

Beal first asserts that there was no probable cause for the initial traffic stop. The evidence indicates that Engel observed a traffic violation, which provides sufficient probable cause for the initial stop. We find no merit to Beal's assertions on appeal.

[2,3] 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. *Id.* A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *Id.* An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 2359, 185 L. Ed. 2d 1082 (2013).

In the present case, Engel testified that when the van first passed him in traffic, Engel was unable to see a rear license plate on it and he followed it to effect a traffic stop. As he got closer to the van, he was able to observe that there was a rear license plate, but he was unable to read the plate. Engel testified that there was a "ball hitch" blocking part of the plate and also a license plate bracket that obscured the portion of the plate indicating what state the van was registered in.

[4] Neb. Rev. Stat. § 60-399(2) (Reissue 2010) provides that "[a]ll letters, numbers, printing, writing, and other identification marks upon [a vehicle's license] plates . . . shall be kept clear and distinct . . . so that they shall be plainly visible at all times . . . ."

Engel's testimony demonstrates that he observed the rear license plate of the van not to be in compliance with § 60-399(2). Because Engel observed a traffic violation, he had probable cause to stop the van.

Beal's argument on appeal concerning probable cause to stop the van is entirely based on an assertion that Engel's testimony was not trustworthy. Beal elicited testimony at trial in an attempt to call Beal's veracity into question. Issues of credibility, however, are not resolved by the appellate court, and we will not pass on the credibility of witnesses or reweigh the evidence. See *State v. Ruegge, ante* p. 249, 837 N.W.2d 593 (2013). As such, we find this argument to be without merit.

(b) Expansion of Stop

Beal next asserts that the district court erred in finding that there was reasonable, articulable suspicion to expand the initial traffic stop. Based on Engel's observations during the traffic stop, including detecting the odor of marijuana, we find that there was reasonable, articulable suspicion, and we find no merit to Beal's assertion.

[5] Once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011); *State v. Morissey*, 19 Neb. App. 590, 810 N.W.2d 195 (2012). This investigation may include asking the driver for an operator's license and registration, requesting that the driver sit in the patrol car, and asking the driver about the purpose and destination of his or her travel. *Id.* Also, the officer may run a computer check to determine whether the vehicle involved in the stop has been stolen and whether there are outstanding warrants for any of its occupants. *State v. Howard, supra*.

In the present case, Engel was justified in conducting an investigation reasonably related in scope to the circumstances of the initial stop. He was justified in asking Ryan, the driver, for his operator's license and registration; having Ryan

accompany him to the patrol car; and asking Ryan about the purpose and destination of his travel.

[6,7] In order to continue to detain a motorist, an officer must have a reasonable, articulable suspicion that the person is involved in criminal activity beyond that which initially justified the stop. *State v. Prescott*, 280 Neb. 96, 784 N.W.2d 873 (2010). To detain a motorist for further investigation past the time reasonably necessary to conduct a routine investigation incident to a traffic stop, an officer must have a reasonable, articulable suspicion that the motorist is involved in criminal activity unrelated to the traffic violation. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[8] Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances. *State v. Prescott, supra*; *State v. Draganescu, supra*. Courts must determine this on a case-by-case basis. *Id*.

[9,10] Reasonable suspicion entails some minimal level of objective justification for detention; it is something more than an inchoate and unparticularized hunch—but less than the level of suspicion required for probable cause. *Id*. Regarding an officer's reasonable suspicion, the Nebraska Supreme Court has previously noted that factors that would independently be consistent with innocent activities may nonetheless amount to reasonable suspicion when considered collectively. *State v. Draganescu, supra*.

In the present case, Engel testified that he detected the odor of raw marijuana when he approached the van, that the van's windows were covered with drawn blinds, and that Ryan provided vague and short answers concerning his travel. Although Ryan had indicated that the other occupants of the van were "his friends, comrades," he was unable to accurately provide the second passenger's last name.

Upon making contact with Beal and the other passenger of the van, after issuing a warning to Ryan, Engel discovered that although their stories were "somewhat similar," the second passenger did not seem to know where they had been or "have

any idea what was going on." Engel observed air fresheners and four or five cell phones and again detected the odor of marijuana.

Engel also received information from dispatch indicating that all three occupants of the van had committed prior drug violations and that Beal had "a history of prior weapons violations."

The record indicates that all of these observations were made prior to Engel's initially indicating to Ryan that he was free to go and prior to Engel's attempt to secure a consensual encounter. Those observations were sufficient to support a reasonable, articulable suspicion of criminal activity exclusive of the basis for the initial traffic stop, and they supported a continued detention of the van's occupants. We find no merit to Beal's assertions to the contrary.

(c) Search

Finally, Beal asserts that there was not sufficient probable cause to search the van. We disagree.

[11-13] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government. *State v. Podrazo, ante* p. 489, 840 N.W.2d 898 (2013). These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions. *Id*. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to a few specifically established and well-delineated exceptions. See *State v. Podrazo, supra*. The warrantless search exceptions recognized by Nebraska courts include searches undertaken with consent, searches justified by probable cause, searches under exigent circumstances, inventory searches, searches of evidence in plain view, and searches incident to a valid arrest. *Id*.

[14-17] A warrantless search of a vehicle is permissible upon probable cause that the automobile contains contraband. *State v. Dalland*, 20 Neb. App. 905, 835 N.W.2d 95 (2013), *reversed on other grounds* 287 Neb. 231, 842 N.W.2d

92 (2014). A law enforcement officer has probable cause to search when it is objectively reasonable. *Id*. A search is objectively reasonable when known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that he will find contraband or evidence of a crime. *Id*. Probable cause depends on the totality of the circumstances. *Id*.

In this case, Engel had probable cause to search the van. As noted above, he had detected the odor of raw marijuana, received objectively suspicious responses from the driver and passengers of the van, observed air fresheners and numerous cell phones, observed the drawn blinds on the windows of the van, and received information from a routine records check indicating that all of the occupants had a history of drug violations and that Beal had a history of weapons violations. The odor of marijuana was also detected by Hermanson, the other officer on the scene. Additionally, when Hermanson had Beal and the other passenger exit the van so that the canine could be deployed around it, Hermanson observed "something shiny" sticking out of Beal's boot, and after Beal refused to respond to inquiries and commands concerning the shiny object, all three occupants were patted down for officer safety. Marijuana was discovered on the persons of both Beal and the driver when they were patted down. There is no merit to Beal's assertion that there was not sufficient probable cause to support searching the van.

(d) Conclusion on Motion to Suppress

Because Engel observed a traffic violation, he had probable cause to make the initial stop. During the traffic stop, Engel's observations gave rise to a reasonable, articulable suspicion of criminal activity that justified expanding the scope of the stop and continuing to detain the occupants of the van. The observations also gave rise to probable cause sufficient to justify a search of the van, which led to the discovery of nearly 155 pounds of marijuana. Beal's first assigned error is meritless.

2. Justification or Choice of Evils and Motion in Limine

(a) Arguments Raised by Parties

Beal next challenges the district court's granting of the State's motion in limine, precluding Beal from presenting testimony or argument on his proposed justification or choice of evils defense. The choice of evils defense was factually unavailable to Beal on the record presented to us, and we find no merit to his assertion that the district court erred.

[18] The justification or choice of evils defense is codified in Nebraska at Neb. Rev. Stat. § 28-1407 (Reissue 2008). That statute specifies that conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged, see § 28-1407(1)(a). The statute also mandates that "[a] legislative purpose to exclude the justification claimed does not otherwise plainly appear," see § 28-1407(1)(c).

[19-21] The justification or choice of evils defense authorized by § 28-1407 reflects the Nebraska Legislature's policy decision that certain circumstances excuse conduct that would otherwise be criminal. *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992). Therefore, the justification or choice of evils defense operates to legally excuse conduct that would otherwise subject a person to criminal sanctions. *Id.* "'[I]f the harm which will result from compliance with the law is greater than that which will result from violation of it, [a person is] justified in violating it.'" *Id.* at 571, 490 N.W.2d at 189, quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.4 (1986).

[22] The justification or choice of evils defense requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediately imminent harm; and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, actual or reasonably believed by the defendant to be certain to occur. *State v. Cozzens, supra*.

In *State v. Cozzens*, the Nebraska Supreme Court discussed both legal and factual availability of the justification or choice of evils defense in the context of an appeal by defendants convicted of criminal trespass when they sought to block lawful access to an abortion clinic.

[23,24] The court discussed the proposition that for the defense to be factually available to a defendant, he or she must factually establish that his or her actions were efforts to prevent a specific and immediate harm to at least one reasonably identifiable person. *Id*. A generalized belief, even if apparently well founded, that the alleged greater harm might occur and might involve an unidentified person is insufficient to supply a factual basis for application of the justification or choice of evils defense. See *id*.

[25,26] The court also discussed the propositions that for the defense to be legally available to a defendant, the defendant's conduct must be responsive to a legally recognized harm, and that the defense may not be used to justify or excuse criminal activity as an expression of disagreement with decisions by a branch of government. *Id*. Sincere belief and fervor, resulting in impatience with the alternative and frequently time-consuming process for change in a democracy subject to a constitution, do not supply a legal basis for the justification or choice of evils defense. *Id*. In other words, for the defense to be available, a defendant's responsive criminal conduct must relate only to an interest that the community is willing to recognize and that is not specifically denied recognition by the legal system. *Id*.

In *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992), the Supreme Court concluded that the justification or choice of evils defense was factually unavailable to all but one of the defendants. The court noted that only one of the defendants had established that she had personal knowledge, gained through her contacts with women who were about to enter the clinic, that abortions were likely to be performed on the morning when the group of defendants attempted to block access to the clinic. It was that one defendant's knowledge of specifically identifiable women who were attempting to enter the clinic to receive an abortion that provided factual

availability of the defense. *Id*. The remaining defendants established only a general belief that abortions were performed, and none knew any particular woman who was about to enter the clinic for the purpose of receiving an abortion. The remaining defendants, therefore, were not acting to prevent a specific and immediately imminent harm to a particular person. *Id*.

We conclude that the justification or choice of evils defense was similarly factually unavailable to Beal based on the record presented to us. In support of his objection to the State's motion in limine, Beal presented a written offer of proof. That offer of proof indicated that if allowed, he and a medical doctor would both have presented testimony in support of Beal's choice of evils defense. The offer of proof indicated that Beal would have testified that he had cofounded a nondenominational religious organization, with a New York City tax number, that runs a "cannabis Patients Registry" and works with a "Buyers Club" in New York. Beal would have testified that his organization provides medicinal marijuana for patients with a medically diagnosed condition recognized to benefit from cannabis. Beal would have testified about other states' passing laws to permit medical marijuana use, about how marijuana is the best therapeutically active medicine for many conditions, and about how it is not addictive.

According to Beal's offer of proof, he also would have testified that the marijuana seized in this case was for use by specific individuals known by him to be afflicted with AIDS and cancer and that marijuana provides treatment for these patients. Beal did not, however, identify any such individuals or indicate in his offer of proof that any of them would have testified on his behalf. He also indicated in his offer of proof that he would have testified that the marijuana otherwise available to his organization was not suitable. In the offer of proof, Beal also asserted that a doctor would have testified about the medicinal benefits of marijuana.

In his offer of proof, Beal did not identify any particular individuals who were at risk of immediately imminent harm. He did not establish that he was acting to prevent infliction of a specific and immediate harm to a reasonably identifiable

victim. Rather, he demonstrated general moral opposition to illegalization of marijuana because of his belief in its medicinal benefits. Although not a published opinion, and therefore not citable as authority, we note that similar testimony was not sufficient to support factual availability of the defense in *State v. Thompson*, No. A-98-1371, 2000 WL 758767 at *6 (Neb. App. June 13, 2000) (not designated for permanent publication), wherein the defendant testified that "if the people he knew in the 'New York Buyer's Club' were not provided with marijuana, they would suffer inescapable harm to their bodies." We held this did not demonstrate personal knowledge of any specific person who would use the marijuana. *Id.*

In this case, we decline to specifically address the question of whether the justification or choice of evils defense is legally available to a defendant stopped with nearly 155 pounds of marijuana and purporting to have been transporting it to patients in need of its medicinal benefits. We conclude that Beal's offer of proof was insufficient to demonstrate the factual availability of the defense, and we find no error in the district court's grant of the State's motion in limine to prevent Beal from adducing testimony or argument about it.

(b) Requirement of Force

We have concluded that the justification or choice of evils defense that Beal attempted to raise in this case is factually unavailable and have declined to address the question of whether it could be legally available to a situation like the present one. The concurrence disagrees with our decision not to reach the issue of whether the defendant's use of force should be a legal prerequisite to the availability of the choice of evils defense. We have declined to reach that question for several reasons, including that the issue has not been raised by the parties, that the issue would be one of first impression and contrary to the guidance in Nebraska Supreme Court precedents, and that stretching our analysis to reach the issue would require resolution of competing rules of statutory analysis. It is because none of that is necessary to reach the same result—that the defense was properly rejected in this case—that we decline to do so.

Initially, we note that the issue of whether the defendant's use of force is a legal prerequisite to application of the choice of evils defense has not been raised by the parties in this case. Although the State did argue on appeal that that defense should be found legally unavailable, the State's argument in that regard was solely on the basis of an assertion that the laws prohibiting the possession of marijuana evidence a legislative intent that the choice of evils defense not be applicable to possession of marijuana in any situation. The State did not make any argument to this court that the defense should be unavailable because Beal did not use any force, as the concurrence would conclude. Indeed, during oral argument, counsel for the State specifically answered a question posed by the court by indicating that the State did not believe the defendant's use of force was a legal prerequisite and that the State was not asserting such a proposition.

There is no prior judicial pronouncement in this state to indicate that the defendant's use of force is a legal prerequisite to application of the choice of evils defense. The concurrence has cited to no such authority, despite the Nebraska Supreme Court's having discussed the choice of evils defense and specifically delineated the elements that must be shown to successfully raise the defense. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003); *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999); *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992). The Supreme Court's iteration of those elements has never included the defendant's use of force. *Id.*

Our review of the Nebraska Supreme Court's jurisprudence involving the choice of evils defense and other justification defenses in prior cases demonstrates that the Supreme Court has consistently chosen to find the defense factually unavailable whenever possible and not to address the defendant's use of force as a legal prerequisite. See, e.g., *State v. Mowell, supra* (defense found factually unavailable because of inadequate showing of imminent risk of harm and specific declination to address legal availability); *State v. Wells, supra* (defense found factually unavailable for inadequacy of offer of proof on imminent risk of harm and without discussion of use of force as legal prerequisite); *State v. Graham*, 201 Neb. 659,

271 N.W.2d 456 (1978) (defense found factually unavailable for inadequate showing of imminent risk of harm and without discussion of use of force as legal prerequisite).

Indeed, in *State v. Mowell, supra*, the Nebraska Supreme Court was presented with a factual situation wherein the defendant attempted to raise the choice of evils or justification defense in a factual situation where the defendant was not trying to justify the use of any force. In that case, the defendant was charged with second degree murder, use of a weapon, and possession of a weapon. The defendant attempted to raise the choice of evils defense specifically as a defense to the possession of a weapon charge, arguing he was justified in possessing the weapon for self-defense because he was in fear for his life. The Supreme Court iterated the specific elements necessary to demonstrating the choice of evils defense, never mentioning the defendant's use of force as a legal prerequisite. *Id*. The court declined to address whether the defense could be legally available, focusing instead on rejecting the defense as factually unavailable because there was an insufficient showing of imminent risk of harm. *Id*. If the conclusion of the concurrence is correct and the defendant's use of force is a legal prerequisite, it would appear that the Supreme Court could have specifically found the defense legally unavailable in that case because possession of a weapon would not constitute the use of force; the court did not need to do so to reach its result, and it accordingly did not do so.

Finally, in order to reach the conclusion that the concurrence would urge, we would be required to engage in discussion of rules of statutory construction and to resolve potential conflicts in those rules. The concurrence correctly points out that the choice of evils defense at issue in this case is in a section of the Nebraska Revised Statutes generally pertaining to justification for the use of force. The concurrence correctly points out that nearly every *other* statute in the vicinity in the statutes includes in its title or in its text a reference to the use of force. Notably, however, § 28-1407 specifically does not include a reference to the use of force either in its title or in its text, and none of the other specific justification statutes referenced by the concurrence are implicated in the present case.

It is undoubtedly correct, as the concurrence notes, that statutory language is to be given its plain and ordinary meaning and that courts are not to read into a statute something that is not there or read anything plain and direct out of the statute. See, *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013); *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013). In this case, however, the plain and ordinary meaning of the words actually in § 28-1407 does not include any reference to the defendant's use of force. The title of § 28-1407 does not refer to the defendant's use of force. Although the surrounding statutes do include such references, it is not apparent that the plain and ordinary meaning or the plain and direct language of § 28-1407, standing on its own, makes a defendant's use of force a legal prerequisite to application of § 28-1407.

The concurrence correctly notes that the definitions section of Neb. Rev. Stat. § 28-1406(4) (Reissue 2008) defines "[a]ctor" to mean "any person who uses force." A conclusion that this definition necessarily means that the defendant's use of force is a legal prerequisite to application of the choice of evils defense found specifically in § 28-1407, however, has never been espoused by the Nebraska Supreme Court. Such a reading would also suggest that a general justification or choice of evils defense would be legally unavailable in a variety of situations where the defendant does not engage in the use of force, including the factual situation discussed above in *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003), or in a hypothetical situation where a defendant has attempted to flee a potential kidnapper and has trespassed on private property to hide and procure safety, all without using force.

While it may well be true that the Supreme Court would conclude that the defendant's use of force is a legal prerequisite in any situation, and regardless of whether any of the statutory provisions specifically referring to the use of force are implicated, because the Supreme Court has never done so and has, in fact, elected on multiple occasions to find the defense factually unavailable without discussing legal availability, we conclude that it would be inappropriate for us to reach such a conclusion in this case. This is especially so because there is

no need for us to raise and resolve such an issue to reach the conclusion in this case.

The concurrence has not taken issue with the conclusion that the choice of evils defense is factually unavailable in this case or the conclusion that the district court properly sustained the State's motion in limine. As such, it is apparent that there is no disagreement that the factual unavailability conclusion is a correct way to reach the result of affirming the decision of the district court. Because that conclusion is in accordance with the arguments raised by the parties, is consistent with prior Nebraska Supreme Court jurisprudence, and does not require us to sua sponte raise an issue, engage in analysis of potentially conflicting rules of statutory analysis, and make the present case one of first impression unnecessarily, we decline to do so.

3. Excessive Sentence

Finally, Beal asserts that the district court imposed an excessive sentence. Beal's sentence was within statutory limits, and there is no apparent abuse of discretion. This assigned error is meritless.

[27,28] Sentences within statutory limits will be disturbed on appeal only if the sentences complained of were an abuse of judicial discretion. *State v. Podrazo, ante* p. 489, 840 N.W.2d 898 (2013). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

[29-31] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and

all the facts and circumstances surrounding the defendant's life. *Id.*

Possession of marijuana with intent to deliver is a Class III felony offense. See Neb. Rev. Stat. §§ 28-405(c)(10) [Schedule I] (Cum. Supp. 2009) and 28-416(2)(b) (Reissue 2008). A Class III felony offense is punishable by 1 to 20 years' imprisonment, a fine of $25,000, or both. Neb. Rev. Stat. § 28-105 (Reissue 2008).

Beal was sentenced to 48 to 72 months' imprisonment. This sentence is well within the statutory limits, with the maximum portion of Beal's sentence being less than one-third of the possible maximum sentence. Beal has presented no argument on appeal to demonstrate how this sentence, well within the statutory limits, is an abuse of discretion, other than to assert that he was 65 years old at the time of sentencing, has been a lifelong activist, and received scores on an evaluation consistent with being amenable to probation and unlikely to present supervision problems.

Beal's presentence investigation report indicates a long criminal history, including a long history of disregard for drug laws, starting in 1967. Since that time, Beal has been convicted on at least nine occasions and in at least five different states for violation of a variety of drug laws. Beal has received sentences of jail and prison time, probation, and fines, but none of these avenues have served to deter him from continuing to disregard drug laws. Indeed, the presentence investigation report indicates that in January 2011, less than 16 months after the stop giving rise to the present case, Beal was caught in possession of 169 pounds of marijuana in Wisconsin. Beal's "activism" reflects a continual disregard for drug laws across the country. Beal's criminal history is not confined solely to drug offenses, however. He also has prior convictions for reckless endangerment and destruction of property.

On the record presented, the district court's sentence of 48 to 72 months' imprisonment is not an abuse of discretion for this conviction of possessing nearly 155 pounds of marijuana with intent to deliver. This assigned error is meritless.

V. CONCLUSION

We find no merit to Beal's assertions on appeal. We affirm.

AFFIRMED.

BISHOP, Judge, concurring.

I concur with the majority opinion affirming the district court's decision and sentence in this matter. However, I write separately to address the justification or choice of evils defense that Beal sought to raise at his bench trial. I agree that the trial court was correct to deny this defense to Beal; however, I disagree with the majority's analysis on this issue and have concerns that it will perpetuate continued attempts to raise this defense in similar circumstances when, in my opinion, the defense is legally unavailable for individuals charged with possession with intent to deliver marijuana.

The majority concludes that the defense was "factually unavailable to Beal" and declines to address whether the defense was "legally unavailable" and whether the "use of force [or threat of force] is [necessary as] a legal prerequisite to application of the . . . defense." It seems to me that if the statutes pertaining to this defense specifically require "use of force," then the justification defense is legally unavailable to a defendant charged with possession of marijuana with intent to deliver where it is conceded there has been no use of force by that defendant in committing the offense. The majority in this case, like that in the unpublished case from this court referred to by the majority, *State v. Thompson*, No. A-98-1371, 2000 WL 758767 (Neb. App. June 13, 2000) (not designated for permanent publication), concludes that the defense is factually unavailable to the defendant, in this case because "Beal did not identify any particular individuals who were at risk of immediately imminent harm" and Beal "did not establish that he was acting to prevent infliction of a specific and immediate harm to a reasonably identifiable victim. Rather, he demonstrated general moral opposition to illegalization of marijuana because of his belief in its medicinal benefits." My concern is that trial courts and litigants may view this decision, along with *Thompson*, as suggesting that the justification defense may have merit in these cases if a proper factual basis exists. Based on the plain language of

our statutes, I do not believe our Legislature has authorized an application of the justification statutes to marijuana possession offenses.

The justification statutes fall under chapter 28 (titled "Crimes and Punishments"), article 14 (titled "Noncode Provisions"), at subpart (b) under the heading "Justification for Use of Force," and can be found in Neb. Rev. Stat. §§ 28-1406 through 28-1416 (Reissue 2008 & Cum. Supp. 2012). Section 28-1406(4) states that "[a]ctor shall mean any person *who uses force* in such a manner as to attempt to invoke the privileges and immunities afforded him by sections 28-1406 to 28-1416, except any duly authorized law enforcement officer of the State of Nebraska or its political subdivisions." (Emphasis supplied.) Section 28-1407(1) states in relevant part, "Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if: (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." Section 28-1409 is titled "Use of force in self-protection," § 28-1410 is titled "Use of force for protection of other persons," § 28-1411 is titled "Use of force for protection of property," § 28-1412 is titled "Use of force in law enforcement," and § 28-1413 is titled "Use of force by person with special responsibility for care, discipline, or safety of others." Given that use of force is found in the heading of the statutory section on justification, in the definition of "actor," and throughout the justification statutes, I would affirm the trial court's denial of this defense to Beal, but on the ground that the defense is legally unavailable to a defendant charged with possession of marijuana with intent to deliver.

The Nebraska Supreme Court recently reminded us that "[i]t is not within the province of the courts to read a meaning into a statute that is not there *or to read anything direct and plain out of a statute*." *State v. Medina-Liborio*, 285 Neb. 626, 631, 829 N.W.2d 96, 100 (2013) (emphasis supplied). 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. *State v. Sikes*, 286 Neb. 38,

834 N.W.2d 609 (2013). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008). I do not see how we can read "use of force" or "[a]ctor shall mean any person who uses force," see § 28-1406(4), out of §§ 28-1406 through 28-1416. This is a marijuana possession with intent to deliver case. It does not involve the use of force, and accordingly, the "Justification for Use of Force" statutes are legally unavailable to Beal. In my opinion, that should be the end of our judicial inquiry on that issue.

STATE OF NEBRASKA, APPELLEE, V.
CHRISTOPHER D. ELLIOTT, APPELLANT.
845 N.W.2d 612

Filed April 22, 2014. No. A-13-522.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
3. ____. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
4. ____. It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
5. **Criminal Attempt: Weapons: Sentences.** Attempted use of a deadly weapon to commit a felony is not a crime defined in Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2012), and therefore, it does not carry a mandatory consecutive sentence.
6. **Sentences.** It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively.
7. ____. The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count and whether some additional evidence is required to prove one of the other offenses.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Christopher D. Elliott appeals his plea-based convictions of robbery and attempted use of a firearm to commit a felony. Elliott asserts that the district court abused its discretion by imposing excessive sentences and ordering his sentences to be served consecutively. Finding no merit to Elliott's assigned errors, we affirm.

II. BACKGROUND

On November 5, 2012, the State filed an information in the district court for Lancaster County charging Elliott with robbery, a Class II felony, and use of a firearm to commit a felony, a Class IC felony. Pursuant to a plea agreement, the State amended the use of a firearm charge to attempted use of a firearm, a Class II felony, and agreed not to file any additional charges arising out of this incident. Elliott entered a plea of guilty to robbery and a plea of no contest to attempted use of a firearm to commit a felony.

Before accepting his pleas, the district court thoroughly advised Elliott regarding the rights he was waiving and the potential penalties he faced, all of which Elliott indicated he understood. The court initially advised Elliott that the sentence imposed for attempted use of a firearm would be ordered to run consecutively to the sentence imposed for robbery. However, the district court later changed its advisement after Elliott's counsel requested clarification on the issue. The following exchange occurred:

> [Defense counsel]: . . . I think when you told [Elliott] what the penalty was, you advised him that the penalty on Count II had to be consecutive to Count I. I advised him that that penalty could be concurrent or consecutive. It's not a use — it's an attempted use — and that it was in your discretion whether you ran that concurrently or consecutively.

> So I wanted to clarify that with my client because I told him a little differently.
>
> THE COURT: And you are accurate on an attempt. You are accurate. It could either be concurrent or consecutive, the sentence.

The State provided a factual basis to support the pleas, as summarized below:

Shortly after 5 a.m. on August 3, 2012, Lincoln Police received a report of a home invasion robbery near 15th and Whittier Streets in Lincoln, Lancaster County, Nebraska. Upon arrival, officers observed two men fleeing from the back of the residence. Both men were apprehended after a short foot pursuit; they were identified as Elliott and Clyde Flemons. A third suspect was believed to have driven off.

Officers made contact with one of the victims, Amon Whitlow, who was bleeding due to injuries on his forehead and lip as well as an open laceration on the top rear portion of his head. Whitlow reported that he was going out to his car to go to work around 5 a.m. when Elliott approached him and asked "to borrow his phone." Elliott then pulled out a gun, which Whitlow described as "a short Tech 9 or oozie-style firearm" with a clip and shoulder strap. Flemons approached from the south side of the house and pointed a small silver- or chrome-colored gun at Whitlow. A third, unidentified male also approached.

Elliott and Flemons began hitting Whitlow in the head with their guns and fists and then led him inside the house, demanding to know where money and marijuana were located. Whitlow told them he did not sell marijuana any more, but they continued beating him and threatened to kill him and his family. Whitlow's wife, who was 8 months pregnant at the time, was forced to take one of the men through the house to search for money and drugs. At one point, Flemons grabbed Whitlow's 2-year-old son, pointed a gun at the child's head, and threatened to shoot him. Whitlow's wife grabbed the child from Flemons and retreated to a back bedroom, where she and her five children escaped out a window. Meanwhile, a struggle ensued between Elliott and Whitlow. Elliott fired his weapon, but Whitlow was not struck. Whitlow gave the men

approximately $2,400 that he and his wife had been saving for a trip. They took the money, and Whitlow was able to escape "out the back."

Officers located a .45-caliber shell casing in the living room of the residence and discovered that the bullet had traveled through the living room floor and the basement ceiling and was lodged in the wall of one of the children's bedrooms. Officers also recovered two firearms: (1) a black .45-caliber "ACP MasterPiece Arms machine pistol" with a loaded magazine and a round in the chamber, "located near . . . Elliott" and similar to the "oozie-style firearm" that Whitlow described, and (2) a black 9-mm pistol with five rounds in the magazine and one in the chamber, located in the backyard of a nearby residence where Flemons ran during the foot pursuit. Officers also found blood spatters in the residence that corresponded with Whitlow's statement describing the incident.

Elliott was interviewed by law enforcement. He initially denied any involvement in the robbery, but eventually acknowledged that he and two other men went to the house with the intent to rob the owner, who was rumored to be a drug dealer in possession of $20,000 cash. Elliott maintained, however, that he brought only pepper spray to the residence and that he had been downstairs when the firearm discharged.

The district court accepted Elliott's pleas and found him guilty beyond a reasonable doubt of both offenses. Elliott was sentenced to 15 to 20 years' imprisonment for robbery and 4 to 6 years' imprisonment for attempted use of a firearm to commit a felony, to be served consecutively. Elliott timely appeals.

III. ASSIGNMENTS OF ERROR

Elliott assigns two errors on appeal. He alleges the district court abused its discretion by (1) imposing excessive sentences and (2) ordering his sentences to be served consecutively.

IV. STANDARD OF REVIEW

[1] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012).

V. ANALYSIS

1. Excessive Sentences

The crimes of which Elliott was convicted are Class II felonies, punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. Neb. Rev. Stat. §§ 28-105, 28-201(4)(a), and 28-1205(1)(c) (Cum. Supp. 2012). Elliott's sentences are well within the statutory limits, and he received a substantial benefit from the plea agreement reached with the State. As originally charged, Elliott faced a Class IC felony, punishable by a mandatory minimum of 5 years' imprisonment and a maximum of 50 years' imprisonment. See §§ 28-105 and 28-1205(1)(c). The original charge also required a consecutive sentence. See § 28-1205(3).

Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010). When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *Id*. But the appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

Elliott was 21 years old at the time of sentencing. The presentence report reflects that Elliott's criminal activity began in 2006, when he was just 15 years old. He was charged in juvenile court for disturbing the peace, but the case was later dismissed. In 2007, Elliott was adjudicated for two counts of unauthorized use of vehicles. He was committed to a youth rehabilitation and treatment center and escaped from that facility less than 2 months later. Elliott's adult convictions include

obstructing a police officer and two counts of attempted criminal mischief involving $1,500 or more.

Although his criminal history is relatively minor, the present offenses are very serious and were committed in an extremely violent manner. The evidence shows that Elliott was an active participant in an armed robbery during which Whitlow was badly beaten and the lives of Whitlow's pregnant wife and 2-year-old child were threatened at gunpoint. Elliott wielded an automatic machine pistol during the robbery and fired a shot during a struggle with Whitlow.

Elliott argues on appeal that the trial court failed to give adequate weight to mitigating circumstances, including his age, lack of a significant criminal history, lack of any criminal history involving violence, drug and alcohol addiction and mental health problems, strong family ties and support, obligations as a father, willingness to accept responsibility for his actions, and demonstrated remorse for his involvement in the offense. However, all of this information was presented to the district court before it imposed Elliott's sentences. The district court indicated that it considered the presentence report, as well as the comments provided at sentencing and the applicable statutes. There is no evidence that the district court failed to properly consider all of the relevant factors in imposing Elliott's sentences.

Given the serious and violent nature of these offenses, we cannot say that the district court abused its discretion by imposing sentences within the statutory limits.

2. Consecutive Sentences

(a) Attempted Use of Firearm Does Not Require Consecutive Sentence

In his second assignment of error, Elliott asserts that the district court abused its discretion by ordering his sentences to be served consecutively. He argues that one of the potential benefits of his plea agreement was that it reduced the use of a firearm charge, a conviction of which carried a mandatory consecutive sentence, to attempted use of a firearm, which permitted the court to impose concurrent sentences. Elliott

argues that concurrent sentences are appropriate because both offenses arose out of a single transaction.

At the plea hearing, the judge initially advised Elliott that the sentence imposed on count II would be ordered to run consecutively. Defense counsel then reminded the judge that the use of a firearm charge had been amended to attempted use and stated that a consecutive sentence was not mandatory. The judge agreed, stating, "It could either be concurrent or consecutive, the sentence."

Counsel has not provided us with any authority that governs whether a sentence for attempted use of a firearm must be served consecutively, as required by § 28-1205(3), or whether it can be ordered to be served concurrently, and our research has not disclosed any. Therefore, this appears to be a question of first impression.

Section 28-1205(3) provides that crimes of use or possession of a firearm are separate offenses from the felony being committed and that therefore, the sentence imposed shall be consecutive to any other sentence imposed. Had Elliott been convicted of the original charge of use of a firearm to commit a felony, the sentencing judge would have been statutorily required to order consecutive sentences. The State reduced the use charge, however, to attempted use pursuant to § 28-201(4)(a).

Section 28-1205(1)(a) defines the offense of use of a deadly weapon to commit a felony, and § 28-1205(2)(a) defines the offense of possession of a deadly weapon during the commission of a felony. The language of § 28-1205(3) states: "The crimes *defined in this section* shall be treated as separate and distinct offenses from the felony being committed, and sentences imposed *under this section* shall be consecutive to any other sentence imposed." (Emphasis supplied.)

[2-5] Statutory language is to be given its plain and ordinary meaning. *State v. Ohlrich*, 20 Neb. App. 67, 817 N.W.2d 797 (2012). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Id.* It is not within the province of a court to read a meaning into a statute that is not warranted by the

language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). Applying the plain language of the statute as written in § 28-1205(3), it is only those "crimes defined in this section" that are treated as distinct offenses from the felony committed, and only the "sentences imposed under this section" that are required to be consecutive to any other sentence imposed. When the State amended its charge to attempted use of a firearm to commit a felony, the State was no longer proceeding under § 28-1205, but, rather, was charging Elliott under § 28-201. Therefore, Elliott did not plead to a crime defined under § 28-1205 and the sentence imposed was not a sentence imposed under § 28-1205. As a result, the sentencing judge was not statutorily required to impose a consecutive sentence.

We are mindful that the legislative purpose in enacting § 28-1205 was to discourage individuals from employing and carrying deadly weapons while they commit felonies, in order to prevent the threat of violence and accompanying danger to human life present whenever one has a deadly weapon during the commission of a felony. *State v. Miller*, 284 Neb. 498, 822 N.W.2d 360 (2012); *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999). Applying the statute to attempted use of a firearm may, in many circumstances, be consistent with and in furtherance of this purpose. However, "[i]t is the province of the legislative branch, not the judiciary, to define criminal offenses within constitutional boundaries. '[J]udicial construction is constitutionally permissible, but judicial legislation is not.'" *State v. Smith*, 282 Neb. 720, 732, 806 N.W.2d 383, 393 (2011), quoting *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998) (Wright, J., concurring; Connolly and Gerrard, JJ., join). To include the crime of attempted use of a firearm to commit a felony within the confines of § 28-1205 would be judicial legislation.

Elliott did not plead to either use of a firearm or possession of a firearm. Under the plain language of § 28-1205, absent one of those two crimes, a consecutive sentence is not required. Therefore, we conclude that the sentencing judge

was not required to impose a consecutive sentence in this case. We must therefore determine whether he abused his discretion in doing so.

(b) Trial Court Did Not Abuse Its Discretion by Imposing Consecutive Sentences

[6,7] It is within the discretion of the trial court to direct that sentences imposed for separate crimes be served consecutively. *State v. Andersen*, 238 Neb. 32, 468 N.W.2d 617 (1991). The test of whether consecutive sentences may be imposed under two or more counts charging separate offenses, arising out of the same transaction or the same chain of events, is whether the offense charged in one count involves any different elements than an offense charged in another count and whether some additional evidence is required to prove one of the other offenses. See *id*.

Here, it is clear that robbery and attempted use of a firearm to commit a felony are separate offenses containing different elements. See §§ 28-201 and 28-1205 and Neb. Rev. Stat. § 28-324 (Reissue 2008). Additional evidence is necessary to prove the elements of attempted use of a firearm than that which is necessary to prove the elements of robbery. Thus, it was in the district court's discretion to impose consecutive rather than concurrent sentences for the separate crimes. The sentencing judge recognized this discretion and agreed with defense counsel's statement that the sentence on the attempt charge could be either concurrent with or consecutive to the sentence for robbery. Based upon the facts set forth above, we find no abuse of discretion in the trial court's order of consecutive sentences.

VI. CONCLUSION

Because the crime of attempted use of a firearm to commit a felony is not included in § 28-1205, it does not carry a mandatory consecutive sentence. However, because it is a separate crime from robbery, the district court had discretion to impose consecutive sentences. The district court did not abuse its discretion in imposing Elliott's sentences. Accordingly, we affirm.

AFFIRMED.

In re Guardianship & Conservatorship of Thomas L. Herrick, a protected person. Todd A. Herrick, appellant, v. Tina M. Paulsen, appellee.

846 N.W.2d 301

Filed April 29, 2014. No. A-12-962.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
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. ____: ____. An appellate court, in reviewing a judgment of the trial court for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Judgments: Jurisdiction.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law.
6. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
7. **Standing.** Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself.
8. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
9. ____: ____. The defect of standing is a defect of subject matter jurisdiction.
10. **Parties: Standing: Jurisdiction.** The issue of standing is jurisdictional; a party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.
11. **Courts: Parties: Justiciable Issues: Words and Phrases.** The capacity to sue is the right to come into court. A party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.
12. **Rules of the Supreme Court: Pleadings.** Under Nebraska's pleading rules, a party wishing to raise the issue of whether another party has the necessary capacity must specifically deny that the opposing party has capacity.

13. **Courts: Parties: Jurisdiction.** Unlike standing, a party's capacity to sue or be sued is not jurisdictional; however, lack of capacity deprives a party of the right to come into court.
14. **Standing: Moot Question.** A plaintiff's personal interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter.
15. **Moot Question: Appeal and Error.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
16. ____: ____. A case is not moot unless a court cannot fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances.
17. **Parties: Jurisdiction: Waiver.** Because a party's capacity to sue or be sued is not jurisdictional, a challenge to a party's capacity must be brought at the earliest opportunity or it is waived.
18. **Parties: Proof.** The party seeking to raise the issue that a party has lost capacity during the course of litigation bears the burden of establishing that the party raised such issue at the first opportunity, thereby properly preserving it.
19. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the County Court for Dawson County: CARLTON E. CLARK, Judge. Affirmed.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

Nathan T. Bruner, of Greenwall, Bruner & Frank, L.L.C., for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

This appeal was filed by Todd A. Herrick (Todd), the proposed successor conservator of Thomas L. Herrick (Herrick), alleging that the Dawson County Court erred in certain determinations regarding the challenge of the inventory of Herrick's estate filed by the original conservator, Tina M. Paulsen.

II. STATEMENT OF FACTS

Herrick is the protected person in this case. Todd is Herrick's son, and Paulsen is Herrick's daughter. In September 2010,

Herrick suffered a stroke resulting in his incapacity. Paulsen was appointed as the original conservator, and Todd was appointed as the original guardian.

On June 6, 2011, Paulsen filed an "Accounting of the Protected Party's Assets and Liabilities" in which she listed a 2007 Hummer H3 owned by Herrick as an asset valued at $16,700. On June 7, the county court sustained Paulsen's motion to sell Herrick's assets, personal property, and real estate. Paulsen and her husband, William Paulsen, traveled to Herrick's home in Lexington, Nebraska, to pick up Herrick's Hummer and return it to their home in Aberdeen, South Dakota. When Paulsen retrieved the Hummer, it was locked in Herrick's garage and had a "shorted out" battery. Paulsen and William replaced the battery in the Hummer before returning to South Dakota. The Hummer was smoking when they picked it up and continued smoking, and the engine ran sluggishly during the trip back to South Dakota. After arriving in South Dakota, William drained the oil from the Hummer's engine and found that the oil was sludge and had clumps in it.

Shortly thereafter, Paulsen took the Hummer, which had not been driven since being brought to South Dakota, to a local Aberdeen automobile repair shop owned by Brad Brake. Brake inspected the Hummer and provided Paulsen with an estimate for the cost of repairing the Hummer. Brake indicated that the "[e]ngine light was on" and that the Hummer was "[using] oil and smoking" and needed "lots of [e]ngine work." Brake estimated the cost for repair at "about" $4,900. Paulsen testified that she checked the "cars.com" and Kelley Blue Book Web sites between May 1 and July 1, 2011, and determined that the value of the Hummer was between $9,000 and $12,000. On July 1, Paulsen sold the Hummer to Brake for $4,200, which price reflected a $4,900 discount for the cost of necessary repairs. At the time of the sale to Brake, the Hummer had 58,307 miles and had been driven less than 2,000 miles from the time it was originally purchased by Herrick in March 2010.

In February 2012, Paulsen filed an accounting of Herrick's assets and liabilities. On February 15, Todd, in his capacity

as the original guardian, filed an application for complete accounting, surcharge, and indemnification, alleging that the accounting filed by Paulsen was insufficient and that Paulsen sold the Hummer for substantially less than its fair market value. Todd requested in the application that Paulsen be surcharged or required to indemnify Herrick's estate. Paulsen filed an updated inventory/annual accounting on April 4, which did not list the Hummer as an asset and to which Todd objected. A hearing was held on April 9, which was continued on June 25. The issues raised by Todd on appeal center around the sale of the Hummer. Consequently, we focus our factual synopsis around that testimony and evidence concerning the Hummer.

The evidence established that on March 2, 2010, Herrick purchased a used Hummer with 56,870 miles for $18,400 from Plum Creek Motors in Lexington. The office manager at Plum Creek Motors testified that although used vehicles are sold "'as is,'" if the vehicle has a manufacturer's warranty, the warranty transfers to the subsequent owner of the vehicle.

The Hummer that Herrick purchased had a "five-year or 100,000 mile factory power train warranty" that transferred to Herrick upon his purchase of the Hummer. The warranty "would cover the engine, transmission, drive train, [and] the four-wheel drive system." The beginning of warranty coverage is determined by the "in-service date" of the vehicle. The "in-service" date, and start of the warranty coverage, applicable to Herrick's Hummer was January 12, 2007. Thus, according to the office manager, if something had been wrong with the Hummer's engine in July 2011, the issue would have been covered by warranty, provided that the Hummer was still within the applicable mileage limits and no other exceptions applied. For example, she testified that the warranty does not apply to vandalism to vehicles and that the warranty might not apply if an engine has been tampered with; however, the decision of whether a warranty would apply would be made by someone else at the dealership.

Paulsen admitted that she did not take the Hummer to the General Motors dealership in Aberdeen to determine why the vehicle was smoking or whether any necessary repairs would

have been covered by warranty. Paulsen testified that she did not consult with a General Motors dealership to determine if the Hummer was under warranty and that she assumed because the Hummer was a used vehicle, the factory warranty would not have been transferred to Herrick because he was a successive owner. Instead, she initially relied upon her husband, William, to determine what was wrong with the Hummer, then she took the Hummer to Brake's shop for a repair estimate. Paulsen testified that she has taken her personal vehicles to Brake's shop for repairs on three occasions and that he is not a friend or a relative of hers.

William testified that he had attended mechanic's college for 1 year and that although he did not graduate from that program, he has experience rebuilding and repairing engines and has worked with engines for over 30 years. William performed a compression check on the engine, which is a test to verify the physical condition of the engine's rings, pistons, valve seats, and valves. William testified that the readings for the Hummer from the compression check were "very bad," that the condition of the oil "would be typical of a vehicle if it had never had its oil changed in 48,000 miles," and that "clean oil, without being tampered with, does not get clumps in it and turn to road tar." William testified that Herrick had a history of properly maintaining his vehicles, so the condition of the oil as he found it would not have been that way prior to Herrick's stroke. William testified that relying on the tests he performed on the Hummer, he had reached the conclusion that the cause of the Hummer's condition was one of two things: that the engine oil had never been changed for the life of the vehicle and was sold to Herrick in that condition or that the vehicle was tampered with after it came into Herrick's possession. William testified that if a vehicle either is not maintained or is tampered with, there is no warranty coverage. Both Paulsen and William testified that after William researched whether the Hummer was covered by the manufacturer's warranty, they concluded that the manufacturer's warranty did not cover the Hummer's engine damage. However, in an answer to a request for admissions, Paulsen provided that "it is unknown if the warranty [on the Hummer]

was still in effect under the conditions that the vehicle was in on or before July 1, 2011."

Thomas Feltes, the owner and general manager of Plum Creek Motors since 1997, testified that Manheim was the largest wholesale automobile auction company in the country at that time and that it sells used vehicles to registered dealers nationwide. Feltes testified that Plum Creek Motors purchased vehicles from Manheim "from time to time," so Feltes was familiar with, and frequently used, a service Manheim provides called the Manheim Market Report (MMR). The MMR lists a vehicle and then gives the prices that the same model of vehicle has sold for during the timeframe indicated based upon the vehicle's mileage and condition—below average, average, or above average. Feltes testified that the MMR shows what a given model of vehicle would be worth in the market and that the MMR value is an average of similar vehicles which have actually sold at Manheim's auctions. The MMR printout states that for the week ending on April 4, 2012, in the Midwest region, which includes Nebraska and South Dakota, there were 14 2007 Hummers in average condition which were sold for an average sale price of $17,188 with an average odometer reading of 63,705 miles. The MMR printout projected that between April 9 and 16, a 2007 Hummer H3 of average condition would sell for $18,500, with the same projected sale price listed for 1 year later in April 2013. For the week ending April 4, 2012, nationwide, there were 99 2007 Hummer H3's in average condition which were sold through Manheim's auctions for an average sale price of $16,388 with an average odometer reading of 72,973 miles. This same MMR projected that between April 9 and 16, the sale price for a 2007 Hummer in above-average condition would be $19,800, in average condition would be $17,600, and in below-average condition would be $15,400. This MMR also projected that 1 year later, in April 2013, a 2007 Hummer of average condition would sell for $17,600 at auction.

Another MMR report was admitted into evidence for the time period ending in early February 2012. For the week ending February 4, there were 12 2007 Hummer H3's sold in the

Midwest region, with those in average condition selling for an average sale price of $15,839 with an average odometer reading of 74,687 miles. The report projected that between February 9 and 16, a 2007 Hummer H3 in average condition would sell at auction for $17,850, with a projected sale price 1 year later, in February 2013, of $16,900. For the week ending February 1, 2012, nationally, there were 67 2007 Hummer H3's sold, with those in average condition selling at an average sale price of $15,352 with an average odometer reading of 77,254 miles. This same report projected that between February 6 and 13, a 2007 Hummer H3 in average condition would sell at auction for $17,200 and that 1 year later, in February 2013, it would sell for $16,250.

Feltes testified that the impact that the vehicle's smoking would have on the fair and reasonable market value of Herrick's Hummer in July 2011 would depend on what was causing Herrick's Hummer to smoke. According to Feltes, if an internal engine failure of some sort was causing the Hummer to smoke, that would be covered under the vehicle's warranty and would be repaired at no cost. If the owner of the vehicle were to bear the cost of a total engine replacement, it could run $5,000 to $6,000. Feltes further testified that a vehicle as new as Herrick's Hummer would still have "considerable value" even if it had a bad engine.

On August 23, 2012, the Dawson County Court entered an order finding that Paulsen's accounting showed an inventory value of $16,700 for the Hummer on June 6, 2011, and that on July 1, she sold the same vehicle for $4,200. The court found that the fair market value of the vehicle was $13,300 and that there were necessary repairs on the vehicle in the amount of $4,900. The court found that Paulsen should be surcharged $4,200 for the unrecovered value of the vehicle. Although the court's order noted that Paulsen's accounting was insufficient and incomplete, the court determined that it was in the best interests of both Herrick and his estate for the accounting to be approved as submitted with the surcharge.

The court's order also accepted Todd's resignation as the original guardian and appointed Herrick's brother as successor guardian. The order accepted Paulsen's resignation as

original conservator and provided that "Todd . . . is hereby appointed as successor conservator for . . . Herrick to serve without bond. That letters of conservatorship are hereby issued and approved upon his filing the acceptance and other documents for his appointment." However, an affidavit filed by the Dawson County Court clerk magistrate set forth that Todd never filed an acceptance of his appointment as successor conservator and that no letters of appointment were ever issued.

Despite his failure to accept his appointment as successor conservator, Todd, on August 29, 2012, purportedly acting in his capacity as successor conservator, filed a motion to alter or amend the court's journal entry on the basis that the surcharge imposed upon Paulsen was inconsistent with the evidence presented. A hearing was held on the motion to alter or amend on September 18, but neither party requested that a bill of exceptions be prepared for this hearing. Thus, our only information regarding the hearing on Todd's motion to alter or amend comes from the transcript. The transcript reveals that despite the fact the hearing was being held on his motion, Todd's counsel did not appear at the hearing, and that the hearing was attended by Paulsen's counsel. No evidence was presented in support of the motion, and the matter was submitted without argument. The motion was overruled by the court on October 9. Thereafter, Todd, again purportedly acting in his capacity as successor conservator, appealed to this court, contending that the county court erred in finding that Herrick's Hummer required $4,900 worth of repairs and reducing its fair market value by that amount, in finding that the Hummer's fair market value was $13,300 when Paulsen sold it, and in the amount surcharged to Paulsen.

Upon this appeal being filed with this court, Paulsen filed a motion to dismiss for lack of jurisdiction for the reason that Todd was not authorized to file the appeal as successor conservator because he had never filed an acceptance of the appointment and, thus, he lacked standing to seek any legal remedies on behalf of the protected person, Herrick. We denied Paulsen's motion for summary dismissal, but reserved

ruling on the issue of standing and ordered the parties to address the issue of standing in their briefs to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Todd contends that the county court erred in the amount surcharged to Paulsen. Specifically, he contends that the county court erred (a) in finding that the Hummer had a fair market value of $13,300 when Paulsen sold it and (b) in finding that the Hummer required $4,900 in repairs and reducing its fair market value by that amount.

IV. STANDARD OF REVIEW

[1-3] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Conservatorship of Gibilisco*, 277 Neb. 465, 763 N.W.2d 71 (2009); *In re Guardianship & Conservatorship of Cordel*, 274 Neb. 545, 741 N.W.2d 675 (2007). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. An appellate court, in reviewing a judgment of the trial court for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings. *In re Guardianship of Gaube*, 14 Neb. App. 259, 707 N.W.2d 16 (2005).

V. ANALYSIS

1. Jurisdiction

[4,5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012). Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law. *Id*. In this case, there is a question of whether Todd had the capacity to bring the instant appeal.

[6-10] Initially, it is important to set forth the difference between standing and capacity to sue. Although the concepts

of standing and capacity to sue are related, they are distinct: Capacity to sue is the right to come into court, whereas standing to sue is the right to relief in court. See *Smith v. Cimmet*, 199 Cal. App. 4th 1381, 132 Cal. Rptr. 3d 276 (2011). Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 281 Neb. 992, 801 N.W.2d 253 (2011). Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. *In re Application A-18503*, 286 Neb. 611, 838 N.W.2d 242 (2013); *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res., supra*. The focus is on the party, not the claim itself. *Id.* Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. *Id.* The defect of standing is a defect of subject matter jurisdiction. *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013); *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009). Thus, the issue of standing is jurisdictional; a party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding. *In re Application A-18503, supra*; *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res., supra*.

[11] In contrast, the capacity to sue is the right to come into court. A party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy. *Carlos H. v. Lindsay M., supra*. The "'legal capacity to sue or be sued'" generally refers to the status of the party. *A Plus Janitorial Co. v. Group Fox, Inc.*, 2013 IL App (1st) 120245, 406, 988 N.E.2d 178, 182, 370 Ill. Dec. 402, 406 (2013). Examples of lack of capacity include infancy and mental incompetency. See *Carlos H. v. Lindsay M., supra* (minor lacks capacity to bring action); *Dafoe v. Dafoe*, 160 Neb. 145, 69 N.W.2d 700 (1955) (denying son right to bring lawsuit as "next friend" of his father where evidence presented did not

sustain conclusion that father was mentally incompetent to bring lawsuit in his own behalf).

[12,13] Under Nebraska's pleading rules, a party wishing to raise the issue of whether another party has the necessary capacity must specifically deny that the opposing party has capacity. *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012); Neb. Ct. R. Pldg. § 6-1109(a) (rev. 2008). Thus, unlike standing, a party's capacity to sue or be sued is not jurisdictional. See *Carlos H. v. Lindsay M., supra*. Because a lack of legal capacity is a legal disability that can be cured during the pendency of the litigation, *Washington Mut. Bank v. Blechman*, 157 Cal. App. 4th 662, 69 Cal. Rptr. 3d 87 (2007), it follows that a plaintiff's capacity to sue may also be lost subsequent to the filing of a complaint. See *Troester v. Sisters of Mercy Health Corp.*, 328 N.W.2d 308 (Iowa 1982) (it is proper to challenge plaintiff's capacity to sue by motion to dismiss based on facts that occurred subsequent to filing of petition); *Dumbaugh v. Cascade Mfg. Co.*, 264 N.W.2d 763 (Iowa 1978) (plaintiff, trustee in bankruptcy, had capacity to sue when suit was commenced; however, he lost capacity during pendency of case when he was discharged as trustee and bankruptcy estate was closed).

Having set forth the distinctions between standing and capacity to sue, we now consider their application to the instant case.

(a) Standing

[14] It is clear that Todd had standing at the inception of the instant case in February 2012, when the application for an accounting was filed, because he brought the action as the original guardian. See Neb. Rev. Stat. § 30-2628(2) (Cum. Supp. 2012) ("[w]ithout regard to custodial rights of the ward's person, a guardian shall take reasonable care of his or her ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his or her ward is in need of protection"). The issue of whether a plaintiff lost standing during a proceeding, even though he initially had standing, was considered, and rejected, by the Nebraska Supreme Court in *Myers v.*

Nebraska Invest. Council, 272 Neb. 669, 724 N.W.2d 776 (2006). In rejecting the notion that standing had been lost, the court set forth that a plaintiff's personal interest "'is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter.'" *Id.* at 682-83, 724 N.W.2d at 792.

Pursuant to *Myers v. Nebraska Invest. Council, supra*, because standing is determined at the commencement of the litigation, Todd, as the original guardian, clearly had standing at the time that he filed the application for complete accounting, surcharge, and indemnification in the county court, which was the commencement of litigation in this case.

[15,16] Furthermore, the issues presented in the application for accounting and raised in this appeal have not become moot. A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Glantz v. Daniel, ante* p. 89, 837 N.W.2d 563 (2013); *Muzzey v. Ragone*, 20 Neb. App. 669, 831 N.W.2d 38 (2013). A case is not moot unless a court cannot fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances. *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009). Clearly, the issues presented regarding the county court's determination surcharging Paulsen are still alive, some meaningful relief could be fashioned, and this case is not subject to dismissal for mootness.

(b) Capacity

[17,18] Having determined that Todd had standing at the inception of this action and that he did not lose standing, we proceed to consider whether he had the capacity to sue and to bring this appeal. Todd's failure to file an acceptance of his appointment as conservator was brought to this court's attention by Paulsen in a motion for summary dismissal, although

the issue was couched under the rubric of "standing" rather than "capacity to sue." However, because a party's capacity to sue or be sued is not jurisdictional, a challenge to a party's capacity must be brought at the earliest opportunity or it is waived. See *Smith v. Cimmet*, 199 Cal. App. 4th 1381, 1390, 132 Cal. Rptr. 3d 276, 282 (2011) ("[a] challenge to a party's capacity must be brought at the earliest opportunity or the challenge is forfeited"). After resigning as Herrick's guardian, Todd, purportedly acting in his capacity as successor conservator, filed a motion in the county court to alter or amend. Although Todd had not filed an acceptance of his appointment of successor conservator at the time this motion was filed, we are unable to discern, due to the lack of a bill of exceptions from the hearing on Todd's motion to alter or amend, whether Paulsen challenged Todd's authority to act in that capacity at that time. Because under Nebraska's pleading rules a party who wishes to raise the issue of whether another party has the necessary capacity must specifically deny that the opposing party has capacity, *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012), it follows that the party seeking to raise the issue that a party has lost capacity during the course of litigation bears the burden of establishing that the party raised such issue at the first opportunity, thereby properly preserving it. Because Paulsen cannot establish that she challenged Todd's authority at the earliest opportunity, i.e., before the county court at the hearing on Todd's motion to alter or amend, and because standing to sue is not jurisdictional, she has waived any objection to his lack of capacity. Therefore, we proceed to address the merits of this appeal as raised in Todd's assignments of error.

2. Merits of Appeal

Having determined that Todd has standing to pursue this appeal and that Paulsen waived any objections to Todd's capacity to sue, we proceed to consider the errors assigned by Todd. Todd contends that the county court erred in the amount surcharged to Paulsen. Specifically, he contends that the county court erred (a) in finding that the Hummer had a

fair market value of $13,300 when Paulsen sold it and (b) in finding that the Hummer required $4,900 in repairs and reducing its fair market value by that amount.

(a) Hummer's Fair Market Value

Todd contends that the value assigned to the Hummer by the county court was not supported by competent evidence, because although credible evidence was offered at trial that the fair market value of the Hummer was between $16,000 and $17,000 at the time Paulsen sold it, the court determined that the fair market value of the Hummer was $13,300 at the time of its July 1, 2011, sale to Brake.

The evidence established that on the June 6, 2011, inventory/accounting, Paulsen valued the Hummer at $16,700, but her trial testimony placed the Hummer's value between $9,000 and $10,000, based upon Internet research she conducted on the "cars.com" and Kelley Blue Book Web sites. Todd presented evidence that in April 2012, a 2007 Hummer in average condition with around 63,705 miles would sell at auction for an average sale price of $17,188.

An appellate court, in reviewing a judgment of the trial court for errors appearing on the record, will not substitute its factual findings for those of the trial court where competent evidence supports those findings. *In re Guardianship of Gaube*, 14 Neb. App. 259, 707 N.W.2d 16 (2005).

The county court heard the evidence and determined that the fair market value of Herrick's Hummer was $13,300. This amount is between the fair market value of the Hummer which was listed by Paulsen in her inventory at $16,700 and her trial testimony which placed the Hummer's value between $9,000 and $10,000. The county court's determination is supported by competent evidence and is neither arbitrary, capricious, nor unreasonable. As such, we accept the factual finding of the county court on this issue.

[19] We further note that Todd argues in his brief that the county court abused its discretion in failing to receive into evidence a printout from the Kelley Blue Book Web site showing the private party value of a 2007 Hummer H3 with 56,870 miles. However, Todd did not assign this as error. Errors

argued but not assigned will not be considered on appeal. *Butler County Dairy v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013).

(b) Repairs

Todd contends that the county court erred in finding that the Hummer required $4,900 in repairs and reducing its fair market value by that amount. He argues that Paulsen should have been surcharged this amount, because she breached her duty as conservator to comply with the "prudent investor rule" by failing to verify facts relevant to the repair of the Hummer, and that this breach resulted in the $4,900 diminishment of Herrick's estate.

Pursuant to Neb. Rev. Stat. § 30-2646 (Reissue 2008), a conservator is to act as a fiduciary and comply with the prudent investor rule set forth in Neb. Rev. Stat. §§ 30-3883 to 30-3889 (Reissue 2008). The prudent investor rule mandates that a conservator who is a fiduciary shall exercise reasonable care, skill, and caution in managing estate assets. § 30-3884(a). The prudent investor rule also requires a conservator to "make a reasonable effort to verify facts relevant to the investment and management of trust assets." § 30-3884(d). Compliance with the prudent investor rule is determined in light of the facts and circumstances at the time of the conservator's decision or action and not by hindsight. See § 30-3887.

Todd contends that Paulsen failed to make a reasonable effort to determine whether the Hummer's engine problems were covered by the warranty. Although the record is undisputed that Paulsen did not take the Hummer to a General Motors dealership to determine if the Hummer's engine problems were covered by the warranty, the evidence did establish that William researched the warranty issue and that he and Paulsen determined the Hummer's engine issues would not have been covered by the warranty. Paulsen then took the vehicle to an independent mechanic and obtained an estimate of the cost to repair the vehicle, which estimate was $4,900. She then chose to sell the Hummer and discount the price by the $4,900 in necessary repairs. The county court determined that the value of the necessary repairs should be subtracted

from the fair market value of the vehicle. The county court's determination is supported by competent evidence and is neither arbitrary, capricious, nor unreasonable. As such, we accept the factual finding of the county court on this issue.

VI. CONCLUSION

Having determined that we have jurisdiction over this appeal, we find that the decision of the county court conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. As a result, the decision of the county court is affirmed.

AFFIRMED.

DONALD L. BRITTAIN, APPELLANT, V. H & H CHEVROLET LLC AND MID-CENTURY INSURANCE COMPANY, APPELLEES.

845 N.W.2d 619

Filed April 29, 2014. No. A-13-384.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong.
2. **Workers' Compensation: Judgments: Appeal and Error.** Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts.
3. **Employer and Employee.** An activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the controversy before it.

Appeal from the Workers' Compensation Court: DANIEL R. FRIDRICH, Judge. Affirmed.

Joseph W. Grant and Michael R. Peterson, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellant.

Stacy L. Morris, of Lamson, Dugan & Murray, L.L.P., for appellees.

INBODY, Chief Judge, and PIRTLE and RIEDMANN, Judges.

PIRTLE, Judge.

INTRODUCTION

Donald L. Brittain appeals the order of dismissal issued by the Nebraska Workers' Compensation Court on April 10, 2013, in which the court found that Brittain's injury did not occur in the scope and course of his employment and that his injury did not arise out of his employment with H & H Chevrolet LLC (H&H). For the reasons that follow, we affirm.

BACKGROUND

Brittain worked as a lot porter for H&H, an automobile dealership located in Omaha, Nebraska. The owners of H&H purchased the dealership in January 2010, but Brittain had worked at the dealership's location for approximately 7 or 8 years. One of his job duties was to remove trash from the service building and dispose of it in Dumpsters located on the premises. Other duties included washing cars, sweeping floors, and driving people to locations and picking them up.

Brittain had a hobby which included scavenging discarded metal from various sources and selling it to a local scrapyard. He stored the metal in his home for approximately 3 months and then sold the metal to a recycling center, making about $20 to $30 per load.

On the morning of February 27, 2012, Brittain loaded a cart with two trash cans from the service building and wheeled the cart across the parking lot to a Dumpster. While dumping the trash, Brittain noticed a piece of metal in one of the trash cans. Brittain decided to salvage the piece of metal he found in the trash can that morning. He removed it from the can and began wheeling the cart back toward the service building.

Brittain stopped at his personal vehicle, a truck, to load the metal so he could take it home and sell it. Brittain stopped the cart near the front of his truck. Brittain testified that the parking lot was clear of snow and ice that day, except for the area near the back of his truck where H&H had piled plowed snow. Despite the snow and ice, Brittain walked toward the back of his truck to deposit the metal in the truck bed. Brittain's

onsite incident report stated he stood on a "block of ice" while trying to put something in the truck bed. He testified he unlocked the sliding back gate on his truck, put the metal in the truck bed, closed the gate, and locked it.

As Brittain finished loading the metal, he turned to go back to the front of the truck when he "caught some ice" and fell to the ground. He called on his radio for help, and a coworker responded. Brittain was found lying near his truck. Brittain told the worker that he had slipped and fallen on a "little chunk of ice." The worker called for medical attention, and Brittain sought treatment for an injury to his right hip. Brittain testified that had he not stopped to put this piece of metal in his truck, he would not have fallen.

Brittain had surgery to replace his right hip on May 23, 2012. Brittain testified that this hip had been giving him some discomfort prior to the fall and that it affected the way he made certain motions. Brittain previously had both hips replaced in 1988, and he had suffered a fall in 2009, after which he complained of hip pain.

Brittain was terminated from his employment with H&H after his 12 weeks of family medical leave expired. There was no reason disclosed by H&H for ending his employment, and he was not otherwise disciplined in relation to his fall.

H&H's employee handbook included provisions prohibiting "outside employment" and taking "new and used parts" from the premises. Brittain stated that he is unable to read very well, but that he had his wife read the handbook to him. He signed an acknowledgment that he had read and would abide by the terms of the handbook. He testified he did not feel he was breaking any rules by removing the metal pieces from the H&H premises.

Brittain further testified that an employee named "John" recycled items from H&H. Brittain stated that he never talked to John about it, but that he knew John was taking metal from H&H because he watched John load the metal into his car. Brittain testified that he did not seek permission from H&H to do the same.

Steve Hinchcliff, the president and chief executive officer of H&H, testified that John was an employee who worked for

a different dealership prior to H&H's purchase of that business. Hinchcliff testified that John had specifically sought permission to recycle certain metal parts as he continued his employment with H&H. Hinchcliff testified that John was allowed to take certain metal items, on his own time, with permission. Hinchcliff testified that there were no other employees, to his knowledge, who asked for, or were given, the same permission. He testified that Brittain did not have permission to remove parts from the premises.

Brittain sought workers' compensation benefits for temporary total disability; past, current, and future hospital and medical expenses; penalties; interest; and attorney fees.

The parties stipulated that Brittain was an employee of H&H on February 27, 2012; Douglas County was the proper venue for this case; Brittain's average weekly wage was $381; and he provided notice of the accident as required by Neb. Rev. Stat. § 48-133 (Reissue 2010).

The Workers' Compensation Court issued an order of dismissal on April 10, 2013. The court found Brittain had no work-related business for being at his truck on his way back from emptying the trash cans. The court found that Brittain knew there was ice by his truck and chose to stop there, even though there was no ice anywhere else in the lot. The court further found Brittain substantially deviated from his employment and was no longer in the course and scope of his employment when he was injured, and the court dismissed Brittain's petition with prejudice. Brittain timely appeals.

ASSIGNMENTS OF ERROR

Brittain asserts the court erred in finding that the accident did not occur in the scope and course of his employment and that his injury did not arise out of his employment. Brittain also asserts the court erred in failing to award temporary disability benefits, hospital and medical benefits, penalties, interest, and attorney fees.

STANDARD OF REVIEW

[1] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, a

higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong. *Cervantes v. Omaha Steel Castings Co.*, 20 Neb. App. 695, 831 N.W.2d 709 (2013).

[2] Where there is no factual dispute, the question of whether the injury arose out of and in the course of employment is clearly one of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior courts. *Misek v. CNG Financial*, 265 Neb. 837, 660 N.W.2d 495 (2003).

ANALYSIS

According to the Nebraska Revised Statutes:

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

Neb. Rev. Stat. § 48-101 (Reissue 2010).

Brittain asserts the trial court erred in finding his injury was not compensable, because the trial court found the accident did not arise out of his employment nor did the accident occur in the course of his employment with H&H.

Course of Employment.

The "in the course of" requirement of § 48-101 has been defined as testing the work connection as to the time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. *Misek v. CNG Financial, supra*; *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

Here, the court reasoned that Brittain had "no work[-]related business for being at his truck," as he stopped at his truck to drop off the scrap metal he intended to sell. The court stated that straying from the path between the service center and the Dumpster constituted a substantial deviation from Brittain's

employment, because the task was performed for personal benefit rather than to fulfill the requirements of his position at H&H.

Brittain asserts that he was performing the duties of his position by removing the trash, putting some in the Dumpster, and putting the metal scraps into his truck. Brittain also asserts that he was not violating specific instructions, that he was still fulfilling the duties of his position, and that therefore, his actions at the time of his fall were incident to his employment.

[3] An activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly. *Skinner v. Ogallala Pub. Sch. Dist. No. 1, supra*. It is undisputed that Brittain's job duties did not include removing scrap metal from the premises and selling them for his personal gain. Brittain testified that he was "supposed to" take H&H's trash to the Dumpster but that if he found "something in it," he would remove it from the bin, dump the trash out, and then wheel that item back toward his truck.

Brittain asserts he was doing exactly the same thing as another employee, John, who recycled scrap metal from H&H. H&H's president, Hinchcliff, testified that John asked for and was granted specific permission by H&H's management to remove certain metal items from the premises on his own time. Hinchcliff testified that this was not a common practice and that to his knowledge, John was the only employee who had been granted permission to do so. Hinchcliff testified that H&H's management personnel were not aware of Brittain's practice of removing scrap metal and that Brittain was not granted permission to do so, especially during working hours. Hinchcliff's testimony indicated that the type of recycling that Brittain and John engaged in, if undertaken during working hours, would be considered a second job and would be impermissible for H&H employees according to the employee handbook.

Upon our review, we agree with the court's assessment that Brittain had no work-related reason to go to his truck or to load any materials into his truck. While he did this during his working hours, the activity had no purpose related to his

employment, and the act was for his own personal benefit, not for the benefit of H&H. We find Brittain's injury did not arise in the course of his employment with H&H.

Arising Out of Employment.

[4] The test to determine whether an act or conduct of an employee is compensable under the Nebraska Workers' Compensation Act has two prongs. We found that Brittain failed to meet the requirements of one prong—proving the injury arose in the scope and course of his employment. Therefore, we decline to address the second prong of whether Brittain's injury arose out of his employment. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the controversy before it. *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

Denial of Workers' Compensation Benefits.

Brittain asserts the court erred in failing to award temporary disability benefits, hospital and medical benefits, penalties, interest, and attorney fees.

The Workers' Compensation Court acknowledged the outcome of this case was a "close call." However, after our independent review of the evidence, we cannot find the court's conclusion was clearly wrong.

Thus, we find the court did not err in denying Brittain's requests for temporary disability benefits, hospital and medical benefits, penalties, interest, and attorney fees, because the fall does not fit within the definition of a compensable injury under § 48-101.

CONCLUSION

The Workers' Compensation Court was not clearly wrong in finding Brittain's injury did not occur in the course of his employment with H&H. We affirm the lower court's order of dismissal.

AFFIRMED.

HEADNOTES
Contained in this Volume