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REPORTS OF CASES

DECIDED BETWEEN

JUNE 5, 2015 and OCTOBER 29, 2015

IN THE

# Supreme Court of Nebraska

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# NEBRASKA REPORTS

VOLUME CCXCI

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PEGGY POLACEK

OFFICIAL REPORTER

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LINCOLN

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

For the benefit of the State of Nebraska

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John F. Wright, Associate Justice
William M. Connolly, Associate Justice
Kenneth C. Stephan, Associate Justice[1]
Michael M. McCormack, Associate Justice
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice[2]

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## COURT OF APPEALS
## DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
John F. Irwin, Associate Judge
Everett O. Inbody, Associate Judge
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge

---

Peggy Polacek . . . . . Reporter
Teresa A. Brown . . . . . Clerk
Corey Steel . . . . . State Court Administrator

[1]Until June 30, 2015
[2]As of June 28, 2015

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

## First District

*Counties in District:* Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer

| *Judges in District* | *City* |
|---|---|
| Paul W. Korslund | Beatrice |
| Daniel E. Bryan, Jr. | Auburn |
| Vicky L. Johnson | Wilber |

## Second District

*Counties in District:* Cass, Otoe, and Sarpy

| *Judges in District* | *City* |
|---|---|
| William B. Zastera | Papillion |
| David K. Arterburn | Papillion |
| Max Kelch | Papillion |
| Jeffrey J. Funke | Plattsmouth |

## Third District

*Counties in District:* Lancaster

| *Judges in District* | *City* |
|---|---|
| Steven D. Burns | Lincoln |
| John A. Colborn | Lincoln |
| Jodi Nelson | Lincoln |
| Robert R. Otte | Lincoln |
| Andrew R. Jacobsen | Lincoln |
| Stephanie F. Stacy | Lincoln |
| Lori A. Maret | Lincoln |
| Susan I. Strong | Lincoln |

## Fourth District

*Counties in District:* Douglas

| *Judges in District* | *City* |
|---|---|
| Gary B. Randall | Omaha |
| J. Michael Coffey | Omaha |
| W. Mark Ashford | Omaha |
| Peter C. Bataillon | Omaha |
| Gregory M. Schatz | Omaha |
| J Russell Derr | Omaha |
| James T. Gleason | Omaha |
| Thomas A. Otepka | Omaha |
| Marlon A. Polk | Omaha |
| W. Russell Bowie III | Omaha |
| Leigh Ann Retelsdorf | Omaha |
| Timothy P. Burns | Omaha |
| Duane C. Dougherty | Omaha |
| Kimberly Miller Pankonin | Omaha |
| Shelly R. Stratman | Omaha |
| Horacio J. Wheelock | Omaha |

## Fifth District

*Counties in District:* Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

| *Judges in District* | *City* |
|---|---|
| Robert R. Steinke | Columbus |
| Mary C. Gilbride | Wahoo |
| James C. Stecker | Seward |
| Rachel A. Daugherty | Aurora |

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

**Sixth District**

*Counties in District:* Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

| *Judges in District* | *City* |
|---|---|
| John E. Samson | Blair |
| Geoffrey C. Hall | Fremont |
| Paul J. Vaughan | Dakota City |

**Seventh District**

*Counties in District:* Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

| *Judges in District* | *City* |
|---|---|
| James G. Kube | Madison |
| Mark A. Johnson | Madison |

**Eighth District**

*Counties in District:* Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

| *Judges in District* | *City* |
|---|---|
| Mark D. Kozisek | Ainsworth |
| Karin L. Noakes | St. Paul |

**Ninth District**

*Counties in District:* Buffalo and Hall

| *Judges in District* | *City* |
|---|---|
| John P. Icenogle | Kearney |
| Teresa K. Luther | Grand Island |
| William T. Wright | Kearney |
| Mark J. Young | Grand Island |

**Tenth District**

*Counties in District:* Adams, Franklin, Harlan, Kearney, Phelps, and Webster

| *Judges in District* | *City* |
|---|---|
| Stephen R. Illingworth | Hastings |
| Terri S. Harder | Minden |

**Eleventh District**

*Counties in District:* Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

| *Judges in District* | *City* |
|---|---|
| Donald E. Rowlands | North Platte |
| James E. Doyle IV | Lexington |
| David Urbom | McCook |
| Richard A. Birch | North Platte |

**Twelfth District**

*Counties in District:* Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

| *Judges in District* | *City* |
|---|---|
| Randall L. Lippstreu | Gering |
| Leo Dobrovolny | Gering |
| Derek C. Weimer | Sidney |
| Travis P. O'Gorman | Alliance |

# JUDICIAL DISTRICTS AND COUNTY JUDGES

**First District**

*Counties in District:* Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer

| *Judges in District* | *City* |
|---|---|
| Curtis L. Maschman | Falls City |
| Steven B. Timm | Beatrice |
| Linda A. Bauer | Fairbury |

**Second District**

*Counties in District:* Cass, Otoe, and Sarpy

| *Judges in District* | *City* |
|---|---|
| Robert C. Wester | Papillion |
| John F. Steinheider | Nebraska City |
| Todd J. Hutton | Papillion |
| Stefanie A. Martinez | Papillion |

**Third District**

*Counties in District:* Lancaster

| *Judges in District* | *City* |
|---|---|
| James L. Foster | Lincoln |
| Laurie Yardley | Lincoln |
| Susan I. Strong | Lincoln |
| Timothy C. Phillips | Lincoln |
| Thomas W. Fox | Lincoln |
| Matthew L. Acton | Lincoln |
| Holly J. Parsley | Lincoln |

**Fourth District**

*Counties in District:* Douglas

| *Judges in District* | *City* |
|---|---|
| Lawrence E. Barrett | Omaha |
| Joseph P. Caniglia | Omaha |
| Marcena M. Hendrix | Omaha |
| Darryl R. Lowe | Omaha |
| John E. Huber | Omaha |
| Jeffrey Marcuzzo | Omaha |
| Craig Q. McDermott | Omaha |
| Susan Bazis | Omaha |
| Marcela A. Keim | Omaha |
| Sheryl L. Lohaus | Omaha |
| Thomas K. Harmon | Omaha |
| Derek R. Vaughn | Omaha |

**Fifth District**

*Counties in District:* Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

| *Judges in District* | *City* |
|---|---|
| Frank J. Skorupa | Columbus |
| Patrick R. McDermott | David City |
| Linda S. Caster Senff | Aurora |
| C. Jo Petersen | Seward |
| Stephen R.W. Twiss | Central City |

# JUDICIAL DISTRICTS AND COUNTY JUDGES

**Sixth District**

*Counties in District:* Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

| *Judges in District* | *City* |
|---|---|
| C. Matthew Samuelson | Blair |
| Kurt Rager | Dakota City |
| Douglas L. Luebe | Hartington |
| Kenneth Vampola | Fremont |

**Seventh District**

*Counties in District:* Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

| *Judges in District* | *City* |
|---|---|
| Donna F. Taylor | Madison |
| Ross A. Stoffer | Pierce |
| Michael L. Long | Madison |

**Eighth District**

*Counties in District:* Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

| *Judges in District* | *City* |
|---|---|
| Alan L. Brodbeck | O'Neill |
| James J. Orr | Valentine |
| Tami K. Schendt | Broken Bow |

**Ninth District**

*Counties in District:* Buffalo and Hall

| *Judges in District* | *City* |
|---|---|
| Philip M. Martin, Jr. | Grand Island |
| Gerald R. Jorgensen, Jr. | Kearney |
| Arthur S. Wetzel | Grand Island |
| John P. Rademacher | Kearney |

**Tenth District**

*Counties in District:* Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster

| *Judges in District* | *City* |
|---|---|
| Michael P. Burns | Hastings |
| Timothy E. Hoeft | Holdrege |
| Michael O. Mead | Hastings |

**Eleventh District**

*Counties in District:* Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

| *Judges in District* | *City* |
|---|---|
| Kent D. Turnbull | North Platte |
| Edward D. Steenburg | Ogallala |
| Anne Paine | McCook |
| Michael E. Piccolo | North Platte |
| Jeffrey M. Wightman | Lexington |

**Twelfth District**

*Counties in District:* Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

| *Judges in District* | *City* |
|---|---|
| James M. Worden | Gering |
| Randin Roland | Sidney |
| Russell W. Harford | Chadron |
| Kristen D. Mickey | Gering |
| Paul G. Wess | Alliance |

## SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

### Douglas County

| *Judges* | *City* |
|---|---|
| Douglas F. Johnson | Omaha |
| Elizabeth Crnkovich | Omaha |
| Wadie Thomas | Omaha |
| Christopher Kelly | Omaha |
| Vernon Daniels | Omaha |

### Lancaster County

| *Judges* | *City* |
|---|---|
| Toni G. Thorson | Lincoln |
| Linda S. Porter | Lincoln |
| Roger J. Heideman | Lincoln |
| Reggie L. Ryder | Lincoln |

### Sarpy County

| *Judges* | *City* |
|---|---|
| Lawrence D. Gendler | Papillion |
| Robert B. O'Neal | Papillion |

---

## WORKERS' COMPENSATION COURT AND JUDGES

| *Judges* | *City* |
|---|---|
| James R. Coe | Omaha |
| Laureen K. Van Norman | Lincoln |
| J. Michael Fitzgerald | Lincoln |
| John R. Hoffert | Lincoln |
| Thomas E. Stine | Omaha |
| Daniel R. Fridrich | Omaha |
| Julie A. Martin | Lincoln |

# ATTORNEYS
## Admitted Since the Publication of Volume 290

---

Jessop Beal Adams
Natalie M. Andrews
Isaiah Eduard Tolentino Ang
Dwyer Stenquist Arce
Charrisse Nicole Artry
Sara Marie Athen
Patrick J. Bartman
Adam Patrick Bates
Nicholas B. Batter
Scot Lee Bauermeister
Stephani Michelle Bennett
Justin David Bignell
Daniel Joseph Birdsall
John Scott Black
Mark Bongiovanni
Tanner Ray Bortnem
Wesley Charles Bottorf
Jenna Caitlin Boulas
Taylor Pansing Brooks
Mary Candice Byrd
Dale Thomas Callahan
Sagan Lynn Carman-Downer
Lily Amare Carr
Mark Daniel Carraher
Nathan Ryan Chicoine
Brian Anthony Chou
Nathan Drew Clark
Sarah Nicole Clark
Ciara Jean Coleman
Conrad Francis Connealy
Andrew J. Conroy
Nolan Derek Cordon
Bryan Jonathan Cox
Ryan Stephen Crnkovich
Sean Patrick Danehey
Jennifer Sue Dannehl
Dennis R. Davidson
Katie Samples Dean
Dominique Deery
David A. Derbin
John D. DeWald
Connor Bennett Dillard
Megan Ann Dockery
Katherine Judith Doering
Paul Brennan Donahue
Ryan Charles Dorcey
Thomas Clinton Dorwart
Mark Galen Drent
Matthew William Dunlap
Daan Gunnar Erikson
Morgan Leigh Eskra
Elizabeth Angeline Evans
Eric Michael Fabian
Brian John Fahey
Hannah K. Fischer
Kaylen Kristine Fleming
Anna S. Forman
James Lawrence Garvin III
Dearra Renee Godinez
Steven Vincent Golej
Connor L. Gorby
Andrea V. Gosnold-Parker
Stephanie Ann Grattan
Erin Ann Greve
Kevin Francis Griffith

ATTORNEYS

Lori Diane Gruver
Caitlin Marie Gustafson
Harrison Ford Hagg
Brett Patrick Hall
Laurel Paige Hall
Adam Weston Harper
Catrina K. Harris
Colleen Marie Hassett
Neil P. Hassler
Kirsten Allie Hattan
Titus Jonathan Hattan
Jedediah James Herblan
Emilee Lynn Higgins
Claire Lucy Hillan
Thomas Virgil Hinshaw
Kortnei Nicole Hoeft
Nicholas Ian Holle
Jordan Elizabeth Holst
Logan James Hoyt
Brock S.J. Hubert
Thomas Anthony Hughes
Mary Elizabeth Jacobson
Nathan G. Jarvis
Katie Ann Joseph
Charles F. Kaplan
Kati Michelle Kilcoin
Sarah Joy Kniep
Robert Michael Knowles, Jr.
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Jay Douglas Koehn
Jared James Krejci
Cameron Kroeger
Jeffrey Merle Kunz
Daniel Richard Lam
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John Blaine Lawless
Nicholas Francis Lesiak
Ryan Patrick Loneman
Tyler Scott Loontjer
Kelly Zorn Lowery
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Edward Brian Lupomech
Sheena Dane Makinster
Rebekah Mangrum
Sarah Kay Maresh
Sarah Elizabeth Porter Marfisi
Abby Rebecca McConnaughhay
Shannon Glenn McCoy
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Kyle John McGinn
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Daniel D. McMahon
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Carmine Vincent Mediate
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Jay Allen Michelsen
Michael W. Milone
Brian D. Moore
Kathryn M. Moore
Seth William Morris
Dru Michael Moses
Cambell Leigh Moyer
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Michele Ann Munson
Elizabeth Rose O'Connor
Adam Conrad Odle
Nathan Gerald Osborn
Augustine Chima Osuala
James Arnold Owen
Skyler Howard Pearson
Jeffery Dean Pedersen
Clifton Maurice Pee
Mark Robert Pence
Stacie Kawailani Persons

ATTORNEYS

Elizabeth A. Peters
Preston John Peterson
Brock Joseph Pohlmeier
Sydney L. Pomykata
Katherine Rose Powers
Amelia Vivian Prickett
Hannah Elizabeth Putz
Kate Ono Rahel
Eric McArthur Ransone
Rebecca Scout Richters
Sheri Ann Rickert
Quentin Lee Riggins
Kristen Kendall Rine
Samantha Marie Ritter
Zachary Michael Rupiper
Maryl Christina Sattler
Andrew Mark Schill
James Lee Schneider
Bergan Elizabeth Schumacher
Comran Ehsan Sharif-Kashani
Thomas Benton Shires II
Spencer Stephen Shucard
Tessie Leigh Seiler Smith
Alex D. Stowe
Susan Kwon Suh
Audrey Renee Svane
Daniel Patrick Sweeney
Richard Walter Tast, Jr.
Korey Tyrone Taylor
Carl J. Troia III
Derek Charles True
Eugene Joseph Twellman
Randa B.S. Vieira
Cindy Rae Volkmer
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Ashley Irene Walkup
Thomas Nicholas Ward
James Macrae Warden
Kelsey Marie Weiler
Kathryn Elizabeth Welsh
Kevin Roy Wesley
Casey Camille Wheeler
Ashlea Ray Whitney
Carlton Wray Wiggam
Benjamin Scott Williamson
Dane Alan Wilson
Melissa Deanne Wray
William Bruce Wray
Alexis Mary Wright
William Raymond Wurm
Joshua T. Zarse
Natalie Ann Zaysoff

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## LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-13-1004: **Klawitter v. Midlands Foot Specialists**. Affirmed as modified. Cassel, J. Wright, J., participating on briefs.

No. S-13-1015: **Mejia v. Chapman**. Petition for further review dismissed as having been improvidently granted. Per Curiam.

No. S-14-309: **Lehn v. Sutton**. Affirmed in part, and in part reversed. Wright, J. Heavican, C.J., participating on briefs. Stephan, J., not participating in the decision.

No. S-14-742: **In re Estate of Maahs**. Reversed and remanded with directions. Cassel, J.

No. S-15-181: **State v. Turbes**. Affirmed. Per Curiam.

# LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-14-901: **State v. Hernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-14-901: **State v. Hernandez**. Motion of appellant for rehearing sustained. June 30, 2015, order granting motion for summary affirmance vacated.

No. S-14-901: **State v. Hernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-14-931: **State v. Sims**. Appeal dismissed.

No. S-14-966: **O'Brien v. Cessna Aircraft Co**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1315 and 25-1912 (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

No. S-14-1048: **Jolliffe v. Haz-Mat Response, Inc**. Stipulation allowed; appeal dismissed.

No. S-15-077: **Dye v. Kenney**. Affirmed. See, § 2-107(A)(1); *O'Neal v. State*, 290 Neb. 943, 863 N.W.2d 162 (2015).

No. S-15-134: **Waite v. Scottsbluff Internal Medicine Group**. Motions of appellees for summary dismissal sustained. See § 2-107(B)(1).

No. S-15-174: **State v. DeJong**. By order of the court, appeal dismissed for failure to file briefs.

No. S-15-186: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-15-260: **State v. Duncan**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

# LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-13-421: **Walsh v. Erickson**. Petition of appellee for further review denied on June 24, 2015.

No. S-13-528: **In re Estate of Lorenz**, 22 Neb. App. 548 (2014). Petition of appellee for further review sustained on June 10, 2015.

No. A-13-704: **6224 Fontenelle Blvd. v. Metropolitan Util. Dist.**, 22 Neb. App. 872 (2015). Petition of appellant for further review denied on July 20, 2015.

No. S-13-756: **State v. Determan**, 22 Neb. App. 683 (2015). Petition of appellee for further review sustained on September 10, 2015.

No. A-13-815: **In re Conservatorship of Trobough**. Petitions of appellant for further review denied on June 3, 2015.

No. A-13-815: **In re Conservatorship of Trobough**. Petition of appellee Clippinger for further review denied on June 3, 2015.

No. A-13-815: **In re Conservatorship of Trobough**. Petition of appellee Timmerman-Fees for further review denied on June 3, 2015.

No. S-13-887: **State v. McSwine**, 22 Neb. App. 791 (2015). Petition of appellee for further review sustained on June 10, 2015.

No. A-13-1018: **Nelson v. Jantze**. Petition of appellant for further review denied on June 10, 2015, as untimely filed.

No. A-13-1018: **Nelson v. Jantze**. Petition of appellees for further review denied on June 10, 2015.

No. A-13-1053: **Burns v. Burns**. Petition of appellant for further review denied on June 17, 2015.

No. A-14-023: **State v. Flege**. Petition of appellant for further review denied on July 9, 2015.

No. A-14-057: **Schroeder v. Schroeder**, 22 Neb. App. 856 (2015). Petition of appellee for further review denied on July 13, 2015.

No. S-14-070: **State v. Mucia**, 22 Neb. App. 821 (2015). Petition of appellee for further review sustained on June 30, 2015.

No. A-14-076: **Vlach v. Vlach**, 22 Neb. App. 776 (2015). Petition of appellant for further review denied on July 13, 2015.

Nos. A-14-180, A-14-187: **State v. Chuol**. Petitions of appellant for further review denied on June 3, 2015.

No. A-14-210: **Lagerstrom v. Neal**. Petition of appellant for further review denied on August 4, 2015.

PETITIONS FOR FURTHER REVIEW

No. A-14-261: **Echo Financial v. Peachtree Properties**, 22 Neb. App. 898 (2015). Petition of appellee for further review denied on August 26, 2015.

No. A-14-312: **Manhart v. Manhart**. Petition of appellant for further review denied on June 8, 2015, as premature.

No. A-14-312: **Manhart v. Manhart**. Petition of appellant for further review denied on August 26, 2015.

Nos. A-14-344, A-14-347, A-14-350, A-14-351: **State v. McCroy**. Petitions of appellant for further review denied on June 17, 2015.

No. A-14-358: **In re Interest of Ethan M.**, 22 Neb. App. 780 (2015). Petition of appellant for further review denied on June 10, 2015.

No. A-14-359: **State v. Van Winkle**. Petition of appellant for further review denied on July 13, 2015.

No. A-14-360: **State v. Richter**. Petition of appellant for further review denied on August 3, 2015, as untimely filed.

No. A-14-371: **Schriner v. Schriner**. Petition of appellant for further review denied on October 14, 2015.

No. A-14-379: **State v. Rohde**, 22 Neb. App. 926 (2015). Petition of appellant for further review denied on July 15, 2015.

No. A-14-386: **State v. Ayala**. Petition of appellant for further review denied on July 20, 2015.

No. A-14-391: **Campbell v. Campbell**. Petition of appellant for further review denied on June 24, 2015.

No. A-14-417: **Briggs v. State**. Petition of appellee for further review denied on June 24, 2015.

No. A-14-418: **Weiss v. Western Sugar Co-op**. Petition of appellant for further review denied on June 24, 2015.

No. A-14-440: **State v. Marchese**. Petitions of appellant for further review denied on June 3, 2015.

No. A-14-492: **Bohnet v. Bohnet**, 22 Neb. App. 846 (2015). Petition of appellant for further review denied on July 20, 2015.

No. A-14-505: **State v. Cobos**, 22 Neb. App. 887 (2015). Petition of appellant for further review denied on June 10, 2015, as untimely.

No. A-14-515: **In re Estate of Jurgens**. Petition of appellant for further review denied on August 13, 2015.

No. A-14-548: **Meints v. City of Beatrice**. Petition of appellant for further review denied on June 10, 2015.

No. A-14-548: **Meints v. City of Beatrice**. Petition of appellee for further review denied on June 10, 2015.

No. A-14-559: **Loomis v. Messersmith**. Petition of appellant for further review denied on August 7, 2015, as untimely.

PETITIONS FOR FURTHER REVIEW

No. A-14-569: **McCall v. Nebraska Methodist Health System**. Petition of appellant for further review denied on September 23, 2015.

No. A-14-576: **In re Interest of Kathryn S. & Lauren S**. Petition of appellant for further review denied on July 13, 2015.

No. A-14-584: **State v. Burton**. Petition of appellant for further review denied on September 10, 2015.

No. A-14-589: **State v. Door**. Petition of appellant for further review denied on June 24, 2015.

No. S-14-592: **Stamm v. Fisher**. Petition of appellant for further review sustained on August 5, 2015.

No. A-14-605: **State v. Pittman**. Petition of appellant for further review denied on June 3, 2015.

No. A-14-610: **In re Interest of Alexandria H. et al**. Petition of appellant for further review denied on June 17, 2015.

No. A-14-616: **Buck's Inc. v. City of Omaha**. Petition of appellant for further review denied on August 4, 2015.

No. A-14-636: **State v. Bogenreif**. Petition of appellant for further review denied on June 30, 2015.

No. A-14-644: **In re Interest of Morgan C**. Petition of appellant for further review denied on August 4, 2015.

No. A-14-645: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellee Bo W. for further review denied on June 9, 2015, as untimely.

No. A-14-645: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellee Catherine A. for further review denied on June 9, 2015, as untimely.

No. A-14-645: **In re Interest of Yue-Bo W. & Xin-Bo W**. Petition of appellant for further review denied on July 13, 2015.

No. A-14-654: **In re Interest of Nery V. et al.**, 22 Neb. App. 959 (2015). Petition of appellant for further review denied on August 26, 2015.

No. A-14-658: **Old Republic Nat. Title v. Kornegay**. Petition of appellant for further review denied on July 13, 2015.

No. A-14-662: **NRS Properties v. Agribusiness & Food Assocs**. Petition of appellee for further review denied on October 14, 2015.

No. A-14-670: **Kobza v. Bowers**, 23 Neb. App. 118 (2015). Petition of appellant for further review denied on October 14, 2015.

No. A-14-705: **Williams v. EGS Appleton**. Petition of appellee for further review denied on June 3, 2015.

No. S-14-742: **In re Estate of Maahs**. Petition of appellants for further review granted on June 10, 2015.

PETITIONS FOR FURTHER REVIEW

No. A-14-759: **State v. Chol**. Petition of appellant for further review denied on August 4, 2015.

No. A-14-766: **Bejmuk v. Bejmuk**. Petition of appellant for further review denied on September 16, 2015.

No. A-14-777: **State v. Schaetzle**. Petition of appellant for further review denied on August 17, 2015.

No. A-14-793: **McDaniel v. Western Sugar Co-op**, 23 Neb. App. 35 (2015). Petition of appellant for further review denied on October 14, 2015.

No. A-14-817: **State v. Jahnke**. Petition of appellant for further review denied on June 10, 2015.

No. A-14-860: **In re Interest of Angeleah M. & Ava M**. Petition of appellant for further review denied on June 17, 2015.

No. A-14-882: **State v. Dowling**. Petition of appellant for further review denied on August 4, 2015.

No. A-14-914: **State v. Khalaf**. Petition of appellant for further review denied on July 22, 2015.

No. A-14-921: **Welch v. Welch**. Petition of appellant for further review denied on June 8, 2015, as untimely.

No. A-14-942: **In re Interest of Keisha G**. Petition of appellant for further review denied on June 17, 2015.

No. A-14-952: **Ames v. Ames**. Petition of appellant for further review denied on September 10, 2015.

No. A-14-962: **State v. Marion**. Petition of appellant for further review denied on June 24, 2015.

No. A-14-964: **In re Interest of Jordan M**. Petition of appellee for further review denied on June 24, 2015.

No. A-14-965: **In re Interest of Miley M**. Petition of appellee for further review denied on June 24, 2015.

No. A-14-999: **In re Interest of Adalyn B**. Petition of appellant for further review denied on June 30, 2015.

No. A-14-1013: **State v. Erpelding**. Petition of appellant for further review denied on June 3, 2015.

No. A-14-1017: **State v. Soto**. Petition of appellant for further review denied on August 5, 2015.

No. A-14-1026: **In re Interest of Jacob I**. Petition of appellant for further review denied on September 10, 2015.

No. A-14-1034: **Lanning v. Lanning**. Petition of appellant for further review denied on August 13, 2015.

No. A-14-1040: **State v. Ellis**. Petition of appellant for further review denied on July 17, 2015, for lack of jurisdiction.

PETITIONS FOR FURTHER REVIEW

No. A-14-1074: **In re Interest of Victoria W. & Lindsey W**. Petition of appellant for further review denied on August 7, 2015, as untimely.

No. A-14-1077: **State v. Clayborne**. Petition of appellant for further review denied on August 17, 2015.

No. A-14-1103: **Simmons v. Precast Haulers**. Petition of appellant for further review denied on October 14, 2015.

No. A-14-1136: **State v. Longwell**. Petition of appellant for further review denied on July 20, 2015.

No. A-14-1143: **State v. Agok**. Petition of appellant for further review denied on June 17, 2015.

No. A-15-029: **State v. Pedersen**. Petition of appellant for further review denied on September 10, 2015.

No. A-15-048: **State v. Marks**. Petition of appellant for further review denied on June 30, 2015.

No. A-15-132: **White v. State**. Petition of appellant for further review denied on August 4, 2015.

No. A-15-184: **State v. Matthews**. Petition of appellant for further review denied on September 23, 2015.

No. A-15-203: **State v. Schaefer**. Petition of appellant for further review denied on October 14, 2015.

No. A-15-206: **State v. Sherrod**. Petition of appellant for further review denied on June 17, 2015.

No. A-15-212: **State v. Naney**. Petition of appellant for further review denied on August 5, 2015.

No. A-15-266: **State v. Hasbrouck**. Petition of appellant for further review denied on June 10, 2015.

No. S-15-282: **Purdie v. Department of Corr. Servs**. Petition of appellant for further review granted on June 17, 2015.

Nos. A-15-294, A-15-297, A-15-298: **State v. Wulbern**. Petitions of appellant for further review denied on August 26, 2015.

No. S-15-382: **Doe v. Piske**. Petition of appellant for further review sustained on August 26, 2015.

No. A-15-386: **Ewers v. Saunders County**. Petition of appellant for further review denied on August 26, 2015.

No. A-15-468: **State v. Wesner**. Petition of appellant for further review denied on October 14, 2015.

No. A-15-473: **State v. Rice**. Petition of appellant for further review denied on August 3, 2015, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-558: **State v. Harris**. Petition of appellant for further review denied on September 10, 2015.

Nebraska Supreme Court
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# Selma B. Hauxwell, appellee, v. H.W. Ferdinand Henning et al., appellees, and Ryan R. Hanzlick et al., appellants.

863 N.W.2d 798

Filed June 5, 2015. No. S-14-523.

1. **Quiet Title: Equity.** A quiet title action sounds in equity.
2. **Injunction: Equity.** An action for injunction sounds in equity.
3. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Standing: Jurisdiction: Parties.** 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.
6. ____: ____: ____. Only a party that has standing—a legal or equitable right, title, or interest in the subject matter of the controversy—may invoke the jurisdiction of a court or tribunal.
7. **Taxes.** Neb. Rev. Stat. § 77-1844 (Reissue 2009) lays out the conditions precedent that must be satisfied before a party may question title acquired by tax deed, even if title under a tax deed is void or voidable.
8. ____. A party can satisfy the tax requirement under Neb. Rev. Stat. § 77-1844 (Reissue 2009) simply by paying the taxes before or during the trial, or before final judgment.
9. ____. The showing of taxes paid must be made by the evidence and not by the pleadings alone.
10. ____. Under Neb. Rev. Stat. § 77-1842 (Reissue 2009), a defendant's tax deeds are presumptively valid.

11. ____. A county treasurer's tax deed is presumptive evidence that all things whatsoever required by law to make a good and valid tax sale and vest title in the purchaser were done.
12. **Injunction: Property: Trespass.** It is only when the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land that an injunction against future trespass will be granted.

Appeal from the District Court for Furnas County: David Urbom, Judge. Reversed and remanded for further proceedings.

Robert S. Lannin and Wesley Bottorf, Senior Certified Law Student, of Shively & Lannin, P.C., L.L.O., for appellants.

Roger L. Benjamin, P.C., for appellee Selma B. Hauxwell.

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

Heavican, C.J.

## NATURE OF CASE

Ryan R. Hanzlick and his wife acquired two tracts of land through treasurer's tax deeds. A trust controlled by Hanzlick subsequently acquired title to the two tracts by quitclaim deed. The trust and Hanzlick and his wife in their individual capacities are the defendants-appellants (collectively referred to as "the Hanzlicks"). Selma B. Hauxwell, the plaintiff-appellee and the adjacent property owner, does not appear in the official records of the county register of deeds as the owner of the two tracts, but had allegedly been using those tracts since 1971.

After the Hanzlicks acquired the property, Hauxwell filed a complaint seeking to quiet title by claim of adverse possession. The Hanzlicks filed a counterclaim asking the district court to find that they were the owners of the two tracts and to eject and enjoin Hauxwell from the property. The district court found that Hauxwell had acquired title to the property through adverse possession and did not address any other issues regarding the tax deeds. The Hanzlicks now appeal. We

find the district court erred in determining that Hauxwell had standing to challenge the tax deeds and in failing to address the Hanzlicks' counterclaims.

## BACKGROUND

Hauxwell, along with her first husband, purchased a parcel of land (Broeker land) in Furnas County, Nebraska, in 1959. Hauxwell's first husband later passed away, and Hauxwell subsequently remarried. Hauxwell is still the record owner of the Broeker land. Hanzlick, as trustee of Midwest Investments Irrevocable Trust, is recorded in the official records as the owner of two tracts of land (Tracts 1 and 2) adjacent to the Broeker land. Tracts 1 and 2, collectively, consist of approximately 21.45 acres. There is a former open-pit silica mine on the first tract, and the second tract consists of 2 acres and is a "deeded easement" across the Broeker land to reach the nearby county road. Hanzlick acquired Tracts 1 and 2 by treasurer's tax deeds in 2010. Hanzlick and his wife deeded title of the tracts to the trust by quitclaim deed.

Hauxwell currently resides in an assisted living facility in Arapahoe, Nebraska. Ihling Lee Carskadon, Jr., is Hauxwell's son and her attorney in fact. Carskadon testified at trial that he has performed work on Tracts 1 and 2 since at least 1971, including controlling the musk thistle and shearing cedar trees on the property. Before 2001, Carskadon's cattle would regularly graze on Tracts 1 and 2. In 2001, Carskadon began renting out the Broeker land and Tracts 1 and 2 to a neighbor. Besides Hauxwell's family or tenants, no one else has had access to the property since 1971. Carskadon, however, did testify that neither he nor anyone else in his family has paid any property taxes for either tract. Further, the record does not demonstrate that Carskadon or anyone in the family tendered payment of the taxes to either the county or the Hanzlicks.

The Hanzlicks purchased the tax certificates for Tracts 1 and 2 from the Furnas County treasurer in October 2007. Hanzlick testified that he inspected the land and found no evidence that anyone was using the property at that time. Carskadon agreed

that the cattle would not have been on either tract at the time Hanzlick inspected the property.

The Hanzlicks sent notice by certified mail to the record owner, Caspar F. Henning, on July 10, 2010. Notices were sent to Henning's last known residence, along with the last two known addresses of Henning's heir. All three notices were returned unopened to the Hanzlicks. On July 15, 22, and 29, the Hanzlicks published notice in a Furnas County weekly newspaper. On November 30, the Hanzlicks presented an affidavit of service to the Furnas County treasurer and received and recorded the treasurer's tax deeds for Tracts 1 and 2. The trust then acquired title by a quitclaim deed from Hanzlick and his wife, also recorded on November 30, and by a corrective quitclaim deed from Hanzlick and his wife recorded on February 25, 2013.

According to Hauxwell's brief, 42 days after acquiring the deed, the Hanzlicks sent a letter to Hauxwell indicating that the Hanzlicks now owned Tracts 1 and 2 and that they believed Hauxwell was using the land. At trial and in her brief, Hauxwell argues that the fact the Hanzlicks sent this letter indicates the Hanzlicks knew Hauxwell was in actual possession of the property and did not give her notice. Hauxwell argues that this renders the tax deed invalid.

Hauxwell filed a complaint seeking the district court quiet title to Tracts 1 and 2 by claim of adverse possession. The Hanzlicks' answer and counterclaim requested that the court find the Hanzlicks are the owners of Tracts 1 and 2 and to eject and enjoin Hauxwell from the property. The Hanzlicks appeared pro se at trial, but are now represented by counsel on appeal.

The district court determined that Hauxwell had been in adverse possession under a claim of ownership for more than 10 years. Therefore, the district court quieted title in favor of Hauxwell. The district court's order did not explicitly rule on whether Hauxwell had standing to challenge the tax deeds, whether the tax deeds were validly issued, or any of the Hanzlicks' counterclaims. However, given the district court's

ultimate disposition of the case, it can be implied the district court determined that Hauxwell had standing and that the tax deeds were void. The Hanzlicks now appeal the district court's judgment.

## ASSIGNMENTS OF ERROR

The Hanzlicks assign, consolidated and restated, that the district court erred in (1) finding that Hauxwell had standing to challenge the tax deed, (2) granting Hauxwell's request to quiet title to Tracts 1 and 2 by claim of adverse possession, and (3) not addressing the Hanzlicks' counterclaims.

## STANDARD OF REVIEW

[1-3] A quiet title action and an action for injunction both sound in equity.[1] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[2]

[4] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

## ANALYSIS

### Hauxwell's Complaint

[5-7] On appeal, the Hanzlicks assign that the district court erred in determining Hauxwell has standing to challenge the treasurer's tax deeds. 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

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[1] See, *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007); *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006).

[2] *Rice v. Bixler*, 289 Neb. 194, 854 N.W.2d 565 (2014).

[3] *Underwood v. Nebraska State Patrol*, 287 Neb. 204, 842 N.W.2d 57 (2014).

proceeding.[4] Only a party that has standing—a legal or equitable right, title, or interest in the subject matter of the controversy—may invoke the jurisdiction of a court or tribunal.[5] Neb. Rev. Stat. § 77-1844 (Reissue 2009) lays out the conditions precedent that must be satisfied before a party may question title acquired by tax deed. These requirements must be met "even if title under a tax deed is void or voidable."[6] This means that Hauxwell must comply with § 77-1844 before she would have standing to the challenge the tax deeds.[7]

Section 77-1844 provides:

> No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property had been paid by such person or the persons under whom he claims title as aforesaid.

[8,9] We do not need to reach the issue of whether Hauxwell acquired title to the property through adverse possession, because the evidence establishes that Hauxwell has not paid taxes owed on the property. We have held that a party can satisfy the tax requirement simply by paying the taxes "'"before or during the trial, or before final judgment."'"[8] Further, the party needs only to show the tender of payment of taxes to the treasurer.[9] The showing of taxes paid must be made by the evidence and not by the pleadings alone.[10]

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[4] *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 281 Neb. 992, 801 N.W.2d 253 (2011).

[5] *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015).

[6] *Larkin, supra* note 1, 273 Neb. at 772, 733 N.W.2d at 547.

[7] See *id.*

[8] *Larkin, supra* note 1, 273 Neb. at 774, 733 N.W.2d at 548 (quoting *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 842, 147 N.W. 697 (1914)).

[9] See *Larkin, supra* note 1.

[10] *Id.*

Hauxwell did not plead or demonstrate through evidence that payment of the past due taxes was ever made or tendered to the treasurer or to the Hanzlicks. Therefore, under § 77-1844, Hauxwell does not having standing to challenge the tax deeds and Hauxwell's complaint must be dismissed. The district court erred in implicitly determining that Hauxwell had standing under § 77-1844 to question title.

Because Hauxwell does not have standing to challenge the tax deeds, we do not reach the issue of whether Hauxwell had previously acquired title to Tracts 1 and 2 via adverse possession.

## Hanzlicks' Counterclaim

The Hanzlicks assign that the district court erred in dismissing their counterclaim and not addressing their claims to the property. Other than dismissing the claims, the district court failed to address the Hanzlicks' counterclaims in any way. The Hanzlicks' counterclaim requested the district court to eject Hauxwell from the premises and enjoin Hauxwell from future trespass.

[10,11] The Hanzlicks are correct that under Neb. Rev. Stat. § 77-1842 (Reissue 2009), the Hanzlicks' tax deeds are presumptively valid. "[A] county treasurer's tax deed is presumptive evidence that all things whatsoever required by law to make a good and valid tax sale and vest title in the purchaser were done."[11] The presumption may be rebutted by a party attacking the validity of the deed.[12] But because Hauxwell does not have standing to challenge the deeds, she cannot rebut the presumption and we must presume the deeds are valid.

[12] Merely having title to the property, however, does not automatically guarantee a right to an injunction against future trespass. It is only when "'the nature and frequency of

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[11] *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 264, 682 N.W.2d 232, 237 (2004).

[12] *Id.*

trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land'" that an injunction against future trespass will be granted.[13] It is unclear from the record who is currently occupying the land or whether there is any threat that Hauxwell will trespass on the land in the future. Therefore, we remand the cause for further proceedings on the issue of whether an injunction is necessary.

## CONCLUSION

The district court erred by not dismissing Hauxwell's complaint for lack of jurisdiction due to the failure of Hauxwell to establish standing. Further, the district court erred in failing to address the Hanzlicks' counterclaims. We therefore reverse the district court's order quieting title in favor of Hauxwell and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

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[13] *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 487, 658 N.W.2d 258, 270 (2003).

Nebraska Supreme Court
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# David Fisher and Pamela W. Fisher, husband and wife, and David Fisher and Pamela W. Fisher, Trustees, appellants, v. The Heirs and Devisees of T.D. Lovercheck et al., appellees.

864 N.W.2d 212

Filed June 5, 2015. No. S-14-529.

1. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches an independent conclusion.
2. **Statutes: Appeal and Error.** The meaning and interpretation of a statute are questions of law, which an appellate court independently reviews.
3. **Pleadings: Parties: Limitations of Actions.** Under Neb. Rev. Stat. § 25-301 (Reissue 2008), an amendment joining the real parties in interest relates back to the date of the original pleading.
4. **Garnishment: Statutes: Appeal and Error.** An appellate court applies the ordinary rules of interpretation to statutes in chapter 25 of the Nebraska Revised Statutes.

Appeal from the District Court for Banner County: Derek C. Weimer, Judge. Reversed and remanded with directions.

Philip M. Kelly and Jerald L. Ostdiek, of Douglas, Kelly, Ostdiek & Ossian, P.C., for appellants.

Leslie A. Shaver and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellees.

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

Connolly, J.

## SUMMARY

David Fisher and Pamela W. Fisher sued, among others, U.S. Bank National Association (US Bank) to terminate severed mineral interests. The Fishers filed their complaint as "Husband and Wife" and alleged that they had owned the land since 1986. In its answer, US Bank noted that in 2001, the Fishers conveyed the land to themselves as trustees for the David and Pamela Fisher Living Trust. Thus, US Bank argued that the Fishers, as husband and wife, were not the real parties in interest.

Before the Fishers filed an amended complaint adding themselves in their capacity as trustees as plaintiffs, US Bank recorded a verified claim of mineral interest. Because US Bank did not otherwise publicly exercise its right of ownership, whether it recorded a claim of interest before the Fishers commenced the action was the decisive issue. The court held that the amended complaint did not relate back to the original complaint and sustained US Bank's motion for summary judgment. As a matter of first impression, we conclude that the amended complaint relates back under Neb. Rev. Stat. § 25-301 (Reissue 2008) because it joined the real parties in interest. We reverse, and remand with directions.

## BACKGROUND

In 1986, "DAVID FISHER and PAMELA W. FISHER, husband and wife," received by warranty deed 400 acres in Banner County, Nebraska, as joint tenants. In 2001, the Fishers quitclaimed the land to "DAVID FISHER and PAMELA W. FISHER, TRUSTEES OF THE DAVID AND PAMELA FISHER LIVING TRUST." David and Pamela Fisher are the initial trustees and beneficiaries of the trust.

US Bank is the trustee of the L.T. Lovercheck Trust. US Bank claims that the corpus of the Lovercheck trust includes an undivided one-quarter interest in the minerals produced on the land in question.

The parties generally agree that the mineral estate has not been active. David averred that since he and Pamela acquired the land in 1986, no well drilling occurred and no mineral leases were executed. US Bank admitted that, to its knowledge, no drilling activity occurred on the land and that it had not filed a claim of interest before this litigation.

On March 4, 2013, "DAVID FISHER and PAMELA W. FISHER, Husband and Wife," filed a complaint to terminate severed mineral interests. The defendants included US Bank as the trustee of the Lovercheck trust. To succeed, the Fishers had to prove three negatives. Generally, they had to show that the record owners of the severed mineral interests did not, in the 23 years before the Fishers filed suit, publicly exercise their ownership rights by (1) transferring, leasing, or encumbering their interest; (2) drilling for or removing minerals; or (3) recording a verified claim of interest.[1]

On May 2, 2013, US Bank filed an answer alleging that the Fishers did not bring suit in the name of the real party in interest, i.e., the trustees of their trust. On the same day, US Bank recorded a verified claim of mineral interest. On May 29, US Bank filed another claim of interest to "further clarify the ownership of title."

On June 14, 2013, the Fishers moved for leave to file an amended complaint. The court sustained their motion, and the Fishers filed an amended complaint that added "DAVID FISHER and PAMELA W. FISHER, Trustees," as plaintiffs. The amended complaint did not change the substance of the Fishers' claims. In its answer to the amended complaint, US Bank alleged that it recorded a claim of interest before the Fishers filed their amended complaint.

US Bank and the Fishers filed cross-motions for summary judgment. The court sustained the Fishers' motion for a default judgment against all defendants except US Bank.

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[1] See Neb. Rev. Stat. § 57-229 (Reissue 2010).

In its order disposing of the cross-motions for summary judgment, the court stated that US Bank recorded a valid claim of interest after the Fishers filed the original complaint but before they filed the amended complaint. So, the "critical conclusion" was whether the amended complaint related back to the original complaint. Because the Fishers' trust owned the surface estate, the court stated that "[t]he real parties in interest in this matter are David and Pamela Fisher, as trustees of the trust, not as husband and wife."

After deciding that the general relation-back statute, Neb. Rev. Stat. § 25-201.02 (Reissue 2008), does not apply to amendments that add plaintiffs, the court turned to § 25-301, the real party in interest statute. Section 25-301 provides that joinder of the real party in interest "shall have the same effect as if the action had been commenced by the real party in interest." The court stated that § 25-301 "can be used to 'save' cases that might otherwise be dismissed due to the statute of limitations." But the court determined that § 25-301 must be read in the context of "the interplay between the general rules related to civil procedure and those specific rules related to dormant mineral interests." Reasoning that equity abhors forfeitures and that the dormant mineral interest statutes must be strictly construed, the court decided that the Fishers' amended complaint did not relate back to the original complaint under § 25-301. The court sustained US Bank's motion for summary judgment.

## ASSIGNMENTS OF ERROR

The Fishers assign, restated and consolidated, that the court erred by (1) deciding that the amended complaint did not relate back to the original complaint, (2) sustaining US Bank's motion for summary judgment, and (3) overruling the Fishers' motion for summary judgment.

## STANDARD OF REVIEW

[1] On appeal from an equity action, an appellate court tries factual questions de novo on the record and reaches an independent conclusion.[2]

[2] The meaning and interpretation of a statute are questions of law.[3] An appellate court independently reviews questions of law.[4]

## ANALYSIS

The Fishers offer two theories for why the amended complaint relates back to the original: First, they contend that it relates back under § 25-201.02 because the claims asserted in the original and amended complaints arose out of the same transaction. Second, they argue that the amended complaint relates back under § 25-301 because it merely joins the real parties in interest. US Bank responds that § 25-201.02 does not apply to amendments that add plaintiffs and that § 25-301 "says nothing about relation back."[5]

As an initial matter, we note that the court found that the Fishers as trustees, and not as husband and wife, were the real parties in interest. Thus, the court implicitly decided that the beneficiaries of a revocable trust are not "owners of the surface" under Neb. Rev. Stat. § 57-228 (Reissue 2010). The focus of the real party in interest inquiry is standing to sue.[6] If the statute that creates the cause of action specifies the persons who have standing to sue, those persons are the real parties in interest.[7] The Fishers do not argue that they are "owners" in their capacity as beneficiaries. So, the meaning

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[2] See *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 831 N.W.2d 696 (2013).

[3] See *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015).

[4] *Id.*

[5] Brief for appellee at 9.

[6] *Manon v. Orr*, 289 Neb. 484, 856 N.W.2d 106 (2014).

[7] See *Polk County v. Wombacher*, 229 Neb. 239, 426 N.W.2d 266 (1988).

of "owners" in § 57-228 is not before us.[8] We do not review the court's conclusion that the Fishers as beneficiaries are not real parties in interest.

Turning to the civil procedure statutes, § 25-201.02 generally provides that an amendment relates back if it arises out of the same transaction set forth in the original pleading. Under § 25-201.02(2), if the amendment "changes the party or the name of the party against whom a claim is asserted," the proponent of the amendment must also show that the party in the amended pleading had, within the relevant limitations period, (1) notice of the action such that it will not be prejudiced and (2) notice that the action would have been brought against it absent some mistake. Section 25-201.02 is substantially similar to Fed. R. of Civ. P. 15(c).[9] So, we have looked to federal decisions for guidance.[10]

Section 25-301, Nebraska's real party in interest statute, provides:

> Every action shall be prosecuted in the name of the real party in interest . . . . An action shall not be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for joinder or substitution of the real party in interest. Joinder or substitution of the real party in interest shall have the same effect as if the action had been commenced by the real party in interest.

Before a 1999 amendment,[11] § 25-301 simply provided that, subject to an exception not applicable here, "[e]very action

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[8] See *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

[9] See, *Gibbs Cattle Co. v. Bixler, supra* note 2; *Reid v. Evans*, 273 Neb. 714, 733 N.W.2d 186 (2007).

[10] *Gibbs Cattle Co. v. Bixler, supra* note 2. See, also, *Zyburo v. Board of Education*, 239 Neb. 162, 474 N.W.2d 671 (1991); *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988).

[11] 1999 Neb. Laws, L.B. 48.

must be prosecuted in the name of the real party in interest . . . ."[12] The added language is substantially similar to Fed. R. Civ. P. 17,[13] particularly to rule 17 as it existed before a 2007 stylistic amendment.[14] Because § 25-301 is similar to rule 17, we may look to federal decisions for guidance.[15]

The Fishers amended their complaint to join the real parties in interest, so we look first to § 25-301. As noted, whether an amendment joining the real party in interest relates back to the original pleading under § 25-301, as amended in 1999, is an issue of first impression.

Most courts have concluded that amendments "in the nature of a substitution of the real party in interest" can relate back to the original pleading.[16] Similarly, there is "general agreement" that amendments changing the plaintiff's capacity relate back.[17] Among federal courts, some have based relation back for added or substituted real parties in interest under rule 15.[18] Others have applied rules 15 and 17 in tandem.[19] Many recognize that rule 17 alone includes a relation-back principle.[20]

Rule 17(a)(3) provides that after the real party in interest ratifies, joins, or is substituted into the action, "the action

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[12] § 25-301 (Reissue 1995).

[13] Compare § 25-301 (Reissue 2008), with federal rule 17(a)(3).

[14] See 4 James Wm. Moore, Moore's Federal Practice § 17App.04[1] (Daniel R. Coquillette et al. eds., 3d ed. 2015).

[15] See *Gibbs Cattle Co. v. Bixler, supra* note 2.

[16] 61B Am. Jur. 2d *Pleading* § 828 at 123 (2010).

[17] *Id.* at 122. See, e.g., *Mo., Kans. & Tex. Ry. v. Wulf*, 226 U.S. 570, 33 S. Ct. 135, 57 L. Ed. 355 (1913).

[18] See, e.g., *Warpar Mfg. Corp. v. Ashland Oil, Inc.*, 102 F.R.D. 749 (N.D. Ohio 1983).

[19] See, e.g., *Crowder v. Gordons Transports, Inc.*, 387 F.2d 413 (8th Cir. 1967). See, also, *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 33 P.3d 816 (2001).

[20] See, e.g., *Scheufler v. General Host Corp.*, 126 F.3d 1261 (10th Cir. 1997). See, also, *Preston v. Kindred Hospitals West, L.L.C.*, 226 Ariz. 391, 249 P.3d 771 (2011).

proceeds as if it had been originally commenced by the real party in interest." This language reflects the policy that "the choice of a party at the pleading stage ought not have to be made at the risk of a final dismissal of the action should it later appear that there had been an error."[21] Before a stylistic 2007 amendment, rule 17 provided that joinder of the real party in interest "shall have the same effect as if the action had been commenced in the name of the real party in interest."[22] The drafters of the federal rules intended this language to codify relation-back rules applied by courts.[23] State courts have interpreted rules with language similar to rule 17 to allow relation back.[24]

[3] We conclude that the Fishers' amended complaint relates back under the plain language of § 25-301. The last sentence of § 25-301 provides: "Joinder or substitution of the real party in interest shall have the same effect as if the action had been commenced by the real party in interest." Here, the Fishers filed the original complaint before US Bank recorded a claim of interest. They filed the amended complaint after US Bank recorded a claim of interest. If the amended complaint has the same effect as the original complaint, then we must treat it as if it also preceded US Bank's claim of interest. That is, the amended complaint relates back to the original.

The district court seemed to decide that the last sentence of § 25-301 usually requires relation back, but that the amended complaint in this case should not relate back for two reasons. First, the dormant mineral interest statutes should be strictly construed. Second, relation back would be inequitable

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[21] 6A Charles Alan Wright et al., Federal Practice and Procedure § 1555 at 569 (3d ed. 2010).

[22] 4 Moore, *supra* note 14, § 17App.04[1] at 17App.-4 (emphasis omitted).

[23] See, *Esposito v. U.S.*, 368 F.3d 1271 (10th Cir. 2004); 28 U.S.C. app. rule 17 (2012), advisory committee notes on 1966 amendment.

[24] See, *Preston v. Kindred Hospitals West, L.L.C., supra* note 20; *Watford v. West*, 78 P.3d 946 (Okla. 2003); *Miller v. Jackson Hosp. and Clinic*, 776 So. 2d 122 (Ala. 2000).

because it would cause the forfeiture of US Bank's severed mineral interest.

For the rule of strict construction, the court cited our decision in *Gibbs Cattle Co. v. Bixler*.[25] There, we addressed two questions of statutory interpretation: (1) The meaning of "record owner" in § 57-229 of the dormant mineral interest statutes and (2) the meaning of "changes the party or the name of the party" in § 25-201.02(2). As to "record owner," we declined to adopt a rule of liberal or strict interpretation of the dormant mineral interest statutes. But we noted that an action to terminate severed mineral interests sounds in equity and that equity abhors forfeitures. Thus, we reasoned that if doubt remained about the meaning of "record owner," it should be construed against forfeiture. We did not use the maxim that equity abhors forfeitures in our analysis of § 25-201.02—which is not a dormant mineral interest statute.

[4] Here, we are interpreting a civil procedure statute, not a dormant mineral interest statute. We apply the ordinary rules of interpretation to statutes in chapter 25 of the Nebraska Revised Statutes.[26] Contrary to US Bank's argument, we do not strictly construe § 25-301 to the extent that it derogates the common law. Neb. Rev. Stat. § 25-2218 (Reissue 2008) provides: "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code." Furthermore, the maxim that equity abhors a forfeiture is tempered by another: Equity follows the law.[27] We strictly apply the latter maxim if the law is clear.[28]

US Bank argues that even if the Fishers' amended complaint would relate back for statute of limitations purposes, it does not do so here because the 23-year period under § 57-229 is part of the Fishers' substantive claim. We are aware that

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[25] *Gibbs Cattle Co. v. Bixler, supra* note 2.

[26] See *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

[27] *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d 737 (2012).

[28] See *id.*

courts differ in how far they extend the reach of relation-back rules.[29] But the Legislature did not place any limits on relation back under § 25-301, which unambiguously directs that an amendment joining the real party in interest "shall have the same effect as if the action had been commenced by the real party in interest." Nothing in the plain language of § 25-301 suggests that it does not apply to the 23-year period under the dormant mineral interest statutes. We will not read into a statute a meaning that is not there.[30]

Nor does § 25-301 condition relation back on factors such as notice or prejudice to the opposing party. Before the 1999 amendment to § 25-301, we stated that an amendment substituting the real party in interest should not relate back if doing so would prejudice the defendant.[31] Some federal courts relate an amendment back under rule 17 only if the plaintiff's mistake was "understandable."[32] But if the Legislature wanted courts to consider factors such as prejudice it would have said so, as it did in § 25-201.02(2). Furthermore, § 25-301 states that an amendment "shall have the same effect." Generally, the word "shall" in a statute is mandatory.[33] If an exception to this mandate exists, the facts before us do not warrant its application.

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[29] Compare *Farber v. Wards Co., Inc.*, 825 F.2d 684 (2d Cir. 1987), *In re Franklin Mut. Funds Fee Litigation*, 478 F. Supp. 2d 677 (D.N.J. 2007), and *Zalkind v. Ceradyne, Inc.*, 194 Cal. App. 4th 1010, 124 Cal. Rptr. 3d 105 (2011), with *Corbin v. Blankenburg*, 39 F.3d 650 (6th Cir. 1994), and *Erickson v. Wright Welding Supply, Inc.*, 485 N.W.2d 82 (Iowa 1992).

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

[31] See *New Light Co. v. Wells Fargo Alarm Servs.*, 252 Neb. 958, 567 N.W.2d 777 (1997).

[32] See, e.g., *Wieburg v. GTE Southwest Inc.*, 272 F.3d 302, 308 (5th Cir. 2001). See, also, *Fujimoto v. Au*, 95 Haw. 116, 19 P.3d 699 (2001). But see, e.g., *Esposito v. U.S., supra* note 23. See, also, *Preston v. Kindred Hospitals West, L.L.C., supra* note 20.

[33] *Christiansen v. County of Douglas*, 288 Neb. 564, 849 N.W.2d 493 (2014).

Finally, US Bank argues that it "did not seek dismissal because the action was not brought in the name of the real party in interest."[34] Therefore, it contends that § 25-301 is not relevant. We disagree. In its answer to the original complaint, US Bank prayed for dismissal and alleged that the "[Fishers'] Complaint is not brought in the name of the real party in interest."

Because the amended complaint relates back under § 25-301, we need not decide whether the same result could be reached under § 25-201.02. And, again, we express no opinion whether the beneficiaries of a trust—often said to hold equitable title[35]—can be "owners of the surface" under § 57-228.

Our conclusion that the amended complaint relates back to the original complaint means that the Fishers are entitled to summary judgment. US Bank admitted that it recorded its claims of interest after the Fishers filed the original complaint. There is no evidence that US Bank otherwise publicly exercised its right of ownership as described in § 57-229. Thus, the court should have sustained the Fishers' motion for summary judgment.

## CONCLUSION

The Fishers amended their complaint to join the real parties in interest. Therefore, the amended complaint relates back to the original complaint under § 25-301. Because US Bank did not publicly exercise its right of ownership during the 23 years preceding the original complaint, the Fishers are entitled to summary judgment. We reverse, and remand with directions to enter a judgment terminating any severed mineral interest in the subject property of which US Bank is the record owner.

Reversed and remanded with directions.

McCormack, J., participating on briefs.

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[34] Brief for appellee at 9.

[35] See 90 C.J.S. *Trusts* § 265 (2010).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Zanaya W. et al., children under 18 years of age. State of Nebraska, appellee and cross-appellee, v. P'lar'e S., appellee and cross-appellant, and Reon W., intervenor-appellant.

# In re Interest of Jahon S., a child under 18 years of age. State of Nebraska, appellee, v. P'lar'e S., appellant.

863 N.W.2d 803

Filed June 5, 2015. Nos. S-14-550, S-14-564.

1. **Juvenile Courts: Evidence: 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. 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.
2. **Parental Rights.** Incarceration may be considered along with other factors in determining whether parental rights can be terminated. Specifically, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration.
3. **Parental Rights: Abandonment.** Although incarceration itself may be involuntary as far as the parent is concerned, the criminal conduct causing the incarceration is voluntary.
4. **Parental Rights.** Where 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.
5. **Constitutional Law: Appeal and Error.** Generally, a constitutional issue not passed upon by the trial court is not appropriate for consideration on appeal.

6. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

Appeals from the Separate Juvenile Court of Douglas County: Christopher Kelly, Judge. Affirmed.

Joseph L. Howard, of Dornan, Lustgarten & Troia, P.C., L.L.O., for intervenor-appellant Reon W. in No. S-14-550.

Thomas C. Riley, Douglas County Public Defender, and Zoë R. Wade for appellee P'lar'e S. in No. S-14-550 and appellant P'lar'e S. in No. S-14-564.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Jennifer Chrystal-Clark for appellee State.

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

Stephan, J.

Reon W. and P'lar'e S. are the biological parents of Zanaya W., Mileaya S., and Imareon S. The separate juvenile court of Douglas County terminated their parental rights to the children, and both filed timely appeals. Reon's appeal and P'lar'e's cross-appeal are before us as case No. S-14-550.

Reon and P'lar'e are also the parents of Jahon S. In separate proceedings, the juvenile court also terminated their parental rights to Jahon. P'lar'e's appeal is before us in case No. S-14-564. Reon's appeal is separately docketed as case No. S-14-1049 and is not the subject of this opinion. We granted P'lar'e's petition to bypass and consolidated cases Nos. S-14-550 and S-14-564 for disposition. We now affirm the judgment of the juvenile court in each case.

## BACKGROUND

### General

In March 2011, the State filed a petition alleging Zanaya, then 2 years old, and Mileaya, then approximately 1 year old,

came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the fault or habits of P'lar'e. The children were removed from P'lar'e's custody and placed with Reon. In July, Reon was allowed to intervene in the juvenile proceedings as an interested party. Imareon was born in May 2012, and the petition was subsequently amended to include him as a child within the meaning of § 43-247(3)(a) due to the fault or habits of P'lar'e. Zanaya, Mileaya, and Imareon were adjudicated in July 2012 after P'lar'e admitted she had failed to provide them with safe and stable housing and had failed to participate in necessary mental health treatment for herself. Imareon was also placed with Reon.

The original disposition was in September 2012. At that time, the permanency objective was family preservation with Reon and a concurrent objective of reunification with P'lar'e. P'lar'e was ordered to work with her psychiatrist for medication management and take all medications prescribed, to submit to random drug and alcohol testing a minimum of two times per week, to continue to participate in individual therapy, to participate in an outpatient substance abuse program and mental health therapy, and to cooperate with family support workers and the Department of Health and Human Services (DHHS). P'lar'e was allowed supervised visitation with the children.

P'lar'e completed 5 of 10 scheduled visits with the children in September 2012 and 1 of 6 scheduled visits in October. Her caseworker reported that during visits, P'lar'e struggled to engage appropriately with the children, but did show them verbal and physical affection. P'lar'e missed scheduled drug tests in May, June, and August. She also missed four scheduled appointments with a psychiatrist between March and September. P'lar'e stopped visitation in November, when she moved to Detroit, Michigan. At that time, she understood Reon was going to be given custody of the children and she was comfortable with that. She testified that she was capable of parenting at that time but was tired of the process and decided to just let the children be with Reon. P'lar'e and Reon

agreed she could have visits with the children, supervised by him. After P'lar'e moved to Detroit, the permanency objective changed to family preservation with Reon and DHHS stopped making efforts to reunify P'lar'e and the children.

In March 2013, Reon was arrested for possessing marijuana with intent to distribute. In April, a supplemental petition was filed alleging Zanaya, Mileaya, and Imareon came within § 43-247(3)(a) due to the fault or habits of Reon. As relevant to this case, it was alleged that Reon used and/or possessed controlled substances in the home and that Reon failed to provide safe housing for the children. Reon admitted these allegations, and the children were adjudicated and placed in the care and custody of DHHS.

Meanwhile, P'lar'e returned to Nebraska in February 2013. In an April 2013 review order, the court allowed her to resume DHHS-supervised visitation with the children. It also ordered her to submit to random drug and alcohol testing.

### Termination of Reon's Parental Rights

On January 21, 2014, the State petitioned to terminate Reon's parental rights to Zanaya, Mileaya, and Imareon based on an allegation that he substantially and continuously or repeatedly neglected and refused to give them necessary parental care and protection.[1] The petition also alleged that the children had been in an out-of-home placement for 15 or more of the most recent 22 months.[2] The petition further alleged that terminating Reon's parental rights was in the best interests of the children.

Reon initially denied the allegations in the petition. At a May 19, 2014, hearing, however, he informed the court he wished to admit the allegations that (1) he substantially and continuously or repeatedly neglected the children and refused to give them parental care and protection and (2) termination

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[1] See Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2014).

[2] See § 43-292(7).

of his parental rights was in the children's best interests. The court advised Reon of the rights he would be waiving by making the admissions and ascertained that his admissions were freely and voluntarily given. The court then asked the State to give a factual basis for the admissions, and it responded:

> Your Honor, if called today, Janece Potter[, a family permanency specialist,] would testify that [the children] have been in foster care since April of 2013 when they were removed from the care of their father due to his incarceration. The evidence will also show that the father was convicted of possession with intent to distribute marijuana.
>
> And the State would offer Exhibit 54, a certified copy of that conviction. Exhibit 54 would also show that the father was sentenced to three to five years for his conviction of possession with intent to distribute. In addition, the State offers Exhibit 56, an additional conviction of the father for an assault that occurred while he was incarcerated in which he was sentenced an additional 120 days.
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> If called to the stand, Janece Potter would testify that it's in the children's best interests that their father's rights be terminated due to incarceration and the fact that he's not able to provide permanency for the children currently, nor will be — will he be enabled to provide permanency for them in the upcoming — for at least a year.

The State later added:

> [I]f Janece Potter were to testify, she would testify that while the children were in the father's care and custody, which occurred when they were initially removed [in March 2011] up until April of 2013, the father had admitted, once incarcerated, to using marijuana on a daily basis while he had care, custody, and control of his children.

The record shows that Janece Potter is a representative of the Nebraska Families Collaborative and was the family permanency specialist for DHHS in the juvenile proceedings.

The court accepted Reon's admissions and found the allegations in the petition pertaining to neglect under § 43-292(2) and the best interests of the children had been proved by clear and convincing evidence. It then stated on the record that "it is the agreement of the parties that the Court will make a finding that this is, in fact, a voluntary termination of parental rights on the part of the father." Reon agreed to this statement. The court then terminated Reon's parental rights.

### Termination of P'lar'e's Parental Rights

The State also moved to terminate P'lar'e's parental rights to Zanaya, Mileaya, and Imareon on January 21, 2014. The petition alleged three grounds under § 43-292: subsections (2) (substantial neglect), (6) (failure to correct conditions leading to adjudication), and (7) (out-of-home placement for 15 of last 22 months). On February 25, the State also moved to terminate P'lar'e's parental rights to Jahon, born in November 2013. The petition alleged that termination of parental rights as to Jahon was proper under § 43-292(2), because P'lar'e had substantially and continuously or repeatedly neglected or refused to give Jahon's siblings (Zanaya, Mileaya, and Imareon) necessary parental care and protection. The juvenile court appointed a guardian ad litem for P'lar'e in the termination proceedings.

A trial on both petitions was held in May 2014. The State introduced evidence that the three older children had been in their current foster home since April 13, 2013, and that Jahon had been in that home since shortly after his birth. The foster mother testified that the three older children exhibited negative changes in their behavior after visits with P'lar'e, including becoming aggressive, having nightmares, and being "whiny" and "clingy."

Potter, the family permanency specialist, also testified. She testified that in March 2013, P'lar'e reported that she had "run out" of her psychiatric medication and was not taking it. P'lar'e had stopped seeing her mental health therapist in

October 2012, before she moved to Detroit. She resumed therapy again in June 2013, but refused to release her therapy records to DHHS. She stopped therapy again in November and then started with a new therapist in December. By the time of trial in May 2014, she had been seeing a therapist and drug counselor for 5 months and was not on psychiatric medication. She testified at trial that she was not on medication because she had been pregnant twice while the proceedings were ongoing.

Beginning in 2012, all of P'lar'e's visits with the children were supervised and she consistently demonstrated an inability to appropriately interact with and discipline the children. From September 2012 to February 2014, P'lar'e attended approximately 75 percent of the scheduled supervised visits and complied with about 50 percent of the family support services offered to her. She also completed only about 50 percent of the drug tests she was scheduled to take. During this time period, P'lar'e also failed to maintain stable housing and she drifted from various shelters to the homes of friends. P'lar'e lived in Fremont, Lincoln, and Omaha, Nebraska, during this time period. At the time of trial, she had obtained a voucher for housing and believed she could provide housing for the children. She did not have and never had suitable transportation for herself or the children. P'lar'e testified that she knew Reon was selling and using marijuana in the spring of 2013 while he had custody of the children.

The State did not present any evidence that P'lar'e had been diagnosed with a mental illness. However, during cross-examination of Potter, P'lar'e elicited testimony that she receives Supplemental Security Income because of her mental health issues. Additionally, P'lar'e testified that she has been diagnosed with manic depressive disorder.

After trial, the court terminated P'lar'e's rights to all the children. It found clear and convincing evidence that Zanaya, Mileaya, and Imareon were within the meaning of § 43-292(2), (6), and (7) and that termination of P'lar'e's parental rights was in their best interests. It found clear and convincing

evidence that Jahon came within the meaning of § 43-292(2) and that termination of P'lar'e's parental rights was also in his best interests. P'lar'e filed timely appeals, and we consolidated the cases for review.

## ASSIGNMENTS OF ERROR

Reon assigns in case No. S-14-550 that the juvenile court erred in (1) terminating his parental rights without first obtaining a sufficient factual basis to support his admissions to the allegations in the petition, (2) terminating his parental rights under § 43-292(2), and (3) terminating his parental rights under § 43-292(7).

P'lar'e assigns in both cases Nos. S-14-550 and S-14-564 that she was deprived of a fundamentally fair proceeding when the State was allowed to "proceed to termination under §§ 43-292(2), (6), and (7), instead of § 43-292(5), when the State was fully aware [she] was mentally ill and that her mental illness affected her capacity to parent."

## 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. 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.[3]

## ANALYSIS

### Reon

Reon assigns that the juvenile court erred in terminating his parental rights under § 43-292(7). That subsection allows termination when the children have been in out-of-home placement for 15 of the last 22 months, and Reon contends in his brief that the facts do not support termination on this ground.

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[3] *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

But the juvenile court did not terminate Reon's rights based on § 43-292(7). It was alleged as a ground for termination in the petition, but it was dismissed when Reon entered his admission to the § 43-292(2) allegation. Because § 43-292(7) was not a ground utilized by the juvenile court, we need not address this argument on appeal.

Reon also assigns and argues that the State failed to prove the § 43-292(2) allegation by clear and convincing evidence. But he admitted this allegation in the petition. In *In re Interest of L.B., A.B., and A.T.*,[4] a mother admitted the allegations in the termination petition. We characterized this as a judicial admission, noting a judicial admission is "'a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.'"[5]

Because Reon admitted the § 43-292(2) allegation in the petition to terminate, the State did not have to independently prove it by clear and convincing evidence. But it was required to put forth a factual basis for the allegations in the petition, even though Reon admitted them.[6] Reon contends the State failed to do so, thus making his admissions invalid.

According to § 43-279.01(3), when termination of parental rights is sought, a court may accept an in-court admission as to all or any part of the allegations in the petition. Section 43-279.01(3) then specifically states that the "court shall ascertain a factual basis for an admission." The statute does not specify precisely what the factual basis must entail.

Here, Reon admitted two allegations: (1) that he substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection and (2) that termination of his parental rights was in the children's

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[4] *In re Interest of L.B., A.B., and A.T.*, 235 Neb. 134, 454 N.W.2d 285 (1990).

[5] *Id.* at 140, 454 N.W.2d at 289.

[6] See Neb. Rev. Stat. § 43-279.01(3) (Cum. Supp. 2014).

best interests. The factual bases to support the allegation that Reon had substantially and continuously or repeatedly neglected the children or refused to give them necessary parental care and protection was that Reon was convicted of possession with intent to distribute marijuana and that on September 10, 2013, he was sentenced to 3 to 5 years' incarceration. Further, while incarcerated, Reon was convicted of third degree assault and sentenced to an additional 120 days, the sentence to run consecutively to the previous sentence. In addition, the factual bases included that Reon had admitted while he was incarcerated that he used marijuana on a daily basis while the children were in his care, custody, and control. The record shows that the children were in his care, custody, and control from March 2011 to March or April 2013.

[2,3] Reon argues that these factual bases relied extensively on the fact that he was incarcerated and were thus insufficient. To support this argument, he emphasizes that we have held that incarceration alone does not provide a ground for termination of parental rights.[7] While this is true, we have also stated that incarceration may be considered along with other factors in determining whether parental rights can be terminated.[8] Specifically, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration.[9] And although incarceration itself may be involuntary as far as the parent is concerned, the criminal conduct causing the incarceration is voluntary.[10]

Here, the incarceration alone was not the sole factual basis offered in support of Reon's admissions. Instead, the State showed what crimes Reon was incarcerated for and for how

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[7] See, *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012); *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999); *In re Interest of Josiah T.*, 17 Neb. App. 919, 773 N.W.2d 161 (2009).

[8] See *In re Interest of Kalie W., supra* note 7; *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

[9] *In re Interest of Ryder J., supra* note 7.

[10] *In re Interest of Kalie W., supra* note 7.

long he was incarcerated. It further showed that he committed an additional crime while incarcerated, thus extending his sentence. It also showed that he used marijuana daily while the children were in his custody. These factual bases were sufficient to support Reon's admission to the allegation that he had substantially and continuously or repeatedly refused to give the children proper parental care.

[4] With respect to the best interests allegation, the factual basis provided by the State was that the caseworker would testify that termination was in the children's best interests because Reon was not able to provide permanency for them. This testimony was given on May 19, 2014, and on that date, the State also informed the court that the children had been in foster care since April 2013. There was also evidence that Reon at the time was subject to one prison term of 3 to 5 years and another prison term of 120 days. Where 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.[11] This was a sufficient factual basis for the admission that termination of Reon's parental rights was in the children's best interests. For these reasons, we find no error in the order terminating Reon's parental rights to Zanaya, Mileaya, and Imareon.

### P'lar'e

P'lar'e's sole assignment of error in both cases Nos. S-14-550 and S-14-564 is that her due process rights were violated because the State was "allowed to proceed" to termination under a ground other than § 43-292(5) when it was aware she had a mental illness that affected her ability to parent. Section 43-292(5) allows termination of parental rights when "[t]he parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period."

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[11] *In re Interest of Ryder J., supra* note 7.

This court rejected a similar argument in *In re Interest of J.N.V.*,[12] a case in which the parental rights of a parent who had been diagnosed with paranoid schizophrenia and required long-term hospitalization were terminated on the ground of neglect pursuant to § 43-292(2). In a divided opinion, the majority concluded that "[w]hile it might have been kinder . . . for the State to have proceeded under § 43-292(5), it was not required to do so."[13] A dissenting opinion concluded that it was "fundamentally unfair to tell a mother it is the neglect of her son which is at issue and then try her for lacking the mental capacity to carry out her parental responsibilities."[14]

[5,6] P'lar'e argues on appeal that we should overrule *In re Interest of J.N.V.* and adopt the reasoning of its dissent. But she did not raise this due process argument to the juvenile court. Generally, a constitutional issue not passed upon by the trial court is not appropriate for consideration on appeal.[15] When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.[16]

P'lar'e argues that we can nevertheless reach the issue under the reasoning of *In re Interest of Mainor T. & Estela T.*[17] In that case, we held that a parent's failure to appeal from orders which preceded the termination of parental rights did not preclude our consideration of issues which could have been raised in such appeals because there was plain error which permeated the proceedings and denied fundamental fairness to the parent. That is not the case here.

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[12] *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986).

[13] *Id.* at 112, 395 N.W.2d at 761.

[14] *Id.* at 114, 395 N.W.2d at 762 (Caporale, J., dissenting).

[15] *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013).

[16] *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011); *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002).

[17] *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

P'lar'e does not complain of any procedural irregularities in the manner in which the termination proceedings were conducted. She was represented by appointed counsel throughout the case, and a guardian ad litem was appointed for her, which is required only when termination is sought under § 42-292(5).[18] Her sole complaint is that she was deprived of a fair proceeding because the State was "allowed to proceed to termination under § 43-292(2) . . . instead of § 43-292(5)." Given that no one objected to the State's proceeding under § 43-292(2) and that it was permitted to do so under the existing precedent of *In re Interest of J.N.V.*, the fact the juvenile court did not sua sponte direct the State to proceed under § 43-292(5) instead can hardly be characterized as plain error, which we have defined as 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.[19]

We therefore conclude that P'lar'e's sole assigned error is not preserved for our review.

## CONCLUSION

There was a sufficient factual basis in the record to support Reon's admissions to the allegations in the petition to terminate his parental rights to Zanaya, Mileaya, and Imareon. We affirm the decision of the juvenile court as to Reon in case No. S-14-550.

P'lar'e's argument that the State violated her due process rights in cases Nos. S-14-550 and S-14-564 by failing to base termination on § 43-292(5) was not preserved for appeal. We affirm the decisions of the juvenile court in both cases.

Affirmed.

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[18] See, Neb. Rev. Stat. § 43-292.01 (Reissue 2008); *Wayne G. v. Jacqueline W.*, 288 Neb. 262, 847 N.W.2d 85 (2014).

[19] *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011); *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Cory L. Russell, appellant.
863 N.W.2d 813

Filed June 5, 2015. No. S-14-927.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty plea, and an appellate court will overturn that decision only where there is an abuse of discretion.
3. **Sentences: Sexual Assault.** For purposes of the authorized limits of an indeterminate sentence under Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Cum. Supp. 2014), both "mandatory minimum" as used in Neb. Rev. Stat. § 28-319.01(2) (Cum. Supp. 2014) and "minimum" as used in Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014) in regard to a Class IB felony mean the lowest authorized minimum term of the indeterminate sentence.
4. **Sentences: Probation and Parole.** A person convicted of a felony for which a mandatory minimum sentence is prescribed is not eligible for probation.
5. **Sentences.** Good time reductions do not apply to mandatory minimum sentences.
6. **Sentences: Probation and Parole: Sexual Assault.** The mandatory minimum required by Neb. Rev. Stat. § 28-319.01(2) (Cum. Supp. 2014) affects both probation and parole.
7. **Pleas.** In order to support a finding that a plea of guilty or no contest has been entered freely, intelligently, voluntarily, and understandingly, among other requirements the record must establish that the defendant knew the range of penalties for the crime with which he or she is charged.
8. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, appellate courts are guided by the presumption

that the Legislature intended a sensible rather than absurd result in enacting the statute.

9. **Sentences: Sexual Assault.** The range of penalties for sexual assault of a child in the first degree, first offense, under Neb. Rev. Stat. § 28-319.01(2) (Cum. Supp. 2014), is 15 years' to life imprisonment.
10. **Sentences.** A court's failure to advise a defendant of the correct statutory minimum and maximum penalties does not automatically warrant reversal.
11. **Sentences: Probation and Parole.** In the event of a discrepancy between the statement of the minimum limit of a sentence and the statement of parole eligibility, the statement of the minimum limit controls the calculation of an offender's term.
12. **Sentences.** The meaning of a sentence is, as a matter of law, determined by the contents of the sentence itself.
13. **Judges: Sentences: Probation and Parole.** A trial judge's incorrect statement regarding time for parole eligibility is not part of the sentence and does not evidence ambiguity in the sentence imposed.

Appeal from the District Court for Colfax County: Mary C. Gilbride, Judge. Affirmed.

Bryan C. Meismer for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

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

Cassel, J.

## INTRODUCTION

Cory L. Russell appeals from his plea-based conviction and sentence for sexual assault of a child in the first degree. He argues that because he was not correctly advised of the 15-year "mandatory minimum," his plea was not entered knowingly. To resolve the appeal, we (1) explain the distinction, in this context, between "minimum" and "mandatory minimum"; (2) determine the correct range of penalties; (3) conclude that the error was not prejudicial; and (4) describe why the different

good time calculation for a "mandatory minimum" does not affect the validity of the plea.

## BACKGROUND

The controlling statute states, "Sexual assault of a child in the first degree is a Class IB felony with a mandatory minimum sentence of fifteen years in prison for the first offense."[1] The general statute prescribing the range of penalties for a Class IB felony specifies a "[m]inimum" of 20 years' imprisonment and a "[m]aximum" of life imprisonment.[2]

The State filed an information charging Russell with 27 counts of sexual assault of a child in the first degree. Pursuant to a plea agreement, the State agreed to file an amended information charging Russell with only one count of that offense in return for Russell's plea of no contest to the charge. The amended information did not allege that Russell had any prior convictions.

Prior to accepting Russell's plea, the district court advised Russell that the crime "carries a minimum of 20 years[']incarceration and a maximum of life." The court accepted Russell's plea of no contest and adjudged him guilty of sexual assault of a child in the first degree.

At the sentencing hearing, the district court stated that the offense carried "a mandatory minimum of at least 20 years." The court imposed a sentence of 40 to 50 years' imprisonment. The court advised Russell that he "must serve 20 years, less 332 days served on the minimum term before you would be eligible for parole, and 25 years, less 332 days served on the maximum term before mandatory release."

Russell timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

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[1] Neb. Rev. Stat. § 28-319.01(2) (Cum. Supp. 2014).

[2] See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014).

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

## ASSIGNMENT OF ERROR

Russell assigns that the district court erred by not properly advising him of the crime's range of penalties prior to the acceptance of his plea.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[4]

[2] A trial court is given discretion as to whether to accept a guilty plea, and an appellate court will overturn that decision only where there is an abuse of discretion.[5]

## ANALYSIS

### Meaning of "Mandatory Minimum"

In order to address Russell's assignment of error, we must determine the specific meaning of the phrase "mandatory minimum sentence" in § 28-319.01(2). From one context to another, the meaning of the term "mandatory minimum" can vary. In some instances, it may be a term of art, while in other circumstances, it may be used only in the general sense of the two words. For example, a "minimum" prescribed by § 28-105 can be described as "mandatory" in the sense that a judge is not authorized to impose an indeterminate sentence of imprisonment having a minimum term which is less than the statutorily authorized minimum sentence.[6] We have previously stated that a court must advise a defendant of any mandatory minimum sentence that will apply.[7] But in none of those cases were we faced with a "mandatory minimum sentence" in the

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[4] *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015).

[5] *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

[6] See Neb. Rev. Stat. § 29-2204(1)(a)(ii) (Cum. Supp. 2014).

[7] See, e.g., *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991); *State v. Stastny*, 223 Neb. 903, 395 N.W.2d 492 (1986).

sense that the only consequences were to prohibit probation eligibility and to deny any good time prior to service of the mandatory minimum term. Those consequences did not exist in statute for a felony offense until 1995.[8] Thus, we must explain the differences and similarities between the terms in the specific statutes before us.

[3] For purposes of the authorized limits of an indeterminate sentence under § 29-2204(1)(a)(ii)(A), both "mandatory minimum" as used in § 28-319.01(2) and "minimum" as used in § 28-105 in regard to a Class IB felony mean the lowest authorized minimum term of the indeterminate sentence. Thus, in that sense, there is no difference between the two.

But the Legislature has prescribed different consequences regarding probation and parole, depending upon whether the bottom end of a sentence is a "minimum" or a "mandatory minimum." Under current law regarding the specific statutes before us, there are two significant differences between a "minimum" and a "mandatory minimum."

[4] First, a court cannot place the convicted offender on probation. We have said that whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.[9] Thus, with respect to the "minimum" required for a Class IB felony under § 28-105, a court is generally authorized to suspend the sentence and impose a term of probation.[10] But a person convicted of a felony for which a mandatory minimum sentence is prescribed is not eligible for probation.[11] Because § 28-319.01(2) imposes a mandatory minimum of 15 years' imprisonment for sexual assault of a child in the first degree, a sentence to probation is not authorized.

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[8] See 1995 Neb. Laws, L.B. 371, §§ 2 and 21.

[9] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[10] See, generally, Neb. Rev. Stat. § 29-2262 (Cum. Supp. 2014); *State v. Hylton*, 175 Neb. 828, 124 N.W.2d 230 (1963).

[11] § 28-105(4).

[5] The second consequence is that the offender will not receive any good time for the entire duration of the mandatory minimum. Good time reductions do not apply to mandatory minimum sentences.[12] This has consequences for the good time calculations for both the minimum and maximum terms of an indeterminate sentence. We have held that in calculating parole eligibility, a defendant must serve the mandatory minimum plus one-half of any remaining minimum sentence before becoming eligible for parole.[13] Thus, where the court sentences an offender to a minimum term equal to the applicable mandatory minimum, the offender becomes eligible for parole only after serving the full mandatory minimum. And we have determined that good time credit cannot be applied to the maximum term of an indeterminate sentence before the mandatory minimum sentence has been served.[14] Thus, in calculating mandatory release, a defendant must serve the mandatory minimum plus one-half of any remaining maximum sentence.[15]

[6] Therefore, under our current statutes, the mandatory minimum required by § 28-319.01(2) affects both probation and parole. Probation is not authorized in sentencing an offender for sexual assault of a child in the first degree. And good time credit cannot be allowed until the full amount of the mandatory minimum term of imprisonment has been served. The designation of the minimum as "mandatory" in § 28-319.01(2) does not affect the range of penalties, but the statute's specification of a different minimum does.

## Range of Penalties

[7] Long ago, we articulated that in order to support a finding that a plea of guilty or no contest has been entered

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[12] See Neb. Rev. Stat. § 83-1,110 (Reissue 2014).

[13] See *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012).

[14] See *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002).

[15] See *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), *disapproved on other grounds, State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

freely, intelligently, voluntarily, and understandingly, among other requirements the record must establish that the defendant knew the range of penalties for the crime with which he or she is charged.[16] Russell challenges his plea because he was not advised of the mandatory minimum sentence of 15 years' imprisonment required by § 28-319.01(2).

But the parties do not agree upon the correct range of penalties. Russell contends that the range is 20 years' to life imprisonment, of which the first 15 years are "mandatory." The State argues that the range is 15 years' to life imprisonment and that the entire minimum term is mandatory. Thus, we must first determine whether the range of penalties is 20 years' to life imprisonment or imprisonment of 15 years to life.

We have not explicitly enunciated the range of penalties for sexual assault of a child in the first degree under § 28-319.01. Most recently, in *State v. Lantz*,[17] we reviewed sentences of 15 to 25 years' imprisonment, but we focused only on whether the mandatory minimum required that the sentences be served consecutively. Some of our language in *State v. Fleming*[18] could be interpreted to mean that the minimum sentence is 20 years in prison, of which 15 years must be served before becoming eligible for parole. But other language in the opinion is consistent with a minimum term of 15 years. Notably, we did not expressly state that the 20-year minimum sentence imposed by the court was the most lenient authorized by statute. We have yet to expressly opine on this precise issue.

The Nebraska Court of Appeals, however, has overtly determined that the minimum penalty for sexual assault of a child in the first degree is 15 years. In *State v. Lantz*,[19] the trial court imposed sentences of imprisonment of 15 to 25 years

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[16] See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

[17] *State v. Lantz, supra* note 15.

[18] *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010).

[19] *State v. Lantz*, 21 Neb. App. 679, 842 N.W.2d 216 (2014), *disapproved in part on other grounds, State v. Lantz, supra* note 15.

for each of the three counts of sexual assault. On appeal, the State argued that the sentences were not within the statutory sentencing range, because the sentencing statutes required the minimum portion of the sentence to be 20 years' imprisonment, of which 15 years was a mandatory minimum sentence not subject to good time. The Court of Appeals disagreed, relying upon the principle that to the extent there is a conflict between two statutes, the specific statute controls over the general statute. The court reasoned:

> 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.[20]

The Court of Appeals' resolution was consistent with its determination in a prior case that a sentence of 15 to 15 years' imprisonment for first degree sexual assault of a child was the most lenient sentence of imprisonment that could be imposed for the conviction.[21]

[8] To hold otherwise could lead to absurd results. For example, a person found guilty of sexual assault of a child in the first degree and who had previously been convicted of the same crime would be guilty of a Class IB felony with a mandatory minimum sentence of 25 years in prison.[22] In that instance, although the crime would remain a Class IB felony, the court supposedly would be permitted to impose a minimum term of years less than the mandatory minimum. In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd

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[20] *Id.* at 704, 842 N.W.2d at 236-37.

[21] See *State v. Kays*, 21 Neb. App. 376, 838 N.W.2d 366 (2013), *affirmed on other grounds* 289 Neb. 260, 854 N.W.2d 783 (2014).

[22] See § 28-319.01(3).

result in enacting the statute.[23] This requires that we reject Russell's interpretation.

[9] We explicitly hold that the range of penalties for sexual assault of a child in the first degree, first offense, under § 28-319.01(2), is 15 years' to life imprisonment. Because the lower limit is a mandatory minimum, probation is not an authorized sentence for the offense and no good time is accrued until the full mandatory minimum term has been served.

### Erroneous Advisement

The district court erroneously advised Russell of the lower end of the range of penalties. The court informed Russell that the minimum sentence was 20 years rather than 15 years. But this erroneous advisement does not necessitate reversal.

[10] A court's failure to advise a defendant of the correct statutory minimum and maximum penalties does not automatically warrant reversal. In *State v. Rouse*,[24] we rejected the concept that the standards for advisement were per se rules, where a failure to technically comply would mandate an automatic reversal. We instead said, "If it can be determined that the defendant understood the nature of the charge, the possible penalty, and the effect of his plea, then there is no manifest injustice that would require that the defendant be permitted to withdraw his plea."[25] In that case, the court did not inform the defendant of the statutory maximum and minimum penalties for second degree murder. However, the defendant was aware of the plea arrangements between his counsel and the prosecution and that he would have the opportunity to withdraw his plea if the sentence imposed was not between 16 and 20 years in prison. We concluded that the defendant received the sentence that he had bargained for and that any error on the part of the trial judge in failing to inform the defendant of the statutory penalty did not prejudice the rights of the defendant

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

[24] *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980).

[25] *Id.* at 375-76, 293 N.W.2d at 86.

or result in manifest injustice. Without more, the technical failure of the trial judge to inform the defendant of the statutory penalties was not enough for reversal.

We also found no prejudice in a case where a defendant was advised of a lower maximum penalty than that mandated by statute. In *State v. Jipp*,[26] the defendant was advised that the maximum penalty was 20 years' imprisonment when the actual maximum penalty was 50 years' imprisonment. We observed that the defendant was advised that the minimum penalty was 1 year and that he was sentenced to 1 year. We stated that the effect of *State v. Rouse*[27] "was to hold that if a defendant was sentenced within the term described by the trial court, prejudice is not then apparent on the face of the record."[28]

Russell suffered no prejudice as a result of the erroneous advisement. His sentence of 40 to 50 years' imprisonment was within the statutory range of penalties. It was also within the range of penalties articulated by the district court. It is inconceivable that Russell would plead no contest after being advised of a 20-year minimum sentence but would not have entered such a plea if he were properly informed that the minimum sentence was 15 years. This is particularly true where Russell faced 27 counts of sexual assault of a child in the first degree before the State agreed to dismiss 26 counts in return for Russell's plea of no contest. The notion that Russell would not have pled no contest but for the erroneous advisement regarding the minimum penalty strains credulity. Russell's counsel admitted as much at oral argument.

### Characterization as "Mandatory Minimum"

The statutory characterization of the minimum penalty as a mandatory minimum does not change our analysis. As we have explained, the addition of the word "mandatory" to "minimum"

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[26] *State v. Jipp*, 214 Neb. 577, 334 N.W.2d 805 (1983).

[27] *State v. Rouse, supra* note 24.

[28] *State v. Jipp, supra* note 26, 214 Neb. at 579, 334 N.W.2d at 806-07.

in § 28-319.01(2) had the effect of removing eligibility for probation and denying accrual of good time prior to service of the first 15 years of any minimum term. But the addition of the word "mandatory" did not affect the range of penalties. Rather, the special minimum established in § 28-319.01(2) for this offense superseded the minimum provided for Class IB felonies in § 28-105. In other words, it was the designation of a specific minimum in § 28-319.01(2) for sexual assault of a child in the first degree that affected the range of penalties; the additional word "mandatory" did not do so.

Federal sentencing law supports our decision. Our previous statements concerning advising a defendant of the mandatory minimum sentence on a charge derived from standard 1.4 of the ABA Standards Relating to Pleas of Guilty (Approved Draft 1968).[29] And that statement is consistent with the Federal Rules of Criminal Procedure, which require that a defendant be advised of "any mandatory minimum penalty."[30] The purpose of the rule is "to insure that a defendant knows what minimum sentence the judge MUST impose and what maximum sentence the judge MAY impose."[31] Nonetheless, the U.S. Supreme Court, citing Fed. R. Crim. P. 11, stated in a parenthetical that "federal courts generally are not required to inform defendant about parole eligibility before accepting guilty plea."[32] It follows that the term "mandatory minimum penalty" as used in the ABA standards and the Federal Rules of Criminal Procedure does not refer to parole eligibility, but, rather, refers to the low end of the range of punishments for a charged offense. One federal circuit court has explicitly

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[29] See, e.g., *State v. Clark*, 217 Neb. 417, 350 N.W.2d 521 (1984); *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974). See, also, *State v. Irish, supra* note 16 (Shanahan, J., dissenting; Krivosha, C.J., and White, J., join) (citing successor standard, standard 14-1.4 of ABA Standards for Criminal Justice (2d ed. 1980)).

[30] Fed. R. Crim. P. 11(b)(1)(I).

[31] Fed. R. Crim. P. 11, advisory committee notes on 1974 amendments.

[32] *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

stated that "'penalty' means the statutory nominal sentence and not actual time in prison after credit for good behavior and parole."[33]

Clearly, Russell's argument depends solely upon the consequences of a mandatory minimum for accrual of good time. He makes no claim that he would have been considered for a sentence of probation. As Russell explained, "After the math is done, the difference [is] between what the [district court] advised and [s]entenced (40 years, 20 with good time) and what Nebraska [l]aw mandates (40 years, 27.5 with good time) . . . ."[34] In other words, he is arguing about the effect of the mandatory minimum only on his good time, which the district court described as part of its "truth-in-sentencing" pronouncements.[35]

The district court stated, "Assuming that [Russell] loses none of the good time for which he becomes eligible, [he] must serve 20 years, less 332 days served, on the minimum term before obtaining parole eligibility, and must serve 25 years, less 332 days served, on the maximum term, before obtaining mandatory release." The State, in effect, concedes that these advisements were incorrect. But the State argues that truth-in-sentencing advisements are not required until a sentence is pronounced and that, thus, the incorrect truth-in-sentencing advisements did not affect the validity of Russell's plea. We agree.

[11-13] As the Court of Appeals has explained, § 29-2204 plainly provides that in the event of a discrepancy between the statement of the minimum limit of the sentence and the statement of parole eligibility, the statement of the minimum limit controls the calculation of the offender's term.[36] The meaning of a sentence is, as a matter of law, determined by

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[33] *United States v. Garcia*, 698 F.2d 31, 33 (1st Cir. 1983).

[34] Brief for appellant at 1.

[35] See § 29-2204(1)(b) and (c).

[36] See *State v. Glover*, 3 Neb. App. 932, 535 N.W.2d 724 (1995).

the contents of the sentence itself.[37] A trial judge's incorrect statement regarding time for parole eligibility is not part of the sentence and does not evidence ambiguity in the sentence imposed.[38] Section 29-2204 provides the same rule regarding any conflict between the statement of maximum limit of the sentence and the advisement of mandatory release—the former controls.

## CONCLUSION

In the context of § 28-319.01(2), the term "mandatory minimum" differs from a "minimum" only in that probation is not authorized and no good time credit accrues until after the full amount of the mandatory minimum has been served. The lowest authorized minimum term of an indeterminate sentence for sexual assault of a child in the first degree, first offense, under § 28-319.01(2) is 15 years' imprisonment. Thus, the range of penalties for that offense is 15 years' to life imprisonment. The district court incorrectly advised Russell that the range of penalties was 20 years' to life imprisonment. But the error was not prejudicial and did not affect the validity of Russell's plea. The sentence imposed of 40 to 50 years' imprisonment was within both the authorized statutory range and the advisement of the range given to Russell. There was no prejudice from the incorrect advisement. Russell's actual complaint is that the truth-in-sentencing advisements were incorrect. But § 29-2204 plainly states that the pronounced terms of imprisonment prevail over any conflict with the truth-in-sentencing advisements. We therefore affirm the judgment of the district court.

AFFIRMED.

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[37] *State v. McNerny*, 239 Neb. 887, 479 N.W.2d 454 (1992).

[38] See *State v. Glover, supra* note 36.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# In re Estate of Ellen M. Panec, deceased. Rebecca Griffin, appellant, v. William J. Panec, Personal Representative of the Estate of Ellen M. Panec, deceased, appellee.

864 N.W.2d 219

Filed June 12, 2015. No. S-13-777.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines 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. ____: ____. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Abatement, Survival, and Revival: Wrongful Death.** A wrongful death action and a survival action are two distinct causes of action which may be brought by a decedent's personal representative. Although they are frequently joined in a single action, they are conceptually separate.
5. **Wrongful Death: Damages.** A wrongful death action is brought on behalf of the widow or widower and next of kin for damages they have sustained as a result of the decedent's death. Such damages include the pecuniary value of the loss of the decedent's support, society, comfort, and companionship.
6. **Abatement, Survival, and Revival: Decedents' Estates.** An action under the survival statute, Neb. Rev. Stat. § 25-1401 (Reissue 2008), is the continuance of the decedent's own right of action which he or she possessed prior to his or her death. The survival action is brought on behalf of the decedent's estate and encompasses the decedent's claim for predeath pain and suffering, medical expenses, funeral and burial

expenses, and any loss of earnings sustained by the decedent, from the time of the injury up until his or her death.

7. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Irwin and Pirtle, Judges, on appeal thereto from the County Court for Jefferson County, Steven B. Timm, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Eric B. Brown, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellant.

Vincent M. Powers and Elizabeth A. Govaerts, of Vincent M. Powers & Associates, for appellee.

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

Cassel, J.

## INTRODUCTION

The county court ordered distribution of settlement proceeds in the estate of Ellen M. Panec. Although the proceeds flowed from both a survival claim and a wrongful death claim, the court applied a wrongful death statute[1] to govern all distributions. The Nebraska Court of Appeals affirmed. We granted further review to clarify the separate legal concepts governing the respective distributions. The county court should have allocated part of the proceeds to the survival claim and ordered distribution of those proceeds as part of Ellen's probate estate. Although the Court of Appeals determined that $20,000 was allocated to the survival claim, the evidence did not support this conclusion. We therefore reverse, and remand with directions.

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[1] Neb. Rev. Stat. § 30-810 (Reissue 2008).

## BACKGROUND

In September 2011, Ellen and her second husband, William J. Panec, were injured in a motor vehicle accident. Both Ellen and William sustained injuries. William ultimately recovered, but Ellen passed away from her injuries after being hospitalized for nearly 6 weeks. At the time of the accident, Ellen was 68 years old. She had retired from her employment some years earlier. She had also been diagnosed with three types of cancer, including "stage 4" lung cancer, brain cancer, and esophageal cancer.

An informal probate of Ellen's will was initiated in the county court. Pursuant to Ellen's will, William was appointed the personal representative of her estate. However, the majority of Ellen's estate passed to her daughter from her first marriage, Rebecca Griffin, as the remainder beneficiary. William received only the household goods and furniture, any vehicles Ellen had owned, and a life estate in certain real estate. Further, William had previously waived any statutory rights in Ellen's estate via a postnuptial agreement.

Prior to Ellen's death, a lawsuit was filed in the district court for Lancaster County against the driver of the other vehicle. Upon Ellen's death, William filed an amended complaint alleging that Ellen had succumbed to her injuries. The complaint asserted that Ellen had sustained fatal injuries, incurred medical expenses, and experienced pain, suffering, inconvenience, and disability. As relief, it sought "judgment against the [driver] in an amount which will fairly and justly compensate [Ellen] for her injuries under the laws of the State of Nebraska."

In order to settle the claim, the driver's liability insurer offered to pay the limits of the policy in the amount of $100,000. William filed a petition for approval of the settlement in the county court. He requested that the court approve the settlement, because the driver was without sufficient assets to pursue. Although the court ultimately approved the settlement, William later requested that the approval

be vacated due to the failure to provide proper notice to all parties.

William also made a claim against his and Ellen's underinsurance carrier. And he filed a subsequent petition for approval of a settlement offer. In the petition, he alleged that the carrier had offered $515,000 to settle two claims: "$495,000.00 for wrongful death and $20,000.00 for the pain and suffering" that Ellen had experienced prior to her death.

The county court conducted a hearing on the two settlement offers—$100,000 from the driver's liability insurer and $516,000 from the underinsurance carrier (although William had previously alleged that the underinsurance carrier had offered $515,000, both the court and the parties treated the offer as $516,000). William and Griffin entered into a stipulation that both of the settlements were fair and reasonable. And they further stipulated to the payment of attorney fees and several medical liens that had been placed on the settlement proceeds. They also agreed that Ellen had incurred medical expenses of $214,754.77 from the accident.

William testified as to his and Ellen's marriage. William described his "married life" as "[v]ery good" and confirmed that he and Ellen had a loving relationship. He testified that he and Ellen had traveled together and that Ellen had assisted with office work in his law practice.

As to Ellen's injuries, William testified that she suffered a "ruptured . . . aorta in her stomach" and eventually developed an infection from surgery. She was ultimately admitted to a rehabilitation hospital. William described that Ellen "wasn't quite so bad" upon her admission, but "the longer she was there . . . she would tire and was on medication to alleviate her pain." However, William indicated that she was "[p]retty much" cognizant of where she was. Ellen survived for 5 weeks and 4 days until she ultimately passed away at the rehabilitation hospital.

Griffin described that Ellen had been "crushed head to foot" from the accident. According to Griffin, Ellen sustained 17

broken ribs, a lacerated spleen, a broken lumbar vertebra, a broken "coccygeal tailbone," and a compromised "hiatal hernia stomach wrap." Ellen also required a 12- to 14-inch incision, which eventually became infected. Griffin testified that Ellen experienced high levels of pain. She described that Ellen was in "sheer agony" and that Ellen would cry, moan, and "constantly" request more medication.

Griffin also testified as to her relationship with Ellen. Griffin expressed that Ellen was her "best friend" and that they had remained close since Griffin was a child. However, as to her pecuniary interests, Griffin confirmed that she had not been receiving any pecuniary benefits from Ellen prior to her death. She was not expecting any financial support from Ellen, and Ellen did not send her money on a regular basis. Griffin testified that she was married to an engineer, and she confirmed that her husband was able to support their family.

At the conclusion of the evidence, Griffin's counsel argued that the settlement proceeds should be allocated between the potential wrongful death and survival claims arising from Ellen's death. He asked the county court to "decide how much is related to [the] personal injury claim [and] decide how much is related to wrongful death." And he further asserted that Ellen's medical bills and funeral and burial expenses should be reflected in the estate's portion of the proceeds.

After the hearing, the county court entered an order approving the settlements and distributing the $616,000 of settlement proceeds. But in its order, the court explained that it did not believe it had the authority to distribute the proceeds other than as provided by § 30-810, governing wrongful death actions. That statute provides that the "avails" of a wrongful death action shall be paid to the "widow or widower and next of kin in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such

persons."[2] The court expressed that it recognized the distinction between the damages, i.e., Ellen's pain and suffering, and the loss to the widower and next of kin, but it concluded that all of the proceeds were required to be distributed pursuant to § 30-810.

As to each party's pecuniary loss, the county court concluded that William's pecuniary loss was "substantially greater" than Griffin's. The court observed that Ellen had assisted William in his law practice and that a presumption of pecuniary loss existed in his favor, as Ellen's spouse. Further, Griffin had admitted that she was not receiving financial support from Ellen.

Based upon its analysis of the parties' pecuniary loss, the county court ordered that the vast majority of the $616,000 of settlement proceeds be distributed to William. After the payment of the stipulated attorney fees and medical liens, Griffin received $63,873.45 and William received the remainder. In making the distribution to Griffin, the court explained only that her portion represented "10% + $20,000.00; as suggested in [William's] reply brief." And in making the distribution, the court did not consider the value of the medical expenses that Ellen had incurred. The court observed that the majority of the medical bills had been paid by insurance or "written off" and that both William and the estate would have been liable for their payment.

Griffin filed a timely notice of appeal, and the case was assigned to the docket of the Court of Appeals. On appeal, Griffin challenged (1) the county court's determination that it lacked authority to deviate from § 30-810 in distributing the settlement proceeds, (2) the county court's failure to allocate any of the proceeds to the survival claim, and (3) the county court's failure to consider the value of Ellen's medical expenses.

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[2] *Id.*

The Court of Appeals rejected Griffin's premise that the county court had failed to make an allocation of the proceeds to the survival claim. Relying upon William's assertions in his petition for approval of settlement, the Court of Appeals determined that

> it is clear from our review of the record that the causes of action were joined. The [county court's] order provided for wrongful death and medical expenses, and an additional $20,000 distribution to [Griffin], beyond the 10 percent the court allotted for the wrongful death claim. Though the words "pain and suffering" are not explicitly used, $20,000 was the amount suggested by William and the amount the Panecs' insurance company allotted for the pain and suffering portion of the $616,000 settlement.[3]

As to Ellen's medical expenses, the Court of Appeals agreed with the county court that the retail value of Ellen's medical expenses was irrelevant. The Court of Appeals observed that Griffin's argument apparently relied upon the collateral source rule. Under that rule, a plaintiff's right to recover from a wrongdoer is not reduced by benefits received from insurance or other sources.[4] But the Court of Appeals concluded that the rule did not apply, because there was no need to prove the extent of Ellen's medical expenses as damages. The amount of recovery had already been established, and the parties had stipulated to the cost of the medical services paid and to the remaining amounts owed. The only issue to be determined was the distribution of the proceeds.

And based upon its review of the record, the Court of Appeals determined that the county court's distribution conformed to the law, was supported by competent evidence,

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[3] *In re Estate of Panec*, 22 Neb. App. 497, 503, 856 N.W.2d 331, 337 (2014).

[4] See *Strasburg v. Union Pacific RR. Co.*, 286 Neb. 743, 839 N.W.2d 273 (2013).

and was neither arbitrary, capricious, nor unreasonable. Griffin timely petitioned for further review, and we granted her petition.

## ASSIGNMENTS OF ERROR

Griffin assigns, restated, that the Court of Appeals erred in (1) characterizing the $20,000 she received as a distribution for the survival claim; (2) determining that the county court's distribution of the settlement proceeds conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, nor unreasonable; (3) finding that the collateral source rule was irrelevant; and (4) rejecting her claim that she was entitled to the retail value of Ellen's medical expenses.

## STANDARD OF REVIEW

[1-3] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.[5] 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.[6] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

## ANALYSIS

Each of Griffin's assignments of error ultimately addresses the county court's distribution of the settlement proceeds. Her claims involve multiple levels of error. To start, she contends that the county court erroneously distributed all of the proceeds pursuant to § 30-810, as if the proceeds solely

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[5] *In re Conservatorship of Hanson*, 268 Neb. 200, 682 N.W.2d 207 (2004).

[6] *Id.*

[7] *Id.*

represented a wrongful death claim. She argues that the proceeds arose from the settlement of both the wrongful death and survival claims and that the court should have allocated the proceeds between the two claims.

Next, she asserts that the Court of Appeals compounded this error by finding that the county court did in fact allocate $20,000 to the survival claim. She claims that this conclusion was improper and establishes a "troubling" precedent.[8] As noted above, the Court of Appeals based its conclusion upon William's assertion that the underinsurance carrier had allotted $20,000 to the survival claim. Thus, Griffin contends that the Court of Appeals' opinion would permit a personal representative to settle multiple claims and allocate the proceeds to the claim from which he or she would derive the greatest benefit. In order to provide some context to this claim, we briefly recall governing principles of law.

## General Principles

[4] A wrongful death action and a survival action are two distinct causes of action which may be brought by a decedent's personal representative.[9] Although they are frequently joined in a single action, they are conceptually separate.[10]

[5] A wrongful death action is brought on behalf of the widow or widower and next of kin for damages they have sustained as a result of the decedent's death.[11] Such damages include the pecuniary value of the loss of the decedent's support, society, comfort, and companionship.[12]

[6] In contrast, an action under our survival statute[13] is the continuance of the decedent's own right of action which he or

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[8] Memorandum brief for appellant in support of petition for further review at 3.

[9] See *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

[10] See *id.*

[11] See, § 30-810; *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998).

[12] See *Reiser, supra* note 11.

[13] Neb. Rev. Stat. § 25-1401 (Reissue 2008).

she possessed prior to his or her death.[14] The survival action is brought on behalf of the decedent's estate and encompasses the decedent's claim for predeath pain and suffering, medical expenses, funeral and burial expenses, and any loss of earnings sustained by the decedent, from the time of the injury up until his or her death.[15]

In a typical case, the same individuals may stand to recover in both a wrongful death and survival action. The decedent's next of kin may also be the beneficiaries of the survival claim under the decedent's will or the laws of intestate succession.

But as this appeal illustrates, the typical case does not always hold true. As Ellen's widower, William would share in any recovery from the wrongful death claim. But he would not benefit from the survival claim brought on behalf of Ellen's estate. Any proceeds from the survival claim would pass solely to Griffin as Ellen's residuary beneficiary. Thus, a personal representative in similar circumstances would have the incentive to maximize the recovery for the wrongful death claim.

Based upon this conflict of interests, Griffin argues that the Court of Appeals' opinion permits a personal representative to allocate settlement proceeds in a manner which benefits him or her personally, at the expense of the estate. With these assertions in mind, we turn to Griffin's first assignment of error.

## Characterization of $20,000

Griffin assigns that the Court of Appeals "improperly stepped into the role of fact finder"[16] by characterizing the

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[14] See *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 314 N.W.2d 19 (1982).

[15] See, *Reiser, supra* note 11; *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989); *Rhein, supra* note 14.

[16] Memorandum brief for appellant in support of petition for further review at 5.

$20,000 she received as a distribution for the survival claim. As previously discussed, the Court of Appeals concluded that the $20,000 was a distribution for the survival claim, because $20,000 was the amount that the underinsurance carrier had allotted for Ellen's pain and suffering.

We reject Griffin's assertion that the Court of Appeals engaged in improper factfinding. The Court of Appeals reasoned that the county court had allocated $20,000 to the survival claim based upon the allegations in William's petition. In our view, an appellate court does not engage in improper factfinding when it merely attempts to identify the actions taken by the court below.

[7] However, we find no basis to support the Court of Appeals' conclusion. Although William alleged that the underinsurance carrier had allotted $20,000 for Ellen's pain and suffering, his allegations were not evidence. No settlement agreement was offered or received into evidence by the county court. There is no evidence of any allocation of the settlement proceeds between the wrongful death and survival claims. We have consistently stated that a bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[17]

Moreover, the county court did not indicate that the $20,000 was a distribution for the survival claim. Rather, it explained only that the $20,000 had been suggested in William's reply brief. And the county court expressly stated that it was distributing all of the proceeds pursuant to § 30-810. Without an indication to the contrary, we will not speculate that the county court deviated from its express statements. And we agree that it was improper for the Court of Appeals to do so.

### Distribution of Proceeds

Griffin assigns that the Court of Appeals erred in affirming the county court's distribution of the proceeds. We agree.

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[17] See, e.g., *Richards v. McClure*, 290 Neb. 124, 858 N.W.2d 841 (2015).

In distributing the proceeds solely pursuant to § 30-810, the county court's distribution failed to conform to the law and was not supported by the evidence.

Based upon the evidence received by the county court, it is clear that a portion of the proceeds represented the settlement of the survival claim. The complaint filed against the driver of the other vehicle sought compensation for Ellen's "injuries under the laws of the State of Nebraska." And it alleged that Ellen had experienced pain and suffering and incurred medical expenses prior to her death. Additionally, the underinsurance carrier was informed via a letter that Ellen had incurred medical expenses of $214,754.77.

Ellen's pain and suffering and medical expenses were relevant only to the survival claim. These damages would not have been recoverable in a wrongful death action. Thus, it is apparent that the proceeds also represented the settlement of the survival claim. But contrary to this evidence, the county court distributed all of the proceeds pursuant to § 30-810. And it determined that it was required to do so.

We see no basis for the county court's conclusion. We have never held that proceeds from a survival claim are subject to § 30-810. Indeed, our earlier review demonstrates that this proposition cannot be correct. Each action addresses a separate injury. And the class of beneficiaries of each action is also conceptually distinct. The survival action continues a decedent's cause of action beyond death to redress the decedent's estate for the decedent's injuries that occurred before death.[18] A wrongful death action permits statutorily designated survivors of the decedent to bring a cause of action to redress their injuries resulting from the decedent's death.[19]

Moreover, we have previously observed that § 30-810 provides no basis upon which to recover a decedent's own

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[18] See 25A C.J.S. *Death* § 23 (2012).

[19] See *id.*

damages.[20] And we have held that as its own cause of action, a survival claim is not subject to the 2-year limitations period of § 30-810.[21]

Because a survival action is separate and distinct from the wrongful death statutes, we see no logical reason to conclude that the proceeds from a survival claim must be distributed pursuant to § 30-810. The Montana Supreme Court has recognized that (1) a survival action is personal to the decedent for damages suffered by the decedent between the wrongful act and his or her death and (2) recovery for such damage belongs to the decedent's estate and is administered as an estate asset.[22] In contrast, a wrongful death action seeks damages that pertain to the personal loss of the survivors.[23] These principles are consistent with our statutory framework, and we reach the same result.

We therefore conclude that in distributing all of the proceeds pursuant to § 30-810, the county court's distribution failed to conform to the law. Thus, the cause must be remanded to the county court to allocate the settlement proceeds between the wrongful death and survival claims. Only those proceeds representing the wrongful death claim are subject to § 30-810. The proceeds for the survival claim are subject to distribution as a part of the assets of Ellen's probate estate. Additionally, we note that neither party contests the payment of the attorney fees and medical liens from the gross settlement proceeds. Thus, the allocation should occur after the payment of those expenses.

We acknowledge, as Griffin suggests, the danger of abuse that exists in this and similar cases. A personal representative who stands to benefit personally from one claim but not the

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[20] See *Nelson, supra* note 15.

[21] See *Corona de Camargo, supra* note 9.

[22] See *In re Estate of Bennett*, 371 Mont. 275, 308 P.3d 63 (2013).

[23] See *id.*

other may influence an allocation between a survival claim and a wrongful death claim by the payer of the settlement proceeds. And we note that other courts have recognized a conflict in similar scenarios when a personal representative possesses an interest adverse to the estate.[24]

However, we need not address the matter here. William did not present any evidence of an allocation of the proceeds to the county court. Although he alleged that an allocation had been made, he offered no proof of it. Thus, the county court was free to allocate all of the proceeds between the respective claims. If, upon remand, a conflict becomes apparent, the county court will need to resolve the issue in a way that prevents the conflict from affecting the court's allocation.

## Remaining Assignments of Error

Griffin assigns that the Court of Appeals erred in determining that the collateral source rule was irrelevant and in rejecting her claim that she was entitled to the full value of Ellen's medical expenses. These claims ultimately address the amount to be allocated to the survival claim. We decline to determine the issue in the first instance.

However, we reject Griffin's assertion that she was automatically entitled to the full value of Ellen's medical expenses. While it is clear that the medical bills were used in obtaining the settlement proceeds, Ellen's medical expenses are only one piece of evidence as to the value to be given to the survival claim. In making its allocation, the county court must consider all of the evidence and divide the proceeds between the wrongful death and survival claims accordingly. We will not comment on the weight to be given to any one piece of evidence.

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[24] See, *Continental Nat. Bank v. Brill*, 636 So. 2d 782 (Fla. App. 1994); *Readel v. Towne*, 302 Ill. App. 3d 714, 706 N.E.2d 99, 235 Ill. Dec. 839 (1999).

## CONCLUSION

Based upon the evidence received by the county court, it is clear that the proceeds included the settlement of the survival claim. And we reject the proposition that the proceeds for the survival claim were subject to distribution under § 30-810. We therefore reverse the decision of the Court of Appeals and remand the cause with directions to remand to the county court with directions to allocate the settlement proceeds between the wrongful death and survival claims, to direct distribution of the wrongful death settlement proceeds in accordance with § 30-810, and to direct distribution of the survival claim proceeds to Griffin as the sole beneficiary of Ellen's residuary probate estate.

Reversed and remanded with directions.

Stephan, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Benjamin Carrel, appellee, v. Serco Inc., a New Jersey corporation, appellant, and Devin Witt, individually and as an employee of Serco Inc., a New Jersey corporation, appellee.

864 N.W.2d 236

Filed June 12, 2015. No. S-14-377.

1. **Default Judgments: Motions to Vacate: Appeal and Error.** In reviewing a trial court's action in vacating or refusing to vacate a default judgment, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion. On appeal, a much stronger showing is required to substantiate an abuse of discretion when the judgment is vacated than when it is not.
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. **Default Judgments: Proof: Time.** Generally, when the court has entered a default judgment and the defendant has made a prompt application at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
4. **Default Judgments.** When determining whether to set aside a default judgment, two competing interests must be considered: the right of a litigant to defend the action on the merits and judicial efficiency.
5. **Default Judgments: Motions to Vacate: Words and Phrases.** In the context of a motion to vacate a default judgment, a meritorious defense is one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.
6. **Default Judgments: Motions to Vacate.** Although a defendant seeking to vacate a default judgment is required to present a meritorious

defense, it is not required that the defendant show he will ultimately prevail in the action, but only that the defendant show that he has a defense which is recognized by the law and is not frivolous.

7. **Default Judgments: Motions to Vacate: Proof.** Regarding a refusal to set aside a default judgment, an abuse of discretion may exist where the defaulted party tenders an answer or other proof disclosing a meritorious defense to the action which is the subject of the default.

Appeal from the District Court for Gage County: Paul W. Korslund, Judge. Reversed and remanded with directions.

Thomas J. Culhane and Matthew B. Reilly, of Erickson & Sederstrom, P.C., L.L.O., for appellant.

Lyle J. Koenig, of Koenig Law Firm, for appellee Benjamin Carrel.

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

Stephan, J.

Benjamin Carrel filed a personal injury action against Serco Inc., a New Jersey corporation, and Devin Witt. When Serco did not respond to service of summons, a show cause order, or notice of Carrel's motion for a default judgment, the district court for Gage County sustained the motion and entered a default judgment against the company. Within the 6 months following its entry, Serco moved to vacate the default judgment. The district court denied the motion, and Serco appeals from that order. We conclude that the district court erred in denying Serco's motion to vacate the default judgment, and we therefore reverse, and remand with directions.

## BACKGROUND

The underlying incident occurred in August 2008. Witt allegedly drove a Chevrolet pickup truck over Carrel's foot in a parking lot outside a bar in Beatrice, Nebraska. The truck was registered to "Serco Inc at 1430 North Main in Borger, TX 79007."

The attorney who was then representing Carrel sent a letter to Serco at a Reston, Virginia, address on February 18, 2010, advising the company of the incident and asserting a claim for damages. Serco's corporate claims manager responded to the letter the next day, informing Carrel that it had never employed Witt and had "no knowledge of any Serco owned vehicles" located in Nebraska.

Represented by the same attorney, Carrel commenced this action against Serco and Witt on May 21, 2012, alleging that Serco, as Witt's employer, was vicariously liable for his actions. Serco's agent in Nebraska received service of summons on August 7. Because Serco had not filed a responsive pleading, an order to show cause was entered on June 27, 2013. Serco did not respond. On July 23, Carrel filed a motion for default judgment. A hearing on the motion was set for August 12. The court ordered Carrel to file an affidavit in support of his motion for default judgment and scheduled the matter for further hearing on September 30. Notice was sent to Serco's registered agent.

Serco did not appear at the hearing. The district court entered default judgment on October 7, 2013, in the amount of $210,216.36, reflecting the lost wages and medical expenses claimed by Carrel. The court also awarded postjudgment interest at the rate of 2.086 percent per year.

On March 11, 2014, Carrel initiated garnishment proceedings on Serco's account at a Pennsylvania bank. The writ of execution was served on the bank on March 14. Serco's general counsel first learned of the default judgment that March. On April 1, Serco filed its motion to vacate the judgment. This was 5 months 25 days after the entry of default judgment. In support of its motion, Serco tendered an answer and affidavits stating that Serco did not employ Witt or own the vehicle he was driving, and therefore was not the appropriate defendant in this action. Serco also filed a motion to enjoin the garnishment proceedings. Following a hearing, the district court granted a temporary restraining order suspending the

garnishment proceedings until the court ruled on the motion to vacate.

At the subsequent hearing on the motion to vacate, Serco presented evidence showing that there is a Borger, Texas, corporation named "Service Engineering Repair Company, Inc." which uses the acronym "SERCO." Serco's evidence further established that it has never been affiliated in any manner with the Texas corporation. Serco also presented evidence establishing that when the summons was served on its Nebraska registered agent, it was sent to Serco's offices in Reston, Virginia, and forwarded to its risk management department. However, employees in the risk management department did not take any further action, because they "mistakenly believed no action was necessary because the claims did not involve a Serco employee and did not tender it to Serco's insurance carrier for its defense as [they] should have." Further, when notice of the default judgment was received by Serco, a "newly employed paralegal . . . did not appreciate the significance of the notice," resulting in Serco's failure to make a timely opposition to the motion.

The district court determined that Serco's neglect was "severe" and thus denied the motion to vacate default judgment. The district court found that Serco moved to vacate the judgment within 6 months of the order and presented a meritorious defense. However, the court found the inquiry did not end there, and then it examined the reasons why Serco failed to respond. Ultimately, the court concluded that the filing was not prompt and that Serco's purported explanations and blame shifting to Carrel for filing against the wrong defendant rang "hollow."

Serco filed a timely appeal. We moved this case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

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

## ASSIGNMENTS OF ERROR

Serco assigns, consolidated, that the district court erred in (1) denying Serco's motion to vacate default judgment on the basis of Serco's neglect, (2) failing to consider the issue of "'gross laches,'" and (3) finding Serco did not act promptly in moving to vacate the default judgment, and that the court abused its discretion in refusing to vacate the default judgment.

## STANDARD OF REVIEW

[1] In reviewing a trial court's action in vacating or refusing to vacate a default judgment, an appellate court will uphold and affirm the trial court's action in the absence of an abuse of discretion.[2] On appeal, a much stronger showing is required to substantiate an abuse of discretion when the judgment is vacated than when it is not.[3]

[2] 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.[4]

## ANALYSIS

We begin our analysis with Neb. Rev. Stat. § 25-2001(1) (Reissue 2008), which provides: "The inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order." Here, default judgment was entered on October 7, 2013, and the motion to vacate was filed on April 1, 2014. Because the motion was filed after term but less than 6 months after the default judgment was entered,

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[2] *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013); *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996).

[3] *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970).

[4] *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129, 825 N.W.2d 767 (2013); *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012).

§ 25-2001(1) applies and the district court had discretionary statutory authority to vacate the default judgment on the same grounds as if it had been within term.

[3,4] Generally, when the court has entered a default judgment and the defendant has made a prompt application at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.[5] When determining whether to set aside a default judgment, two competing interests must be considered: the right of a litigant to defend the action on the merits and judicial efficiency.[6] The law favors allowing a defendant to present a defense to the court. We have stated:

> "'It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. . . . *Mere mistake or miscalculation of a party or his attorneys is not sufficient, in itself, to warrant the refusal to set aside a default judgment, where there is a good defense pleaded or proved and no change of position or substantial misjustice [sic] will result from permitting a trial on the merits*.'"[7]

The record discloses that Serco acted promptly when its general counsel became aware of the default judgment. He stated in his affidavit: "After learning of the default judgment in March 2014, I took immediate action to retain counsel to

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[5] *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007); *Beliveau v. Goodrich, supra* note 3.

[6] See 49 C.J.S. *Judgments* § 605 (2009). See, generally, *Miller v. Steichen*, 268 Neb. 328, 682 N.W.2d 702 (2004).

[7] *Miller v. Steichen, supra* note 6 at 335, 682 N.W.2d at 708 (emphasis in original), quoting *DeVries v. Rix*, 203 Neb. 392, 279 N.W.2d 89 (1979) (quoting *Beliveau v. Goodrich, supra* note 3).

appear in the action and defend Serco's interests." Although lower level employees were aware of the action earlier, they misunderstood its significance and the necessity to respond. The writ of execution was served on March 14, 2014, and Serco filed its motion to vacate the default judgment on April 1.

[5-7] And, as the district court concluded, Serco has demonstrated that it has a meritorious defense to Carrel's claim. In this context, a meritorious defense is one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.[8] Although a defendant seeking to vacate a default judgment is required to present a meritorious defense, it is not required that the defendant show he will ultimately prevail in the action, but only that the defendant show that he has a defense which is recognized by the law and is not frivolous.[9] We have also said that regarding a refusal to set aside a default judgment, an abuse of discretion may exist where the defaulted party tenders an answer or other proof disclosing a meritorious defense to the action which is the subject of the default.[10]

In *Miller v. Steichen*,[11] we determined that an insurance company against which a default judgment had been entered in a garnishment proceeding demonstrated a meritorious defense by asserting that the professional liability policy it issued to the defendant in a professional liability case excluded coverage for the acts or omissions upon which formed the basis of the claim against the insured. Without determining whether the claims were covered by the policy or not, we determined that this defense was a question of law worthy of consideration and that thus, the default judgment should have been vacated.

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[8] *Miller v. Steichen, supra* note 6.

[9] *Id.*

[10] *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987).

[11] *Miller v. Steichen, supra* note 6.

Here, Serco alleged in its tendered answer that it had never employed Witt and was not the owner of the vehicle operated by him at the time of Carrel's injury. At the hearing on its motion to vacate the default judgment, Serco produced evidence in support of these allegations. Carrel's appellate counsel acknowledged during oral argument that Carrel's previous counsel apparently sued the wrong defendant. It is difficult to conceive of a more meritorious defense than Serco's substantiated and uncontested claim that it was a complete stranger to the incident upon which Carrel's claim is based.

The critical question, then, is whether any negligence on the part of Serco in responding to the suit is inexcusable. It is evident from the record that Serco's employees made mistakes in their handling of the service of summons and the notice of default. Their conduct is similar to that at issue in *Barney v. Platte Valley Public Power and Irrigation District.*[12] In that case, the president of the board of directors of a power and irrigation district was served with a summons but did not report that fact to the district's general manager or legal counsel, because he was of the mistaken belief that they were aware of the suit. Another employee of the district was also aware of the suit but likewise did not advise the general manager or legal counsel, who did not become aware of the suit until after a default judgment had been entered against the district. In reversing an order of the district court overruling the motion to set aside the default judgment, this court reasoned that while the district was not without fault due to the failure of its employees to notify the general manager and counsel of the suit, their conduct was not "so inexcusable that it should have the effect of defeating the district's right to have a trial of the issues . . . on the merits."[13]

Also pertinent to our analysis is the fact that Carrel would not be unfairly prejudiced by permitting Serco to defend the

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[12] *Barney v. Platte Valley Public Power and Irrigation District*, 147 Neb. 375, 23 N.W.2d 335 (1946).

[13] *Id.* at 381, 23 N.W.2d at 338.

action on the merits. As we have noted, more than 2 years before the suit was filed, Serco placed Carrel's previous counsel on notice of its position that it did not employ Witt or own the vehicle he was driving at the time of the incident. And, as Serco contends and Carrel does not dispute, the statute of limitations with respect to the proper corporate defendant had run prior to the date on which Serco's answer was originally due.

Considering all of these circumstances, we conclude that permitting the default judgment to stand would unfairly deprive Serco of a substantial right and produce an unjust result. The effect of the judgment is to exact a substantial penalty against Serco for the lapses of its employees while permitting Carrel a full recovery from a defendant which, on the basis of the record before us, had no possible legal liability for his injury and damages. We therefore conclude that the district court abused its discretion in denying Serco's motion to vacate the default judgment.

## CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the cause with directions to the district court to (1) vacate the default judgment entered against Serco on October 7, 2013, and (2) give Serco a reasonable time in which to file an appropriate responsive pleading.

Reversed and remanded with directions.

McCormack, J., participating on briefs.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Paul F. McGill, appellee and cross-appellee, v. Lion Place Condominium Association, an unincorporated association, appellee and cross-appellant, and Michael L. Henery, appellant.

864 N.W.2d 642

Filed June 12, 2015. No. S-14-582.

1. **Res Judicata: Collateral Estoppel.** The applicability of claim and issue preclusion is a question of law.
2. **Statutes.** Statutory interpretation is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **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.
5. **Actions: Pleadings: Parties.** The character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone.
6. **Courts: Actions: Parties: Complaints: Pleadings: Records.** If the capacity in which a party sues is doubtful, a court may examine the complaint, the pleadings as a whole, and even the entire record.
7. **Derivative Actions: Words and Phrases.** A derivative action is a suit brought by a shareholder to enforce a cause of action belonging to the corporation.
8. **Derivative Actions: Pleadings.** In appropriate circumstances, a unit owner may bring a derivative suit on behalf of an unincorporated condominium association to enforce a cause of action belonging to the

association. But the unit owner must allege that demand has been made upon the association or governing body to enforce the claim or that demand would have been futile.

9. **Actions: Corporations.** According to the business judgment rule, courts are precluded from conducting an inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.
10. ____: ____. The business judgment rule applies to all discretionary decisions by a board of directors, including the decision not to pursue a cause of action.
11. **Res Judicata.** Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication.
12. **Collateral Estoppel.** Issue preclusion bars the relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate.
13. **Res Judicata: Collateral Estoppel.** While claim preclusion and issue preclusion are similar and serve similar purposes, they are distinct. Among other differences, claim preclusion looks to the entire cause of action, but issue preclusion looks to a single issue.
14. **Res Judicata: Actions.** The basis of the doctrine of res judicata is that the party to be affected, or someone with whom he or she is in privity, has litigated or has had an opportunity to litigate the same matter in a former action.
15. **Collateral Estoppel.** Issue preclusion protects litigants from relitigating an identical issue with a party or his or her privy and promotes judicial economy by preventing needless litigation.
16. ____. The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly.
17. **Limitations of Actions: Waiver.** The benefit of a statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.
18. **Estoppel: Words and Phrases.** Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations.
19. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
20. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.

21. **Attorney Fees: Costs.** Without indication to the contrary, where a statute speaks only to attorney fees and costs, a party may recover his or her attorney fees, the costs of the filing of the action, and any other expenses that are specifically delineated as taxable costs by statute.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed in part, and in part vacated and remanded for further proceedings.

Dean F. Suing and David A. Castello, of Katskee, Henatsch & Suing, for appellant.

Justin D. Eichmann, of Bradford & Coenen, L.L.C., for appellee Paul F. McGill.

Michael S. Kennedy, of Kennedy Law Firm, P.C., L.L.O., for appellee Lion Place Condominium Association.

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

Cassel, J.

## I. INTRODUCTION

This appeal was taken from a judgment invalidating the sale of limited common elements of a condominium governed by the Nebraska Condominium Act[1] and awarding attorney fees, expenses, and court costs. We address two primary issues. First, we conclude that despite the absence of statutory authority, equity allows a derivative suit on behalf of an unincorporated unit owners association. Second, we interpret the governing statute[2] to require both approval by 80 percent of the votes in the association and unanimous agreement by the owners of units to which the limited common elements are allocated. But only an award of attorney fees and costs is authorized by the relevant statute.[3] It does not permit the

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[1] Neb. Rev. Stat. §§ 76-825 to 76-894 (Reissue 2009 & Cum. Supp. 2014).

[2] § 76-870.

[3] § 76-891.01.

recovery of expenses. We vacate the award of costs and expenses and remand the cause for determination of the taxable costs. Because we find no merit to the other issues raised in the appeal, we otherwise affirm the judgment of the district court.

## II. BACKGROUND

### 1. Development of Condominium

Paul F. McGill developed Lion Place Condominium with Michael L. Henery. The recorded "Declaration of Condominium Property Regime" established 16 units, consisting of 12 residential and 4 commercial units. Henery purchased the commercial units, and McGill purchased four of the residential units.

The declaration allocated certain common elements as limited common elements for the exclusive use of the commercial units. These limited common elements consisted of "[a]ll [c]ommon [e]lements in the basement level and first floor." Under Nebraska law, "[c]ommon elements" include "all portions of a condominium other than the units."[4] A "[l]imited common element" is any "portion of the common elements allocated . . . for the exclusive use of one or more but fewer than all of the units."[5]

To govern the condominium, the declaration established an unincorporated association, composed of all of the unit owners. Each unit owner was granted one vote for each unit owned, except that the owner of the basement commercial unit was granted three votes. Although the association was granted "all of the powers necessary to govern" the condominium, an "[e]xecutive [b]oard" of five unit owners was created to act on the association's behalf and to administer its affairs.

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[4] § 76-827(4).

[5] § 76-827(16).

### 2. Henery's Purchase of Limited Common Elements

In 2008, Henery offered to pay $35,000 to purchase the limited common elements adjacent to his commercial units. The minutes of a July 2008 meeting of the association reveal that Henery's offer may have been the "key" to financing repairs to the exterior of the condominium building. At a meeting in September, the association agreed to withhold approval of Henery's offer until its next meeting in order to facilitate other offers. However, "[e]very [one]" agreed to sell the limited common elements and to accept the highest offer.

McGill also sought to purchase the limited common elements and offered $36,000. Upon learning of McGill's offer, Henery immediately countered with an offer of $36,000, plus the payment of all closing costs and related expenses. At a meeting in December 2008, the association ultimately voted to accept Henery's second offer. As we explain below, the heart of the controversy is the sufficiency of the vote at the December 2008 meeting.

In May 2009, Henery and the president of the association signed a purchase agreement for a portion of the limited common elements adjacent to Henery's commercial units. And in order to transfer the limited common elements to Henery, the president signed an amendment to the condominium declaration, modifying the boundaries of three of Henery's commercial units to incorporate the limited common elements. The president then reconveyed the modified commercial units to Henery via a warranty deed.

### 3. McGill's First Action

In January 2010, McGill filed an action in the district court for Douglas County against Henery and the association, challenging the sale of the limited common elements. The 2010 action was dismissed upon the association's motion for judgment on the pleadings. The district court determined that McGill lacked standing as an individual to bring the action. It observed that McGill had failed to demonstrate how he was

injured by the sale to Henery, because the limited common elements had always been allocated to Henery's commercial units. And the court further denied McGill leave to amend his complaint, observing that a lack of standing could not be remedied by amendment.

### 4. Present Action

#### (a) Pleadings and Pretrial Proceedings

After the dismissal of the 2010 action, McGill filed a second action against Henery and the association in the district court for Douglas County. And McGill again challenged the sale of the limited common elements. However, in contrast to the 2010 action, McGill brought the second action "on his own behalf, as well as on behalf of all other members of the [a]ssociation similarly situated, derivatively in the right of and for the benefit of the [a]ssociation." And he asserted that he had made demand upon the association to initiate proceedings regarding the sale, but that the executive board had refused.

Both Henery and the association moved to dismiss on the basis that the second action was barred by the dismissal of the 2010 action. The district court overruled the motions, observing that the 2010 action was dismissed due to McGill's lack of standing as an individual. But the second action was brought derivatively on behalf of the association. Thus, the court determined that while any suit in McGill's individual capacity was barred, a derivative action was appropriate.

Each party subsequently moved for summary judgment. At the summary judgment hearing, the district court received McGill's deposition testimony. In his deposition, McGill indicated that prior to the sale, Henery had been using the limited common elements adjacent to Henery's commercial units. McGill believed that Henery should be paying rent, and McGill complained of Henery's use of the limited common elements to the president of the association. In an affidavit, Henery explained that he sought to incorporate the limited common

elements into his commercial units in order to "avoid any confusion or conflict."

McGill further explained that he had been interested in purchasing the limited common elements and that the sale to Henery "was not done right." McGill had made an offer and included everything that Henery had proposed. But McGill believed that the limited common elements were going to be auctioned, and his offer was only his "beginning bid." McGill also believed that Henery should have paid market value, because the limited common elements had been appraised for $88,000.

The district court overruled each of the motions for summary judgment. Henery subsequently filed a second motion for summary judgment, claiming that McGill could not maintain a derivative action on behalf of the association, because it was unincorporated. The district court rejected Henery's argument and overruled the motion. The court observed that while a derivative action is generally associated with a corporation, "there is nothing that prevents it from being brought on behalf of a partnership, a limited liability company, or some type of other unincorporated association."

(b) Trial

The matter proceeded to trial, and the district court received evidence regarding the December 2008 approval of the sale to Henery. According to the treasurer of the association, all of the unit owners voted in favor of Henery's offer except McGill and another unit owner. However, the treasurer could not remember if an absent unit owner had been represented by a proxy. Thus, the treasurer testified that out of a possible 18 votes, 13 or 14 votes were cast in favor of the sale.

Henery also testified and clarified the circumstances of the vote. According to Henery, the absent unit owner had been represented by a proxy. Henery testified that there were "14 votes voted for the sale and four votes against."

### 5. District Court's Judgment

After trial, the district court entered an order finding that the sale and conveyance were void. The court determined that under the Nebraska Condominium Act, the sale required the approval of 80 percent of the association. But at most, only 77.7 percent of the association approved the sale. Further, the act required an agreement signed by the requisite number of unit owners. But no evidence of such an agreement had been offered by Henery or the association. Consequently, the court concluded that the sale was void and that title to the limited common elements remained with the association. And in a later order, the court awarded McGill his attorney fees in the amount of $28,016 and expenses of $1,209.14, plus costs.

Henery and the association filed several motions to alter or amend or for a new trial, which were all overruled. Henery filed a timely notice of appeal, and the case was initially assigned to the Nebraska Court of Appeals' docket. We moved the case to our docket.[6] After obtaining permission to file a brief out of time, the association filed a brief on cross-appeal.

## III. ASSIGNMENTS OF ERROR

Henery assigns, consolidated and restated, that the district court erred in (1) finding that the derivative action was not barred by the dismissal of the 2010 action, (2) permitting McGill to bring a "shareholder derivative suit" on behalf of the association, (3) determining that McGill was not equitably estopped from bringing the derivative action, and (4) finding that the sale and conveyance of the limited common elements were void.

In its cross-appeal, the association makes the same assignments of error as Henery. But in addition, it contends that the district court erred in (1) finding that McGill had stated a claim, (2) determining that title to the limited common elements remained with the association, and (3) awarding McGill his attorney fees and costs.

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

## IV. STANDARD OF REVIEW

[1-3] The applicability of claim and issue preclusion is a question of law.[7] Statutory interpretation is a question of law.[8] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[9]

[4] 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.[10]

## V. ANALYSIS

Before addressing Henery's and the association's assignments of error, we recall general principles of the condominium form of property ownership. Although Nebraska retains another group of statutes governing condominiums,[11] the Nebraska Condominium Act applies to condominiums created on or after January 1, 1984.[12] Because the declaration in this case was recorded in 1998, the Nebraska Condominium Act controls.

The condominium form is distinguished by its dual levels of property ownership. Individual units are separately owned, while the remainder is designated for common ownership by the unit owners.[13] This remainder comprises the "[c]ommon

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[7] *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014).

[8] *First Nat. Bank of Omaha v. Davey*, 285 Neb. 835, 830 N.W.2d 63 (2013).

[9] *Id.*

[10] *Sadler v. Jorad, Inc.*, 268 Neb. 60, 680 N.W.2d 165 (2004).

[11] See Condominium Property Act, Neb. Rev. Stat. §§ 76-801 to 76-823 (Reissue 2009).

[12] See, § 76-826(a); *Twin Towers Condo. Assn. v. Bel Fury Invest. Group*, 290 Neb. 329, 860 N.W.2d 147 (2015).

[13] See § 76-827(7).

elements" of the condominium.[14] And each unit owner possesses an undivided ownership interest in the common elements. "Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners."[15]

However, the use of some common elements may be reserved to fewer than all of the unit owners. These restricted common elements are known as limited common elements.[16] But limited common elements remain common elements of the condominium. The comments to the Uniform Condominium Act, on which the Nebraska Condominium Act is based,[17] are instructive on this point. "Like all other common elements, limited common elements are owned in common by all unit owners."[18]

Although each unit owner possesses an undivided ownership interest in the common elements, the individual unit owners have no right of control over the common elements. The power to "[r]egulate the use, maintenance, repair, replacement, and modification of common elements" is vested in the association[19] and may be delegated to the executive board.[20]

Having reviewed some basic characteristics of condominium property ownership, we now turn to Henery's and the association's assignments of error. We first address their claims regarding McGill's ability to bring the present action challenging the sale to Henery. We then turn to the validity of the sale and McGill's award of attorney fees, expenses, and costs.

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[14] See § 76-827(4).

[15] § 76-827(7).

[16] See § 76-827(16).

[17] See 1983 Neb. Laws, L.B. 433.

[18] Unif. Condominium Act § 2-108, comment 1, 7 (part II) U.L.A. 548 (2009).

[19] § 76-860(6).

[20] See § 76-861.

1. Present Action

(a) Derivative Suit

Henery and the association contend that McGill did not properly sue in a derivative capacity and that Nebraska law did not permit McGill to bring a derivative suit on behalf of the association. They argue that McGill failed to appropriately caption his complaint as being brought in a representative capacity. And they assert that he had no statutory authority to bring the action, because the association was unincorporated. They further invoke the business judgment rule, claiming that the executive board's refusal to instigate proceedings regarding the sale was a reasonable decision. We address each argument in turn.

[5,6] Although McGill's complaint was not captioned as being brought in a representative capacity, we have stated that the character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone.[21] If the capacity in which a party sues is doubtful, a court may examine the complaint, the pleadings as a whole, and even the entire record.[22]

We read McGill's complaint as asserting a claim on behalf of the association. The complaint specifically stated that the action was brought "derivatively in the right of and for the benefit of the [a]ssociation." And McGill alleged a common injury to the unit owners of the condominium. Each unit owner possessed an undivided ownership interest in the common elements, and McGill claimed that Henery had unlawfully obtained title to certain common elements. Because the association was granted the power to institute litigation on matters affecting the condominium,[23] McGill's allegations

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[21] See *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

[22] *Id.*

[23] See § 76-860(4).

were sufficient to establish that he was asserting a claim on the association's behalf.

[7] We agree that the action did not fall within an express grant of statutory authority. Derivative proceedings are typically initiated pursuant to Nebraska's Business Corporation Act.[24] That act authorizes derivative proceedings brought on behalf of a corporation in certain circumstances,[25] and it applies to a "corporation for profit . . . incorporated under or subject to the provisions of the act."[26] Our case law reflects this paradigm by speaking in terms of "shareholder" and "corporation." We have held that a derivative action is a suit brought by a shareholder to enforce a cause of action belonging to the corporation.[27] However, because the association was unincorporated, the Business Corporation Act did not apply. And the Nebraska Condominium Act is silent as to the right of a unit owner to sue derivatively on behalf of an association.

But derivative proceedings are not dependent upon legislative authorization. Many courts have recognized that derivative actions originated in equity, existing independent of specific legislation.[28] As expressed by the Supreme Court of Delaware,

> [t]o prevent a "failure of justice," courts of equity granted equitable standing to stockholders to sue on behalf of the corporation "for managerial abuse in economic units which by their nature deprived some participants of an effective voice in their administration." The courts

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[24] Neb. Rev. Stat. §§ 21-2001 to 21-20,197 (Reissue 2012).

[25] See §§ 21-2070 to 21-2077.

[26] § 21-2014(4).

[27] See, e.g., *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004); *Sadler, supra* note 10.

[28] See, *Schoon v. Smith*, 953 A.2d 196 (Del. 2008); *Larsen v. Island Developers, Ltd.*, 769 So. 2d 1071 (Fla. App. 2000); *Kilburn v. Young*, 244 Ga. App. 743, 536 S.E.2d 769 (2000); *Caprer v. Nussbaum*, 36 A.D.3d 176, 825 N.Y.S.2d 55 (2006); *Polikoff v. Adam*, 67 Ohio St. 3d 100, 616 N.E.2d 213 (1993).

> reasoned that without equitable standing, "stockholders would be without an immediate and certain remedy," there would have been a complete failure of justice, and the general principles of equity and fairness would have been defeated.[29]

Recognizing the equitable origins of derivative actions, in *Caprer v. Nussbaum*,[30] the New York Supreme Court, Appellate Division, extended the ability to sue derivatively to the unit owners of a condominium. The New York court acknowledged that the unit owners had no statutory authority to bring a derivative claim on behalf of the condominium. But the court observed that the basis for the corporate derivative action was the fiduciary relationship between shareholders and directors. And it reasoned that the condominium was analogous to other situations in which derivative suits had been permitted.

> Like the management of a corporation or the general partner in a limited partnership, the members of the board of managers of a condominium owe a fiduciary duty to the individual unit owners in their management of the common property . . . . The same factors that caused the courts to fashion the derivative action procedure for shareholders and limited partners thus apply to condominium unit owners. All are owners of fractional interests in a common entity run by managers who owe them a fiduciary duty that requires protection.[31]

(Citations omitted.)

We agree with the New York court that the same factors prompting the development of derivative actions in other contexts apply equally to condominiums. All of the unit owners possess an interest in the condominium. But the power to initiate proceedings on matters affecting the condominium is granted to the association and may be delegated to a separate

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[29] *Schoon, supra* note 28, 953 A.2d at 201.

[30] *Caprer, supra* note 28.

[31] *Id.* at 189, 825 N.Y.S.2d at 67.

body.[32] Thus, if derivative proceedings were not allowed, a harm or injury to the condominium might go unaddressed through managerial abuse of power.

Further, we have previously recognized that in certain circumstances, a member of an unincorporated association may properly bring a derivative suit on the association's behalf.[33] Although our previous case arose under considerably different circumstances, it does not suggest any reason why the same rule should not apply to an unincorporated condominium association.

[8] We therefore hold that in appropriate circumstances, a unit owner may bring a derivative suit on behalf of an unincorporated condominium association to enforce a cause of action belonging to the association. But the unit owner must allege that demand has been made upon the association or governing body to enforce the claim or that demand would have been futile.[34]

In the present action, McGill sought to invalidate the alleged unlawful sale of the limited common elements to Henery. And because the sale affected the entire condominium, the cause of action would have been properly initiated by the association or the executive board.[35] But McGill alleged that he had made demand upon the association to initiate proceedings and that the executive board had refused. Additionally, evidence of the demand and refusal was received by the district court. Consequently, we find no error in the district court's conclusion that a derivative proceeding was appropriate.

But Henery and the association also rely upon the executive board's refusal of McGill's demand and contend that the business judgment rule precluded McGill from maintaining a

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[32] See §§ 76-860(4) and 76-861.

[33] See *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

[34] See *id.* See, also, *Sadler, supra* note 10.

[35] See §§ 76-860(4) and 76-861.

derivative suit. They claim that because the executive board's refusal was reasonable and made in good faith, the district court was barred from questioning the sale's validity.

[9,10] This argument is not well taken. According to the business judgment rule, courts are precluded from conducting an inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.[36] The business judgment rule applies to all discretionary decisions by a board of directors, including the decision not to pursue a cause of action.[37] However, such a decision is entitled to the protection of the business judgment rule only if made by a majority of disinterested directors.[38] In this case, the district court received evidence of two votes of the executive board refusing McGill's demand. But in each vote, Henery and his son formed a part of the majority. And they clearly were not disinterested members of the executive board.[39] We cannot indulge in speculation as to how the other members of the executive board would have voted in the absence of Henery and his son's participation. Consequently, we see no basis for the business judgment rule. This assignment of error is without merit.

### (b) Claim Preclusion and Issue Preclusion

Both Henery and the association contend that the present action was barred by the dismissal of the 2010 action. They assert that the present action was an impermissible attempt to relitigate issues either that were conclusively determined or that could have been raised in the 2010 action.

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[36] *Sadler, supra* note 10.

[37] See *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979).

[38] See *Harhen v. Brown*, 431 Mass. 838, 730 N.E.2d 859 (2000).

[39] See 1 American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 1.23 at 25 (1994) (defining "[i]nterested" director or officer).

As previously discussed, the district court determined that any action brought by McGill in his individual capacity was barred by the dismissal of the 2010 action. No party contests this determination. The court further concluded that the derivative suit brought on the association's behalf was appropriate. We therefore restrict our analysis to the derivative suit.

[11-13] Henery's and the association's arguments invoke the concepts of claim preclusion and issue preclusion. In the past, we have referred to these concepts as res judicata and collateral estoppel.[40] Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication.[41] Issue preclusion bars the relitigation of a finally determined issue that a party had a prior opportunity to fully and fairly litigate.[42] While the doctrines are similar and serve similar purposes, they are distinct.[43] Among other differences, claim preclusion looks to the entire cause of action, but issue preclusion looks to a single issue.[44]

The present action and the 2010 action clearly invoked the same cause of action or claim. In both suits, McGill sought to invalidate the sale of the limited common elements to Henery. But in order for claim or issue preclusion to apply, some nexus must exist between the parties to the successive actions.[45] As previously discussed, McGill brought the 2010 action in his individual capacity and initiated the present proceedings on the association's behalf. This change from an individual to a representative capacity permitted a successive lawsuit.

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[40] See *Hara, supra* note 7.

[41] See *id.*

[42] See *id.*

[43] *Id.*

[44] See *id.*

[45] See, *Kirkland v. Abramson*, 248 Neb. 675, 538 N.W.2d 752 (1995); *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994).

We addressed a similar scenario in *Hickman v. Southwest Dairy Suppliers, Inc.*[46] In that case, a husband and wife were injured in a motor vehicle accident and the wife passed away from her injuries. The administrator of the wife's estate brought a wrongful death action, and a verdict was returned in favor of the defendants. The husband then filed suit against the same defendants for his own personal injuries, and the defendants claimed that the suit was barred by the prior verdict.

We rejected the defendants' argument and observed that even if the husband had been appointed the administrator of his wife's estate, res judicata or collateral estoppel would likely not have applied. "'In order that parties for or against whom the doctrine of res judicata is sought to be applied may be regarded the same in both actions, the general rule is that they must be parties to both actions *in the same capacity or quality*.'"[47] In the case at bar, by bringing a suit on behalf of the association, it is clear that McGill appeared in a different capacity than in the 2010 action.

But Henery and the association argue that McGill's different capacity was irrelevant, because he was in privity with the association in the 2010 action. Both claim preclusion and issue preclusion require an identity or privity of parties.[48] However, an analysis of the principles behind privity and the doctrines of claim preclusion and issue preclusion demonstrate the flaws in this argument.

[14,15] In analyzing federal law, we have previously observed:

> "There is no definition of 'privity' which can be automatically applied to all cases involving the doctrines of res judicata and collateral estoppel. Privity requires, at a minimum, a substantial identity between the issues in

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[46] *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 230 N.W.2d 99 (1975).

[47] *Id.* at 22, 230 N.W.2d at 103, quoting *American Province Real Estate Corp. v. Metropolitan Utilities Dist.*, 178 Neb. 348, 133 N.W.2d 466 (1965). See, also, Restatement (Second) of Judgments § 36 (1982).

[48] See *R.W. v. Schrein*, 263 Neb. 708, 642 N.W.2d 505 (2002).

> controversy and showing the parties in the two actions are really and substantially in interest the same."[49]

And we have stated that the basis of the doctrine of res judicata is that the party to be affected, or someone with whom he or she is in privity, has litigated or has had an opportunity to litigate the same matter in a former action.[50] Similarly, issue preclusion protects litigants from relitigating an identical issue with a party or his or her privy and promotes judicial economy by preventing needless litigation.[51]

In this case, McGill and the association cannot be said to be in privity, because they are not really and substantially the same in interest. In the 2010 action, the district court determined that McGill did not have an interest in contesting the sale to Henery and that, thus, he did not have standing. McGill did not appeal this ruling. In contrast, in representing the interests of the unit owners and the condominium as a whole, the association was necessarily interested in the validity of the sale. We therefore reject the assertion that McGill was in privity with the association.

[16] And it cannot be said that prior to the derivative suit, any party had yet litigated the validity of the sale, either independently or on the association's behalf. The doctrine of issue preclusion recognizes that limits on litigation are desirable, but a person should not be denied a day in court unfairly.[52] We find no error in the district court's conclusion that the derivative proceeding was not barred by claim preclusion or issue preclusion. This assignment of error is without merit.

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[49] *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 505, 500 N.W.2d 566, 573 (1993), quoting *Lowell Staats Min. Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271 (10th Cir. 1989).

[50] See *Hickman, supra* note 46.

[51] *Hara, supra* note 7.

[52] *Hickman, supra* note 46.

(c) Failure to State Claim

The association claims that McGill's complaint failed to state a claim, because the action was filed more than 1 year from the date that the amendment to the declaration was recorded. As discussed above, in order to effect the sale to Henery, the president of the association executed an amendment to the declaration modifying the boundaries of Henery's commercial units and then reconveyed the units to Henery. Section 76-854(b) provides that "[n]o action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded."

We reject the premise of this argument—that McGill challenged the amendment to the declaration and not the sale of the limited common elements. The president executed the amendment only to transfer the limited common elements to Henery. The sale of these limited common elements was at the heart of McGill's derivative action, and the evidence established that the limited common elements were sold. Section 76-870 specifies the requirements to convey a portion of the common elements. Therefore, that statute controls.[53]

[17] Even if § 76-854 were controlling, Henery and the association waived any defense based upon the 1-year limitations period. Neither Henery nor the association raised a statute of limitations defense in their answers or motions to dismiss. The association did not raise § 76-854(b) until after judgment had been entered against it. The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.[54]

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[53] See *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

[54] *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

(d) Equitable Estoppel

Henery and the association assert that equitable estoppel should defeat McGill's claim, because the association accepted the benefits of the sale by using the funds received from Henery. They further argue that McGill also benefited from the sale and that he voted in favor of using the funds.

[18] Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his or her own deeds, acts, or representations.[55] Before discussing the elements of equitable estoppel, we first reject any argument relating to McGill in his individual capacity. As already discussed, McGill brought the present action derivatively on behalf of the association. Any conduct or benefit relating to McGill as an individual is irrelevant.

Because this is a derivative action, the association is the party to be estopped. And as to the association, the defense clearly fails. To be estopped, the association is required to have possessed "knowledge, actual or constructive, of the real facts."[56] Although the district court ultimately determined that the sale was void, the association had no awareness of its invalidity. As the court observed, "There was merely a misunderstanding as to what the requirements were of such a sale."

Further, it cannot be said that the parties were unable to ascertain the truth or falsity of the pertinent facts.[57] The requirements for the sale were set forth in the Nebraska Condominium Act, and Henery was present when his offer was approved by the association. Thus, the pertinent facts were equally available to all of the parties. This argument is without merit.

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[55] *Berrington Corp. v. State*, 277 Neb. 765, 765 N.W.2d 448 (2009).

[56] See *id.* at 774, 765 N.W.2d at 455.

[57] See *id.*

2. Sale and Attorney Fees

(a) Validity of Sale

Henery and the association assert that the sale of the limited common elements was not invalid. And the association further claims that the district court erred in determining that title to the limited common elements remained with the association, rather than Henery.

In arguing that the sale was not invalid, the association again relies upon § 76-854, concerning amendments to the declaration. But as already discussed, the amendment in this case was executed only to carry out the sale to Henery. Regardless of the form of the transfer, the sale was required to comply with the provisions of § 76-870.

Section 76-870 provides, in relevant part:

> (a) Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least eighty percent of the votes in the association, . . . or any larger percentage the declaration specifies, agree to that action; but all the owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. . . . Proceeds of the sale are an asset of the association.
>
> (b) An agreement to convey common elements or subject them to a security interest must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof must be recorded in every county in which a portion of the condominium is situated and is effective only upon recordation.
>
> . . . .
>
> (d) Any purported conveyance, encumbrance, judicial sale, or other voluntary transfer of common elements, unless made pursuant to this section, is void.

Henery and the association also misunderstand the requirements of § 76-870(a). They assert that only Henery's consent was necessary to approve the conveyance, because he owned all of the commercial units to which the limited common elements were allocated. Thus, they do not read the 80-percent requirement as applying to limited common elements. We disagree.

This argument neglects the common ownership of limited common elements. As previously discussed, although allocated to the exclusive use of certain units, limited common elements are nonetheless common elements of the condominium. Because they are common elements, each unit owner possesses an undivided ownership interest in the limited common elements, even if the owner has no right to their use. Section 76-870(a) protects this ownership interest by requiring the approval of 80 percent of the total authorized votes in the association to convey common elements, whether or not the common elements are also limited common elements.

Rather than providing an alternative method of approval, § 76-870(a) provides an additional safeguard as to the sale of limited common elements. Not only must 80 percent of the total votes approve the sale of limited common elements, but the sale must be approved by all of the unit owners entitled to the use of the limited common elements. Without the unanimity requirement, the association could vote to sell limited common elements despite an objection from those unit owners entitled to their use.

Because § 76-870(a) required approval by both 80 percent of the total votes and 100 percent of the unit owners to whom the limited common elements were allocated, the vote was clearly insufficient. While the second requirement was satisfied, the first was not. As the district court determined, at most, the sale to Henery was approved by a vote of only 77.7 percent. Thus, the conveyance fell short of the 80-percent requirement.

Further, there is no evidence of any agreement executed by the unit owners approving the sale, or ratifications thereof, as required by § 76-870(b). Only Henery and the president of the association signed the purchase agreement for the limited common elements. And only the president signed the amendment to the declaration and the warranty deed. We therefore agree with the district court that the conveyance of the limited common elements was void.[58]

Henery and the association raise additional arguments relying upon provisions of the declaration and of the act which are similarly unpersuasive. Section 76-845(b) addresses the "reallocation" of limited common elements between units, not the conveyance of title. Similarly, paragraph 14(B)(ii) of the declaration merely provides that only limited common elements may be incorporated into an adjacent unit or units "then owned by Declarant." Assuming a declarant still exists in this case, the incorporation of limited common elements into an adjacent unit or units necessarily requires the conveyance of title. Such a conveyance is not permitted without compliance with the requirements of § 76-870.

As to the association's assertion regarding the state of title to the limited common elements, we agree that the district court could have been more specific. Rather than indicating that title to the limited common elements remained with the association, it would have been more clear to state that each unit owner retained his or her undivided ownership interest. But because the association was composed of all the unit owners, the district court was not necessarily incorrect. However, we reject the association's premise that title to the limited common elements remained with Henery. The limited common elements are still allocated to the exclusive use of the commercial units. But Henery's ownership of the limited common elements

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[58] See § 76-870(d).

is shared with all of the unit owners. This assignment of error is without merit.

(b) Attorney Fees

The association assigns that the district court erred in awarding McGill his attorney fees and costs. It claims that there was no statutory basis to permit the award, that the award included attorney fees incurred in the 2010 action, and that McGill was improperly granted payment of certain "expenses."

[19] The association is correct that some basis must exist to permit an award of attorney fees. We have stated that attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[59] The district court did not mention a statutory basis for the award of attorney fees. Rather, it relied upon the "laws of Derivati[ve] Action lawsuits."

However, a specific statutory basis exists in § 76-891.01, which provides:

> If a declarant or any other person subject to the Nebraska Condominium Act fails to comply with any provision of the act or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award costs and reasonable attorney's fees.

We determine that an award of attorney fees and costs was proper under § 76-891.01.

[20] As to the amount of the award, we find no abuse of discretion regarding the services provided by McGill's attorneys. When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.[60]

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[59] See *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

[60] *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009).

The district court based the amount of the award on an affidavit from one of McGill's attorneys. In the affidavit, the attorney averred that $28,016 in services were provided either in support of the present action or in support of both the 2010 action and the present action. And two attached listings show that numerous services related solely to the 2010 action were excised from McGill's ultimate award.

The association also argues that the district court improperly awarded McGill payment for several miscellaneous expenses charged by his attorneys, including postage, photocopies, and court reporters. Our prior case law has not been consistent in its treatment of such litigation expenses. For example, in *National Am. Ins. Co. v. Continental Western Ins. Co.*,[61] we rejected the argument that litigation expenses were not recoverable under Neb. Rev. Stat. § 44-359 (Reissue 2010), reasoning that there was no rational basis for distinguishing expenses for photocopying or expert consultation from other expenses necessary to a client's representation. However, in *Young v. Midwest Fam. Mut. Ins. Co.*,[62] we construed the same section and concluded that expert witness fees and other litigation expenses were not recoverable.

Since as early as 1922, we have recognized that litigation expenses are not recoverable unless provided for by statute or a uniform course of procedure.[63] But as the above two cases illustrate, we have not been uniform in applying this principle,[64] and our cases have diverged even when construing the same statutory section.

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[61] *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

[62] *Young v. Midwest Fam. Mut. Ins. Co.*, 276 Neb. 206, 753 N.W.2d 778 (2008).

[63] See *Toop v. Palmer*, 108 Neb. 850, 189 N.W. 394 (1922).

[64] See *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011). See, also, *Bartunek v. Gentrup*, 246 Neb. 18, 516 N.W.2d 253 (1994) (recognizing prior affirmance of award of expert witness fee without statutory basis or uniform course of procedure).

This disparity arises, in part, from the numerous distinct statutory provisions addressing the recovery of attorney fees and costs in certain types of litigation. For example, specific statutes expressly permit the recovery of certain litigation expenses.[65] One such statute authorizes the recovery "for fees necessarily incurred for not more than two expert witnesses" under certain conditions in a condemnation action.[66] In contrast, other statutes, such as § 76-891.01 in the present case, authorize only the recovery of attorney fees and costs.

In *City of Falls City v. Nebraska Mun. Power Pool*,[67] we recognized the inconsistencies in our case law. Although that case specifically dealt with the taxation of costs under Neb. Rev. Stat. § 25-1711 (Reissue 2008), we find it instructive in construing any statute providing only for the recovery of attorney fees and costs. We recognized that it is the province of the Legislature to designate specific items of litigation expense which may be taxed as costs and that the Legislature has done so with respect to certain court costs.[68] Further, shifting of litigation expenses from one party to another could have a chilling effect on a plaintiff's right to seek relief for injury or wrong or subject an unsuccessful defendant to costs greatly in excess of the monetary relief sought by the plaintiff.[69]

[21] We therefore hold that without indication to the contrary, where a statute speaks only to attorney fees and costs, a party may recover his or her attorney fees, the costs of the filing of the action, and any other expenses that are specifically delineated as taxable costs by statute.[70] And we expressly

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[65] See, e.g., Neb. Rev. Stat. § 76-720 (Reissue 2009).

[66] *Id.*

[67] *City of Falls City, supra* note 64.

[68] See *id.*

[69] *Id.*

[70] See *Kliment v. National Farms, Inc.*, 245 Neb. 596, 514 N.W.2d 315 (1994).

disapprove of our prior cases, such as *National Am. Ins. Co.*, which permitted the recovery of litigation expenses without an explicit basis for doing so.

As previously discussed, § 76-891.01 speaks only to the recovery of attorney fees and costs. But the district court allowed McGill to recover $1,209.14 in expenses, including expenses for postage, photocopies, and court reporters. Our attention has not been directed to any statute which defines taxable costs to include these items. But we are also aware that the parties have not had the opportunity to brief the statutory basis for the items to be claimed as costs, and we think it is appropriate that the district court consider the matter in the first instance.

## VI. CONCLUSION

Based upon the requirements of the Nebraska Condominium Act, the sale and conveyance of the limited common elements were void. The conveyance was neither approved by the requisite vote of the association nor evidenced by an agreement signed by the unit owners. And we further conclude that McGill was not barred from bringing the present derivative action and that a statute authorized the district court to award McGill his taxable costs and reasonable attorney fees. We therefore affirm the award of attorney fees of $28,016, but we vacate the award of costs and expenses and remand the cause to the district court to determine the amount of taxable costs to be awarded to McGill in conformity with this opinion. In all other respects, we affirm the judgment of the district court.

Affirmed in part, and in part vacated and remanded for further proceedings.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Jahon S., a child under 18 years of age. State of Nebraska, appellee, v. Reon W., appellant.

864 N.W.2d 228

Filed June 12, 2015. No. S-14-1049.

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: Proof.** Under Neb. Rev. Stat. § 43-292 (Cum. Supp. 2014), in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.
3. ____: ____. In addition to proving a statutory ground, the State must show that termination is in the best interests of the child.
4. **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.
5. **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.
6. **Parental Rights: Statutes: Words and Phrases.** The term "unfitness" is not expressly used in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2014), but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.
7. **Constitutional Law: Parental Rights: Words and Phrases.** In the context of the constitutionally protected relationship between a parent and a child, 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 caused, or probably will result in, detriment to a child's well-being.

8. **Parental Rights.** The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.
9. ____. Although incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered.
10. **Parental Rights: Abandonment.** Although incarceration itself may be involuntary as far as a parent is concerned, the criminal conduct causing the incarceration is voluntary.
11. ____: ____. In a case involving termination of parental rights, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration.
12. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: Christopher Kelly, Judge. Affirmed.

Joseph L. Howard, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Jennifer Chrystal-Clark for appellee.

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

Stephan, J.

Reon W. and P'lar'e S. are the parents of Zanaya W., Mileaya S., Imareon S., and Jahon S. The separate juvenile court of Douglas County terminated P'lare's parental rights to all four children and Reon's parental rights to Zanaya, Mileaya, and Imareon. Both parents filed timely appeals. We affirmed the terminations in *In re Interest of Zanaya W. et al.*[1] In a separate proceeding, the same court terminated Reon's parental rights to Jahon, the youngest of the four children. This is Reon's direct appeal from that order.

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[1] *In re Interest of Zanaya W. et al., ante* p. 20, 863 N.W.2d 803 (2015).

## BACKGROUND

As noted in our opinion in *In re Interest of Zanaya W. et al.*, the three older children were adjudicated as children within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and placed with their father, Reon, after they were removed from the custody of their mother, P'lar'e. But in March 2013, the children were removed from Reon's custody when the Department of Health and Human Services (DHHS) learned that Reon was incarcerated on pending criminal charges. On July 9, Reon pled guilty to a charge of possession of marijuana with intent to deliver, a Class IIIA felony. On September 10, he was sentenced to imprisonment for 3 to 5 years.

Jahon was born in November 2013, while Reon was serving his prison sentence. Two days after his birth, an ex parte order for emergency temporary custody was entered and he was placed in the custody of DHHS. When he was 4 days old, Jahon was placed with the same foster parents who care for his three older siblings, and he remained in that placement with his siblings at the time of the termination hearing.

In September 2014, the State filed a supplemental petition to terminate Reon's rights to Jahon. As grounds, it asserted he had substantially and continuously or repeatedly neglected and refused to give necessary parental care and protection to Jahon and his three older siblings. Reon personally appeared in the juvenile court with counsel on October 28 and entered a denial to the supplemental petition. A termination hearing was held immediately thereafter. Although Reon was present with counsel, he did not testify or offer any evidence.

The State called two witnesses. The first was the foster parent with whom Jahon and his siblings had been placed. She testified that Jahon was placed with her in December 2013 and that his three siblings had been placed with her since April 2013. All four children were in her care at the time of the hearing. She testified that while the children were in her care, Reon had sent several letters to each of them, including Jahon, but had not visited with them in person or by telephone. She

testified that Reon had been incarcerated during the entire time that Jahon had been placed with her.

The second State witness was Janece Potter. She testified that she had served as the family permanency specialist for Jahon and his three siblings and had worked with them and their parents from August 2012 through March 2014, when she took a different position. Potter testified that after they became state wards and were removed from the custody of their mother, Zanaya and Mileaya were placed with Reon in March 2011 and that Imareon was placed with Reon in August 2012. Potter testified that while the children were placed with Reon, she checked on them one or two times each month and had no concerns about their well-being other than an observation that the house was "cluttered." But in 2013, Potter learned that Reon had been incarcerated in 2012 and that during his incarceration, the children were cared for by Reon's mother. Reon had not reported this incarceration to Potter; she learned of it from another source. On March 29, 2013, Reon was arrested for possession of marijuana with intent to deliver and the three children were removed and placed in foster care. While incarcerated for this offense, Reon was charged with physically assaulting another inmate.

Potter visited with Reon at the correctional facility where he was incarcerated in April 2013. They discussed the fact that drugs had been found in his home, and he reported that he had been smoking an ounce of marijuana a day but denied selling it. Potter stated that Reon was unable to participate in review hearings or receive services during his incarceration.

In January 2014, Potter assumed case management responsibilities for Jahon. She prepared a court report and case plan for a review hearing held in March. The report noted that Jahon's needs for safety, health, and well-being were being met in his foster home and that DHHS was working on an alternative permanency plan of adoption. The report noted that no services had been ordered for Reon, who was still incarcerated. Potter stated that she had been unable to meet with Reon since September 2013 because he had been placed

in isolation. At some point, she learned this was because he had been charged with the assault of another inmate. In March 2014, Potter recommended that a motion to terminate parental rights be filed with respect to all of the children, including Jahon, because of the length of time that the cases had been open and the lack of progress that Reon had made with Jahon and his older siblings.

Potter testified that in her conversations with Reon, he never accepted responsibility for his actions or for how they affected his children. Reon told Potter that he had been employed at the correctional facility but that he either had quit or was fired. He also told her that when released, he planned to move to Florida, where his mother lived. When she asked him if he would be cooperative with DHHS upon his release, he replied that he would participate in services but would not cooperate and "would make it very difficult." Potter testified that she had determined Reon's projected release date to be in September 2015.

Potter testified that in her opinion, termination of Reon's parental rights was in the best interests of Jahon. She based her opinion on the fact that Jahon had been in foster care for "100 percent of his life" and was in need of care, which Reon could not provide due to his incarceration. She stated that Reon had not been able to make any progress toward reunification with Jahon "[d]ue to being incarcerated" and would not make any such progress during the additional year that she believed his incarceration would continue. She further stated that Jahon would be at risk of harm if returned to Reon and that Reon was not in a position to care for a child because of his incarceration. She also noted that Jahon's siblings had been in foster care for a significant amount of time.

On cross-examination, Potter acknowledged that she had assisted Reon in gaining custody of the three older children before his arrest. As late as February 2013, she believed that placement of the children with Reon was appropriate, and she wrote in a court report that Reon was able to meet the needs of his children by utilizing informal supports and community

resources while seeking full-time employment. At that time, she recommended that the permanency objective for the children should be family preservation with Reon. Potter further acknowledged that at that point, Reon had been voluntarily participating in services from the juvenile court, and she supported placing the children in his custody. In a case plan for the three older children which was in effect from July 30 until December 29, 2013, during the time that Reon was incarcerated, Potter listed "[s]trategies" which included Reon's obtaining certain evaluations and programming while "in jail" and participating "in supervised visitation when he is released from jail." She was asked how Reon could be expected to work toward reunification or provide support when no services were being provided to him, and she responded, "I'm not sure. There's not a lot you can do when you're in jail."

On redirect examination, Potter testified that she supported Reon's reunification with his three older children only while she remained unaware of his daily marijuana use and the criminal charges which resulted in his conviction and incarceration. She stated that after learning that information, she no longer thought that Reon could provide proper parental care and support.

In an order entered on October 29, 2014, the separate juvenile court terminated Reon's parental rights to Jahon. It found that the ground for termination specified in Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2014) had been met and that it was in the best interests and welfare of Jahon that Reon's parental rights be terminated. The court did not state its reasoning with respect to the best interests finding.

On November 12, 2014, Reon's counsel filed a motion to reconsider, in which he noted that at the termination hearing, there was evidence that Reon was incarcerated "and was not going to be paroled for another year." The motion recited that Reon's incarceration "was a material factor . . . in the Court's decision to terminate his parental rights" and urged reconsideration, because "[o]n November 2, 2014, Reon . . . was paroled and is no longer incarcerated." At a hearing held

on November 18, Reon's counsel advised the court that Reon had been paroled, was living in a "halfway home," and was employed. No evidence was received. The juvenile court overruled the motion, explaining that its decision was not based solely on Reon's projected release date of September 24, 2015. Reon perfected this timely appeal.

## ASSIGNMENTS OF ERROR

Reon assigns that the juvenile court erred in (1) finding his parental rights should be terminated pursuant to § 43-292(2) and (2) finding termination was in Jahon's best interests. He does not assign error with respect to the juvenile court's ruling on his motion to reconsider.

## 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.[2]

## ANALYSIS

[2] Under § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.[3] Reon first argues that the State failed to prove the existence of a statutory ground for termination of his parental rights to Jahon. As noted, the State sought termination under § 43-292(2), which authorizes termination 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. Because we affirmed the juvenile court's decision in case No. S-14-550 terminating Reon's parental rights to Zanaya, Mileaya, and Imareon on

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[2] *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014); *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014).

[3] *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014); *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009).

this same ground, which Reon did not contest in that case, the juvenile court in this case correctly determined that the same statutory ground for termination existed as to Jahon.[4]

[3-8] Reon also challenges the finding that termination of his parental rights was in Jahon's best interests. In addition to proving a statutory ground, the State must show that termination is in the best interests of the child.[5] 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.[6] 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.[7] The term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.[8] In the context of the constitutionally protected relationship between a parent and a child, 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 caused, or probably will result in, detriment to a child's well-being.[9]

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[4] See, *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010); *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

[5] See *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[6] *Id.*; *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

[7] *Id.* See, also, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

[8] *In re Interest of Kendra M. et al., supra* note 5; *In re Interest of Hope L. et al., supra* note 4.

[9] See, *In re Interest of Nicole M., supra* note 3; *In re Interest of Kendra M. et al., supra* note 5; *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 while both are separate inquiries, each examines essentially the same underlying facts as the other.[10]

In this case, there is evidence of Reon's lack of parental fitness in that he chose to use and sell marijuana during a time when he was the sole custodial parent of Jahon's three older siblings, thereby placing the children at risk of harm. As a result of this conduct, he was incarcerated at the time of Jahon's birth and for the first year of his life, making it impossible for him to be present in Jahon's life or provide him with care and support. There is evidence that Reon was incarcerated in December 2012, also at a time when he was the sole custodial parent of Jahon's three older siblings. Further, there is evidence that Reon was charged with assaulting another inmate during his 2013 incarceration.

[9-11] Although incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered.[11] And we have noted that although incarceration itself may be involuntary as far as a parent is concerned, the criminal conduct causing the incarceration is voluntary.[12] Thus, in a case involving termination of parental rights, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration.[13]

In *In re Interest of DeWayne G. & Devon G.*,[14] we concluded that termination of an incarcerated father's rights was in the best interests of his two sons when he had never cared for them prior to his incarceration and when one son had been in foster care for more than 4 years and the other for 2 years.

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[10] *In re Interest of Nicole M., supra* note 3; *In re Interest of Kendra M. et al., supra* note 5.

[11] *In re Interest of Ryder J., supra* note 6; *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

[12] *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

[13] *In re Interest of DeWayne G. & Devon G., supra* note 11.

[14] *Id.*

We reached this conclusion despite the father's testimony that he was scheduled for parole approximately 3 months after the termination hearing.

Although it appears from the record that Reon may have been paroled within a month following the termination hearing, there is no basis for concluding that he is prepared to be a parent to Jahon. His past criminal actions demonstrate voluntary conduct that prevented him from functioning as a fit parent. The only evidence as to his future ability to parent is that he does not intend to cooperate with DHHS and "would make it very difficult" for that agency to reunify him with his children. Further, there is evidence that Reon refuses to accept responsibility for his criminal actions and how they affected his children.

[12] Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.[15] As a result of decisions made by Reon which adversely reflect upon his parental fitness, Jahon has been in foster care for his entire life, and there is no basis on this record to conclude that permanency could be achieved in the foreseeable future if Reon's parental rights remain intact. We therefore conclude that the separate juvenile court did not err in finding that termination of Reon's parental rights was in Jahon's best interests.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the separate juvenile court terminating Reon's parental rights to Jahon.

Affirmed.

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[15] *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Jassenia H., a child under 18 years of age. State of Nebraska, appellee, and Joy Shiffermiller, guardian ad litem, on behalf of Jassenia H., appellant, v. Monique M., appellee.

864 N.W.2d 242

Filed June 12, 2015. No. S-14-1076.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **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.
3. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
6. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a special proceeding for appellate purposes.
7. **Final Orders: Appeal and Error.** To be final and appealable, an order in a special proceeding must affect a substantial right.

8. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
9. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.

Appeal from the Separate Juvenile Court of Lancaster County: Toni G. Thorson, Judge. Appeal dismissed.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., guardian ad litem, for appellant.

Lisa F. Lozano and Danielle L. Savington for appellee Monique M.

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

Cassel, J.

## INTRODUCTION

This appeal attempts to challenge a juvenile court order determining that the federal Indian Child Welfare Act of 1978 (ICWA)[1] (and by implication, the Nebraska Indian Child Welfare Act (NICWA)[2]) applies to the adjudication proceeding of an alleged Indian child. The child's guardian ad litem (GAL) asserts that the "Indian family" had already been dissolved by the mother's intent to relinquish custody. However, we determine that the order was not a final, appealable order. The mere determination that ICWA and NICWA applied, without further action, did not affect a substantial right. We dismiss the appeal for lack of jurisdiction.

## BACKGROUND

The juvenile proceeding under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) regarding Jassenia H. began several weeks

[1] 25 U.S.C. §§ 1901 to 1963 (2012).

[2] Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008 & Cum. Supp. 2014).

after her birth and commenced with the filing of a motion for temporary custody. In support of the motion, the State attached an affidavit from a "Children and Family Services Specialist" with the Nebraska Department of Health and Human Services (DHHS). The specialist indicated that Jassenia's mother, Monique M., had an extensive history of involvement with DHHS regarding her other children. According to the specialist, "[S]everal of [Monique's] children have been abused and/or neglected, which resulted in them being removed from her care. She has thereafter failed to correct the conditions of neglect and those children have not been able to be returned to her care."

The juvenile court granted DHHS temporary custody of Jassenia and ordered that she be removed from Monique's care. Several days later, the State filed a petition for adjudication pursuant to § 43-247(3)(a), alleging that Jassenia lacked proper parental care by reason of Monique's fault or habits and/or that Jassenia was in a situation dangerous to life or limb or injurious to her health or morals.

After a hearing, the juvenile court ordered the State to provide notice to the Oglala Sioux Tribe as set forth in ICWA and NICWA. The notice provisions of ICWA and NICWA are substantially the same. Under NICWA,

> [i]n any involuntary proceeding in a state court, when the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe . . . of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the secretary.[3]

In addition, the court appointed a GAL for Jassenia and counsel to represent Monique.

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[3] § 43-1505(1).

At a later hearing, the juvenile court stated that despite the notice given to the Oglala Sioux Tribe, no response or motion to intervene had been received from the tribe. And according to Monique's testimony, Jassenia was eligible for enrollment in the tribe. Monique testified that she was an enrolled member of the tribe, that Jassenia was born on the reservation, and that Monique had completed "application forms" for Jassenia's enrollment.

However, Monique also testified that on the day of Jassenia's birth, she had intended to grant custody of Jassenia to Monique's cousin. To that effect, Monique executed a document purporting to "[h]ereby/and give full legal consent and guardianship an[d] custody of [Jassenia] [t]o my relative . . . ." And Monique believed that pursuant to the document, her cousin had "legal custody" of Jassenia. Monique testified that her cousin was a member of the tribe living on the reservation and that Monique wanted Jassenia to be raised in a "Native American culture" by a family member.

After the hearing, the juvenile court continued the matter in order to determine whether ICWA applied. And on that issue, the GAL filed a motion specifically requesting that ICWA be found inapplicable based upon the U.S. Supreme Court's holding in *Adoptive Couple v. Baby Girl*.[4]

In *Adoptive Couple*, the adoptive parents of a little girl who was 3/256 Cherokee petitioned for certiorari from the South Carolina Supreme Court's interpretation of certain provisions of ICWA. The South Carolina court interpreted provisions of the federal act to require the removal of the girl from her adoptive parents' care to be given to her biological father, a member of the Cherokee Nation, with whom she had never had prior contact and who had attempted to relinquish custody.

The U.S. Supreme Court rejected the South Carolina court's interpretation and observed that the adoption of the little girl did not contravene Congress' intent in enacting ICWA.

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[4] *Adoptive Couple v. Baby Girl*, ___ U.S. ___, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).

> [T]he primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts. . . . And if the legislative history of the ICWA is thought to be relevant, it further underscores that the Act was primarily intended to stem the unwarranted removal of Indian children from intact Indian families. . . . In sum, when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated.[5]

Relying upon the Court's holding, the GAL argued that Monique's intention to relinquish custody of Jassenia rendered ICWA inapplicable. The GAL claimed that like *Adoptive Couple*, this case would not result in the dissolution of an Indian family, because Monique did not intend to raise Jassenia.

The juvenile court conducted a hearing on the applicability of ICWA, and the court received an affidavit from an "ICWA Advocate" with the Oglala Sioux Tribe. In the affidavit, the advocate stated that he had reviewed the tribe's "records of enrollment" and that Monique was a registered member of the tribe. He further averred that as the child of an enrolled member, Jassenia was eligible for enrollment in the tribe.

The juvenile court entered an order finding that ICWA was applicable to the proceedings. (Because the applicability of ICWA and NICWA are substantially the same,[6] we construe the court's order as speaking to both acts.) The GAL filed

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[5] *Id.*, 133 S. Ct. at 2561.

[6] See 25 U.S.C. § 1903(4) and § 43-1503(4). See, also, *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007) (observing that applicability of ICWA and NICWA depends on whether proceedings involve "Indian child").

a timely notice of appeal, and we moved the appeal to our docket pursuant to statutory authority.[7]

## ASSIGNMENT OF ERROR

The GAL assigns, restated, that the juvenile court erred in determining that ICWA and NICWA were applicable to the proceedings notwithstanding Monique's intent to relinquish custody of Jassenia.

## STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[8]

## ANALYSIS

[2,3] As noted above, from the outset, this case presents an issue regarding appellate jurisdiction. 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.[9] When an appellate court is without jurisdiction to act, the appeal must be dismissed.[10]

[4,5] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[11] 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

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

[8] *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

[9] *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

[10] *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

[11] *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002).

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.[12]

[6,7] We have previously indicated that a proceeding before a juvenile court is a special proceeding for appellate purposes.[13] Thus, we focus our analysis upon the second category of final orders set forth in § 25-1902. And as provided by that section, to be final and appealable, an order in a special proceeding must affect a substantial right.[14]

However, short of identifying a substantial right, the GAL does not identify *any* right which was affected by the juvenile court's order finding ICWA and NICWA applicable to the proceedings. Rather, her assertion of appellate jurisdiction relies upon the Nebraska Court of Appeals' holding in *In re Interest of Brittany C. et al.*[15] In that case, the Court of Appeals concluded that the denial of a biological mother's requests to transfer jurisdiction to a tribal court pursuant to ICWA and NICWA was a final, appealable order.

But in *In re Interest of Brittany C. et al.*, the Court of Appeals reasoned that the mother's requests for transfer were analogous to a motion seeking arbitration in lieu of litigation.[16] If granted, the proceedings would stop and be transferred to another forum which may "differ in other respects consistent with the tribal court's Native American traditions."[17] And as

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[12] *In re Interest of Meridian H., supra* note 9.

[13] See, e.g., *id.*; *In re Interest of Anthony R. et al., supra* note 11.

[14] See *In re Interest of Anthony R. et al., supra* note 11.

[15] *In re Interest of Brittany C. et al.*, 13 Neb. App. 411, 693 N.W.2d 592 (2005).

[16] See *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004) (determining that denial of motion to compel arbitration affected substantial right, because motion sought to halt pending lawsuit and transfer it to nonjudicial forum).

[17] *In re Interest of Brittany C. et al., supra* note 15, 13 Neb. App. at 421, 693 N.W.2d at 601.

Congress recognized in enacting ICWA, a tribal court may provide a parent and child with significant advantages inherent in the recognition and implementation of Native American customs and traditions.[18]

However, unlike *In re Interest of Brittany C. et al.*, this case does not involve the denial of a request to transfer jurisdiction to a tribal court. Rather, the juvenile court merely determined that ICWA and NICWA were applicable to the proceedings. Thus, we must decide whether this determination alone affected a substantial right.

[8,9] We have defined a "substantial right" in various ways. We have stated that a substantial right is an essential legal right, not a mere technical right.[19] We have also explained that 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.[20]

In this case, as in all juvenile cases, the GAL represents the interests of the juvenile.[21] But discussion of a juvenile's interests is rare in our final order jurisprudence. Most of our prior cases dealing with the finality of juvenile court orders involve the substantial right of a parent.[22] In our review, we have found only one appellate case of this state addressing the substantial right of a juvenile in a juvenile proceeding.[23] And that case merely determined that a juvenile did not have a substantial right to testify outside of the presence of her mother.[24]

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[18] See *id.*

[19] See *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

[20] See *id.*

[21] See Neb. Rev. Stat. § 43-272(2) (Reissue 2008).

[22] See *In re Interest of Karlie D., supra* note 19 (identifying substantial right of parent in juvenile proceedings as parent's fundamental, constitutional right to raise his or her child).

[23] See *In re Interest of Marcella B. & Juan S.*, 18 Neb. App. 153, 775 N.W.2d 470 (2009).

[24] See *id.*

In considering a juvenile's interest, we take note of the purpose of the Nebraska Juvenile Code in ensuring the rights of all juveniles to care and protection and a safe and stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship to protect the public interest.[25] And we acknowledge that like parents, children also have a constitutional interest in the continuance of the parent-child relationship.[26] However, we cannot settle the issue here. Although ICWA and NICWA have repercussions upon a child's welfare and the parent-child relationship, these consequences are not realized until some adjudicative or dispositive action is taken by the juvenile court.

Generally speaking, the substantive portions of ICWA and NICWA provide heightened protection to the rights of Indian parents, tribes, and children in proceedings involving custody, termination, and adoption.[27] To that effect, among other provisions, the acts authorize tribal jurisdiction,[28] require specific showings for foster care placement or termination of parental rights,[29] and express a preference for the placement of Indian children with extended family members or persons with tribal ties.[30]

However, all of the heightened protections afforded by ICWA and NICWA apply prospectively to future determinations in the proceedings.[31] In the present case, there is no indication that these protections have had any effect upon the adjudication proceedings. From the record, it does not appear

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[25] See Neb. Rev. Stat. § 43-246(1) (Cum. Supp. 2014).

[26] See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

[27] See *In re Adoption of Kenten H., supra* note 6.

[28] See 25 U.S.C. § 1911 and § 43-1504.

[29] See 25 U.S.C. § 1912 and § 43-1505.

[30] See 25 U.S.C. § 1915 and § 43-1508.

[31] See *In re Adoption of Kenten H., supra* note 6 (observing that ICWA and NICWA apply prospectively from date Indian child status is established on record).

that the juvenile court has entered a preadjudication detention order. (Although we understood the GAL as stating at oral argument that such an order had been entered, we do not find it in our record.) And it is clear that Jassenia had not yet been adjudicated at the time ICWA and NICWA were found applicable. Further, we see no motion to transfer jurisdiction to a tribal court or any indication that the Oglala Sioux Tribe has sought to intervene.

Until the court takes action to implement or contravene the heightened protections afforded by ICWA and NICWA in some fashion, we cannot conclude that the mere determination of applicability affects a substantial right. The juvenile court declared only that these laws apply—it did not implement them in any way affecting the child's substantial rights. The court's order was interlocutory and until it applied the law in some adjudicative or dispositive action, functioned merely as an advisory opinion.

## CONCLUSION

The GAL appealed from an order merely finding that ICWA and NICWA applied to the adjudication proceeding. But the juvenile court took no action implementing or contravening the heightened protections afforded by the acts. Although we are sensitive to the need to expedite juvenile matters, without some dispositive action, we see no impact upon the juvenile's substantial rights. Consequently, the juvenile court's order does not constitute a final order within the meaning of § 25-1902. In the absence of a final order, we must dismiss the appeal for lack of jurisdiction. Because these proceedings have already been delayed for an inordinate time, we have expedited the disposition of this appeal.

Appeal dismissed.

Stephan, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Jacob D. Armagost, appellant.

864 N.W.2d 417

Filed June 19, 2015. No. S-14-058.

1. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
3. **Jury Instructions.** In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
4. **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.
5. **Criminal Law: Legislature: Statutes.** Within constitutional boundaries, the Legislature is empowered to define a crime.

Petition for further review from the Court of Appeals, Inbody, Riedmann, and Bishop, Judges, on appeal thereto from the District Court for Merrick County, Michael J. Owens, Judge. Judgment of Court of Appeals affirmed.

Mitchell C. Stehlik, of Lauritsen, Brownell, Brostrom & Stehlik, P.C., L.L.O., for appellant.

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

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

Wright, J.

## NATURE OF CASE

Jacob D. Armagost was charged with operating a motor vehicle in a willful reckless manner to avoid arrest and was subsequently convicted by a jury. On appeal, the Nebraska Court of Appeals held that an attempt to arrest or issue a citation to a defendant is an essential element of the offense of operating a motor vehicle to avoid arrest. See *State v. Armagost*, 22 Neb. App. 513, 856 N.W.2d 156 (2014). It concluded the district court erred in failing to include a jury instruction on the material elements of the offense, but that the error was harmless. Armagost and the State petitioned for further review.

## SCOPE OF REVIEW

[1,2] Whether the jury instructions given by a trial court are correct is a question of law. *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015). When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court. *In re Guardianship & Conservatorship of Barnhart*, 290 Neb. 314, 859 N.W.2d 856 (2015).

## FACTS

A jury found Armagost guilty of operating a motor vehicle in a willful reckless manner to avoid arrest. He was found to be a habitual criminal, and the district court sentenced him to 10 to 14 years' imprisonment.

At the jury instruction conference, Armagost offered a proposed jury instruction setting forth a definition of the term "arrest." Defense counsel argued that it was important for the jury to know the definition of an arrest so that the jury could determine whether the essential element of an attempt to arrest Armagost was satisfied. The district court declined to give the proposed instruction, indicating that such instruction

could confuse the jury, since an actual arrest was not necessary for a conviction.

Armagost also objected to instruction No. 3, which set forth the elements of the offense, on the basis that it omitted the element of an attempt to arrest him. The district court overruled the objection and gave the elements instruction as written, without including the element of an attempted arrest. The jury found Armagost guilty of operating a motor vehicle in a willful reckless manner to avoid arrest.

On appeal, Armagost assigned, inter alia, that the district court erred in giving jury instruction No. 3 pertaining to the charge of flight to avoid arrest, which did not include a requirement that the jury find the officer made an attempt at an arrest. He also contended that the district court erred in failing to offer his proposed jury instruction containing the definition of "arrest."

The Court of Appeals affirmed Armagost's conviction and sentence. It found that the district court erred by giving a jury instruction on the material elements of the offense that omitted the element of an attempt to arrest or cite Armagost, but determined that the error was harmless. The court concluded that a jury instruction on the definition of "arrest" was not warranted. Armagost and the State each petitioned this court for further review.

## ASSIGNMENTS OF ERROR

Armagost claims the Court of Appeals erred when it found that an attempt at an arrest or citation was an essential element of the crime charged, but concluded that the failure to so instruct the jury was harmless error. He also contends that it was error not to give his proposed jury instruction on the definition of "arrest."

The State asserts that the Court of Appeals erred in finding that an attempt to arrest or cite Armagost was an essential element of the charge of operating a motor vehicle in a willful reckless manner to avoid arrest.

## ANALYSIS

The question we address is whether the attempt to arrest or issue a citation is an essential element of the charge of operating a motor vehicle in a willful reckless manner to avoid arrest under Neb. Rev. Stat. § 28-905 (Reissue 2008).

The State claims that the attempted arrest or citation is implicit in the language of § 28-905, which provides in relevant part:

> (1) Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation commits the offense of operation of a motor vehicle to avoid arrest.
>
> . . . .
>
> (3)(a) Any person who violates subsection (1) of this section shall be guilty of a Class IV felony if, in addition to the violation of subsection (1) of this section, one or more of the following also applies:
>
> . . . .
>
> (iii) The flight to avoid arrest includes the willful reckless operation of the motor vehicle.

The Court of Appeals found, and it was not disputed, that instruction No. 3 mirrored the language of § 28-905. Therefore, we turn to instruction No. 3 as given to the jury, which stated:

> The material elements which the State must prove beyond a reasonable doubt in order to convict [Armagost] of the offense of operating a motor vehicle in a willful reckless manner to avoid arrest are:
>
> 1. That . . . Armagost . . . operated a motor vehicle;
>
> 2. That [Armagost] fled in such vehicle in an effort to avoid arrest or citation;
>
> 3. That [Armagost] did so in a willful reckless manner; and
>
> 4. That [Armagost] did so on or about June 6, 2013, in Merrick County, Nebraska.
>
> A person drives in a willful reckless manner if he or she drives any motor vehicle in such a manner as

> to indicate a willful disregard for the safety of persons or property.
>
> The elements of the lesser included offense of operating a motor vehicle to avoid arrest are:
>
> 1. That . . . Armagost . . . operated a motor vehicle; and
>
> 2. That [Armagost] did so in an effort to avoid arrest or citation; and
>
> 3. That [Armagost] did so on or about June 6, 2013, in Merrick County, Nebraska.

This instruction mirrors the statute, but Armagost claims that the jury should have been given an instruction on the separate element of attempted arrest or citation. We disagree.

[3,4] In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). 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. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

In concluding that the district court should have included an instruction on attempted arrest or citation, the Court of Appeals relied on our statement in *State v. Williams*, 247 Neb. 931, 939, 531 N.W.2d 222, 229 (1995), *overruled, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), that "[j]ury instructions that set forth only the statutory elements of a crime are insufficient when they do not set forth all the essential elements of the crime." The Court of Appeals relied on our statement in *State v. Claussen*, 276 Neb. 630, 756 N.W.2d 163 (2008), that an attempt at an arrest or citation is an essential element of the offense of operating a motor vehicle to avoid arrest. Based on our statements in *Williams* and *Claussen*, the Court of Appeals concluded that the district court erred in failing to include an instruction to the jury on attempted arrest or citation.

The State contends that we rejected a court's ability to look beyond the language of a statute in determining an element of a crime in *Burlison*, thus overruling our holding in *Williams*. We agree.

The Court of Appeals' reliance on our statement in *Williams* was misplaced. Since overruling *Williams*, we have consistently held that when instructing the jury, it is proper for the court to describe the offense in the language of the statute. See, *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011); *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Sanders, supra*.

This principle simplifies the process of preparing jury instructions. It provides certainty for trial courts concerning the question whether the essential elements of the offense have been given to the jury.

[5] Using the specific language of a statute more effectively implements the intent of the Legislature. Within constitutional boundaries, the Legislature is empowered to define a crime. *State v. Burlison, supra*. In *Burlison*, we held that the only elements of murder in the second degree were those which the Legislature included in the statute on second degree murder, namely, the causation of death intentionally but without premeditation. And we have followed this principle in considering whether a jury has been properly instructed as to the elements of the crime charged. See, *State v. Kass, supra*; *State v. Davlin, supra*; *State v. Sanders, supra*.

Additionally, the State argues that the Court of Appeals' reliance on our statement in *Claussen* that "attempt to arrest" was an essential element of the crime of operating a motor vehicle in a willful reckless manner to avoid arrest was misplaced. Memorandum brief for appellee in support of petition for further review at 3. The State distinguishes *Claussen*, because our interpretation of the statute addressed the sufficiency of the evidence and not the adequacy of jury instructions. We agree. In *Claussen*, we did not suggest that attempted arrest or citation must be included as a separate element in the jury

instructions. Instead, we were addressing whether there was sufficient evidence to sustain a conviction.

However, even assuming arguendo that our statement in *Claussen* regarding attempted arrest or citation had been referring to jury instructions, our conclusion remains the same. Instruction No. 3, which used the language of the statute, was sufficient to describe the elements of the crime charged. To convict Armagost, the district court required the jury to find that "[Armagost] fled in such vehicle in an effort to avoid arrest or citation." Thus, the jury necessarily had to determine that Armagost fled from an attempted arrest or citation, otherwise there would be nothing for him to avoid or from which to flee. No separate instruction was necessary to convey this point to the jury. The charge of operating a vehicle to avoid arrest or citation inherently implies the defendant was attempting to avoid an arrest or citation.

We find that Armagost's proposed jury instruction regarding the definition of "arrest" was unnecessary and could have confused the jury. Consequently, the district court did not err in excluding it from the jury instructions. The proposed instruction stated:

> An arrest is taking custody of another person for the purpose of holding or detaining him or her to answer to a criminal charge, and to effect an arrest, there must be an actual or constructive seizure or detention of the person arrested.
>
> *State v. Heath*, 21 Neb.App. 141 (2013)[.]

The proposed instruction is a correct statement of the law, but an instruction on the definition of arrest was not required. The Court of Appeals correctly concluded that in order to be convicted of this charge, it was not necessary for the State to prove that an arrest had been effected.

Unlike charges for resisting arrest and escape from arrest, which involve a crime occurring after or during an arrest, the charge of operating a motor vehicle to avoid arrest occurs before the arrest. The charge means that the defendant attempted to avoid arrest, and whether a defendant was "under

arrest" is not a material element of fleeing to avoid arrest. Such an instruction could have confused the jury as to whether an arrest was an element of the crime charged. Unlike an offense or civil action where the nature of a person's detention is at issue, a common understanding of the term "arrest" was sufficient for the jury to convict Armagost of willful reckless use of a vehicle to avoid arrest.

For the reasons stated above, we find that the district court did not err in refusing to instruct the jury that an attempted arrest or citation was an element of the offense and did not err in refusing to give a separate instruction on the legal definition of "arrest."

## CONCLUSION

We affirm the Court of Appeals' decision affirming Armagost's conviction, but disapprove of its conclusion that under § 28-905, an attempt to arrest or cite a defendant must be separately identified as an element in jury instructions.

Affirmed.

McCormack, J., participating on briefs.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# John E. Murray and Jim J. Fitl, as Cotrustees of the Murray/Fitl Children's Trust, a Nebraska trust, and on behalf of 304 Corporation, a Nebraska corporation, appellants and cross-appellees, v. Greg Stine, an individual, an officer in Premier Bank, and as former interim manager of Mid City Bank, et al., appellees and cross-appellants, and Dennis A. O'Neal et al., appellees.

# John E. Murray and Jim J. Fitl, as Cotrustees of the Murray/Fitl Children's Trust, a Nebraska trust, appellees, v. Greg Stine, an individual, an officer in Premier Bank, and as former interim manager of Mid City Bank, et al., appellants, and John F. Lund et al., appellees.

864 N.W.2d 386

Filed June 19, 2015. Nos. S-14-389, S-14-753.

1. **Judgments: Jurisdiction.** A jurisdictional question that does not involve a factual dispute presents a question of law.
2. **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.
3. **Attorney Fees: Costs.** Attorney fees, where recoverable, are generally treated as an element of court costs.
4. **Judgments: Costs.** An award of costs in a judgment is considered a part of the judgment.
5. **Judgments: Attorney Fees.** A party seeking statutorily authorized attorney fees, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause.

6. ____: ____. Silence of a judgment on the issue of attorney fees must be construed as a denial of the request.
7. **Judgments: Final Orders: Attorney Fees.** When a motion for attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 2008) is made prior to the judgment of the court in which the attorney's services were rendered, the judgment will not become final and appealable until the court has ruled upon that motion.
8. **Appeal and Error.** A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court.

Appeals from the District Court for Douglas County: W. Mark Ashford, Judge. Appeals dismissed.

James D. Sherrets, Diana J. Vogt, and Jared C. Olson, of Sherrets, Bruno & Vogt, L.L.C., for appellants John E. Murray et al. in No. S-14-389 and appellees John E. Murray et al. in No. S-14-753.

Thomas J. McCusker, Michael J. Mills, and Ryan A. Steen, of Gettman & Mills, L.L.P., for appellees Dennis A. O'Neal et al.

William R. Reinsch, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for appellee Ken Grigsby.

Steven D. Davidson, of Baird Holm, L.L.P., for appellee Vance D. Gardiner.

William F. Hargens and Lauren R. Goodman, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees Greg Stine and Premier Bank in No. S-14-389 and appellants Greg Stine and Premier Bank in No. S-14-753.

John P. Passarelli and Todd C. Kinney, of Kutak Rock, L.L.P., for appellees William J. Lindsay, Jr., et al.

Heavican, C.J., Wright, Connolly, McCormack, and Cassel, JJ.

Per Curiam.

## INTRODUCTION

Because of unresolved motions for attorney fees, we lack jurisdiction and must dismiss two attempts to appeal from an action for breach of fiduciary duties. The fee motions were filed after summary judgment motions were heard but before they were decided. The first appeal followed the summary judgment ruling. The undisposed fee motions prevented that ruling from being final. The second appeal followed the district court's refusal, citing lack of jurisdiction, to rule on the fee motions. Until the fee motions are decided, there is no final judgment and no appellate jurisdiction.

## BACKGROUND

The cotrustees of a trust filed suit against a number of parties. The cotrustees alleged, among other causes of action, that the defendants breached their fiduciary duties.

Upon motions to dismiss, the district court dismissed five of the cotrustees' eight causes of action. The remaining defendants then filed answers, some of which specifically requested attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 2008).

Subsequently, the remaining defendants filed motions for summary judgment. The district court heard the motions on April 7, 2014. On April 8 and 9, several defendants filed motions seeking attorney fees under § 25-824. The motions were set to be heard on May 12.

On April 16, 2014, the district court entered orders granting the motions for summary judgment. The orders were silent as to attorney fees. On May 2—10 days before the scheduled hearing on the motions for attorney fees—the cotrustees filed a notice of appeal in the district court, which was docketed as our case No. S-14-389.

The district court subsequently entered an order finding that it did not have jurisdiction to hear the motions for attorney fees because of the pending appeal. Several defendants timely

filed an appeal from that order, which appeal was docketed as our case No. S-14-753.

The appeals were consolidated for briefing and disposition, and we moved them to our docket.[1]

## ASSIGNMENTS OF ERROR

The cotrustees assign seven errors which, consolidated and restated, allege that the district court erred in (1) dismissing their first five causes of action for failure to state a claim and (2) granting summary judgment and dismissing their sixth through eighth causes of action.

Several defendants included in the consolidated briefing what they characterized as cross-appeals challenging the district court's refusal to rule on their motions for attorney fees under § 25-824.

## STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute presents a question of law.[2]

## ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction.[3] We must determine whether the absence of a ruling on the motions for attorney fees prevents us from acquiring jurisdiction over the appeals.

[3-5] Attorney fees, where recoverable, are generally treated as an element of court costs.[4] And an award of costs in a judgment is considered a part of the judgment.[5] We have stated

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

[2] *Shasta Linen Supply v. Applied Underwriters*, 290 Neb. 640, 861 N.W.2d 425 (2015).

[3] *Id.*

[4] See *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

[5] *Id.*

that a party seeking statutorily authorized attorney fees, for services rendered in a trial court, must make a request for such fees prior to a judgment in the cause.[6]

Two lines of authority with divergent consequences are implicated by the procedural background of this case. On the one hand, some defendants requested attorney fees in their answers, and the judgment contained no explicit ruling on the issue. On the other hand, some defendants also filed separate motions for attorney fees before entry of judgment, and the hearing on the motions had not yet occurred at the time the cotrustees filed their notice of appeal. We discuss the consequences of each situation in more detail.

[6] We have stated that silence of a judgment on the issue of attorney fees must be construed as a denial of the request.[7] In *Olson v. Palagi*,[8] the defendant's answer requested attorney fees under a statute[9] authorizing such an award in a child support modification proceeding. The trial court's judgment did not explicitly rule on the request, and the court's docket entry stated that there were no matters under advisement. After entry of judgment, the defendant filed a separate application for attorney fees and the plaintiff appealed prior to the scheduled hearing on attorney fees. The defendant did not cross-appeal on the issue of attorney fees, and the Nebraska Court of Appeals and the parties treated the judgment as a final order. We stated, "The silence of the judgment on the issue of attorney fees must be construed as a denial of [the defendant's] request under these circumstances."[10] Similarly, in *NEBCO, Inc. v. Murphy*,[11] a party sought an award of

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[6] See *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[7] See *Olson v. Palagi, supra* note 4.

[8] *Id.*

[9] See Neb. Rev. Stat. § 42-351 (Reissue 2008).

[10] *Olson v. Palagi, supra* note 4, 266 Neb. at 380, 665 N.W.2d at 585.

[11] *NEBCO, Inc. v. Murphy*, 280 Neb. 145, 784 N.W.2d 447 (2010).

attorney fees under § 25-824 in a responsive pleading to two different complaints. The court explicitly denied the request in one case, but its order in the other case was silent on the issue of attorney fees. We noted that the defendant did not file a separate motion for attorney fees and stated that the court rejected both requests, either explicitly or implicitly.

[7] But we have also held that when a motion for attorney fees under § 25-824 is made prior to the judgment of the court in which the attorney's services were rendered, the judgment will not become final and appealable until the court has ruled upon that motion.[12] Additionally, we have declined to exercise jurisdiction when an appeal is filed before a scheduled hearing or when the trial court has reserved ruling on attorney fees. In *Billingsley v. BFM Liquor Mgmt.*,[13] the parties stipulated prior to trial that the trial court would reserve ruling on the plaintiff's request for equitable relief until after the jury determined any damages. After the court entered judgment on the jury verdict, the plaintiff filed a motion seeking an order regarding the equitable relief he had requested, as well as attorney fees. The defendant appealed before the scheduled hearing on the motion. We concluded that a determination of whether the plaintiff was entitled to equitable relief or attorney fees was necessary to completely dispose of the matter, and thus, the "judgment" on the jury verdict was not final and appealable. In *In re Guardianship & Conservatorship of Woltemath*,[14] a responsive pleading requested attorney fees under § 25-824 and the trial court's order dismissing the petition specifically reserved the issue of attorney fees. We concluded that the appeals taken prior to a ruling on attorney fees were premature.

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[12] *Salkin v. Jacobsen, supra* note 6.

[13] *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000).

[14] *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

Even if the order granting the summary judgment motions implicitly denied the requests for attorney fees included in the respective answers, it clearly did not dispose of the separate motions for attorney fees. In addition to requests for attorney fees asserted in answers, several defendants also filed separate motions seeking such fees under § 25-824. These motions were properly made before the court entered its orders granting summary judgment. It is noteworthy that a hearing on attorney fees was scheduled but had not yet occurred at the time the court entered its orders. Under these circumstances, the court's silence on the issue cannot be considered a denial of the request. We conclude that the absence of a ruling on attorney fees left a portion of the judgment unresolved and that thus, the orders from which the cotrustees appealed were not final. We must dismiss the appeal in case No. S-14-389 for lack of a final, appealable order.

[8] Because the cotrustees appealed from nonfinal orders, the district court never lost jurisdiction of the case. A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court.[15] The cotrustees' appeal from nonfinal orders did not divest the district court of jurisdiction to rule on the motions for attorney fees. Because the court declined to rule on the motions, they are still pending. Thus, the situation in the second appeal does not differ materially from that in the first appeal. Because the motions for attorney fees remain undisposed, the district court has not entered a judgment or final order from which an appeal may be taken. We therefore dismiss the appeal in case No. S-14-753.

## CONCLUSION

Requests for attorney fees under § 25-824 were made prior to judgment and were set for a hearing. But before the

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[15] *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

scheduled hearing occurred, the district court entered orders granting summary judgment and the cotrustees filed an appeal from those orders. Because the absence of a ruling on attorney fees left a portion of the judgment unresolved, the orders from which the cotrustees appealed were not final. Thus, we lack jurisdiction of the first appeal. Although the district court retained jurisdiction to rule on the motions for attorney fees, it believed that it lacked jurisdiction. The court declined to rule on the motions, which are still pending before that court. Because the motions have not been disposed, we also lack jurisdiction of the second appeal. We therefore dismiss both appeals.

Appeals dismissed.

Stephan and Miller-Lerman, JJ., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Kaelynn Kimminau and Wayne Kimminau, wife and husband, appellants, v. City of Hastings, a Nebraska political subdivision, et al., appellees.

864 N.W.2d 399

Filed June 19, 2015. No. S-14-413.

1. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
2. **Political Subdivisions Tort Claims Act.** Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act is a question of law.
3. **Political Subdivisions Tort Claims Act: Appeal and Error.** An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act independent from the conclusion reached by the trial court.
4. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
6. ____: ____. When cross-motions for summary judgment have been ruled upon by the district court, the appellate court may determine the controversy that is the subject of those motions or may make an order specifying the facts that appear without substantial controversy and direct such further proceedings as it deems just.

7. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act provides limited waivers of sovereign immunity which are subject to statutory exceptions.
8. **Political Subdivisions Tort Claims Act: Tort Claims Act.** Where language in the Political Subdivisions Tort Claims Act is similar to language in the State Tort Claims Act, cases construing one statute are applicable to construction of the other.
9. ____: ____. The purpose of the discretionary function exception of the Political Subdivisions Tort Claims Act or the State Tort Claims Act is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.
10. ____: ____. The discretionary function exception of the Political Subdivisions Tort Claims Act or the State Tort Claims Act extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. The exception does not extend to the exercise of discretionary acts at an operational level.
11. ____: ____. A court engages in a two-step analysis to determine whether the discretionary function exception of the Political Subdivisions Tort Claims Act or the State Tort Claims Act applies. First, the court must consider whether the action is a matter of choice for the acting employee. If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.
12. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused.
13. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.
14. **Negligence: Words and Phrases.** A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another. If there is no duty owed, there can be no negligence.
15. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
16. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.

17. **Negligence: Liability: Public Policy.** An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. But, in exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that a defendant has no duty or that the ordinary duty of reasonable care requires modification.
18. **Judgments: Negligence: Liability: Public Policy.** A no-duty determination is grounded in public policy and based upon legislative facts, not adjudicative facts arising out of the particular circumstances of the case. And such ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care.

Appeal from the District Court for Adams County: Terri S. Harder, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Douglas G. Pauley and Scott D. Pauley, of Conway, Pauley & Johnson, P.C., and Jefferson Downing, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellants.

Stephen L. Ahl and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees R Lazy K Trucking, Inc., and Wayne Todd.

Gail S. Perry and Robert B. Seybert, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee City of Hastings.

Vincent Valentino and Brandy Johnson for appellee County of Adams.

Stephen G. Olson, Robert S. Keith, and Kristina J. Kamler, of Engles, Ketcham, Olson & Keith, P.C., for appellee Hastings Rural Fire District.

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

Stephan, J.

Kaelynn Kimminau and her husband, Wayne Kimminau, brought this action seeking damages for personal injuries

Kaelynn suffered as the result of a motor vehicle accident in rural Adams County, Nebraska, in November 2009. They alleged that Kaelynn lost control of her vehicle due to corn mash which had spilled from a truck onto the highway the previous day. The action was brought against Wayne Todd, the driver of the truck, and R Lazy K Trucking, Inc. (R Lazy K), Todd's employer. Also named as defendants, pursuant to the Political Subdivisions Tort Claims Act (PSTCA),[1] were the City of Hastings, Hastings Rural Fire District (Hastings Rural), and the County of Adams. The district court for Adams County entered summary judgment in favor of all named defendants.

The Kimminaus perfected this timely appeal, and we granted a petition to bypass. We reverse the judgment of the district court in favor of the political subdivisions and affirm the judgment in favor of Todd and R Lazy K.

## BACKGROUND

### Undisputed Facts

The following facts are uncontroverted: The City of Hastings, Adams County, and Hastings Rural are political subdivisions as defined by Nebraska law. Pursuant to an emergency service agreement, the Hastings Fire Department (Hastings Fire) and Hastings Rural keep fire equipment in facilities owned by Hastings Fire. Hastings Fire will also respond to emergency calls with Hastings Rural within the latter's response district, which generally includes those areas of Adams County not within the Hastings city limits. Hastings Rural is comprised of an all-volunteer force.

On November 15, 2009, Nebraska State Trooper Monte Dart was completing a traffic stop on South Showboat Boulevard in rural Adams County when he observed wet corn mash spilling onto the roadway from a truck owned by R Lazy K and operated by Todd. The corn mash, which has the consistency

[1] Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012).

of tapioca pudding and is sometimes referred to as "wet cake" or "wet distiller's grain," is a byproduct of ethanol production that is fed to cattle.

Dart closed the southbound lane of the roadway and requested assistance. South Showboat Boulevard is a two-lane paved roadway with solid white lines delineating the edge of each lane. It has an unpaved shoulder, approximately 5 to 8 feet wide, leading to a ditch on either side of the roadway.

Hastings Fire and Hastings Rural responded to the scene of the spill at approximately 12:20 p.m. They moved the spilled corn mash from the traveled portion of the roadway onto the unpaved shoulder and into the ditch, utilizing shovels, brooms, and firehoses. Neither Todd nor R Lazy K were requested to assist with the cleanup of the spill, and neither did so.

These events were visually and audibly recorded by a front dash-mounted camera in Dart's patrol vehicle. On the recording, corn mash is visible on the shoulder of the roadway just past the white line at the edge of the southbound lane of the roadway after the cleanup was completed. When the cleanup was concluded, Dart issued a traffic citation to Todd, inspected the roadway, and then reopened it to vehicular traffic, because he thought it was safe to do so. Later that evening, the Adams County highway superintendent and a volunteer captain with Hastings Rural separately drove past the site of the corn mash spill and observed that the paved road surface was clear of any corn mash debris.

On the following day, November 16, 2009, at approximately 1:20 p.m., Kaelynn was driving southbound on South Showboat Boulevard. At the site of the corn mash spill, she lost control of her vehicle. The vehicle swerved on the roadway and eventually came to rest against a utility pole in the ditch. A photograph of the accident scene shows corn mash on the surface of the southbound lane of South Showboat Boulevard, north of where Kaelynn's vehicle came to rest. Kaelynn was not aware of corn mash on the roadway until her

vehicle came in contact with it. A motorist who was traveling behind Kaelynn prior to the accident saw her vehicle drop a tire off the roadway onto the unpaved shoulder and encounter corn mash immediately prior to its swerving.

At approximately 1:26 p.m. on November 16, 2009, an unidentified truckdriver contacted the joint dispatch center in Hastings to report Kaelynn's accident. The joint dispatch center serves as the exclusive dispatch center for the Hastings Police Department, the Adams County Sheriff's Department, and all of the fire departments in Adams County. From the completion of the cleanup on November 15 until the report of Kaelynn's accident at 1:26 p.m. on November 16, the dispatch center received no calls or messages regarding any corn mash spills on South Showboat Boulevard. Likewise, Hastings Rural was not notified of any other incidences of corn mash on the paved portion of the roadway on South Showboat Boulevard following the cleanup on November 15 until it was informed of Kaelynn's accident at 1:29 p.m. on November 16.

## Procedural Background

In their operative amended complaint, the Kimminaus alleged that the three political subdivisions had actual or constructive notice of the corn mash spill and were negligent in (1) failing to take or to direct others to take corrective action and (2) failing to warn motorists of the danger posed by the spill. The Kimminaus further alleged that Todd was negligent in causing the spill, failing to take reasonable steps to remove the corn mash from the roadway, and failing to warn motorists of the danger. They alleged that R Lazy K was negligent in hiring and failing to adequately supervise Todd and in failing to take reasonable steps to remove the spilled corn mash from the roadway and warn motorists of the danger.

The three political subdivisions asserted various affirmative defenses, including sovereign immunity under § 13-910. Todd and R Lazy K denied that they were negligent and

alleged that Kaelynn's negligence was the proximate cause of the accident.

The political subdivisions filed motions for summary judgment, which were sustained by the district court. The court determined as a matter of law that the political subdivisions were immune from suit under § 13-910(12), reasoning that "the migration of the corn mash onto the roadway (after being cleaned up) was a 'spot or localized defect' as described in § 13-910" of which the political subdivisions did not have actual or constructive notice.

Subsequently, the district court entered a separate order denying the Kimminaus' motion for summary judgment with respect to Todd and R Lazy K and sustaining the cross-motions for summary judgment filed by those parties. The court reasoned that the actions of the firefighters and the state trooper in supervising, conducting the cleanup of the corn mash spill, and declaring the road safe for travel cut off any duty on the part of Todd and R Lazy K to remediate the spill. The court concluded that it was "unwilling to create such a duty in light of the potential far-reaching applications that defy logic and common sense."

## ASSIGNMENTS OF ERROR

The Kimminaus assign, restated, that the district court erred when it (1) found the political subdivisions were immune from liability under § 13-910(12); (2) granted the political subdivisions' motions for summary judgment, because a question of material fact existed regarding whether they exercised reasonable care in remediating the spill; (3) granted summary judgment, because an issue of material fact exists as to whether Kaelynn first encountered the wet corn mash on the paved roadway or the shoulder; (4) found any duty owed by Todd and R Lazy K was extinguished as a matter of law when Dart deemed the highway reasonably safe for travel after the cleanup, because this is a question of fact; and (5) erred in not granting the Kimminaus' motion for summary judgment on the issue of the liability of Todd and R Lazy K.

## STANDARD OF REVIEW

[1] Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.[2]

[2,3] Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the PSTCA is a question of law.[3] An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the PSTCA independent from the conclusion reached by the trial court.[4]

[4,5] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[5]

[6] When cross-motions for summary judgment have been ruled upon by the district court, the appellate court may determine the controversy that is the subject of those motions or may make an order specifying the facts that appear without substantial controversy and direct such further proceedings as it deems just.[6]

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[2] *Frederick v. City of Falls City*, 289 Neb. 864, 857 N.W.2d 569 (2015); *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2008).

[3] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015). See, also, *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014).

[4] *Id.*

[5] *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008); *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008).

[6] *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008); *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008).

## ANALYSIS

### Political Subdivisions

[7] The sole issue on appeal with respect to the three political subdivisions is whether they are immune from suit under the doctrine of sovereign immunity. The PSTCA provides limited waivers of sovereign immunity which are subject to statutory exceptions.[7] Section 13-910(12), one of those exceptions, provides in pertinent part that the PSTCA shall not apply to the following:

> Any claim arising out of the alleged insufficiency or want of repair of any highway as defined in such section, bridge, or other public thoroughfare. Insufficiency or want of repair shall be construed to refer to the general or overall condition and shall not refer to a spot or localized defect. A political subdivision shall be deemed to waive its immunity for a claim due to a spot or localized defect only if (a) the political subdivision has had actual or constructive notice of the defect within a reasonable time to allow repair prior to the incident giving rise to the claim . . . .

We have not previously construed the phrase "spot or localized defect" as it is used in this statute. Generally, a "defect" is defined as "[a]n imperfection or shortcoming, esp. in a part that is essential to the operation or safety of a product."[8] "Spot" is defined as "a small area visibly different . . . from the surrounding area."[9] "Localize" is defined as "to accumulate in or be restricted to a specific or limited area."[10]

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[7] *Stick v. City of Omaha, supra* note 3; *Hall v. County of Lancaster, supra* note 3.

[8] Black's Law Dictionary 507 (10th ed. 2014).

[9] Merriam-Webster's Collegiate Dictionary 1134 (10th ed. 2001).

[10] *Id.* at 682.

[8] In *Woollen v. State*,[11] we determined that ruts of three-fourths of an inch or greater depth in an asphalt surfaced road constituted a "spot or localized defect" within the meaning of a corresponding provision of the State Tort Claims Act,[12] because the ruts constituted an "unacceptable safety risk."[13] And, we have held that where language in the PSTCA is similar to language in the State Tort Claims Act, cases construing one statute are applicable to construction of the other.[14]

The parties generally agree that the spilled corn mash on South Showboat Boulevard constituted a spot or localized defect. But the political subdivisions argue that there were actually two separate events: the first on November 15, 2009, when the corn mash spilled onto the roadway and was removed from the paved surface by Hastings Fire and Hastings Rural, and the second, when the corn mash "migrated" from the shoulder of the roadway back onto the paved surface. They contend that because they had no actual or constructive notice of the second event, their sovereign immunity under § 13-910(12) was not waived. On the other hand, the Kimminaus contend that there was a single spot or localized defect created by the corn mash spill on November 15, as to which all three political subdivisions had actual notice, resulting in a waiver of their sovereign immunity. Further, they contend that the presence of the corn mash on the roadway at the time of the accident was not a new "defect," but, rather, was the result of a negligent response by the political subdivisions to the original spill.

In resolving this issue, we assume that Kaelynn's accident occurred when she lost control of her vehicle due to

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[11] *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999), *abrogated on other grounds, A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[12] See Neb. Rev. Stat. § 81-8,219(12) (Reissue 2014).

[13] *Woollen v. State, supra* note 11, 256 Neb. at 878, 593 N.W.2d at 739.

[14] See, e.g., *Hall v. County of Lancaster, supra* note 3; *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

the presence of corn mash on the southbound lane of South Showboat Boulevard. We also note the uncontroverted evidence that the spilled corn mash was moved from the paved surface of the roadway to the adjacent shoulder and ditch following the spill on November 15, 2009, but was present on the southbound lane on the following day. The record does not disclose how or precisely when the corn mash "migrated" from the shoulder to the paved roadway surface.

We conclude that there was only one "spot or localized defect" on South Showboat Boulevard: the corn mash which spilled from the truck driven by Todd on November 15, 2009. There is no reasonable basis to infer that the corn mash on the roadway on the following day originated from any other source. And the fact that the corn mash was removed from the traveled portion of the highway following the spill cannot be viewed as an elimination of the defect, because of the uncontroverted fact that corn mash remained on the shoulder of the road following the initial cleanup. Under Nebraska statutes pertaining generally to highways, "[s]houlder means that *part of the highway* contiguous to the roadway and designed for the accommodation of stopped vehicles, for emergency use, and for lateral support of the base and surface courses of the roadway."[15] Our cases recognize that a political subdivision's responsibility to maintain a highway in a reasonably safe condition for travel is not limited to the traveled portions of the highway, but may extend to dangerous conditions existing on a shoulder or other adjacent structures.[16] Because corn mash remained on the shoulder of the road after the initial cleanup, its subsequent "migration" onto the southbound lane was not a new and distinct defect, but, rather, a sequela of the original spill which constituted a single defect.

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[15] Neb. Rev. Stat. § 39-101(12) (Reissue 2008) (emphasis supplied).

[16] See, e.g., *Richardson & Gillispie v. State*, 200 Neb. 225, 263 N.W.2d 442 (1978), *modified on denial of rehearing* 200 Neb. 781, 265 N.W.2d 457; *King v. Douglas County*, 114 Neb. 477, 208 N.W. 120 (1926).

Section § 13-910(12) immunizes political subdivisions from liability claims relating to spot or localized defects in highways, bridges, or other public thoroughfares unless and until they have notice of the defect and a reasonable time to repair it. When the requisite notice exists, sovereign immunity is waived. That occurred here when Hastings Fire and Hastings Rural responded to the spill on November 15, 2009, and the Adams County highway superintendent was informed of it later that same day. We do not read § 13-910(12) as providing immunity to a political subdivision with respect to a claim alleging that it took inadequate measures to repair a spot or localized defect of which it had notice.

[9,10] We are also not persuaded by Adams County's argument that § 13-910(2) provides an alternative source of immunity. Section 13-910(2) provides that the PTSCA shall not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused." The purpose of the discretionary function exception is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.[17] The discretionary function exception extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. The exception does not extend to the exercise of discretionary acts at an operational level.[18] Examples of discretionary functions include the initiation of programs and activities, establishment of plans and schedules, and judgmental decisions within a broad regulatory framework lacking specific standards.[19]

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[17] *Shipley v. Department of Roads, supra* note 14; *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[18] *Id.*

[19] *Doe v. Omaha Pub. Sch. Dist., supra* note 17; *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

[11] A court engages in a two-step analysis to determine whether the discretionary function exception of the PSTCA applies.[20] First, the court must consider whether the action is a matter of choice for the acting employee.[21] If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.[22] We have held that the placement of pavement markings[23] and traffic signs[24] is a discretionary function where there is no specific statutory or other legal requirement governing such placement.

Maintenance of roads and highways is not a matter of choice. Neb. Rev. Stat. § 39-2003 (Reissue 2008) provides that "[a]ll county roads . . . shall be maintained at the expense of the county." Maintenance is defined as

> the act, operation, or continuous process of repair, reconstruction, or preservation of the whole or any part of any highway, including surface, shoulders, roadsides, traffic control devices, structures, waterways, and drainage facilities, for the purpose of keeping it at or near or improving upon its original standard of usefulness and safety.[25]

In *Maresh v. State*,[26] we held that discretionary function immunity under the State Tort Claims Act did not apply to a claim that the State was negligent in failing to warn of a dropoff at the edge of a state highway. We reasoned in part that failure to warn of a dangerous condition was "akin to maintenance,

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[20] *Shipley v. Department of Roads, supra* note 14; *Doe v. Omaha Pub. Sch. Dist., supra* note 17.

[21] *Id.*

[22] *Id.*

[23] *Blaser v. County of Madison*, 288 Neb. 306, 847 N.W.2d 293 (2014).

[24] *Shipley v. Department of Roads, supra* note 14.

[25] § 39-101(6).

[26] *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992) (superseded by statute on other grounds as stated in *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010)).

where decisions are made at the operational level without policy implications," and therefore was not a discretionary function.[27]

Similarly, we conclude here that actions taken by a county in response to a reported spot or localized defect on a roadway are not policy decisions, but, rather, are ministerial acts at the operational level pursuant to the county's statutory duty to maintain its roads. A contrary conclusion would negate the provision of § 13-910(12) that sovereign immunity for a claim due to a spot or localized defect is waived if the political subdivision has notice of the defect within a reasonable time to allow repair.

In summary, we conclude that the corn mash spill on November 15, 2009, was a singular spot or localized defect on South Showboat Boulevard which was still in existence at the time of Kaelynn's accident on the following day. All three political subdivisions had actual notice of the defect within a sufficient time to allow repair, and their sovereign immunity was therefore waived pursuant to § 13-910(12). We conclude the district court erred in granting summary judgment to the political subdivisions on the basis of sovereign immunity. We emphasize that this disposition focuses solely on the issue of sovereign immunity. We do not comment on the merits of the Kimminaus' claims against the political subdivisions, including questions with respect to duty, as those issues have not yet been addressed by the district court.

### Todd and R Lazy K

The Kimminaus contend that the district court erred in concluding that any duty that Todd and R Lazy K had to remediate the corn mash spill was cut off by the actions of Hastings Fire and Hastings Rural in supervising and conducting the cleanup on November 15, 2009, and by the determination of Dart that the road was safe for travel after that cleanup was

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[27] *Id.* at 518, 489 N.W.2d at 314.

concluded. They rely principally on *Simonsen v. Thorin*[28] and *Brown v. Nebraska P.P. Dist.*,[29] in which this court addressed the duty owed by one who causes an obstruction to be placed on a public roadway. In *Simonsen*, we held that a truckdriver who, without negligence, hit and knocked a trolley pole into a street had a "positive, continuing duty to the public traveling the street to warn of [the] danger."[30] In *Brown*, we held that a public utility whose employees caused smoke to drift across a public road and allegedly caused a motor vehicle accident could bear liability to an injured motorist on the theory that it had placed a dangerous obstruction on the highway and failed to use ordinary care to prevent injury. But neither of these cases involved the circumstances presented here, where a public authority took action to remove the obstruction and then declared the road safe for travel.

[12-16] In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused.[31] Thus, the threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.[32] A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another.[33] If there is no duty owed, there can be no negligence.[34] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[35] When reviewing a question

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[28] *Simonsen v. Thorin*, 120 Neb. 684, 234 N.W. 628 (1931).

[29] *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 306 N.W.2d 167 (1981).

[30] *Simonsen v. Thorin, supra* note 28, 120 Neb. at 687, 234 N.W. at 629.

[31] *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013); *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

of law, an appellate court resolves the question independently of the conclusion reached by the trial court.[36]

[17,18] Under § 7 of the Restatement (Third) of Torts[37] which we adopted in *A.W. v. Lancaster Cty. Sch. Dist. 0001*,[38] an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.[39] But, in exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that a defendant has no duty or that the ordinary duty of reasonable care requires modification.[40] A no-duty determination, then, is grounded in public policy and based upon legislative facts, not adjudicative facts arising out of the particular circumstances of the case.[41] And such ruling should be explained and justified based on articulated policies or principles that justify exempting these actors from liability or modifying the ordinary duty of reasonable care.[42]

Here, the district court essentially determined that it would be poor public policy to recognize a duty on the part of a motorist who creates an obstruction on a roadway to take further action with respect to the obstruction after public authorities have removed it to their satisfaction and declared the roadway safe for vehicular travel. We agree. Generally, public authorities are in a better position than an average motorist to determine when an obstruction has been sufficiently removed from a roadway to make it safe for travel, particularly when such authorities take control of the scene and actively engage

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[36] *Id.*

[37] 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010).

[38] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 11.

[39] *Id.*, citing 1 Restatement, *supra* note 37, § 7(a).

[40] *Id.*, citing 1 Restatement, *supra* note 37, § 7(b).

[41] *Id.*, citing 1 Restatement, *supra* note 37, § 7, comment *b*.

[42] *Id.*, citing 1 Restatement, *supra* note 37, § 7, comment *j*.

in removing the obstruction. It is not reasonable to expect a motorist in that circumstance to second-guess the judgment of the public authorities regarding the efficacy of their actions and the safety of the roadway. The district court correctly determined that the actions of the firefighters who responded to the spill and Dart, the state trooper who opened the road for traffic, cut off any duty that Todd and R Lazy K had to remediate the spill or warn of the hazard it posed to other motorists. Accordingly, the district court did not err in denying the Kimminaus' motion for summary judgment with respect to their claims against Todd and R Lazy K or in granting those parties' cross-motion for summary judgment.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court with respect to Todd and R Lazy K. But we reverse the judgment of the district court in favor of the City of Hastings, Adams County, and Hastings Rural, and remand the cause to the district court for further proceedings with respect to those parties.

Affirmed in part, and in part reversed and remanded for further proceedings.

Connolly, J., not participating.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Adrian M. Casares, appellant.

864 N.W.2d 667

Filed June 19, 2015. No. S-14-442.

1. **Effectiveness of Counsel: Records: Appeal and Error.** The resolution of an ineffective assistance of counsel claim made on direct appeal turns on the sufficiency of the record.
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. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
4. **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.
5. **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.
6. **Effectiveness of Counsel: Proof: Appeal and Error.** When an ineffective assistance of counsel claim is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.
7. ____: ____: ____. General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal and thereby preserve the issue for later review.

8. **Effectiveness of Counsel: Records: Appeal and Error.** An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice.
9. **Sentences: Evidence.** A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.
10. **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.
11. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Nancy K. Peterson for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

STEPHAN, J.

Adrian M. Casares pled no contest to an amended information charging one count of aiding and abetting second degree murder. He was subsequently sentenced to no less than life imprisonment or more than life imprisonment. In this direct appeal, he alleges that his trial counsel was ineffective in various respects and that his sentence was excessive. We affirm his conviction and sentence.

## I. FACTS

On December 30, 2012, at approximately 4 a.m., a newspaper carrier found the body of Tyler Schoenrock on a gravel road in rural Lancaster County, Nebraska. Schoenrock had been shot twice in the back and once in the head. The resulting investigation identified Casares and Miguel Castillo as suspects.

Casares was originally charged with making terroristic threats, a Class IV felony, and use of a firearm to commit a felony, a Class IC felony.[1] The information was later amended to add charges of possession of a firearm by a prohibited person, a Class ID felony, and accessory to a felony, a Class III felony.[2]

The State later moved to file a second amended information, in which it planned to charge a total of six crimes, including first degree murder, a Class IA felony.[3] But before that information was filed, the parties negotiated a plea agreement. Pursuant to the terms of that agreement, Casares entered a plea of no contest to a second amended information charging a single count of aiding and abetting second degree murder, a Class IB felony.[4]

At the plea hearing, the court had an extended colloquy with Casares discussing his rights, the nature of the charge, and the possible penalty. The factual basis for the plea was set forth in the written plea agreement, which characterized the stated facts as "true and undisputed." According to the factual statement in the plea agreement, Casares, Castillo, and Schoenrock were all involved with methamphetamine use and distribution. On December 29, 2012, Casares confronted Schoenrock at Schoenrock's residence with a handgun and

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[1] See Neb. Rev. Stat. §§ 28-311.01 (Reissue 2008) and 28-1205(1)(c) (Cum. Supp. 2014).

[2] Neb. Rev. Stat. §§ 28-1206(3)(b) (Cum. Supp. 2014) and 28-204(2)(a) (Reissue 2008).

[3] See Neb. Rev. Stat. § 28-303 (Reissue 2008).

[4] See Neb. Rev. Stat. §§ 28-206 and 28-304 (Reissue 2008).

accused Schoenrock of being a law enforcement "'snitch.'" Casares later left the residence, but in the early morning hours of December 30, he and Castillo returned and picked Schoenrock up in a vehicle which Casares drove. Casares had the handgun with him, and a witness described the handgun and the ammunition it contained with specificity. The handgun and ammunition were eventually determined to have been used to kill Schoenrock. The handgun was stolen, and its owner informed police he noticed it was missing from his truck on December 25, shortly after a visit from Castillo and Casares.

Castillo was arrested soon after Schoenrock's body was discovered. He told police that after they picked Schoenrock up, Casares drove the vehicle out of the city into the country. Castillo stayed in the car while Casares and Schoenrock got out. Castillo told authorities that Casares was responsible for shooting Schoenrock at that location.

Casares was arrested on January 15, 2013, in Texas. At the time of the arrest, he was accompanied by a woman. He denied knowing Castillo well and denied being in Lincoln, Nebraska, when Schoenrock was killed. The woman later told police that she drove Castillo and Casares to her apartment after the shooting and that she went to Omaha, Nebraska, with them later in the day on December 30, 2012. On the way to Omaha, Castillo and Casares discussed disposing of the handgun, which was in a silver lockbox. The woman stated that she eventually buried the lockbox in the backyard of an Omaha residence, and eventually led police to it. Casares' cell phone records showed he was in and around Lincoln on December 29 and 30, and that the cell phone was frequently used for calls and messaging, except from 3:05 a.m. to 4:08 a.m. on December 30, when it was turned off. Casares informed the court at the time he entered his plea that he had no disagreement with the factual basis set forth in the plea agreement.

After accepting the plea, the court ordered a presentence investigation (PSI). After reviewing the results of this investigation and conducting a hearing, the district court sentenced Casares to a term of life-to-life imprisonment. Additional facts relevant to the analysis are included therein.

## II. ASSIGNMENTS OF ERROR

Casares assigns that his trial counsel was ineffective in (1) failing to take the depositions of certain witnesses, (2) failing to engage in effective advocacy at sentencing, (3) failing to obtain a drug and alcohol evaluation of Casares, (4) failing to arrange for Casares to review discovery, and (5) inducing Casares to enter his plea by promising him he would receive a specific sentence. In addition, Casares assigns that the sentence of life-to-life imprisonment is excessive and was an abuse of the sentencing court's discretion.

## III. STANDARD OF REVIEW

[1] The resolution of an ineffective assistance of counsel claim made on direct appeal turns on the sufficiency of the record.[5]

[2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[6]

## IV. ANALYSIS

### 1. Ineffective Assistance of Counsel

[3] Casares is represented in this direct appeal by different counsel than the counsel who represented him at the trial level. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance

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[5] See, *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014); *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[6] See *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.[7]

[4-7] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[8] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[9] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[10] The determining factor is whether the record is sufficient to adequately review the question.[11] When the claim is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.[12] General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal and thereby preserve the issue for later review.[13]

[8] Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial.[14]

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[7] *State v. Filholm, supra* note 5; *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

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

[9] *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015); *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

[10] See, *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013); *State v. Ramirez, supra* note 7.

[11] *Id.*

[12] *State v. Filholm, supra* note 5.

[13] *Id.*

[14] *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice.[15]

Casares raises five allegations of ineffective assistance of counsel in this appeal. We address each in turn.

(a) Failure to Take Depositions

Casares claims that his trial counsel failed to take the depositions of certain witnesses, identified as Felicia Guevara, Perla Cisneros, and Isaiah Nevins. He alleges that these three witnesses were "critical" and that their testimony would have provided facts sufficient to argue that Castillo was the shooter and had lied to law enforcement.[16] Specifically, Casares alleges Guevara told law enforcement that prior to the murder of Schoenrock, Castillo had told her he was going to "'take care of a rat.'" Guevara also authored a letter to the court that was included in the PSI in which she stated Casares was innocent. Casares alleges that Cisneros was Castillo's girlfriend and told Nevins that "'we killed that fool.'"[17] And Casares alleges Nevins told investigators that he believed Castillo had killed Schoenrock and that he had seen Castillo with a gun prior to the murder. Casares also alleges that certain letters written by Nevins indicate Casares was not guilty. In sum, Casares argues that knowing these facts, counsel should have deposed these witnesses to find out more information, and that the failure to do so was deficient performance.

Because the record does not show whether these depositions were taken or whether the letters exist, it is insufficient for review of this claim on direct appeal, and we therefore do not reach it.

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[15] See *State v. Filholm, supra* note 5.

[16] Brief for appellant at 12.

[17] *Id.* at 13.

(b) Ineffective Advocacy at Sentencing

Casares argues that his counsel was ineffective at sentencing because he (1) allowed various letters of support for Casares to be included in the PSI, (2) did not object to certain victim impact statements included in the PSI, and (3) did not include certain depositions in the PSI.

*(i) Letters of Support*

The letters of support are a part of the record before us. While certain of the letters express a belief that Casares was innocent, the prevailing tone of the letters is that Casares was a good person who did a bad thing. Casares argues they should not have been included, because they were attempts to demonstrate his innocence, which was no longer an issue at sentencing. Having viewed the letters, we find counsel was not deficient in allowing them to be included in the PSI.

*(ii) Victim Impact Statements*

The victim impact statements Casares complains about are also part of the record before us. One was written by the sister of Schoenrock's girlfriend and one was written by a friend of Schoenrock's girlfriend. There are also impact statements written by the mother of Schoenrock's infant son in her own behalf and on behalf of the child.

According to Neb. Rev. Stat. § 29-2261(3) (Cum. Supp. 2014), the presentence investigation report should include any written statements submitted to either the county attorney or the probation officer by a victim. "Victim" in this context is statutorily defined in the case of a homicide as the "nearest surviving relative under the law as provided by section 30-2303."[18] Neb. Rev. Stat. § 30-2303 (Reissue 2008) provides that the nearest surviving relative is issue of the decedent, followed by the decedent's parents. Victims who meet this

[18] Neb. Rev. Stat. § 29-119(2)(b) (Cum. Supp. 2014). See § 29-2261(3) and (4).

definition have the right to make a written or oral impact statement and have it be included in the PSI.[19]

[9] Based on these statutes, only Schoenrock's infant son, and perhaps Schoenrock's parents, had the statutory right to have a victim impact statement included in the PSI. But the relevant statutes also state that a PSI is to include "any other matters that the probation officer deems relevant or the court directs to be included."[20] Further, a sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.[21] Thus, although the victim impact statements to which Casares now objects were not required to be included in the PSI, they were not necessarily excludable. Because of this, and the district court's broad discretion to give the statements any weight they were due, we conclude that the files and records affirmatively show that trial counsel was not deficient in failing to object to the identified victim impact statements. Moreover, inclusion of the statements could not have resulted in prejudice to Casares under the *Strickland* test, because there is no reasonable probability that his sentence would have been different if these impact statements had been excluded from the PSI.

*(iii) Depositions*

Casares claims that his trial counsel failed to include in the PSI copies of the depositions that were taken of Castillo and three others. He alleges that inclusion of these depositions would have demonstrated how the witnesses' stories changed over time. He alleges this information would have further

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[19] Neb. Rev. Stat. § 81-1848(1)(d)(iv) (Reissue 2014). See Neb. Const. art. I, § 28.

[20] § 29-2261(3).

[21] *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

challenged the credibility of Castillo's claim that Casares was the shooter.

But the credibility of Castillo's story was not an issue at sentencing. The factual basis of Casares' no contest plea was that he drove Schoenrock to a rural area and shot him, while Castillo waited in the car. Casares expressly told the court at the time the plea was entered that he had "no disagreement" with this factual basis. Moreover, the PSI was over 2,000 pages long, and the court acknowledged at sentencing that "virtually everyone knowing any — having any knowledge about what happened prior to, at the time of, and shortly after the killing . . . lied to one degree or another to those investigating the murder." Additional examples of inconsistent statements or lies would not, with any reasonable likelihood, have convinced the sentencing court to impose a different sentence. This allegation is without merit.

(c) Drug and Alcohol Evaluation

Casares alleges that his trial counsel was ineffective in failing to arrange for him to have a separate drug and alcohol evaluation and then include the results of that evaluation in the PSI. He alleges such an evaluation would have provided more detail about his life and was "one tool among many" that could have humanized Casares before the court.[22]

As noted, the PSI was extensive. It includes sections regarding Casares' background, criminal history, family life and relationships, use of alcohol and drugs, and prior treatment for alcohol and drugs, as well as the circumstances of the offense. Any additional information obtained by a drug and alcohol evaluation would have been largely cumulative. There is no reasonable probability that the sentence would have been different if a drug and alcohol evaluation had been included in the PSI. This allegation is without merit.

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[22] Brief for appellant at 20.

(d) Failure to Show Casares Discovery Materials

Casares claims his trial counsel did not arrange for him to review materials obtained during discovery before he entered his plea. He alleges that as a result, he was unable to make an informed decision about the resolution of his case. The record does not show whether Casares' counsel reviewed discovery with him, and the record is therefore insufficient to review this claim on direct appeal.

(e) Promise of Specific Sentence

Casares claims that his trial counsel promised him he would receive a sentence of 30 to 60 years' imprisonment if he entered his plea of no contest. But the files and records of the case affirmatively show that this allegation of deficient performance has no merit. At the plea hearing, Casares was specifically asked whether "any promises or representations" had been made to him "to get [him] to enter [his] plea," and he responded "[n]o." He was also specifically asked whether "anyone made any promises or representations" to him as to what the "sentence will be" and again responded "[n]o." He also was asked whether any inducement or promise was made to get him to enter his plea, and he again responded "[n]o." This record affirmatively refutes Casares' claim that he was promised a sentence of 30 to 60 years' imprisonment. This claim of ineffective assistance of counsel is without merit.

2. Excessive Sentence

Casares was sentenced to a minimum term of life imprisonment and a maximum term of life imprisonment for aiding and abetting second degree murder. He alleges the sentence was excessive.

[10,11] Casares' sentence was within the statutory limits,[23] and an appellate court will not disturb a sentence imposed

[23] See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014) and §§ 28-206 and 28-304.

within the statutory limits absent an abuse of discretion by the trial court.[24] 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.[25] 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.[26]

Casares argues his life sentence was excessive primarily because Castillo received a sentence of 55 to 70 years. In doing so, however, Casares acknowledges that Castillo pled to one count of aiding and abetting the use of a firearm during the commission of a felony and one count of accessory to a felony. He also acknowledges that the prosecutor submitted a letter urging the court when sentencing Castillo to consider that Castillo "'deserves consideration for his cooperation and willingness to testify.'"[27] It is thus apparent from Casares' own argument that Castillo was convicted of a different crime and that Castillo, but not Casares, chose to cooperate with the investigation. Both of these are valid reasons for the disparity in the sentences imposed on the two men.

Moreover, Casares' criminal history and background, as demonstrated in the PSI, supports the life-to-life sentence. Prior to imposing the sentence, the trial court reviewed the entire PSI and considered Casares' circumstances as a whole.

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[24] *State v. McGuire, supra* note 6.

[25] *Id.*; *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[26] *State v. Dixon, supra* note 25; *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[27] Brief for appellant at 29.

In concluding that life-to-life imprisonment was an appropriate sentence, it noted that Schoenrock's killing was "intentional and cold blooded" and that Casares was a "dangerous person who needs to be kept off the streets and away from the public as long as possible." The record demonstrates that the sentence imposed was not an abuse of discretion.

## V. CONCLUSION

We do not reach Casares' claims that his trial counsel was ineffective in failing to take certain depositions and in failing to review discovery materials with him, because the record on direct appeal is insufficient for us to do so. We conclude that his remaining claims of ineffective assistance of counsel are without merit and that his sentence is not excessive. Accordingly, we affirm the conviction and sentence.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Castellar Partners LLC, appellant, v. AMP Limited et al., appellees.

864 N.W.2d 391

Filed June 19, 2015. No. S-14-461.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Final Orders: Appeal and Error.** A trial court's decision to certify a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) is reviewed for an 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.
4. **Actions: Parties: Final Orders: Appeal and Error.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Reissue 2008), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
5. **Judgments: Parties: Appeal and Error.** Certification of a final judgment must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.
6. **Judges: Judgments.** The power that Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) confers upon the trial judge should be used only in the infrequent harsh case as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.

7. **Courts: Judgments.** A trial court considering certification of a final judgment should weigh factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.
8. **Jurisdiction: Final Orders: Appeal and Error.** If the trial court has abused its discretion in certifying an order as final under Neb. Rev. Stat. § 25-1315(1) (Reissue 2008), there is no final order before the appellate court and, thus, no jurisdiction of the appeal.
9. **Judges: Judgments.** When a trial court concludes that entry of judgment under Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Order vacated in part, and appeal dismissed.

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

James P. Fitzgerald and Patrick D. Pepper, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees.

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

Cassel, J.

## INTRODUCTION

Castellar Partners LLC (Castellar) appeals from a purported final judgment dismissing 1 claim, but retaining 10 other claims. The district court concluded that due to a forum selection clause, the claim for breach of contract was required to be litigated in New South Wales, Australia. And it certified the dismissal of that claim as a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2008). However, we find

that the certification was improper. Castellar's claims entail "similar issues" and "related facts," and all of the parties remain involved in the litigation before the district court. We therefore dismiss the appeal for lack of jurisdiction.

## BACKGROUND

According to Castellar's amended complaint, it was retained in 2009 by the appellees (collectively AMP parties) to review a "hedge fund portfolio" and the services being provided by another advisor. The AMP parties, which are interrelated, include:

- AMP Limited (AMP)—a "multibillion dollar Australian asset manager";
- AMP Capital Investors (US) Limited (AMP US)—a subsidiary of AMP, incorporated in Delaware;
- AMP Capital Investors Limited (AMPCI)—a second subsidiary of AMP, incorporated in Australia; and
- AMP Capital Alternative Defensive Fund—the hedge fund portfolio managed by AMP and its subsidiaries, involved in "high risk and high return investments."

In its review of the fund, Castellar identified governance and compliance failures and irregularities contributing to losses of "hundreds of millions of dollars over many months." Castellar informed the AMP parties of its findings, and the AMP parties sought Castellar's assistance in resolving the issues it had identified. The AMP parties further sought to remove the acting advisor, and Castellar helped negotiate a settlement with the advisor over several matters, including unpaid fees.

In consideration of Castellar's services, the AMP parties promised Castellar a "substantial monetary reward" that included the opportunity to be "partners . . . in building a global business." Additionally, the AMP parties offered Castellar "customary hedge fund performance fees" and fees from the development of a new investment product.

In December 2009, Castellar and AMPCI executed an "Advisory Agreement." According to Castellar, the agreement

was "one of a series of agreements which . . . would transition into a proper hedge fund advisory contract and global business partnership." Under the agreement, Castellar was required to "provide investment advisory services" regarding the fund in exchange for fees amounting to a one-time payment of $562,500 and an annual retainer of $1 million.

However, the formation of the global business partnership apparently never occurred and the AMP parties terminated their relationship with Castellar in October 2010. Castellar filed suit and alleged that the AMP parties had "recklessly and willfully" misled it in order to obtain its services with regard to the fund. As indicated above, Castellar asserted 11 causes of action. With respect to the advisory agreement, Castellar alleged that the AMP parties had breached the agreement by failing to provide proper notice of termination. And Castellar alleged that such failure had caused it to sustain damages in the amount of $250,000.

AMP US moved to dismiss on the basis of lack of personal jurisdiction. But rather than proceeding on the motion, the parties entered into a stipulation that AMP US would withdraw the motion and that the AMP parties would not contest personal jurisdiction. However, they reserved the right to assert that any claim involving the advisory agreement was required to be litigated in New South Wales.

In the advisory agreement, Castellar and AMPCI specified that all disputes would be subject to the

> exclusive jurisdiction of the courts of the place specified in the Details and courts of appeal from them. Each party waives any right it has to object to an action being brought in those courts including, without limitation, by claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.

And they further agreed that the "Governing law" would be the "law in force in the place stated in the Details." The "Details" stated that the governing law was the law of New South Wales. But Castellar argues that the details did not contain an additional statement as to jurisdiction.

The AMP parties moved to dismiss Castellar's claim for breach of the advisory agreement. After multiple hearings, the district court granted their request. The court first determined that AMP, AMP US, and the fund were not signatories to the agreement. It concluded that the only parties to the agreement were Castellar and AMPCI. And as to AMPCI, the court found that a "reasonable interpretation" of the agreement required all disputes to be litigated in New South Wales and to be governed by its laws.

After the dismissal of its claim for breach of the agreement, Castellar moved for certification of a final judgment pursuant to § 25-1315(1). On May 15, 2014, the district court sustained the motion, but it set forth no findings or analysis and merely repeated the statutory language that "there is no just reason for delay."[1] Castellar filed a timely notice of appeal, and the appeal was assigned to the docket of the Nebraska Court of Appeals. We moved the appeal to our docket.[2]

## ASSIGNMENTS OF ERROR

Castellar assigns, restated, that the district court erred in (1) determining that the advisory agreement contained an enforceable forum selection clause, (2) failing to find that the advisory agreement was ambiguous and to consider the parties' intentions, (3) failing to find that the forum selection clause was permissive, and (4) rejecting its claim that New South Wales would be a substantially less convenient forum.

## STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3] A trial court's decision to certify a final judgment pursuant to § 25-1315(1) is reviewed for an abuse of discretion.[4]

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[1] See § 25-1315(1).

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

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

[4] *Id.*

## ANALYSIS

In its assignments of error, Castellar generally asserts that the district court improperly construed the advisory agreement in determining that it contained an enforceable forum selection clause. It contends that the agreement did not specify an exclusive forum in which to litigate disputes or, in the alternative, that any such provision was unenforceable.

[3] However, we do not consider the merits of Castellar's arguments. 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] In our jurisdictional review, we conclude that the district court improperly certified the dismissal of Castellar's claim for breach of the advisory agreement as a final judgment pursuant to § 25-1315(1). Thus, we are without jurisdiction over the appeal.

In *Cerny v. Todco Barricade Co.*,[6] we summarized the legislative intent behind § 25-1315 and set forth a number of factors for trial courts to consider when applying that section. Section 25-1315(1) permits a trial court to certify an otherwise interlocutory order as a final, appealable judgment under the limited circumstances set forth in the statute:

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

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[5] *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015).

[6] See *Cerny, supra* note 3.

> claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

[4] There are three elements constituting a § 25-1315(1) certification. With the enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.[7]

[5,6] However, as we explained in *Cerny*, § 25-1315(1) was intended to prevent interlocutory appeals, not make them easier.[8] And we iterated that certification of a final judgment must be reserved for the "'unusual case'" in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.[9] The power that § 25-1315(1) confers upon the trial judge should be used only in the infrequent harsh case as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.[10]

[7] In determining whether certification is warranted, a trial court must take into account judicial administrative interests as well as the equities involved.[11] To that effect, a trial court

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[7] See *id.*

[8] See *id.*

[9] See *id.* at 809, 733 N.W.2d at 886.

[10] See *Cerny, supra* note 3.

[11] See *id.*

should weigh (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.[12]

[8] In the case at bar, Castellar's suit clearly involved multiple parties. And the district court's dismissal of Castellar's claim for breach of the advisory agreement was a final order within the meaning of § 25-1902 as the ultimate disposition of an individual claim for relief.[13] Thus, in this case, the appropriateness of certification turns upon whether the district court properly weighed and considered the above factors. If the trial court has abused its discretion in certifying an order as final under § 25-1315(1), there is no final order before the appellate court and, thus, no jurisdiction of the appeal.[14]

[9] However, contrary to our express direction in *Cerny*, the district court failed to make specific findings in support of its § 25-1315(1) determination. "When a trial court concludes that entry of judgment under § 25-1315(1) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order. . . . It is difficult to review the trial court's exercise of discretion when the court does not explain its reasoning."[15]

Thus, without specific findings, we must review the record for some indication of a "'pressing, exceptional need for immediate appellate intervention, or grave injustice of the sort

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[12] See *id.*

[13] See *id.*

[14] *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

[15] *Cerny, supra* note 3, 273 Neb. at 811, 733 N.W.2d at 887.

remediable only by allowing an appeal to be taken forthwith, or dire hardship of a unique kind.'"[16] We further take particular notice of the allegations contained in Castellar's request for certification.[17] But rather than demonstrating that certification was appropriate, Castellar's allegations affirmatively show that it was not.

In its request for certification of a final judgment, Castellar alleged that its 11 causes of action involved the "same parties, similar issues, and related facts." As we explained in *Cerny*, the presence of overlapping claims counsels against certification, not in favor of it.[18] Moreover, all of the claims stated in Castellar's amended complaint appear to arise from the same underlying event—the AMP parties' alleged breach of various promises to form a "global business" with Castellar. And Castellar alleged that the advisory agreement was a step toward "transition[ing] into a proper hedge fund advisory contract and global business partnership." Thus, it appears that Castellar's claims involve considerable overlap. When the dismissed and surviving claims are factually and legally overlapping or closely related, fragmentation of the case is to be avoided except in "'"unusual and compelling circumstances."'"[19]

We recognize that the district court's dismissal of Castellar's claim for breach of the advisory agreement may cause Castellar to incur considerable expense in litigating the claim in New South Wales. But there is no indication of any grave injustice or dire hardship that would result from requiring Castellar to raise this issue in an appeal from a final determination of the case. Castellar's claim of a New South

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[16] *Id.* at 810, 733 N.W.2d at 887, quoting *Spiegel v. Trustees of Tufts College*, 843 F.2d 38 (1st Cir. 1988).

[17] See *Cerny, supra* note 3.

[18] See *id.*

[19] *Id*. at 813, 733 N.W.2d at 888-89, quoting *Long v. Wickett*, 50 Mass. App. 380, 737 N.E.2d 885 (2000).

Wales statute of limitations is a mere allegation with no evidentiary support.

The law disfavors piecemeal appeals, and multiple appeals interfere with efficient judicial administration and impose on the parties costs and risks associated with protracted litigation.[20] Because all of Castellar's claims are interrelated and the same parties remain involved in the pending litigation, we conclude that the district court abused its discretion in certifying a final judgment pursuant to § 25-1315(1).

## CONCLUSION

Without specific findings to guide our review of the district court's § 25-1315(1) determination, we find no basis to conclude that this was the "unusual case" warranting the proliferation of piecemeal appeals. And the interrelatedness of Castellar's claims counsels against certification. We therefore conclude that the district court abused its discretion in certifying the dismissal of Castellar's claim for breach of the advisory agreement as a final judgment. Thus, we vacate the provision of the court's May 15, 2014, order purporting to certify a final judgment and dismiss the appeal for lack of jurisdiction.

Order vacated in part, and appeal dismissed.

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[20] See, *Cerny, supra* note 3; *Halac v. Girton*, 17 Neb. App. 505, 766 N.W.2d 418 (2009).

Nebraska Supreme Court
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# General Drivers & Helpers Union, Local No. 554, appellant, v. County of Douglas, Nebraska, and Tom Doyle, Douglas County Engineer, appellees.

864 N.W.2d 661

Filed June 19, 2015. No. S-14-531.

1. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions 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. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
4. ____: ____. An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Contracts.** A contract must be construed as a whole, and its terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

M.H. Weinberg, of Weinberg & Weinberg, P.C., for appellant.

Donald W. Kleine, Douglas County Attorney, Timothy K. Dolan, and Meghan M. Bothe for appellees.

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

McCormack, J.

## NATURE OF CASE

This case involves a dispute between Douglas County, Nebraska (the County), and General Drivers & Helpers Union, Local No. 554 (the Union), regarding the construction of its collective bargaining agreement (the CBA). The issue to be determined is whether the word "start" in the CBA means the starting wage for all employees in a certain classification or whether only the "start" of the pay scale from which employees may be hired at different wages. The Union appeals the declaratory judgment that "start" is unambiguous and is the minimum wage or "start" of a pay scale.

## BACKGROUND

The Union, the Douglas County engineer, and the County are parties to a CBA effective from January 1, 2010, through December 31, 2013. The CBA controls the terms and conditions of employment for mechanics employed by the County. Article 1, section 1, of the CBA states that the County "recognizes the Union as the sole and exclusive collective bargaining representative for the purposes of establishing wages, hours and other conditions of employment for all regular full time and regular part time employees."

A management rights clause states:

> Except where limited by express provisions of [the CBA], nothing herein shall be construed or interpreted to restrict, limit or impair the rights, powers and authority of the [County] heretofore possessed and hereafter granted by virtue of law, regulations or resolution. These rights, powers and authority include, but are not limited to, the right to manage and supervise all of its operations

> and establish work rules, regulations and other terms and conditions of employment not inconsistent with the specific terms of [the CBA].

Article 7 of the CBA discusses the seniority system. Article 7, section 6, states: "New employees shall be added to the seniority list as of the date of their employment, following satisfactory completion of their probationary period." Under the CBA, article 6, "newly hired employees shall serve a probationary period of ninety (90) days. . . . Employees shall not be eligible for promotion during the probationary period provided in this Article."

Article 9, section 1, states:

> "[P]romotion" shall be defined as the advancement of an employee from one position classification to another in a higher salary grade within their department. A promoted employee will move to the step in the higher classification that is above his current rate and will progress on annual steps thereafter to the maximum.

Article 31 is entitled, "Teamsters Bargaining Unit Pay Rates - Effective January 1, 2013." For all positions there exists a chart, at the top of which are columns entitled "Start," "Step 2," "Step 3," et cetera, through "Step 8." Under each column is an hourly pay rate that increases with each step. For the "Equipment Mechanic II" position, the "start" pay is $19.44 per hour and increases until the pay scale ends at $23.98 per hour at "Step 8."

### Hiring of Randy Nickell

In late October 2013, the County announced a vacancy for an equipment mechanic II. The County posted a vacancy notice that described the position as "Equipment Mechanic II," with a salary range of $19.44 to $22.05 hourly.

On December 3, 2013, the County hired Randy Nickell to fill the equipment mechanic II vacancy. The County hired Nickell at the wage of $22.05 per hour, corresponding to step 5 of the 2013 pay scale provided in the CBA.

### Grievance

The Union steward filed a grievance, arguing that the CBA prevented the County from hiring a new employee at a wage above the "start," or the first step, of the pay scale.

The parties filed a joint stipulation of facts and cross-motions for summary judgment. Based on the parties differing interpretations of the word "start" in the CBA, the parties filed for summary judgment on the meaning of "start" in the CBA pay rates scale. The parties reserved any breach of contract claim for after the resolution of this motion.

### Trial Court Opinion

The trial court granted summary judgment in favor of the County. The trial court stated that "the CBA, taken as a whole, is not ambiguous . . . and as drafted does not prohibit [the] County from hiring an employee at a wage above the starting step of the pay scale." In coming to this decision, the trial court looked at the CBA's "Management Rights" clause. The court noted that the clause reserved to the County the right to establish "'other terms and conditions of employment.'" The court reasoned that a starting wage is a condition of employment. Thus, the court found that the County had the right to select a new hire's starting pay, at least within the range set forth for that position in article 31 of the CBA.

Further, the court found that "[t]he express provisions of the CBA do not state that the 'Start' step on the pay scale must be the uniform starting wage for all new hires" of a given position. The trial court found significant the fact that the CBA stated that a vacancy notice shall include a salary range for a posted position. The Union appeals.

## ASSIGNMENTS OF ERROR

The Union asserts, restated, that the trial court erred in granting summary judgment (1) by concluding that there was no starting or initial salary specified in the CBA, (2) by finding that the word "start" in the CBA was not ambiguous, and

(3) in relying on the management rights clause to give the County the right to set initial wages without negotiation with the Union.

## STANDARD OF REVIEW

[1,2] The meaning of a contract and whether a contract is ambiguous are questions of law.[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[2]

[3,4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[3] We will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4]

## ANALYSIS

In the trial court, the Union argued that the meaning of "start" pay under the CBA pay scale chart for "Equipment Mechanic II" unambiguously referred to the mandatory starting wage for all new employees filling that position. Under that interpretation, no new "Equipment Mechanic II" could begin employment with the County at a step 2 or above wage.

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[1] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005). See, also, *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004); *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003).

[2] *Id.*

[3] *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

[4] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013).

On appeal, the Union argues that "start" is ambiguous—that reasonable minds could adopt either the trial court's reading or the Union's. The County argues that the ambiguity of the CBA has been waived by the Union and cannot be raised for the first time on appeal. We disagree. The meaning of the CBA is a question of law and must be determined in order to address the Union's assignment of error that the trial court should have found the County in breach of the CBA. Whether the CBA is ambiguous is a necessary analysis in determining the meaning of the CBA.

The question in this appeal is whether, as the trial court found, the CBA pay scale established a wage range within which the County, under the management rights clause, could exercise discretion to set the level of a newly hired employee, or whether, instead, "start" is the mandatory starting wage for all beginning employees. We conclude that the meaning of "start" in this context is unambiguous and denotes the start of a pay scale in which the employer has discretion to set the step on the pay scale of each new hire.

[5] Whether a contract is ambiguous is a question of law.[5] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[6]

Webster's dictionary defines "start" as both "to begin an activity or undertaking" or "to begin work."[7] If we apply the first meaning of "start," then it lends itself to the Union's alleged meaning—when an employee begins to do his or her job, he begins at the "start" pay. However, if we apply the second definition supplied, the County's proffered meaning

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[5] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[6] *Beveridge v. Savage*, 285 Neb. 991, 830 N.W.2d 482 (2013); *Davenport Ltd. Partnership v. 75th & Dodge I, L.P., supra* note 5.

[7] Webster's Third New International Dictionary of the English Language, Unabridged 2227 (1993).

seems to apply; "to begin work" would mean that "start" is causing the *pay scale* to begin at a minimum starting wage of $19.44 per hour and ending at step 8, which is $23.98 per hour.

[6] However, a contract must be construed as a whole,[8] and its terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.[9] In light of the reasonable interpretation of the remaining provisions of the CBA, the meaning of the term "start" becomes clear.

The CBA includes a management rights provision in article 3 which allows the County to "manage and supervise all of its operations and establish work rules, regulations and other terms and conditions of employment," except where the terms are otherwise limited by the CBA. Here, the terms of the CBA limit the pay of an equipment mechanic II. But they do so by setting forth a pay range to anywhere from the "start" pay at $19.44 hourly up to the step 8 pay at $23.98 hourly. There is no express provision stating that new employees must begin at "start," or $19.44 per hour. Therefore, the County complied with this limitation on the pay for Nickell.

The management rights clause gave the County the flexibility to determine where Nickell's pay fell on the bargained-for pay scale. Further, common sense suggests that the County must be free to offer different wages to new employees according to their experience and expertise. If the County needed a highly experienced equipment mechanic, the County could not expect to pay that mechanic the starting wage that it would give to an applicant with very little experience.

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[8] *Hearst-Argyle Prop. v. Entrex Comm. Servs.*, 279 Neb. 468, 778 N.W.2d 465 (2010); *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008).

[9] See, *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015); *Gibbons Ranches v. Bailey*, 289 Neb. 949, 857 N.W.2d 808 (2015).

Other provisions of the CBA also support the reading that "start" is merely the beginning of a pay range by which equipment mechanics may be assigned a wage. For example, the CBA expressly states that any vacancy notices posted by the County should include a salary range for the posted position. If the CBA meant to have each new hire begin work at the "start" wage, then the vacancy notice could post only the starting wage.

## CONCLUSION

Reading the CBA as a whole, we find that the meaning of "start" in article 31 of the CBA is unambiguous and that summary judgment was proper.

Affirmed.

Wright, J., participating on briefs.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Marcus M. Escamilla, appellant.
864 N.W.2d 376

Filed June 19, 2015. No. S-14-698.

1. **Criminal Law: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
2. ____: ____: ____. The relevant question when an appellate court reviews 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.
3. **Intent: Words and Phrases.** Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.
4. **Homicide: Intent: Time: Words and Phrases.** The term "premeditated" means to have formed a design to commit an act before it is done. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death.
5. **Homicide: Intent: Time**. The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed.
6. **Homicide: Intent: Circumstantial Evidence: Proof.** Deliberation and premeditation may be proved circumstantially.

7. **Homicide: Intent: Weapons.** Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death.
8. **Convictions: Evidence: Proof: Appeal and Error.** The law imposes a heavy burden on a defendant who claims on appeal that the evidence is insufficient to support a conviction.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed.

Alan G. Stoler, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Miller-Lerman, J.

## NATURE OF CASE

Following a jury trial, Marcus M. Escamilla was convicted in the district court for Douglas County of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Escamilla appeals, claiming as his only assignment of error that there was insufficient evidence of premeditation to convict him of first degree murder. Because the record contains sufficient evidence to support the jury's verdict, we affirm his convictions and sentences.

## STATEMENT OF FACTS

Escamilla was convicted of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person in connection with the 2013 shooting death of Kenneth Gunia. He was sentenced to life imprisonment for his conviction of first degree murder, 5 years' imprisonment for his conviction of use of a deadly weapon to commit a felony, and 3 years' imprisonment for his conviction of possession of a deadly weapon by a prohibited person. Escamilla's sentences were ordered to be served

consecutively to each other, and he was given credit for 414 days of time served.

Evidence at trial generally indicated that on the night of April 16, 2013, Escamilla drove with Michele Willcoxon to an apartment complex located on 24th Street in Omaha, Nebraska, in order to meet up with Gunia. When they arrived at the apartments, Escamilla got out of Willcoxon's black sport utility vehicle (SUV) and met Gunia in the parking lot. They talked outside Gunia's car for a brief time before they both got into Gunia's car, where Escamilla shot and killed Gunia. Escamilla then walked back to Willcoxon's SUV, and she drove Escamilla back to his residence.

Escamilla was charged on July 17, 2013, with first degree murder in alternative theories of premeditated murder and felony murder, use of a firearm to commit a felony, and possession of a deadly weapon by a prohibited person. A jury trial was held May 6 through 9, 2014.

At trial, Willcoxon testified for the State. She said that at the time of Gunia's death, she knew Escamilla and Janella Marks, who lived with Escamilla, and that she had become recently acquainted with Gunia. Willcoxon testified that at the time, she was using methamphetamine "[a]ll the time," and that part of her relationship with Gunia was based on the use and sale of methamphetamine. On April 15, 2013, Willcoxon "fronted" Gunia some methamphetamine, and at the end of the day on April 15, Gunia owed Willcoxon $275 to $300.

Sometime in the early evening on April 16, 2013, Willcoxon went to the residence of Escamilla and Marks in order to use methamphetamine with Marks. Willcoxon testified that while she was with Marks, she was waiting for Gunia to call her to let her know that he had the money he owed her. Willcoxon told Marks that she had heard that Gunia was going to rob her. Escamilla heard this conversation, and Willcoxon testified that he told her "not to worry about it. He [Escamilla] would say something to him [Gunia]."

Sometime later that evening, Willcoxon left the residence of Escamilla and Marks in her SUV and she agreed to give

Escamilla a ride. Willcoxon testified that Escamilla was wearing a black sweater over a white T-shirt, black pants, black shoes, and a black hat.

Willcoxon and Escamilla drove to a few places, and during that time, Gunia texted Willcoxon and they arranged to meet at the apartment complex on 24th Street. Willcoxon and Escamilla arrived at the apartment complex at approximately 10 p.m., and when they got there, Willcoxon did not see Gunia right away, so she circled the parking lot a couple of times. When Willcoxon and Escamilla saw Gunia walking to his car, Escamilla got out of the SUV and walked toward Gunia. As Escamilla approached Gunia, Willcoxon heard Gunia say, "What? What? What did I do?" as he backed up against the driver's-side door of his car.

Willcoxon circled her SUV around the parking lot another time before parking. When she parked, Willcoxon saw Gunia sitting in the driver's side of his car and Escamilla squatting down next to the driver's-side door. Willcoxon testified that she did not constantly watch the activity going on between Escamilla and Gunia, but that at some point, she looked over and saw Escamilla in the driver's seat and Gunia in the passenger seat of Gunia's car. Willcoxon testified that she did not hear anything come from the car, but that at some point, Escamilla "jogged" back to her SUV and said they needed to go. Escamilla got in the passenger side of Willcoxon's SUV, and she drove them back to Escamilla's residence.

On the way to Escamilla's residence, Escamilla told Willcoxon that he had shot Gunia. Willcoxon testified that Escamilla stated, "'I shot that fool.'" When asked to describe Escamilla's demeanor when he said that, Willcoxon stated that "[h]e was okay with it. He was hyped up." Willcoxon testified that when Escamilla told her about what had occurred in Gunia's car, "[h]e kind of chuckled" and stated that Gunia "kept asking — saying that he just want[ed] to go upstairs to his kids."

Willcoxon stated that after they arrived at Escamilla's residence, she stayed for approximately 10 minutes before going

home. Willcoxon testified that she did not see Escamilla with a gun that night, but she stated that he was wearing loose-fitting clothing.

The State also called Thomas Williams to testify at trial. At the time of Escamilla's trial, there was a charge of criminal intent to distribute methamphetamine pending against Williams, and Williams was incarcerated at the Douglas County Correctional Center. Williams testified that he was acquainted with Escamilla through Escamilla's girlfriend, Marks, because Williams was friends with Marks' father.

Sometime after Williams was incarcerated, Escamilla was placed in the same unit at the Douglas County Correctional Center where Williams was placed, and Escamilla started talking to Williams. In connection with the death of Gunia, Escamilla asked Williams if he had ever heard "a gun pop in a car" and stated that he might be in trouble. Williams asked why, and Escamilla stated that he had "'killed a fool.'" Escamilla said he had killed Gunia inside a car in front of the residence of Gunia's girlfriend off of 24th Street. Escamilla told Williams that "since the gun was pushed uptight [sic] against him [Gunia], it was just like a whoosh inside the car." He also told Williams that he had "the piece up on [Gunia] so good . . . that it wasn't like a loud pop, bang. It was like a whoosh. Like an air — like an air release or something in the car." Williams testified that Escamilla indicated that he held the gun up to Gunia's abdominal area. Escamilla told Williams that after he shot Gunia, he "casually got out of [Gunia's] car," walking back to the SUV in which he had arrived, and he and Willcoxon drove away.

Amanda Wickersham, Gunia's girlfriend at the time of his death, was called to testify. At the time of Gunia's death, Wickersham and her two children were living in the apartment complex at the 24th Street location, and Gunia sometimes stayed at her apartment. Wickersham stated that she was aware of Gunia's drug use and that it had caused problems between them. Wickersham testified that on the night of Gunia's murder, April 16, 2013, Gunia had made dinner

and spent time with her children. After dinner, Wickersham lay down because she was not feeling well. Gunia lay down next to her for a little while, then he got up and left the room. After a while, Wickersham realized Gunia had not returned to the room, so she got up to look for him. Gunia was not in the apartment, but his coat was still there, so Wickersham called him.

Wickersham testified that when she dialed Gunia's cell phone number, the call was answered, but she did not actually converse with Gunia. She stated that she heard a man's voice who was not Gunia and that it sounded like there was "some kind of argument or tussle going on." She ended the call. Because she assumed there was something wrong, she went downstairs. When she got downstairs, she saw a man walking away from where Gunia's car was parked. She described the man as white or light skinned, wearing dark clothing, and between 5 feet 7 inches and 6 feet tall. Wickersham watched the man get into a dark SUV and leave.

Wickersham testified that she then ran to Gunia's car, where she found Gunia in the front passenger seat. Wickersham stated that the passenger car door was open, and Gunia's legs were outside the car. Wickersham nudged Gunia, and he reacted, so Wickersham called the 911 emergency dispatch service. Wickersham testified that there appeared to be a burn hole in Gunia's shirt on the left side of his abdominal area, but that she was "too scared to lift the shirt up to see what was underneath it." While she was waiting for the police to arrive, Wickersham stated that Gunia was unable to speak, but that he had "reach[ed] out" to her.

Lisa Stafford, Wickersham's neighbor at the apartment complex, was then called to testify. She stated that on the night of Gunia's murder, she was home studying. At approximately 10 p.m., Stafford was smoking a cigarette near her bedroom window that overlooked the apartment complex's parking lot. She observed two men in the parking lot near a white car, one wearing a white shirt and the other dressed in black. Stafford stated that the two men were standing "really

close to each other," which Stafford found to be "odd," so she watched them. Stafford described the man dressed in black as approximately 5 feet 7 inches tall and light skinned, either "white or Hispanic or native."

Stafford stated that she thought the man dressed in black was trying to make the man in the white shirt get into the driver's side of the white car. Specifically, she testified that Escamilla's conduct was aggressive and that "there was no way for the guy in the white shirt to go [anywhere] but into the car." Stafford stated she believed the man in the white shirt was nervous or drunk based on his body language. She stated that he was "kind of jittery or shaky or not fully stable." Stafford turned away for a moment, and when she looked back out the window, the two men were in the car. She heard a "pop" and a man's scream. She then observed the man dressed in black get out of the driver's side of the white car and walk across the parking lot to a black SUV. He got in the passenger side of the black SUV, and it drove away.

Stafford testified that she left her apartment and went downstairs to the white car, where she encountered Wickersham. She saw the man in the white shirt in the front passenger seat in the car. She stated that his white shirt appeared to be black on the side of his body. Stafford reached into the car to see if the man had a pulse; he then "took a big gasp of air . . . like he was trying to breathe." Stafford was there when the police arrived, and she gave a statement to the police that night.

The State then called Savannah Sharpe to testify. Sharpe stated that she met Gunia at a drug rehabilitation center in 2011. Sharpe stated that in April 2013, Gunia would call her every night to check on her and her children. On April 16, Sharpe was having a telephone conversation with Gunia at approximately 10 p.m., and Sharpe testified that her conversation with Gunia stopped when she heard another man approach Gunia, but that Sharpe stayed on the open line. Sharpe testified that she could hear the conversation between the two men and that during the conversation, Gunia's tone changed from confident to "more of a plea." Sharpe then

heard a sound as if the cell phone had been dropped or stepped on, which she described as sounding like "pow pow pow." Sharpe testified that after hearing the noises, she heard Gunia breathing and making a gurgling sound. After some time, Sharpe heard two women's voices and then sirens before the call was disconnected. Sharpe testified that the next morning, she learned that there had been a homicide at the apartment complex, so she called the police to report what she had heard.

Marks, Escamilla's girlfriend, also testified. She stated that in April 2013, she was living with Escamilla and knew Gunia through her father. Marks testified that at that time, she was using methamphetamine daily. On April 16, Willcoxon came to the residence of Escamilla and Marks to talk to Escamilla and, at some point, they left together. Marks testified that later that night, Escamilla returned to their residence with Willcoxon, and that after Willcoxon left, Escamilla told Marks that "he shot somebody." Marks testified that on that night, Escamilla was wearing all black and had a gun tucked into the waistband of his pants. Marks stated that after Willcoxon left, Escamilla placed the gun in a hole in the ceiling of their bedroom.

Marks stated that on the morning of April 17, 2013, U.S. marshals arrived at the residence of Escamilla and Marks. Marks testified that Escamilla told another person in the residence to retrieve the gun from the hole in the ceiling and to hide it in the wall of the shower in the basement bathroom. The U.S. marshals arrested Escamilla, and they searched the residence, but they did not find the gun. Marks found the gun after the marshals left, and she returned it to the hole in the ceiling.

Marks testified that Escamilla called her from jail soon after he was arrested and that he asked her to get rid of some clothes he had left in their bathroom. Marks told Escamilla she got rid of them, but, in actuality, she did not because she could not find the clothes. Marks testified that in their telephone conversation, Escamilla told her to sell his "car" so Marks

would have some money. Marks testified that at the time, Escamilla did not own a car and that by "car," he meant the gun. Marks sold the gun.

The State called Dr. Michelle Elieff, a general and forensic pathologist, to testify, and Dr. Elieff stated that she performed the autopsy on Gunia. She testified that Gunia had suffered a single gunshot wound, with an entrance wound in his left lower abdomen and an exit wound in his back. Dr. Elieff stated that the entrance wound had a ring of soot around it and that "[t]he ring of soot indicates a close range of fire. Inches perhaps."

The State rested, and Escamilla presented no evidence in his defense. At the close of evidence, Escamilla moved to dismiss the three counts against him and, specifically, the State's theory of felony murder. The State conceded that it did not present evidence with regard to the felony murder theory and requested that the court not instruct the jury as to felony murder. The court granted the motion to dismiss the theory of felony murder, and it did not instruct the jury as to felony murder; however, the court overruled Escamilla's motion with respect to the theory of premeditated murder and the other two counts, i.e., use of a deadly weapon to commit a felony and possession of a deadly weapon by a prohibited person. The jury was given a step instruction stating that Escamilla could be found guilty of first degree murder, second degree murder, intentional manslaughter, or unintentional manslaughter, or found not guilty.

Escamilla was convicted of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Escamilla moved for a new trial, which the district court overruled. After a sentencing hearing, the district court filed an order on August 4, 2014, sentencing Escamilla to life imprisonment for his conviction of first degree murder, 5 years' imprisonment for his conviction of use of a deadly weapon to commit a felony, and 3 years' imprisonment for his conviction of possession of a deadly weapon by a prohibited person. Escamilla's sentences

were ordered to be served consecutively to one another, and Escamilla was given credit for 414 days of time served.

Escamilla appeals.

## ASSIGNMENT OF ERROR

Escamilla contends that there was insufficient evidence of premeditation to support his conviction for first degree murder.

## STANDARDS OF REVIEW

[1,2] In reviewing a criminal conviction for 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. See *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015). 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. See, *id.*; *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014).

## ANALYSIS

Escamilla asserts that the evidence adduced at trial was insufficient to support a conviction of first degree murder. Escamilla specifically contends that the evidence was insufficient to support a finding that the killing was done with deliberate and premeditated malice. Contrary to Escamilla's argument, we determine that there is sufficient evidence in the record to support the jury's verdict, and we therefore find no merit to this assignment of error.

Escamilla stands convicted of premeditated murder, which in Nebraska is a form of murder in the first degree. Pursuant to Neb. Rev. Stat. § 28-303 (Reissue 2008), a person commits this form of murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice. We have summarized the three elements which

the State must prove beyond a reasonable doubt to obtain a conviction for first degree murder as follows: The defendant (1) killed another person, (2) did so purposely, and (3) did so with deliberate and premeditated malice. *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013); *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). A question of premeditation is for the jury to decide. *State v. Watt, supra*.

[3-5] With respect to the element of "deliberate and premeditated malice," our cases commonly look to the facts showing the planning of a murder and the manner in which the murder was carried out. Regarding planning we have stated:

> "'Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act. . . . The term "premeditated" means to have formed a design to commit an act before it is done. . . . One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. . . . No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. . . .'"

*Id.* at 659, 832 N.W.2d at 474, quoting *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). The time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011). Whether premeditation exists depends on numerous facts about "how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, *planning activity*." 2 Wayne R. LaFave, Substantive Criminal Law § 14.7(a) at 480 (2d ed. 2003) (emphasis in original).

Regarding the method of a murder, we have observed that the manner or fashion in which the injury is inflicted may show a deliberate act and hence serve as evidence to support a finding of premeditation. See *State v. Watt*, 285 Neb. at 659, 832 N.W.2d at 474 (stating that "the act of shooting an individual in the manner described by the witnesses in this case is inherently a deliberate act"); *State v. Nolan*, 283 Neb. at 74, 807 N.W.2d at 541 (stating that "[t]he act of shooting an individual, at least in the fashion described by [a witness], is inherently a deliberate act"). Other sources are in accord. See, e.g., 40A Am. Jur. 2d *Homicide* § 448 (2008) (stating that finding of premeditation may be supported by nature and number of victim's wounds or use of deadly weapon upon unarmed victim). Other courts agree that the manner of the murder can serve as evidence of premeditation. Thus, it has been stated that the fact finder may look to "facts about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design." *State v. Clark*, 739 N.W.2d 412, 422 (Minn. 2007) (emphasis in original), quoting *State v. Moore*, 481 N.W.2d 355 (Minn. 1992). See, also, 2 LaFave, *supra*.

[6] In a criminal case, the evidence upon which a jury may rely in making its findings may be direct, circumstantial, or a combination thereof. See *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015). Deliberation and premeditation may be proved circumstantially. *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978). In *State v. Kofoed*, 283 Neb. 767, 788-89, 817 N.W.2d 225, 242 (2012), we stated that "circumstantial evidence is not inherently less probative than direct evidence. In finding a defendant guilty beyond a reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom." It has been observed that premeditation may be established by circumstantial evidence, including the nature of the defendant's conduct before and after the killing. See 40A Am. Jur. 2d, *supra*.

Given the foregoing principles and remembering that on appeal after conviction, the evidence is viewed in a light most favorable to the State, we determine that there is sufficient evidence in this record to support the jury's finding beyond a reasonable doubt that Escamilla killed Gunia with deliberate and premeditated malice.

Although no one testified directly that they saw Escamilla arrive at the meeting with Gunia with a gun, the overwhelming evidence in the case shows that Escamilla brought a gun to the event. Further, there is no indication that Gunia had a gun. Willcoxon testified that when Escamilla first approached Gunia in the parking lot, Gunia backed up against the driver's-side door of his car and said, "What? What? What did I do?" A juror could infer from Gunia's reaction that Gunia saw that Escamilla was approaching him with a gun. Willcoxon testified that after Escamilla got out of Gunia's car and returned to her SUV, Escamilla told her, "'I shot that fool.'" Williams testified that Escamilla told him that he had "'killed a fool'" inside of a car. Marks testified that after Escamilla returned to their residence on the night of the shooting, Escamilla told her he had shot somebody, and that he then pulled a gun out of the waistband of his pants and hid it. Thus, there is considerable evidence that Escamilla arrived at the meeting with Gunia with a gun and that over the course of their encounter, if not before, Escamilla formed a design to kill Gunia with no legal justification.

Stafford, the neighbor of Gunia's girlfriend, Wickersham, testified that she observed Escamilla and Gunia in the parking lot the night of the shooting. She stated that Escamilla's conduct was aggressive and that "there was no way for [Gunia] to go [anywhere] but into the car." Stafford also testified that Gunia appeared to be nervous or drunk. After Stafford heard a "pop" and a man's scream, she observed Escamilla get out of the driver's side of Gunia's car and walk to Willcoxon's SUV. The evidence indicates that when Escamilla shot Gunia, Escamilla was in the driver's seat of Gunia's car and Gunia was in the passenger seat. Based on this placement and other

evidence, a juror could infer that Escamilla was in control of the situation by forcing Gunia to get into the driver's side of his car and to slide across to the passenger side, while Escamilla sat in the driver's seat. Escamilla's control of the situation indicates a deliberate plan unfolding that is indicative of premeditation.

Sharpe testified that she was on the telephone with Gunia the night of the shooting. She stated that when she heard another man, Escamilla, approach Gunia, her conversation with Gunia stopped, but that she stayed on the open line and overheard the conversation between the two men. Sharpe testified that during that conversation, Gunia's tone shifted from confident to "more of a plea." She then heard a sound as though the cell phone had been dropped and a "pow pow pow." After those noises, Sharpe heard what she described as Gunia's struggling to breathe.

As stated above, no particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). Furthermore, the time required to establish premeditation may be of the shortest possible duration and may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed. *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011). The jury could infer from the testimony of Willcoxon, Williams, Marks, Stafford, and Sharpe that Escamilla's plan was unfolding and that Escamilla had sufficient time to form an intent to kill prior to shooting Gunia, and these facts would establish premeditation.

[7] A rational juror could also find that the manner in which Escamilla killed Gunia, i.e., the placement of the gun at close range to Gunia's torso, indicates a deliberate and premeditated killing with malice. With respect to the nature or manner of killing, it has been stated that "what is required [to show premeditation] is evidence (usually based upon examination

of the victim's body) showing that the wounds were deliberately placed at vital areas of the body." 2 Wayne R. LaFave, Substantive Criminal Law § 14.7(a) at 481 (2d ed. 2003). The Virginia Supreme Court has recognized that the placement of a gun that is used to shoot a victim may indicate premeditation. See *Stewart v. Com.*, 245 Va. 222, 427 S.E.2d 394 (1993). In *Stewart*, the Virginia Supreme Court stated that "evidence that a weapon was placed against a victim's head when the fatal shot was fired . . . is sufficient alone to support a finding that 'the shot was fired deliberately and with premeditation.'" *Id.* at 240, 427 S.E.2d at 406, quoting *Townes v. Commonwealth*, 234 Va. 307, 362 S.E.2d 650 (1987). Similarly, we have previously stated that intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death. *State v. Watt, supra*. See, also, *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

The evidence shows that Escamilla shot Gunia on the left side of Gunia's abdomen from a close range. The shot was to the torso and was a "through-and-through wound," perforating the aorta. Dr. Elieff testified that the entrance wound from the bullet on Gunia's abdomen indicated that the shot was fired from inches away. Dr. Elieff observed a ring of soot around the wound. Furthermore, Williams testified that Escamilla told him that "the gun was pushed uptight [sic] against [Gunia]" and that "the piece was up on [Gunia] so good . . . that it wasn't like a loud pop, bang. It was like a whoosh." Based upon this evidence, a rational juror could infer Escamilla had formed the intent to kill from the deliberate use of a deadly weapon in a manner reasonably likely to cause death. See *State v. Watt, supra*.

The evidence also indicates that Escamilla was calm immediately after he killed Gunia. Calmness immediately after a killing has sometimes been associated with premeditation. See 40A Am. Jur. 2d *Homicide* § 448 (2008). Williams testified that after Escamilla shot Gunia, Escamilla "casually got out of the car" in which he had just shot Gunia and walked

back to Willcoxon's SUV, and they drove away. Willcoxon testified that as she and Escamilla were driving away from the scene, Escamilla told her, "'I shot that fool,'" and Willcoxon said that Escamilla's behavior showed that he "was okay with it." She also testified that when Escamilla told her what had occurred in Gunia's car, "[h]e kind of chuckled."

[8] The law imposes a heavy burden on a defendant who claims on appeal that the evidence is insufficient to support a conviction. See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). Faced with the trial record to which we have referred above, we determine that Escamilla has not carried that burden. Given the evidence, we determine that a rational trier of fact could reasonably infer that Escamilla formed an intent to deliberately kill Gunia before committing the homicide and, therefore, could have found beyond a reasonable doubt that Escamilla killed purposely and with deliberate and premeditated malice. The evidence is therefore sufficient to support entry of the jury's verdict of first degree murder.

## CONCLUSION

We conclude that the evidence is sufficient to support Escamilla's convictions, and we find no merit to his assignment of error on appeal. Therefore, we affirm the judgment of the district court.

Affirmed.

Heavican, C.J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Thomas G. Sundvold, respondent.

864 N.W.2d 412

Filed June 19, 2015. No. S-14-828.

Original action. Judgment of suspension.

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

Per Curiam.

## INTRODUCTION

This case is before the court on the conditional admission filed by Thomas G. Sundvold, respondent, on April 15, 2015. Prior to the filing of the conditional admission at issue in this case, this court filed an opinion on April 4, 2014, in case No. S-13-002, in which we suspended respondent for a period of 3 years followed by 2 years' monitored probation upon reinstatement. See *State ex rel. Counsel for Dis. v. Sundvold*, 287 Neb. 818, 844 N.W.2d 771 (2014). Accordingly, respondent was suspended at the time he filed the present conditional admission. We accept respondent's conditional admission and order that respondent be suspended from the practice of law for a period of 6 months, which suspension shall commence immediately consecutive to respondent's current 3-year suspension followed by 2 years' monitored probation upon reinstatement.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 25, 2003. At all relevant times,

he was engaged in the private practice of law in Lincoln, Nebraska.

As stated above, prior to the filing of the conditional admission at issue in this case, in case No. S-13-002, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent on January 3, 2013, and it filed amended formal charges on February 15. The amended formal charges contained two counts against respondent and generally alleged that respondent had violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and several of the Nebraska Rules of Professional Conduct. A referee was appointed, and after holding an evidentiary hearing, the referee determined that respondent had violated Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence); 3-501.3 (diligence); 3-501.4(a) and (b) (communications); 3-501.15(a) and (c) (safekeeping property); and 3-508.4(a), (c), and (d) (misconduct); and his oath of office as an attorney. The referee recommended that respondent be suspended for a period of 3 years, followed by 2 years' monitored probation.

Respondent initially filed exceptions to the referee's report regarding findings of fact and conclusions of law and the recommended discipline; however, in his brief to this court, respondent stated that he withdrew his exceptions to the referee's findings of fact and conclusions of law and took exception only to the referee's recommended discipline. We filed an opinion on April 4, 2014, in which we suspended respondent for a period of 3 years, followed by 2 years' monitored probation upon reinstatement. See *State ex rel. Counsel for Dis. v. Sundvold, supra*.

In the current case, case No. S-14-828, formal charges were filed against respondent on September 10, 2014. The formal charges consist of two charges against respondent. In the two counts, it was alleged that by his conduct, respondent had violated his oath of office as an attorney, § 7-104, and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence); 3-501.3 (diligence); 3-501.4(a)(3) (communications); 3-501.5(a) (fees); 3-501.15(a), (c), (d); and (e) (safekeeping property);

3-501.16(d) (declining or terminating representation); and 3-508.4(a), (c), and (d) (misconduct).

With respect to count I, the formal charges state that on July 5, 2011, an owner of commercial property in Papillion, Nebraska, filed suit in the district court for Sarpy County for unpaid rent against a company and the company's owner. On August 5, respondent filed an answer on behalf of his client—the company's owner. Thereafter, discovery commenced and the case progressed toward trial.

On September 18, 2013, the district court scheduled a status hearing in the case to be held on December 9. On December 6, respondent filed a certificate of readiness for trial in which respondent stated that

> "the case is ready for trial; that all discovery proceedings including depositions and other necessary preparation has been completed; that the testimony of all necessary witnesses is as of the date hereof available for trial as certified hereby; that the trial is estimated to take no less than 1 day nor more than 2 days."

On December 19, relying on respondent's certificate of readiness for trial, the district court issued an order for a pretrial conference to be held on April 3, 2014, and set the jury trial to be held on April 22 and 23.

Respondent failed to notify his client that the trial was scheduled for April 22, 2014. After December 19, 2013, respondent failed to contact or subpoena any witnesses for the trial.

On April 2, 2014, respondent directed his paralegal to send an e-mail to opposing counsel, which stated: "'Our client contacted us to let us know she is having difficulty making arrangement[s] to be in Nebraska on April 22nd.'" The formal charges state that this was a false statement and that respondent knew it was false when he directed his paralegal to make it.

At 3:34 p.m. on April 2, 2014, respondent filed a motion to continue the pretrial conference set for April 3 at 11:15 a.m. and the trial set for April 22. The formal charges state that in the motion, respondent falsely stated: "'The reason

for this request is because [his client] has recently moved out of state and is having difficulty making arrangements to attend the trial.'" Respondent had not informed his client that the pretrial conference was scheduled for April 3, nor had he informed her that trial was scheduled for April 22. On April 3, the district court denied respondent's motion to continue the trial.

On April 4, 2014, as stated above, we suspended respondent from the practice of law for a period of 3 years. The district court judge became concerned that respondent may not have informed his client of his suspension and the need to find replacement counsel for the trial scheduled to begin April 22. The judge directed his bailiff to contact the client to see if she had found replacement counsel. On April 15, the judge's bailiff spoke with the client by telephone. The client stated that she was unaware that the trial was scheduled for April 22, that respondent had been suspended from the practice of law on April 4, that a pretrial conference was held on April 3, and that the dates for the pretrial conference and the trial had been set on December 19, 2013. Upon learning this information, the judge filed a grievance against respondent with the Counsel for Discipline on April 28, 2014.

In his May 20, 2014, response to the grievance, the formal charges state that respondent falsely stated that his paralegal had spoken with the client in March and had told the client that the case was set for trial in April. The formal charges further state that respondent also falsely stated that he had attempted to contact opposing counsel to discuss settlement. The formal charges state that at no time between December 19, 2013, and April 3, 2014, did respondent discuss settlement with opposing counsel.

The formal charges allege that by his actions with respect to count I, respondent violated his oath of office as an attorney and professional conduct rules §§ 3.501.1, 3-501.3, 3-501.4(a)(3), and 3-508.4(a), (c), and (d).

With respect to count II, the formal charges state that on March 12, 2014, an estate-related client hired respondent to

assist him in being appointed as personal representative for the estate of his brother. Respondent and the estate-related client entered into a written fee agreement entitled "'Flat Fee Agreement,'" which required that the estate-related client pay $1,500 as a "'non-refundable flat fee.'" However, the fee agreement also stated: "'Should the matter need to be litigated and a lawsuit is filed, the fee agreement will revert to an hourly agreement with fees as $175.00 an hour for attorney time and $75.00 for paralegal time.'"

The estate-related client paid respondent $1,500 in cash on March 12, 2014. Respondent did not deposit any portion of the $1,500 into his client trust account.

On March 17, 2014, the estate-related client sent respondent a money order for $500. Respondent did not know why the estate-related client had sent this payment, but respondent did not contact him to determine the purpose of this payment. Respondent deposited the $500 money order into his business account and not his client trust account.

On April 14, 2014, as stated above, we suspended respondent from the practice of law for a period of 3 years. Respondent did not refund any portion of the $1,500 payment he had received from the estate-related client on March 12, nor did respondent refund any portion of the $500 he had received on or after March 17.

On June 17, 2014, the estate-related client filed a grievance against respondent regarding his failure to refund the unearned fee payments. A copy of the grievance letter was mailed to respondent. On July 1, respondent sent the estate-related client a business check in the amount of $500 as a refund of the $500 payment made on March 17. In respondent's July 3 reply to the estate-related client's grievance, respondent asserted that the $1,500 payment was a nonrefundable fee.

The formal charges allege that by his actions with respect to count II, respondent violated his oath of office as an attorney and professional conduct rules §§ 3-501.5(a); 3-501.15(a), (c), (d), and (e); 3-501.16(d); and 3-508.4(a).

On April 15, 2015, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney and certain professional conduct rules. In the conditional admission, respondent knowingly does not challenge or contest the truth of the matters conditionally admitted and waived all proceedings against him in connection therewith in exchange for a 6-month suspension to be added to his current 3-year suspension followed by 2 years' monitored probation as issued in case No. S-13-002. Upon reinstatement, if accepted, respondent shall be placed on monitored probation as set forth in case No. S-13-002, which states that "[t]he monitoring shall be by an attorney licensed to practice law in the State of Nebraska, who shall be approved by the [Counsel for Discipline]." *State ex rel. Counsel for Dis. v. Sundvold*, 287 Neb. 818, 833, 844 N.W.2d 771, 783 (2014). Respondent shall submit a monitoring plan as set forth in case No. S-13-002, which states:

> The monitoring plan shall include, but not be limited to, the following: During the first 6 months of the probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible, which list shall include the date the attorney-client relationship began; the general type of case; the date of last contact with the client; the last type and date of work completed on the file (pleading, correspondence, document preparation, discovery, or court hearing); the next type of work and date that work should be completed on the case; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly, contingency, et cetera). After the first 6 months through the end of probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information as set forth above; respondent shall reconcile his trust account within 10 days of receipt of the monthly bank statement and provide the monitor with a copy within

> 5 days; and respondent shall submit a quarterly compliance report with the Counsel for Discipline, demonstrating that respondent is adhering to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of the probation.

*Id*. at 833-34, 844 N.W.2d at 784.

The proposed conditional admission included a declaration by the Counsel for Discipline stating that respondent's proposed discipline is appropriate and consistent with sanctions imposed in other disciplinary cases with similar acts of misconduct.

## ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.3 and 3-501.4(a)(3), to which he admitted, and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, we approve the conditional admission and enter the orders as indicated below.

## CONCLUSION

Respondent is suspended from the practice of law for a period of 6 months, which suspension shall commence immediately consecutive to respondent's current 3-year suspension as set forth in case No. S-13-002. See *State ex rel. Counsel for Dis. v. Sundvold*, 287 Neb. 818, 844 N.W.2d 771 (2014). Should respondent apply for reinstatement, his reinstatement shall be conditioned upon respondent's being on probation for a period of 2 years, including monitoring, following reinstatement, subject to the terms agreed to by respondent in the conditional admission, outlined above, and set forth in case No. S-13-002, and acceptance of an application for reinstatement is conditioned on the application's being accompanied by a proposed monitored probation plan the terms of which are consistent with this opinion. See *id*. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323(B) of the disciplinary rules within 60 days after the order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Michael Gallner, as Personal Representative of the Estate of Judy Hoffman, deceased, and Jordan Gallner, individually and as Guardian and next friend of Makenzie Gallner, appellants, v. C. Gregg Larson, appellee.

865 N.W.2d 95

Filed June 26, 2015. No. S-14-240.

1. **Actions: Conversion.** An action for conversion sounds in law.
2. **Appeal and Error.** A district court's factual determination in a bench trial in an action at law has the same effect as a jury verdict and will not be set aside unless clearly wrong.
3. **Actions: Trusts: Equity.** An action to impose a constructive trust sounds in equity.
4. ____: ____: ____. An action to establish an oral trust sounds in equity.
5. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that 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.
6. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
7. **Agency: Proof.** Where a fiduciary or confidential relationship exists between the parties to a transaction, the burden of proof is upon the party holding the fiduciary or confidential relationship to establish the fairness, adequacy, and equity of the transaction.
8. **Agency.** It is the duty of the fiduciary to fully inform the other party of all the facts relating to the subject matter of the transaction which

come to the knowledge of the fiduciary and which are material for the other party to know for the protection of that party's interest.

9. **Attorney and Client: Agency.** It is axiomatic that the relationship between attorney and client is a fiduciary or confidential one.
10. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellants.

Joshua C. Dickinson and Shilee T. Mullin, of Spencer, Fane, Britt & Browne, L.L.P., for appellee.

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

Heavican, C.J.

## I. INTRODUCTION

Michael Gallner (Gallner) filed a complaint against C. Gregg Larson alleging breach of fiduciary duty arising out of the attorney-client relationship, breach of fiduciary duty arising out of the duty of a trustee, and conversion. Gallner sought either money damages or the imposition of an oral or constructive trust as to proceeds paid out to Larson as beneficiary of various life insurance policies following the death of Judy Hoffman (Judy).

The district court dismissed Gallner's claims and entered judgment in Larson's favor. Gallner appeals. We affirm.

## II. FACTUAL BACKGROUND

Gallner and Judy were married in 1982 and divorced in 1994. There was one son as a result of their marriage, Jordan Gallner. Jordan is the father of Makenzie Gallner.

Judy was a resident of Omaha, Nebraska, and an attorney licensed to practice law. She died intestate on December 10, 2007. Gallner was named personal representative of her estate.

The present litigation involves Larson, who was a friend of Judy's. Judy and Larson met in the early 1990's when both represented different defendants in a federal criminal case. Over the years, Larson assisted Judy in various legal matters, including continuing legal matters relating to her divorce from Gallner. Larson, who resides in another state, would also periodically visit Omaha for personal and professional activities. On those visits, Larson would sometimes stay at Judy's home. Judy attended Larson's wedding and also attended Larson's wife's funeral. Judy introduced Larson to her parents. Jordan testified that Larson was a close friend of Judy's and that he, Jordan, telephoned Larson upon Judy's eventual death.

In November 1999, Judy engaged an attorney to draft a trust document. That document named Judy as trustee and Larson as successor trustee. Jordan was the beneficiary under the trust. In early 2000, Judy sent a copy of the trust document to Larson. Larson testified that he notified Judy he was not in a position to serve as trustee given his distance from Omaha. Larson provided no legal advice to Judy concerning the trust document. There is no indication that Judy ever executed this trust document.

At the same time Judy sent Larson this draft trust, she also sent two other documents. One, exhibit 158, was a handwritten note dated January 27, 2000, purportedly from Judy to Larson. This note read in full:

> Gregg —
>
> I looked for you on the news — thought you might be handing out your business cards after that snowstorm interstate accident[.] Lots of broken bones & wrongful deaths — That was sick, wasn't it?

> Anyway, when you can, look this over. You're the executor or Trustee or whatever, if I die.
>
> Also, I finally got approved on the life insurance. You're the straight-up beneficiary on that. It's yours.

Gallner objected to exhibit 158 on best evidence grounds because the exhibit was a photocopy of the original note, which was no longer available. That objection was overruled.

The other document was the beneficiary designation on a $100,000 American Family Life Insurance Company policy (American Family policy). Apparently, Jordan had originally been the primary beneficiary, but in late November 1999, Judy changed the primary beneficiary to Larson, who was listed as a "family friend." The contingent beneficiary had been, and remained, Judy's father.

In November 2000, Judy obtained employment as an instructor at a community college in Omaha. She met with the coordinator of benefits and compensation at the beginning of her employment. Judy's benefits included a "UnumProvident" life insurance policy (Unum policy) and a 403(b) retirement account. The record shows that the 403(b) account was split equally between a Fidelity Investments account and a TIAA-CREF account.

On the Unum policy, Judy designated Larson as her primary beneficiary and Jordan as her contingent beneficiary. On the Fidelity Investments account, Judy designated Larson as primary beneficiary and Jordan as contingent beneficiary. Judy did not make any mention of a trust or trustee on either of Larson's designations. Larson is identified as "friend/atty" where the relationship is requested.

However, on the TIAA-CREF account, Judy designated Jordan as primary beneficiary and Larson as contingent beneficiary. Jordan was also designated as primary beneficiary for distribution of final pay and accumulated leave pay from the college, with Larson listed as contingent beneficiary.

In the fall of 2007, Judy engaged attorney Larry Forman to draft a last will and testament. The draft will and cover letter

were sent to Judy on October 11. The will designated the distribution of Judy's tangible personal property and "insurance policies and claims under such policies on such property" to Jordan, with the remainder of her estate to Jordan and Makenzie. The trustee and personal representative under this will was to be Larson. On its face, the will does not indicate any intention with regard to any life insurance policies, nor does it contemplate any trusts funded by life insurance policies or retirement accounts. The will does not name any of the assets or funds at issue in this case.

Forman testified at trial that Judy identified her assets to include her house, a First National Bank account, a "Provident Trust," her TIAA-CREF account, and shares of "Heinz and UP stock." It is not clear from the record whether the "Provident Trust" and the Unum policy were in fact the same asset or two separate assets. In addition, Judy also indicated to Forman that she had a 401K account. In fact, Judy had a 403(b) retirement account; the parties appear to dispute whether Judy was referring to the 403(b) account when she indicated she had a 401K. Forman further testified that Judy did not mention any life insurance policies. In his testimony, Forman indicated that life insurance proceeds were not contemplated to be included in the estate as the will was drafted; rather, the testamentary trust created by the draft will included only the "residue and remainder of the estate." This will was apparently never executed.

Judy died on December 10, 2007. Jordan telephoned Larson that day to inform him of Judy's death. Larson testified that he spoke to Jordan twice on December 10 and once on December 11. Jordan agreed that they spoke twice on December 10, but testified they did not speak on December 11.

Jordan's and Larson's accounts of their conversations also differ. Jordan testified that Larson told him there were "policies" for which Larson was trustee and that Larson would be there to help Jordan take care of Makenzie. Larson, on the other hand, disputed that he mentioned any "policies" or

indicated that he was a trustee. Larson further noted that he was unaware of the existence of multiple policies, had in 2000 declined to serve as trustee, and at the time of these conversations, was unaware of the 2007 draft will.

Larson further claimed that he spoke to Gallner, who told him that Forman had drafted a will for Judy. Gallner denied having informed Larson of that fact and further noted that he disliked Larson such that he would not have conversed with him at all. The district court agreed that Larson did not learn of the will from Gallner. Rather, the district court found that Larson likely learned of the 2007 will from Judy.

The district court found Jordan's recollection of his conversation with Larson to be more credible. The district court concluded that the telephone conversation between Jordan and Larson created the inference that Larson knew Forman had been engaged to draft a will and that there might have been some duties for Larson and some "'policies'" to be held in trust.

Larson contacted Forman on December 11, 2007, in order to obtain a copy of the draft will. On December 13, a copy of that will was faxed to Larson.

As found by the district court, Larson eventually received $236,024.33 from the two life insurance policies and the retirement account. Upon learning that Larson was the beneficiary on these policies and the retirement account, Gallner, as personal representative of Judy's estate, demanded return of the funds. Gallner filed a complaint against Larson on May 2, 2008. Following a bench trial, the district court found for Larson and against Gallner. This appeal followed.

## III. ASSIGNMENTS OF ERROR

Gallner assigns that the district court erred in (1) determining that an express trust needed to be created in order to find Larson liable and in placing the burden to prove such trust on Gallner, (2) failing to impose a constructive trust, (3) failing to find that Larson deviated from the standard of care

and committed legal malpractice by accepting and retaining Judy's death benefit funds given his status as her attorney, and (4) admitting exhibit 158 into evidence.

## IV. STANDARD OF REVIEW

[1,2] An action for conversion sounds in law.[1] A district court's factual determination in a bench trial in an action at law has the same effect as a jury verdict and will not be set aside unless clearly wrong.[2]

[3-5] An action to impose a constructive trust sounds in equity.[3] An action to establish an oral trust also sounds in equity.[4] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that 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.[5]

[6] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[6]

## V. ANALYSIS

On appeal, Gallner assigns four errors to the district court, which can be restated as two: that Larson breached some duty owed to Judy and, as a result, he should be liable for conversion or a constructive trust should be placed on the insurance proceeds, and that the district court erred in admitting

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[1] *Krzycki v. Krzycki*, 284 Neb. 729, 824 N.W.2d 659 (2012).

[2] *Id.*

[3] *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007).

[4] *Gasper v. Moss*, 204 Neb. 24, 281 N.W.2d 213 (1979).

[5] *Eggleston, supra* note 3.

[6] *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013).

exhibit 158, the photocopy of the note purportedly from Judy to Larson.

### 1. Admissibility of Exhibit 158

We begin with Gallner's contention that the district court erred in overruling his best evidence objection to exhibit 158, because the disposition of this assignment of error impacts the remainder of our analysis. We review the district court's decision for an abuse of discretion.[7]

Exhibit 158 was the note from Judy to Larson informing Larson of the 1999 trust and the American Family insurance policy. The 2-page note itself is handwritten, but "Judy K. Hoffman" was preprinted across the top of the first page. In addition, the first page of the note was written on ruled paper, while the second page was not. Gallner argues that the photocopy of the note which was admitted into evidence was not the best evidence and that Larson should have had to produce the original. Larson explained that the original was not available, though he did not explain why.

Neb. Rev. Stat. § 27-1002 (Reissue 2008) provides:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or of the Legislature of the State of Nebraska or by other rules adopted by the Supreme Court of Nebraska.

Neb. Rev. Stat. § 27-1003 (Reissue 2008) provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

In this instance, Jordan testified that he believed the handwriting on the note to be Judy's. But Jordan also testified that Judy usually signed her name to her notes. He also commented upon the lack of lines on the second page of the note.

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[7] See *id.*

Section 27-1003 allows the admissibility of a duplicate unless a genuine question is raised as to the authenticity of the original. Jordan's testimony does not reach this threshold. The fact that the note was unsigned does not seem unusual given that Judy's name was printed at the top of the page. And the lack of lines on the second page suggests that the second page was written on the reverse side of the first page. As such, the district court did not abuse its discretion in admitting exhibit 158.

### 2. Breach of Fiduciary Duty

#### (a) Attorney/Client Relationship

Gallner also argues that Larson owed Judy a fiduciary duty as her attorney. Gallner asserts that Larson should have advised Judy to seek additional independent legal counsel upon learning that he had been named as a beneficiary on the American Family policy. Gallner further argues that this failure tainted Judy's designation of Larson as primary beneficiary on the Unum policy and the Fidelity Investments account. Gallner also contends that Larson committed professional malpractice resulting in a breach of Larson's fiduciary duty to Judy.

[7,8] Where a fiduciary or confidential relationship exists between the parties to a transaction, the burden of proof is upon the party holding the fiduciary or confidential relationship to establish the fairness, adequacy, and equity of the transaction.[8] This rule rests on the premise that it is the duty of the fiduciary to fully inform the other party of all the facts relating to the subject matter of the transaction which come to the knowledge of the fiduciary and which are material for the other party to know for the protection of that party's interest.[9]

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[8] *Bauermeister v. McReynolds*, 254 Neb. 118, 575 N.W.2d 354 (1998).

[9] *Id.*

Both the Code of Professional Responsibility, which was in effect at the time this designation was made, and the now effective Nebraska Rules of Professional Conduct, address the issue of gifts from clients to attorneys. The code provides:

> A lawyer should not suggest to his or her client that a gift be made to the lawyer or for the lawyer's benefit. If a lawyer accepts a gift from his or her client, the lawyer is peculiarly susceptible to the charge that he or she unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his or her lawyer, the lawyer may accept the gift, but before doing so, the lawyer should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his or her client desires to name the lawyer beneficially be prepared by another lawyer selected by the client.[10]

The rules seem to impose an even stricter prohibition:

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.[11]

But the comments to the rules further note:

> A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a

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[10] Canon 5, EC 5-5, of the Code of Professional Responsibility.

[11] Neb. Ct. R. of Prof. Cond. § 3-501.8(c).

> gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).
>
> . . . If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide.[12]

The rules further provide guidance in interpretation:

> The Rules of Professional Conduct are rules of reason. . . . Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. . . . Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.
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> . . . Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's

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[12] § 3-501.8, comments 6 and 7.

> self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.[13]

[9] The record clearly shows that at the time Judy made Larson a beneficiary on the American Family policy, he was representing her in legal matters. It is axiomatic that the relationship between attorney and client is a fiduciary or confidential one,[14] and there is nothing that suggests the informality between Judy and Larson makes the relationship less so. We conclude that because Larson was Judy's attorney, he has the burden to show that the gift from Judy was fair.

We conclude that Larson has met his burden. As the district court noted, Judy was herself a lawyer. She did not suffer from any diminished mental capacity and was not elderly or incapacitated. She understood the consequences of her designation, as is evidenced by exhibit 158.

In addition, at the time Judy first contacted Larson regarding the American Family policy, she had already also engaged the services of another lawyer for estate planning purposes. She did not seek Larson's advice with regard to the drafting of the unexecuted trust or with respect to the change in beneficiary on the American Family policy. Larson did not seek the designation as beneficiary and was unaware of it until after the designation was made. And because Larson had done much uncompensated legal work for Judy, the designation seemed reasonable to Larson.

Of course, as counsel for Larson himself noted at oral arguments, it would have been preferable if Larson had simply

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[13] Neb. Ct. R. of Prof. Cond. Scope, comments 14 and 20.

[14] *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

told Judy to obtain independent legal advice regarding the designation. Indeed, that would be the best practice in such situations. But on these facts, Larson's failure to do so does not defeat the designation.

Moreover, we note that Gallner essentially argues that Larson violated the disciplinary rules applicable to Larson as an attorney, and therefore breached a duty to Judy. But as we note above, the rules are designed to provide guidance and "not designed to be a basis for civil liability."

[10] Gallner next asserts that Larson breached his fiduciary duty when he committed professional malpractice. In a civil action for legal malpractice, a plaintiff alleging professional negligence on the part of an attorney must prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.[15] When a plaintiff asserts attorney malpractice in a civil case, the plaintiff must show that he or she would have been successful in the underlying action but for the attorney's negligence.[16]

But there is simply no evidence of an employment relationship regarding estate matters upon which to base a malpractice claim. Larson plainly did not represent Judy on any estate planning matter. Nor can Gallner show a neglect of duty. We concluded above that Larson showed on these facts the designation of him as beneficiary was fair. Finally, Gallner cannot show any loss, because as noted above, Judy's father, not Jordan or the estate, was the contingent beneficiary on the American Family policy. We find no merit to this argument.

(b) Trustee

Gallner also argues that Larson breached the fiduciary duty he owed to Judy as trustee of her trust. Gallner contends that

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[15] *Harris v. O'Connor*, 287 Neb. 182, 842 N.W.2d 50 (2014).

[16] *Id.*

an oral trust was created for which Larson was the trustee and that the funds designated to Larson were actually given to him as trustee for Jordan and Makenzie.

But the evidence does not support the creation of a trust, oral or otherwise. There is evidence of a 1999 trust for which Larson was listed as trustee. But Larson testified that he informed Judy that he could not serve as trustee, and in fact, the 1999 trust was never executed. There is also evidence of a testamentary trust from a 2007 will for which Larson was listed as trustee. But that will was also never executed. Testimony from the attorney who drafted that will suggests that he was not fully informed of the existence of the assets now at issue in this appeal.

Finally, the designations themselves refute the assertion that Larson was given this property as a trustee. The American Family policy names the primary beneficiary as Larson, a "family friend." The Unum policy and Fidelity Investments account listed the primary beneficiary as Larson, a "friend/atty." At the time Judy made Larson the beneficiary to the American Family policy, she also sent him the note informing him that he was the "straight-up beneficiary" and that "[i]t's yours."

And though the district court may have found that prior to Judy's death Larson was aware of the 2007 will, the district court also found that Jordan's

> recollection [that Larson informed him that Judy left a will/trust] is clearly not specific enough to support the conclusion that [Judy] had declared her intention to create a trust from the Unum policy and the Fidelity account. Larson's knowledge that [Judy] may have a will and he may be a trustee is not evidence of [Judy's] intent to create an oral trust with the Unum policy proceeds or the Fidelity account.

To the extent that the district court was making credibility determinations regarding Jordan's, Gallner's, and Larson's conflicting testimony, we defer to those determinations. And

upon our de novo review, we agree with the district court that the record supports the conclusion that there was no oral trust created in this case. Moreover, Larson engaged in no fraud or misrepresentation such that the imposition of a constructive trust would be appropriate or necessary. Nor did Larson unlawfully convert the property, as he was the designated beneficiary of the proceeds. There is no merit to Gallner's argument on this point.

Gallner's assignments of error are without merit.

## VI. CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

STEPHAN and MCCORMACK, JJ., not participating.

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# Paul Castonguay, appellant, v. Leigh Ann Retelsdorf et al., appellees.

865 N.W.2d 91

Filed June 26, 2015. No. S-14-292.

1. **Actions: Records: Appeal and Error.** A district court's denial of in forma pauperis status is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Statutes.** When a statute specifically provides for exceptions, items not excluded are covered by the statute.
3. **Courts.** The courts are not at liberty to engraft on Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) any additional requirements for proceeding in forma pauperis.
4. **Venue.** Filing in the improper venue does not make the legal position asserted by the plaintiff frivolous or malicious for purposes of the in forma pauperis statute, Neb. Rev. Stat. § 25-2301.02 (Reissue 2008).
5. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is one wholly without merit, that is, without rational argument based on the law or on the evidence.
6. **Venue.** Venue is not jurisdictional and is not grounds for dismissal of the suit.
7. **Venue: Waiver.** The right of a defendant to be sued in a particular county or district is a mere personal privilege which the defendant may waive.

Appeal from the District Court for Lancaster County: Stephanie F. Stacy, Judge. Reversed and remanded with directions.

Paul Castonguay, pro se.

Douglas J. Peterson, Attorney General, and Blake E. Johnson for appellees.

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

McCormack, J.

## NATURE OF CASE

The issue presented is whether a trial court's sua sponte objection to venue is a proper basis under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) for denying in forma pauperis status.

## BACKGROUND

Paul Castonguay was convicted in Douglas County, Nebraska, pursuant to a plea, of first degree sexual assault. He subsequently filed a pro se complaint in Lancaster County, Nebraska, alleging an action under 42 U.S.C. § 1983 (2012). The complaint was brought against prosecutors, public defenders, and two attorneys whose capacity in the underlying criminal action is unclear from the complaint. Castonguay alleged that the defendants withheld exculpatory DNA evidence, and that the assistant attorney general lied about the existence of the DNA evidence in response to a request for discovery filed by Castonguay. Castonguay sought money damages. The complaint does not make clear whether the defendants are being sued in their official or individual capacities. The DNA report attached to the complaint indicates no male DNA was found on the victim.

Castonguay moved for leave to proceed in forma pauperis. He attached to his motion an affidavit of poverty and a certification of the Nebraska Department of Correctional Services concerning his institutional account transactions. The district court, acting sua sponte, objected that venue was not proper in Lancaster County. On that basis, the court also objected sua sponte to the motion to proceed in forma pauperis. The court made "no comments on the merits of the lawsuit." After a hearing, the court denied Castonguay's motion to proceed in forma pauperis. The court reasoned that the complaint contained no allegations suggesting venue was proper in Lancaster County. The court opined that if Castonguay wished to proceed with

the action in forma pauperis, he should make such a request in Douglas County. Castonguay appeals.

## ASSIGNMENTS OF ERROR

Castonguay asserts, consolidated and restated, that the district court erred in denying him in forma pauperis status.

## STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.[1]

## ANALYSIS

There was no objection that Castonguay had sufficient funds to pay the costs of his action. There was no objection that the legal position taken in the action was frivolous or malicious. Rather, the district court denied Castonguay's motion to proceed in forma pauperis on its sua sponte objection that the complaint alleged no facts indicating that Lancaster County was the proper venue for Castonguay's action. We agree with Castonguay that the court erred in denying in forma pauperis status on that basis.

[2,3] Section 25-2301.02(1) states that an application to proceed in forma pauperis "shall be granted unless there is an objection that the party filing the application (a) has sufficient funds . . . or (b) is asserting legal positions which are frivolous or malicious." When a statute specifically provides for exceptions, items not excluded are covered by the statute.[2] The courts are not at liberty to engraft on § 25-2301.02 any additional requirements for proceeding in forma pauperis.[3]

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[1] § 25-2301.02(2); *Tyler v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 795, 701 N.W.2d 847 (2005).

[2] *Conroy v. Keith Cty. Bd. of Equal.*, 288 Neb. 196, 846 N.W.2d 634 (2014); *Chapin v. Neuhoff Broad.-Grand Island, Inc.*, 268 Neb. 520, 684 N.W.2d 588 (2004).

[3] See, e.g., *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003). See, also, *Tyler v. City of Milwaukee*, 740 F.2d 580 (7th Cir. 1984).

In *Tyler v. Natvig*,[4] the Nebraska Court of Appeals accordingly held that illegibility was not a proper basis for denying the plaintiff in forma pauperis status. The court explained that being prevented by illegibility from determining whether the complaint was frivolous or malicious "does not fulfill the requirement of § 25-2301.02 that the court find that the complaint was actually frivolous or malicious as a prerequisite to denying the application."[5] The district court was free to pursue other avenues to address the illegibility of the complaint, such as striking the complaint pursuant to Neb. Ct. R. § 6-1503 and holding the application to proceed in forma pauperis in abeyance until the applicant provided a legible complaint. But the court could not address this issue via a denial of in forma pauperis status.

[4] Although the district court never expressly found Castonguay was asserting a frivolous or malicious legal position, the State asserts that the complaint's failure to allege facts supporting Lancaster County as the proper venue is equivalent to asserting a frivolous or malicious legal position. We disagree. Just as illegibility does not make the alleged legal position "frivolous" or "malicious" for purposes of § 25-2301.02, we hold that filing in the improper venue does not make the legal position asserted by the plaintiff frivolous or malicious.

[5-7] "A frivolous legal position pursuant to § 25-2301.02 is one wholly without merit, that is, without rational argument based on the law or on the evidence."[6] Venue, as expressly stated by the venue statute[7] and emphasized by our case law, is not jurisdictional and is not grounds for dismissal of the suit.[8] "'[T]he right of a defendant to be sued in a particular

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[4] *Tyler v. Natvig*, 17 Neb. App. 358, 762 N.W.2d 621 (2009).

[5] *Id.* at 360, 762 N.W.2d at 623.

[6] *Id.* See, also, *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002).

[7] Neb. Rev. Stat. § 25-403.01 (Reissue 2008).

[8] See *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988).

county or district is a mere personal privilege which [the defendant] may waive.'"[9] Indeed, because venue is a waivable personal privilege, it is not clear that it is a matter that can be objected to by a court sua sponte.[10]

The legal position alleged in a complaint is not "wholly without merit" simply because the alleged facts indicate that the defendant may—but may not—ask for a change of venue. This is especially true because, even if the defendant asks for a change of venue, the lawsuit will continue on the merits. The underlying merits of the legal position taken in the complaint will not be affected by the objection to venue; they will simply be decided by a different court. Improper venue is thus in contrast to cases wherein an affirmative defense apparent from the complaint constitutes an absolute jurisdictional bar or otherwise wholly disposes of the merits of the suit in the defendant's favor.[11]

We observe that the Third Circuit has specifically rejected the notion that venue can be grounds for denying in forma pauperis status under similar statutory language.[12] The courts of the Third Circuit have stated that in the absence of any statutory authority to deny in forma pauperis status for lack of venue, it is inappropriate for the trial court to dispose of the case sua sponte on an objection to the complaint that would be waived if not raised by the defendant in a timely manner.[13] Even if raised, these courts note, there would be a possibility of transferring the case to a district where venue

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[9] *Id.* at 421, 422 N.W.2d at 780.

[10] See, e.g., 14D Charles Alan Wright et al., Federal Practice and Procedure § 3826 (4th ed. 2013).

[11] See, *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006); *Yellen v. Cooper*, 828 F.2d 1471 (10th Cir. 1987); *Sanders v. United States*, 760 F.2d 869 (8th Cir. 1985).

[12] *Sinwell v. Shapp*, 536 F.2d 15 (3d Cir. 1976); *Fiorani v. Chrysler Group*, 510 Fed. Appx. 109 (3d Cir. 2013); *Crawford v. Frimel*, 197 Fed. Appx. 144 (3d Cir. 2006).

[13] See *id.*

would be proper, rather than dismissing the complaint without prejudice. And "[t]he denial of leave to proceed in forma pauperis would hardly seem to be a suitable vehicle for such a determination."[14] The State points to no case law holding differently.

The district court for Lancaster County, whether or not the proper venue for Castonguay's action, had subject matter jurisdiction over the complaint.[15] Unless and until the action is transferred to another venue, the district court for Lancaster County has the power and the duty to determine the merits of any motions before it. This includes Castonguay's motion to proceed in forma pauperis.

The statute governing in forma pauperis status does not allow the court to deny the plaintiff's application on the grounds of improper venue. Rather, the exceptions to granting in forma pauperis status are limited to objections based on (1) sufficient funds or (2) the plaintiff's asserting legal positions which are frivolous or malicious. There is no allegation here that Castonguay had sufficient funds. The court did not determine that the complaint was frivolous or malicious, and we reject the State's argument that improper venue is tantamount to asserting a frivolous or malicious legal position.

## CONCLUSION

Because § 25-2301.02 does not permit denial of in forma pauperis status based on a sua sponte objection to venue, the district court erred in denying Castonguay in forma pauperis status on that basis. We reverse the judgment and remand the cause with directions to proceed in a manner consistent with this opinion.

Reversed and remanded with directions.

Cassel, J., not participating.

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[14] *Sinwell v. Shapp, supra* note 12, 536 F.2d at 19.

[15] See, e.g., *Blitzkie v. State, supra* note 8.

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John A. Kasel, appellee, v. Union Pacific Railroad Company, appellant, and Liberty Mutual Insurance Company, intervenor-appellee.

865 N.W.2d 734

Filed June 26, 2015. No. S-14-563.

1. **Contracts: Judgments: Appeal and Error.** The meaning of an unambiguous contract is a question of law, in connection with which an appellate court has an obligation to reach a conclusion independently of the determination made by the court below.
2. **Contracts: Assignments.** An assignee of contractual rights stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor.
3. ____: ____. An assignment does not affect or change any of the provisions of the contract.
4. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
5. **Contracts.** If the terms of a contract are clear, a court may not resort to rules of construction.
6. ____. The court must accord clear terms of a contract their plain and ordinary meaning as an ordinary or reasonable person would understand them.
7. ____. The fact that the parties suggest opposing meanings of a disputed instrument does not compel the conclusion that the instrument is ambiguous.

Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Affirmed.

Walter J. Downing, of Hall & Evans, L.L.C., for appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka, Longoria & Kishiyama, P.C., L.L.O., for appellee.

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

Connolly, J.

## SUMMARY

John A. Kasel sustained injuries at a motel while he was an employee of Union Pacific Railroad Company (Union Pacific). Kasel sued Union Pacific and the motel. After the parties settled, Union Pacific asserted a contractual right of subrogation to the extent of medical payments made on Kasel's behalf by a third-party administrator. The contract in question created a lien or right of reimbursement if a third party is liable, but not if Union Pacific is liable. The court held that Union Pacific did not have a lien or right of reimbursement because it was party to the settlement. We also conclude that Union Pacific is a liable party under the settlement. We therefore affirm.

## BACKGROUND

### Parties

Kasel, an engineer, stayed at an Oak Tree Inn in Wyoming, while on duty for Union Pacific in October 2009. Union Pacific contracted with Oak Tree Inn to provide overnight lodging for its employees. Kasel sustained injuries when the bottom of the bathtub in his room gave way.

In January 2010, Kasel sued Union Pacific and Oak Tree Inn. Count I of the complaint alleged that Union Pacific was negligent and liable for his injuries under the Federal Employers' Liability Act (FELA). Count II alleged that Oak Tree Inn negligently failed to provide a reasonably safe premises, warn of hidden dangers, and inspect for defects.

Liberty Mutual Insurance Company (Liberty Mutual) accepted tenders of defense from both Union Pacific and Oak

Tree Inn. Liberty Mutual issued insurance policies to Oak Tree Inn, and Oak Tree Inn had executed an indemnity agreement with Union Pacific. Counsel hired by Liberty Mutual represented both defendants.

The Union Pacific Railroad Employes Health Systems (UPREHS) paid some medical expenses on behalf of Kasel. UPREHS was the third-party administrator for on-duty injuries to active Union Pacific employees. UPREHS is not a subsidiary of Union Pacific.

During the period relevant to this case, UPREHS' "Challenger Health Plan" applied to Kasel. Article XI of the Plan—titled "SUBROGATION"—provides:

> a) In consideration of treatment or payment for treatment of a Member by UPREHS, said Member assigns, transfers and subrogates to UPREHS, to the extent of all expenditures made in behalf of said Member by UPREHS, all rights, claims, interest and rights of action that the Member may have against any party, person, firm or corporation that may be liable for the loss except . . . Union Pacific . . . and its affiliated and subsidiary companies. Said UPREHS Member authorizes UPREHS to sue, compromise or settle in the Member's name and UPREHS is fully substituted for the Member and subrogated to all of the Member's rights to the extent of all expenditures made in behalf of said Member. . . .
>
> b) In the event a Member elects to pursue a suit, claim or right of action against any party, person, firm, or corporation that may be liable for loss, except . . . Union Pacific . . . , with respect to on-duty injuries, UPREHS is entitled to full reimbursement to the extent of all benefits it pays out of any proceeds, settlement, or verdict recovered by the Member. In all such cases, UPREHS shall have a lien against any recovery and expects and is entitled to be reimbursed in full in the amount of all benefits it pays, without any reduction for costs or attorney's fees. This subparagraph shall not in any way limit

or impair UPREHS' right to independently recover such expenditure as set forth in subparagraph (a) above.

In March 2012, 2 days before the start of trial, Kasel's attorney and an attorney representing Union Pacific and Oak Tree Inn reached a tentative agreement to settle Kasel's claims.

In May 2012, Kasel and his wife signed a "Release of All Claims" (Release), early drafts of which "originated" from Union Pacific. The Release provided: "For the sole gross consideration of Four Million Dollars . . . to be paid on behalf of **DEFENDANTS** to **CLAIMANTS**, **CLAIMANTS** releases [sic] any and all **CLAIMS** against **RELEASEES** arising out of . . . **KASEL'S** employment with **UNION PACIFIC** . . . ." The Release defined "**DEFENDANTS**" as Union Pacific and Oak Tree Inn; defined "**RELEASEES**" as Union Pacific, Oak Tree Inn, and Liberty Mutual; and defined "**CLAIMANTS**" as Kasel and his wife. The "**CLAIMS**" subject to the Release include not only those arising from Kasel's October 2009 injuries, but all claims arising out of Kasel's employment with Union Pacific. For example, Kasel expressly waived any wage claims under collective bargaining agreements and claims for unlawful discrimination under federal law. In addition to dismissing his lawsuit, Kasel agreed to resign from active service with Union Pacific and to never again seek employment with the railroad.

## Procedural Background

After Kasel and his wife signed the Release, a disagreement arose about Union Pacific's subrogation rights. The court sustained Liberty Mutual's motion to interplead $300,000 to the clerk of court. The court later released $129,736.70 of the interpleader fund to Kasel after the parties stipulated that Union Pacific sought only $170,263.30.

Union Pacific and UPREHS jointly filed a notice of claims to the interpleader fund. In their "Claim for Subrogation," they alleged that the "moment UPREHS began paying medical

bills on behalf of [Kasel], [Kasel] assigned the right of subrogation to UPREHS to pursue any claims against any third party," and that "UPREHS assigned to Union Pacific the right of subrogation that [Kasel] assigned to UPREHS." In their second and third claims, Union Pacific and UPREHS alternatively asserted that UPREHS had a lien against the settlement that it did or did not assign to Union Pacific.

In May 2014, the court released the remaining $170,263.30 to Kasel. The court reasoned that the settlement was just as much on Union Pacific's behalf as it was on behalf of Oak Tree Inn: "Liberty Mutual did not pay four million dollars to settle only Kasel's claims against Oak Tree Inn. It was paid to settle all Kasel's claims against both [Union Pacific] and Oak Tree Inn." The court emphasized the unity of Union Pacific's and Oak Tree Inn's fortunes:

> [D]uring the course of this lawsuit [Union Pacific] and Oak Tree Inn were represented by the same attorney or attorneys . . . . From the time that Kasel filed his Complaint until the time the case was settled Kasel's claim was against both Oak Tree Inn and [Union Pacific]. The parties' eventual "Release of All Claims" was a global release wherein Kasel and his wife released all claims against [Union Pacific] and Oak Tree Inn (and its insurer) "arising out of [Kasel's] employment with Union Pacific . . . ."

Union Pacific appealed. The Court of Appeals sustained Oak Tree Inn's motion to be excused from the appeal.

## ASSIGNMENT OF ERROR

Union Pacific assigns that the court erred by "holding that UPREHS did not have a valid subrogation interest in Kasel's settlement with Union Pacific and Oak Tree Inn and in holding that as a result neither Union Pacific nor UPREHS had a valid lien, right of subrogation or right of reimbursement against the interpleaded funds."

## STANDARD OF REVIEW

[1] The meaning of an unambiguous contract is a question of law, in connection with which an appellate court has an obligation to reach a conclusion independently of the determination made by the court below.[1]

## ANALYSIS

Union Pacific argues that "[b]ecause Kasel sued a responsible third party . . . ," it has a lien against the settlement funds.[2] Union Pacific's in-house counsel conceded that Kasel could have sued only Union Pacific and that, if Kasel had done so, "there's no UPREHS lien." But, according to Union Pacific, once Kasel sued a third party, the railroad was entitled to recover medical expenses paid by UPREHS whether or not Union Pacific was also liable.

[2,3] We note that Union Pacific is not asserting a subrogation interest arising from a relationship between itself and Kasel. Instead, Union Pacific argues that UPREHS assigned to it certain contractual subrogation rights. As an assignee, Union Pacific stands in the shoes of its assignor and is bound by the terms of the contract to the same extent as UPREHS.[3] An assignment does not affect or change any of the provisions of the contract.[4] If the assignor could not have maintained an action based on the contract, neither can the assignee.[5]

The contractual provision in question is article XI of the Challenger Health Plan. There, Kasel generally transferred to UPREHS his remedies against third parties in the amount that UPREHS paid medical expenses on his behalf. In paragraph (a),

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[1] *Weber v. North Loup River Pub. Power*, 288 Neb. 959, 854 N.W.2d 263 (2014).

[2] Brief for appellant at 11.

[3] See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[4] *Hansen v. E. L. Bruce Co.*, 162 Neb. 759, 77 N.W.2d 458 (1956).

[5] *Id.*

Kasel "authorize[d] UPREHS to sue, compromise or settle in [Kasel's] name." In paragraph (b), Kasel recognized UPREHS' right to assert a lien or right to reimbursement against any settlement Kasel reached with "any party, person, firm, or corporation that may be liable for loss, except . . . Union Pacific . . . , with respect to on-duty injuries." This appeal involves the interpretation of paragraph (b).

[4-7] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[6] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[7] If the terms of a contract are clear, a court may not resort to rules of construction.[8] The court must accord clear terms their plain and ordinary meaning as an ordinary or reasonable person would understand them.[9] The fact that the parties suggest opposing meanings of a disputed instrument does not compel the conclusion that the instrument is ambiguous.[10]

We conclude that Union Pacific does not have a lien or right of reimbursement under the unambiguous terms of the Challenger Health Plan. The railroad argues that "Liberty Mutual on behalf of Oak Tree Inn, a third party, funded the settlement; Union Pacific did not."[11] But Kasel sued Union Pacific in addition to Oak Tree Inn. Liberty Mutual accepted tenders of defense from both Union Pacific and Oak Tree Inn. The attorney hired by Liberty Mutual represented both Union Pacific and Oak Tree Inn. And Liberty Mutual funded the settlement on behalf of the "**DEFENDANTS**," defined as

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[6] *Gibbons Ranches v. Bailey*, 289 Neb. 949, 857 N.W.2d 808 (2015).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Reply brief for appellant at 3.

Union Pacific and Oak Tree Inn, in order to relieve both parties of their potential liability to Kasel. Union Pacific's argument that the settlement was on behalf of Oak Tree Inn only is simply inaccurate.

In fact, the Release benefits Union Pacific in ways that it does not benefit Oak Tree Inn. Kasel waived potential claims against Union Pacific that are wholly unrelated to the incident at the Wyoming motel. For example, Kasel waived employment discrimination claims and claims for unpaid wages. The surrender of these rights benefited only Union Pacific. The railroad was at least an equal party to the Release.

Union Pacific argues that the trial court's interpretation of article XI "circumvent[ed] FELA law,"[12] citing our decision in *Strasburg v. Union Pacific RR. Co*.[13] There, a railroad employee filed separate lawsuits against Union Pacific and a third-party manufacturer. The employee settled his claims against the manufacturer and obtained a judgment against Union Pacific. The trial court sustained Union Pacific's motion for a setoff against the verdict for the amount of the employee's medical expenses that UPREHS paid. But the court declined to give Union Pacific a setoff for the difference between the amount that medical providers initially billed and what UPREHS actually paid (the "'writeoff amount'").[14]

Union Pacific appealed in *Strasburg*, assigning that the court erred by not including the writeoff amount in the medical expense setoff. We noted that UPREHS assigned its subrogation rights to Union Pacific, but we did not discuss the source of UPREHS' subrogation rights in any detail. Furthermore, the employee did not cross-appeal and did not dispute that Union Pacific had a lien for the amount that

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[12] Brief for appellant at 13.

[13] *Strasburg v. Union Pacific RR. Co.*, 286 Neb. 743, 839 N.W.2d 273 (2013).

[14] *Id.* at 747, 839 N.W.2d at 277.

UPREHS actually paid. And, unlike the instant case, the employee separately sued and recovered from the railroad and a third-party tort-feasor. For these reasons, *Strasburg* does not mean that Union Pacific is entitled to a lien or right of reimbursement in this case.

## CONCLUSION

Under the unambiguous terms of the contract, Union Pacific does not have a lien or right of reimbursement. We therefore affirm the order releasing the remainder of the interpleader fund to Kasel.

AFFIRMED.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Jordan D. Klug, appellant, v.
Nebraska Department of
Motor Vehicles, appellee.
864 N.W.2d 676

Filed June 26, 2015. No. S-14-600.

1. **Administrative Law: Motor Vehicles: Appeal and Error.** An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
3. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
4. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
5. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Timothy S. Noerrlinger for appellant.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellee.

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

Wright, J.

## NATURE OF CASE

Jordan D. Klug appeals a district court's order affirming the lifetime revocation by the Nebraska Department of Motor Vehicles (DMV) of his commercial driver's license (CDL). The revocation was based on a Kansas administrative license proceeding and a South Dakota criminal conviction for driving under the influence of alcohol. For the reasons discussed below, we affirm the judgment of the district court.

## SCOPE OF REVIEW

[1] An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record. *Strong v. Neth*, 267 Neb. 523, 676 N.W.2d 15 (2004).

[2] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court. *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013).

## FACTS

On January 19, 2010, Klug was administratively adjudicated to have committed the offense of "Driving Under Influence-1st" in the State of Kansas. Klug was not criminally convicted of driving under the influence in this administrative proceeding, but instead completed a diversion program. On September 23, 2013, Klug was convicted in the Circuit Court of South Dakota of "Driving Under Influence-1st." On September 27, the DMV revoked Klug's CDL for life pursuant to Neb. Rev. Stat. § 60-4,168 (Cum. Supp. 2012).

Klug appealed the DMV's revocation to the district court pursuant to Neb. Rev. Stat. § 60-4,105 (Reissue 2010). He contended that the Kansas and South Dakota offenses were not "included" in § 60-4,168 and therefore did not provide a

basis for the DMV to revoke his CDL. Instead, he asserted that § 60-4,168 referred specifically to the Nebraska statutes for driving under the influence of alcohol—Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197 (Cum. Supp. 2014)—and therefore did not include out-of-state convictions for driving under the influence of alcohol.

The district court rejected Klug's argument. It found that the phrase "'in this or any other state'" in § 60-4,168(1) was intended by the Legislature to include all driving under the influence of alcohol convictions, including those which occurred in another state that are equivalent to a violation of driving under the influence in § 60-6,196 or § 60-6,197. The court determined that revoking Klug's CDL was proper pursuant to the statutory objective of the applicable statutes. Klug timely appealed.

## ASSIGNMENT OF ERROR

Klug assigns as error the district court's finding that the Kansas administrative license revocation and the South Dakota conviction for driving under the influence of alcohol were offenses included in § 60-4,168(1)(a) and therefore provided a basis to revoke his CDL.

## ANALYSIS

The issue is whether out-of-state convictions for driving under the influence of alcohol are included in the provisions of § 60-4,168 pertaining to the revocation of CDL's. At all times relevant to this case, § 60-4,168 provided:

> (1) Except as provided in subsections (2) and (3) of this section, a person shall be disqualified from driving a commercial motor vehicle for one year upon his or her first conviction, after April 1, 1992, *in this or any other state* for:
>
> (a) Driving a commercial motor vehicle in violation of section 60-6,196 or 60-6,197 or under the influence of a controlled substance or, beginning September 30,

> 2005, driving any motor vehicle in violation of section 60-6,196 or 60-6,197 or under the influence of a controlled substance;
>
> . . . .
>
> (3) A person shall be disqualified from driving a commercial motor vehicle for life if, after April 1, 1992, he or she:
>
> (a) Is convicted of or administratively determined to have committed a second or subsequent violation of any of the offenses described in subsection (1) of this section or any combination of those offenses arising from two or more separate incidents; or
>
> . . . .
>
> (7) For purposes of this section, conviction means an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law, in a court of original jurisdiction or by an authorized administrative tribunal . . . regardless of whether or not the penalty is rebated, suspended, or probated.

(Emphasis supplied.)

It is not disputed that both Klug's Kansas administrative license proceeding and his South Dakota criminal conviction are "conviction[s]" within the meaning of § 60-4,168(7). However, Klug argues (1) that the district court erred in finding those convictions were included under § 60-4,168 and (2) that the out-of-state convictions do not fit into the statutory scheme. He asserts that whereas § 60-4,168(1)(a) refers generally to controlled substances ("under the influence of a controlled substance"), it refers specifically to Nebraska statutes regarding driving under the influence of alcohol ("[d]riving a commercial motor vehicle in violation of section 60-6,196 or 60-6,197"). Klug therefore claims that § 60-4,168 includes out-of-state convictions for driving under the influence of a controlled substance, but not out-of-state convictions for driving under the influence of alcohol.

Klug was not convicted under nor did he suffer a loss of license pursuant to § 60-6,196 or § 60-6,197, but, rather, his offenses were pursuant to South Dakota and Kansas statutes for driving under the influence of alcohol. Consequently, he contends that his CDL should not have been revoked.

[3] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013). Section 60-4,168(1) expressly provides that a person shall be disqualified from driving a commercial motor vehicle upon his or her conviction "in this or any other state" for all violations listed in subsections (a) through (f). Although § 60-4,168(1)(a) identifies §§ 60-6,196 and 60-6,197 specifically, we conclude this preliminary phrase unambiguously demonstrates that the Legislature intended to include their equivalent violations in other states for driving under the influence of alcohol.

The exclusion of out-of-state convictions from § 60-4,168 would defeat the purpose of the statute. If the language is condensed to its rule pertaining to driving under the influence of alcohol, it reads:

> [A] person shall be disqualified from driving a commercial motor vehicle for one year upon his or her first conviction, after April 1, 1992, *in this or any other state* for:
>
> . . . [d]riving a commercial motor vehicle in violation of section 60-6,196 or 60-6,197 or . . .
>
> . . . A person shall be disqualified from driving a commercial motor vehicle for life if . . . he or she:
>
> (a) Is convicted of or administratively determined to have committed a second or subsequent violation of any of the offenses described in subsection (1) of this section

> or any combination of those offenses arising from two or more separate incidents[.]

See § 60-4,168(1)(a) and (3)(a) (emphasis supplied).

It is not a reasonable statutory interpretation to conclude that for a person to be convicted in "any other state," such person must be convicted of the specific Nebraska offenses for driving under the influence of alcohol. Consequently, the interpretation Klug offers cannot be what the Legislature intended. Both §§ 60-6,196 and 60-6,197 include prior out-of-state convictions for driving under the influence of alcohol in their sentencing framework. See Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2014). It would be unreasonable to consider a defendant's out-of-state convictions under §§ 60-6,196 and 60-6,197 for criminal sentencing purposes, but exclude them under § 60-4,168 to determine whether to revoke a driver's CDL based on convictions under those statutes.

[4] Klug's interpretation is contrary to the purpose of § 60-4,168. When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *TracFone Wireless v. Nebraska Pub. Serv. Comm.*, 279 Neb. 426, 778 N.W.2d 452 (2010). The purpose of § 60-4,168 is

> to implement the requirements mandated by the federal Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. 31100 et seq., the federal Motor Carrier Safety Improvement Act of 1999, Public Law 106-159, section 1012 of the federal Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, USA PATRIOT Act, 49 U.S.C. 5103a, and federal regulations and to reduce or prevent commercial motor vehicle accidents, fatalities, and injuries by: (1) Permitting drivers to hold only one operator's license; (2) disqualifying drivers for specified

> offenses and serious traffic violations; and (3) strengthening licensing and testing standards.

Neb. Rev. Stat. § 60-4,132 (Cum. Supp. 2012).

Thus, the purpose of the applicable statute is to reduce and prevent motor vehicle accidents and to comply with the mandates of federal law, including federal regulations, by disqualifying drivers for specific offenses and serious traffic violations. An interpretation of the statute that excludes out-of-state convictions for driving under the influence of alcohol would clearly defeat this purpose.

The State cites to various federal regulations demonstrating that states are required to disqualify commercial drivers who have been convicted of driving under the influence. One such regulation pertaining to state compliance with the federal CDL program mandates that states take action against a person required to have a CDL by disqualifying the person "who is convicted of an offense or offenses necessitating disqualification under § 383.51 of this subchapter." 49 C.F.R. § 384.231(b)(2) (2014). Table 1 of 49 C.F.R. § 383.51 (2014) provides that one such offense is being convicted of operating a motor vehicle while "[b]eing under the influence of alcohol as prescribed by State law." As explained above, Nebraska law contemplates out-of-state convictions for driving under the influence of alcohol. See § 60-6,197.02(1)(a)(i)(C). Therefore, compliance with federal regulations requires the State to take action against CDL holders who have been convicted of driving under the influence of alcohol.

We conclude that an interpretation of § 60-4,168(1) that applies only the portion of subsection (a) pertaining to controlled substances but excludes convictions in other states for driving under the influence of alcohol would not be sensible given the broader policies behind the statute. One can easily recognize the reasons for this. If the overall goal of § 60-4,168 is to promote commercial vehicle motor safety, excluding convictions for out-of-state driving under the influence of

alcohol from the DMV's decisionmaking process for CDL revocation would clearly undermine that purpose.

[5] Klug's argument is based solely on the language in § 60-4,168 that refers generally to convictions for driving under the influence of controlled substances but refers to specific statutes for driving under the influence of alcohol. Klug argues, "It would appear that for whatever reason, driving under the influence of alcohol was to be treated differently than the other offenses with regard to out-of-state convictions . . . ." Brief for appellant at 10. We disagree. It is not within the province of the courts to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Both the purpose and policy behind the statute guide our conclusion.

## CONCLUSION

For the reasons stated above, we affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Benjamin Frederick, appellant.
864 N.W.2d 681

Filed June 26, 2015. No. S-14-727.

1. **Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made below.
2. **Statutes.** A statute is not to be read as if open to construction as a matter of course.
3. **Statutes: Legislature: Intent.** It is the court's duty, if possible, to discover the Legislature's intent from the language of the statute itself.
4. ____: ____: ____. Only if a statute is ambiguous or if the words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, lead to some manifest absurdity, to some consequences which a court sees plainly could not have been intended, or to a result manifestly against the general term, scope, and purpose of the law, may the court apply the rules of construction to ascertain the meaning and intent of the lawgiver.
5. **Statutes.** A statute is ambiguous if it is susceptible of more than one reasonable interpretation, meaning that a court could reasonably interpret the statute either way.
6. **Legislature: Intent.** The intent of the Legislature is generally expressed by omission as well as by inclusion.
7. **Statutes: Appeal and Error.** An appellate court is not at liberty to add language to the plain terms of a statute to restrict its meaning.
8. **Statutes: Motor Vehicles: Licenses and Permits.** Because Neb. Rev. Stat. § 60-4,108 (Cum. Supp. 2014) is plainly written without the limitation of "public highways" found in other statutes, the Nebraska Supreme Court does not read that limitation into the statute.

Appeal from the District Court for Buffalo County, John P. Icenogle, Judge, on appeal thereto from the County Court for Buffalo County, Gerald R. Jorgensen, Jr., Judge. Judgment of

District Court affirmed in part, and in part sentence vacated and cause remanded for resentencing.

Greg C. Harris for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

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

McCormack, J.

## NATURE OF CASE

The defendant was convicted in county court of driving during revocation in violation of Neb. Rev. Stat. § 60-4,108(1) (Cum. Supp. 2014), which states:

> It shall be unlawful for any person to operate a motor vehicle during any period that he or she is subject to a court order not to operate any motor vehicle for any purpose or during any period that his or her operator's license has been revoked or impounded pursuant to conviction or convictions for violation of any law or laws of this state, by an order of any court, or by an administrative order of the director.

The only evidence presented at the trial besides the defendant's driving record reflecting that the defendant's license was revoked was the testimony of a local law enforcement officer. The officer testified that he found the defendant driving in a store parking lot. There was a passenger in the vehicle, and the vehicle was unlicensed. There was no evidence concerning the ownership of the vehicle. The officer testified that he did not see the defendant drive outside of the parking lot. The question on appeal is whether the evidence was sufficient to support the conviction.

## BACKGROUND

Benjamin Frederick was found guilty in a bench trial before the county court of driving during revocation in violation of

§ 60-4,108(1), a Class II misdemeanor. He was sentenced to 30 days of jail time and 9 months of probation.

Before trial, Frederick moved to suppress the testimony of the State's only witness, the officer who observed him driving with a suspended license. The officer testified that Frederick was driving a vehicle without license plates in a Wal-Mart parking lot in Kearney, Nebraska. The officer never observed Frederick operate the vehicle outside of the parking lot.

Arguments were not made on the record, but the court responded that the issue raised by Frederick in the motion to suppress "appear[ed] to be more of a trial issue." The court said that it would need "to read all these statutes and see how the scheme fits" before deciding the motion. The motion was later denied.

At trial, the officer testified that around 3 p.m. on December 31, 2012, a caller reported that "Benjamin Frederick" was driving without a license in the Wal-Mart parking lot. The officer responded to the call in a marked police cruiser. The officer observed the vehicle described by the caller when he arrived at the Wal-Mart parking lot. The vehicle did not have license plates. The officer was able to visually identify the driver as Frederick. There was a female passenger in the vehicle.

The officer followed Frederick's vehicle as it weaved up and down the parking lot aisles. The officer confirmed on his in-car mobile data terminal that Frederick's driver's license was revoked. The officer did not activate the police cruiser's lights, but Frederick eventually pulled into a parking space and exited the vehicle. Frederick admitted to the officer that he did not have a driver's license.

The State submitted into evidence Frederick's records with the Department of Motor Vehicles. The records show that at the time the officer observed Frederick driving in the Wal-Mart parking lot, his license was administratively revoked pursuant to "Section 60-498.02 et seq." as a result of his second offense of driving under the influence (DUI),

in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010). The administrative license revocation was to begin on July 7, 2012, and end on July 7, 2013.

The records also contain the county court judgment for second-offense DUI and its order sentencing Frederick to a 1-year license revocation beginning on November 14, 2012, and ending on July 7, 2013.

The records do not reflect an explicit assessment of points under the points system established in Neb. Rev. Stat. §§ 60-4,182 to 60-4,186 (Reissue 2010 & Cum. Supp. 2014).

Frederick moved to dismiss the State's case for failure to make a prima facie case. The arguments were not made on the record, but the court expressed that there had already been a motion to suppress on the same issue. The court opined that it had found the State's argument persuasive and saw "no reason to deviate from that reading of the law at this time." When the court subsequently discussed with Frederick the scheduling of sentencing, it stated that it assumed Frederick was planning to appeal to "get a definitive decision from a higher court."

Frederick appealed to the district court, arguing that the offense of driving under revocation cannot occur in a privately maintained parking lot. The district court affirmed the conviction.

The district court observed that there are two separate criminal offenses in the Motor Vehicle Operator's License Act[1] concerning the operation of a motor vehicle once a person has obtained an operator's license and has forfeited it. One offense is contained in § 60-4,186, the other is contained in § 60-4,108. Frederick was charged and convicted of violating § 60-4,108.

Section 60-4,186 provides, "It shall be unlawful to operate a motor vehicle on the public highways after revocation of an operator's license under sections 60-4,182 to 60-4,186 . . . ."

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[1] See Neb. Rev. Stat. §§ 60-462 to 60-4,188 (Reissue 2010 & Cum. Supp. 2014).

Highway is defined by § 60-470 as "the entire width between the boundary limits of any street, road, avenue, boulevard, or way which is publicly maintained when any part thereof is open to the use of the public for purposes of motor vehicle travel." Alley is defined by § 60-607 as "a highway intended to provide access to the rear or side of lots or buildings and not intended for the purpose of through vehicular traffic." There is no dispute that the Wal-Mart parking lot is not a "highway."

Section 60-4,183 is the pertinent statute describing the revocation to which § 60-4,108 applies. It states:

> Whenever it comes to the attention of the director that any person has, as disclosed by the records of the director, accumulated a total of twelve or more points within any period of two years, as set out in section 60-4,182, the director shall (1) summarily revoke the operator's license of such person . . . .

The district court reasoned that § 60-4,186 and its limitation to driving with a revoked license "on the public highways" pertains only to licenses that have been revoked by the Department of Motor Vehicles due to an accumulation of points under the point system.

Section 60-4,108 states in relevant part:

> (1) It shall be unlawful for any person to operate a motor vehicle during any period that he or she is subject to a court order not to operate any motor vehicle for any purpose or during any period that his or her operator's license has been revoked or impounded pursuant to conviction or convictions for violation of any law or laws of this state, by an order of any court, or by an administrative order of the director.

The district court reasoned that, unlike § 60-4,186, the provisions of § 60-4,108 are not limited to driving under revocation on public highways. Frederick's license had been revoked pursuant to a conviction, by a court order, and by an administrative order of the director, as described in § 60-4,108. Therefore, the district court concluded that the

evidence was sufficient to support Frederick's conviction. Frederick appeals.

## ASSIGNMENT OF ERROR

Frederick assigns, consolidated, that the district court erred in holding that § 60-4,108 does not require proof the driver was operating on a public highway and in thereby affirming his conviction and sentence.

## STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made below.[2]

## ANALYSIS

Section 60-4,108(1) contains no express limitation on the location of the offender's operation of a vehicle during a period of suspension, revocation, or impoundment. The lower courts thus read § 60-4,108(1) as containing no such requirement. Accordingly, the lower courts concluded that driving with a revoked license in a parking lot violated § 60-4,108(1). Frederick argues on appeal that we should read the limitation of "on the public highways" into § 60-4,108(1). We disagree.

[2-4] A statute is not to be read as if open to construction as a matter of course.[3] It is the court's duty, if possible, to discover the Legislature's intent from the language of the statute itself.[4] Only if a statute is ambiguous or if the words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, lead to some manifest absurdity, to some consequences which a court sees plainly could not have been intended, or to a result manifestly

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[2] *In re Application of City of North Platte*, 257 Neb. 551, 599 N.W.2d 218 (1999).

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

[4] See *Fisher v. Payflex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

against the general term, scope, and purpose of the law, may the court apply the rules of construction to ascertain the meaning and intent of the lawgiver.[5]

Courts in other jurisdictions interpreting laws that do not explicitly limit the crime of driving with a revoked or suspended license to driving on "public highways" find the laws unambiguous and refuse to add such a limitation.[6] In *State v. Kelekolio*,[7] the court explained that adding the requirement of being on a "'public highway,'" when that limitation is not expressed in the relevant statute for driving without a license, is "contrary to the literal and unambiguous language of the statute."[8] In *Guidry v. State*,[9] the court similarly reasoned that there was no language requiring proof of operation of a motor vehicle upon a public highway in the relevant statute and said, "We do not place special interpretations or requirements upon statutes which are clear and unambiguous on their face."[10] The court further explained that "[i]f the legislature had wished to limit the focus of the statute to operation of a vehicle upon a highway, it most certainly could have done so."[11]

The court in *State v. Hackett*[12] also held that because the relevant statute concerning operating a motor vehicle under suspension, revocation, or refusal contained no language limiting the location of operation, the plain meaning of the

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[5] See, *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012); *In re Interest of Wickwire*, 259 Neb. 305, 609 N.W.2d 384 (2000).

[6] See, *Cremer v. Anchorage*, 575 P.2d 306 (Alaska 1978); *State v. Hackett*, 72 Conn. App. 127, 804 A.2d 225 (2002); *State v. Kelekolio*, 94 Haw. 354, 14 P.3d 364 (Haw. App. 2000); *Guidry v. State*, 650 N.E.2d 63 (Ind. App. 1995); *State v. Bauman*, 552 N.W.2d 576 (Minn. App. 1996).

[7] *State v. Kelekolio, supra* note 6.

[8] *Id.* at 357, 14 P.3d at 367.

[9] *Guidry v. State, supra* note 6.

[10] *Id.* at 66.

[11] *Id.*

[12] *State v. Hackett, supra* note 6.

statute "prohibits absolutely all operation of a motor vehicle, without limitation."[13] The court said that consideration of the statute in light of other statutes in the same chapter only reinforced this reading, because those statutes clearly demonstrated that the Legislature added the specific limitation of public highways when it wished to.[14] Given this plain reading, the court rejected the defendant's contention that because an operator's license is generally required by law only for driving on highways or public roads for which a speed limit has been established, the defendant could not be convicted of driving in an apartment complex parking lot with a suspended license.

[5-7] We likewise do not find § 60-4,108(1) ambiguous. A statute is ambiguous if it is susceptible of more than one reasonable interpretation, meaning that a court could reasonably interpret the statute either way.[15] The fact that § 60-4,108(1) does not expressly limit where the driver cannot drive with a revoked license does not make it susceptible of more than one meaning. The intent of the Legislature is generally expressed by omission as well as by inclusion.[16] We are not at liberty to add language to the plain terms of a statute to restrict its meaning.[17]

We observe that other Nebraska statutes expressly limit their application to driving on public highways. Most notably, the driving-under-revocation statute that Frederick was not charged with, § 60-4,186, expressly limits its application to "operat[ing] a motor vehicle on the public highways after revocation of an operator's license under sections 60-4,182 to 60-4,186." Section 60-4,108, in contrast—the statute Frederick was charged with—states it shall be unlawful for any person

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[13] *Id.* at 133, 804 A.2d at 228.

[14] *State v. Hackett, supra* note 6.

[15] *Fisher v. Payflex Systems USA, supra* note 4.

[16] See *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014).

[17] See *Black v. Brooks*, 285 Neb. 440, 827 N.W.2d 256 (2013).

to operate a motor vehicle "during any period" that he or she is subject to a court order not to operate any motor vehicle for any purpose or during any period that his or her operator's license has been revoked or impounded pursuant to a conviction or convictions, by an order of any court, or by an administrative order of the director.

Section 60-4,186 focuses on where the driving occurs, while § 60-4,108 focuses on the period of time when the driving occurs. Section 60-4,108 was plainly intended to have a broader application. If the Legislature had wished to limit § 60-4,108 to driving "on the public highways," it knew how to do so. That the Legislature did not add such limiting language is an unambiguous expression of its intent that driving "on the public highways" is not an element of § 60-4,108.

We disagree with Frederick's argument that failing to read "on the public highways" into § 60-4,108(1) contradicts other clauses or leads to some manifest absurdity, some consequence the Legislature plainly could not have intended, or to results manifestly against the general term, scope, and purpose of the law.[18] Frederick argues it is absurd to be able to commit a crime of driving with a revoked operator's license in a place where an operator's license is not otherwise generally required. Frederick further argues it is absurd that it would be unlawful under § 60-4,108(1) to drive in a parking lot during a period of revocation "pursuant to conviction or convictions for violation of any law or laws of this state, by an order of any court, or by an administrative order of the director," while it is unlawful under § 60-4,186 to drive "on the public highways" during a period of revocation imposed by order of the director after the accumulation of 12 points under the point system.

Other courts have concluded that a broadly crafted statute pertaining to driving under revocation, suspension, or refusal is logical and consistent with other motor vehicle statutes that limit their application to driving on public highways. In

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[18] See *Anthony, Inc. v. City of Omaha, supra* note 5.

*Kelekolio*, the court rejected the idea that the driving-with-a-revoked-license statute should be construed as limited to driving on public highways simply because other statutory sections expressly required operation on a public highway and stated that the legislative purpose of the chapter was to foster highway safety.[19] The court in *Guidry* distinguished persons who have never obtained an operator's license from those who have had their license removed after demonstrating that their driving presents a danger to others.[20] The court observed, "Statutes providing for forfeiture of driving privileges . . . are designed to protect the public from persons who have demonstrated that they are unable to obey traffic laws established for the safety of citizens . . . ."[21] The court reasoned that the absence of limiting language in the driving-with-a-revoked-license statute was "the legislature's recognition that the danger to the public is equally as great on private property used by the public, such as shopping center parking lots and apartment complex roads, as it is on public highways."[22]

Sections 60-4,108 and 60-4,183 are not themselves part of the Nebraska Rules of the Road, but those rules illustrate that the absence of an "on public highways" limitation in § 60-4,108, when such limitation is present in § 60-4,183, is part of a consistent and logical scheme. While an operator's license is not generally required to drive in Nebraska on privately owned parking lots, serious traffic offenses presenting an immediate danger to the public, such as reckless driving, careless driving, and DUI, are punishable offenses under the Nebraska Rules of the Road when committed in a parking lot open to public access.[23] Specifically, § 60-6,108(1)

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[19] *State v. Kelekolio, supra* note 6.

[20] *Guidry v. State, supra* note 6.

[21] *Id.* at 66.

[22] *Id.*

[23] See, Neb. Rev. Stat. §§ 60-6,108(1) (Reissue 2010) and 60-6,196; *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004).

provides that such violations of the Nebraska Rules of the Road "shall apply upon highways and anywhere throughout the state except private property which is not open to public access." In contrast, all other provisions of the Nebraska Rules of the Road "refer exclusively to operation of vehicles upon highways except where a different place is specifically referred to in a given section."[24]

Though there is some overlap, many violations under the points system do not present the same immediate threat to the public as reckless driving, careless driving, and DUI. They are violations such as speeding,[25] failure to yield to a pedestrian,[26] or failure to render aid,[27] that can only occur on "public highways." And a violation under § 60-4,186 of driving with a license that has been revoked under the points system is punished less severely than driving with a revoked license under the categories listed in § 60-4,108. Under § 60-4,186, the defendant is subject to a Class III misdemeanor and 6 months' revocation, while under § 60-4,108(1)(a), a driver is subject to a Class II misdemeanor and a 1-year revocation. The Legislature plainly contemplated that drivers prosecuted under § 60-4,108 present a greater level of culpability and danger to the public than drivers falling under § 60-4,186. It is thus logical that driving with a revoked license under § 60-4,108 encompasses a broader range of locations than under § 60-4,186.

We do not decide in this case whether driving with a revoked license on private property which is not open to public access may violate § 60-4,108, because the facts of this case do not present that issue. The Wal-Mart parking lot was open to public access. It was a place where members of the public could be endangered by Frederick, who demonstrated

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[24] § 60-6,108(1).

[25] § 60-4,182(10).

[26] § 60-4,182(11).

[27] § 60-4,182(3).

through his prior DUI conviction that he is unable to safely exercise the privilege conferred by his operator's license.

[8] Because § 60-4,108 is plainly written without the limitation of "public highways" found in other statutes, we do not read that limitation into the statute. We see no inherent inconsistency or absurd result from our failure to read "public highways" into § 60-4,108—at least as concerns "anywhere throughout the state except private property which is not open to public access."[28] Section 60-4,108 is consistent with other statutes that prohibit driving on private property when doing so endangers the public that has access to the private property. Therefore, we affirm Frederick's conviction for violating § 60-4,108(1).

Having affirmed the conviction, we observe that the county court committed plain error when it failed to revoke Frederick's operator's license for 1 year as required by § 60-4,108(1)(a). Section § 60-4,108(1)(a) states in relevant part that

> the court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of one year from the date ordered by the court and also order the operator's license of such person to be revoked for a like period.

Inasmuch as this court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced,[29] we vacate the sentence imposed and remand the cause for imposition of the sentence required by law.

## CONCLUSION

For the foregoing reasons, we affirm Frederick's conviction, vacate his sentence, and remand for resentencing.

Affirmed in part, and in part vacated and remanded for resentencing.

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[28] See § 60-6,108(1).

[29] *State v. Ferrell*, 218 Neb. 463, 356 N.W.2d 868 (1984).




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Glenn W. Binder, appellant, v.
Laura L. Binder, appellee.

864 N.W.2d 689

Filed June 26, 2015. No. S-14-783.

1. **Judgments: Alimony: Appeal and Error.** Domestic matters such as alimony are entrusted to the discretion of trial courts. An appellate court reviews a trial court's determinations on such issues de novo on the record to determine whether the trial judge abused his or her discretion. Under this standard, an appellate court conducts its own appraisal of the record to determine whether the trial court's judgments are untenable such as to have denied justice.
2. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines do not apply if the parties have no minor children.
3. **Divorce: Alimony.** Under Neb. Rev. Stat. § 42-365 (Reissue 2008), courts should consider four factors relative to alimony: (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.
4. ____: ____. Beyond the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), in considering alimony upon the dissolution of marriage, a court should also consider the income and earning capacity of each party, as well as the general equities of the situation.
5. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not decide whether it would have awarded the same amount of alimony as the trial court. Instead, it decides whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
6. **Alimony.** The main purpose of alimony is to assist a former spouse for a period necessary for that individual to secure his or her own means of support.
7. ____. In awarding alimony, reasonableness is the ultimate criterion.

8. ____. A court may consider all of the property owned by the parties—marital and separate—in decreeing alimony.
9. **Judgments: Evidence: Appeal and Error.** If credible evidence is in conflict on a material issue of fact, an appellate court on de novo review considers and may give weight to the circumstance that the trial judge heard and observed the witnesses and accepted one version of the facts than another.

Appeal from the District Court for Pawnee County: Daniel E. Bryan, Jr., Judge. Affirmed.

Claude E. Berreckman, Jr., of Berreckman & Davis, P.C., for appellant.

Andrew M. Ferguson, of Carlson & Burnett, L.L.P., for appellee.

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

Connolly, J.

SUMMARY

The court dissolved the marriage of nonagenarians Laura L. Binder and Glenn W. Binder and ordered Glenn to pay alimony. On appeal, Glenn argues that the amount of alimony is a presumptive abuse of discretion because it drives his net income below the poverty line in the Nebraska Child Support Guidelines.[1] Glenn cites *Gress v. Gress*,[2] where we held that the subsistence limitation in the guidelines also applied to an alimony award. Laura argues that *Gress* does not apply here because, unlike the parties in *Gress*, she and Glenn do not have any minor children.

We conclude that the guidelines do not apply because Laura and Glenn have no minor children. So, the amount of alimony is not a presumptive abuse of discretion because it pushes Glenn's net income under the poverty threshold in the

[1] Neb. Ct. R. § 4-218 (rev. 2015).

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

guidelines. Nor can we say that the award is an abuse of discretion under the circumstances. We therefore affirm.

## BACKGROUND

Laura and Glenn married in 1982. Neither was the other's first spouse, and their marriage did not produce any children. At the time of trial, Laura was 95 and Glenn was 94.

Glenn is retired now, but he used to farm and operate a fertilizer business. Laura did not work outside the home. According to Glenn, Laura did not help in the fields, although he stated that she might have retrieved parts for his fertilizer business. He testified that she helped with the fertilizer business only on "a minimal scale."

Regarding her contributions to the marriage, Laura testified that she took messages to Glenn, retrieved parts, prepared lunches, and helped move livestock. She testified that she answered the telephone for Glenn's fertilizer business, and even put a line in the bathroom so that she could take calls while dressing. Glenn denied that Laura installed a telephone for this purpose. Laura admitted that she did not help as much after Glenn's daughter and son-in-law, Karin and Bruce Droge, took over the farming operation.

Laura and Glenn initially lived in a brick farmhouse. In 1985, the Droges moved into the farmhouse and Laura and Glenn moved into a mobile home. Laura stated that she paid $25,000 for the mobile home. Both Laura and Glenn estimated that the mobile home was now worth $15,000.

In 1986, Glenn and the Droges executed a farm lease whereby Glenn rented all the farmland he owned to the Droges. The lease states that it will be effective for 10 years, but Bruce testified that he and Glenn "continued it on a verbal basis" after 1996. Bruce testified that he currently pays an annual rent of about $100 per acre.

Laura and Glenn maintained separate checking accounts during their marriage, and each paid half of the couple's expenses. Over the years, Laura made numerous loans to Glenn. Glenn testified that he did not owe Laura any money

at the time of trial, but Laura thought that he owed more than $25,000.

Glenn stated that Laura moved into a nursing home in December 2012. Glenn said that before Laura moved, she was "incapacitated" and confined to a wheelchair for 2 years and he cared for her during this period. Glenn continued to live in the mobile home after Laura left.

Laura initially used her savings to pay for her nursing home care. After 10 months, she exhausted her savings and Glenn began paying $3,200 per month. Glenn testified that he has paid about $30,000 to the nursing home and that he had to borrow money from the Droges to do so.

Laura has a monthly income of $2,927.40, which consists of her Social Security benefit, a long-term care insurance benefit, and a small pension from her prior husband. Laura has monthly expenses of $6,230, of which $5,369 is for the nursing home. So, she testified that she ran a monthly deficit of $3,302.60. Laura has no assets beyond a checking account worth about $5,000.

According to Glenn, his monthly income is $2,890.73, about $1,700 of which is rental income. The remainder is his Social Security benefit.

Glenn owns several farms and part of a residential lot. He stated that he is the sole trustee of a trust that "holds" the four parcels of real estate for him. Glenn said that he "can cancel [the trust] at any time, basically." Statements from the Pawnee County assessor for tax year 2013 show that Glenn, as the trustee of an unnamed trust, was assessed taxes on four pieces of real estate totaling about 222 acres. The combined taxable value was nearly $560,000. Laura and Glenn agreed that the real estate is Glenn's premarital property.

The court dissolved the marriage and ordered Glenn to pay $3,302.60 per month in alimony. The court explained that the alimony was "to offset any costs [Laura] has at the nursing home." The decree awarded the mobile home to Glenn but required him to pay Laura $15,000 for her interest. The court decided that the "loan issue" was "a wash."

## ASSIGNMENT OF ERROR

Glenn assigns that the court erred by ordering him to pay an amount of alimony that drives his net monthly income below the poverty threshold in the Nebraska Child Support Guidelines.

## STANDARD OF REVIEW

[1] Domestic matters such as alimony are entrusted to the discretion of trial courts.[3] An appellate court reviews a trial court's determinations on such issues de novo on the record to determine whether the trial judge abused his or her discretion.[4] Under this standard, an appellate court conducts its own appraisal of the record to determine whether the trial court's judgments are untenable such as to have denied justice.[5]

## ANALYSIS

Glenn argues that the amount of alimony is "presumptively an abuse of discretion" because it drives his net income below the poverty threshold in the Nebraska Child Support Guidelines.[6] He contends that the court did not rebut this presumption because it "failed to make any specific findings as to why such a deviation was warranted."[7] Laura argues that the guidelines are irrelevant because she and Glenn do not have any minor children.

In a case involving minor children, we held that the amount of alimony must not force the obligor's net income below the poverty line unless the court specifically finds that such an award is warranted. In *Gress v. Gress*,[8] the court dissolved the marriage of Pamela Gress and Patrick Gress and ordered Patrick to pay child support of $1,224 per month. Although

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[3] See *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015).

[4] See *id.*

[5] See *id.*

[6] Brief for appellant at 4.

[7] *Id.*

[8] *Gress v. Gress, supra* note 2.

Patrick had a net income of only $1,433.85 after subtracting his child support obligation, the court also ordered him to pay alimony of $1,000 per month.

Patrick argued that the amount of alimony was a presumptive abuse of discretion because it left him below the poverty line in the child support guidelines. At the time, paragraph R of the guidelines stated that a parent's support obligation could not reduce his or her monthly net income below the poverty line, which was $851 for one person. Paragraph R is now § 4-218, which provides:

> A parent's support, child care, and health care obligation shall not reduce his or her net income below the minimum of $981 net monthly for one person, or the poverty guidelines updated annually in the Federal Register by the U.S. Department of Health and Human Services under authority of 42 U.S.C. § 9902(2), except minimum support may be ordered . . . .

The guidelines—then in paragraph M and now in Neb. Ct. R. § 4-213—also instruct courts to determine alimony from the income left after the court establishes child support.

We decided in *Gress* that the subsistence limitation in the child support guidelines also applied to Patrick's alimony obligation.[9] So, as a "mirror of our holding on child support under paragraph R," an alimony award that drove Patrick's net income below the poverty line was presumptively an abuse of discretion unless the court specifically found that "conformity with paragraph R would work an 'unjust or inappropriate' result."[10] We emphasized that the guidelines prioritized child support over alimony. Logically, if child support could not drive the obligor's net income below the poverty line, then neither could alimony.

[2] But we conclude that § 4-218 does not apply because Laura and Glenn do not have any minor children. Our holding in *Gress* was "buttressed by the structure" of the child

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[9] *Id.* See, also, *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

[10] *Gress v. Gress, supra* note 2, 274 Neb. at 702, 743 N.W.2d at 80-81.

support guidelines.[11] The aim of the guidelines is to set child support payments in light of the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.[12] The guidelines have no application—structural or otherwise—when the parties have no children to support. We derived the rule in *Gress* from the logic of the guidelines themselves. In cases where the guidelines are inapposite, so is their logic.

Furthermore, we are wary of grafting the guidelines' method of calculating net income onto cases that involve only alimony. Before awarding child support, the guidelines require courts to make a detailed calculation of the parties' income and expenses.[13] In contrast, we have said that there is no mathematical formula by which alimony awards can be precisely determined.[14] Although detailed findings are certainly not unwelcome, we are not eager to mandate the same requirements in alimony cases.

So, the amount of alimony is not a presumptive abuse of discretion even though it appears to drive Glenn's net income below the subsistence limitation in the child support guidelines. But that does not end our inquiry. We must still determine whether the amount of alimony is unreasonable under the circumstances of this case.

[3,4] Under Neb. Rev. Stat. § 42-365 (Reissue 2008), courts should consider four factors relative to alimony: (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.[15] Beyond the specific criteria listed

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[11] *Id.* at 701, 743 N.W.2d at 80.

[12] See, Neb. Ct. R. § 4-201; *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013).

[13] See Nebraska Child Support Guidelines, worksheet 1.

[14] *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986).

[15] See *Anderson v. Anderson, supra* note 3.

in § 42-365, a court should also consider the income and earning capacity of each party, as well as the general equities of the situation.[16]

[5-7] In reviewing an alimony award, an appellate court does not decide whether it would have awarded the same amount of alimony as the trial court.[17] Instead, it decides whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.[18] The main purpose of alimony is to assist a former spouse for a period necessary for that individual to secure his or her own means of support.[19] Reasonableness is the ultimate criterion.[20]

[8] Applying these factors, we cannot say that the amount of alimony is an abuse of discretion. Glenn sought to dissolve his nearly 32-year marriage to Laura after she began incurring expenses for essential nursing home care that are well beyond her means. Laura did not work outside the home during the marriage, she is not employed now, and there is no evidence that she has untapped earning capacity. Similarly, Glenn is retired and has no wage income. But while Laura has exhausted nearly all her assets, Glenn has the power to dispose of more than 200 acres of farmland. The land is not irrelevant to alimony even though it is Glenn's premarital property. A court may consider all of the property owned by the parties—marital and separate—in decreeing alimony.[21]

[9] As to disputes over matters such as Laura's contributions to the marriage, we note that the district court was in the best position to judge the witness' credibility. Although

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[16] See *id.*

[17] See *id.*

[18] See *id.*

[19] See *id.*

[20] See *id.*

[21] See, *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002); *Ainslie v. Ainslie*, 249 Neb. 656, 545 N.W.2d 90 (1996); 3 Mercedes Samborsky & Catherine N. Carroll, Family Law & Practice § 35.03[1][b] (Arnold H. Rutkin ed., 2014).

our review is de novo, if credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstance that the trial judge heard and observed the witnesses and accepted one version of the facts than another.[22] This rule is particularly apt here because both Laura and Glenn had some trouble testifying and the record does not show to what extent their difficulties were cognitive, auditory, or other.

## CONCLUSION

The Nebraska Child Support Guidelines do not apply because the parties have no minor children. Thus, the fact that the amount of alimony apparently exceeds the poverty line in the guidelines does not make the award a presumptive abuse of discretion. Applying the factors for reviewing alimony awards, we conclude that the court did not abuse its discretion.

AFFIRMED.

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[22] See, e.g., *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

# Cindy Marshall, appellant, v. EyeCare Specialties, P.C. of Lincoln, appellee.

865 N.W.2d 343

Filed July 2, 2015. No. S-14-696.

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. **Administrative Law: Evidence.** Admission of an administrative agency's findings is within the trial court's discretion.
3. **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.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
5. **Summary Judgment: Proof.** A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.
6. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

7. **Termination of Employment.** The general rule in Nebraska is that an employer, without incurring liability, may terminate the employment of an at-will employee at any time with or without reason, unless termination is constitutionally, statutorily, or contractually prohibited.
8. **Fair Employment Practices: Termination of Employment: Discrimination.** Neb. Rev. Stat. § 48-1104(1) (Reissue 2010) makes it unlawful for an employer to discharge or otherwise discriminate against an individual because of, among other things, the individual's disability.
9. **Fair Employment Practices: Words and Phrases.** For purposes of Neb. Rev. Stat. § 48-1104(1) (Reissue 2010), disability means, among other things, being regarded as having a physical or mental impairment.
10. **Discrimination: Proof.** An individual can show that he or she was regarded as having a physical or mental impairment if the individual establishes that he or she has been subjected to a prohibited action because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.
11. **Evidence: Proof: Words and Phrases.** Direct evidence is that evidence which proves the fact in dispute directly without inference or presumption.
12. **Employer and Employee: Discrimination: Evidence: Proof.** In the context of an employment discrimination case, direct evidence is statements by a person with control over the employment decision sufficient to prove discrimination without inference or presumption which reflect a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee and are made by a person involved in the challenged decision.
13. **Discrimination: Evidence.** Evidence is not direct when the statement only suggests discrimination or is subject to more than one interpretation. Thus, stray remarks, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself are not direct evidence.
14. **Summary Judgment: Discrimination: Evidence.** When considering allegations of unlawful discrimination at the summary judgment stage, direct evidence is not the converse of circumstantial evidence.
15. **Discrimination: Evidence: Proof.** Direct evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action. Thus, direct refers to the causal strength of the proof, not whether it is circumstantial evidence.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Reversed and remanded for further proceedings.

Abby Osborn and Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Shawn D. Renner, Susan K. Sapp, and Tara A. Stingley, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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

Cassel, J.

## INTRODUCTION

After Cindy Marshall's employer terminated her employment, Marshall sued—claiming unlawful discrimination based upon a perceived disability. The district court entered summary judgment in favor of the employer, and Marshall appeals. Because there is a genuine issue of material fact as to whether the employer terminated Marshall's employment on that basis, we reverse the summary judgment and remand the cause for further proceedings.

## BACKGROUND

### Parties

EyeCare Specialties, P.C. of Lincoln (EyeCare Specialties), provides optometric care to patients. In January 2007, it hired Marshall as a clinical technician. Prior to being employed by EyeCare Specialties, Marshall lost her nursing license and was diagnosed as being dependent on prescription medication. She completed treatment for her condition.

### Issues Regarding Marshall's Work Performance

In March 2007, Marshall received an above-average score on her employee performance evaluation. The 90-day evaluation noted that she was doing very well, that she was a

fast learner, and that she retained information well. In May, EyeCare Specialties scheduled her to attend "Marco school" to learn how to perform a specific eye examination. But several e-mails sent in May noted apprehensions about Marshall. One e-mail referenced "concerns that have been brought to us by other technicians regarding [Marshall's] staying on task, and her struggles at times with day[-]to[-]day clinic responsibilities." Another stated that Marshall "has a hard time staying focused on the flow" and that the coworker was concerned about Marshall's "hands getting very shakey [sic] more towards afternoon." An e-mail from the director of human resources at the time stated that others had reported Marshall seemed paranoid, had trouble staying focused, and "seems to not be present when they think she should be and they are not aware of where she is." And an e-mail from one of the doctors reported that a visual field test performed by Marshall was useless due to errors.

In June 2007, more concerns about Marshall were raised. One coworker's e-mail stated in part: "I saw [Marshall] taking medications at least four times. When I would see her and she would see me she acted very nervous and turned the other way to finish taking them and then would chug a cup of coffee." A different coworker stated that random drug testing needed to be implemented due to "an employee that always seems zoned out and alot [sic] of times doesn't seem able to perform her everyday duties." That e-mail went on to discuss Marshall's slowness in screening patients. Coworkers expressed frustration and unhappiness about the prospect of Marshall's receiving Marco training. Ultimately, Marshall was informed that she would not be going to "Marco school" due to concerns that she might not be ready. Also in June, Marshall reported to the director of human resources and the chief operating officer that she had told a coworker she lost her license as a nurse due to an addiction to prescription medication. The chief operating officer suggested that Marshall set her prescription bottle on the table when she needs to take medication so that staff can see what she is

taking. On June 28, Marshall received a corrective action form to address interpersonal issues with coworkers and quality of work issues.

In January 2008, Marshall became "Marco" certified. In January and February, she received verbal and written warnings for "abuse of time clock." In March, Marshall's supervisor reviewed with Marshall concerns about work performance, including slow workpace, poor attendance, inappropriate discussions with patients regarding test results, and poor performance in patient meetings. But in May, Marshall received a raise based on an above-average score on an "Epic Technician" performance evaluation. The following year, she received a smaller raise based on an average score on the same type of performance evaluation.

Marshall's subsequent annual evaluations had both positive and negative aspects. Her 2010 evaluation stated that she interacted well with patients, but that she needed to "be aware of schedule and how flow is moving," that she had a few issues with tardy arrivals, and that she could use improvement "in OPTOS images." Marshall's 2011 evaluation stated that she was "a good technician," but that her slow workpace continued to be a concern. The evaluation showed that she needed improvement in the following areas: "[p]erforms well, and uses good judgment, as tension and requirements increase"; "[c]onversations with . . . patients and staff are quiet so as not to disturb others in department"; and "[h]as complete confidence using . . . lensometers . . . ."

Marshall admitted that she had various conversations with Laura Houdesheldt, the director of human resources for EyeCare Specialties since April 2009, about performance issues such as productivity, speed, focus, and timing. On January 9, 2012, Houdesheldt gave Marshall a written warning and a corrective action plan for not doing Marshall's share of the work. One coworker told Houdesheldt that Marshall scratched her arms excessively. A doctor expressed concerns about Marshall's shaking while administering tests to patients' eyes. On January 26, Houdesheldt told Marshall that there

were concerns about sores on Marshall's arms and about Marshall's appearing anxious and acting paranoid. Marshall informed Houdesheldt that the "sores" were an inherited skin condition called senile purpura and that her tremors were also inherited. Houdesheldt observed red, raw-looking scratches and open, "weeping" sores on Marshall's arms. Marshall denied that her arms had open sores or "seeping" wounds. She testified in a deposition that she covered any open wounds with a bandage, but that her purpura "are like little bruises under the skin that are not open and weeping."

Marshall began using daily patient schedules to keep track of which technician handled each patient. These schedules would normally be shredded at the end of the day, but Marshall instead removed them from EyeCare Specialties' premises. The schedules show that over 13 particular days between February 2 and March 14, 2012, Marshall generally handled more patients than her coworkers.

Those working with Marshall reported no significant changes in Marshall's behavior or work performance in February 2012. On February 21, Houdesheldt gave Marshall a written warning and a corrective action plan. Houdesheldt informed Marshall that she had progressively become slower paced in her work and that she often left work for others to finish. According to Houdesheldt, Marshall then "abandoned" her shift without authorization, which is an offense that could result in the termination of employment. But Marshall testified in her deposition that she obtained permission to leave from her team leader.

On March 13, 2012, Houdesheldt presented Marshall with a second written warning. The corrective action plan stated that Marshall should continue with counseling and that termination of employment was likely if significant and consistent improvement was not seen within 3 weeks. Marshall provided Houdesheldt with a note from her doctor stating that she had "non-intention tremor" and a "rash" that was not contagious. Marshall was scheduled to work until 8 p.m., but she left at approximately 4:20 p.m. because she "felt sick to [her]

stomach." Marshall stated that she told Houdesheldt that she felt sick and was going to go home and that Houdesheldt said, "OK." But Houdesheldt stated that Marshall abandoned her shift without approval. The following day, EyeCare Specialties terminated Marshall's employment at the end of her shift. According to Houdesheldt, from October 2011 through March 2012, at least 13 individuals were disciplined and 5 individuals had their employment terminated for reasons similar to those for Marshall's termination of employment. Houdesheldt stated that Marshall consistently failed to meet performance expectations over her 5 years of employment.

### Discrimination Allegations

Marshall filed a charge of discrimination with the Nebraska Equal Opportunity Commission (NEOC) and the federal Equal Employment Opportunity Commission. She felt that she was discriminated against based on a "[p]erceived disability." She explained: "They perceived I was unable to take eye pressures because of my tremors, and they perceived — I don't know what they perceived. I felt like they were discriminating against me because they were aware of my history." She further testified, "I believe that they did not want me there, that they believed that — maybe they perceived the tremors or my skin that bruises as using drugs, and so they used performance issues." But no one ever told Marshall that he or she thought the sores or tremors were due to drug use. Houdesheldt specifically testified in her deposition that she did not perceive Marshall as having a drug or alcohol problem. Houdesheldt stated that Marshall had no disability known to EyeCare Specialties, nor did Marshall ever identify any specific disability or activities that she was unable to perform.

In February 2013, Marshall filed a complaint against EyeCare Specialties, seeking damages for acts alleged to be in violation of the Nebraska Fair Employment Practice Act.[1]

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[1] See Neb. Rev. Stat. § 48-1101 et seq. (Reissue 2010 & Cum. Supp. 2014).

She alleged that EyeCare Specialties perceived her as disabled when "it became known that she had entered into substance abuse treatment prior to her employment with [EyeCare Specialties] and because [Marshall] had at-rest hand tremors since she was a child." Marshall claimed that she was also perceived as disabled due to the purpura, which caused red marks on her skin. Marshall contended that she was required to wear adhesive bandages to cover her arms even though she covered her arms by a cuff as directed by her doctor and that she was required to lay out her medications where other employees could observe them.

EyeCare Specialties alleged in its answer that its actions were made in good faith compliance with applicable laws. It alleged that it terminated Marshall's employment due to poor performance, leaving work without authorization and without finishing her shift, insubordination, unprofessional conduct when being counseled about performance issues, and refusing to cover open wounds visible to patients.

### Summary Judgment

EyeCare Specialties moved for summary judgment. Following a hearing, the district court entered summary judgment in favor of EyeCare Specialties. The court rejected Marshall's claim that there was direct evidence of discrimination and her claim that the burden-shifting analysis under the framework of *McDonnell Douglas Corp. v. Green*[2] was unnecessary. The court next determined that a mixed-motive analysis under *Price Waterhouse v. Hopkins*[3] was inapplicable to Marshall's disability discrimination claim. The court recognized that *Price Waterhouse* involved a title VII case and that it did not address the Americans with Disabilities Act. The court stated that Marshall failed to meet her burden of

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[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[3] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (superseded in part by federal Civil Rights Act of 1991).

showing that EyeCare Specialties would not have terminated her employment in the absence of her alleged perceived disability. The court concluded that Marshall failed to establish a prima facie case of discrimination based on a perceived disability. The court further reasoned that even if Marshall could establish a prima facie case of disability discrimination, EyeCare Specialties had established legitimate, nondiscriminatory reasons for terminating her employment. Finally, the court stated that Marshall had not presented any evidence creating a genuine issue of material fact that EyeCare Specialties' decision was a mere pretext for discrimination.

Marshall timely appealed, and we moved the case to our docket.[4]

## ASSIGNMENTS OF ERROR

Marshall assigns, consolidated and restated, that the district court erred in (1) relying on the NEOC's findings and (2) granting summary judgment in favor of EyeCare Specialties.

## STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[5]

## ANALYSIS

### NEOC Findings

[2] Marshall argues that the district court impermissibly relied on the NEOC's findings in granting summary judgment. We disagree. Admission of an administrative agency's findings is within the trial court's discretion.[6] But even if this

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

[5] *Johnson v. Nelson*, 290 Neb. 703, 861 N.W.2d 705 (2015).

[6] See *White v. Honeywell, Inc.*, 141 F.3d 1270 (8th Cir. 1998).

evidence was inadmissible, the court's analysis did not refer to or rely upon the findings in any manner. The order merely mentioned the findings as part of its summarization of the case's background. This assignment of error lacks merit.

## Summary Judgment

[3-6] The principles regarding summary judgment are well established. 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.[7] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[8] A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.[9] After the movant for summary judgment makes such a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[10]

The crux of Marshall's appeal is that the district court erred in entering summary judgment, particularly because it failed to view the evidence in the light most favorable to her and failed to find that a genuine issue of material fact existed as to whether she was fired due to a perceived disability. After giving Marshall the benefit of all reasonable inferences deducible from the evidence, we agree that summary judgment was not proper in this case.

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[7] *Johnson v. Nelson, supra* note 5.

[8] *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015).

[9] *Doe v. Board of Regents*, 287 Neb. 990, 846 N.W.2d 126 (2014).

[10] *Id.*

[7-10] Although EyeCare Specialties hired Marshall on an at-will basis, Nebraska law prohibits discrimination on the basis of perceived disability. The general rule in Nebraska is that an employer, without incurring liability, may terminate the employment of an at-will employee at any time with or without reason, unless termination is constitutionally, statutorily, or contractually prohibited.[11] But a Nebraska statute makes it unlawful for an employer to discharge or otherwise discriminate against an individual because of, among other things, the individual's disability.[12] For purposes of that statute, disability means, among other things, "being regarded as having [a physical or mental] impairment."[13] An individual can show that he or she was regarded as having such an impairment "'if the individual establishes that he or she has been subjected to [a prohibited action] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.'"[14] The focus is on the impairment's effect upon the attitudes of others.[15]

In Marshall's complaint, she identified her perceived disabilities as her substance abuse treatment prior to employment with EyeCare Specialties, her hand tremors, and her purpura. A qualified individual with a disability includes an individual who has been rehabilitated successfully or who is erroneously regarded as engaging in the illegal use of drugs.[16]

Marshall claims that the burden-shifting analysis originating in *McDonnell Douglas Corp. v. Green*[17] does not apply in the circumstances before us. We agree. We have previously

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[11] See *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

[12] See § 48-1104(1).

[13] § 48-1102(9)(c).

[14] *Tramp v. Associated Underwriters, Inc.*, 768 F.3d 793, 805 (8th Cir. 2014).

[15] *Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995).

[16] § 48-1102(10)(c)(i) and (iii).

[17] *McDonnell Douglas Corp. v. Green, supra* note 2.

employed that analytical framework when considering claims of employment discrimination.[18] That framework is used when an employee does not put forward direct evidence of discrimination.[19] But Marshall argues that she presented direct evidence of discrimination. This argument rests upon the meaning of direct evidence in the employment discrimination context.

[11-13] Our jurisprudence has defined direct evidence both in a general sense and in this specific area of law. We have stated that direct evidence is that evidence which proves the fact in dispute directly without inference or presumption.[20] We have also quoted from a federal district court case stating that in the context of an employment discrimination case, direct evidence is statements "'by a person with control over the employment decision "sufficient to prove discrimination without inference or presumption"'" which "'reflect a "discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee"'" and are "'"made by a person involved in the challenged decision."'"[21] According to the federal case: "'Evidence is not direct when the statement only "suggests discrimination" or "is subject to more than one interpretation." . . . Thus, "stray remarks . . . statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" are not direct evidence.'"[22]

[14,15] Marshall directs us to an explanation of direct evidence from the U.S. Court of Appeals for the Eighth Circuit.

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[18] See *Riesen v. Irwin Indus. Tool Co., supra* note 11.

[19] See *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011).

[20] See *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 720 N.W.2d 372 (2006).

[21] *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 404, 590 N.W.2d 688, 695 (1999), quoting *Moore v. Alabama State University*, 980 F. Supp. 426 (M.D. Ala. 1997).

[22] *Id.* at 404-05, 590 N.W.2d at 695.

In that case, the court stated that when considering allegations of unlawful discrimination at the summary judgment stage, direct evidence is "not the converse of circumstantial evidence."[23] The Eighth Circuit elaborated:

> [D]irect evidence is evidence "showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. . . . Thus, "direct" refers to the causal strength of the proof, not whether it is "circumstantial" evidence. A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext.[24]

The Eighth Circuit's analysis is consistent with our law, and we adopt its reasoning.

Viewing the evidence in the light most favorable to Marshall, we conclude that she has presented direct evidence that illegal discrimination led to the termination of her employment. Marshall asserted that Houdesheldt told her on January 26, 2012, that EyeCare Specialties' "'real concern is that you have sores on your arm, you appear to be anxious and you are acting paranoid.'" The second written warning stated in part:

> [Marshall's] performance continues to be an issue. Her performance is very inconsistent, with periods of average performance followed by periods where her performance decreases significantly. [Marshall] continues

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[23] See *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004).

[24] *Id.*

> to spend 20 - 30+ minutes working with a patient, causing everyone on her team to be off schedule and causing patients to get upset about the amount of time being spent. [Marshall] continues to refuse to cover her sores with bandages, using the bottom cuffs of some children's legging as sleeve extenders instead. I have talked to [Marshall] about the appropriate way to create a barrier with bandages[,] but she has not done so. [Marshall] continues to be jittery and easily flustered.

Thus, Marshall's refusal to cover her "sores" was given as a reason for the warning. But Marshall presented evidence that the so-called sores were actually an inherited skin condition that was "like little bruises under the skin that are not open and weeping." Although Marshall covered any cuts or open wounds with bandages, she did not want to risk tearing her skin in order to cover her skin condition with bandages. Such evidence can be construed as direct evidence that EyeCare Specialties perceived Marshall to have a disability. The ultimate strength or persuasiveness of this evidence is not before us, and we express no opinion on that issue. At this stage, the only question is whether this evidence was sufficient to create a genuine issue of material fact as to whether EyeCare Specialties terminated her employment for that reason. We conclude that it was. Accordingly, summary judgment was not proper.

## CONCLUSION

The judgment of the district court granting EyeCare Specialties' motion for summary judgment and dismissing Marshall's complaint is reversed, and the cause is remanded to the district court for further proceedings.

Reversed and remanded for
further proceedings.

Wright and Stephan, JJ., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Cleaver-Brooks, Inc., appellee, v. Twin City Fire Insurance Company, a subsidiary of The Hartford Insurance Company, appellant, and American Insurance Company et al., appellees.

865 N.W.2d 105

Filed July 2, 2015. No. S-14-822.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Estoppel: Appeal and Error.** An appellate court reviews a court's application of judicial estoppel to the facts of a case for abuse of discretion and reviews its underlying factual findings for clear error.
4. **Workers' Compensation: Appeal and Error.** In light of the beneficent purpose of the Nebraska Workers' Compensation Act, the appellate courts give the act a liberal construction to carry out justly the spirit of the act.
5. **Workers' Compensation.** Delay, cost, and uncertainty are contrary to the underlying purposes of the Nebraska Workers' Compensation Act.
6. **Workers' Compensation: Legislature: Intent: Employer and Employee: Time.** The Nebraska Workers' Compensation Act was intended by the Legislature to simplify legal proceedings and to bring about a speedy settlement of disputes between the injured employee and the employer by taking the place of expensive court actions with tedious delays and technicalities.

7. **Equity: Estoppel.** Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process.
8. **Estoppel.** The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.
9. ____. Judicial estoppel prevents parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding.
10. ____. Judicial estoppel is to be applied with caution so as to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.
11. **Laches.** The defense of laches is not favored in Nebraska.
12. ____. Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.
13. **Laches: Equity.** Laches does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.
14. **Laches.** What constitutes laches depends on the circumstances of the case.
15. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
16. ____. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
17. ____. Absent a duty, a negligence claim fails.
18. **Negligence: Insurance: Claims.** When a claim arises, an insurer generally owes a duty to the insured to exercise reasonable care in defending the suit.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Andrew T. Schlosser, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellant.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees SSW, Inc., formerly known as National Dynamics Corporation, et al.

J. Scott Paul, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee American Insurance Company.

Tiernan T. Siems and Andrew M. Collins, of Erickson & Sederstrom, P.C., for appellee Cleaver-Brooks, Inc.

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

Heavican, C.J.

## I. NATURE OF CASE

James E. Risor, an employee at a boiler manufacturing plant in Lincoln, Nebraska, sustained permanent hearing loss as a result of his employment. Between the time Risor was injured and the time he filed his workers' compensation claim, the plant changed ownership. Counsel representing the new owner's insurer, American Insurance Company (American), mistakenly believed American had insured the plant during the time of the injury. Twin City Fire Insurance Company (Twin City), which insured the plant for the previous owner, was not given notice of the claim until after entry of an award.

The new owner of the plant filed a declaratory judgment action against the previous owner and both insurers to determine who is liable for payment of the award. The district court determined that Twin City was liable. Twin City appeals. We find the district court correctly determined that Twin City was liable for the award and hence affirm.

## II. BACKGROUND

The parties have entered into a stipulation, so the facts are not in dispute by any party.

### 1. Risor's Injuries

Risor began working at a boiler manufacturing plant, colloquially referred to as "Nebraska Boiler," in Lincoln in 1973, and remained continuously employed at the plant until his retirement in 2004. During the course of Risor's employment, he suffered permanent hearing loss in both ears. Risor filed a claim against Nebraska Boiler in the Nebraska Workers' Compensation Court on January 20, 2004.

### 2. Nebraska Boiler

The plant has been owned by several different entities from 1973 to the present, although a company with the exact legal name of "Nebraska Boiler" has never owned the plant. In 1976, Daniel T. Scully, Roger L. Swanson, and Verlyn L. Westra purchased the plant and incorporated it as Nebraska Boiler Company, Inc. In 1989, Nebraska Boiler Company, Inc., merged with National Dynamics Corporation (National Dynamics), and after the merger, Nebraska Boiler Company, Inc., ceased to exist. Scully, Swanson, and Westra were shareholders of National Dynamics.

In 1998, Aqua-Chem, Inc., purchased various assets of National Dynamics, including the boiler manufacturing plant. Pursuant to the purchase agreement, National Dynamics agreed to indemnify Aqua-Chem for any liabilities not assumed by Aqua-Chem. No workers' compensation claims by Risor were mentioned in the agreement. After the sale, National Dynamics changed its name to SSW, Inc., and subsequently dissolved in 2003. The assets of the corporation were distributed to its three shareholders: Scully, Swanson, and Westra. In 2006, Aqua-Chem changed its name to Cleaver-Brooks, Inc. Cleaver-Brooks is the current legal owner of the boiler manufacturing plant.

### 3. Insurance Coverage

Several companies have provided workers' compensation insurance coverage to the boiler manufacturing plant over the years.

At the time of the sale to Cleaver-Brooks, National Dynamics entered into an agreement with Twin City to provide workers' compensation insurance coverage to National Dynamics for claims made by employees working at the boiler manufacturing plant from 1992 to 1998.

Cleaver-Brooks contracted with Fireman's Fund Insurance Company, later renamed American, to provide workers' compensation insurance coverage from 1992 to 2002. The coverage did not extend back to claims arising from the boiler manufacturing plant before Cleaver-Brooks acquired it in 1998.

Liberty Mutual Group, Inc., provided workers' compensation insurance coverage to Cleaver-Brooks from 2002 through Risor's trial. Liberty Mutual is not a party to this action.

### 4. Procedural History

Nebraska Boiler was the only named defendant in Risor's workers' compensation claim. The compensation court provided only Cleaver-Brooks with notice of the claim. Neither National Dynamics nor any of the insurance companies were given notice by the court. After Cleaver-Brooks tendered the claim to its two insurance providers, each insurance company retained separate counsel to defend Cleaver-Brooks against Risor's claims. During the course of the litigation, counsel for American operated under the mistaken belief that American had provided workers' compensation insurance coverage to Nebraska Boiler from 1992 to 2002. Instead, American had actually provided workers' compensation insurance coverage to only Cleaver-Brooks and not to National Dymanics, which actually owned Nebraska Boiler when Risor was injured. Counsel for American represented this mistaken belief to the compensation court.

On April 26, 2006, a single judge of the compensation court determined that Risor was permanently and totally disabled as a result of the hearing loss. The judge determined the date of the accident to be October 19, 1993. The date of the injury was apparently a surprise to both Risor and the defendants.

In his complaint, Risor alleged that he had suffered injuries only as early as 2001. Despite the determination of October 19, 1993, as the date of the accident causing the hearing loss, the judge ordered payment from Nebraska Boiler to begin as of the date of Risor's retirement, February 12, 2004.

After the filing of this order, an adjuster for American realized that Cleaver-Brooks did not own the plant on the date of Risor's injury; therefore, American was not the plant's insurer at the time of the injury. Nebraska Boiler filed a motion for continuance in order to allow "'additional parties who may have an exposure to liability once a final determination has been made' be served and given an opportunity to present additional evidence to the court."[1] The judge denied the motion for continuance. Both Risor and Cleaver-Brooks appealed to a review panel of the compensation court.

Twin City was given notice of the claim against Nebraska Boiler on August 1, 2006, and on October 25, Twin City filed a motion for leave to intervene to participate as a party in the appeal to the review panel. The review panel denied Twin City's motion, and Twin City appealed that decision to this court in *Risor v. Nebraska Boiler* (*Risor I*).[2] In 2008, we determined that "Twin City did not have a right to postaward intervention in Risor's workers' compensation action brought solely against his employer, Nebraska Boiler."[3] In reaching this conclusion, we noted that American "believed . . . that it was Nebraska Boiler's insurer during the period in which the court ultimately determined Risor was injured" and that "the evidence is that Nebraska Boiler's interests, represented by attorneys provided by [American], were substantially the same as Twin City's."[4] Twin City, however, was "free to represent the interests of its insured, Nebraska Boiler, in [Risor's

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[1] *Risor v. Nebraska Boiler*, 274 Neb. 906, 908, 744 N.W.2d 693, 696 (2008).

[2] *Id.*

[3] *Id.* at 910, 744 N.W.2d at 697.

[4] *Id.* at 915, 744 N.W.2d at 700.

subsequent] appeal of the award to the review panel, if it so chooses."[5] Twin City did not participate in that appeal.

In Risor's separate appeal of the award to the review panel, Risor argued that the appropriate date for commencing payments was the date of the injury in 1993, rather than the date Risor retired in 2004. In May 2008, the review panel reversed the single judge's decision and determined that payment should start from the date Risor was permanently injured in 1993. Nebraska Boiler appealed that decision to this court in *Risor v. Nebraska Boiler* (*Risor II*).[6] We affirmed the review panel's decision in 2009.[7]

In November 2012, Cleaver-Brooks filed this action for declaratory judgment in the district court for Douglas County to determine which party or parties were liable for Risor's claim. The named defendants were Twin City; American; SSW, Inc.; and Scully, Swanson, and Westra in their individual capacities. All parties filed motions for summary judgment. On June 21, 2013, the district court issued an order finding that Twin City was solely liable for the award. The district court determined that Twin City insured the plant at the time of Risor's injury and also found that the doctrines of laches and judicial estoppel did not apply and were not a defense to liability for Twin City. Further, the district court dismissed Twin City's counterclaims and cross-claims against Cleaver-Brooks and American for negligence, equitable subrogation, indemnification, contribution, and unjust enrichment. Finally, the district court held that the individual shareholders had no liability for the award, but did not address the claims by SSW, Inc.

Twin City appealed to this court, but the appeal was dismissed on the ground that the order from the district court was not a final order because it did not address the claims

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[5] *Id.* at 916, 744 N.W.2d at 700.

[6] *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

[7] *Id.*

by SSW, Inc. On August 13, 2014, the district court issued a supplemental order which incorporated its previous order and disposed of any remaining claims related to SSW, Inc. Twin City now properly appeals from a final order.

## III. ASSIGNMENTS OF ERROR

Twin City assigns, consolidated and restated, that the district court erred in (1) finding that Twin City was solely liable for payment of the workers' compensation award; (2) applying *Risor I* to the merits of a subsequent contribution or indemnity claim; (3) finding that the delay by Cleaver-Brooks in giving notice to Twin City and in asserting that Risor was not its employee prior to 1998 was not inexcusable; (4) finding that judicial estoppel did not prevent the district court from finding that Twin City was solely liable for payment of the claim; and (5) finding that other parties to the suit did not breach their duty to exercise reasonable care with respect to Twin City.

## IV. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[8] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[9]

[3] An appellate court reviews a court's application of judicial estoppel to the facts of a case for abuse of discretion and reviews its underlying factual findings for clear error.[10]

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[8] *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015).

[9] *Id.*

[10] *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010).

## V. ANALYSIS

### 1. Liability for Award

Twin City assigns that the district court erred in determining Twin City was solely liable for payment of the workers' compensation award. Twin City's argument hinges on the facts that Risor brought suit against Nebraska Boiler, which was owned by Cleaver-Brooks at the time Risor filed his complaint, and that the dates of the injuries Risor alleged in his complaint all occurred when Cleaver-Brooks owned the plant. Twin City argues that this indicates Risor's intent to file a claim only against Cleaver-Brooks.

In *Risor I*, we referred to Cleaver-Brooks as Nebraska Boiler's "parent company."[11] The use of the term "parent company," which suggests Cleaver-Brooks owned a controlling interest in a separate corporation, is not an accurate description of that relationship. Nebraska Boiler was in fact merely a trade name used by both National Dynamics and Cleaver-Brooks to refer to the plant. The transaction between National Dynamics and Cleaver-Brooks, which resulted in the transfer of ownership of the plant, was an asset sale and not a stock purchase. At the time Risor filed his complaint, Cleaver-Brooks owned the plant outright as an asset and not as a subsidiary.

That being said, we still correctly recognized in *Risor I* that Twin City could potentially face liability for the award. In *Risor I*, we held that Twin City was not deprived of its right to procedural due process when the review panel denied Twin City's motion to intervene in the proceedings.[12] We classified Twin City as being "in privity" with Nebraska Boiler, noting "Nebraska Boiler's interests [in defending the suit] were substantially the same as Twin City's."[13] This holding, at the very least, suggests Twin City could potentially be liable for an award entered against Nebraska Boiler by the

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[11] *Risor I, supra* note 1, 274 Neb. at 909, 744 N.W.2d at 696.

[12] *Risor I, supra* note 1.

[13] *Id.* at 914-15, 744 N.W.2d at 700.

compensation court. The fact that Nebraska Boiler is not a separate legal subsidiary does not change this.

[4-6] We note the purpose of the Nebraska Workers' Compensation Act and the flexibility with which we have interpreted the act: "In light of [the] beneficent purpose of the [Nebraska Workers' Compensation Act, the appellate courts] have consistently given the act a liberal construction to '"'"carry out justly the spirit of the [a]ct.'"'"'"[14] "Delay, cost, and uncertainty are contrary to the underlying purposes of the [Nebraska Workers' Compensation] Act."[15] "The [Nebraska Workers' Compensation] Act was intended by the Legislature to simplify legal proceedings and to bring about a speedy settlement of disputes between the injured employee and the employer by taking the place of expensive court actions with tedious delays and technicalities."[16]

From Risor's perspective, he worked at the same plant (Nebraska Boiler) for his entire career, even though ownership of the plant changed several times over the course of his employment. Although filing a complaint against Nebraska Boiler was not technically accurate, Risor's intent was clear: to receive compensation for the injury incurred during his employment at the plant, regardless of who owned the plant at the time he suffered his injury.

The compensation court found that Risor's injury occurred in 1993, which holding was affirmed by this court in *Risor II*.[17] Further, it is undisputed that Twin City, through its policy with National Dynamics, was the sole provider of coverage for workers' compensation claims for employees working at the plant during that time period. Therefore, Twin City is liable

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[14] *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 431, 657 N.W.2d 634, 640 (2003).

[15] *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 10, 834 N.W.2d 236, 245 (2013).

[16] *Id.*

[17] *Risor II, supra* note 6.

for the award and cannot elude payment by relying on a technical inaccuracy, the designation of General Dynamics, rather than Nebraska Boiler, as the employer in Risor's claim. The district court did not err in finding that Twin City was liable for the award.

Twin City's assignment of error is without merit.

### 2. Twin City's Equitable Defenses

Twin City assigns that the district court erred in finding that it was liable for the award because the doctrine of judicial estoppel precluded Cleaver-Brooks from claiming Twin City was responsible and because Cleaver-Brooks' claim was barred by the doctrine of laches.

#### (a) Judicial Estoppel

Twin City argues that because Cleaver-Brooks, through the attorney retained by American, represented to the compensation court that American's coverage of the plant started in 1992, the doctrine of judicial estoppel now prevents Cleaver-Brooks and American from asserting an inconsistent position in this proceeding.

[7-9] Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process.[18] The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.[19] Fundamentally, the intent behind the doctrine of judicial estoppel is to prevent parties from gaining an advantage by taking one position in a proceeding and then switching to a different position when convenient in a later proceeding.[20]

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[18] *TFF, Inc., supra* note 10.

[19] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

[20] See, e.g., *MW Erectors v. Niederhauser Ornamental*, 36 Cal. 4th 412, 115 P.3d 41, 30 Cal. Rptr. 3d 755 (2005).

Some have described the purpose of the rule as "to prevent parties from playing fast and loose with the courts."[21]

[10] This doctrine, however, is to be applied with caution so as to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.[22] Many courts require a showing of bad faith before the doctrine is invoked and will not apply the doctrine in the case of mistake or negligence.[23] We agree with these jurisdictions that bad faith or an actual intent to mislead on the part of the party asserting inconsistent positions must be demonstrated before the judicial estoppel doctrine may be invoked. Although the judicial admission doctrine is not applicable here,[24] we note we have held that for a judicial admission to substitute as evidence the admission "'must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.'"[25]

In this case, we find no evidence of any bad faith or an intent to mislead on the part of either Cleaver-Brooks or American. In fact, it was in neither Cleaver-Brooks' nor American's interest to initially represent to the compensation court that Cleaver-Brooks owned the plant or that American's policy covered the plant in 1993. At the time American's attorney made the misrepresentation, all parties involved believed

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[21] *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996).

[22] *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009).

[23] See, e.g., *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001); *King v. Herbert J. Thomas Memorial Hosp.*, 159 F.3d 192 (4th Cir. 1998); *In re Chambers Development Co., Inc.*, 148 F.3d 214 (3d Cir. 1998); *Johnson v. State of Oregon*, 141 F.3d 1361 (9th Cir. 1998); *Haley v. Dow Lewis Motors, Inc.*, 72 Cal. App. 4th 497, 85 Cal. Rptr. 2d 352 (1999); *Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 160 P.3d 13 (2007).

[24] See *Marting v. Nebraska Liquor Control Comm.*, 250 Neb. 134, 548 N.W.2d 326 (1996).

[25] *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 93, 809 N.W.2d 751, 764-65 (2012).

that the earliest possible date of Risor's injury was 2001—3 years after the plant was sold. It was only after the compensation court determined the date of the injury to actually be 1993 that the attorney's inaccurate statement gained any significance. Further, American's attorney sought to correct the information once the mistake was uncovered. There is no reason to believe that Cleaver-Brooks or American intentionally misrepresented the facts in order to mislead or gain some type of advantage.

The district court did not abuse its discretion in rejecting this defense.

(b) Laches

[11-14] Twin City argues that recovery against Twin City should be barred by the doctrine of laches, because Cleaver-Brooks unjustifiably delayed notifying Twin City of the claim by Risor. The defense of laches is not favored in Nebraska.[26] Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.[27] Laches does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.[28] What constitutes laches depends on the circumstances of the case.[29] In other words, Twin City must prove that any delay in notification by Cleaver-Brooks and American was inexcusable and that Twin City was prejudiced by that delay.

Because the original dates of the alleged injuries in Risor's claim were all while Cleaver-Brooks owned the company, Cleaver-Brooks or American had no reason to notify Twin City until the compensation court determined the date of the injury

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[26] *Schellhorn v. Schmieding*, 288 Neb. 647, 851 N.W.2d 67 (2014).

[27] *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012).

[28] *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006).

[29] *Id.*

to be in 1993. The facts indicate that the trial court entered its award on April 26, 2006, and Twin City was notified of the claim on August 1. Between those two dates the following occurred in the case: Risor appealed the award on May 9, Nebraska Boiler filed a cross-appeal on May 10, and Nebraska Boiler's motion for a continuance was denied on May 10. We find nothing in the stipulated facts suggesting any delay was inexcusable.

Even if Cleaver-Brooks had some reason to know before the trial court entered its award that there was a potential claim for which Twin City could be liable, the evidence still does not establish that Twin City was prejudiced by any delay. American "vigorously defended against Risor's claim"[30] and the outcome likely would not have differed had Twin City participated. Further, *Risor I* specifically granted Twin City the chance to participate in the appeal of the award to the review panel, but Twin City chose not to participate. To the extent that Twin City may have been prejudiced at all, Twin City's own inaction undeniably contributed to that prejudice. The court did not abuse its discretion in rejecting this defense.

Twin City's assignments of error are without merit.

### 3. Twin City's Counterclaim/ Cross-Claim: Negligence

[15] Twin City assigns that the district court erred in dismissing Twin City's counterclaim and cross-claim that alleged Cleaver-Brooks and American negligently injured Twin City when they both failed to notify Twin City of the pending claim. For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.[31]

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[30] *Risor I, supra* note 1, 274 Neb. at 915, 744 N.W.2d at 700.

[31] *Brown v. Social Settlement Assn.*, 259 Neb. 390, 610 N.W.2d 9 (2000).

(a) Duty

[16-18] We must determine whether Cleaver-Brooks or American owed a duty to Twin City in this situation. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.[32] Absent a duty, a negligence claim fails.[33] When a claim arises, an insurer generally owes a duty to the insured to exercise reasonable care in defending the suit.[34] But Twin City cites to no case law in Nebraska, or any other jurisdiction, which has found that one insurance company owes a duty to notify another insurance company of potential claims. There also appears to be no case law that suggests Cleaver-Brooks, having purchased the plant as an asset, would owe a duty to notify Twin City of such claims. Given the facts of this case, when presented with a workers' compensation claim alleging injuries that occurred no earlier than 2001, Cleaver-Brooks and American could not have reasonably been expected to notify Twin City, an insurer which covered claims arising from the plant only between 1992 and 1998. As a matter of law, we find Cleaver-Brooks and American had no duty to notify Twin City.

(b) Breach

Further, there is no evidence that either Cleaver-Brooks or American breached any duty of care owed to Twin City if such a duty were to exist. In this case, the parties only had reason to believe that Twin City could potentially be exposed to liability after a single judge from the compensation court determined, to the surprise of all the parties, the date of the injury to be in 1993. Twin City was informed within a reasonable period of time after that judgment. The evidence established that Cleaver-Brooks and American acted reasonably

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[32] *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010).

[33] *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010).

[34] See, e.g., *Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637 (Iowa 2000).

in protecting any interests Twin City had in the claim.[35] The district court did not err in dismissing Twin City's negligence claims.

### 4. Twin City's Remaining Counterclaims/ Cross-Claims: Equitable Subrogation, Indemnification, Contribution, and Unjust Enrichment

Pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2014), the amount of a workers' compensation award is increased by 50 percent if payment is not made to the claimant within 30 days of entry of the award. In order to avoid the statutory penalty, Twin City paid the lump-sum award due to Risor and has been making monthly payments to Risor since that time.

All of Twin City's remaining assignments of error essentially allege the same thing under slightly different legal theories: Twin City was wrongfully forced to pay the award to Risor and either Cleaver-Brooks or American should compensate Twin City for all or part of what Twin City has already paid to Risor. These arguments necessarily fail, because we have found that Twin City, as the insurer of the plant at the time Risor was injured, is liable for payment of the award. Twin City's remaining assignments of error are without merit.

## VI. CONCLUSION

The district court did not err in determining Twin City was liable for Risor's workers' compensation award, in rejecting Twin City's equitable defenses, and in dismissing Twin City's counterclaims.

Affirmed.

Stephan, J., participating on briefs.
Wright, J., not participating.

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[35] See *Risor I, supra* note 1.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Jose C. Oliveira-Coutinho, appellant.

865 N.W.2d 740

Filed July 10, 2015. No. S-13-798.

1. **Juries: Discrimination: Appeal and Error.** An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law.
2. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.
3. **Juries: Equal Protection: Prosecuting Attorneys.** In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the U.S. Supreme Court held that a prosecutor's privilege to strike individual jurors through peremptory challenges was subject to the commands of the Equal Protection Clause.
4. **Juries: Prosecuting Attorneys.** A prosecutor is ordinarily entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his or her view concerning the outcome of the case.
5. **Juries: Equal Protection: Discrimination.** The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely because of their race.
6. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process. First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful discrimination. The third step requires the trial court to evaluate the persuasiveness of the

justification proffered by the prosecutor. But the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

7. **Juries: Discrimination: Prosecuting Attorneys: Moot Question.** Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has decided the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing is moot.
8. **Juries: Prosecuting Attorneys: Discrimination: Appeal and Error.** The initial question whether a prosecutor's reasons for a peremptory challenge were race neutral is a question of law that an appellate court reviews de novo. The question is whether the stated reasons, on their face, were inherently discriminatory. In making that determination, an appellate court does not consider whether the prosecutor's reasons are persuasive.
9. **Juries: Prosecuting Attorneys.** The U.S. Supreme Court has explained that the third step of a *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), inquiry involves evaluating the prosecutor's credibility. Such credibility determinations lie within the peculiar province of the trial judge and require deference to the trial court.
10. **Criminal Law: Trial: Juries: Appeal and Error.** Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court.
11. ____: ____: ____: ____. To warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have prejudiced the defendant.
12. **Jurors: Jury Instructions: Presumptions.** Jurors are presumed to follow their instructions unless evidence to the contrary is shown.
13. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence 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.
14. **Search and Seizure: Evidence: Trial.** Evidence obtained as the direct or indirect fruit of an illegal search or seizure, the poisonous tree, is inadmissible in a state prosecution and must be excluded.
15. **Search and Seizure: Evidence.** To determine whether the evidence is a fruit of the illegal search or seizure, a court asks whether the evidence has been come at by exploitation of the primary illegality or whether

it has instead been come at by means sufficiently distinguishable to be purged of the primary taint.

16. **Evidence.** Under the independent source doctrine, the challenged evidence is admissible if it came from a lawful source independent of the illegal conduct.
17. **Evidence: Constitutional Law.** Under the attenuated connection doctrine, the challenged evidence is admissible if the causal connection between the constitutional violation and the discovery of the evidence is so attenuated as to rid the taint.
18. **Evidence: Police Officers and Sheriffs.** Under the inevitable discovery doctrine, the challenged evidence is admissible if it inevitably would have been discovered by lawful means without reference to the police misconduct.
19. **Constitutional Law: 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.
20. **Constitutional Law: Appeal and Error.** Claimed violations of the compulsory process right are reviewed de novo.
21. **Constitutional Law: Witnesses: Due Process: Proof.** In order to show that his or her compulsory process or due process rights have been violated as a result of the deportation of a potential witness, a defendant must (1) make an initial showing that the government has acted in bad faith and (2) make a plausible showing that the testimony of the deported witness would have been both material and favorable to his or her defense.
22. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.
23. **Trial: Witnesses.** Competency of a witness is an issue to be determined by the trial court and not by the jury.
24. ____: ____. The credibility and weight of a witness' testimony are for the jury to determine.
25. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
26. **Criminal Law: Constitutional Law: Due Process.** Under the Due Process Clause of the 14th Amendment and the Compulsory Process and Confrontation Clauses of the 6th Amendment, a criminal defendant is guaranteed a meaningful opportunity to present a complete defense.
27. **Trial: Evidence.** Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. It is not essential that conditions existing at the time of the experiment be identical with those existing

at the time of the occurrence, but the conditions should be essentially similar, that is, similar in all those factors necessary to make the comparison a fair and accurate one. The lack of similarity regarding the nonessential factors then goes to the weight of the evidence rather than to its admissibility.

28. **Trial: Photographs.** The admission of photographs into evidence rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.
29. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
30. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
31. **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.
32. **Motions for New Trial: Evidence: Witnesses.** A new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at trial.
33. **Trial: Prosecuting Attorneys: Appeal and Error.** When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.
34. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.
35. **Trial: Prosecuting Attorneys: Appeal and Error.** If an appellate court concludes that a prosecutor's acts were misconduct, the court must next consider whether the misconduct prejudiced the defendant's right to a fair trial.
36. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.
37. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
38. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury, (2) whether the conduct or remarks

were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction.

39. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
40. **Criminal Law: Evidence.** The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.
41. **Photographs: Rules of Evidence.** Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), does not require a separate purpose for every photograph, and it requires a court to prohibit cumulative evidence only if it substantially outweighs the probative value of the evidence.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

Todd W. Lancaster, of Nebraska Commission on Public Advocacy, and Horacio J. Wheelock, of Horacio Wheelock Law Offices, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ., and Pirtle, Judge.

Heavican, C.J.

## I. INTRODUCTION

Jose C. Oliveira-Coutinho was charged with and convicted of three counts of first degree murder in the deaths of Vanderlei, Jaqueline, and Christopher Szczepanik, and also with one count of theft by deception over $1,500. The State sought the death penalty, and the jury found aggravating circumstances in connection with each of the three counts of murder. A three-judge panel was appointed for a sentencing determination hearing. Following that hearing, Oliveira-Coutinho was sentenced to three life sentences on the murder counts and 20 years' imprisonment on the theft by deception count, sentences to be served consecutively. He appeals. We affirm.

## II. FACTUAL BACKGROUND

### 1. Szczepanik/Oliveira-Coutinho Relationship

Vanderlei and Jaqueline moved from Brazil to Florida. While in Florida, their son Christopher was born. The family then moved to Omaha, Nebraska, as missionaries for their church to renovate an old school building located on South 16th Street.

At some point, the church became financially unstable and Vanderlei became involved in his own renovation and construction projects. He purchased and was renovating a property located on Park Avenue in Omaha, and his business, IGIT Services Corporation (IGIT), was also hired for a lead stabilization project in Omaha.

Oliveira-Coutinho moved from Brazil to Florida in 2005, where he met and worked for Vanderlei. He moved to Omaha with the family and resided with them at the South 16th Street property. Oliveira-Coutinho led one of Vanderlei's work crews. In early 2009, Oliveira-Coutinho contacted childhood friends Valdeir Goncalves-Santos and Elias Lourenco-Batista, who lived in Brazil, about working in the United States. Both agreed, moved to Omaha to work for Vanderlei in April 2009, and lived at the Park Avenue address.

### 2. Family Disappears

On January 6, 2010, the Szczepaniks' pastor from Florida received a telephone call from a friend of the Szczepaniks who was unable to contact the family. Jaqueline's adult daughter also had tried and failed to contact her mother. A member of Vanderlei's work crew reported that he had last seen Vanderlei near the end of the workday on December 17, 2009, at the Park Avenue address. The pastor then contacted Oliveira-Coutinho. Oliveira-Coutinho indicated that he was not concerned because Vanderlei had previously gone somewhere without telling him.

After arriving in Omaha on January 8, 2010, the pastor from Florida and another church official reported the Szczepaniks'

disappearance to the Omaha Police Department. A wellness check was then initiated at the South 16th Street address. Oliveira-Coutinho let law enforcement and church officials into the building. Located in the parking lot was a white Dodge van with in-transit papers dated December 16, 2009, another white truck apparently belonging to IGIT, and a dark-colored Volvo registered to Vanderlei. A Nissan pickup registered to Vanderlei was not in the parking lot.

Once inside the home, law enforcement noted that the living quarters looked like someone had been living there, but had just gone out, and that there were no signs of a disturbance. The next day, Oliveira-Coutinho gave the church officials another tour of the South 16th Street property, as well as a tour of the Park Avenue property. Oliveira-Coutinho indicated that he had moved to the Park Avenue property because the heat did not work at the South 16th Street address.

A missing persons investigation was opened on January 11, 2010. No response was received from Vanderlei's and Jaqueline's cell phones. E-mails to IGIT were not returned. The last day that Christopher had been at school was December 17, 2009. The last telephone call from either cell phone was from Jaqueline to Vanderlei at 8:46 p.m. on December 17. Vanderlei's Nissan truck was found on January 30, 2010, about 2½ miles from the Park Avenue location and about one-half mile from the South 16th Street location. The truck had a tow notice from 2 days earlier. A neighbor testified that the truck had been parked one afternoon in December by a Hispanic male, who said "'hi'" in English and kept walking.

### 3. Case Transferred to Homicide

On February 1, 2010, the Omaha Police Department's homicide unit was briefed on the case. The move to the homicide unit was due to a bank surveillance video which showed that someone other than the Szczepaniks had been using the family's bank cards in Omaha on December 17, 2009. Search warrant applications were prepared on February 1, 2010, and

warrants were executed at the South 16th Street and Park Avenue addresses that same day.

While executing the warrants at the Park Avenue address, officers found items matching those purchased with the family's bank cards after the family had gone missing, notably two space heaters. Clothing and hats similar to those worn by the persons seen in the bank surveillance video were also seized, including a black hat with stylized white lettering that spelled "Fox" and a tan hooded coat. In the same room where the black hat was found, law enforcement recovered driving documents, blank checks, and deposit slips, all in Oliveira-Coutinho's name, as well as checks written on IGIT's account and mail postmarked December 23, 2009, and addressed to Jaqueline, Vanderlei, and IGIT.

In the master bedroom at the South 16th Street address, law enforcement found, among other items, a "Thomas the Train" bedspread, Jaqueline's eyeglasses, checks made out to IGIT totaling $95,919, checks made out to Vanderlei totaling $2,800, cash totaling $36,400, and $10,000 in Menards gift checks. In addition to those items, law enforcement noted that items at the South 16th Street address had been moved since the initial wellness check.

#### 4. Questioning of Oliveira-Coutinho, Goncalves-Santos, and Lourenco-Batista

Prior to exercising the search warrants on February 1, 2010, officers made contact with Oliveira-Coutinho, who was standing in the threshold of the South 16th Street property when officers arrived. Oliveira-Coutinho was wearing a tan coat, a long-sleeved camouflage shirt, and a black hat with white lettering that spelled "DC." Officers tried to communicate with Oliveira-Coutinho, but had difficulty because of a language barrier. Eventually, Oliveira-Coutinho was asked to sit in the back seat of the police cruiser. While there, he made a telephone call to a person who was able to talk with one of the officers over Oliveira-Coutinho's cell phone and interpret and

explain the situation to him. Upon arriving at the scene, officers recognized the hat worn by Oliveira-Coutinho as similar to one worn in the bank surveillance video.

Oliveira-Coutinho, Goncalves-Santos, and Lourenco-Batista were all questioned on February 1 and into February 2, 2010, and again later in February and March. When Goncalves-Santos was taken into custody, he was wearing a white jacket with black stripes on the sleeves.

### 5. Bank Records, Automatic Teller Machine Footage, and Shopping Sprees

Bank records showed that Oliveira-Coutinho's bank balance on December 10, 2009, was $476.96. In approximately the 1 month preceding, there had been just two deposits—for $600 and $363. But between December 21, 2009, and January 5, 2010, three deposits totaling $7,000 were made into Oliveira-Coutinho's bank account, all from IGIT's account. Nearly all of that money had been transferred out of the account by the end of the subsequent statement cycle, much of it through withdrawals made by a service described on his statement as "Xoom." Similar deposits were made into the accounts of Goncalves-Santos and Lourenco-Batista, again with the payments coming from IGIT. In addition, 14 automatic teller machine withdrawals were made from the IGIT and Szczepanik accounts between December 17, 2009, and January 20, 2010. No other unauthorized withdrawals occurred after February 1.

Automatic teller machine footage shows individuals in a dark-colored car and a white van, similar to the van driven by Oliveira-Coutinho, making withdrawals from the Szczepaniks' bank accounts. The first withdrawal was on December 17, 2009, at 11:59 p.m. Though faces are not discernible because the vehicle's occupants were wearing hats or hoods, one occupant appears to be wearing a long-sleeved camouflage shirt or hoodie, and in another, a tan hooded coat. Yet still another shows an occupant wearing a black hat with white stylized

lettering that spelled "Fox." According to one witness, Oliveira-Coutinho wore such a hat.

The Szczepaniks' debit cards were used to make various purchases, including purchases at a store referred to as either "Hat World" or "LIDS." At that store, a white hat with black lettering that spelled "Oklahoma" and a black hat with white lettering that spelled "DC" were purchased. On December 31, 2009, three individuals purchased items at a Wal-Mart store in Council Bluffs, Iowa. Those individuals arrived in a dark-colored sedan; one individual was wearing a tan coat with dark lining and a black hat with white letters similar to the "DC" hat, while another individual was wearing a white coat with black stripes on the sleeves.

### 6. Initial Charges

Following law enforcement's questioning of Oliveira-Coutinho and others, all were placed on immigration holds by the federal government. Lourenco-Batista was ordered deported on April 22, 2010. On July 29, Oliveira-Coutinho, Goncalves-Santos, and Lourenco-Batista were charged with unauthorized use of a financial transaction device. The charges against Goncalves-Santos and Lourenco-Batista were dropped on January 11, 2011. On January 28, Goncalves-Santos was charged with three counts of first degree murder. A few months later, Lourenco-Batista was deported.

Goncalves-Santos' trial began on August 15, 2011. After 7 days of evidence, Goncalves-Santos interrupted his trial to cooperate with the State and law enforcement. As part of this cooperation, Goncalves-Santos informed law enforcement that he and Lourenco-Batista killed the Szczepanik family at Oliveira-Coutinho's direction.

On August 25, 2011, pursuant to a plea agreement, Goncalves-Santos pled guilty to one count of second degree murder for killing Vanderlei. Also pursuant to the agreement, in exchange for his plea and truthful testimony in any current or future cases related to the murders, the State agreed to recommend a sentence of 20 years' to 20 years' imprisonment.

With credit for good time and time served, Goncalves-Santos could reduce his sentence to 7 years 5 months' imprisonment, after which he would likely be deported to Brazil. As of Oliveira-Coutinho's trial, Goncalves-Santos had not been sentenced.

### 7. Testimony of Goncalves-Santos

At Oliveira-Coutinho's trial, Goncalves-Santos testified that on December 17, 2009, he and Lourenco-Batista were working at the Park Avenue property when Oliveira-Coutinho arrived. Goncalves-Santos testified that Oliveira-Coutinho was unhappy working for Vanderlei and wanted to "get" him. Oliveira-Coutinho tried to persuade Goncalves-Santos and Lourenco-Batista to help him kill Vanderlei.

Oliveira-Coutinho gave Lourenco-Batista a baseball bat and gave Goncalves-Santos an iron bar and told them to go to the basement where Vanderlei was working and kill him. Lourenco-Batista went into the basement, but did not kill Vanderlei.

Oliveira-Coutinho then drove Goncalves-Santos and Lourenco-Batista to the South 16th Street property. The men went to Oliveira-Coutinho's bedroom, where Oliveira-Coutinho showed the others his bank balance and complained that he had no money. Goncalves-Santos testified that Oliveira-Coutinho was upset because Vanderlei had lowered their wages, because work was slow in the winter months. Oliveira-Coutinho indicated again that they had to kill Vanderlei and that it had to be "'today.'"

Oliveira-Coutinho, Goncalves-Santos, and Lourenco-Batista waited on the staircase for Vanderlei to come home. Oliveira-Coutinho handed Goncalves-Santos a box cutter that looked like a gun. Vanderlei came home. Lourenco-Batista hit Vanderlei, causing him to fall. Vanderlei screamed for Jaqueline and kept saying, "'It's me, guys.'" Vanderlei sat up, and Goncalves-Santos hit him with the iron bar. Lourenco-Batista then hit Vanderlei on the forehead. At that point, Vanderlei was apparently dead.

Meanwhile, Jaqueline came running to Vanderlei. Oliveira-Coutinho grabbed her and punched her in the mouth. He then told Lourenco-Batista to get Christopher. Jaqueline and Christopher were taken to Oliveira-Coutinho's bedroom. Goncalves-Santos testified that Jaqueline's legs and hands were taped and that "we tied her with a sock."

Oliveira-Coutinho demanded bank account numbers from Jaqueline. She told him the numbers. Oliveira-Coutinho retrieved the bank card and returned with the card and a box of checks. Oliveira-Coutinho made Jaqueline sign the checks. At this point, Oliveira-Coutinho left Lourenco-Batista with Jaqueline and Christopher while he and Goncalves-Santos went to the bank to withdraw cash. After the trip to the bank, Oliveira-Coutinho drove to the Missouri River to look for a place to "throw him away and be free of these people."

After returning to the South 16th Street address, Oliveira-Coutinho and Goncalves-Santos found that Lourenco-Batista had untaped Jaqueline's hands. Oliveira-Coutinho said that doing so was "'dangerous. This woman might hit you.'" They tied Jaqueline back up, but took the tape off her feet and put a pillowcase over her head. Oliveira-Coutinho warned her that "'[i]f you do anything, you know what's gonna happen to Christopher.'"

Goncalves-Santos and Lourenco-Batista then walked Jaqueline down the hallway to a staircase, though not the same staircase where Vanderlei was killed. Oliveira-Coutinho stayed with Christopher. Goncalves-Santos stayed at the top of the staircase. Lourenco-Batista tied a rope around Jaqueline's neck, and the other end of the rope was tied to a railing at the top of the staircase. Jaqueline begged for her life, but Lourenco-Batista pushed her down the stairs. According to Goncalves-Santos' testimony, Jacqueline "rolled over and she hit the wall. And then she rolled again and she went down, and she stayed with her head down. Her knees were almost touching the ground and she was head-down . . . ." Goncalves-Santos took the rope off Jaqueline and placed her at the bottom of

the stairs. From the bedroom, Oliveira-Coutinho asked, "'Are you done?'"

They repeated the process with Christopher. Goncalves-Santos testified that he could not "stand to look at him, to see Christopher moving around." When it was finished, Oliveira-Coutinho again asked, "'Is it over?'" Goncalves-Santos went to Christopher, who was still moving, and laid him next to Jaqueline.

While Oliveira-Coutinho looked for money, Goncalves-Santos and Lourenco-Batista wrapped the bodies in plastic and sheets and loaded them into Oliveira-Coutinho's van. Oliveira-Coutinho then drove to the Missouri River, where Goncalves-Santos and Lourenco-Batista unloaded the bodies. While Oliveira-Coutinho drove, Goncalves-Santos cut open the stomach of each body, apparently to keep the bodies from floating, and tied each body's legs to iron bars. The bodies were then placed in the river, but they continued to float. Oliveira-Coutinho was concerned that the bodies would be found, so they returned to the South 16th Street address to get a knife to cut the rope. Goncalves-Santos cut the iron bars from Vanderlei's and Jaqueline's bodies, but Christopher's body had disappeared. Goncalves-Santos threw the knife, iron bars, baseball bat, the contents of a bucket of Vanderlei's blood, and their cleaning supplies into the river.

The men returned to the South 16th Street location and cleaned more thoroughly. In addition, according to Goncalves-Santos, he and Oliveira-Coutinho parked Vanderlei's truck on a nearby street to make it look like the family had gone on vacation. The men then returned to the Park Avenue property to sleep.

Goncalves-Santos testified that they wrote checks and cashed them at a Wells Fargo Bank and also that Oliveira-Coutinho used the Szczepaniks' bank cards while with Goncalves-Santos and Lourenco-Batista. Goncalves-Santos testified that Oliveira-Coutinho hid the bank cards and checks in his van or in the attic at the Park Avenue property.

Goncalves-Santos testifed that he told his wife about the killings, but denied telling anyone else. He said that he did not tell law enforcement the truth at first because he did not know whom to trust, and admitted on cross-examination that he made inconsistent statements to law enforcement. Goncalves-Santos testified that he decided to tell the truth for Jaqueline's daughter's sake. He also testified that he believed he killed the family because he was with Oliveira-Coutinho and Lourenco-Batista when everything happened.

In addition to his testimony, Goncalves-Santos led law enforcement to the spot where the bodies had been placed in the river, though flooding prevented further search at that time. In addition, because of Goncalves-Santos' information, Vanderlei's blood was found at the South 16th Street property near a radiator in the entryway to the building. Vanderlei's blood was also found in a mop bucket located in a utility closet in the building.

On October 13, 2011, Goncalves-Santos returned with law enforcement to the location where the bodies were disposed of. Eventually, skeletal remains bundled in plastic and a "Thomas the Train" sheet were found. A pathologist testified that DNA evidence established the remains as Christopher but that the cause of death could not be determined due to the condition of the partial skeletal remains. Also recovered was a metal grate with a rope attached. Goncalves-Santos testified that the rope was the one they used to hang Jaqueline and Christopher. No other evidence was recovered, nor were Vanderlei's or Jaqueline's bodies found.

### 8. Testimony of Patricia Barbosa dos Santos-Oliveira

Oliveira-Coutinho's wife, Patricia Barbosa dos Santos-Oliveira, testified. According to her testimony, Oliveira-Coutinho had a 5-year plan, which began in 2005, to earn money and then return to his family in Brazil. In addition, Patricia testified that Goncalves-Santos and Lourenco-Batista

owed Oliveira-Coutinho money upon their arrival in the United States.

Patricia testified that Vanderlei had "laid [Oliveira-Coutinho] off," but then rehired him at a lower wage, and that Oliveira-Coutinho was angry because he worked hard for "very little money." Oliveira-Coutinho told Patricia that Vanderlei treated him "like a slave," that Oliveira-Coutinho hated Vanderlei, and that he was thinking of killing Vanderlei. Patricia told him that "only God has the power to give life and . . . to take life" and that he could not kill Vanderlei because he could not repent from that. Oliveira-Coutinho replied that he would not kill Vanderlei because of Christopher. When Patricia later asked if Vanderlei and Oliveira-Coutinho's relationship had improved, he said that it had not but that it did not matter, because he and "the boys" had something planned. According to Patricia, Oliveira-Coutinho referred to Goncalves-Santos and Lourenco-Batista as "the boys."

At the end of January or beginning of February 2010, Oliveira-Coutinho contacted Patricia in Brazil and requested that if anything happened to him she should transfer money from his bank accounts to her bank accounts in Brazil. She testified that she did so via "Xoom." She also testified that Oliveira-Coutinho never told her that the Szczepanik family was missing.

By mid-February 2010, Patricia began almost daily contact with Goncalves-Santos's wife and assisted the Omaha Police Department in making contact with her. Patricia testified that she assisted law enforcement because "when you're made aware of a crime being committed and you don't report that crime, then I believe that you are just as guilty as the perpetrators of that crime. And I did not want to have that guilt on me."

### 9. Motion for Advance Ruling—Goncalves-Santos Cross-Examination

As relevant on appeal, Oliveira-Coutinho filed a motion for advance ruling seeking to cross-examine Goncalves-Santos

about his sexual relations with animals, his killing or harming of animals, his threats to kill his wife, and any other violent or antisocial tendencies or behaviors. In connection with this, Oliveira-Coutinho also sought to introduce the testimony of Renan Diaz, one of Goncalves-Santos' cellmates at the Douglas County Correctional Center. Oliveira-Coutinho argued that this evidence was relevant and went to the competency of Goncalves-Santos as a witness under rule 601.[1]

The district court rejected Oliveira-Coutinho's motion for advance ruling. It reasoned that the evidence Oliveira-Coutinho sought to introduce had no bearing on Goncalves-Santos' competency as a witness and, further, did not bear on Goncalves-Santos' credibility, because none of the questions which Oliveira-Coutinho sought to ask were probative of Goncalves-Santos' truthfulness or lack thereof.

The district court further concluded that Oliveira-Coutinho could not ask Diaz questions related to specific instances of Goncalves-Santos' conduct, because such extrinsic evidence, under rule 608(2),[2] could not be used to attack a witness' credibility.

The district court next rejected Oliveira-Coutinho's contention that the evidence which he sought to admit would contradict Goncalves-Santos' presumed testimony that he, Goncalves-Santos, was not violent, but that he killed only under Oliveira-Coutinho's orders. The district court found there was nothing to suggest that Goncalves-Santos would testify that he was not violent; to the contrary, his testimony about committing the murders would tend to support the conclusion that Goncalves-Santos was violent. The evidence Oliveira-Coutinho sought to introduce, then, would not contradict Goncalves-Santos' testimony.

Finally, the district court rejected Oliveira-Coutinho's assertions that these questions of Goncalves-Santos would

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[1] Neb. Evid. R. 601, Neb. Rev. Stat. § 27-601 (Reissue 2008).

[2] Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 2008).

show bias on the part of Goncalves-Santos against Oliveira-Coutinho. The district court reasoned that none of the questions which Oliveira-Coutinho sought to ask touched upon the relationship between Oliveira-Coutinho and Goncalves-Santos or upon Goncalves-Santos' self-interest.

Oliveira-Coutinho filed a motion to reconsider, alleging that cross-examination on the issues sought was "'reverse 404(b)'"[3] evidence offered to prove Goncalves-Santos' conscious guilt, as well as for impeachment if Goncalves-Santos testified otherwise. The court denied the motion to reconsider, reasoning that the evidence could not show Goncalves-Santos' conscious guilt where Goncalves-Santos had admitted his guilt.

### 10. Other Pretrial Motions

#### (a) Motion to Sequester

Prior to trial, Oliveira-Coutinho sought a change of venue and to have the jury, once selected, sequestered for the duration of the trial due to pretrial publicity. The district court granted the motion with regard to sequestering the jury for deliberations but otherwise denied the motion, concluding that the evidence before it showed that while there had been significant pretrial publicity, it was not "invidious, inflammatory, misleading, or biased against [Oliveira-Coutinho]."

#### (b) Family Photograph

Prior to trial, Oliveira-Coutinho sought to have a family photograph of the Szczepaniks excluded from evidence as prejudicial. The district court denied that motion, agreeing with the State that in this case, the photograph was necessary for purposes of identification.

#### (c) Handwriting Expert

Oliveira-Coutinho also objected to the State's handwriting expert, Charles Eggleston. The district court held a

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[3] See, Fed. R. Evid. 404(b); Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014).

*Daubert*/*Schafersman* hearing regarding the admissibility of Eggleston's testimony.[4] The district court found that Eggleston qualified as an expert and that his testimony satisfied the standards of *Daubert*/*Schafersman* and was therefore admissible.

At trial, Eggleston testified that the evidence strongly supported the conclusion that Vanderlei wrote the checks found during the execution of the Park Avenue search warrant, but that he did not sign the credit card slips. He also testified that the evidence very strongly supported the proposition that Jaqueline signed the 13 checks processed after December 17, 2009, and also wrote the numeral and narrative dollar amounts, but that she did not write the payee and date entries. Eggleston testified that the evidence moderately supported the proposition that one person wrote the payee and date entries on all 13 checks.

(d) Motion to Dismiss

Prior to trial, Oliveira-Coutinho filed a motion to dismiss, alleging that witnesses who would have provided exculpatory evidence were deported, thus violating his due process and compulsory process rights under the Fifth and Sixth Amendments to the U.S. Constitution and article I of the Nebraska Constitution. On appeal, Oliveira-Coutinho is primarily concerned with the testimony of Ricardo Gonzalez-Mendez and of Lourenco-Batista, though at trial, he also sought testimony from Diaz.

At a hearing on the motion, evidence was produced to suggest that Oliveira-Coutinho was involved in a romantic relationship with Gonzalez-Mendez at the time of the murders. Oliveira-Coutinho claimed that Gonzalez-Mendez could provide him with an alibi.

The district court noted first that two others were allegedly with Oliveira-Coutinho and Gonzalez-Mendez on the night

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[4] See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

of the murders and that one of those individuals had been located but had not confirmed Oliveira-Coutinho's alibi.

The district court also noted that the time line of events did not support Oliveira-Coutinho's claim that his due process and compulsory process rights were violated. Rather, the time line shows that Oliveira-Coutinho was first questioned on February 1, 2010, and was placed on a U.S. Immigration and Customs Enforcement (ICE) hold within 24 hours after the interview. He had been in custody since that time and had been given his *Miranda* rights[5] and interviewed multiple times. Within a few hours of asking for an attorney on March 11, Oliveira-Coutinho had one.

Meanwhile, Gonzalez-Mendez was ordered removed on April 15, 2010, and following a felony conviction for criminal impersonation, was deported on October 20. Lourenco-Batista was ordered removed from the United States on April 22, 2010; he was later deported. Despite an international warrant for his arrest, Lourenco-Batista remains at large. Meanwhile, Oliveira-Coutinho was not charged with the murders until September 1, 2011, and did not reveal his alibi defense to investigators until later in the fall of 2011.

In sum, the district court denied the motion to dismiss, reasoning that there was a

> total absence of evidence in the record that the federal government departed from normal deportation procedures in the removal of Gonzalez-Mendez or any of the other individuals mentioned . . . nor was any evidence offered in support of this Motion that these individuals were deported by the federal government so that the State of Nebraska could gain an unfair tactical advantage over [Oliveira-Coutinho] at trial. In fact, there was no evidence at the hearing on this Motion to show that either the federal government or the State was aware that these

[5] See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> individuals had the information that [Oliveira-Coutinho] recently disclosed they possessed.

(e) Motion to Suppress

Oliveira-Coutinho also filed motions to suppress his February 1, 2010, stop, search, and detention, under the Fourth Amendment, and to suppress any statements he made during questioning on March 11, under the Fifth Amendment. The district court held an evidentiary hearing, but ultimately denied both motions. As to the stop, the district court concluded that "[b]ased upon the collective information of the police engaged in their common investigation . . . and given the totality of circumstances, which included this complete language barrier . . . they did satisfy the specific, articulable facts requirement for . . . an investigative stop." Further, the district court found that this encounter used the least intrusive methods reasonably available.

On appeal, Oliveira-Coutinho does not raise any Fifth Amendment claims, but instead argues only that his seizure was illegal under the Fourth Amendment and that, as such, subsequent statements are inadmissible.

11. *Batson* Challenge

During voir dire, the State asked whether any prospective juror had gotten a ticket or had a family member get a ticket; additionally, the State inquired as to whether anyone had spent at least one night in jail or had a family member who had spent one night in jail. A prospective juror, B.H., answered that she had gotten a conviction for driving under the influence in 1997. The juror indicated her ability to be fair and impartial despite the conviction. The State thanked the juror, who then also remembered a 1999 disturbing the peace violation, though the juror could not remember many details. The juror again indicated that she could remain fair and impartial.

The next day, the same juror met privately with the district court and both counsel and indicated that the juror's son had also been convicted of a federal weapons charge and

was currently incarcerated and that the son had previously been convicted of a state weapons charge and sentenced to 3 to 6 years' imprisonment. She indicated that she believed her son had been treated fairly and that she could be fair and impartial.

The State exercised its fourth peremptory strike to remove this juror from the panel. Oliveira-Coutinho made a *Batson* challenge, indicating the State had struck the juror, who was an African-American woman, despite the fact that she stated she could be fair and impartial.[6] The State responded by noting that it was concerned the juror had failed to immediately respond to the question with information about her son's criminal record and also because the juror did not initially remember her disturbing the peace conviction or the background of that conviction; this gave the State pause regarding the juror's memory and her ability to serve as a juror. Finally, the State noted that the juror did have a son who had been convicted of multiple felonies and that in fact, another juror with a similar relationship had been struck using another of the State's peremptory challenges.

The court found that the State had articulated a race-neutral explanation for the strike and overruled Oliveira-Coutinho's challenge.

### 12. Motion for Mistrial

During the State's opening argument, it explained that the primary evidence of the events of the murder would be provided by Goncalves-Santos. The State then stated:

> Goncalves-Santos will come and tell you the truth about that night. And it is brutal and it is horrible. It is frank and honest. He will tell you about unsavory, gut-wrenching details, but it's the truth.
>
> The information that he provides is direct. It's certainly unpleasant, horribly so, but it is corroborated by other

[6] See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

testimony and it's corroborated by independent physical evidence. And you'll hear about the truth from that night from [Goncalves-Santos]. And what you'll also hear about is — it's the truth. He didn't have to tell you. See, you'll hear about [Goncalves-Santos'] being in this room about 13 months ago, this courtroom. You'll hear about his being on trial for homicide, for murder.

[Goncalves-Santos] is not sophisticated. He's illiterate. He's uneducated, and he'd only been — before he was arrested, in the United States about six months. So in the — the course of just having his trial and the case was still being presented against him, the State's case was still ongoing. . . . Goncalves-Santos had those events, the true events weighing on his conscience. He couldn't hold it anymore, and during the course of his trial he broke down.

He, through his attorney, asked Judge Otepka for — for a delay because he wanted to tell the truth. He stopped the trial in the middle of the State's case because he wanted to tell the truth, and he delayed the trial, mind you, at that point in August of 2011, with no physical evidence. It was testimonial at that point, primarily testimonial, but he stopped the trial with no physical evidence because he wanted to tell the truth. He delayed a trial with no physical evidence at that time. When he potentially could be days away from getting acquitted, going back to Brazil even, but he stopped it.

Now, certainly he stopped it, and he was — met with law enforcement, who told him you have to tell the complete truth with all the details. He did that and law enforcement verified it. And the county attorney, our office, allowed him to plead guilty to second-degree murder for the killing of Vanderlei Szczepanik, for what he did, but also so that he could tell the truth. The proviso through all of this was that he must tell the complete and utter truth at all times.

> Judge Otepka is the person who — as he described at different times along the process, but you'll hear about this through the evidence of the people involved. Judge Otepka is the one who metes out sentences to any defendant. But as it relates to [Goncalves-Santos, he] believes his life is over no matter what happens to him. But as part of his plea agreement, the county attorney and his attorneys, [Goncalves-Santos'] attorneys, will recommend to the judge a 20-year sentence, as long as he continues and completes [his testimony] telling the truth. Ultimately, Judge Otepka is the one that hands out that sentence.

At the conclusion of the State's opening, a sidebar was held at which Oliveira-Coutinho sought a mistrial or, in the alternative, the district court judge's recusal. Counsel argued that counsel for the State

> looked at you [Judge Otepka] and said that Judge Otepka will sentence Goncalves-Santos when he was talking about the deal that the Douglas County Attorney's Office made with Goncalves-Santos. He looked at you and said that Judge Otepka will sentence him.
>
> In that context he was stating that, essentially he was making you a witness, as if you were vouching for the credibility of Goncalves-Santos by giving him the reasonable sentence.

The district court denied both motions.

### 13. Alibi Evidence

At trial, Oliveira-Coutinho attempted to establish a foundation for an alibi. He sought to introduce evidence, through cross-examination of Goncalves-Santos, that Oliveira-Coutinho and Gonzalez-Mendez were involved in a sexual relationship and that he spent many nights with Gonzalez-Mendez at Gonzalez-Mendez' home. In addition, Oliveira-Coutinho sought to introduce evidence that he had looked for Gonzalez-Mendez following the latter's deportation, but that the search was unsuccessful.

The judge sustained the State's relevancy objections on each. As to the relationship with Oliveira-Coutinho, in an offer of proof, Goncalves-Santos testified that he was aware that Oliveira-Coutinho spent many evenings with Gonzalez-Mendez, though there was no specific testimony by Goncalves-Santos (or anyone else) that Oliveira-Coutinho spent the evening of the murders with Gonzalez-Mendez. As for the search for Gonzalez-Mendez, an investigator testified that it was possible to locate individuals who were in other countries; however, no testimony as to the ultimately futile efforts to locate Gonzalez-Mendez was permitted.

### 14. Reenactment of Murders

At trial, Oliveira-Coutinho sought to introduce evidence, through the testimony of yet another investigator, that Jaqueline's and Christopher's murders could not have occurred as the State theorized. That investigator testified, in an offer of proof, to a reenactment that he and a colleague tried at the crime scene. The investigator testified that a rope was tied to the colleague's neck and that the colleague then walked down the stairs, but at no point was ever suspended. Oliveira-Coutinho argued that this reenactment showed that Goncalves-Santos was lying about how Jaqueline and Christopher were killed.

Following the offer of proof, the district court formally sustained the State's foundation objection to the investigator's testimony and accompanying photographs. The district court reasoned that any experiments, in order to be admissible, must be done under substantially similar circumstances to the original event, but that there was no evidence this was the case here.

### 15. Testimony of Forensic Anthropologist and Dentist and Admission of Photographs of Skeletal Remains

At trial, the State offered the testimony of Michael Finnegan, a forensic anthropologist, and of John Filippi, a forensic dentist.

Both examined the skeletal remains found in the Missouri River, primarily for identification purposes. Finnegan testified that his examination indicated that the remains belonged to a person around 8.2 years of age, plus or minus 1 year. He also testified that the victim had suffered a perimortem nasal fracture, though he could not tell for certain whether the fracture was suffered just prior to or just after death. Filippi testified that based on his examination, he placed the age of the remains at 7 years, plus or minus 2 years.

In addition to their examinations, according to Filippi, Finnegan used a drill belonging to Filippi to remove DNA from the humerus bone of the skeletal remains. That DNA sample later came back as a match to Christopher.

Oliveira-Coutinho filed a motion to strike the testimony of each expert or, in the alternative, a motion for mistrial, and also objected to the admission of exhibits Nos. 553, 558, 566, 569, and 571. Those exhibits were photographs of the skeletal remains found in this case, including several close-ups of the skull taken from different angles. Counsel argued that the photographs were cumulative and unduly prejudicial. That objection was overruled based on the State's contention that the photographs were necessary for the testimony of Finnegan and Filippi. The objection to the photographs was renewed during Finnegan's testimony and was overruled. The district court denied the motions to strike and the motions for mistrial.

### 16. Motion for New Trial

Following the guilty verdicts, Oliveira-Coutinho filed a motion for new trial on the basis of newly discovered evidence. That evidence consisted of the affidavit of Kak Thoan. Thoan was placed in a holding cell at the Douglas County Courthouse with Goncalves-Santos. During their time together, which was confirmed by court records, Goncalves-Santos allegedly told Thoan that Oliveira-Coutinho was "not a good person," but that Oliveira-Coutinho did not kill the Szczepanik family and was not there when Goncalves-Santos killed the family.

Thoan also noted in his affidavit that "it was clear to me [that Goncalves-Santos] was crazy. He had mental problems. He would laugh after every statement he made."

The district court denied the motion for new trial, reasoning that Thoan's testimony only went to Goncalves-Santos' credibility and was insufficient to support a new trial. In addition, the court noted that Thoan's statements were not wholly inconsistent with Goncalves-Santos' testimony: Goncalves-Santos testified that he and Lourenco-Batista, but not Oliveira-Coutinho, actually killed the Szczepanik family and that Oliveira-Coutinho was not in the room at the time of the murders. The district court also noted that Thoan and Goncalves-Santos were speaking English, which was neither's primary language.

## III. ASSIGNMENTS OF ERROR

On appeal, Oliveira-Coutinho assigns that the district court erred in (1) not granting his *Batson* challenge, (2) denying his request to sequester the jury during the trial, (3) denying his motion to suppress, (4) denying his motion to dismiss due to the deportation of several witnesses, (5) denying his motion for advanced ruling on certain evidentiary issues, (6) denying his motion in limine regarding the testimony of the State's handwriting expert, (7) not admitting alibi evidence, (8) not admitting evidence of the reenactment of the murders by his investigators, (9) admitting a photograph of the Szczepanik family, (10) denying his motion for new trial based on newly discovered evidence, (11) denying his motion for mistrial based on the State's opening statements, and (12) not granting a mistrial or striking the testimony of the State's forensic anthropologist and dentist and in admitting photographs of Christopher's skeletal remains for the purposes of that testimony.

## IV. ANALYSIS

### 1. *Batson* Challenge

In his first assignment of error, Oliveira-Coutinho assigns that the district court erred in not granting his *Batson* challenge

to the State's exercise of its peremptory challenge against juror B.H.

(a) Standard of Review

[1,2] An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law.[7] An appellate court reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.[8]

(b) Analysis

[3-5] In *Batson v. Kentucky*,[9] the U.S. Supreme Court held that a prosecutor's privilege to strike individual jurors through peremptory challenges was subject to the commands of the Equal Protection Clause. A prosecutor is ordinarily entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his view concerning the outcome of the case.[10] But the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely because of their race.[11]

[6] Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process.[12] First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must then determine whether the defendant has carried his or her burden of proving purposeful

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[7] *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

[8] *Id.*

[9] *Batson v. Kentucky, supra* note 6.

[10] See *id.*

[11] See *id.*

[12] See *State v. Nave, supra* note 7.

discrimination.[13] The third step requires the trial court to evaluate the persuasiveness of the justification proffered by the prosecutor.[14] But the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.[15]

Here, the trial court determined that Oliveira-Coutinho had presented a prima facie case that the prosecutor had exercised the State's peremptory challenge because of the juror's race. The State then offered its reasons for the strike, which the trial court determined were race neutral and persuasive. On this basis, the trial court overruled Oliveira-Coutinho's *Batson* challenge.

[7] Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has decided the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing is moot.[16] Thus, we must determine only whether the prosecutor's reasons were race neutral and whether the trial court's final determination regarding purposeful discrimination was clearly erroneous.[17]

[8] The initial question whether a prosecutor's reasons for a peremptory challenge were race neutral is a question of law that we review de novo.[18] The question is whether the stated reasons, on their face, were inherently discriminatory.[19] In making that determination, we do not consider whether the prosecutor's reasons are persuasive.[20] Indeed,

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[13] *Id.*

[14] *Id.*

[15] See *id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

while the prosecutor's reasons must be comprehensible, they need not be persuasive or even plausible, if they are not inherently discriminatory.[21]

In support of the exercise of the challenge, the State noted it was concerned because juror B.H. had failed to immediately respond to the question with information about her son's criminal record and because juror B.H. did not initially remember her disturbing the peace conviction or the background of that charge, which gave the State pause regarding juror B.H.'s memory and her ability to serve as a juror. Finally, the State noted that juror B.H. had a son who had been convicted of multiple felonies and that, in fact, another juror with a similar relationship had been struck using another of the State's peremptory challenges.

We conclude that these reasons, on their face, are racially neutral. We therefore move on to the third and final step of our analysis: whether Oliveira-Coutinho proved that the district court clearly erred in finding no purposeful discrimination by the prosecutor. In support of his position, Oliveira-Coutinho argues that the State's reasons were perhaps race neutral, but were unpersuasive, because the explanation ignored juror B.H.'s assertion that she felt her son was treated fairly and had received a fair sentence and that what had happened to him would not affect her ability to be a fair and impartial juror.

[9] The U.S. Supreme Court has explained that the third step of a *Batson* inquiry involves evaluating the prosecutor's credibility and that the best evidence of discriminatory intent "'often will be the demeanor of the attorney who exercise[d] the challenge.'"[22] Such credibility determinations lie within the peculiar province of the trial judge and "'in the absence

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[21] *Id.*

[22] *Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008).

of exceptional circumstances,'" require deference to the trial court.[23] As we noted in *State v. Nave*,[24] this deference is reflected in our standard of review.

We cannot conclude that this case is the "exceptional" case where the trial court's determination should be reversed. As the State noted, another juror was challenged due to a family member with a criminal record. Though juror B.H. did indicate she could remain fair and impartial, it was permissible for the State to remain skeptical, not only because of the parent-child relationship, but because juror B.H. did not initially disclose the conviction. In addition, the State's reason for its concern about juror B.H.'s memory was appropriate, as the trial was anticipated to last 2 weeks and contain hundreds of exhibits and many witnesses.

We conclude that the district court did not clearly err in overruling Oliveira-Coutinho's *Batson* challenge. Oliveira-Coutinho's first assignment of error is without merit.

### 2. Jury Sequestration

In his second assignment of error, Oliveira-Coutinho assigns that the district court erred in denying his motion to sequester the jury during the trial. His motion to sequester the jury during deliberations was granted, and the jury was so sequestered at that time.

#### (a) Standard of Review

[10] Whether a jury is to be kept together before submission of the cause in a criminal trial is left to the discretion of the trial court.[25]

#### (b) Analysis

[11] To warrant reversal, denial of a motion to sequester the jury before submission of the cause must be shown to have

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[23] *Id.*

[24] *State v. Nave, supra* note 7.

[25] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

prejudiced the defendant.[26] No such prejudice was shown in this case.

[12] Immediately after they were sworn, the jurors here were admonished not to discuss the case among themselves or anyone else when court was not in session, and not to read, view, or listen to any news reports regarding the case. Jurors are presumed to follow their instructions unless evidence to the contrary is shown.[27]

The fact that two prospective jurors admitted during voir dire that they ignored the admonishment is not relevant to our determination of prejudice for the simple matter that these jurors were not chosen for the jury. Moreover, though alleged, Oliveira-Coutinho has not shown the nature of the apparent pervasive media attention or that the jurors were actually exposed to that publicity.[28]

The district court did not abuse its discretion in denying Oliveira-Coutinho's motion to sequester the jury during trial. Oliveira-Coutinho's second assignment of error is without merit.

### 3. Motion to Suppress

In his third assignment of error, Oliveira-Coutinho assigns that the district court erred in denying his motion to suppress. Oliveira-Coutinho argues that he was unlawfully seized for purposes of the Fourth Amendment on February 1, 2010, as officers prepared to execute search warrants on the South 16th Street and Park Avenue addresses. Oliveira-Coutinho therefore contends that "any and all observations, evidence and statements derived from [Oliveira-Coutinho's] stop, warrantless search of his person, and arrest" should be suppressed.[29]

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[26] *Id.*

[27] See *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

[28] See *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

[29] Brief for appellant at 22.

(a) Standard of Review

[13] In reviewing a trial court's ruling on a motion to suppress evidence based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review.[30] 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.[31]

(b) Analysis

[14,15] Evidence obtained as the direct or indirect "fruit" of an illegal search or seizure, "the poisonous tree," is inadmissible in a state prosecution and must be excluded.[32] To determine whether the evidence is a "fruit" of the illegal search or seizure, a court asks whether the evidence has been come at by exploitation of the primary illegality or whether it has instead been come at by means sufficiently distinguishable to be purged of the primary taint.[33] There are three general exceptions to the exclusionary rule to aid in this analysis.

[16-18] Under the "independent source doctrine," the challenged evidence is admissible if it came from a lawful source independent of the illegal conduct.[34] Under the "attenuated connection doctrine," the challenged evidence is admissible if the causal connection between the constitutional violation and the discovery of the evidence is so attenuated as to rid the taint.[35] And under the "inevitable discovery doctrine," the challenged evidence is admissible if it inevitably would have

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[30] *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014).

[31] *Id.*

[32] *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W.2d 706 (2012).

[33] See *id.* (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

[34] *U.S. v. Reinholz*, 245 F.3d 765 (8th Cir. 2001).

[35] *Id.*

been discovered by lawful means without reference to the police misconduct.[36]

In Oliveira-Coutinho's brief, other than a general assertion that "observations, evidence and statements" should be suppressed, he does not explain what items require suppression.[37] It is therefore difficult to analyze this assignment of error. Before the district court, Oliveira-Coutinho argued as follows: He was initially stopped and seized on February 1, 2010, in violation of the Fourth Amendment; he was questioned on that day and then placed on an ICE hold; and he eventually reestablished contact with law enforcement and implicated Goncalves-Santos in an interview on March 11.

The State eventually charged Goncalves-Santos with murder, and he was put on trial. During his trial, Goncalves-Santos decided to cooperate with the State and testify against Oliveira-Coutinho. Oliveira-Coutinho was charged with first degree murder, and Goncalves-Santos testified against him. Oliveira-Coutinho apparently argues, in essence, that all of Goncalves-Santos' testimony should be suppressed because he, Oliveira-Coutinho, was unlawfully seized over 2 years before.

Assuming without deciding that there was an unlawful seizure under the Fourth Amendment, all three exceptions to the exclusionary rule have applicability here. To begin, the inevitable discovery doctrine is applicable. Law enforcement questioned Goncalves-Santos at the Park Avenue address on February 1, 2010, when executing the search warrant. In interviewing Goncalves-Santos and searching his property, they discovered clothing matching that worn by the persons in the Wal-Mart surveillance video. Oliveira-Coutinho was also connected to this surveillance video. Thus, law enforcement would have inevitably discovered Goncalves-Santos' involvement in this matter to the extent that his involvement was not already apparent to law enforcement prior to Oliveira-Coutinho's statements to that effect on March 11.

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[36] *Id.*

[37] See brief for appellant at 22.

In addition to the inevitable discovery doctrine, law enforcement had an independent source regarding Goncalves-Santos' involvement—his wife, who ultimately testified at Goncalves-Santos' trial that Goncalves-Santos admitted his participation in the murders.

Finally, the evidence was also sufficiently attenuated as to rid itself of any taint from any alleged Fourth Amendment violation. Though Oliveira-Coutinho contends he was seized on February 1, 2010, he was not initially held by the State on any charges related to the Szczepanik family's disappearance, but instead was placed on an ICE hold by the federal government. Between March 6 and 11, Oliveira-Coutinho contacted an investigator in this case and spoke to him, against his attorney's advice, regarding Goncalves-Santos' involvement on March 11. Thirty-eight days elapsed between Oliveira-Coutinho's February 1 encounter with law enforcement and the March 11 interview regarding Goncalves-Santos. This length of time, the fact that Oliveira-Coutinho's voluntary statement led law enforcement to Goncalves-Santos, and the fact that law enforcement had other reasons to suspect Goncalves-Santos, lead to the conclusion that the causal connection was so attenuated as to remove any taint.

The district court did not err in denying Oliveira-Coutinho's motion to suppress. Oliveira-Coutinho's third assignment of error is without merit.

### 4. Deportation of Witnesses

In his fourth assignment of error, Oliveira-Coutinho assigns that the district court erred in denying his motion to dismiss. The basis of his motion was the federal government's deportation of several individuals who Oliveira-Coutinho contends could have provided material evidence to his defense. Oliveira-Coutinho asserts that his Fifth Amendment due process rights and Sixth Amendment compulsory process rights under the U.S. Constitution, and the equivalent protections under the Nebraska Constitution, were violated as a result of these deportations.

(a) Standard of Review

[19,20] The determination of whether the procedures afforded an individual comport with the constitutional requirements for procedural due process presents a question of law.[38] Likewise, claimed violations of the compulsory process right are reviewed de novo.[39]

(b) Analysis

The Fifth Amendment to the U.S. Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." Article I, § 3, of the Nebraska Constitution provides the same protection. And the Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." Similarly, Neb. Const. art. I, § 11, provides that "the accused shall have the right . . . to have process to compel the attendance of witnesses in his behalf."

This right is not absolute, however. In *U.S. v. Valenzuela-Bernal*,[40] the U.S. Supreme Court addressed the extent of the compulsory process right when the government deports an individual that a defendant wishes to call as a witness. The Court held that the "mere fact that the Government deports [illegal-alien] witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment."[41] The Court further noted that "[s]anctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative

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[38] *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[39] *U.S. v. Damra*, 621 F.3d 474 (6th Cir. 2010).

[40] *U.S. v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982).

[41] *Id.*, 458 U.S. at 872-73.

to the testimony of available witnesses,"[42] such that there is "a reasonable likelihood that the testimony could have affected the judgment of the trier of fact."[43]

The U.S. Supreme Court later relied upon *Valenzuela-Bernal* in its decision in *Youngblood v. Arizona*.[44] In *Youngblood*, the government intentionally destroyed evidence. Citing to *Valenzuela-Bernal* and other cases, the Court held that the failure of law enforcement to preserve potentially useful evidence was not a denial of due process, absent a showing of bad faith on the part of the government.

Since the U.S. Supreme Court's decision in *Youngblood*, several circuit courts of appeal have addressed whether the compulsory and due process rights of a defendant were violated where a potential witness was deported. All, save the Fifth Circuit, have read *Valenzuela-Bernal* and *Youngblood* together to hold that in order to show a violation of due process or compulsory process rights, a defendant must "first make an initial showing that the government has acted in bad faith, and, having made that showing, must then make some plausible showing that the testimony of the deported witness would have been both material and favorable to his defense."[45] The Fifth Circuit has discussed the issue, but has not yet determined whether it would require a showing of bad faith.[46]

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[42] *Id.*, 458 U.S. at 873.

[43] *Id.*, 458 at 874.

[44] *Youngblood v. Arizona*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

[45] *U.S. v. Damra, supra* note 39, 621 F.3d at 489-90. See, also, *U.S. v. De La Cruz Suarez*, 601 F.3d 1202 (11th Cir. 2010); *U.S. v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir. 2000); *U.S. v. Iribe-Perez*, 129 F.3d 1167 (10th Cir. 1997); *U.S. v. Dring*, 930 F.2d 687 (9th Cir. 1991). See, also, *State v. Estrella*, 277 Conn. 458, 893 A.3d 348 (2006).

[46] *U.S. v. Gonzales*, 436 F.3d 560 (5th Cir. 2006). See, also, *People v. Valencia*, 218 Cal. App. 3d 808, 267 Cal. Rptr. 257 (1990) (court did not address whether showing of bad faith is required); *People v. Holmes*, 135 Ill. 2d 198, 552 N.E.2d 763, 142 Ill. Dec. 172 (1990) (court rejected bad faith requirement in case involving unavailable, but not deported, witness).

How a defendant shows bad faith differs slightly between circuits. In the Ninth Circuit, a defendant must show either (1) that the government departed from normal deportation procedures or (2) that it deported the witnesses to gain an unfair tactical advantage.[47] In the Seventh Circuit, a defendant must show "'"official animus"'" or a "'"conscious effort to suppress exculpatory evidence."'"[48] Here, the focus is on the "Government's knowledge when . . . it arranged for the departure of the witnesses, not on any of its subsequent conduct."[49] Also relevant, if the government interviews the witness or has other information suggesting that he or she could offer exculpatory evidence, the government may not deport him or her without first giving defense counsel a chance to interview him or her.[50]

[21] We agree with the circuit courts that have adopted the above two-pronged test and conclude that a defendant must (1) make an initial showing that the government has acted in bad faith and (2) make a plausible showing that the testimony of the deported witness would have been both material and favorable to his or her defense.

Oliveira-Coutinho cannot meet either prong. He complains about the deportation of Gonzalez-Mendez and Lourenco-Batista. Gonzalez-Mendez, who Oliveira-Coutinho now claims could be an alibi witness, was deported in October 2010. And Lourenco-Batista who, according to Goncalves-Santos, participated in the murders, was deported in early 2011. But Lourenco-Batista and Oliveira-Coutinho were not charged with the murders until September 1, 2011, after Goncalves-Santos began cooperating with the State. Oliveira-Coutinho did not inform the State of his alibi defense until the fall of 2011. Regardless of which test of bad faith might be

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[47] *U.S. v. Pena*-Gutierrez, 222 F.3d 1080 (9th Cir. 2000).

[48] *U.S. v. Chaparro-Alcantara, supra* note 45, 226 F.3d at 624.

[49] See *id.*

[50] *U.S. v. Leal-Del Carmen*, 697 F.3d 964 (9th Cir. 2012).

applicable, we cannot conclude, based on this time line, that these potential witnesses were deported in bad faith.

Oliveira-Coutinho also cannot meet his burden to show that the witnesses would have provided material and exculpatory evidence. As to his alibi, Oliveira-Coutinho apparently contends that he was with Gonzalez-Mendez and others on the evening of the murder. One of those individuals was interviewed by Oliveira-Coutinho's investigators, but did not confirm the alibi. In addition, though Gonzalez-Mendez was interviewed early in this investigation, he did not provide any exculpatory information about Oliveira-Coutinho. As for Lourenco-Batista, he was a codefendant and, had he been otherwise available to testify, likely would have invoked his Fifth Amendment right to remain silent[51] or would have testified against Oliveira-Coutinho.

The district court did not err in denying Oliveira-Coutinho's motion to dismiss. Oliveira-Coutinho's fourth assignment of error is without merit.

### 5. Motion for Advance Ruling on Evidentiary Issues

In his fifth assignment of error, Oliveira-Coutinho assigns that the district court erred in not allowing him to cross-examine Goncalves-Santos regarding his competency and credibility as a witness, including admissions he made, certain behaviors subsequent to the murders, threats against his wife, threats against a cellmate, and other violent behaviors such as mistreating or killing animals. In addition to cross-examination, Oliveira-Coutinho sought to call the cellmate, Diaz, as a rebuttal witness, should Goncalves-Santos deny the accusations on cross-examination.

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[51] See *U.S. v. Iribe-Perez, supra* note 45. See, also, *U.S. v. Stassi*, 544 F.2d 579 (2d Cir. 1976).

(a) Standard of Review

[22] A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.[52]

(b) Analysis

Oliveira-Coutinho argues that his proposed cross-examination was relevant to Goncalves-Santos' competency under rule 601 and to his credibility under rule 607.[53] He further argues that such cross-examination was not prohibited by limits on extrinsic evidence set forth in rule 608(2) and was admissible as "'reverse 404(b)'" evidence.

*(i) Competency*

[23] We turn first to Oliveira-Coutinho's contention that the matters upon which he sought to cross-examine Goncalves-Santos were relevant to Goncalves-Santos' competency. We disagree. Rule 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." Competency of a witness is an issue to be determined by the trial court and not by the jury.[54] Yet, Oliveira-Coutinho wished to cross-examine Goncalves-Santos in an attempt to show that Goncalves-Santos was incompetent to testify. But, in fact, the jury could not make such a determination. In addition, Oliveira-Coutinho did not assign that the district court erred in finding that Goncalves-Santos was competent to testify. There is no merit to this argument.

*(ii) Credibility*

Oliveira-Coutinho contends that the evidence for which he sought to cross-examine Goncalves-Santos would be admissible to impeach Goncalves-Santos' credibility.

[24] Rule 607 states, "The credibility of a witness may be attacked by any party, including the party calling him." Unlike

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[52] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[53] Neb. Evid. R. 607, Neb. Rev. Stat. § 27-607 (Reissue 2008)

[54] See *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

competency, the credibility and weight of a witness' testimony are for the jury to determine.[55] Finally, as relevant, rule 608(2) explains:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character for truthfulness or untruthfulness, or (b) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Though under rule 608(2), specific instances of conduct by a witness to attack his or her credibility are not provable by extrinsic evidence, Oliveira-Coutinho nevertheless argues that this evidence was admissible, because it was directly relevant to both "material issues of the case" and Goncalves-Santos' bias "in favor of himself and against [Oliveira-Coutinho]," as well as "Goncalves[-Santos'] attempts to threaten, intimidate and tamper with witnesses," which Oliveira-Coutinho refers to as "conscious guilt."[56] Oliveira-Coutinho is correct in that he argues that specific conduct evidence can be admissible insofar as it is directly relevant to bias[57] or to the material issues of the case.[58] But as demonstrated below, the specific conduct he seeks to admit was nevertheless irrelevant and inadmissible.

We begin with the alleged admissions made by Goncalves-Santos to Diaz. At trial, Goncalves-Santos testified that he had not told anyone except his wife about the murders, denied

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[55] *Id.*

[56] Brief for appellant at 27-28, 32.

[57] See *United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).

[58] See *U.S. v. Calle*, 822 F.2d 1016 (11th Cir. 1987).

that he was unhappy with Vanderlei, and stated that Oliveira-Coutinho told him, Goncalves-Santos, to kill the Szczepanik family. Because Diaz had been deported and was unavailable to testify, Oliveira-Coutinho was permitted to introduce portions of Diaz' trial testimony from Goncalves-Santos' trial in an effort to impeach Goncalves-Santos' later testimony at Oliveira-Coutinho's trial. The introduced testimony included Diaz' statements that Goncalves-Santos had complained Vanderlei had treated him poorly and had not paid him well, that Goncalves-Santos said "'he [Goncalves-Santos] did it,'" and that Goncalves-Santos did not tell Diaz that others were involved.

Through this testimony, Oliveira-Coutinho was permitted to introduce Goncalves-Santos' admissions to impeach his testimony. For that reason, there is no merit to Oliveira-Coutinho's argument that he be allowed to impeach Goncalves-Santos with his admissions to Diaz.

Oliveira-Coutinho also argues that he should have been allowed to cross-examine Goncalves-Santos regarding Goncalves-Santos' alleged threats to kill Diaz if Diaz repeated Goncalves-Santos' admissions. Oliveira-Coutinho argues these threats are relevant to show Goncalves-Santos felt "conscious guilt" over the Szczepaniks' murders.[59]

But in his testimony at Oliveira-Coutinho's trial, Goncalves-Santos admitted his guilt. It was therefore unnecessary to introduce these threats, which are specific acts of misconduct prohibited by rule 608(2), to show any conscious guilt. The district court did not err in not allowing Oliveira-Coutinho to cross-examine Goncalves-Santos on this point.

The district court also did not err in not allowing cross-examination regarding threats made by Goncalves-Santos against his wife. These threats are not relevant to Goncalves-Santos' alleged bias against Oliveira-Coutinho, or to any material issues of the case as identified by Oliveira-Coutinho or otherwise. Nor are they relevant to Goncalves-Santos'

[59] Brief for appellant at 32.

conscious guilt because, of course, any conscious guilt is irrelevant where Goncalves-Santos has admitted his actual guilt.

In addition, Oliveira-Coutinho sought to introduce evidence of Goncalves-Santos' certain "concerning behaviors" while incarcerated after being arrested for the Szczepaniks' murders.[60] This evidence has no relevance to any bias on the part of Goncalves-Santos, and its introduction would not contradict Goncalves-Santos' testimony that he killed the family at Oliveira-Coutinho's direction.

Oliveira-Coutinho also sought to introduce evidence showing Goncalves-Santos' violence toward animals. Oliveira-Coutinho is apparently arguing that this evidence shows Goncalves-Santos was violent, independent of any direction by Oliveira-Coutinho. There is nothing in Goncalves-Santos' testimony suggesting that he had to be persuaded to kill the family or that he was ordinarily not a violent person. In fact, Goncalves-Santos' testimony shows that he was a violent person. This evidence is not relevant to show any alleged bias against Oliveira-Coutinho.

Finally, Oliveira-Coutinho argues that Diaz' testimony, in which he discussed certain "concerning behaviors" of Goncalves-Santos, was admissible under rule 404(2) as so-called reverse 404(b) of the Federal Rules of Evidence, relevant to show Goncalves-Santos' consciousness of guilt. Rule 404(2) provides:

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

Oliveira-Coutinho argues that "[i]f [Diaz'] testimony was relevant to proving Goncalves[-Santos'] guilt at his trial, it is

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[60] *Id.* at 27.

inconceivable that the same evidence was not admissible in [Oliveira-Coutinho's] trial to show third-party guilt . . . ."[61]

We disagree. At his own trial, Goncalves-Santos had pled not guilty and the State was tasked with proving his guilt beyond a reasonable doubt. Diaz' testimony regarding actions of Goncalves-Santos that might have shown conscious guilt is arguably relevant. But, as noted above, at Oliveira-Coutinho's trial, Goncalves-Santos admitted his guilt. It was unnecessary to admit the evidence sought by Oliveira-Coutinho to prove conscious guilt of a person who did not deny his guilt.

Finally, to the extent Oliveira-Coutinho argues that Goncalves-Santos had an incentive to testify against him in order to secure the benefit of his plea deal, we note that the jury was informed of the plea deal and the reasons for Goncalves-Santos' cooperation at Oliveira-Coutinho's trial.

In sum, the specific acts upon which Oliveira-Coutinho sought to cross-examine Goncalves-Santos violated the prohibition against such evidence set forth in rule 608(2) and were not relevant to show Goncalves-Santos' bias against Oliveira-Coutinho or to rebut the material issues in the case against Oliveira-Coutinho. The district court did not err in not allowing Oliveira-Coutinho to cross-examine Goncalve-Santos as argued above. There is no merit to Oliveira-Coutinho's fifth assignment of error.

### 6. Handwriting Expert

In his sixth assignment of error, Oliveira-Coutinho assigns that the district court erred in admitting the testimony of Eggleston, the State's handwriting expert. Oliveira-Coutinho argues that Eggleston's testimony does not reach the standards set forth under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[62] and *Schafersman v. Agland Coop*.[63]

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[61] *Id.* at 32.

[62] *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 4.

[63] *Schafersman v. Agland Coop, supra* note 4.

(a) Standard of Review

[25] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[64]

(b) Analysis

In support of his contention that Eggleston's testimony was unreliable and thus inadmissible, Oliveira-Coutinho cites to the decision of the U.S. District Court for the District of Nebraska in *U.S. v. Rutherford*.[65] There, the court concluded that the "handwriting analysis testimony on unique identification lacks both the validity and reliability of other forensic evidence, such as fingerprint identification or DNA evidence."[66]

Since that decision, several federal circuit courts of appeal have addressed the same basic issue. Each court presented with the issue has concluded that even subsequent to the U.S. Supreme Court's decision in *Daubert* and *Kuhmo Tire Co. v. Carmichael*,[67] such handwriting identification evidence can be valid and reliable and therefore admissible.[68] As one federal court has noted, there is "broad discretion and flexibility given to trial judges to determine how and to what degree these factors should be used to evaluate the reliability of expert testimony [which] dictate[s] a case-by-case review rather than a general pronouncement that . . . handwriting analysis is reliable."[69]

An examination of the record on Oliveira-Coutinho's motion shows that Eggleston, who was accredited in his field,

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[64] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[65] *U.S. v. Rutherford*, 104 F. Supp. 2d 1190 (D. Neb. 2000).

[66] *Id.* at 1193.

[67] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[68] *U.S. v. Prime*, 431 F.3d 1147 (9th Cir. 2005); *U.S. v. Crisp*, 324 F.3d 261 (4th Cir. 2003); *U.S. v. Mooney*, 315 F.3d 54 (1st Cir. 2002); *U.S. v. Jolivet*, 224 F.3d 902 (8th Cir. 2000). See, also, *U.S. v. Paul*, 175 F.3d 906 (11th Cir. 1999).

[69] *U.S. v. Prime, supra* note 68 at 1152.

testified at Oliveira-Coutinho's *Daubert*/*Schafersman* hearing that the theory that no two individuals write identically is generally accepted and has been subjected to tests that have been printed in peer review journals. Eggleston further explained his methodology and acknowledged that the probability statistics in his field were different than that for DNA or chemical analysis.

In denying the motion to exclude Eggleston's testimony, the district court noted the above and also noted the development of the law since *Rutherford* had been decided. Given the comprehensive examination of Eggleston and his field, we cannot conclude that the district court abused its discretion in allowing Eggleston to testify. Oliveira-Coutinho's sixth assignment of error is without merit.

### 7. Alibi Evidence

In his seventh assignment of error, Oliveira-Coutinho assigns that the district court erred in not allowing him to admit evidence of his alibi witness. In particular, Oliveira-Coutinho sought to introduce evidence, through cross-examination of Goncalves-Santos, that he and Gonzalez-Mendez were involved in a relationship and that Oliveira-Coutinho spent many nights with Gonzalez-Mendez at Gonzalez-Mendez' home. In addition, Oliveira-Coutinho sought to introduce evidence that he had looked for Gonzalez-Mendez following the latter's deportation but that the search was unsuccessful.

#### (a) Standard of Review

A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.[70]

#### (b) Analysis

[26] Under the Due Process Clause of the 14th Amendment and the Compulsory Process and Confrontation Clauses of the 6th Amendment, a criminal defendant is guaranteed a

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[70] *State v. Sellers, supra* note 52.

meaningful opportunity to present a complete defense.[71] But "'[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'"[72] The evidence sought to be introduced here is irrelevant and therefore inadmissible.

Oliveira-Coutinho argues that admitting evidence of his relationship with Gonzalez-Mendez provides foundational support for his alibi. However, Oliveira-Coutinho did not present any alibi evidence at trial. Moreover, any evidence regarding the nature of his relationship with Gonzalez-Mendez has no bearing on Oliveira-Coutinho's whereabouts on December 17, 2009. In other words, the fact that Oliveira-Coutinho had a relationship with Gonzalez-Mendez or spent many nights with him does not show that Oliveira-Coutinho spent the night of the murders with Gonzalez-Mendez. Evidence regarding their relationship is simply irrelevant.

Also irrelevant are Oliveira-Coutinho's ultimately futile efforts to locate Gonzalez-Mendez. The jury was aware that Gonzalez-Mendez had been deported. Oliveira-Coutinho's witness was allowed to testify that it was possible to look for a witness who had been deported to Mexico. But the exact means undertaken by Oliveira-Coutinho to look for Gonzalez-Mendez has no bearing on Oliveira-Coutinho's whereabouts on December 17, 2009, and would accomplish nothing more than inviting the jury to speculate as to Gonzalez-Mendez' testimony had he been called to testify. Such speculation would have been prejudicial and not in any way probative.

The district court did not abuse its discretion in finding this evidence inadmissible. Oliveira-Coutinho's seventh assignment of error is without merit.

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[71] See *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013), *cert. denied* ___ U.S. ___, 134 S. Ct. 1899, 188 L. Ed. 2d 930 (2014).

[72] *Id.* at 996, 840 N.W.2d at 519.

### 8. Reenactment Evidence

In his eighth assignment of error, Oliveira-Coutinho assigns that the district court erred in not admitting evidence of a reenactment of the murders.

#### (a) Standard of Review

The standard for reviewing the admissibility of expert testimony is abuse of discretion.[73]

#### (b) Analysis

[27] This court has held that evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly.[74] It is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence, but the conditions should be essentially similar, that is, similar in all those factors necessary to make the comparison a fair and accurate one.[75] The lack of similarity regarding the nonessential factors then goes to the weight of the evidence rather than to its admissibility.[76]

Oliveira-Coutinho argues that the experiment was relevant not to recreate the hangings, but to rebut Goncalves-Santos' version of events. Oliveira-Coutinho sought to impeach Goncalves-Santos' testimony about how the hangings occurred, suggesting that his reenactment evidence demonstrated that if the rope had been tied in the manner in which Goncalves-Santos testified, the victims would not have been suspended. He directs us to *U.S. v. Jackson*,[77] which holds that "where the purpose of the experiment is not to recreate

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[73] *State v. McClain, supra* note 64.

[74] *Perry Lumber Co. v. Durable Servs.*, 266 Neb. 517, 667 N.W.2d 194 (2003).

[75] *Id.*

[76] *Id.*

[77] *U.S. v. Jackson*, 479 F.3d 485, 489 (7th Cir. 2007).

events but simply to rebut or falsify the opposing party's sweeping hypothesis, the substantial similarity requirement is relaxed." In contrast, the State argues that Oliveira-Coutinho's "experimental evidence was a veiled attempt to recreate the events under controlled conditions favorable to him and the substantial similarity requirement is not relaxed."[78] Moreover, the State argues that even if the requirement is relaxed, it is not "eviscerated."[79]

Oliveira-Coutinho argues that we should relax the "substantial similarity" requirement, because the purpose of his reenactment is to rebut Goncalves-Santos' testimony. But even if the requirement is relaxed, we agree that the reenactment is not sufficiently similar to Goncalves-Santos' version of events to offer even appropriate rebuttal to those events.

First, Goncalves-Santos testified that Jaqueline was pushed down the stairs, while the investigator in the reenactment walked down the stairs. And while Goncalves-Santos' testimony could be read to suggest that Christopher was suspended after he was pushed down the stairs, the testimony was clear that Jacqueline landed on the floor. Moreover, Jaqueline's height and weight were unknown, as were the exact kind of rope used and the exact location of where the rope was tied. Finally, the State's pathologist expert witness testified that it was not necessary to be suspended in order to be asphyxiated.

The district court did not err in refusing to admit Oliveira-Coutinho's reenactment evidence. Oliveira-Coutinho's eighth assignment of error is without merit.

### 9. Admission of Family Photograph

In his ninth assignment of error, Oliveira-Coutinho assigns that the district court erred in admitting a photograph of the family. Oliveira-Coutinho contends that its admission was more prejudicial than probative.

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[78] Brief for appellee at 60.

[79] *Id.*

(a) Standard of Review

[28] The admission of photographs into evidence rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.[80]

(b) Analysis

[29] In a homicide prosecution, photographs of a victim may be received into evidence for purposes of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[81] We have also noted that a photograph which is admitted at trial depicting a victim while he or she was alive is not offered for a proper purpose.[82]

The district court in this case noted that neither Vanderlei's nor Jaqueline's body was ever found; furthermore, Christopher's remains were not visually identifiable. Under these circumstances, this case is distinguishable from our case law finding the admission of such a photograph to be erroneous. Because the photograph was helpful in identifying the victims, it was not an abuse of discretion to admit it. Oliveira-Coutinho's ninth assignment of error is without merit.

10. Motion for New Trial

In his 10th assignment of error, Oliveira-Coutinho assigns that the district court erred in denying his motion for new trial on the basis of newly discovered evidence in the form of the affidavit from Thoan.

(a) Standard of Review

[30,31] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of

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[80] *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[81] *Id.*

[82] *Id.*

discretion is shown, the trial court's determination will not be disturbed.[83] 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.[84]

(b) Analysis

Thoan's statement is discussed in more detail above. Generally, Thoan avers that Goncalves-Santos told him that Oliveira-Coutinho was not involved in the murder of the Szczepanik family.

As an initial matter, Thoan's affidavit is not wholly inconsistent with Goncalves-Santos' testimony. As the district court noted, Goncalves-Santos testified that Oliveira-Coutinho was not in the room when the family was killed. Especially considering that both Thoan and Goncalves-Santos were speaking English when it was the first language of neither, the accuracy of Thoan's recitation of any conversation with Goncalves-Santos is questionable.

[32] In addition, at most, Thoan's affidavit tells a different story from what Goncalves-Santos testified to at trial. We have held that a new trial will not ordinarily be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at trial.[85] We have further noted that to justify a new trial, newly discovered evidence must involve something other than the credibility of the witness who testified at trial.[86] In the end, this was all that Thoan's story did.

The district court did not abuse its discretion in denying Oliveira-Coutinho's motion for new trial. There is no merit to Oliveira-Coutinho's 10th assignment of error.

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[83] *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005).

[84] *Id.*

[85] *State v. Wycoff*, 180 Neb. 799, 146 N.W.2d 69 (1966).

[86] *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983).

11. Opening Statements

In his 11th assignment of error, Oliveira-Coutinho assigned that the district court erred in denying his motion for mistrial on the basis of the State's opening statements. Oliveira-Coutinho contends that the State vouched for the testimony of the State's primary witness and also that the State suggested that the district court was also vouching for Goncalves-Santos when the State noted that the district court would eventually sentence Goncalves-Santos for his role in the murders.

(a) Standard of Review

Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.[87]

(b) Analysis

[33-35] When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct.[88] A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[89] But if we conclude that a prosecutor's acts were misconduct, we next consider whether the misconduct prejudiced the defendant's right to a fair trial.[90]

[36-38] Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.[91] Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[92] In determining whether the conduct prejudiced the defendant's right to a fair trial,

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[87] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[88] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

we consider the following factors: (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.[93]

[39] We note that Oliveira-Coutinho has likely waived any argument that the State erred in directly vouching for Goncalves-Santos when it failed to object to those statements at the time they were made. Failure to make a timely objection waives the right to assert prejudicial error on appeal.[94] However, we conclude that on appeal, Oliveira-Coutinho has preserved his argument that the State suggested the district court was also vouching for Goncalves-Santos.

We need not determine whether the State's action amounted to misconduct, because even if it did, such misconduct was not prejudicial to Oliveira-Coutinho's right to a fair trial. The challenged remarks were made during a portion of the State's opening statements in this case. Such statements were the first remarks in what would be an 11-day trial, complete with nearly 50 witnesses and hundreds of exhibits.

While the jury was not immediately instructed to disregard the prosecutor's statements, it was eventually instructed specifically as follows:

> There has been testimony from . . . Goncalves-Santos, a claimed accomplice of [Oliveira-Coutinho]. You should closely examine his testimony for any possible motive he might have to testify falsely. You should hesitate to convict [Oliveira-Coutinho] if you decide that . . . Goncalves-Santos testified falsely about an important matter and that there is no other evidence to support his testimony.

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[93] *Id.*

[94] *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012).

> In any event, you should convict [Oliveira-Coutinho] only if the evidence satisfies you beyond a reasonable doubt of his guilt.

In addition, the jury was instructed by the court that the court was "not permitted to comment on the evidence, and I have not intentionally done so. If it appears to you that I have commented on the evidence, during either the trial or the giving of these instructions, you must disregard such comment entirely." The jury was also instructed that "[s]tatements, arguments, and questions of the lawyers for the State and [Oliveira-Coutinho are not evidence]."

The comments of the prosecutor during his opening statements were isolated in the overall context of the trial, and the jury was instructed specifically on Goncalves-Santos' testimony as well as on issues relating to arguments of counsel versus evidence presented. Finally, the strength of the evidence overall was such that any alleged misconduct in opening statements was not prejudicial to Oliveira-Coutinho's right to a fair trial. There is no merit to Oliveira-Coutinho's 11th assignment of error.

### 12. Testimony of Forensic Dentist and Photographs of Skeletal Remains

In his 12th and final assignment of error, Oliveira-Coutinho assigns that the district court erred when it did not grant his motions for mistrial or, in the alternative, his motions to strike the testimony of Finnegan, the State's forensic anthropologist, and Filippi, the State's forensic dentist. Oliveira-Coutinho contends that the testimony of each expert was repetitive, cumulative, and prejudicial and, further, that the State misrepresented to the court the actions taken by Filippi during Christopher's autopsy. In addition, Oliveira-Coutinho assigns that the district court erred in admitting exhibits Nos. 553, 558, 566, 569, and 571, which were photographs of Christopher's skeletal remains. Oliveira-Coutinho contends that these photographs were prejudicial.

(a) Standard of Review

Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.[95]

The admission of photographs into evidence rests largely within the discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.[96]

(b) Analysis

We turn first to Oliveira-Coutinho's assertions regarding the testimony of the anthropologist and the dentist. He contends that these witnesses purportedly testified with respect to identification but, in fact, Christopher's remains were identified through DNA testing and that therefore, the testimony of each expert was unnecessary.

We disagree that the district court abused its discretion in not granting a mistrial or, in the alternative, striking the testimony of these witnesses. Each witness testified as to the identification of the skeletal remains. Finnegan testified as to the age of the person to whom the remains belonged based upon his examination of the bones. Filippi testified as to the age of the person to whom the remains belonged based upon his examination of the teeth.

Moreover, both testified to the procedures followed to extract DNA from the humerus in order to test the DNA for identification purposes. While DNA evidence might be the most common way to identify remains, such does not make any means of additional identification inadmissible. As the State pointed out at trial, even DNA evidence is stated in terms of probability.

Because Filippi, like Finnegan, testified as to the identification of Christopher's remains, we cannot conclude the State mischaracterized Filippi's testimony in order to get the

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[95] *State v. Dixon, supra* note 87.

[96] *State v. Faust, supra* note 80.

challenged photographs admitted. The district court did not abuse its discretion in denying Oliveira-Coutinho's motions to strike and for mistrial.

We turn next to Oliveira-Coutinho's argument regarding the photographs of Christopher's skeletal remains, exhibits Nos. 553, 558, 566, 569, and 571.

[40,41] As noted earlier, in a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[97] The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.[98] Rule 403[99] does not require a separate purpose for every photograph, and it requires a court to prohibit cumulative evidence only if it substantially outweighs the probative value of the evidence.[100]

First, these photographs were not cumulative. Each was used by the expert witnesses in explaining their examinations and identification processes. In addition, we have examined the photographs and do not find them to be more prejudicial than probative.

The district court did not err in admitting the photographs and in failing to strike the testimony of the experts or in granting a motion for mistrial. Oliveira-Coutinho's final assignment of error is without merit.

## V. CONCLUSION

Oliveira-Coutinho's convictions and sentences are affirmed.

Affirmed.

Wright, J., not participating.

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[97] *State v. Dubray, supra* note 88; *State v. Faust, supra* note 80.

[98] *State v. Dubray, supra* note 88.

[99] Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

[100] *Id.*

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# John Jacobitz, appellee, v. Aurora Cooperative, appellant.

865 N.W.2d 353

Filed July 10, 2015. No. S-14-903.

1. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. ____: ____. Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), 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 no 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.
4. **Workers' Compensation: Proof.** In a workers' compensation case, the claimant must establish that the injury for which compensation is sought arose out of and in the course of employment.
5. **Workers' Compensation: Employer and Employee.** Recreational or social activities are within the course of employment when (1) they occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Appeal from the Workers' Compensation Court: J. Michael Fitzgerald, Judge. Reversed and remanded for further proceedings.

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

Jacob M. Steinkemper, of Steinkemper Law, P.C., L.L.O., for appellee.

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

McCormack, J.

## NATURE OF CASE

John Jacobitz was injured when he fell off a truck following a customer appreciation supper for his employer, Aurora Cooperative (the Co-op). The dispute is whether Jacobitz' injury occurred in the scope and course of employment, thus making the Co-op liable for the injury. The Nebraska Workers' Compensation Court found that Jacobitz was injured in the course of his employment. The Co-op appeals.

## BACKGROUND

### Customer Appreciation Supper

The Co-op owns grain elevators in various locations in southeast and south central Nebraska. The location in Ong, Nebraska, is one of the Co-op's elevators, which buys and sells grain, and sells seed, fertilizer, and other chemicals such as herbicides and insecticides.

On August 20, 2010, the Co-op in Ong held a customer appreciation supper. The supper was organized by Jerry Overturf, the location agronomy manager of the Ong location. Overturf planned the supper with the permission of his supervisor, the Co-op's area manager. Overturf invited farmers that had done business with the Ong location in the previous year. The purpose of the supper was to thank the Ong location's customers for their business during the previous year.

The Ong location sent a total of 17 invitations to customers. The invitation was printed on company letterhead on a one-page flyer that was folded, addressed, and mailed.

The Ong location's vendors sponsored the supper and paid for all of the food and drinks that were served. One of the vendors, Kruger Seeds, also provided a large smoker to cook the meat that was served. The smoker was mounted on a trailer and had to be towed behind a vehicle. Overturf towed and parked the smoker at the Ong Community Building prior to the supper on August 20, 2010.

The Co-op scheduled the supper to begin at 6 p.m. The supper was held at the Ong Community Building, which is located on Main Street in Ong. Food began to be served at 6 p.m., when the guests began to arrive. Approximately 12 farmers and their spouses attended the supper.

Six employees from the Ong location were invited to the supper. These Co-op employees include Dennis Hansen, the location grain manager; Rick Johnson, the sprayer operator; Dan Eberhardt, a general laborer; Bill Mountford, the facility operator; Karen Corliss, a secretary; and Jacobitz, a general laborer. Overturf testified that he invited the employees to the supper for "[m]orale," but that attendance was not required and he did not take attendance to determine who appeared and who did not appear.

All of the employees of the Ong location attended the supper except for Mountford and Corliss. Employees were not compensated for attending the supper. None of the employees who attended were asked to help or actually helped serve the food. Neither were the employees asked to help clean up. However, Hansen, the other manager in attendance, did help to transport meat from the smoker to the buffet line.

### Jacobitz

Jacobitz began employment with the Co-op in 2010 as a general laborer. The Co-op classified Jacobitz as a temporary part-time worker.

Jacobitz delivered the event invitations for the supper to the post office during his work hours. Jacobitz and Hansen helped set up for the supper during work hours by setting up tables and putting on table coverings in the community building.

There was conflicting testimony regarding how Overturf invited Jacobitz to the supper. But, Jacobitz recalled that Overturf told him it was to Jacobitz' benefit to be there. Jacobitz testified that he recalled Overturf telling him to "[g]o home, clean up, [and] head back" and "[n]eed your help." When asked what his perception of his responsibility was to be at the party, Jacobitz answered, "I didn't know . . . the trouble I would get into for not showing up." Further, Jacobitz answered that he went to the function as part of his job. Overturf testified that the employees "were told they could attend; I did not ask them to attend." In regard to Jacobitz in particular, Overturf testified that "[Jacobitz] was told the supper was going on; he was welcome to come eat and was not required to be there."

Jacobitz clocked out of work at approximately 5:05 p.m. the evening of the supper. At the time, Jacobitz lived about 30 miles from the Ong location. Jacobitz testified that he drove home that evening after work, cleaned up, played with his children, and drove back to the Ong location for the supper.

When he returned, Jacobitz did not assist in preparing the food, did not serve the food, and did not help clean up at the community building. Overturf testified that he did not observe Jacobitz talking with any of the farmers or customers at the supper. However, on redirect, Overturf admitted that he was outside the building while he was cooking, so he did not specifically see what was going on inside at the supper. Johnson spoke with many or all of the customers present at the supper "just to be friendly," but did not testify whether Jacobitz had spoken with any customers. Due to his injuries, Jacobitz does not have a clear memory of his own activities at the supper.

Accident

Overturf finished cooking by 7 p.m. Overturf shut down the smoker, retrieved his personal truck, and attached the smoker to his truck so that he could tow the smoker to storage. Hansen and Jacobitz walked over to Overturf as he was hooking the smoker to his truck. Neither Hansen nor Jacobitz helped to hook the smoker to Overturf's truck.

Overturf towed the smoker over to a fire hydrant to wash out the smoker. Hansen and Jacobitz walked, following Overturf to the fire hydrant. After Overturf turned on the hose, Overturf handed the hose to Jacobitz so that Overturf could pull a log out of the firebox. Jacobitz then sprayed the log as it was lying on the ground and washed out the firebox.

Overturf then drove the smoker a short distance to a shed located on the Co-op's property, where he intended to store the smoker until the Kruger Seeds' representative could pick the smoker up. Hansen and Jacobitz walked to the shed and met Overturf there. Hansen opened the shed door, and Overturf backed the smoker into the shed, unhooked the smoker, and drove his truck back out of the shed.

Overturf testified that as he drove his truck out of the shed, Jacobitz stated to Hansen that he was going to ride back to the community building and jumped onto the bed of Overturf's truck. However, Hansen testified that when Overturf drove his truck out of the shed, "[Jacobitz] was riding in the back of the pickup, and they said [Hansen] could ride along." Hansen declined the offer to ride because he needed to throw some trash from the party into the Dumpster. Overturf drove to Main Street, took a right onto Main Street, and proceeded to the community building, which was about a block away on the left. As he drove, Overturf noticed out of his rearview mirror that Jacobitz was lying in the middle of Main Street.

Jacobitz sustained head injuries as a result of his fall from Overturf's truck. No one knows how Jacobitz fell out of the truck, and Jacobitz does not remember how he fell from the truck.

## Procedural History

The compensation court bifurcated the issues in the case. The compensation court conducted the first trial to determine whether the Co-op was liable for Jacobitz' injury, but the issue of damages was reserved for a later time when Jacobitz reached maximum medical improvement. On January 28, 2013, the compensation court concluded that Jacobitz was injured in the scope and course of his employment.

In support of its ruling, the compensation court found that Jacobitz "believed he had to attend, or that it would at least be in his best interest to attend." However, the court's final holding that Jacobitz was injured in the course of employment was not grounded on a finding that Jacobitz was either expressly or impliedly required to attend the supper. Instead, the compensation court based its holding on the finding that the Co-op received a substantial benefit from Jacobitz' attendance at the event. The compensation court stated: "The finding is that the [Co-op] received a substantial benefit when [Jacobitz] attended the appreciation night supper and visited with customers and was a fine representative of the [Co-op]." The compensation court also stated that the Co-op "received benefit because at the time [Jacobitz] was injured, he had just completed helping put away the smoker used to cook the meat at the Appreciation Night supper."

The determination of monetary benefits was reserved for a further trial. The Co-op appealed the order on liability to this court.[1] We found that because the compensation court's order had resolved only the question of the employer's liability and not the determination of benefits award, the order was not a final, appealable order.[2] On remand, the compensation court determined the benefits due to Jacobitz as a result of his injuries. The Co-op again appeals the issue of liability.

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[1] *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

[2] *Id.*

## STANDARD OF REVIEW

[1,2] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[3] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[4]

[3] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), 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 no 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.[5]

## ANALYSIS

The issue in this case is whether Jacobitz' injuries arose out of and in the course of employment. The Co-op argues that it did not derive a substantial direct benefit from Jacobitz' attendance at the supper. Particularly, the Co-op argues that the compensation court erred in finding that the injury arose out of and in the course of employment because the Co-op derived a "substantial benefit," when the correct legal standard for a finding that the event arose in the course of employment is a "substantial direct benefit."

[4,5] In a workers' compensation case, the claimant must establish that the injury for which compensation is sought arose out of and in the course of employment.[6] In the case of recreational or social activities incident to employment, we apply the following test to determine whether an injury arose out of and in the course of employment:

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[3] *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

[4] *Torres v. Aulick Leasing*, 261 Neb. 1016, 628 N.W.2d 212 (2001).

[5] *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007).

[6] *Gray v. State*, 205 Neb. 853, 290 N.W.2d 651 (1980).

> "Recreational or social activities are within the course of employment when (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life."[7]

Whether or not the activity falls within one of the enumerated categories is reviewed as a factual finding.[8] As we have stated, we "may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law."[9]

The Co-op argues that the compensation court applied the wrong legal standard in its finding that the Co-op received a "substantial benefit" and awarding recovery, when the correct legal standard for the test is a "substantial direct benefit."[10] We agree.

In *Gray v. State*,[11] the employee's injury was found to not be in the "course of employment." In *Gray*, the injury was sustained in a car accident while the employee was on the way to a meeting of people within his career field. Though some of these meetings were required by the employee's employment, this meeting was not expressly required, and it was

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[7] *Shade v. Ayars & Ayars, Inc.*, 247 Neb. 94, 97, 525 N.W.2d 32, 34 (1994), citing *Gray v. State, supra* note 6.

[8] *Shade v. Ayars & Ayars, Inc., supra* note 7.

[9] *Id.* at 99, 525 N.W.2d at 35. See, also, *Gray v. State, supra* note 6.

[10] See *Gray v. State, supra* note 6.

[11] *Id.*

characterized by one of the planners as "primarily a social event."[12] We stated that without a requirement to be present at the meeting, the employer "did not benefit either directly or substantially from [the employee's] participation therein."[13] We further stated that a benefit to the employer from social functions "was neither substantial nor direct," because the benefit was "little, if any" to the employer.[14]

In *Shade v. Ayars & Ayars, Inc.*,[15] the employee was injured at a company picnic. There, the compensation court found, and we agreed, that the employee was not entitled to benefits, because he had failed to show that the company had received "'any substantial direct benefit from the activity "picnic."'"[16]

In our cases that have applied the "substantial direct benefit" test, we have made clear that the standard is a "substantial direct benefit" and not merely a "substantial benefit." Though it is plain that the benefit must be both substantial and direct, we have not yet defined how "direct" fits into the analysis of a "substantial direct benefit."[17] Merriam-Webster's dictionary defines "direct" as "stemming immediately from a source," "natural, straightforward," "marked by absence of an intervening agency, instrumentality, or influence," and "characterized by close logical, causal, or consequential relationship."[18] Black's Law Dictionary defines "direct" as "[f]ree from extraneous influence; immediate," or "[t]o cause (something or someone) to move on a particular course."[19] Using "direct" as a part of the analysis has importance and must be applied

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[12] *Id.* at 854, 290 N.W.2d at 652.

[13] *Id.* at 858, 290 N.W.2d at 654.

[14] *Id*. at 859, 290 N.W.2d at 654.

[15] *Shade v. Ayars & Ayars, Inc., supra* note 7.

[16] *Id*. at 96, 525 N.W.2d at 34.

[17] See *Gray v. State, supra* note 6.

[18] Merriam-Webster's Collegiate Dictionary 327 (10th ed. 2001).

[19] Black's Law Dictionary 556 (10th ed. 2014).

when determining whether or not an employee was injured in the course of employment. The court erred in failing to consider whether the benefit to the employer was both substantial and direct.

In this case, the compensation court found that the Co-op received a "substantial benefit" from Jacobitz' participation in the supper. In support of that finding, the compensation court found that Jacobitz "visited with customers" at the supper. The compensation court did not consider whether that substantial benefit was direct, as required by our prior cases.[20]

## CONCLUSION

Finding that the compensation court applied the wrong legal standard, we reverse the judgment and remand the cause for an application of the correct standard consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[20] See, *Shade v. Ayars & Ayars, Inc., supra* note 7; *Gray v. State, supra* note 6.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Walter E. Demond, respondent.

868 N.W.2d 304

Filed July 10, 2015. No. S-15-434.

Original action. Judgment of disbarment.

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

Per Curiam.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Walter E. Demond, on May 14, 2015. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on March 18, 2004. On May 31, 2011, respondent was convicted of first-degree felony theft by deception, second-degree felony misapplication of fiduciary property, and second-degree felony money laundering in the 424th District Court for Blanco County, Texas. Respondent self-reported his convictions to the Counsel for Discipline of the Nebraska Supreme Court on June 20, and he has kept the Counsel for Discipline informed about the status of his appeal from the convictions.

On November 21, 2014, the Texas Court of Appeals reversed respondent's conviction for first-degree felony theft by deception, but it affirmed the convictions for second-degree felony misapplication of fiduciary property and second-degree felony money laundering. See *Demond v. State*, 452 S.W.3d 435 (Tex. App. 2014). Respondent filed a petition for discretionary review with the Texas Court of Criminal Appeals, and on March 18, 2015, the court refused to review the decision of the Texas Court of Appeals.

On May 14, 2015, respondent filed a voluntary surrender in which he stated that he knowingly does not challenge or contest the ruling of the Texas Court of Appeals that affirmed his convictions of second-degree felony misapplication of fiduciary property and second-degree felony money laundering. With respect to disciplinary proceedings in Nebraska, respondent further stated that he freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

## ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the suggested allegations made against him. Further,

respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the suggested allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Jamey M. Crawford, appellant.
865 N.W.2d 360

Filed July 17, 2015. No. S-14-338.

1. **Judgments: 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 from the lower court's decision.
2. **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.
3. **Limitations of Actions: Pleadings: Waiver.** A statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pled by the party relying upon it and is waived if not pled.
4. **Limitations of Actions.** A typical statute of limitations specifies only that an action must be commenced within a specified time period.
5. **Postconviction: Limitations of Actions: Jurisdiction.** The 1-year period of limitation set forth in Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014) is not a jurisdictional requirement and instead is in the nature of a statute of limitations.
6. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
7. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
8. **Postconviction: Appeal and Error.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case

affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.

9. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
10. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
11. **Effectiveness of Counsel: Pleas: Proof.** To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial.
12. **Constitutional Law: Right to Counsel: Effectiveness of Counsel: Time: Appeal and Error.** A defendant does not have a constitutional right to counsel beyond the conclusion of his or her direct appeal, and therefore, he or she cannot be deprived of effective assistance of counsel based on the failure of counsel to timely file a petition for further review.

Appeal from the District Court for Dodge County: Geoffrey C. Hall, Judge. Affirmed.

Nicholas E. Wurth, of Law Offices of Nicholas E. Wurth, P.C., for appellant.

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

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

Miller-Lerman, J.

## NATURE OF CASE

Jamey M. Crawford appeals the order of the district court for Dodge County which denied his motion for postconviction

relief on the merits after an evidentiary hearing. As an initial matter, the State argues on appeal that although the issue was not raised in the district court, Crawford's motion should have been dismissed as untimely pursuant to the 1-year period of limitation set forth in Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014) of the postconviction act. We conclude that the 1-year period of limitation is an affirmative defense and that the State waived the defense when it failed to raise it in the district court. With respect to the merits, we affirm the district court's denial of Crawford's motion for postconviction relief.

## STATEMENT OF FACTS

In 2011, Crawford pled guilty to possession of a controlled substance and was found to be a habitual criminal. The district court for Dodge County sentenced Crawford to imprisonment for 10 to 15 years. The Nebraska Court of Appeals affirmed Crawford's conviction and sentence. *State v. Crawford*, No. A-11-645, 2012 WL 399888 (Neb. App. Feb. 7, 2012) (selected for posting to court Web site). Crawford did not petition this court for further review, and therefore, the Court of Appeals filed its mandate on March 14, 2012.

On March 27, 2013, Crawford filed a pro se motion for postconviction relief in which he raised various claims. The State responded to Crawford's pro se motion by arguing the merits of Crawford's claims. In its response, the State did not raise the issue whether Crawford's motion was timely under § 29-3001(4).

The district court thereafter appointed postconviction counsel, who filed an amended motion. In the amended motion, Crawford stated that his counsel on direct appeal was different from his trial counsel and that he received ineffective assistance of appellate counsel in various respects.

Among Crawford's claims of ineffective assistance of appellate counsel was an assertion that "appellate counsel failed to assign as error, trial counsel's failure to file a motion

to withdraw [Crawford's] guilty plea after it was made obvious that [Crawford] wished to do so." Crawford asserted that he entered the guilty plea because he was led to believe that he would be eligible to participate in a drug court program. However, Crawford alleged, trial counsel failed to advise him that he would not be eligible for drug court if he was found to be a habitual criminal. He further claimed that he likely would have been allowed to withdraw his plea prior to sentencing, because the misunderstanding regarding eligibility for drug court would have been a fair and just basis to allow withdrawal.

Crawford also claimed that in December 2011, during the pendency of his direct appeal, appellate counsel informed him that counsel would be unable to continue representing him. Crawford claimed that counsel never filed a motion to withdraw as counsel and that, as a result, Crawford "was uncertain of whether he was represented by counsel or not" when the Court of Appeals affirmed his conviction on February 7, 2012, and he was without an attorney to petition this court for further review. Crawford claimed that he would have sought further review but that the time for filing a petition for further review had expired before he learned no substitute appellate counsel had been appointed.

After an evidentiary hearing on Crawford's motion for postconviction relief, the district court denied Crawford's claims on their merits. With regard to the claim regarding withdrawal of the plea on the basis that Crawford was not informed he was not eligible for drug court, the court stated that it was apparent on the record Crawford knew before entering his plea there was a possibility that he would not be admitted into drug court and that Crawford confirmed to the trial court he understood admission into drug court was not part of the plea agreement. The court further stated that the record showed that Crawford was aware of the potential sentence if he was found to be a habitual criminal.

With regard to appellate counsel's withdrawal during the pendency of the direct appeal, the court found that Crawford was not prejudiced by counsel's withdrawal. The court noted that although Crawford was informed of appellate counsel's withdrawal in December 2011, Crawford did not file a request for appointment of appellate counsel until August 2012, at which time, the request was denied because there was no appeal pending.

The district court did not on its own motion raise an issue whether Crawford's postconviction motion was timely under § 29-3001(4), nor did the court address the issue in its order denying relief.

Crawford appeals the denial of his postconviction motion.

## ASSIGNMENTS OF ERROR

Crawford claims, restated, that the district court erred in denying his claims that he received ineffective assistance of counsel when (1) appellate counsel failed to assign error to trial counsel's failure to move to withdraw the plea and (2) appellate counsel failed to ensure that Crawford received substitute appellate counsel. Crawford also claims that he should be granted postconviction relief "due to the plain error that permeates the record." The State asserts that denial of Crawford's motion was correct, either because the motion for postconviction was not timely filed or because it lacked merit.

## STANDARDS OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision. *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014).

[2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Branch*, 290 Neb. 523, 860 N.W.2d 712 (2015).

## ANALYSIS

*Limitation Period Under § 29-3001(4) Is an Affirmative Defense, and the State Waived the Issue When It Failed to Raise the Defense in the District Court.*

We note as an initial matter that the State argues that rather than addressing the merits of Crawford's postconviction motion, the district court should have dismissed Crawford's motion on the basis that it was untimely pursuant to the 1-year period of limitation set forth in § 29-3001(4). Although neither the State nor the district court raised the issue below, the State argues that the timely filing of the postconviction motion is a jurisdictional requirement and that therefore, because the district court lacked jurisdiction to consider the merits of Crawford's motion, this court consequently lacks jurisdiction over this appeal. We conclude that the period of limitation is not a jurisdictional requirement and that instead, it is in the nature of an affirmative defense which the State waived when it failed to raise the defense in the district court.

The time limitation on filing a postconviction action is set forth in § 29-3001(4) of the postconviction act as follows:

> A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the

United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or

(e) August 27, 2011.

The State argues that the timeliness issue goes to subject matter jurisdiction and that we should resolve this appeal based on Crawford's alleged failure to timely file his motion, because lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. See *Davis v. Choctaw Constr.*, 280 Neb. 714, 789 N.W.2d 698 (2010). If timely filing is a jurisdictional requirement, this court can and must consider the issue, whether or not the issue was raised before or decided by the court below. See *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014) (before reaching legal issues presented for review, it is duty of appellate court to determine whether it has jurisdiction over matter before it).

The State alternatively argues that even if the failure to timely file for postconviction relief does not deprive the courts of jurisdiction, then the denial of Crawford's motion should still be affirmed on the basis that the motion was not timely filed under the terms of the statute. See § 29-3001(4). In support of this argument, the State cites *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013), in which this court affirmed the district court's order denying a motion for postconviction relief without an evidentiary hearing because the motion was not filed within the 1-year limitation period set forth in § 29-3001(4).

In *Smith, supra*, we affirmed the district court's order denying postconviction relief for failure to comply with the 1-year limitation, but we did not state that the failure deprived the district court of jurisdiction and we did not dismiss the appeal for lack of jurisdiction. In *Smith*, we did not explicitly discuss whether the 1-year limitation was a jurisdictional requirement. In contrast to the present case, in *Smith*, the limitation issue was raised below and the district court denied the motion on the basis of the statute's time limitation. As such, it

was appropriate for this court to consider the issue on appeal whether or not it was a jurisdictional issue. Therefore, *Smith* does not answer the question presented in this case: whether the time limitation in § 29-3001(4) is a jurisdictional requirement that must be considered by this court or whether the State waived the issue when it failed to raise it as a defense in the district court.

[3] We discussed the distinction between statutorily prescribed time periods that are jurisdictional requirements and those that are in the nature of a statute of limitations in *In re Estate of Hockemeier*, 280 Neb. 420, 786 N.W.2d 680 (2010). We noted that while an appellate court can and must consider an alleged failure to meet a time requirement that is a jurisdictional requirement, the failure to satisfy a statute of limitations cannot be raised for the first time on appeal. We stated that "[t]his is so because a statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pled by the party relying upon it and is waived if not pled." *Id*. at 424, 786 N.W.2d at 684. Therefore, if the 1-year period of limitation in § 29-3001(4) is a jurisdictional requirement, we must consider whether Crawford met the requirement; if instead, it is in the nature of a statute of limitations, then the State may not raise the issue for the first time in this appeal, because the State waived the defense when it failed to raise it in the district court.

[4] At issue in *In re Estate of Hockemeier* was a 60-day period set forth in Neb. Rev. Stat. § 30-2488(a) (Reissue 2008), during which period a claimant must file a petition or commence a proceeding to challenge a personal representative's disallowance of a claim against an estate. We stated that "[a] typical statute of limitations specifies only that an action must be commenced within a specified time period." *In re Estate of Hockemeier*, 280 Neb. at 424, 786 N.W.2d at 684. We noted that the language of § 30-2488(a) was unlike the language of a typical statute of limitations (which can be waived) because § 30-2488(a) not only specified a time period, it also specified the consequences of an untimely filing when it clearly and

expressly stated that a claim was barred if the claimant failed to act within the statutory period. We noted that the statute was self-executing and that if the time requirement was not met, the claim was barred by operation of law. We therefore concluded in *In re Estate of Hockemeier* that "the filing of a petition for judicial allowance of the claim within the 60-day period specified in § 30-2488(a) is a jurisdictional requirement." 280 Neb. at 425, 786 N.W.2d at 685.

[5] Applying the reasoning of *In re Estate of Hockemeier* to the present case, we conclude that the 1-year period of limitation set forth in § 29-3001(4) is not a jurisdictional requirement and instead is in the nature of a statute of limitations. As noted above, the time limitation on filing a postconviction action is set forth in § 29-3001(4) of the postconviction act as follows:

> A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or
>
> (e) August 27, 2011.

The language of § 29-3001(4) is like the language of a "typical statute of limitations" in that it "specifies only

that an action must be commenced within a specified time period." See *In re Estate of Hockemeier*, 280 Neb. 420, 424, 786 N.W.2d 680, 684 (2010). Unlike the language of the statute at issue in that case, § 29-3001(4) does not specify the consequences of an untimely filing and it does not clearly and expressly state that a postconviction action is barred if not filed within the period of limitation. Finally, we note that § 29-3001(4) explicitly labels the time requirement as a "period of limitation." These factors support our determination that § 29-3001(4) does not impose a jurisdictional requirement but instead is in the nature of a statute of limitations.

For the sake of completeness, we note that the language of § 29-3001(4) is similar to a federal statute, 28 U.S.C. § 2244(d)(1) (2012), which imposes a time limitation on the filing of a habeas action under 28 U.S.C. § 2254 (2012) by a person in state custody. In *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006), the U.S. Supreme Court determined that the time limitation set forth in 28 U.S.C. § 2244(d)(1) is not a jurisdictional requirement. Instead, the *McDonough* Court characterized the 1-year limitation period as a statute of limitations defense and stated that therefore, "courts are under no *obligation* to raise the time bar *sua sponte*." 547 U.S. at 205. The Court stated that in this respect, the limitations defense resembled other threshold barriers to habeas relief such as exhaustion of state remedies, procedural default, and nonretroactivity.

We further note that our conclusion that the period of limitation under § 29-3001(4) is not a jurisdictional requirement is consistent with our recent discussion in *State v. Ryan*, 287 Neb. 938, 845 N.W.2d 287 (2014), *cert. denied* ___ U.S. ___, 135 S. Ct. 943, 190 L. Ed. 2d 840 (2015), in which we urged careful use of the term "jurisdiction." In *Ryan*, the district court dismissed a motion for postconviction relief on the basis that the prisoner's "claims were not cognizable in postconviction." 287 Neb. at 940, 845 N.W.2d at 290. As an initial matter in our analysis, we considered the parties' dispute over whether the court had dismissed the motion on "jurisdictional

grounds." *Id.* at 941, 845 N.W.2d at 291. We noted that in prior postconviction cases in which we stated that a court had no jurisdiction to grant postconviction relief, "[o]ur language . . . was imprecise" and we had "frequently used the term 'jurisdiction' too loosely." *Id*. We stated that strictly speaking, "jurisdiction" refers to a court's adjudicatory authority and that the term "jurisdictional" applies only to "'"prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction)" implicating that authority.'" *Id*. at 941-42, 845 N.W.2d at 291. In *Ryan*, we further stated that the specific failing in that case was a failure to show "an element of a claim for postconviction relief, not a jurisdictional prerequisite." 287 Neb. at 942, 845 N.W.2d at 291. Therefore, "the proper course" in such circumstance was "to dismiss for failure to state a claim, not for lack of jurisdiction." *Id*. See, also, *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008) (stating that habeas claim brought in wrong county is issue of venue but not matter of jurisdiction). In the present case, we apply the reasoning in *Ryan* and conclude that while the failure to file a postconviction motion within the period of limitation may deprive the prisoner of a postconviction claim if the State raises the limitation set forth in § 29-3001(4) as a defense, such failure does not deprive a court of subject matter jurisdiction over the general class of postconviction actions.

Based on our conclusion that the period of limitation set forth in § 29-3001(4) is not a jurisdictional requirement and instead is in the nature of a statute of limitations, we conclude that the State waived the statute of limitations when it failed to raise it as an affirmative defense in the district court. The court did not raise the issue sua sponte, and we therefore need not determine whether a court may raise the issue sua sponte when the State fails to do so. Cf. *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (holding that while court is not required to raise time limitation sua sponte, it is not prohibited from doing so). Because the period of limitation under § 29-3001(4) is in the nature of a statute

of limitations, the State cannot raise the issue for the first time on appeal. See *In re Estate of Hockemeier*, 280 Neb. 420, 786 N.W.2d 680 (2010).

We finally note that the State also argues that Crawford's motion should have been denied on the basis that Crawford did not sign or verify his amended motion for postconviction relief. The State cites § 29-3001(4), which requires a "verified motion." We note that the original pro se motion was signed and verified by Crawford and that the State's argument refers only to the amended motion filed after counsel was appointed. Because Crawford filed a verified motion, we find no merit to this argument.

Having rejected the State's alternative arguments, we proceed to consider the merits of Crawford's assignments of error on appeal.

*District Court Did Not Err When It Denied Crawford's Postconviction Claims on Their Merits.*

Crawford claims that the district court erred when it denied his postconviction claims on their merits. Crawford argues that the district court should have granted him postconviction relief based on two claims of ineffective assistance of counsel and based on "plain error that permeates the record." We conclude that the district court did not err when it determined that Crawford's claims were without merit.

[6] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014). Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution,

causing the judgment against the defendant to be void or voidable. *Dragon, supra*.

[7,8] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *Dragon, supra*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

[9,10] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *Id*. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *Dragon, supra*. A court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id*.

Crawford asserts that his appellate counsel provided ineffective assistance in two respects: (1) failing to assign error to trial counsel's failure to move to withdraw Crawford's plea after Crawford learned he would not be eligible for drug court and (2) failing to ensure that Crawford received substitute counsel after appellate counsel withdrew during the pendency of Crawford's direct appeal. The district court addressed and rejected each of these claims in its order denying postconviction relief.

With regard to the claim relating to withdrawal of the plea, the postconviction court stated that it was apparent on the record that Crawford knew before entering his plea that there was a possibility that he would not be admitted into drug court and that Crawford confirmed to the trial court that he understood admission into drug court was not part of the plea agreement. The court further stated that the record showed

Crawford was aware of the potential sentence if he was found to be a habitual criminal. The court found that trial counsel had obtained a favorable plea agreement for Crawford.

[11] To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial. *State v. Fester*, 287 Neb. 40, 840 N.W.2d 543 (2013). The district court determined that trial counsel obtained a favorable plea agreement for Crawford, and the court therefore effectively found that Crawford had not shown that without counsel's alleged ineffectiveness, he would not have accepted the plea and instead would have insisted on going to trial. These determinations are supported by the record, and we agree that Crawford has not shown a reasonable probability that he would have insisted on going to trial; instead, he generally argues that he could have obtained a better plea deal if he had been allowed to withdraw his plea and not that he would have insisted on going to trial.

Having reviewed the record, we note that Crawford's argument regarding his plea is a variation on an argument that was presented to and rejected by the Court of Appeals in Crawford's direct appeal. In his direct appeal, Crawford argued that his plea bargain was illusory and that his plea was not knowingly, voluntarily, and intelligently entered. The Court of Appeals rejected this argument, noting, inter alia, that the record showed Crawford was not misinformed about the plea agreement, that he knew he might not get into drug court, and that Crawford received significant benefits from the plea agreement. Crawford's argument in this postconviction action is effectively a repositioning of this same claim, and we conclude that the district court did not err when it rejected the claim in this postconviction action.

With regard to appellate counsel's withdrawal during the pendency of the direct appeal, the postconviction court found that Crawford "was not prejudiced in any way" by counsel's

withdrawal, because counsel had completed all work necessary for the appeal before withdrawing and, in fact, the appeal was fully considered on the merits. The court noted Crawford's argument that he claimed he was prejudiced by not being able to file a petition for further review. The court found that although Crawford was informed of appellate counsel's withdrawal prior to issuance of the Court of Appeals' decision, Crawford did not request appointment of substitute counsel until after the time had passed to seek further review.

[12] We agree with the postconviction court that Crawford has not shown prejudice from the failure of appellate counsel to seek further review. We acknowledge that Crawford was arguably without counsel at the time the Court of Appeals filed its decision and that during the period, he might have petitioned for further review. However, the U.S. Supreme Court has held that the right to counsel does not extend to discretionary appeals to a state's highest court, *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974), and that the right to counsel is limited to the first appeal as of right, *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Based on this precedent, we have held that in Nebraska, a defendant does not have a constitutional right to counsel beyond the conclusion of his or her direct appeal and that therefore, he or she cannot be deprived of effective assistance of counsel based on the failure of counsel to timely file a petition for further review. See *State v. Mata*, 273 Neb. 474, 730 N.W.2d 396 (2007). See, also, *State v. Taylor*, 14 Neb. App. 849, 716 N.W.2d 771 (2006). We note that this conclusion is consistent with Neb. Ct. R. App. P. § 2-102(G) (rev. 2012), which provides in part that "[f]urther review by the Supreme Court is not a matter of right, but of judicial discretion."

In the present case, before withdrawing, Crawford's appellate counsel had completed all work that was necessary in connection with submitting Crawford's first appeal as of right to the Court of Appeals. Because there was no right to

counsel beyond the conclusion of the appeal to the Court of Appeals, Crawford was not deprived of effective assistance of counsel based on the failure of counsel to file a petition for further review. We therefore conclude that the district court did not err when it rejected this claim.

Crawford finally argues that the district court should have granted postconviction relief based on "plain error that permeates the record." We have rejected Crawford's assertions of error, and we find no other plain error. We therefore conclude that the district court did not err when it denied postconviction relief.

## CONCLUSION

We conclude that the limitation periods for filing a postconviction motion in § 29-3001(4) are in the nature of a statute of limitations and are not jurisdictional. In this case, the State waived the statute of limitations under § 29-3001(4) when it failed to raise the defense in the district court. Having reviewed Crawford's assignments of error on appeal and finding them to be without merit, we affirm the district court's denial of his motion for postconviction relief.

Affirmed.

Cassel, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Dale J. Coufal, appellant, v.
Lavon M. Coufal, appellee.
866 N.W.2d 74

Filed July 17, 2015. No. S-14-591.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
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: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees de novo on the record to determine whether there has been an abuse of discretion.
4. **Divorce: Property Division: Pensions.** In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties.
5. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
6. ____: ____. As a general rule, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.
7. **Divorce: Property Division: Pensions.** Only that portion of a pension which is earned during the marriage is part of the marital estate.
8. ____: ____: ____. Generally, amounts added to and interest accrued on such pensions or retirement accounts which have been earned during the marriage are part of the marital estate. Contributions to pensions before marriage or after dissolution are not assets of the marital estate.

Appeal from the District Court for Buffalo County: William T. Wright, Judge. Affirmed in part, and in part reversed and remanded with directions.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

Gregory G. Jensen, P.C., L.L.O., for appellee.

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

Wright, J.

## NATURE OF CASE

This is an appeal from a decree of dissolution of marriage in which the district court included in the marital estate the increase in value of the premarital portion of the husband's public employees' retirement account. Prior to the marriage, the increase in value was fixed and guaranteed by statute, but it accrued during the marriage. The court found that the increase in value was "'earned' or accumulated during the marriage" and that it should be included in an equitable division of the marital estate pursuant to Neb. Rev. Stat. § 42-366(8) (Reissue 2008). We find that the increase in value of the premarital portion of the husband's retirement account was not the result of the efforts or contributions of either spouse and, therefore, was not earned during the marriage.

## SCOPE OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (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. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002).

## FACTS

Dale J. Coufal (Appellant) and Lavon M. Coufal (Appellee) were married on June 11, 2004. Each had one prior marriage, and no children were born during this marriage.

Appellant has been employed by the Nebraska Department of Roads since April 1986, including the time during the marriage. He participates in the Nebraska Public Employees Retirement Systems (NPERS), which is not a defined benefit plan that would apply to some state employees. Before the marriage, the balance of Appellant's retirement account was $76,271.45. Under Neb. Rev. Stat. § 84-1301(17) (Reissue 2014), members of NPERS are guaranteed a rate of return on their retirement plans of not less than 5 percent or the applicable federal midterm rate plus 1.5 percent. Appellant claimed that the premarital portion of the retirement account should be valued so as to include the statutorily guaranteed interest on the principal.

Appellant offered the testimony of David Rosenbaum as an expert witness for the purpose of establishing the present value of the premarital portion of Appellant's retirement account. Rosenbaum has a Ph.D. in economics from the University of Wisconsin-Madison. He has been employed in various teaching and administrative positions with the University of Nebraska-Lincoln for almost 30 years and is the owner of an economic consulting firm. Rosenbaum testified that as of May 6, 2013, the adjusted value of the premarital portion of the retirement account ($76,271.45) was $120,010.82. His calculation was based upon the statutory rate of return which the State must provide on the principal. After Rosenbaum determined his formulas, he verified with NPERS that his methodology was correct. The adjusted value of this part of Appellant's retirement account is not disputed.

The district court issued a decree of dissolution on May 5, 2014, in which it valued the retirement account at $219,830.07. The court concluded that the increased value of the premarital estate was accumulated and acquired during the course of the marriage through the joint efforts of the parties and

that, therefore, it was part of the marital estate. The court found that the interest accruing on the premarital portion of the retirement account did not fit into any exception to the general rule that property acquired by either party during the marriage is included in the marital estate.

Appellant contends that the district court abused its discretion in including the interest accruing on the premarital portion of the retirement account as part of the marital estate. He asserts that because the increased value on the premarital principal of the retirement account was guaranteed by § 84-1301, it was not due to the joint efforts of the spouses and, therefore, was not "'earned during the marriage.'" See brief for appellant at 4. We granted Appellant's petition to bypass to address this issue.

## ASSIGNMENTS OF ERROR

Appellant claims that the district court abused its discretion by not excluding from the marital estate the interest accrued on the nonmarital portion of the retirement account. Appellant asserts the court should have excluded the statutorily guaranteed appreciation of $43,739.37, because the increase resulted solely from the appreciation under § 84-1301 and was not the result of the joint efforts of the parties.

## ANALYSIS

[3-5] Our reasoning and conclusion are specific to the facts presented in this case. In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. See, *Binder v. Binder, ante* p. 255, 864 N.W.2d 689 (2015); *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009). In dissolution actions, district courts have broad discretion in valuing pension rights and dividing such rights between the parties. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). In a divorce action,

the purpose of a property division is to distribute the marital assets equitably between the parties. Neb. Rev. Stat. § 42-365 (Reissue 2008). Equitable property division under § 42-365 is a three-step process. The first step is to classify the parties' property as marital or nonmarital. *Tyma, supra*.

In dissolution actions, § 42-366(8) confers upon the court the power to equitably divide the marital estate and to include any pension or retirement plans, annuities, and other deferred compensation as part of the marital estate.

> If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested.

*Id.*

[6-8] As a general rule, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. *Reed, supra*. Applying this general rule to pensions, we have held that only that portion of a pension which is earned during the marriage is part of the marital estate. See *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008). Generally, amounts added to and interest accrued on such pensions or retirement accounts which have been earned during the marriage are part of the marital estate. Contributions to pensions before marriage or after dissolution are not assets of the marital estate. See *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997).

In the case at bar, Appellant claims that the district court abused its discretion by including as part of the marital estate the increase in value of the premarital portion of the account. The question presented is whether the increase in value of the premarital portion of the retirement account should be considered as part of the marital estate.

Other courts have concluded that an increase in value of such property during the marriage is not a marital asset when it is not caused by marital efforts or funds. "Appreciation in separate property is marital property to the extent that it was caused by marital funds or marital efforts; otherwise, it remains separate property." 1 Brett R. Turner, Equitable Distribution of Property § 5:54 at 546 (3d ed. 2005). As early as 1983, one annotation stated:

> [C]ourts in the vast majority of cases in which the issue has arisen have held or recognized that an increase in value in the separate property of a spouse, not attributable in any manner to any contribution of funds, property, or effort by either of the spouses, constitutes separate property . . . .

Annot., 24 A.L.R.4th 453, 456-57 (1983).

Some courts have referred to this dichotomy in the appreciation of separate property as "active" appreciation versus "passive" appreciation. Some states have codified this principle. See, e.g., Ala. Code § 30-2-51(b)(2) (1998); Ark. Code Ann. § 9-12-315(b)(5) (2008); Del. Code Ann. tit. 13, § 1513(b)(4) (2009); D.C. Code § 16-910(a) (2008); 750 Ill. Comp. Stat. Ann. 5/503(b)(2) (LexisNexis Cum. Supp. 2009); Me. Rev. Stat. Ann. tit. 19-A, § 953(2)(E) (Cum. Supp. 2004); Mo. Ann. Stat. § 452.330(5) (West 2003); N.Y. Dom. Rel. Law § 236(B)(d)(3) (McKinney 2010).

In order to determine what portion of Appellant's retirement account is nonmarital property, we examine to what extent the appreciation in the separate premarital portion of the retirement account was caused by the efforts of either spouse. In this context, we held that where appreciation of a wife's separate asset was due principally to inflation and market forces and not to any "significant efforts" by the husband, the appreciation should not have been included in the marital estate. See *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 734, 325 N.W.2d 832, 834 (1982).

In *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988), we held that certain shares of stock should not have been

included in the marital estate, because the parties were married 3 years after the husband began receiving stock; neither spouse contributed money to acquire the stock; the wife did not contribute to the improvement or operation of the stock, nor significantly care for the property during the marriage; and the stock was readily identifiable and traceable to the husband. In these decisions, some level of indirect or direct effort was required by the nontitled spouse—not just inflation or market forces—in order to include the increase in value in the marital estate.

The instant case is analogous to having a certificate of deposit with a fixed rate of interest that was owned by one spouse before the marriage. Both the principal and interest remain separate property because the certificate of deposit was acquired before the marriage, though the full economic value is not realized until after the parties were married. There is no marital effort or contribution during the marriage that affects the accrual of interest on the certificate of deposit.

Similarly, the appreciation of the premarital portion of Appellant's retirement account was guaranteed prior to the marriage. No effort from either spouse directly or indirectly affected the appreciation. The interest accrued solely by operation of § 84-1301. Therefore, the appreciation was not earned during the marriage by the joint efforts or contributions of the parties, because Appellant was legally entitled to the increase in value prior to the marriage.

Other courts have reached similar conclusions. In *Baker v. Baker*, 753 N.W.2d 644 (Minn. 2008), the Minnesota Supreme Court held that where a husband did not devote significant effort to managing his retirement funds and no significant effort was diverted from the marriage to generate the increase in the account, the appreciation in the nonmarital portion of the funds remained separate property. Similarly, a court in Illinois held that the value of a wife's individual retirement account as of the date of marriage, and any subsequent appreciation in value of that amount, was the wife's separate property upon dissolution of the marriage. But the

amount contributed to the retirement account during the marriage, and any subsequent appreciation in value of that amount, constituted marital property. See *In re Marriage of Raad*, 301 Ill. App. 3d 683, 704 N.E.2d 964, 235 Ill. Dec. 391 (1998).

In the case at bar, the district court concluded that the interest accumulated on the premarital portion of the retirement account was a form of marital income earned during the marriage by virtue of Appellant's continued employment. Previously, this court has held that a spouse's income which accumulates during the parties' marriage is a marital asset. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). In *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998), we held that employee stock options and stock retention shares were acquired during the marriage through the husband's employment during the marriage and were part of the marital estate.

However, in the present case, the increase in value of the premarital portion of Appellant's retirement account was not contingent on Appellant's continued employment with the State, but instead was guaranteed by statute prior to the marriage. The increase in value of the premarital portion of the account was not derived from contributions by the parties during the marriage.

We also reject the suggestion that the premarital funds in the retirement account were commingled and, therefore, should be treated as marital property. "'[S]eparate property becomes marital property [by commingling] if inextricably mingled with marital property or with the separate property of the other spouse. If the separate property continues to be segregated or can be traced into its product, commingling does not occur . . . .'" *Snodgrass v. Snodgrass*, 295 S.W.3d 240, 256 (Tenn. 2009). Such commingling occurred in *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000), where we set aside from the marital estate the amount of a downpayment made on the purchase of a home prior to the marriage, but not to any

interest accrued on the amount because the mortgage payments were made by the parties during the marriage.

In the instant case, the increase in value of the premarital portion of the retirement account is readily identifiable and traceable to Appellant's premarital portion of the retirement account.

Finally, we note that Rosenbaum's calculation of the increase in value of the premarital portion of the retirement account included a present value date of May 6, 2013, which was neither the date the parties separated nor the date of the dissolution decree. Instead, May 6 was the date Rosenbaum issued his report, and the parties do not dispute the value of the premarital portion of the retirement fund as of that date, nor do they assert that an alternative date should have been used. Therefore, we conclude that the value of the nonmarital portion of Appellant's retirement account should be valued as of May 6, 2013.

## CONCLUSION

The district court abused its discretion by including as a marital asset the increase in value of the nonmarital portion of the retirement account. Such increase in value was not due to the efforts or contribution of marital funds by the parties during the marriage, and it was readily identifiable and traceable to the nonmarital portion of the account.

Therefore, we reverse the portion of the divorce decree that included the increase in value of the nonmarital portion of the retirement account as determined on May 6, 2013, and we remand the cause with directions to exclude this amount from the marital estate. In all other respects, the judgment of the district court is affirmed.

Affirmed in part, and in part reversed and remanded with directions.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Rachelle L. Timberlake, appellee, v. Douglas County, Nebraska, a political subdivision of the State of Nebraska, appellant.

865 N.W.2d 788

Filed July 17, 2015. No. S-14-770.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Statutes.** The meaning and interpretation of a statute presents a question of law.
3. **Contracts.** The interpretation of a contract and whether the contract is ambiguous are questions of law.
4. **Contracts: Declaratory Judgments.** When a declaratory judgment dispute sounds in contract, the action is treated as one at law.
5. **Trial: Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which an appellate court will not disturb on appeal unless clearly wrong.
6. **Contracts: Intent.** In ascertaining the parties' intent in a written integrated contract, a court tries to give meaning to all its parts and avoid an interpretation that renders a material provision meaningless.
7. ____: ____. If a particular contract interpretation renders a material provision meaningless, that construction is inconsistent with the parties' intent.
8. ____: ____. A court should avoid interpreting contract provisions in a manner that leads to unreasonable or absurd results that are obviously inconsistent with the parties' intent.
9. ____: ____. Interpretative aids cannot override the parties' clear intent when a contract is considered as a whole.
10. **Intent: Words and Phrases.** The word "include" preceding a list does not indicate an exclusive list absent other language showing a contrary intent.
11. **Contracts: Words and Phrases.** A court gives written words grouped together in a list a related meaning.

12. **Employer and Employee: Employment Contracts: Wages: Appeal and Error.** Under Neb. Rev. Stat. § 48-1229 (Reissue 2010), an appellate court will consider a payment a wage subject to the Nebraska Wage Payment and Collection Act if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.
13. **Employer and Employee: Wages.** An employee can earn fringe benefits like sick leave and vacation leave just by rendering services.
14. ____: ____. The list of fringe benefits under Neb. Rev. Stat. § 48-1229(3) (Reissue 2010) is not exclusive.

Appeal from the District Court for Douglas County: W. Mark Ashford, Judge. Affirmed.

Donald W. Kleine, Douglas County Attorney, Bernard J. Monbouquette, and Jimmie L. Pinkham for appellant.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellee.

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

Connolly, J.

## I. SUMMARY

The appellee, Rachelle L. Timberlake, is an employee of the Douglas County Department of Corrections. She sustained a concussion while aiding her supervisor, who was having a seizure. She brought this declaratory judgment action to have the court determine her right to "injured on duty" (IOD) benefits under her collective bargaining agreement (CBA). She also requested attorney fees under the Nebraska Wage Payment and Collection Act (Wage Act).[1]

The CBA provides IOD benefits to department employees who are injured while performing a high-risk duty. The CBA provides that high-risk duty "includes (1) responding to a Code, and (2) interaction with an inmate while that inmate is engaged in an act of violence with the officer, another

[1] See Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2010).

inmate or himself/herself." The dispute centers on whether this sentence provides a nonexclusive list of high-risk duties or conjunctive elements that an employee must satisfy to qualify for benefits. The court concluded that the contract was unambiguous and awarded Timberlake IOD benefits. It also awarded her attorney fees under the Wage Act. Although our reasoning differs somewhat from the court's reasoning, we conclude that it correctly ruled Timberlake was injured while performing a high-risk duty. We affirm.

## II. BACKGROUND

Timberlake is a Corrections Officer I for the department. The terms and conditions of her employment are subject to a CBA between Douglas County and the Fraternal Order of Police, Lodge No. 8. Timberlake worked as an escort at the county jail, relieving officers who are assigned to specific housing units and escorting inmates who are moved through the facility. Her specific position was entitled "2 Delta Escort R1": "2 Delta" referred to her floor assignment. Apart from her other duties, "R1" meant she was a first responder for any emergencies in the facility.

On July 22, 2011, she saw her supervisor go limp and start to slide out of his chair during a seizure. While trying to protect him from hitting his head, she lost her balance and hit her own head against a concrete wall, sustaining a concussion. She called a "code green," which is a request for medical personnel to assist in an area. She said she called a code green because her supervisor was in severe distress and she wanted medical personnel there to assist them.

Soon after the accident, Timberlake was taken to the hospital and missed several days of work. When she returned to work, she requested IOD benefits. She received workers' compensation temporary disability benefits. But IOD benefits ensure that a qualified employee receives his or her full salary starting on the day of the injury, which is greater compensation than workers' compensation benefits provide. The department's director, Mark Foxall, denied Timberlake IOD

benefits, and she sought review by the IOD committee, established under the CBA. The committee recommended that she be granted IOD benefits because her actions were in response to an emergency. Foxall again denied benefits. He stated in a letter to Timberlake that "while a code is involved, it neither involves an inmate nor were there any acts of violence."

After exhausting her administrative remedies, she filed this declaratory judgment action and sought attorney fees under the Wage Act. She alleged that IOD benefits are wages under the Wage Act and that the county violated the act by denying her these benefits.

Timberlake testified that there are five color codes an officer might send to others in the facility. She said a code blue means an officer needs assistance, while a code green means the officer needs medical personnel. A code red alerts officers to a fire, and a code orange alerts officers to an escape. Finally, an officer sends a code yellow to signal a false alarm.

Foxall testified that a code blue was a request for assistance in response to some type of violence, such as an altercation between inmates or between inmates and staff. He said an officer might also call a code blue for assistance if an inmate was menacing or threatening in any manner. Foxall admitted that Timberlake had a duty to respond to any code called by an officer in her area and a duty to respond to any emergency she witnessed that would warrant an officer calling a code. He admitted that the physical incapacity of a corrections officer could pose a security threat and should be reported. He could not recall whether he had authorized IOD benefits for an employee injured while responding to a code other than a code blue. He said he had typically authorized benefits for employees responding to a code blue involving an inmate, because the CBA authorized that. He admitted that the CBA's list of high-risk duties was nonexclusive.

At the close of the evidence, the county argued that the CBA unambiguously excluded IOD benefits for injuries sustained in the circumstances presented by Timberlake's claim. Nonetheless, it requested that the court allow it to come back

and present extrinsic evidence about the CBA's meaning if the court concluded that the contract was ambiguous. Its attorney stated that the county could present the testimony of two negotiators but did not state what their testimony would show. The court, however, stated from the bench that the CBA provided a nonexclusive list of high-risk duties and that the facts showed the CBA entitled Timberlake to IOD benefits.

In its written order, the court stated that after hearing Timberlake's and Foxall's testimonies, it concluded that the meaning of article 25 of the CBA was unambiguous. It stated that article 25, which governs IOD benefits, did not specify the type of code that an employee must be responding to in order to receive IOD benefits for an injury. It concluded that Timberlake was injured while performing a high-risk duty and responding to a code green.

The court found that Timberlake had lost pay for 73.75 hours that the county should have paid to her as IOD benefits. It ordered the county to pay her for these hours, minus the workers' compensation disability benefits that she had received, for a total of $1,075.20 in benefits. The court further determined that Timberlake was entitled to attorney fees under § 48-1231 of the Wage Act, thereby implicitly determining that IOD benefits were part of Timberlake's negotiated wages under the CBA.

## III. ASSIGNMENTS OF ERROR

The county assigns that the court erred as follows:

(1) finding that Timberlake sustained an injury while performing a high-risk duty as set out in article 25 of the CBA;

(2) concluding that article 25 clearly and unambiguously defines a high-risk duty;

(3) excluding extrinsic evidence of the parties' intent in drafting article 25, which was described to the court in an offer of proof; and

(4) concluding that IOD benefits are wages under the Wage Act and awarding attorney fees to Timberlake.

## IV. STANDARD OF REVIEW

[1-3] We independently review questions of law decided by a lower court.[2] The meaning and interpretation of a statute presents a question of law.[3] The interpretation of a contract and whether the contract is ambiguous are questions of law.[4]

[4,5] When a declaratory judgment dispute sounds in contract, the action is treated as one at law.[5] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, which an appellate court will not disturb on appeal unless clearly wrong.[6]

## V. ANALYSIS

### 1. Timberlake Was Performing a High-Risk Duty When She Was Injured

As noted, the crux of this appeal is the meaning of a high-risk duty under article 25 of the CBA. We have considered the meaning of a high-risk duty in only one other case.

In *Mitchell v. County of Douglas*,[7] we held that a deputy sheriff was not performing a high-risk duty when he sustained a heart attack while training on an obstacle course that included a firing range. The county resolution that created the injured-on-duty policy did not define a high-risk duty or specify any conduct that constituted such a duty. We concluded that the phrase "high-risk duty" meant something more than routine employment duties. We cited common dictionary understandings of these words to conclude that an officer must be exposed to a "greater hazard or danger than one would normally encounter in the course of his

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[2] *Nebuda v. Dodge Cty. Sch. Dist. 0062*, 290 Neb. 740, 861 N.W.2d 742 (2015).

[3] *Id.*

[4] See *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 860 N.W.2d 391 (2015).

[5] See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[6] *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015).

[7] *Mitchell v. County of Douglas*, 213 Neb. 355, 329 N.W.2d 112 (1983).

employment."[8] We gave examples of conduct that would satisfy that definition: an officer pursuing a fleeing felon or attempting to charge a building where a felon had secured himself. In contrast, we concluded that the officer's risks of injury on the obstacle course flowed only from his own carelessness or gradual physical infirmity.

Although the county relied on *Mitchell* at oral argument, it does not resolve this dispute. First, we specifically stated in *Mitchell* that our examples of high-risk duties were not intended to define the term in its entirety. Obviously, our examples would not be applicable to an employee working in a corrections facility. More important, unlike the resolution considered in *Mitchell*, here we are analyzing a negotiated CBA with language showing the parties' intent of the type of duty the officer must be performing to qualify for IOD benefits. So we turn to that language.

(a) Article 25 Does Not Set Out Conjunctive Elements

Section 1 of article 25 makes sustaining an injury while performing a high-risk duty a condition for receiving the benefits and specifies conduct that satisfies that requirement:

> Injured on duty will mean that a Corrections Officer, while in the employ of the Douglas County Corrections Department, is injured while performing high risk duty, including responding to a Code, and that said injury is a direct result of that high risk duty. *"High risk duty" includes: (1) responding to a Code and (2) interaction with an inmate while that inmate is engaged in an act of violence with the officer, another inmate or himself/herself.* A Correction[s] Officer so injured will not be required to use his/her sick leave while recovering from said injury for the first . . . (180) working days of the recovery period or until he/she has reached maximum medical improvement, whichever comes first.

[8] *Id.* at 359, 329 N.W.2d at 114.

> The determination of whether an employee is entitled to [IOD] benefits shall be made by the Director or his/her designee.

(Emphasis supplied.)

The county argues that items (1) and (2) in the italicized sentence are essential and conjunctive elements, both of which must be satisfied before an employee is eligible for IOD benefits. We disagree.

[6,7] First, in ascertaining the parties' intent in a written integrated contract, a court tries to give meaning to all its parts and avoid an interpretation that renders a material provision meaningless.[9] If a particular contract interpretation renders a material provision meaningless, that construction is inconsistent with the parties' intent.[10] The county obviously considers item (1) to be a material provision because it argues that it is an essential element. But construing the contract to mean that subsection (2) must always be satisfied renders subsection (1) meaningless. That is, if the drafters had intended that an officer must always be interacting with a violent inmate when injured to qualify for IOD benefits, they had no need to include "responding to a Code" as an additional element.

Second, article 25 puts more emphasis on responding to a code than interacting with a violent inmate. Significantly, the first sentence of section 1 makes responding to a code a high-risk duty without mentioning interaction with a violent inmate. So the second sentence operates to expand the type of conduct that is considered a high-risk duty. It clarifies that such duties include responding to a code and interacting with a violent inmate. But the first sentence's separate statement that responding to a code is a high-risk duty refutes the county's argument that an officer must have been both responding

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[9] See, *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015); *Gies v. City of Gering*, 13 Neb. App. 424, 695 N.W.2d 180 (2005).

[10] See, *Gies, supra* note 9; Restatement (Second) of Contracts § 203, comment *b.* (1981).

to a code and interacting with a violent inmate to qualify for IOD benefits.

Moreover, even if the county's alternative argument were correct—that article 25 is at least ambiguous—the court specifically stated that the meaning of article 25 was unambiguous in the light of Timberlake's and Foxall's testimonies. The evidence showed that only a code blue is sent to request assistance with a violent or menacing inmate and that other codes are unrelated to that situation. But to conclude that both items (1) and (2) are essential elements would disqualify an officer who was suddenly attacked and injured by a violent inmate and did not have time to call a code blue. Subduing a violent inmate would obviously pose a high risk of injury to an officer. Yet, the officer would only be *confronted with* a code blue emergency—not *responding to* a code blue. We note that the county specifically argues that because Timberlake called a code green *after* she was injured, she was not responding to a code green.[11]

[8] Similarly, an officer injured while responding to a code red for a fire would not be entitled to benefits unless the officer was injured because he or she was interacting with a violent inmate. So the extrinsic evidence shows that the county's interpretation of the contract would result in officers being denied IOD benefits even if they were injured while performing duties that carried a high risk of injury. And a court should avoid interpreting contract provisions in a manner that leads to unreasonable or absurd results that are obviously inconsistent with the parties' intent.[12]

We also reject the county's position at oral argument that interpreting article 25 to authorize benefits when an officer is only responding to a code would necessarily include responding to a code yellow for false alarms. It argued that this would

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[11] See brief for appellant at 8-9.

[12] See *Davidson v. First American Ins. Co.*, 129 Neb. 184, 261 N.W. 144 (1935). Accord, Restatement, *supra* note 10, § 203 and comment *c.*; 17A Am. Jur. 2d *Contracts* § 338 (2004).

be an absurd result that the parties could not have intended. But this argument fails to create a latent ambiguity in the contract. A code yellow does not require an officer to respond to an emergency—it requires the officer to stop responding. Finally, Foxall stated at trial that the list of high-risk duties was not exclusive. So even if resort to extrinsic evidence had been necessary, the court was not clearly wrong in rejecting the county's argument that an officer must be interacting with a violent inmate to qualify for IOD benefits.

In sum, the court did not have to resort to extrinsic evidence to determine that the county's "conjunctive elements" interpretation of the CBA was unreasonable. Nonetheless, we agree with its conclusion that article 25 unambiguously authorizes IOD benefits for an officer who is injured while responding to an emergency code. The county's interpretation is contrary to the parties' clear intent in the CBA to provide benefits to employees who are injured while performing a high-risk duty, *including* responding to a code.

But we disagree with the court that Timberlake was responding to a code when she was injured. The county correctly argues that she called a code green after she was injured. The court also concluded, however, that Timberlake was performing a high-risk duty. Whether that conclusion is correct hinges on whether article 25 sets out an exclusive or nonexclusive list of conduct that qualifies as a high-risk duty.

### (b) Article 25's List of High-Risk Duties Is Nonexclusive

In interpreting a statute, the Nebraska Court of Appeals has explicitly interpreted the word "include" to designate a nonexclusive list.[13] Generally, absent other words or a context showing a contrary intent, courts in other jurisdictions have similarly held that a statutory or regulatory list preceded by

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[13] See *Spracklin v. Spracklin*, 21 Neb. App. 271, 837 N.W.2d 826 (2013). See, also, *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

some variation of the word "include" designates a nonexclusive enumeration of components within the subject matter.[14] It "conveys the conclusion that there are other items includable, though not specifically enumerated by the statutes."[15] Courts usually do not interpret a statutory list that is preceded by the word "includes" as though the statute contained the word "means," and absent a conflicting statutory provision, the word "include" does not create a doubt whether the listed components are exclusive.[16] Additionally, some courts have also explicitly concluded that the word "include" preceding a list *in a contract* has an expansive meaning, absent any language or context showing a more restrictive intent.[17]

We agree. Adopting a rule of nonexclusivity for our contract interpretation cases is consistent with our statutory interpretation cases.[18] It is also consistent with the way we have applied a rule of exclusivity to lists that were not preceded by the word "include." Specifically, we have applied the principle

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[14] See, *American Surety Co. of New York v. Marotta*, 287 U.S. 513, 53 S. Ct. 260, 77 L. Ed. 466 (1933); *Richardson v. National City Bank of Evansville*, 141 F.3d 1228 (7th Cir. 1998); *Picayune Tribe v. Brown*, 229 Cal. App. 4th 1416, 178 Cal. Rptr. 3d 563 (2014); *Friends for Murray v. Dept. of Human Serv.*, 2014 IL App (5th) 130481, 9 N.E.3d 577, 380 Ill. Dec. 906 (2014); *Connerty v. Metropolitan Dist. Com'n*, 398 Mass. 140, 495 N.E.2d 840 (1986), *abrogated on other grounds, Jean W. v. Com.*, 414 Mass. 496, 610 N.E.2d 305 (1993); *Jackson v. Charlotte Mecklenburg Hosp.*, 768 S.E.2d 23 (N.C. App. 2014); *DEP v. Cumberland Coal Resources, LP*, 102 A.3d 962 (Pa. 2014).

[15] *Argosy Limited v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968), quoted in 2A Norman J. Singer & Shambie Singer, Statutes and Statutory Construction § 47:7 (7th ed. 2014).

[16] See, *Federal Election Com'n v. Mass. Citizens for Life*, 769 F.2d 13 (1st Cir. 1985). But see *Leach v. Monumental Life Ins. Co.*, 118 N.C. App. 434, 455 S.E.2d 450 (1995), *reversed* 342 N.C. 408, 464 S.E.2d 46.

[17] See, e.g., *Ruffin v. RadioShack Corp.*, 49 Kan. App. 2d 92, 305 P.3d 669 (2013); *Empire Mut. Ins. Co. v. Applied Sys. Dev. Corp.*, 121 A.D.2d 956, 505 N.Y.S.2d 607 (1986). See, also, *Enis v. Continental Illinois Nat. Bank*, 795 F.2d 39 (7th Cir. 1986).

[18] See, *Sindelar, supra* note 13; *Spracklin, supra* note 13.

of expressio unius est exclusio alterius (the expression of one thing is the exclusion of the others), when interpreting both statutes and contracts.[19]

[9,10] We recognize that some courts have concluded that the word "include," standing alone, is ambiguous whether the contracting parties meant for the word to be expansive or restrictive.[20] But we are not persuaded by these cases. Concluding that the parties' intent regarding a list is ambiguous if a list is preceded only by the verb "include" is contrary to its plain and ordinary meaning. The word "include" means "1. to contain, embrace, or comprise, as a whole does parts or any part or element . . . 2. to place in an aggregate, class, category, or the like. 3. to contain as a subordinate element; involve as a factor."[21] Contrary to the county's argument, these definitions support the conclusion that enumerated items in a list preceded by the word "include" are normally a part of the whole—not that the parts restrict the whole. Particularly in legal contexts, the "participle *including* typically indicates a partial list," and this meaning holds true whether or not the drafter(s) added emphatic language such as "*including but not limited to*."[22] Obviously, interpretative aids cannot override the parties' clear intent when a contract is considered as a whole. But the word "include" preceding a list does not indicate an exclusive list absent other language showing a contrary intent.[23]

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[19] See, e.g., *Jacobson v. Shresta*, 288 Neb. 615, 849 N.W.2d 515 (2014); *Village of Memphis v. Frahm*, 287 Neb. 427, 843 N.W.2d 608 (2014); *O'Gara Coal Co. v. Chicago, M. & St. P. R. Co.*, 114 Neb. 584, 208 N.W. 742 (1926).

[20] See, *Guerrant v. Roth*, 334 Ill. App. 3d 259, 777 N.E.2d 499, 267 Ill. Dec. 696 (2002); *Great Nat. Corp. v. Campbell*, 687 S.W.2d 450 (Tex. App. 1985).

[21] Webster's Encyclopedic Unabridged Dictionary of the English Language 720 (1989).

[22] See Black's Law Dictionary 880 (10th ed. 2014).

[23] Compare, e.g., *Anderson Excavating Co. v. Neth*, 275 Neb. 986, 751 N.W.2d 595 (2008).

At oral argument, the county stated that other provisions in the CBA show that when the parties intended the word "include" to be expansive, they included clarifying language. It argued that the absence of such language in article 25 shows they did not intend the word "include" to be expansive. We disagree that any emphatic language used in other provisions controls the meaning of article 25.

For example, in article 2 of the CBA, the county asserted that its management rights "include, but are not limited to," a specified lists of powers. As stated, however, language added to emphasize that a list is not exclusive is unnecessary because it means the same thing. It does not change the meaning of "include." So the absence of emphatic language in article 25 does not change our analysis of the parties' intent. We conclude that the list of high-risk duties in article 25 is unambiguously nonexclusive. That leads us to whether Timberlake was injured while performing a high-risk duty.

(c) Article 25 Controls the Meaning of High-Risk Duty

The county argues that "[g]iving first aid is not a high risk activity."[24] But article 25 provides IOD benefits for employees injured while responding to a code, which includes a code green for medical emergencies. By including "responding to a Code" as a high-risk duty, the parties implicitly concluded that the risk of injury while responding to a medical emergency code is sufficient to warrant IOD benefits.

[11] Although Timberlake was not responding to a code green, her conduct—responding to a medical emergency—was within the meaning of a high-risk duty under article 25. Words are known by the company they keep, so a court gives written words grouped together in a list a related meaning.[25]

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[24] Brief for appellant at 7.

[25] See, *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013); 11 Samuel Williston, A Treatise on the Law of Contracts § 32:6 (Richard A. Lord ed., 4th ed. 2012).

And her duty to respond to a medical emergency was indistinguishable from her duty to respond to a code green. We note Foxall admitted that an incapacitated officer presents a security risk and that Timberlake had a duty to respond to any emergency she witnessed. So Timberlake unquestionably had a duty to respond to this medical emergency. And if she had been injured while responding to a code green, her injury would have occurred while she was performing a listed high-risk duty under article 25. Because her conduct was indistinguishable from a duty explicitly made a high-risk duty by article 25, we conclude that she was injured while performing an unlisted high-risk duty.

### 2. Court Properly Awarded Attorney Fees Under the Wage Act

The county argues that under § 48-1229(4), IOD benefits are not compensation under the Wage Act. Timberlake argues that IOD benefits are fringe benefits under the act, which the county was obligated to pay her under the CBA. We briefly set out the act's relevant definitions and requirements.

[12] Section 48-1229(4) defines wages as "compensation for labor or services rendered by an employee, *including fringe benefits*, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis." (Emphasis supplied.) Section 48-1229(3) provides that fringe benefits "includes sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit plans or benefit programs regardless of whether the employee participates in such plans or programs." Section 48-1230(1) provides that unless otherwise stated in the act, "each employer shall pay all wages due its employees on regular days designated by the employer or agreed upon by the employer and employee." Under § 48-1229, we will consider a payment a wage subject to the Wage Act if (1) it is compensation for labor or services,

(2) it was previously agreed to, and (3) all the conditions stipulated have been met.[26]

The county admits that in the CBA, the parties agreed to IOD benefits for injured employees who are unable to work. But it argues that the benefits are not wages for the same reason: "The benefit she seeks is not for her labor and services but rather is one negotiated for her by her union in the CBA specifically for injured employees who are unable to provide labor or services."[27] This argument is without merit.

[13] Section 48-1229(4) specifically defines wages to include fringe benefits that an employer agrees to pay on a "time, task, fee, commission, or other basis." And in the case the county relies on, we explained that an employee can earn fringe benefits like sick leave and vacation leave just by rendering services.[28]

[14] Additionally, the list of fringe benefits under § 48-1229(3) is not exclusive. It specifically defines fringe benefits *to include* sick leave, health and accident benefit plans, and any other employee benefit plans. We have implicitly interpreted this provision to include fringe benefits that are not explicitly listed in the statute. Specifically, we have held that the cash value of a life insurance policy can be wages under the act when the evidence shows the employer agreed to pay it to an employee upon his separation of employment. In *Sindelar v. Canada Transport, Inc.*,[29] we held that the cash value was a fringe benefit under § 48-1229(3). We rejected the argument that the policy was an employee benefit plan. Instead, we held that its cash value was deferred compensation. It therefore "amounted to a fringe benefit, as it was in the form of a pension."[30]

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[26] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[27] Brief for appellant at 14.

[28] See *Fisher, supra* note 26.

[29] *Sindelar, supra* note 13.

[30] *Id.* at 568, 520 N.W.2d at 209.

The same principle applies here. Article 25 provides that a corrections officer injured while performing a high-risk duty "will not be required to use his/her sick leave while recovering from said injury for the first . . . (180) working days of the recovery period or until he/she has reached maximum medical improvement, whichever comes first." This provision shows that IOD benefits are in the same class as sick leave benefits because they are intended to benefit an employee who is unable to work because of sickness or disability. They are not awarded on a time basis, but they are awarded for services rendered if the employee was performing a high-risk duty when injured. The court did not err in concluding that the unpaid benefits were negotiated wages that the county failed to pay. Accordingly, it properly awarded Timberlake attorney fees.

## VI. CONCLUSION

We reject the county's argument that article 25 sets out conjunctive, essential elements that an employee must satisfy to qualify for IOD benefits. We reject its argument that article 25 is ambiguous and conclude that this provision sets out a nonexclusive list of high-risk duties. We therefore do not address the county's argument that the court erred in failing to consider its extrinsic evidence of the parties' intent. We conclude that Timberlake was performing a high-risk duty when she was injured, because her conduct was indistinguishable from conduct that article 25 explicitly listed as a high-risk duty. Finally, we conclude that the court correctly awarded Timberlake attorney fees for collecting unpaid fringe benefits under the CBA.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Marcus M. Williams, appellee, v. City of Omaha, appellant.

865 N.W.2d 779

Filed July 17, 2015. No. S-14-796.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court must resolve independently of the trial court.
2. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
3. **Political Subdivisions Tort Claims Act: Judgments: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
4. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** A police pursuit as defined in Neb. Rev. Stat. § 13-911 (Reissue 2012) involves multiple elements and is a much more nuanced matter than simply deciding whether one vehicle is trying to catch up to, or maintain sight of, another.
5. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Proof.** Three requirements must be met before a finding can be made that a vehicular pursuit under Neb. Rev. Stat. § 13-911 (Reissue 2012) has occurred: (1) There must be an active attempt by a law enforcement officer to apprehend occupants of another motor vehicle, (2) the driver of the fleeing vehicle must be aware of the attempt to apprehend, and (3) the driver must resist apprehension by taking some action, such as speeding, ignoring the officer, or attempting to elude the officer while driving at a speed which is not reasonable under the conditions.

6. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles.** Whether law enforcement sought to apprehend an individual under Neb. Rev. Stat. § 13-911 (Reissue 2012) is a mixed question of law and fact.
7. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Strict Liability.** Under Neb. Rev. Stat. § 13-911 (Reissue 2012), a political subdivision is strictly liable for injuries to an "innocent third party" during a vehicular pursuit, regardless whether the law enforcement officer's actions were otherwise proper or even necessary.
8. **Political Subdivisions Tort Claims Act: Motor Vehicles: Proximate Cause.** For a pursuit under Neb. Rev. Stat. § 13-911 (Reissue 2012) to have been a proximate cause of an accident, the pursuit must have caused the motorist to resist apprehension by maintaining or increasing speed, or by attempting to elude the pursuing officer at unreasonable speeds.

Appeal from the District Court for Douglas County: W. Mark Ashford, Judge. Affirmed.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellant.

Edward F. Fogarty, of Fogarty & Lund, and John J. Ekeh, of Ekeh Law Office, for appellee.

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

Cassel, J.

## I. INTRODUCTION

After a bench trial, the City of Omaha, Nebraska (City), appeals from a money judgment for injuries sustained by an innocent third party in a motor vehicle collision involving a vehicle allegedly being pursued by police officers. The City contends that the pursuit statute[1] did not apply because the officers intended only to stop the vehicle and not to "apprehend" the driver. Under our deferential standard of review,

[1] See Neb. Rev. Stat. § 13-911 (Reissue 2012).

two factual findings support an inference that the officers' objective changed before the collision. The City also criticizes the court's assessment of the officers' intent. But the court's discussion did not detract from its essential findings. Because the district court's factual findings are not clearly erroneous and support its conclusion that the police began a pursuit prior to the collision, we affirm the judgment.

## II. BACKGROUND

### 1. Stipulated Facts

The parties stipulated to basic facts, which we summarize as follows:

- Two motor vehicles collided at the intersection of Spaulding and 30th Streets in Omaha.
- William G. Webster was driving westbound on Spaulding Street.
- Marcus M. Williams was northbound on 30th Street.
- Webster violated a stop sign, resulting in the collision.
- An Omaha police cruiser, driven by Officer Jeffrey Wasmund, who was accompanied by Officer Kalon Fancher, was east of the intersection.
- After the collision, the officers drove through the intersection to follow Webster, who was fleeing from the scene.
- At a point west of the intersection, Fancher used the cruiser's radio to announce that the officers were in pursuit.
- Shortly after the radio call, the officers' supervisor ordered them to terminate the pursuit.

### 2. Pleadings

Williams sued the City. He alleged that at the time of the crash, Webster was fleeing to avoid apprehension by a police cruiser that was actively attempting to apprehend Webster. Williams claimed that by virtue of § 13-911, the City was strictly liable for all of his damages. The City denied liability. It alleged that the sole proximate cause of any damages to Williams was the negligent or intentional actions of Webster.

3. Evidence at Trial

During trial, Williams testified about his directions of travel on the day of the accident. As Williams approached Binney Street, while driving north on 30th Street, he saw a police cruiser behind a white car—Webster's vehicle—turning east onto Wirt Street. The police cruiser was about 1½ blocks in front of Williams when it turned onto Wirt Street. Williams testified that Webster's vehicle and the police cruiser were traveling at a "normal" speed and that the cruiser did not have its overhead lights activated. Williams looked eastward down Wirt Street as he approached it from the south, and he saw that Webster's vehicle and the police cruiser had turned onto 28th Avenue going north. Williams testified that the cruiser's overhead lights were flashing at that time.

Williams testified that Webster's vehicle was being "pursued" by the police cruiser. According to Williams, the police cruiser had "the flashers on chasing [Webster]." At 30th and Spaulding Streets, Webster's vehicle collided with Williams' vehicle. After the collision, onlookers told Williams that the police were in pursuit. When Williams' fiance and her grandmother came to get him, he told them that he had "witnessed a high-speed police chase, and . . . it end[ed] up colliding into [him]."

Fancher described the events occurring approximately 1 minute before the collision. He and Wasmund were traveling westbound on Spaulding Street when they observed a white vehicle with an "expired registration" that was approaching the intersection of 30th and Spaulding Streets. The officers tried to conduct a traffic stop, but Webster's vehicle instead "shot through the intersection and collided with a vehicle." Fancher believed the officers were approximately one block east of 30th Street when they decided to conduct a traffic stop. Once they realized that Webster's vehicle had an expired registration, they turned on the cruiser's overhead flashing lights. Fancher estimated that the officers were two or three car lengths behind Webster's vehicle when they activated the lights.

Wasmund testified that when he determined the license plate on Webster's vehicle was expired, his cruiser was near 29th and Spaulding Streets. He then activated the overhead lights in order to conduct a traffic stop. Webster's vehicle did not stop and instead continued westbound on Spaulding Street. Webster disregarded the stop sign at 30th and Spaulding Streets and collided with Williams' vehicle. Wasmund testified that he was one or two car lengths behind Webster's vehicle and that he was driving approximately 25 miles per hour. Wasmund estimated that 2 or 3 seconds elapsed between his activation of the overhead lights and the collision. When Webster's vehicle did not stop after colliding with Williams' vehicle, Wasmund decided to follow the car. He testified that as the officers approached the block after 30th and Spaulding Streets, Fancher got on the radio to let others know that they were initiating a pursuit. Wasmund denied that he decided to pursue Webster before the collision.

A sergeant with the Omaha Police Department testified that the department's standard operating procedures required officers to immediately get on the radio and advise that they were in pursuit as soon as they actively began a pursuit. The sergeant testified that Fancher reported the reason for the pursuit was that the vehicle had struck another vehicle at 30th and Spaulding Streets. According to a police pursuit recording form, the officers reported that the pursuit began at 30th and Spaulding Streets.

### 4. District Court's Judgment

The district court entered judgment in favor of Williams. The court specifically found the following:

- The "[o]fficers activated their emergency lights but not the siren."
- "[A]fter the officer activated the emergency lights the Webster vehicle 'jack rabbited.'"
- "[B]oth Officer Wasmund[']s cruiser] and the Webster vehicle were accelerating just before the collision."

The court also made numerous findings regarding the officers' intent. Among the findings were that once Webster's vehicle accelerated, Wasmund "instantaneously decided to pursue by accelerating his vehicle"; that the decision to pursue "occurred either at the moment that the Webster vehicle accelerated or at the moment the Webster vehicle ran the stop sign"; that "the decision to pursue and the decision to flee [were] made before the collision"; that "the actions of the fleeing Webster vehicle shows [sic] that Webster was aware of the pursuit of the officer and as a result ran the stop sign striking [Williams]"; and that "[w]ords, actions and conduct shown in the evidence . . . are sufficient . . . to give the Court a basis for the finding of intent to pursue."

The court found that the City was strictly liable for Williams' damages and entered a judgment of $172,138.56 against the City. The City filed a timely appeal, which we moved to our docket.[2]

## III. ASSIGNMENTS OF ERROR

The City assigns eight errors which, consolidated and restated, allege that the district court erred in finding that a pursuit began prior to the collision and that the pursuit proximately caused the collision.

## IV. STANDARD OF REVIEW

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

[2,3] In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.[4] And in such actions, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every

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

[3] *Credit Mgmt. Servs. v. Jefferson*, 290 Neb. 664, 861 N.W.2d 432 (2015).

[4] *Maclovi-Sierra v. City of Omaha*, 290 Neb. 443, 860 N.W.2d 763 (2015).

controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.[5]

## V. ANALYSIS

### 1. Pursuit Statute

Our analysis begins with § 13-911, the pursuit statute. It provides that when an innocent third party suffers injury proximately caused by the action of a law enforcement officer during vehicular pursuit, the political subdivision employing the officer shall be liable for damages to the innocent third party.[6] The pursuit statute defines "vehicular pursuit" as

> an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.[7]

### 2. Whether Officers Were in Pursuit at Time of Collision

[4] The City challenges the district court's determination that a pursuit began before the collision. A police pursuit as defined in § 13-911 involves multiple elements and is a much more nuanced matter than simply deciding whether one vehicle is trying to catch up to, or maintain sight of, another.[8] Among other arguments, the City contends that the "time was too short for the officers to respond in any way that could be seen as an active attempt to apprehend Webster,"[9] that the

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[5] *Id.*

[6] § 13-911(1).

[7] § 13-911(5).

[8] See *Perez v. City of Omaha*, 15 Neb. App. 502, 731 N.W.2d 604 (2007).

[9] Brief for appellant at 17.

officers' decision to pursue is not the affirmative act required under the statute, and that the pursuit statute does not impose liability when officers attempt to make a traffic stop and the vehicle flees.

[5] Three requirements must be met before a finding can be made that a vehicular pursuit under § 13-911 has occurred: (1) There must be an active attempt by a law enforcement officer to apprehend occupants of another motor vehicle, (2) the driver of the fleeing vehicle must be aware of the attempt to apprehend, and (3) the driver must resist apprehension by taking some action, such as speeding, ignoring the officer, or attempting to elude the officer while driving at a speed which is not reasonable under the conditions.[10] We consider these requirements in turn.

(a) Active Attempt to Apprehend

The first component of a vehicular pursuit under the statute requires an "active attempt" to "apprehend." These terms are not defined in the Political Subdivisions Tort Claims Act. We agree with the City that under § 13-911, the attempt to apprehend the driver "must be more than passively driving, monitoring, or watching."[11]

But two actions by the officers prior to the collision demonstrate conduct above and beyond mere driving, monitoring, or watching. First, while following Webster's vehicle, the officers activated the cruiser's overhead flashing lights in order to get Webster to stop. Second, the police cruiser accelerated just before the collision. These facts, which are not clearly wrong, establish an "active attempt."

[6] The City focuses primarily upon the word "apprehend." Whether law enforcement sought to apprehend an individual under § 13-911 is a mixed question of law and fact.[12] The meaning of "apprehend" presents a question of law. The City

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[10] See *Lalley v. City of Omaha*, 266 Neb. 893, 670 N.W.2d 327 (2003).

[11] See brief for appellant at 28.

[12] See *Maclovi-Sierra v. City of Omaha, supra* note 4.

contends that "[a]ll the evidence shows the officers' conduct was nothing more than an attempt to make a traffic stop for a minor violation that would not lead to apprehension."[13] In this case, we need not decide whether liability under § 13-911 can be established where an officer does nothing more than attempt to stop a vehicle by operating the cruiser's emergency lights. Here, the police not only activated the lights but also accelerated their vehicle prior to the collision.

Although "apprehend" has various meanings depending on the context, an inference arises that the officers were attempting to apprehend Webster. And as the prevailing party, Williams is entitled to the benefit of every inference that can reasonably be deduced from the evidence.[14] The word "apprehend" is derived from a French word meaning "to lay hold of, seize."[15] In the physical context, it can mean "[t]o lay hold upon, seize, with hands, teeth, etc."; "[t]o seize (a person) in name of law, to arrest"; "[t]o seize upon for one's own, take possession of"; or "[t]o seize or embrace (an offer or opportunity)."[16] The Nebraska Court of Appeals noted that "apprehension" has been defined as "'[s]eizure in the name of the law; arrest,'"[17] but that "apprehend" can mean to "'catch'" or "'detain.'"[18] While the officers may not have intended to "apprehend" Webster at the moment when they activated their overhead lights, their vehicle's acceleration prior to the collision raised an inference that their objective had changed.

[7] Our application of the word "apprehend" is consistent with the purpose of the statute. Under § 13-911, a political

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[13] Brief for appellant at 23.

[14] *Maclovi-Sierra v. City of Omaha, supra* note 4.

[15] 1 The Oxford English Dictionary 581 (2d ed. 1989).

[16] *Id.*

[17] *Jura v. City of Omaha*, 15 Neb. App. 390, 396, 727 N.W.2d 735, 740 (2007).

[18] *Id.*

subdivision is strictly liable for injuries to an "innocent third party" during a vehicular pursuit, regardless whether the law enforcement officer's actions were otherwise proper or even necessary.[19] The obvious purpose is to shift the burden of bearing the costs resulting from such injuries away from the innocent third party. Clearly, the purpose applies where police pursue a vehicle in order to make an arrest. But it equally applies where police actively pursue a vehicle that flees from an attempt to initiate a traffic stop.

The City also focuses on the district court's statements regarding the police officers' intent to pursue Webster. The City emphasizes the subjective views of the officers and states—without citing any authority—that the "'active attempt' to 'apprehend' requirement is measured by the officer's intent."[20] And the district court concentrated on when the officers made the decision to pursue. But the court's discussion of the officers' intent, even if not directly pertinent, does not detract from the two factual findings that were essential to the court's decision.

The district court found that prior to the collision, the officers activated the cruiser's overhead lights and the cruiser was increasing its speed. As we have already said, these factual findings are not clearly erroneous. And these facts support the court's conclusion that the police were actively attempting to apprehend Webster. The first component of a vehicular pursuit was established.

### (b) Awareness of Attempt to Apprehend

Next, for a vehicular pursuit under § 13-911, the driver must be aware of the attempt to apprehend. Webster did not testify at trial. If he made any statements reflecting on the issue, they were not included in the evidence. Thus, Webster's

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[19] *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

[20] Brief for appellant at 25.

awareness of the attempt to apprehend him must be based on his actions at the time.

The district court found that after the officers activated the cruiser's overhead lights, Webster increased his speed and "ran a stop sign." These facts support a reasonable inference that Webster was aware of the attempt to apprehend him. Giving Williams the benefit of this inference, as we must, the evidence supports the district court's conclusion.

(c) Resistance of Apprehension

The last component for a vehicular pursuit is resistance of apprehension by the driver. The district court found that Webster was aware of the pursuit and, as a result, disregarded the stop sign. The City concedes that this element was met, stating, "There was no dispute that when William[s'] car was struck, Webster was resisting apprehension by driving at speeds in excess of those reasonable and proper under the conditions."[21]

(d) Conclusion as to Pursuit

The district court's factual findings were not clearly erroneous. Viewing the evidence most favorably to Williams and giving him the benefit of every reasonable inference, we cannot say that the district court was clearly wrong in concluding that a pursuit was in progress at the time of the collision.

3. Whether Pursuit Was Proximate Cause of Collision

[8] For the pursuit under § 13-911 to have been a proximate cause of the accident, the pursuit must have caused the motorist to resist apprehension by maintaining or increasing speed, or by attempting to elude the pursuing officer at unreasonable speeds.[22] The City's argument that the pursuit was not the proximate cause of the collision is premised upon its belief

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[21] *Id.* at 17.

[22] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

that there was no vehicular pursuit before the collision. We have rejected that argument. The district court's conclusion that the pursuit was a proximate cause of the collision and the damages suffered by Williams was not clearly wrong.

## VI. CONCLUSION

We consider the evidence in the light most favorable to Williams as the successful party, resolve every controverted fact in his favor, and give him the benefit of every inference that can reasonably be deduced from the evidence. Viewed in that light, the district court's factual findings are not clearly erroneous. And having accepted the district court's factual findings, we find no clear error in the court's conclusion that the police officers made an active attempt to apprehend Webster prior to the collision. Because the other requirements for a pursuit under § 13-911 were satisfied, we agree that the officers' pursuit of Webster was a proximate cause of the collision. We therefore affirm the district court's judgment.

Affirmed.

Stephan, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Bryant Gardner, appellee, v. International Paper Destruction & Recycling, appellant.

865 N.W.2d 371

Filed July 17, 2015. No. S-14-815.

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 factual findings 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. ____: ____. In workers' compensation cases, an appellate court determines questions of law.
4. **Workers' Compensation.** The Nebraska Workers' Compensation Act provides that when an employee suffers personal injury caused by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation from his or her employer if the employee was not willfully negligent at the time of receiving such injury.
5. **Workers' Compensation: Proof.** In a proceeding to modify a prior award, the employer has the burden of establishing a decrease of incapacity and the employee has the burden of establishing an increase.
6. **Workers' Compensation: Words and Phrases.** Under Neb. Rev. Stat. § 48-121 (Reissue 2010), a workers' compensation claimant may receive permanent or temporary workers' compensation benefits for either partial or total disability. "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity.

7. **Workers' Compensation.** Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained.
8. ____. Temporary disability benefits should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury.
9. ____. When an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, permanent.
10. ____. Temporary disability benefits are discontinued at the point of maximum medical improvement, because a disability cannot be both temporary and permanent at the same time.
11. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should not be relitigated at a later stage.
12. **Workers' Compensation: Expert Witnesses: Physicians and Surgeons.** The Workers' Compensation Court is the sole judge of the credibility and weight to be given medical evidence, even when the health care professionals do not give live testimony.
13. **Workers' Compensation.** Causation of an injury or disability presents an issue of fact.
14. ____. Whether a plaintiff in a workers' compensation case is totally and permanently disabled is a question of fact.
15. **Judgments: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence.
16. **Workers' Compensation: Proof.** A claimant is entitled to an award under the Nebraska Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of the evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition has combined with the present work-related injury to produce the disability for which the claimant seeks an award.
17. **Workers' Compensation**. A workers' compensation claimant can recover benefits when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce a disability.
18. **Workers' Compensation: Words and Phrases.** Total disability does not mean a state of absolute helplessness. It means that because of an

injury (1) a worker cannot earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform or (2) the worker cannot earn wages for work for any other kind of work which a person of his or her mentality and attainments could do.

Appeal from the Workers' Compensation Court: James R. Coe, Judge. Affirmed.

Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellant.

Richard J. Rensch and Sean P. Rensch, of Rensch & Rensch Law, P.C., L.L.O., for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

Bryant Gardner, the appellee, suffered an accident arising out of and in the course of his employment on April 16, 2009, while he was employed by the appellant, International Paper Destruction & Recycling (the employer). The Nebraska Workers' Compensation Court filed an "Award" on September 23, 2010, awarding temporary benefits to Gardner. The employer filed a petition to modify the award on May 6, 2013, alleging that Gardner had reached maximum medical improvement and had experienced a decrease in incapacity. In an order filed May 24, the compensation court found that Gardner had reached maximum medical improvement. After a trial on the employer's petition to modify, the compensation court filed a "Further Award" on August 8, 2014, in which the court applied the odd-lot doctrine and determined that, given Gardner's preexisting mental and cognitive deficits, and based upon his physical injuries that arose from the accident, Gardner was permanently and totally disabled. The employer appeals. We affirm.

## STATEMENT OF FACTS

On April 16, 2009, while employed by the employer as a truckdriver, Gardner was operating a semitrailer truck when he was involved in an accident in Omaha, Nebraska. Due to the accident, Gardner was briefly rendered unconscious and suffered injuries to his head, neck, and lower back. Gardner filed a petition in the Workers' Compensation Court on August 27, seeking compensation for his injuries. The employer filed its answer on September 3, generally denying the allegations set forth in Gardner's petition and raising an affirmative defense of willful negligence.

After a trial was held on June 14, 2010, the compensation court filed its "Award" on September 23. The court stated that on April 16, 2009, Gardner was operating a semitrailer truck and that as he was exiting eastbound L Street to merge onto northbound Interstate 680, he failed to negotiate the circular entrance ramp and the semitrailer truck rolled. The court found that Gardner sustained a "'closed head injury'" in the accident of April 16 and that Gardner was unconscious for a brief period of time after the accident.

Gardner saw Dr. Kip Burkman on April 23, 2009. Dr. Burkman noted that Gardner's symptoms included headache, depression, anxiety, blurred vision, dizziness, neck pain, numbness and tingling, confusion, poor balance, and memory loss. The compensation court determined that Gardner's medical history showed that prior to the accident, Gardner had experienced all of the symptoms that Dr. Burkman listed in his report of April 23. The court further determined, based on medical reports, a CT scan of Gardner's head, and an MRI of Gardner's brain, that Gardner did not suffer any physical injury to his brain.

Gardner was seen by a neurologist, Dr. Scott Diesing. In a report dated November 5, 2009, Dr. Diesing noted that an MRI of Gardner's brain on May 6 was normal and that Gardner's neurological examination demonstrated a short-term recall impairment and mild deficits on a short test of mental status. Dr. Diesing noted that Gardner's complaints

were mostly consistent with the musculoskeletal injury as previously diagnosed. Gardner underwent an MRI examination of the cervical spine and the lumbar spine that showed a disk protrusion at the C4-5 and C5-6 levels and, additionally, a slight bulge of the lumbar spine at the S1-L5 level. Dr. Diesing recommended continued symptomatic care.

Gardner continued to complain of neck and back pain, and on November 12, 2009, Dr. Burkman referred him to another physician for a cervical epidural injection, which was performed on November 30. In a report of January 11, 2010, Dr. Diesing noted that Gardner's problems with headaches, nausea, balance, cognitive deficits, and neck pain were improving until the epidural injection on November 30, 2009.

On February 11, 2010, Gardner underwent an MRI examination which, according to Dr. Diesing's report dated April 16, showed that Gardner had a cerebrospinal fluid leak (CSF). The CSF was caused by a leak in the spinal cord's protective sac in which spinal fluid leaked out of a hole in the dura. Gardner underwent a "blood patch" to correct the CSF, as prescribed by Drs. Burkman and Diesing, and Gardner's symptoms improved thereafter. In its award, the compensation court determined that "the evidence preponderates in a finding that the cause of the CSF was due to the epidural injection on November 30, 2009."

Because of Gardner's complaints of cervical and low-back pain, he was referred to Dr. George Greene, a neurosurgeon, and Dr. Eric Phillips, an orthopedic surgeon. In a report dated May 21, 2009, Dr. Phillips stated that Gardner was not a surgical candidate and suggested Gardner continue pain management with Dr. Burkman. In an October 8 report, Dr. Greene likewise did not believe that Gardner was a surgical candidate for neck or back pain.

With respect to Gardner's cognitive injury, Gardner was examined by Dr. Jeffery Snell, a neuropsychologist; Dr. Ty Callahan, a psychologist; Dr. Jennifer Linder, a psychologist; Dr. John Donaldson, a psychiatrist; and Dr. Ian Crabb, a neurologist. In a report dated November 10, 2009, Dr. Linder

stated that Gardner had global impairment in memory and severe cognitive deficits related to memory impairment and was incapable of managing finances and daily tasks.

In a report dated January 27, 2010, Dr. Callahan stated that Gardner suffered from depression and major anxiety disorder and that his emotional state leads to magnification of symptoms sufficient to interfere with his recovery. Dr. Callahan noted that Gardner had suffered a concussion as a result of the April 16, 2009, accident, but that he did not believe any of Gardner's current symptoms were related to any injury to his brain. Dr. Callahan stated that Gardner had reached maximum medical improvement with respect to his cognitive defects within 2 to 3 weeks, or at the most 2 months, after the accident. Dr. Callahan noted Gardner's prior symptoms and stated that he had evidence of malingering based on Gardner's test results. Dr. Callahan stated he believed that the cause of Gardner's cognitive deficits, to the extent they existed, was due to Gardner's previously existing narcotic drug use, marijuana use, and sleep apnea.

Dr. Snell also examined Gardner. In his report and deposition, Dr. Snell stated that based on a CT scan and the "Glasgow coma score," he would not expect any cognitive impairments. Dr. Snell performed various tests on Gardner and suggested that based on Gardner's low test scores, Gardner was not putting forth his full effort on the tests.

Dr. Donaldson examined Gardner, and in a report dated July 2, 2009, Dr. Donaldson stated that there was no objective evidence of physical damage to Gardner's brain. Dr. Donaldson noted that Gardner had some memory loss, and Dr. Donaldson was concerned the cause of the memory loss was Gardner's medications and his sleep apnea. In a July 8 report, Dr. Donaldson stated that Gardner's symptoms were more typical of a concussion because, based on the MRI, there was no sign of brain laceration or significant hemorrhage.

In a report dated October 13, 2009, Dr. Crabb stated that several CT scans showed no traumatic brain injury. Dr. Crabb determined that Gardner had suffered a strained cervical spine

and a low-back strain, that no surgery was indicated, and that Gardner was at maximum medical improvement with no permanent impairment or restrictions. The compensation court's original award mentioned that Dr. Crabb stated that the epidural injection on November 30 was more likely than not the cause of the CSF.

In a report dated June 1, 2010, Dr. Burkman stated that from a brain injury standpoint, Gardner was at maximum medical improvement, but he was still doing active physical therapy, and that therefore, Gardner was not at maximum medical improvement from a physical therapy standpoint.

Based on the evidence, the compensation court set forth its findings in its September 23, 2010, award and stated that

> the evidence preponderates in a finding that [Gardner] was injured in the course and scope of his employment on April 16, 2009, when he was involved in a motor vehicle accident. The evidence preponderates in a finding that [Gardner] suffered a concussion in that accident and as a result had some temporary cognitive deficits that resolved and resulted in no permanent impairment from a cognitive and depression standpoint as a result of the accident and injury of April 16, 2009. The evidence preponderates in a finding that [Gardner's] preexisting conditions were the same from a cognitive standpoint prior to the accident as subsequent to the accident and the exacerbation of the symptoms from the accident of April 16, 2009, was a temporary condition. The evidence preponderates in a finding that the cause of the cognitive deficits was due to the preexisting depression and anxiety from which [Gardner] suffered, the sleep apnea from which [Gardner] suffered and the narcotic and other medications [Gardner] was prescribed prior to the accident.
>
> The Court finds that the evidence preponderates in a finding that [Gardner] sustained an injury to the cervical and lumbar spine and that as a result [Gardner] is still undergoing physical therapy rehabilitation and is not at maximum medical improvement from the injuries

> to the cervical and lumbar spine. [Gardner] is at maximum medical improvement regarding any concussion or cognitive aggravation he sustained as a result of the accident of April 16, 2009.
>
> The Court finds that [Gardner] is not at maximum medical improvement, likewise, due to the continuing treatment for the CSF as stated by Dr. Diesing in his report of May 26, 2010.

The compensation court then rejected the employer's affirmative defense of willful negligence.

The compensation court noted the parties stipulated that Gardner's average weekly wage for purposes of temporary total disability was $605.51 per week and that Gardner's average weekly wage for purposes of permanent impairment was $641.60 per week. The court ordered:

> The [employer] shall pay to and on behalf of [Gardner] benefits of $403.67 per week from and including April 16, 2009, to and including July 6, 2009, and thereafter and in addition thereto benefits of $282.57 for a 70 percent temporary partial loss of earning capacity from and including July 7, 2009, to and including November 30, 2009, and thereafter and in addition thereto the sum of $403.67 per week from and including December 1, 2009, to and including the date of this hearing on June 14, 2010, and a like amount each week for so long as [Gardner] remains temporarily totally disabled.

The court further ordered that the employer pay certain outstanding medical expenses, that the employer is entitled to a credit for previous payment of medical expenses and indemnity benefits, and that the employer pay certain future medical expenses.

On October 7, 2010, the employer filed an "Application for Review" of the award with the review panel, claiming 17 errors made by the compensation court. Gardner did not appeal or cross-appeal the award. On November 10, 2011, the review panel filed its order in which it affirmed the award of the compensation court. The review panel stated that "there is

ample evidence in the record to support the Court's findings," and it determined that the employer's assigned errors were without merit.

On January 26, 2012, Dr. Phillips performed an MRI examination on Gardner's spine and he compared that MRI to the original MRI of May 6, 2009. Based on the January 2012 MRI, Dr. Phillips recommended surgery. On July 27, Gardner underwent surgery performed by Dr. Phillips for an anterior cervical diskectomy and a three-level fusion from the C-4 level to the C-7 level.

On May 6, 2013, the employer filed its petition to modify the award, alleging that Gardner had reached maximum medical improvement and had experienced a decrease in incapacity. In his answer filed May 21, Gardner generally denied the employer's petition to modify. Gardner stated that he had not reached maximum medical improvement, had not experienced a decrease in incapacity, "and may have experienced an increase in incapacity due solely to his original injury."

On May 13, 2013, the employer filed a motion to compel requesting the court to order Gardner to appear for a functional capacity evaluation at the location recommended by Dr. Phillips. On May 24, the compensation court filed an order recognizing that there was a dispute between the parties regarding who should provide a functional capacity evaluation to Gardner "now that [Gardner] has reached maximum medical improvement." The court ordered that Gardner should receive the functional capacity evaluation pursuant to Dr. Phillips' recommendation.

Gardner completed a functional capacity evaluation on July 15, 2013. The functional capacity evaluation found that Gardner could work at a "medium physical demand" level with lifting restrictions of 30 pounds shoulder level, 25 pounds overhead, and a two-hand carry of 40 pounds.

On September 11, 2013, Dr. Phillips responded to a letter from the employer's counsel in which Dr. Phillips stated that Gardner had reached maximum medical improvement with regard to his work-related injury.

On September 25, 2013, the compensation court filed an order appointing vocational rehabilitation counselor, Patricia Reilly, to perform an evaluation for vocation rehabilitation services for Gardner in addition to performing a loss of earning capacity evaluation. On October 18, the employer filed a motion in limine to exclude an October 10 report of Dr. Jay Rich, a psychiatrist, from being considered in Gardner's loss of earning capacity evaluation. In the October 10 report, Dr. Rich was asked, "Do you believe the truck accident was a (not the one and only) proximate cause of . . . Gardner's depression and post-traumatic stress disorder?" (Emphasis in original.) Dr. Rich answered, "[Gardner] had no history of depression or post traumatic stress prior to the accident." In its motion in limine, the employer argued that because the compensation court had determined in its initial award that Gardner had reached maximum medical improvement with respect to his mental health, any ongoing problems are related to his preexisting condition and not related to the compensable injury. The employer thus argued Dr. Rich's report should not be considered in Gardner's loss of earning capacity evaluation.

In an order filed October 31, 2013, the compensation court granted Gardner leave to provide a further report from Dr. Rich to the vocational rehabilitation counselor, Reilly, "concerning any further opinions that Dr. Rich may have upon [Gardner's] mental condition and/or restrictions, if any." The court also granted leave to the employer to take further discovery depositions and to rebut the opinion of Dr. Rich with an updated report of the psychiatrist of the employer's choice. The order also stated the parties stipulated that the employer

> shall pay to [Gardner] indemnity at the rate of a 45 percent loss of earning capacity to the time of final resolution and that the finding of the 45 percent loss of earning capacity shall be considered an agreement by the parties with approval by the Nebraska Workers' Compensation Court.

Dr. Rich treated Gardner four times between August 29 and October 30, 2013. In his August 29 report, Dr. Rich stated that Gardner was depressed and suffered from posttraumatic stress disorder and he noted that Gardner had "no psychiatric treatment history." In a December 16 report addressed to Gardner's attorney, Dr. Rich stated that "Gardner's pre-existing cognitive defects and depression were aggravated by the rollover." He further stated that he believed Gardner's "defects are permanent" and that "Gardner's current symptoms restrict him from return[ing] to work at this time."

In a "Clarification Report" dated February 13, 2014, Dr. Rich stated that (1) Gardner suffered preexisting mental and cognitive deficits, including depression, anxiety, sleep apnea, and effects of narcotics and other medications; (2) the April 16, 2009, accident caused only a temporary exacerbation of the cognitive preexisting conditions; (3) following the temporary exacerbation, Gardner's cognitive state returned to the preexisting conditions he was suffering prior to the accident; (4) the preexisting cognitive conditions, along with the pain caused by the accident, limited Gardner's ability to return to full-time work; (5) Gardner's preexisting cognitive conditions were dynamic and naturally progressive mental states that were left untreated and that they "naturally progressed and expectedly intensified"; and (6) Gardner's preexisting cognitive conditions were permanent and "were naturally progressing due to . . . Gardner's lack of treatment — not due to the April 16, 2009 rollover."

In Reilly's first loss of earning capacity analysis dated October 3, 2013, Reilly determined that Gardner sustained a loss of earning power of approximately 45 percent. The scope of Reilly's first analysis included only Gardner's physical restrictions; it did not include his preexisting cognitive deficits.

In Reilly's addendum to the loss of earning power analysis dated January 10, 2014, Reilly considered Gardner's preexisting cognitive deficits by relying upon the reports of Dr. Rich. Reilly stated that "[w]ith consideration given to the opinions

of Dr. Jay Rich . . . Gardner would be considered to fit the definition of 'odd-lot doctrine' and therefore would not be able to maintain regular full-time employment and would be considered permanently and totally disabled."

In Reilly's second addendum to the loss of earning power analysis dated April 25, 2014, Reilly provided two alternative loss of earning capacity opinions that were based on two hypothetical scenarios presented by the parties' attorneys. Based on the scenario set forth by the employer, which posited that Gardner had no neurocognitive or psychological impairment, Reilly determined that "Gardner would not sustain a loss of earning power as a result of the rollover accident." In contrast, based on the scenario set forth by Gardner, which posited that Gardner had preexisting cognitive and mental conditions that were progressing due to lack of treatment, Reilly determined that because of the combined effect of the preexisting cognitive issues along with the orthopedic injury, "Gardner would be considered to fit the definition of 'odd-lot doctrine' and therefore would not be able to maintain regular full-time employment and would be considered permanently and totally disabled."

On April 28, 2014, a trial was held on the employer's petition to modify. At the trial, the employer objected to, inter alia, Gardner's offer of the report of Dr. Rich, described above, and a separate report of Dr. Jan Golnick. In a report dated March 25, 2013, Dr. Golnick stated that Gardner suffered chronic headaches following the April 16, 2009, accident and that since the accident, Gardner has experienced dizziness, cognitive and memory problems, and regular episodes of confusion. Dr. Golnick reported that Gardner had experienced depression and moderate to severe anxiety. The only past medical history reported by Dr. Golnick was as follows: sinus and nasal surgery in 2005; anterior cervical fusion, C4-C7 level, by Dr. Phillips on July 12, 2012; hypertension; and sleep apnea. Dr. Golnick stated he would like to schedule a followup appointment with Gardner due to the complexity of his case and "due to the fact that I [Dr. Golnick] need to learn more

about him from his medical records before making more definite recommendations."

In objecting to the reports at trial, the employer's attorney argued that the reports of Drs. Rich and Golnick

> are all dealing with issues related to depression, the traumatic brain injury, the effect of that. And we believe that that information is not relevant to the proceeding today because the Court has already issued a decision regarding the depression and the traumatic brain injury and said that that healed without impairment or restriction. And this is essentially an attempt to modify, when that's not appropriate, because the law of the case says that that's already been decided. It's essentially a relevance objection, Your Honor.

In response, Gardner's attorney asserted that

> when you do a loss of earning capacity, you do the loss of earning capacity with respect to the injury that . . . was precipitated as a result of the work injury, and then you take the person as whole. What does that person bring to the table at the time that she was injured?

Gardner's attorney further stated that

> it is our position, when we're doing the loss of earning capacity, that the Court must consider, not only the injuries that [Gardner] sustained at the time of the work injury, but his — what he brought to the table at the time that he was injured. What were his preexisting conditions that could affect his ability to earn a living?

The court overruled the employer's objection and received the reports of Drs. Rich and Golnick.

On August 8, 2014, the compensation court filed its "Further Award" from which this appeal is taken. In sum, the compensation court applied the odd-lot doctrine, which generally provides that while a worker is not altogether incapacitated for work, the worker is so handicapped that the worker will not be employed regularly in any well-known branch of the labor market, and the compensation court determined that Gardner was permanently and totally disabled. See *Schlup v.*

*Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Specifically, in the further award, the court determined that the necessity for the diskectomy and the three-level cervical fusion performed by Dr. Phillips was a result of the April 16, 2009, accident. Based upon the medical evidence and the loss of earning capacity reports from Reilly, the court further determined that Gardner was permanently and totally disabled. The court recognized that in its initial award, it had stated that Gardner's preexisting cognitive deficits were temporarily aggravated by the accident and that they "resolved to their prior state and resulted in no permanent impairment as a result of the work related accident of April 16, 2009." The court further stated:

> Having found that [Gardner's] preexisting emotional condition returned to its pre-accident state, [Gardner's] emotional condition prior to the accident did not resolve. The Court finds that as a result of the [CSF] and the permanent impairment from the three-level cervical fusion with continuing pain combined with [Gardner's] prior emotional and mental state involving learning disability, depression, anxiety and cognitive impairment all developed to make [Gardner] permanently and totally disabled pursuant to the loss of earning capacity analysis of the vocational rehabilitation expert . . . Reilly.

The court also noted that "[s]everal of [Gardner's] physicians have found that [Gardner] will be in need of future medical care such as Dr. Rich stated for pain management and [Gardner's] depression, anxiety, and cognitive difficulties."

In the further award, as modified by an order nunc pro tunc filed August 15, 2014, the court ordered that the employer

> shall pay to and on behalf of [Gardner] the sums for temporary total disability and temporary partial disability for those periods of time and amounts as set forth in the Award of September 23, 2010, and the Order of October 31, 2013 to and including the date of the filing of this Further Order and thereafter in addition thereto the [employer] shall pay to and on behalf of [Gardner]

> the sum of [$427.73] per week for so long as [Gardner] remains permanently and totally disabled.

The court further ordered that the employer pay Gardner certain outstanding medical expenses and that the employer is entitled to a credit for previous payments of medical expenses and indemnity. The court also stated that the employer "should continue to provide and pay for such reasonable and necessary medical expenses as may be necessary as a result of the accident and injury of April 16, 2009."

The employer appeals.

## ASSIGNMENTS OF ERROR

The employer generally assigns, restated, that the compensation court erred when it found that Gardner was permanently and totally disabled and entered the further award accordingly. In particular, the employer contends that because the original award found that Gardner's mental health issues had reached maximum medical improvement, no further awards or evidence regarding mental health issues were appropriate. Thus, the employer claims that the compensation court erred when it considered Gardner's mental and cognitive deficits, admitted reports of Drs. Rich and Golnick, and awarded future medical care including treatment for Gardner's mental health.

## STANDARDS OF REVIEW

[1] 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. See Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014).

[2,3] On appellate review, the factual findings 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. *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015). In workers' compensation cases, we determine questions of law. *Id*.

## ANALYSIS

The employer generally claims that the compensation court erred when it found that Gardner was permanently and totally disabled. The employer asserts that in its original award, the compensation court found that Gardner had reached maximum medical improvement with respect to his head and mental injuries resulting from the April 16, 2009, accident and that this finding was the "law of the case," thus precluding consideration of subsequent mental health issues in the proceedings resulting in the further award. Specifically, the employer claims the compensation court erred when it considered Gardner's preexisting mental health issues and admitted medical reports which discussed Gardner's subsequent mental condition. We find no merit to these arguments and determine that the compensation court did not err when it found that Gardner was permanently and totally disabled.

*Applicable Law.*

[4] The Nebraska Workers' Compensation Act provides that when an employee suffers personal injury caused by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation 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).

With respect to the modification of awards in workers' compensation cases, Neb. Rev. Stat. § 48-141 (Reissue 2010) provides:

> All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his or her dependents by lump-sum payments pursuant to section 48-139 shall be final and not subject to readjustment if the lump-sum

> settlement is in conformity with the Nebraska Workers' Compensation Act, unless the settlement is procured by fraud, but the amount of any agreement or award payable periodically may be modified as follows: (1) At any time by agreement of the parties with approval of the Nebraska Workers' Compensation Court; or (2) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . .

It is well recognized with respect to modification of awards that "[a]t the administrative level, awards can be reopened by the compensation board for modification to meet changes in claimant's condition, such as increase, decrease, or termination of disability." 13 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, ch. 131 at 131-1 (2015). It has been further stated:

> In all states, some kind of provision is made for reopening and modifying awards. This provision is a recognition of the obvious fact that, no matter how competent a commission's diagnosis of claimant's condition and earning prospects at the time of hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Under the typical award in the form of periodic payments during a specified maximum period or during disability, the objectives of the legislation are best accomplished if the commission can increase, decrease, revive, or terminate payments to correspond to a claimant's changed condition.

*Id.*, § 131.01 at 131-3.

[5] In a proceeding to modify a prior award, the employer has the burden of establishing a decrease of incapacity and the employee has the burden of establishing an increase. *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013). We have stated that the employee has the burden of proving that his injury caused permanent impairment as a

predicate to an award for permanent disability, i.e., loss of earning capacity. See *id*. See, also, *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002).

[6-9] Under Neb. Rev. Stat. § 48-121 (Reissue 2010), a workers' compensation claimant may receive permanent or temporary workers' compensation benefits for either partial or total disability. "Temporary" and "permanent" refer to the duration of disability, while "total" and "partial" refer to the degree or extent of the diminished employability or loss of earning capacity. *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005). Compensation for temporary disability ceases as soon as the extent of the claimant's permanent disability is ascertained. *Id*. In other words, temporary disability benefits should be paid only to the time when it becomes apparent that the employee will get no better or no worse because of the injury. *Visoso v. Cargill Meat Solutions, supra*; *Rodriguez v. Hirschbach Motor Lines, supra*. Simply stated, when an injured employee has reached maximum medical improvement, any remaining disability is, as a matter of law, permanent. *Id*.

[10] We have stated that temporary disability benefits are discontinued at the point of maximum medical improvement, because a disability cannot be both temporary and permanent at the same time. *Visoso v. Cargill Meat Solutions, supra*. Temporary payments do not continue after maximum medical improvement has been reached by the employee, as to all injuries. See *Rodriguez v. Hirschbach Motor Lines, supra*. And once the employer establishes that the employee has reached maximum medical improvement, the employer has satisfied its burden of proof that the employee's temporary disability payments should cease. See *Visoso v. Cargill Meat Solutions, supra.*

After determining that temporary disability payments should cease, the next question is what, if any, permanent disability payments the employer should pay to the employee. See *id*. Permanent disability is an essential element of an employee's claim in workers' compensation, and therefore, the burden

rests with the employee to prove the elements of his or her compensation claim. *Id*. See, also, *Green v. Drivers Mgmt., Inc., supra*. After reaching maximum medical improvement, the employee has the burden of proving that his or her injury caused permanent impairment and that this permanent impairment resulted in a loss of earning capacity. See *Visoso v. Cargill Meat Solutions, supra*.

*Employer's Petition to Modify and Further Award.*

In this case, the compensation court awarded temporary benefits to Gardner in the original award filed September 23, 2010. On May 6, 2013, the employer filed a petition to modify the original award, alleging that Gardner had reached maximum medical improvement as to all of his injuries and had experienced a decrease in his incapacity. In his answer filed May 21, Gardner alleged that he had not reached maximum medical improvement, that he had not experienced a decrease in incapacity, and that he "may have experienced an increase in incapacity due solely to his original injury." Gardner suggests that a petition to modify may not have been appropriate. However, because the original award did not set forth terms to convert from temporary to permanent benefits and the parties did not agree to convert, we reject this suggestion. Compare, *Weber v. Gas 'N Shop*, 280 Neb. 296, 786 N.W.2d 671 (2010); *Davis v. Crete Carrier Corp.*, 274 Neb. 362, 740 N.W.2d 598 (2007).

With respect to when Gardner reached maximum medical improvement, the record shows that on May 24, 2013, the compensation court filed an order in which it stated that Gardner "has reached maximum medical improvement" and that he should receive a functional capacity evaluation pursuant to Dr. Phillips' recommendation. Furthermore, in an August 20 letter, the employer's counsel asked Dr. Phillips whether Gardner had reached maximum medical improvement, and in a September 11 response, Dr. Phillips stated that Gardner had reached maximum medical improvement. We

note for completeness that in an order filed on October 31, the compensation court recognized, inter alia, that the parties had stipulated that the employer

> shall pay to [Gardner] indemnity at the rate of a 45 percent loss of earning capacity to the time of final resolution and that the finding of the 45 percent loss of earning capacity shall be considered an agreement by the parties with approval by the Nebraska Workers' Compensation Court.

Because it was established that Gardner had reached maximum medical improvement, Gardner had the burden of proving that his injury caused permanent impairment and that this permanent impairment resulted in a loss of earning capacity. See *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013). After trial, the compensation court filed its further award on August 8, 2014, in which the court determined that Gardner's injury had caused permanent impairment and that his permanent impairment resulted in a 100-percent loss of earning capacity. The compensation court thus awarded Gardner permanent total disability benefits.

*Employer's Contentions.*

The employer claims that the compensation court erred in its further award, because the court considered Gardner's preexisting mental and cognitive conditions and admitted and relied upon the reports of Drs. Rich and Golnick, which reports discussed Gardner's mental and cognitive conditions. The employer asserts that such consideration violates the law-of-the-case doctrine. The employer acknowledges that in the original award, the court had determined that Gardner had preexisting mental health problems that were temporarily exacerbated by the April 16, 2009, accident, but the employer focuses on the ruling to the effect that the head and mental injuries resulting from the accident had reached maximum medical improvement. In the current proceeding, the employer argues that given the finding of maximum medical improvement of mental health issues in the original award, the court

improperly considered Gardner's mental and cognitive conditions and the medical reports that discuss such conditions in determining the extent of Gardner's disability in the further award. In response, Gardner notes that in the original award, the Workers' Compensation Court found that Gardner had a preexisting mental condition and that Gardner's mental and emotional deficits had returned to the baseline preexisting level. Gardner contends that the enduring fact for law-of-the-case purposes is that Gardner has a preexisting mental health condition.

[11] We have stated that the law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should not be relitigated at a later stage. *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012). With respect to the law-of-the-case doctrine in workers' compensation cases, it has been stated:

> [In a] [c]hange-of-condition reopening proceeding, the issue before the [compensation court] is sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based. If the original award held that there was no connection between the accident and claimant's permanent disability, there is nothing to reopen, and claimant cannot retry the issue of work-connection through the device of a reopening petition. Conversely, when the employee reopens to show increased disability, the insurance carrier cannot raise the basic issue of liability. In short, no matter who brings the reopening proceeding, neither party can raise original issues such as work-connection, employee or employer status, occurrence of a compensable accident, and degree of disability at the time of the first award.

13 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 131.03[2][b] at 131-35 (2015). The authority just quoted illustrates the types of determinations in a workers' compensation case that are subject to the law-of-the-case doctrine. We have effectively applied the concept of law of the case in workers' compensation cases. E.g., *Starks*

*v. Cornhusker Packing Co.*, 254 Neb. 30, 37-38, 573 N.W.2d 757, 763 (1998) (stating in modification proceeding that modification of original award could not be applied retroactively to date of original award because "a modification award, retroactively applied to the date of the original award, would effectively afford the parties involved an opportunity to relitigate the award. Such action is prohibited by the principle of res judicata").

In the present case, in the original award, the compensation court found that Gardner had preexisting mental and cognitive deficits prior to the April 16, 2009, accident, including depression, anxiety, confusion, and memory loss. The court determined that these preexisting mental and cognitive deficits were temporarily aggravated by the injury to the head in the accident, but that after the aggravation subsided, Gardner's mental and cognitive deficits returned to their prior baseline condition. The court stated that "[t]he evidence preponderates in a finding that [Gardner's] preexisting conditions were the same from a cognitive standpoint prior to the accident as subsequent to the accident and that the exacerbation of the symptoms from the accident of April 16, 2009, was a temporary condition."

The fact that Gardner had preexisting mental and cognitive deficits that remained after being temporarily exacerbated by the accident, as found in the original award, became a fact decided in this case from which no appeal was taken. Given the fact that Gardner had been determined to have a preexisting mental health condition, under the law-of-the-case doctrine, the compensation court could and did properly consider the significance of the preexisting condition in rendering its further award. In this regard, the compensation court stated in the further award:

> The Award of September 23, 2010 acknowledged [Gardner's] preexisting cognitive, depression and anxiety deficits and found that the accident of April 16, 2009 resulted in a temporary aggravation that resolved to their prior state and resulted in no permanent impairment as

> a result of the work related accident of April 16, 2009. Having found that [Gardner's] preexisting emotional condition returned to its pre-accident state, [Gardner's] emotional condition prior to the accident did not resolve.

[12] As a further argument regarding Gardner's mental health issue, the employer contends that the reports of Drs. Rich and Golnick should not have been considered. We do not agree. The reports of Drs. Rich and Golnick were relevant to the issue of Gardner's mental health condition as it related to his disability at the time of consideration of the petition to modify. In this case, the Workers' Compensation Court did not make a separate award for mental illness. Compare *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009). Nevertheless, mental health evidence was relevant to the issue of permanent disability. In Dr. Rich's reports, he noted that Gardner suffered from depression, anxiety, and posttraumatic stress disorder, which limited his ability to work. In Dr. Golnick's report, he noted that Gardner experienced depression, dizziness, cognitive and memory problems, regular episodes of confusion, and moderate to severe anxiety. These symptoms, as well as Gardner's reported "difficulty with word finding," bore on Gardner's employability. The Workers' Compensation Court is the sole judge of the credibility and weight to be given medical evidence, even when the health care professionals do not give live testimony. See *Damme v. Pike Enters.*, 289 Neb. 620, 856 N.W.2d 422 (2014). The compensation court did not err when it admitted and considered the reports of Drs. Rich and Golnick.

[13-15] The employer claims generally that the compensation court erred when it found Gardner was permanently and totally disabled. We find no merit to this assignment of error. Causation of an injury or disability presents an issue of fact. *Damme v. Pike Enters., supra*. Whether a plaintiff in a workers' compensation case is totally and permanently disabled is a question of fact. See, *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015); *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008). In testing the sufficiency of the

evidence to support the findings of fact, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and we give the successful party the benefit of every inference reasonably deducible from the evidence. See *Money v. Tyrrell Flowers*, *supra*.

[16,17] With respect to preexisting conditions, we have stated that a claimant is entitled to an award under the Nebraska Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of the evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition has combined with the present work-related injury to produce the disability for which the claimant seeks an award. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). See, also, *Damme v. Pike Enters., supra*. A workers' compensation claimant can recover benefits when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce a disability. See *Damme v. Pike Enters., supra*.

Although a South Carolina Court of Appeals' case involved issues regarding a separate award for mental illness, we agree with the observation of that court, which stated that "[a mental health] symptom which is present and causally connected, but found not to impact upon the claimant's condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition." *Estridge v. Joslyn Clark Controls, Inc.*, 325 S.C. 532, 540, 482 S.E.2d 577, 581 (S.C. App. 1997). Thus, the worsening of a claimant's mental health over time remains a possibility.

In the present case, the Workers' Compensation Court relied on the odd-lot doctrine. In *Schlup*, we considered the odd-lot doctrine and agreed with the Workers' Compensation Court that the claimant was permanently and totally disabled under the odd-lot doctrine. We quoted Professor Larson and stated that "'[u]nder the odd-lot doctrine, which is accepted

in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.' 2 A. Larson, The Law of Workmen's Compensation § 57.51(a) at 10-164.68 (1989)." *Schlup v. Auburn Needleworks*, 239 Neb. at 865, 479 N.W.2d at 448. See 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 83.01 (2015). We further quoted Professor Larson by stating:

> "A considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury was constricted by lack of mental capacity or education. This is a sensible result, since it is a matter of common observation that a man whose sole stock in trade has been the capacity to perform physical movements, and whose ability to make those movements has been impaired by injury, is under a severe disadvantage in acquiring a dependable new means of livelihood . . . ."

*Schlup v. Auburn Needleworks*, 239 Neb. at 865, 479 N.W.2d at 448. See 7 Larson & Larson, *supra*, § 83.04.

In *Schlup*, the claimant suffered from carpal tunnel syndrome arising out of her employment and she filed a claim in the Workers' Compensation Court. We noted that the claimant had preexisting problems with her back and that she had left high school in 10th grade and had not received a diploma through the general educational development program. We recognized that because of her preexisting back problems and academic shortcomings, it was impossible for her to find work that did not involve the use of her hands. We determined that in assessing her work-related injury, the compensation court did not err when it considered evidence of her preexisting back problems and academic shortcomings.

[18] With respect to total and permanent disability, we recently stated that total disability does not mean a state of absolute helplessness. *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015). See, also, *Schlup v. Auburn Needleworks,*

*supra*. It means that because of an injury (1) a worker cannot earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform or (2) the worker cannot earn wages for work for any other kind of work which a person of his or her mentality and attainments could do. *Id*.

In the present case, the Workers' Compensation Court found that Gardner had reached maximum medical improvement with respect to all of his injuries arising out of the April 16, 2009, accident. Relying upon the previous finding of his "pre-accident cognitive and learning disability, depression and anxiety," the evidence properly admitted at trial, and applying the odd-lot doctrine, the compensation court determined that Gardner's injury resulting from the accident had combined with his preexisting mental and cognitive conditions and that Gardner was permanently and totally disabled. Included in the evidence upon which the compensation court relied was a report from Dr. Golnick dated March 25, 2013, which stated that since Gardner underwent the three-level cervical fusion of his spine, Gardner continued to have headaches and neck pain, and that he "report[ed] periods of confusion and difficulty with word finding." The compensation court also noted a December 16 report by Dr. Rich, which stated that Gardner had preexisting cognitive deficits and depression prior to the accident and that Gardner "limits his physical activity based on his pain which restricts [Gardner's] interactions and limits other activity and social involvements based on his anxiety and depression." Importantly, Dr. Rich stated that Gardner's restrictions continued to cause an inability to work. Dr. Rich stated that Gardner's preexisting cognitive conditions were permanent and "were naturally progressing due to . . . Gardner's lack of treatment." Under the odd-lot doctrine, the court could look to Gardner's physical injury resulting from the accident along with his preexisting mental and cognitive conditions, including depression and anxiety, in order to determine the extent of his loss of earning power. In view of the evidence and applicable law, we determine that

the court did not err when it determined that Gardner was permanently and totally disabled.

We note for completeness that the employer also claims that the compensation court erred when it awarded Gardner future medical care for his depression, anxiety, and cognitive deficits. However, our reading of the further award does not show the specific award about which the employer complains and we reject this assignment of error.

According to the further award, the employer "should continue to provide and pay for such reasonable and necessary medical expenses as may be necessary as a result of the accident and injury of April 16, 2009." In paragraph III of the further award, the compensation court stated: "Several of [Gardner's] physicians have found that [Gardner] will be in need of future medical care such as Dr. Rich stated for pain management and [Gardner's] depression, anxiety, and cognitive difficulties." In paragraph IV of the further award, the court stated that the employer

> should pay to and on behalf of [Gardner] any outstanding medical bills set forth in Exhibit 237. The defendant is entitled to a credit for any previous payment of medical bills as itemized in Exhibits 267 and 268. To the extent that there are any other third-party payees or reimbursements to [Gardner] those payments should be made as indicated. In addition, the medical fees shall be paid pursuant to the medical fee schedule as adopted by the Nebraska Workers' Compensation Court.

In paragraph V of the further award, the court stated that the employer "is entitled to a credit for its previous payment of indemnity and medical expenses as set forth in Exhibit 267."

The further award also provided that the employer "shall pay to and on behalf of [Gardner] the outstanding medical expenses set forth more particularly in paragraph IV above and subject to the terms and conditions of that paragraph." The order provided that the employer "is entitled to a credit for its previous payment of indemnity and medical expenses as set forth more particularly in paragraphs IV and V above."

Taken as a whole, the court did not make a specific order finding a mental health injury or specifically regarding future medical care for Gardner's mental health issues. We find no error in the further award.

## CONCLUSION

As explained above, we determine that the compensation court did not err when it admitted and relied upon the reports of Drs. Rich and Golnick and when it considered Gardner's preexisting mental and cognitive deficits in determining the extent of his disability. We further determine that the compensation court did not err when it applied the odd-lot doctrine and found that Gardner was permanently and totally disabled. Accordingly, we affirm the further award of the compensation court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Keith M. Huggins, appellant.
866 N.W.2d 80

Filed July 24, 2015. No. S-14-297.

1. **Limitations of Actions.** If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.
3. **Postconviction: Limitations of Actions: Words and Phrases: Appeal and Error.** The issuance of a mandate by a Nebraska appellate court is a definitive determination of the "conclusion of a direct appeal," and the "date the judgment of conviction became final," for purposes of Neb. Rev. Stat. § 29-3001(4)(a) (Cum. Supp. 2014).

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Keith M. Huggins, pro se.

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

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

Miller-Lerman, J.

## NATURE OF CASE

Keith M. Huggins appeals the order of the district court for Douglas County which dismissed his motion for postconviction relief without an evidentiary hearing on the basis that the motion was untimely under the 1-year limitation period set

forth in Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014) of the postconviction act. The court determined that the limitation period began to run upon the issuance of the mandate from Huggins' direct appeal in the Nebraska appellate courts and that Huggins did not file his motion within 1 year after such date. Huggins argues that the limitation period did not begin to run until the time for him to file a petition for a writ of certiorari to the U.S. Supreme Court had expired and that therefore his postconviction motion was timely filed. He alternatively argues that the limitation period should have been tolled during a period when he was in federal custody and not in the custody of the State of Nebraska. We reject Huggins' arguments and agree with the court that Huggins' motion was not timely. We therefore affirm the district court's dismissal of the postconviction motion.

## STATEMENT OF FACTS

In 2011, Huggins entered a plea of no contest to second degree murder. He filed two separate motions to withdraw his plea, and the district court denied both motions. The court sentenced Huggins to imprisonment for 40 to 40 years.

The Nebraska Court of Appeals affirmed Huggins' conviction and sentence in a memorandum opinion, *State v. Huggins*, No. A-11-570, 2012 WL 3030780 (Neb. App. July 24, 2012) (selected for posting to court Web site). Huggins petitioned this court for further review, and we denied further review on August 30. Huggins did not file a petition for a writ of certiorari. The Court of Appeals issued the mandate on September 17.

On November 27, 2013, Huggins filed a pro se motion for postconviction relief in which he raised various claims of ineffective assistance of counsel. In the State's response filed January 30, 2014, it requested that Huggins' motion be dismissed without an evidentiary hearing, because the motion was untimely under § 29-3001(4). Section 29-3001(4) of the Nebraska Postconviction Act provides as follows:

> A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or
>
> (e) August 27, 2011.

The State asserted that Huggins had 1 year from September 17, 2012, the date the Court of Appeals issued its mandate in Huggins' direct appeal, to file a motion for postconviction relief under § 29-3001(4)(a) and that therefore Huggins' motion filed November 27, 2013, was untimely.

On February 10, 2014, the district court dismissed Huggins' postconviction motion without an evidentiary hearing. The court stated that the Court of Appeals' mandate in Huggins' direct appeal was issued on September 17, 2012, and that Huggins' motion for postconviction relief was filed "on November 27, 2013, more than one year following the conclusion of [Huggins'] direct appeal." The court concluded that Huggins' postconviction action was "barred by the time limitation provided for under the Nebraska Postconviction Act" and that therefore the motion "must be dismissed."

On February 14, 2014, Huggins filed a motion to alter or amend the order in which the court dismissed his postconviction motion. Huggins argued that his conviction did not become final until the 90-day period in which he might have petitioned the U.S. Supreme Court for a writ of certiorari had lapsed. He asserted that such time did not lapse until November 28, 2012, and that therefore his motion filed November 27, 2013, was timely.

In his motion to alter or amend, Huggins asserted that at the conclusion of his direct appeal and continuing until May 31, 2013, he was in federal custody serving a federal sentence in Indiana. He also asserted that after he was released from federal custody and put into the custody of the State of Nebraska in May or June 2013, he gained access to legal materials on June 3, when he was transferred to a facility where he was allowed access to a law library. Huggins contends that the running of the limitation period under § 29-3001(4) should have been tolled until June 3, when he had access to the law library, and that therefore his motion filed November 27 was timely.

On March 10, 2014, the district court denied Huggins' motion to alter or amend the February 10 order. The court stated that Huggins had "offered nothing upon which relief might be granted to him for his failure to timely file his motion for postconviction relief."

Huggins appeals the dismissal of his postconviction motion.

## ASSIGNMENTS OF ERROR

Huggins claims, restated, that the district court erred when it dismissed his motion on the basis that it was barred by the time limitation under § 29-3001(4) and when it failed to grant him an evidentiary hearing on the merits of his postconviction claims.

## STANDARDS OF REVIEW

[1,2] If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law. *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810,

716 N.W.2d 87 (2006). To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court. *Kotrous v. Zerbe*, 287 Neb. 1033, 846 N.W.2d 122 (2014).

## ANALYSIS

We note as an initial matter that in *State v. Crawford, ante* p. 362, 865 N.W.2d 360 (2015), we concluded that the 1-year period of limitation under § 29-3001(4) is not a jurisdictional requirement and instead is in the nature of an affirmative defense that the State waives if it does not raise the issue in the district court. In contrast to the circumstances in *Crawford*, in the present case, the State raised the period of limitation as an affirmative defense in its answer in the district court, and the court dismissed Huggins' motion on the basis that it was not timely under § 29-3001(4). Therefore, the statute of limitations defense was not waived in this case, and we consider Huggins' arguments that the district court erred when it determined that his motion exceeded the 1-year limit and concluded his motion was not timely.

Huggins makes two alternative arguments in support of his contention that his postconviction motion was timely filed. He first argues that the period of limitation did not begin to run until the time for him to petition the U.S. Supreme Court for a writ of certiorari had expired and that his motion was filed within 1 year from that date. He alternatively argues that the period of limitation was tolled during the time he was in federal prison and that his motion was filed within 1 year after the date he was released from federal custody and put into the custody of the State of Nebraska. We reject both arguments and conclude that Huggins' postconviction motion was untimely.

### *Limitation Period Under § 29-3001(4)(a) Began to Run on the Date the Mandate Was Filed.*

Huggins first argues that the 1-year period of limitation under § 29-3001(4)(a) did not begin to run until after the

time during which he might have petitioned the U.S. Supreme Court for a writ of certiorari had expired and that his motion was filed within 1 year after that date. We reject this argument, and we conclude that the period of limitation began to run on the date the mandate was issued by the Nebraska appellate court.

Under § 29-3001(4), the period of limitation begins to run on the latest of certain specified dates, the first of which is "[t]he date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal." § 29-3001(4)(a). Our reading of "conclusion of a direct appeal" in § 29-3001(4)(a) determines the outcome of this case. In the present case, the Court of Appeals decided Huggins' direct appeal in an opinion filed on July 24, 2012. Huggins petitioned this court for further review, which we denied on August 30. Huggins did not file a petition for a writ of certiorari. The Court of Appeals issued its mandate on September 17. The district court in this postconviction action determined that Huggins' conviction became final, and the period of limitation began to run, when the Court of Appeals issued its mandate. We agree.

Huggins argues that his conviction did not become final until the time for him to petition the U.S. Supreme Court for a writ of certiorari had expired. He asserts that under rules of the U.S. Supreme Court, he had until 90 days after we denied his petition for further review to petition the U.S. Supreme Court for a writ of certiorari, and that date was November 28, 2012. Huggins contends that he had 1 year from November 28 to file his postconviction action and that, therefore, his motion filed November 27, 2013, was timely.

Huggins relies on federal case law applying the federal habeas statutes and refers us to a Nebraska case, *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). We recognize that federal case law indicates that convictions are not final for purposes of the limitation period under the federal habeas statutes until the time expires for filing for certiorari. See, *Gonzalez v. Thaler*, 565 U.S. 134, 132 S. Ct. 641, 181 L. Ed.

2d 619 (2012) (applying 28 U.S.C. § 2244(d)(1)(A) (2006) with regard to prisoners in state custody); *Clay v. U.S.*, 537 U.S. 522, 123 S. Ct. 1072, 155 L. Ed. 2d 88 (2003) (applying 28 U.S.C. § 2255 (2000) with regard to defendants in federal custody). But the issue before us is the meaning of the Nebraska Postconviction Act's § 29-3001(4)(a), not a federal statute.

Further, Huggins' reliance on our decision in *Lotter, supra*, is misplaced for several reasons, including the fact that the 1-year period of limitation did not exist at the time, so we were not commenting on § 29-3001(4)(a). The State points out that in other cases where a criminal conviction has been appealed, this court has indicated that the finality of the judgment is tied to the issuance of a final mandate. See, *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009); *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003); *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). We reject Huggins' argument, and we conclude that for purposes of § 29-3001(4)(a), the "conclusion of a direct appeal" occurs when a Nebraska appellate court issues the mandate in the direct appeal.

Under Nebraska law and procedure, the issuance of a mandate by an appellate court is a clear signal that a direct appeal has been concluded. Under Neb. Ct. R. App. P. § 2-114(1), a mandate will generally not be issued by a Nebraska appellate court during the time for filing a motion for rehearing (10 days under Neb. Ct. R. App. P. § 2-113 (rev. 2012)) or a petition for further review (30 days under Neb. Ct. R. App. P. § 2-113).

If a criminal defendant intends to seek a writ of certiorari from the U.S. Supreme Court, he or she should request a stay of the Nebraska court's mandate. Neb. Ct. R. App. P. § 2-114(2) provides: "Parties desiring to prosecute proceedings to the United States Supreme Court, and desiring an order staying the mandate, must make application within 7 days from the date of the filing of the opinion or other dispositive entry." It is generally not necessary to wait 90 days to see

whether the defendant will petition for a writ of certiorari, because the defendant should have signaled his or her intent to petition for certiorari by requesting a stay of the mandate pursuant to Neb. Ct. R. App. P. § 2-114(2). Therefore, as a general matter, when a Nebraska appellate court issues a mandate in a direct appeal, it indicates that certiorari is not being sought and that the direct appeal has been concluded. Thus, a mandate is not immediately issued by Nebraska appellate courts after an appeal is decided, and if a defendant intends to seek a writ of certiorari, the defendant may seek to stay issuance of the mandate.

[3] In view of the Nebraska practice rules, jurisprudence, and the language of § 29-3001(4)(a), we conclude that the issuance of a mandate by a Nebraska appellate court is a definitive determination of the "conclusion of a direct appeal," and the "date the judgment of conviction became final," for purposes of § 29-3001(4)(a). In the present case, the "conclusion of [the] direct appeal" occurred when the Court of Appeals issued the mandate in Huggins' direct appeal on September 17, 2012. Huggins filed his postconviction motion on November 27, 2013. Huggins did not file his postconviction motion within 1 year after the date of the mandate, and therefore he did not timely file under § 29-3001(4)(a).

*Huggins Was Released From Federal Custody and Put Into State Custody Within 1 Year After the Limitation Period Began to Run.*

Huggins alternatively argues that the 1-year period of limitation was tolled during the time he was in federal prison and that his postconviction motion, filed within 1 year after the date he was released from federal custody and put into the custody of the State of Nebraska, was timely. We conclude that whether or not such tolling would occur under appropriate circumstances, no tolling occurs where, as in this case, the prisoner has time to file a motion for postconviction relief within the statutory 1-year period.

As determined in the previous section, the 1-year period of limitation for Huggins began to run when the mandate was issued on September 17, 2012. Huggins asserts that at that time, he was in federal custody in a prison in Indiana, and that he was not released from federal custody and put into the custody of the State of Nebraska until May or June 2013 and gained access to Nebraska legal materials on June 3. He contends that the limitation period should have been tolled during the time he was in federal custody and that therefore his motion filed November 27 was timely, having been filed within 1 year after the date he was taken into the custody of the State of Nebraska.

Huggins appears to argue that these circumstances make his motion timely in two ways. First, he argues that under § 29-3001(4)(c), his imprisonment in federal custody was an "impediment" that prevented him from filing a postconviction action in Nebraska. Second, he argues that "equitable tolling" should be applied to toll the running of the limitation period for the time he was in federal custody and did not have access to Nebraska law materials.

With regard to Huggins' first argument, that federal custody and lack of access to a Nebraska law library was an "impediment" under § 29-3001(4)(c) that prevented him from filing a postconviction motion, we note that § 29-3001(4)(c) refers to an impediment "created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state." Regardless of whether being in federal custody without access to Nebraska law materials was an "impediment" under § 29-3001(4)(c), Huggins makes no claim that his imprisonment in federal custody was a situation created in violation of the federal or Nebraska Constitution or Nebraska law, nor is any such violation apparent. Therefore, we reject Huggins' argument that the period of limitation did not begin to run until May or June 2013 under § 29-3001(4)(c).

Huggins also argues that "equitable tolling" should be applied to the running of the 1-year period of limitation for

the time he was in federal custody. This court has not yet addressed whether equitable tolling applies to § 29-3001(4) and under what circumstances it may apply. We note, however, that the U.S. Supreme Court has held that the statute of limitations under 28 U.S.C. § 2244(d), with regard to habeas actions filed by prisoners in state custody, is subject to equitable tolling if the prisoner shows that (1) he or she has been pursuing his or her rights diligently and (2) some extraordinary circumstance stood in the way and prevented timely filing of a petition. *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010).

Under § 29-3001(4), the period of limitation generally begins to run under subsection (a) on the date the conviction becomes final. However, the Legislature has determined that certain circumstances justify starting the period of limitation on a later date. These circumstance are set forth in subsections (b) through (e). The statutory language does not provide that the date on which a prisoner is released from federal custody and taken into the custody of the State of Nebraska is an alternate later date from which the period of limitation would begin to run. Therefore, under the statute itself, the limitation period continues to run regardless of whether the prisoner is in federal custody and whether the prisoner is in the custody of the State of Nebraska.

Huggins contends that equitable tolling would be appropriate in this case; he appears to rely in part on precedent of this court in which we held that a prisoner in federal custody is not "'in actual custody in Nebraska'" and therefore not eligible to file an action under the Nebraska Postconviction Act. *State v. Whitmore*, 234 Neb. 557, 558, 452 N.W.2d 31, 32 (1990). Huggins reasons that the period of limitation should not have run against him during the time when he was in federal custody and could not have filed a Nebraska postconviction action. As we determined in *State v. Crawford, ante* p. 362, 865 N.W.2d 360 (2015), the limitation period under § 29-3001(4) is in the nature of a statute of limitations. Therefore, it is at least arguable that the statute of limitations

under § 29-3001(4) may be subject to equitable tolling principles in the same manner that statutes of limitations in other contexts may be subject to equitable tolling. Although this court has acknowledged the possibility of equitable tolling with respect to statutes of limitations in other contexts, see *Becton, Dickinson & Co. v. Nebraska Dept. of Rev.*, 276 Neb. 640, 756 N.W.2d 280 (2008), it does not appear that this court has set forth the specific circumstances under which equitable tolling could occur. More particularly, we have not decided whether equitable tolling may be applied to the period of limitation set forth in § 29-3001(4), and, on the facts of this case, it is not necessary to do so.

In this case, under the statute, the period of limitation for Huggins to file a postconviction motion ran for 1 year from the date the mandate was issued on September 17, 2012. Huggins asserts that he was released from federal custody and taken into the custody of the State of Nebraska in May or June 2013 and gained access to Nebraska legal materials on June 3. At that time, Huggins still had until September 2013, or a period over 3 months, to file a Nebraska postconviction action within the statutory period of limitation.

In *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013), we determined that a defendant was not deprived of the opportunity to file a postconviction action even though the defendant was in federal custody during part of the period of limitation. We stated that "without deciding that a postconviction action cannot be brought during the time a defendant otherwise serving a Nebraska sentence is in federal custody, [the defendant] has neither pled nor proved that she was in federal custody for the entire 1-year period." *Id.* at 946, 830 N.W.2d at 509. As we reasoned in *Gonzalez*, a prisoner is not deprived of the opportunity to bring a postconviction action if there is some time within the period of the 1-year limitation that the prisoner could have filed a postconviction action. In the present action, Huggins does not claim that he was deprived of the opportunity to file his postconviction action during the entire 1-year period of limitation. Under the facts of this case, we

conclude that, whether or not equitable tolling may be used to toll the 1-year limitation period under § 29-3001(4) under proper circumstances, the circumstances of this case would not support equitable tolling for the time Huggins was in federal custody.

We note that this decision does not foreclose consideration of the possibility that there are circumstances under which equitable tolling may apply or that the limitation period may be tolled for a person who was in federal custody during the entire limitation period and arguably had no opportunity to file a postconviction action within the limitation period. However, Huggins alleges only that he was unable to file his motion during part of the period of limitation, and we conclude that such allegation does not support an equitable tolling of the period of limitation under § 29-3001(4). We therefore reject Huggins' argument that the 1-year period of limitation did not run during the time that he was in federal custody.

## CONCLUSION

We conclude that for purposes of § 29-3001(4)(a), Huggins' direct appeal was concluded and his conviction became final when the Court of Appeals issued the mandate on September 17, 2012, and that the 1-year period of limitation began to run on that date. Given the fact that Huggins was in the custody of Nebraska for at least the last 3 months of the 1-year period of limitation, we further conclude that the running of the period of limitation was not tolled for the time Huggins was in federal prison. Therefore, the period of limitation had run before Huggins filed his motion for postconviction relief on November 27, 2013, and we affirm the district court's dismissal of Huggins' motion on the basis that it was untimely filed.

Affirmed.

Cassel, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Gary Labenz and Sandra Labenz,
husband and wife, appellants, v.
Linda Labenz et al., appellees.
866 N.W.2d 88

Filed July 24, 2015. No. S-14-833.

1. **Partition: Equity: Appeal and Error.** A partition action is an action in equity and reviewable by an appellate court de novo on the record.
2. **Contracts: Appeal and Error.** The construction of a contract is a question of law, and is reviewed de novo.
3. **Attorney Fees: Appeal and Error.** An appellate court reviews the amount of an award of attorney fees for an abuse of discretion.
4. **Partition: Attorney Fees.** Attorney fees are generally permissible in a partition action.
5. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
6. **Contracts.** A contract must receive a reasonable construction, and a court must construe it as a whole and, if possible, give effect to every part of the contract.
7. ____. Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses.
8. ____. When there is a question about the meaning of a contract's language, the contract will be construed against the party preparing it.

Appeal from the District Court for Platte County: Robert R. Steinke, Judge. Affirmed.

George H. Moyer, Jr., of Moyer & Moyer, for appellants.

Mark M. Sipple, of Sipple, Hansen, Emerson, Schumacher & Klutman, for appellees.

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

Heavican, C.J.

## INTRODUCTION

Following the filing of a partition of real estate action, the parties stipulated to a sale by public auction. After the sale, Gary Labenz and Sandra Labenz, husband and wife (collectively the Labenzes), sought confirmation of the sale and asked the court to approve the payment of costs, fees, and expenses. The court awarded the Labenzes' counsel $5,224 pursuant to the stipulation between the parties regarding the sale of the property. The Labenzes appeal. We affirm.

## FACTUAL BACKGROUND

The real estate in question was originally owned by Alois J. Labenz and consists of 160 acres of agricultural land. The personal representative of Alois' estate, Aline M. Labenz, deeded the property to Gary; Linda L. Labenz Kerkman, now known as Linda Labenz; and Lisa S. Labenz, now known as Lisa S. Stephenson, reserving for herself a life interest in the real estate. Aline passed away on July 22, 2003, and her life interest was extinguished. Gary held the land under an oral lease which expired February 28, 2014.

Gary filed a complaint on January 23, 2014, seeking to partition the real estate. Linda and Lisa filed an answer and a motion asking the court to determine "appropriate possession" of the real estate.

On April 1, 2014, the parties entered into a joint stipulation drafted by the Labenzes' attorney, George H. Moyer, agreeing to sell the property at public auction. The stipulation provided that Moyer would attend the auction, draw up the purchase agreement, hold the earnest money, conduct the closing, and escrow the purchase price. The stipulation further provided that "[a]fter the deduction of expenses, attorney fees and costs, the net proceeds of the sale . . ." would be divided equally among Gary, Linda, and Lisa.

The auction was held on April 21, 2014. Gary was the winning bidder at auction, and the sale closed on May 21. The purchase price was $1.29 million. The proceeds from the sale were deposited into Moyer's trust account.

On May 30, 2014, Moyer sought confirmation of the sale by the district court. On that same day, Moyer also sought the court's permission to distribute the proceeds of the sale, subject to the payment of "costs, expenses, commissions and fees," which Moyer asked the court to determine. On July 1, Moyer filed a motion on the Labenzes' behalf seeking a judgment of partition on the pleadings or, in the alternative, based upon the joint stipulation. By the date of this hearing, the primary issue presented was the appropriate amount of attorney fees to be paid to Moyer.

The district court denied the motion for partition on the pleadings, concluding that the sale was conducted via public auction and was complete and that thus, there was no real estate to partition. But the district court noted that some fees were owed under the terms of the stipulation. Following an evidentiary hearing, the district court read paragraphs 5 and 7 of the stipulation together and awarded Moyer fees in the amount of $5,224.

The Labenzes appeal.

## ASSIGNMENTS OF ERROR

The Labenzes assign, restated and consolidated, that the district court erred in (1) concluding that attorney fees were not owed under equitable principles or under the partition statutes, (2) limiting fees to those services outlined in paragraph 5 of the stipulation, and (3) not awarding Moyer the full amount of the fees he had earned as calculated on an hourly basis.

## STANDARD OF REVIEW

[1] A partition action is an action in equity and reviewable by an appellate court de novo on the record.[1]

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[1] *Channer v. Cuming*, 270 Neb. 231, 699 N.W.2d 831 (2005).

[2] The construction of a contract is a question of law, and is reviewed de novo.[2]

[3] An appellate court reviews the amount of an award of attorney fees for an abuse of discretion.[3]

## ANALYSIS

*Fees Under Statute and Case Law.*

In the Labenzes' first assignment of error, they contend that the district court erred in not awarding their counsel fees under either the partition statutes or equitable principles.

[4] This action began as one for partition. Attorney fees are generally permissible under state statutes and case law[4] under those statutes. In particular, the recovery of such fees is permitted by Neb. Rev. Stat. § 25-21,108 (Reissue 2008), which provides:

> If, in the proceedings in partition, judgment shall be entered directing partition, as provided in section 25-2179, the court shall, after partition or after the confirmation of the sale and the conveyance by the referee, determine a reasonable amount of attorney's fees to be awarded, which amount shall be taxed as costs in the proceedings. If the shares confirmed by such judgment and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original complaint of the plaintiff, such attorney's fees shall be awarded entirely to the attorney for the plaintiff; otherwise, the court shall order such fees for the attorneys to be divided among such of the attorneys of record in the proceedings as have filed pleadings upon which any of the findings in the judgment of partition

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[2] See *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

[3] See *In re Guardianship of Brydon P.*, 286 Neb. 661, 838 N.W.2d 262 (2013).

[4] See, e.g., *Mabry v. Mudd*, 132 Neb. 610, 272 N.W. 574 (1937); *Harper v. Harper*, 89 Neb. 269, 131 N.W. 218 (1911).

> are based. The court shall also determine and tax as costs a reasonable fee for the referee.

The Labenzes argue that their counsel is entitled to an award of attorney fees under our case law and under § 25-21,108. We disagree.

While this case began as a partition action, that action effectively ended when the parties decided to sell the land at public auction. In this case, no referee was ever appointed. No referee's report was ever issued. The court did not monitor the sale of the property. In certain partition actions, the award of attorney fees is permitted. But this was not a completed action for partition. We decline to expand the allowance of attorney fees to the scenario presented by these facts.

[5] The Labenzes also argue that the equities of the situation and the common fund doctrine support their assertion that their counsel is entitled to an award of fees. We find this argument misplaced. Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[5] Other than their arguments under the partition statute, which we have rejected, the Labenzes point to no statute or uniform course of practice which would permit the allowance of fees in this situation. Simply arguing that something is unfair does not allow a court to invoke its equitable powers.

The Labenzes' first assignment of error is without merit.

*Fees Under Joint Stipulation.*

The Labenzes also argue that the district court erred in reading paragraphs 5 and 7 of the joint stipulation together in order to limit the fees awarded to Moyer. They contend there is nothing in the stipulation that limits the fee given under paragraph 7 to the work mentioned in paragraph 5. We conclude that the district court correctly interpreted the stipulation.

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[5] *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

This case is a procedural oddity, to be sure. It began as a partition action, which arises in equity and is reviewed de novo, and ended as a contract interpretation action, which is also reviewed de novo, but presents a legal question. On these facts, we are asked to interpret the language of the parties' joint stipulation and we conclude that such is akin to the interpretation of a contract.

[6-8] We have said that a contract must receive a reasonable construction and that a court must construe it as a whole and, if possible, give effect to every part of the contract.[6] Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses.[7] When there is a question about the meaning of a contract's language, the contract will be construed against the party preparing it.[8]

The stipulation, which was drafted by Moyer, the Labenzes' counsel, allowed for the payment of attorney fees and costs. It also explained what responsibilities counsel would have in connection with the auction and subsequent sale. It is reasonable to interpret this stipulation such that the fees and costs envisioned in paragraph 7 are related to those duties set forth in paragraph 5. In our de novo review, we agree with the district court's interpretation of the stipulation.

Finally, we note that the amount of fees awarded to the Labenzes was not an abuse of the district court's discretion. In fact, the Labenzes concede that the amount awarded was correct insofar as it correlated to their counsel's responsibilities under paragraph 5 of the stipulation.

The Labenzes' second and third assignments of error are without merit.

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[6] *Hearst-Argyle Prop. v. Entrex Comm. Servs.*, 279 Neb. 468, 778 N.W.2d 465 (2010).

[7] *Id.*

[8] *McKinnis Roofing v. Hicks*, 282 Neb. 34, 803 N.W.2d 414 (2011).

## CONCLUSION

The district court was correct in concluding that attorney fees were not available under our statutory or case law regarding partition. The district court's interpretation of the stipulation to limit fees to those incurred in connection with the responsibilities listed in the stipulation was also not in error, and the amount of the fees actually awarded was not otherwise an abuse of discretion. The decision of the district court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# NAMN, LLC, appellee, v. Bernard J. Morello, appellant.

867 N.W.2d 545

Filed July 24, 2015. No. S-14-861.

1. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Easements: Real Estate: Conveyances: Time.** An easement by implication from prior use arises only when (1) the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, (2) the use has been so long continued and so obvious as to show it was meant to be permanent, and (3) the easement is necessary for the proper and reasonable enjoyment of the dominant tract.
3. **Easements: Conveyances: Appurtenances.** Once an implied easement is created, it becomes appurtenant to the dominant tenement and remains in existence upon a subsequent conveyance unless and until it is somehow terminated.
4. **Easements: Proof.** Reasonable necessity is required for implied easements in favor of the grantee (implied by grant) but strict necessity is required for implied easements in favor of the grantor (implied by reservation).
5. ____: ____. A greater degree of necessity is required for easement by necessity than for easement implied from prior use.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed.

Larry R. Forman, of Hillman, Forman, Childers & McCormack, for appellant.

Damien J. Wright, of Welch Law Firm, P.C., for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

Bernard J. Morello appeals the order of the district court for Douglas County which ruled that NAMN, LLC, had a permanent easement implied from prior use over Morello's property for vehicle ingress and egress and that NAMN was entitled to make reasonable upgrades to the easement. Morello asserts, inter alia, that equitable considerations preclude a judgment in NAMN's favor and that NAMN did not make an adequate showing of necessity to establish an implied easement from prior use. We affirm.

## STATEMENT OF FACTS

Morello owns property at the northwest corner of 42d and Center Streets in Omaha, Nebraska. NAMN owns property immediately to the west of Morello's property. Throughout this litigation, and hereinafter in this opinion, NAMN's property is referred to as "Lot 9" and Morello's property is referred to as "Lot 10." A residential home is located on Lot 9, and there are no structures on Lot 10. Lot 10 separates Lot 9 from 42d Street, which is to the east of both properties. Both properties are bordered on the south by Center Street; however, a retaining wall that was built by the city of Omaha (City) stands between Lot 9 and Center Street. At one time, Lots 9 and 10 were both owned by the same person.

NAMN filed this action against Morello in the district court on June 12, 2013. NAMN sought an order declaring that a permanent easement exists over Lot 10 as reasonably necessary to allow vehicular access to Lot 9 from 42d Street.

NAMN also sought an order allowing NAMN to construct a concrete driveway over a portion of Lot 10 to connect Lot 9 to a curb ramp leading to 42d Street. NAMN sought other relief, including costs of the action and an injunction prohibiting Morello from interfering with NAMN's easement. NAMN alleged that Lot 9 was "'landlocked,'" because Lot 10 stood between Lot 9 and 42d Street and the City's retaining wall stood between Lot 9 and Center Street. In his answer, Morello raised various affirmative defenses, including defenses he described as "negligence" and "equitable estoppel."

At a bench trial, the court received various pieces of evidence offered by NAMN, including plats, maps, deeds, and photographs intended to demonstrate the chain of title for the parties' respective properties and the situation of each property with respect to one another and with respect to 42d and Center Streets. The evidence indicated that Anita Fuentes acquired title to Lot 9 in 1988, at which time, the City owned Lot 10. The City deeded Lot 10 to Fuentes in 1993. Fuentes deeded Lot 9 to other owners in 1999, but she retained ownership of Lot 10 until 2012.

On May 18, 2012, a sheriff's deed transferring ownership of Lot 9 to a business entity was filed, and on July 2, a quitclaim deed from the business to NAMN was filed. At the time NAMN acquired Lot 9, the title to Lot 10 was still in Fuentes' name. However, on August 23, a sheriff's deed transferring ownership of Lot 10 to the Land Reutilization Commission of Douglas County was filed. On August 27, a special warranty deed from the commission to Morello was filed, and thus, Morello acquired Lot 10 after NAMN had acquired Lot 9. As noted, NAMN filed its complaint against Morello in this action in June 2013.

At trial, NAMN called Jeffrey Rothlisburger as a witness. Rothlisburger testified that he and his wife were the members of NAMN. Rothlisburger testified that he is a mortgage broker and real estate agent and that NAMN owns several residential properties, including Lot 9. He testified that NAMN bought Lot 9 with the intent of fixing up the property and reselling

it. Rothlisburger testified that there is a single-family residence located on Lot 9 but that there is no structure located on Lot 10. Rothlisburger described Lot 10 as a "postage stamp [and an] abnormally small-sized lot." With regard to access to Lot 9 from Center Street, Rothlisburger testified that there is no driveway from Center Street to Lot 9 and that it would not be practical to build such a driveway, because the City had built a retaining wall on the strip of land located between Lot 9 and Center Street, which strip of land had been deeded to the City as part of a widening of Center Street. He testified that Lot 9 was accessible on foot from Center Street, because the City had built a stairway into the retaining wall.

With respect to access to Lot 9 from 42d Street, which Lot 9 does not abut, Rothlisburger testified that a curb ramp was cut into the sidewalk along 42d Street leading onto Lot 10 and that there was gravel on an area running from the curb ramp west across Lot 10 and onto Lot 9. He testified that the City had installed a sign on 42d Street north of the curb ramp. The sign reads "driveways."

Rothlisburger testified that if one drove a vehicle across the graveled area on Lot 10 continuing west onto Lot 9 and then parked, one would be able to enter the house on Lot 9 from the rear through a handicapped accessible entrance and one would not need to walk around to the front of the house. Rothlisburger testified that the curb ramp, the "driveways" sign, and the gravel area were all present at the time he purchased Lot 9. He further testified that there was no street parking allowed on either side of Center Street and no parking on 42d Street within six blocks to a mile of Lot 9.

When asked the purpose for which NAMN needed an easement over Lot 10, Rothlisburger testified that it was needed for vehicular access to Lot 9 and its house: "We would simply have no place to park at all. And the property is set up by the City this way. And it was — there's just no other way for it to work." Rothlisburger further testified that NAMN had been using the graveled area on Lot 10 to reach Lot 9 and would

like to pave over the area or at least continue using the gravel for access to Lot 9.

During Rothlisburger's testimony, NAMN offered into evidence photographs consistent with his testimony regarding the relative sizes of Lots 9 and 10, the existence or absence of structures on each lot, and the presence of gravel on both lots as well as the "driveways" sign on 42d Street and the retaining wall on Center Street. NAMN did not call any other witnesses. Morello did not present any evidence for the defense.

In the district court's judgment filed August 26, 2014, it stated that NAMN sought a declaration that it possessed an implied easement for ingress and egress across Lot 10 and sought an order allowing NAMN to construct a concrete driveway over that portion of Lot 10 which connects the driveway ramp off of 42d Street to Lot 9. The court stated that NAMN asserted two theories to support such relief: (1) an easement implied from prior use and (2) an easement implied by necessity.

The court first considered whether the evidence supported a finding that there was an easement implied from prior use. The court cited *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996), for the proposition that an easement implied from prior use (sometimes referred to as "former use") arises only where (1) the use giving rise to the easement was in existence at the time of the conveyance subdividing the property, (2) the use has been so long continued and so obvious as to show it was meant to be permanent, and (3) the easement is necessary for the proper and reasonable enjoyment of the dominant tract. The court considered each element.

With regard to the first element, the court found that Lots 9 and 10 had both been owned by Fuentes and that the property was subdivided when Fuentes sold Lot 9 in 1999. The court further found that it was apparent from photographic and other evidence that the curb along 42d Street was modified by a permanent manmade driveway ramp and that Lot 9 was

connected to the driveway ramp via a gravel path running across Lot 10. The court found that the worn appearance of the gravel path and the condition of the driveway ramp indicated that they had been present "for years" and most likely predating the 1999 conveyance of Lot 9 for a significant amount of time. The court found that the size and nature of Lot 10 indicated that it would have served Fuentes "very little purpose . . . beyond offering a means of ingress and egress for the house located on Lot 9." The court therefore found that the use of the easement was in existence at the time the property was subdivided in 1999.

With regard to the second element, the court again noted the worn appearance of the gravel path and the driveway ramp and stated that such appearance indicated that modifications had been present and heavily used for years. The court further noted that the gravel path connected to the driveway ramp in a manner suited to provide vehicular access from 42d Street to Lot 9 and that such easement is open and obvious to any casual observer. The court also noted the sign installed by the City indicated the presence of driveways. The court noted that Morello failed to offer any evidence to contradict such evidence, and it therefore found that the use of the easement had been so long continued and so obvious as to show it was meant to be permanent.

With regard to the third and final element, the court noted that in *Hillary Corp., supra*, this court indicated that the required degree of necessity to establish an implied easement by prior use was "reasonable necessity." The court found that photographic, testimonial, and other evidence regarding Lots 9 and 10 indicated that "an easement across Lot 10 is the only possible means of providing vehicular access to Lot 9."

The court rejected Morello's argument that the easement was not necessary, because Lot 9 was close to Center Street and was accessible on foot via the steps built into the retaining wall. The court stated that although pedestrian access alone might be sufficient to negate a claim of easement by "strict necessity," the theory of easement implied from prior use under

consideration required the lesser standard of "reasonable necessity" and that the evidence showed the easement across Lot 10 was "reasonably necessary" for the convenient and comfortable use and enjoyment of Lot 9.

The court found that NAMN had produced sufficient evidence to support all the elements necessary to establish the existence of an easement implied from prior use. The court further noted that Morello had failed to produce any admissible evidence to counter NAMN's evidence or to support the affirmative defenses pled in his answer. Because it found an easement implied from prior use, the court stated that it was not necessary to address whether an easement could also be implied by necessity, and the court therefore refrained from "such superfluous analysis."

The court next concluded that because NAMN had an easement for ingress and egress over Lot 10, such easement carried with it by implication the right to do what was reasonably necessary for full enjoyment of the easement as long as the owner of the easement did not increase the burden on the servient tenement or unreasonably interfere with the rights of the owner of the servient tenement. The court found that NAMN had shown that a concrete driveway was reasonably necessary for the full enjoyment of the easement and that Morello had not shown that a concrete driveway would unreasonably interfere with his rights as owner of Lot 10.

The district court therefore ordered that NAMN, as owner of Lot 9, possessed a permanent easement implied from prior use over Lot 10 to allow vehicular ingress and egress to Lot 9. The court further ordered that it was within NAMN's rights to make upgrades that were reasonably necessary for full enjoyment of the easement as long as such upgrades did not unreasonably interfere with the rights of the owner of Lot 10. The court finally ordered that Morello was enjoined from interfering with NAMN's use and enjoyment of the easement, and the court awarded costs of the action to NAMN.

Morello appeals the district court's order.

## ASSIGNMENTS OF ERROR

We note first that although Morello assigns 11 errors, he does not argue most of the assignments of error in his brief. Errors assigned but not argued will not be addressed on appeal. *In re Interest of Kodi L.*, 287 Neb. 35, 840 N.W.2d 538 (2013).

Morello assigns and argues four assignments of error which we consolidate into three. Morello claims, restated, that the district court erred when it (1) granted an easement to NAMN, because NAMN's conduct precludes it from receiving equitable relief; (2) applied the incorrect legal standard as to the degree of necessity required for an easement implied by prior use; and (3) granted an easement in favor of NAMN where the land abuts a public road.

## STANDARD OF REVIEW

[1] In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996).

## ANALYSIS

### *Easement Implied From Prior Use and District Court's Findings.*

[2] As an initial matter, we note that this case involves an easement implied from prior use and, except for brief mention of easement by necessity, we do not consider other easements, servitudes, or licenses, such as prescriptive easements, expressly written rights, unrecorded servitudes, or adverse possession. As noted by the district court, an easement by implication from prior use arises only when (1) the use giving rise to the easement was in existence at the time of the

conveyance subdividing the property, (2) the use has been so long continued and so obvious as to show it was meant to be permanent, and (3) the easement is necessary for the proper and reasonable enjoyment of the dominant tract. See *Hillary Corp., supra*.

[3,4] We have noted that once an implied easement is created, it becomes appurtenant to the dominant tenement and remains in existence upon a subsequent conveyance unless and until it is somehow terminated. *Id*. Nebraska follows the minority rule that reasonable necessity is required for implied easements in favor of the grantee (implied by grant) but that strict necessity is required for implied easements in favor of the grantor (implied by reservation). *Id*. See 1 Restatement (Third) of Property: Servitudes § 2.12, comment *e*. (2000).

In the present case, the district court found that an easement was in existence when Fuentes subdivided the property in 1999, that the easement was so long continued and so obvious as to be permanent, and that the easement was reasonably necessary for the proper and reasonable enjoyment of Lot 9. Morello's properly assigned errors address the overall equities of the case and the "reasonably necessary" finding, but do not address the two findings of the district court regarding the unity of ownership and the longstanding and obvious nature of the easement. We therefore accept these two findings as the law of this case.

*Equities.*

Morello attributes great weight to the fact that Rothlisburger, on behalf of NAMN, had considerable knowledge about real estate matters and asserts that because Rothlisburger did not exercise diligence prior to buying Lot 9, NAMN is not entitled to relief. Although Morello asserted numerous defenses and affirmative defenses in his answer encompassing his equitable argument, Morello offered no admissible evidence at trial in support of these allegations. We thus understand that Morello relies on the evidence received at trial generally to the effect that Rothlisburger bought Lot 9 on short notice and without

formal inspection. We do not believe these facts or others in the record preclude granting relief to NAMN.

The district court found and the evidence shows that the gravel path from the driveway ramp at 42d Street west across Lot 10 to Lot 9 was open, obvious, and long standing. It was not unreasonable for Rothlisburger to expect access to the rear of the home on Lot 9 to continue. Similarly, when Morello bought Lot 10 after NAMN acquired Lot 9, it would not be unreasonable for Morello to share that expectation. And Morello does not assert that he was assured that Lot 10 was unencumbered by an easement. Compare *Neary v. Martin*, 57 Haw. 577, 579, 561 P.2d 1281, 1283 (1977) (referring to negotiations in which it was agreed that land conveyed would "not be encumbered by an easement").

Both parties bought their lots on short notice. Both parties acquired eccentric properties: vehicular access to Lot 9 was not certain, and the usefulness of Lot 10 was not apparent. The district court found that Morello failed to offer admissible evidence that would show that recognition of an easement would interfere with Lot 10, which the district court found to be "a small, irregular grass lot currently devoid of any usable structures." We are not persuaded that the equities preclude the relief granted to NAMN.

*Degree of Necessity.*

Morello asserts that the district court erred as a matter of law when it concluded that the degree of necessity required to grant an easement implied from prior use was governed by the "reasonably necessary" standard, rather than the greater degree of necessity standard required to grant an easement by necessity. Morello contends that the district court ignored "necessity" in its analysis. We find no merit to this assignment of error.

In the district court's judgment, it referred to *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 550 N.W.2d 889 (1996), and summarized the elements necessary to establish an easement implied by prior use recited earlier in this opinion.

After the district court found sufficient evidence of the first two elements, it proceeded to evaluate the evidence as to the third element, i.e., whether "the easement is necessary for the proper and reasonable enjoyment of the dominant tract." The district court stated that this "degree of necessity . . . is 'reasonable necessity' rather than strict necessity." The district court used the correct standard under Nebraska jurisprudence. See *Hillary Corp., supra*.

[5] As in Nebraska, it is generally agreed that a greater degree of necessity is required for easement by necessity than for easement implied from prior use. 28A C.J.S. *Easements* § 110 (2008). It has been stated:

> This lesser showing of necessity may stem in part from an often unspoken realization on the part of the fact finder that a prior use indicates a need for a particular easement. *See* Michael V. Hernandez, *Restating Implied, Prescriptive, and Statutory Easements*, 40 Real Prop. Prob. & Tr. J. 75 (2005) ("The easement implied by prior use is based on the maxim . . . whatever is necessary and related is appended . . .").

*Boyd v. BellSouth*, 369 S.C. 410, 421, 633 S.E.2d 136, 142 (2006).

The district court recited the correct legal standard and performed its review of the evidence accordingly. The district court referred to the evidence, not repeated here, and determined that under the circumstances, vehicular access to Lot 9, upon which the house sits, was reasonably necessary. The district court's understanding that vehicular access to a house is reasonably necessary is not uncommon. See, e.g., *Boyd, supra* (reversing summary judgment and noting that driveway easement to access rear entrance could be reasonable mode of enjoying the building at time of severance); *Rosendahl v. Nelson*, 408 N.W.2d 609 (Minn. App. 1987) (affirming grant of easement implied by prior use to permit vehicular access to property with no driveway). We find no error in the district court's recitation or application of the law.

*Abutting a Public Road.*

Morello claims that the district court erred when it granted an easement to NAMN where the evidence shows that NAMN's Lot 9 abuts a public road, i.e., Center Street. We reject this claim.

In connection with this assignment of error, Morello asserts that access to Lot 9 on foot is sufficient and that because Lot 9 abuts Center Street where there are stairs to the house on Lot 9, an easement is not reasonably necessary. We are aware that there is authority for the proposition that where land abuts a public road, no easement of necessity can be established. See 25 Am. Jur. 2d *Easements and Licenses* § 33 (2014). However, we need not consider this proposition or Morello's corresponding argument in this case, because the district court decided this case based on the theory of an easement implied by prior use rather than by strict necessity. Specifically, in the district court's judgment, it found an easement existed by implication from prior use and stated that "it is not necessary to address whether NAMN's easement could also be implied out of necessity." Based on the foregoing, we analyze the significance of Lot 9's proximity to Center Street under the jurisprudence of easements implied by prior use.

We have previously been presented with and rejected an argument comparable to the one urged by Morello. In *Hillary Corp. v. United States Cold Storage*, 250 Neb. 397, 411-12, 550 N.W.2d 889, 898 (1996), we stated as follows:

> [I]n *Hengen v. Hengen*[, 211 Neb. 276, 318 N.W.2d 269 (1982)], this court addressed whether the owners of the southwest quarter of a section of land had an implied easement, arising from use before severance of the section, to obtain irrigation water from a canal in the northwest quarter. The court found an implied easement existed, stating that "[t]he necessity involved . . . is to transport the irrigation water from the canal in the northwest quarter to the southwest quarter . . . ." 211 Neb. at 284, 318 N.W.2d at 275.

> Thus, the *Hengen* court found the easement was necessary for the proper and reasonable enjoyment of the dominant tract without discussing possible alternative methods of transporting the irrigation water. [Appellant's] argument, that the necessity element was not met because of the existence of possible alternative methods of transportation, is an argument grounded in strict necessity instead of the reasonable necessity standard applicable in the instant case.

The outcome of this case is resolved by application of the jurisprudence associated with an easement implied by prior use, under which the existence of alternative means of access do not preclude a finding that the easement sought is reasonably necessary and should be granted. See *id*. We therefore reject Morello's assertion that Lot 9's proximity to a public road precluded relief.

## CONCLUSION

The district court found the evidence adduced at trial showed that the gravel path across Lot 10 leading west to Lot 9 was used as an easement when Lots 9 and 10 were subdivided, that the use was so long and obvious that it was meant to be permanent, and that the easement is reasonably necessary for the proper and reasonable enjoyment of Lot 9. We reject Morello's assignments of error challenging the district court's judgment granting an easement implied by prior use to NAMN and permitting reasonable improvement of the easement. Accordingly, we affirm.

Affirmed.

McCormack, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Michael Joseph Sims, appellant.

865 N.W.2d 800

Filed July 24, 2015. Nos. S-14-931, S-14-1073.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.
2. **Jurisdiction: Fees: Appeal and Error.** An appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court.
3. **Affidavits: Costs: Fees: Appeal and Error.** In lieu of the payment of costs and fees of litigation, in forma pauperis status may be obtained by appropriate application.
4. **Affidavits: Costs: Fees: Limitations of Actions: Appeal and Error.** Where an objection to in forma pauperis status is sustained, the party filing the application shall have 30 days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal.

Appeals from the District Court for Douglas County: Gary B. Randall, Judge. Appeal in No. S-14-931 held under submission. Judgment in No. S-14-1073 affirmed.

Michael Joseph Sims, pro se.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

Heavican, C.J.

## INTRODUCTION

The district court denied the application of Michael Joseph Sims to proceed in forma pauperis in his appeal from the denial of his earlier motion for postconviction relief. We find no error in the district court's denial of in forma pauperis status, but give Sims 30 days in which to pay the statutory docket fee for the appeal docketed as case No. S-14-931. If the docket fee has not been paid within that time, the appeal will be dismissed.

Sims also appealed from the district court's denial of his motion to proceed in forma pauperis (as distinct from his appeal on the merits of the litigation); that appeal is docketed as case No. S-14-1073. The judgment of that appeal is affirmed.

## BACKGROUND

In 1998, Sims was convicted of first degree murder, attempted first degree murder, and two counts of use of a deadly weapon to commit a felony. His convictions and sentences were affirmed by this court on direct appeal.[1] Sims later filed a motion for postconviction relief, which was denied,[2] and a second motion for postconviction relief, which was also denied.[3]

These current appeals are based upon Sims' third motion for postconviction relief, which was filed on June 12, 2014. The district court denied this motion without an evidentiary hearing. Sims appealed. In lieu of the statutory docket fee, Sims filed a motion to proceed in forma pauperis on appeal. On its own motion, the district court denied Sims' motion

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[1] *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999).

[2] *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

[3] *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

to proceed in forma pauperis. This appeal from the denial of Sims' postconviction motion was docketed with this court as case No. S-14-931.

Following the denial of his motion to proceed in forma pauperis in the appeal docketed as case No. S-14-931, Sims filed an appeal from this denial. That appeal is docketed as case No. S-14-1073. Sims filed with the district court a motion to proceed in forma pauperis for the appeal docketed as case No. S-14-1073. That application was also denied. Sims has not appealed from that denial of in forma pauperis status. Sims' appeals have been consolidated for argument and disposition.

Sims has not paid any docket fee in connection with either of these appeals.

## ASSIGNMENTS OF ERROR

Sims assigns that the district court erred in (1) denying his motion to proceed in forma pauperis and (2) denying his motion for postconviction relief.

## STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.

## ANALYSIS

Sims first assigns that the district court erred in denying his motion to proceed in forma pauperis in his appeal from the district court's denial of Sims' motion for postconviction relief.

Applications to proceed in forma pauperis are governed by § 25-2301.02. That section provides:

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. The objection to the

application shall be made within thirty days after the filing of the application or at any time if the ground for the objection is that the initial application was fraudulent. Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. In any event, the court shall not deny an application on the basis that the appellant's legal positions are frivolous or malicious if to do so would deny a defendant his or her constitutional right to appeal in a felony case.

(2) In the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility. Upon such application, the court shall order the transcript to be prepared and the cost shall be paid by the county in the same manner as other claims are paid. The appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.

As an initial matter, we note there is some question as to whether the district court held a hearing. Such hearing is

required by the plain language of § 25-2301.02 in the event the court objects to an application to proceed in forma pauperis on the basis that the party filing the application "has sufficient funds to pay costs, fees, or security."

Here, the district court indicated in its order denying the application to proceed in forma pauperis that the matter "came on for hearing." And Sims does not now complain that no hearing was held. We additionally note that our appellate record contains no bill of exceptions and no exhibits from any hearing, but we do not find this dispositive. Section 25-2301.02(2) provides that "[i]n the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility." In this case, Sims is the aggrieved party, but made no application for the transcript of the hearing. As such, we will determine the issues presented by this appeal from a review of the district court's order denying Sims' application to proceed in forma pauperis, as well as the documents attached to Sims' application to proceed in forma pauperis. It is apparent from our review of the record that these documents were available to the district court.

In this case, the district court, on its own motion, objected to Sims' application on the basis that it believed Sims had sufficient funds to pay the docket fee and concluded as much in a written order. The district court specifically noted that Sims had nearly $5,000 in his prison account and was employed for approximately 25 hours per week at a rate of $12.59 an hour. The district court referenced the federal poverty line in making this conclusion.

Sims disagrees with the district court's conclusion that his earnings place him over the federal poverty line. He contends in his brief that while he earns $12.59 an hour, his effective earnings are only $2.25 an hour because the remainder goes to his victims.

Sims' argument regarding his eligibility for in forma pauperis status is without merit. It is undisputed that Sims had

at least $4,800 in his prison account at the time he initially appealed from the district court's denial of his motion for postconviction relief. And while Sims is allowed to purchase items from the prison store, as the district court noted, Sims does not pay for housing or food. Sims appears to have sufficient funds to pay his filing fees for his appeal.

We are not persuaded by Sims' contention that we ought to use the federal poverty line to determine whether a litigant should be entitled to in forma pauperis status. Sims cites to no authority that requires the federal or state courts to do so. Moreover, we note that Sims asks that we use only the federal poverty line as a gauge for in forma pauperis purposes. The district court did this. For these reasons, we conclude that the district court did not err in denying Sims in forma pauperis status.

[2,3] We turn next to the disposition of Sims' appeals. Neb. Rev. Stat. § 25-1912(4) (Reissue 2008) provides that "an appeal shall be deemed perfected and the appellate court shall have jurisdiction of the cause when such notice of appeal has been filed and such docket fee deposited in the office of the clerk of the district court." In lieu of payment of costs and fees of litigation, in forma pauperis status may be obtained by appropriate application.[4]

The appeal docketed as case No. S-14-1073 is solely an appeal from the denial of Sims' motion to proceed in forma pauperis in the appeal docketed as case No. S-14-931. Because we conclude that the district court did not err in denying Sims' application to proceed in forma pauperis, we affirm the district court's order with respect to this appeal.

[4] However, Sims' appeal docketed as case No. S-14-931 concerning the merits of his claim should be held under submission for payment of the statutory docket fee. The district court denied Sims' application to proceed in forma pauperis, and we have above concluded that the district court did not err in doing so. However, § 25-2301.02(1) provides that

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[4] Neb. Rev. Stat. § 25-2301.01 (Reissue 2008).

> [i]f an objection [to in forma pauperis status] is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal.

As such, we conclude that Sims shall be permitted 30 days from the issuance of the mandate in this case in which to pay the statutory docket fee. Failure to so do will result in the dismissal of his appeal from the denial of his postconviction motion docketed as case No. S-14-931.

## CONCLUSION

The district court did not err in denying Sims' application to proceed in forma pauperis. We therefore affirm the judgment in case No. S-14-1073. But we note that Sims has 30 days in which to pay the statutory docket fee for the appeal docketed as case No. S-14-931. Sims' failure to do so will result in the dismissal of that appeal.

Appeal in No. S-14-931 held under submission.
Judgment in No. S-14-1073 affirmed.

Stephan, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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Gerald Ficke, appellee, v.
Gilbert Wolken, appellant.
868 N.W.2d 305

Filed July 31, 2015. No. S-13-906.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.
2. **Equity: Appeal and Error.** On appeal from an equity action, when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Appeal and Error.** The Nebraska Supreme Court will not consider errors which are not properly assigned in a petition for further review and discussed in the supporting memorandum brief.
4. **Fraud: Contracts: Title.** An oral agreement for the transfer of title to real estate is voidable under the statute of frauds.
5. **Contracts: Specific Performance: Real Estate: Proof.** A party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance.
6. **Contracts: Partial Performance: Fraud: Testimony: Intent.** When considering the part performance exception to the statute of frauds, the alleged acts of performance must speak for themselves. Testimony by the plaintiff as to his or her intent in rendering the performance, by itself, is insufficient.

7. **Evidence: Witnesses.** The admissions by a party to an action upon a material matter are admissible against him or her as original evidence.
8. ____: ____. An admission may be made by conduct as well as orally or in writing.
9. ____: ____. As a general rule, any act or conduct on the part of a party which may fairly be interpreted as an admission against interest on a material issue may be shown in evidence against him or her.
10. ____: ____. Where a party on the trial of an action advances contentions which are inconsistent with his or her prior conduct with respect to the matter in controversy, such prior conduct may be shown as being in the nature of an admission.

Petition for further review from the Court of Appeals, Inbody, Riedmann, and Bishop, Judges, on appeal thereto from the District Court for Gage County, Paul W. Korslund, Judge. Judgment of Court of Appeals affirmed.

Lyle J. Koenig, of Koenig Law Firm, for appellant.

Bradley A. Sipp for appellee.

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

Cassel, J.

## INTRODUCTION

An employee, relying upon the part performance exception to the statute of frauds, alleged that his former employer breached an oral contract to convey real estate. Gerald Ficke claimed that the employer promised him 80 acres of farmland if he continued his employment for a period of 10 years. The Nebraska Court of Appeals affirmed a decree in Ficke's favor, concluding that he had proved part performance.[1] Although we ultimately agree that Ficke proved part performance, we disapprove of the Court of Appeals' reliance upon Ficke's testimony as to his intent. To prove part performance, the alleged acts of performance must establish the exception without the

[1] See *Ficke v. Wolken*, 22 Neb. App. 587, 858 N.W.2d 249 (2014).

aid of such testimony. Because there was other sufficient evidence, we affirm.

## BACKGROUND

In January 2000, Ficke began working for Gilbert Wolken as a "hired hand." Ficke performed cattle work, maintenance, mechanical work, and general farm work. He worked various hours depending on the season, ranging from 40 to 60 hours per week. And he was always "on-call" and expected to fix any issues that might arise, regardless of what he was doing. When Ficke began his employment, he earned $7.50 per hour. But at the time of his employment's termination, his wages had risen to $14.75 per hour. He was also paid overtime and usually received an annual bonus extending from $500 to $2,000.

According to Ficke, Wolken promised him the 80 acres of farmland sometime in 2002 or 2003. At the time of the promise, Ficke and Wolken were driving in Wolken's pickup. Ficke looked down at his shoes and said, "[T]here's the only ground I'll ever own." Wolken responded that he would make Ficke a deal. Wolken told Ficke, "After working ten years . . . for me, I will give you 80 acres." And Wolken indicated that the 80 acres were the first 80 acres that Wolken had ever purchased.

Although Ficke worked for Wolken for approximately 10 years 9 months, Wolken never signed over the 80 acres to Ficke. And Wolken terminated Ficke's employment in September 2010. In March 2011, Ficke filed a complaint against Wolken alleging that Wolken had breached the oral contract.

A bench trial was conducted before the district court, and Ficke testified as to his relationship with Wolken. Ficke indicated that he and Wolken were "[v]ery good friends" and that he considered Wolken to be a "father figure." Ficke described that he and Wolken would participate in various activities that "friends and family do together," such as eating together on birthdays, attending concerts, and celebrating holidays.

As to his reaction to Wolken's promise, Ficke testified that he was overwhelmed and that he "didn't really know how to take it." Ficke told Wolken that he did not have to give Ficke the land, but Wolken insisted. And Ficke indicated that Wolken raised the matter many times. Wolken would mention the promise "every so often" and would remind Ficke, usually in January, that Ficke had only "another year or two years," depending on the year.

And Ficke iterated that Wolken's promise was a significant factor for his continued employment.

> [Ficke's counsel:] During this ten-year, nine-month span of time that you worked for . . . Wolken, did you ever think about quitting?
>
> [Ficke:] Oh, yes.
>
> Q. Why?
>
> A. Well, I worked constantly. I had no family life, insurance. I had no health insurance for, I don't know, five, six years. I just, you know, I always thought, you know, that I could do better, but then in the back of [my] mind, yeah, 80 acres after ten years isn't a bad deal either.
>
> Q. Did you ever decide to stay working for . . . Wolken because of his promise?
>
> [Wolken's counsel:] We will object on the ground that it's leading and suggestive, Your Honor.
>
> THE COURT: Sustained.
>
> [Ficke's counsel:] Well, you testified that you thought about quitting before. Why did you stay with him?
>
> [Ficke:] Well, 80 acres, and farming, that's what I loved. I loved to farm. And after the ten years, a bonus like that is something that a person works for.

According to Ficke, on January 10, 2010, Wolken told him that he had completed the 10 years of employment and that the 80 acres belonged to Ficke. Although Wolken never signed over the 80 acres, Ficke described one instance when Wolken treated the 80 acres as belonging to Ficke. During harvest season, all of the wheat from the 80 acres was

kept separate and Wolken instructed the cooperative to pay Ficke 40 percent of the profit from the wheat. Additionally, before Ficke's employment was terminated, Wolken offered to purchase a house for Ficke in exchange for the 80 acres. Ficke agreed to the proposal, but the purchase offer was not accepted and the deal "fell through." And after Ficke's employment was terminated, Wolken discussed the 80 acres with Ficke and mentioned that he was attempting to determine how he could purchase the 80 acres from Ficke with minimal tax consequences.

The district court also received portions of Wolken's deposition testimony, and Wolken confirmed the existence of the promise. Wolken testified that he promised Ficke "[e]ighty acres of land if [Ficke] fulfilled his job." And Wolken stated that in order to fulfill his job, Ficke was required to "[a]ct like a decent man." Wolken explained that he wanted to give Ficke a "better attitude on the job." But Wolken did not believe that Ficke had fulfilled his obligations.

According to Wolken, Ficke's temper was an issue and Ficke would argue with Wolken's wife and call Wolken names. Wolken testified that Ficke "was dangerous to be around," and he described one instance in which Ficke had intentionally set fire to bales of straw and another in which Ficke had thrown a telephone at the windshield of Wolken's vehicle.

Additionally, the district court received testimony from Wolken's sister. Wolken's sister testified that after Wolken had fired Ficke, Wolken told her that he had promised Ficke the 80 acres and that Ficke had completed the 10-year period.

After trial, the district court entered a decree (styled as an "order") granting Ficke specific performance of the contract. The court determined that Ficke's testimony was "completely credible" and that Ficke would not have fulfilled the 10 years of employment but for Wolken's promise to convey the 80 acres. Thus, the court concluded that the part performance exception to the statute of frauds applied, because "[t]o not enforce performance by Wolken would amount to a fraud upon Ficke."

Wolken filed a timely notice of appeal, and the case was assigned to the Court of Appeals' docket. On appeal, the Court of Appeals determined that Ficke had met his burden of proving the existence of the oral contract and its terms by clear, satisfactory, and unequivocal evidence. As to Ficke's performance of the contract, the Court of Appeals relied upon Ficke's testimony in concluding that his continued employment for the 10-year period was referable solely to the oral contract. It therefore affirmed the granting of specific performance in Ficke's favor.

We granted Wolken's petition for further review.

## ASSIGNMENTS OF ERROR

Wolken assigns, restated, that the Court of Appeals erred in (1) concluding that Ficke established by clear, satisfactory, and unequivocal evidence that his continued employment for 10 years was referable solely to the oral contract to convey the 80 acres and (2) applying a subjective, rather than an objective, test to determine whether Ficke had partially performed the oral contract.

## STANDARD OF REVIEW

[1] An action for specific performance sounds in equity, and on appeal, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent from the conclusion reached by the trial court.[2]

[2] On appeal from an equity action, when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[3]

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[2] *Langemeier v. Urwiler Oil & Fertilizer*, 265 Neb. 827, 660 N.W.2d 487 (2003).

[3] *Twin Towers Condo. Assn. v. Bel Fury Invest. Group*, 290 Neb. 329, 860 N.W.2d 147 (2015).

## ANALYSIS

[3] In his petition for further review, Wolken does not challenge the Court of Appeals' conclusion that Ficke met his burden of proving the existence and terms of the oral contract by clear, satisfactory, and unequivocal evidence. Although we understood Wolken at oral argument to raise various assertions regarding the existence of the contract and its terms, we will not consider errors which are not properly assigned in a petition for further review and discussed in the supporting memorandum brief.[4] Thus, we restrict our analysis to Wolken's specific assignments of error, both of which address the Court of Appeals' conclusion that Ficke's performance was referable solely to the oral contract.

[4] It is clear that unless some exception applies, Ficke's claim to enforce the promise to convey the 80 acres was barred by the statute of frauds. An oral contract to convey land falls under the statute of frauds.[5] And it is the general rule that an oral agreement for the transfer of title to real estate is voidable under the statute of frauds.[6]

Nebraska's statute of frauds applicable to the sale of an interest in land provides:

> No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same.[7]

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[4] See *Steele v. Sedlacek*, 261 Neb. 794, 626 N.W.2d 224 (2001).

[5] See Neb. Rev. Stat. §§ 36-103 to 36-105 (Reissue 2008).

[6] *Hackbarth v. Hackbarth*, 146 Neb. 919, 22 N.W.2d 184 (1946).

[7] § 36-103.

Thus, because Ficke did not assert the existence of any document signed by Wolken which could satisfy the statute of frauds, some exception must apply to permit Ficke's claim.

[5] As observed by the Court of Appeals, an exception to the statute of frauds authorizes specific performance of an oral contract in cases of part performance.[8] A party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance.[9]

The Court of Appeals determined that Ficke had satisfied the part performance exception for two reasons: (1) Ficke continued his employment for the 10-year period and (2) Ficke's testimony indicated that his continued employment was referable solely to the promise of the 80 acres and not to some other contract or relationship.

We first address the Court of Appeals' reliance upon Ficke's testimony as to his intent. In determining that Ficke's continued employment was referable solely to the oral contract, the Court of Appeals cited the portion of Ficke's testimony quoted above—that Ficke had thought about quitting, but that the promise of the 80 acres was "something that a person works for." The Court of Appeals determined that this testimony established the part performance exception, because it proved that the "sole reason [Ficke] continued his employment was to attain the land that was promised."[10]

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[8] See *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

[9] *Id.*

[10] *Ficke, supra* note 1, 22 Neb. App. at 595, 858 N.W.2d at 257.

We disapprove of this reliance upon the above testimony as the sole basis for the part performance exception. The part performance exception entails an onerous burden of proof—a plaintiff must prove not only that the alleged performance is referable to the oral contract, but also that the performance "cannot be accounted for on any other reasonable hypothesis."[11] Multiple courts have recognized that in satisfying this high burden, the alleged acts of performance must speak for themselves.[12] As expressed by the Supreme Court of Connecticut:

> [W]e have found no cases, nor have the plaintiffs pointed us to any, in which testimonial evidence as to intent, rather than actions, was probative evidence of part performance. Indeed, if we were to accept as dispositive testimony that a party would not have undertaken the action "but for" the other party's promise, this limited exception to the statute of frauds would swallow the rule.[13]

Without a focus upon a plaintiff's acts, "the statute of frauds could be avoided whenever a plaintiff claimed that he undertook any act in reliance on an alleged agreement."[14]

[6] This reasoning is consistent with both our prior case law and the purpose of the statute of frauds.[15] We therefore hold that to establish the part performance exception, the alleged acts of performance must speak for themselves. Testimony

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[11] *Crnkovich v. Crnkovich*, 144 Neb. 904, 907, 15 N.W.2d 66, 68 (1944).

[12] See, *Owens v. M.E. Schepp Ltd. Partnership*, 218 Ariz. 222, 182 P.3d 664 (2008); *Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 873 A.2d 929 (2005).

[13] *Glazer, supra* note 12, 274 Conn. at 71, 873 A.2d at 953.

[14] *Owens, supra* note 12, 218 Ariz. at 228, 182 P.3d at 670.

[15] See, *Halsted v. Halsted*, 169 Neb. 325, 329, 99 N.W.2d 384, 387 (1959) (observing that statute of frauds "would be reduced to a mere shell" if party was permitted to await death of other parties and satisfy statute solely by his testimony); *Hackbarth, supra* note 6 (rejecting plaintiff's claim of alleged oral contract to convey personal property under statute of frauds and observing that evidence of such contract consisted solely of plaintiff's testimony).

by the plaintiff as to his or her intent in rendering the performance, by itself, is insufficient.

Having identified the proper framework, we turn to the alleged acts of performance to determine whether they are sufficient to establish the part performance exception. As previously indicated, in this case, the alleged acts of performance constitute Ficke's continued employment for the 10-year period. Wolken contends that Ficke's continued employment was insufficient, because there was no basis to distinguish between Ficke's continued employment under his regular employment contract and his continued employment pursuant to the promise of the 80 acres.

Wolken's argument is premised upon two prior cases in which we found the claimants' continued employment insufficient to prove part performance. In *Theobald v. Agee*,[16] an employer allegedly promised two of his employees that he would leave them an interest in a farm in his will if they remained in his employ. Upon the employer's death, one of the employees filed suit, alleging that he had performed the contract by remaining in his employment until the company had been sold. But we determined that the employee's continued employment "was equally referable to his employment contract with the [c]ompany, under which contract he received payment for his services."[17]

And in *In re Estate of Layton*,[18] an employer allegedly promised an employee that he would execute a will leaving a store and inventory to the employee in return for the employee's service. The employee filed suit and claimed that he had remained at the store, working 10 hours per day, 6 days per week, at what he felt were low wages, because of the employer's promise. Like *Theobald*, we found no basis to distinguish the claimant's performance of his employment contract from his performance of the alleged promise.

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[16] *Theobald v. Agee*, 202 Neb. 524, 276 N.W.2d 191 (1979).

[17] *Id.* at 533, 276 N.W.2d at 196.

[18] *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982).

The employee continued to be compensated for his services and received annual raises in his compensation. Further, the employee admitted that he did not agree to do anything more for the employer pursuant to the alleged promise.

However, we find this case distinguishable from *Theobald* and *In re Estate of Layton*. In both those cases, the employer was deceased at the time the employee brought the claim. Thus, a risk for fraud existed upon the employer's estate. We have previously recognized that "'[c]ourts of justice lend a very unwilling ear to statements of what dead men have said.'"[19] "'Unsupported testimony of a single person as to a conversation between himself and a deceased person is regarded as the weakest of all kinds of evidence.'"[20]

But in this case, the propensity for fraud against the employer or the employer's estate was nonexistent. In his deposition testimony, Wolken admitted to promising the 80 acres to Ficke. Thus, rather than fraud against the employer, the possibility for fraud in this case existed only as against Ficke. With respect to the part performance exception, we have stated that the alleged part performance must be "something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him."[21]

We find the evidence received by the district court sufficient to support its conclusion that Ficke would not have continued his employment but for the promise of the 80 acres and that he did so with the 80 acres as his direct view. In doing so, we give weight to the fact that the district court heard Ficke's testimony and found it credible. Ficke testified that he "worked constantly" and was always "on-call," that

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[19] *Johnson v. Kern*, 117 Neb. 536, 546, 225 N.W. 38, 42 (1929), quoting *Lea v. Polk County Copper Co.*, 62 U.S. (21 How.) 493, 16 L. Ed. 203 (1858).

[20] *Johnson, supra* note 19, 117 Neb. at 546, 225 N.W. at 42, quoting *Lippert v. Pacific Sugar Corporation*, 33 Cal. App. 198, 164 P. 810 (1917).

[21] *Overlander v. Ware*, 102 Neb. 216, 218, 166 N.W. 611, 612 (1918).

he had no family life or health insurance, and that he always believed he "could do better."

Additionally, the district court received evidence of Wolken's own statements and conduct admitting that Ficke had fully performed his obligation and that Ficke was entitled to the 80 acres. Wolken's sister testified that Wolken had told her that Ficke had completed the 10-year period. And Wolken granted Ficke payment for a portion of the wheat harvested from the 80 acres and had attempted to purchase a house for Ficke as a substitute for the 80 acres.

[7-9] Wolken's statement to his sister and his treatment of the 80 acres as belonging to Ficke are critically important as admissions. The admissions by a party to an action upon a material matter are admissible against him or her as original evidence.[22] And an admission may be made by conduct as well as orally or in writing.[23] Thus, as a general rule, any act or conduct on the part of a party which may fairly be interpreted as an admission against interest on a material issue may be shown in evidence against him or her.[24]

[10] By admitting to his sister that Ficke had fully performed and in attempting to substitute the house for the 80 acres, Wolken admitted that Ficke was entitled to the 80 acres. Thus, Wolken effectively admitted that Ficke's performance was referable solely to the oral contract. And Wolken's actions regarding the wheat harvest further demonstrated Wolken's belief that Ficke was the owner of the 80 acres. Wolken's admissions treated the contract as performed and the 80 acres as belonging to Ficke; thus, his contention that Ficke's performance was not referable solely to the contract is inconsistent with his own statements and conduct. Where a party on the trial of an action advances contentions which are inconsistent with his or her prior conduct with respect to the matter in controversy, such prior conduct may

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[22] *Silvey & Co., Inc. v. Engel*, 204 Neb. 633, 284 N.W.2d 560 (1979).

[23] 32 C.J.S. *Evidence* § 530 (2008).

[24] *Id.*

be shown as being in the nature of an admission.[25] We therefore consider Wolken's statements and conduct as additional evidence that Ficke's performance was referable solely to the contract.

Giving no consideration to Ficke's testimony as to his intent, we find the evidence regarding Ficke's acts—particularly Wolken's admissions by statements and conduct—is sufficient to establish that his continued employment for the 10-year period was referable solely to the oral contract. Thus, although for different reasons from those stated by the Court of Appeals, we agree that Ficke's claim as to the 80 acres was enforceable under the part performance exception to the statute of frauds.

## CONCLUSION

Although Ficke's claim regarding the 80 acres fell directly within the statute of frauds, it was enforceable under the part performance exception. The evidence, particularly Wolken's admissions by statements and by conduct, was sufficient to establish that Ficke's performance of the oral contract was referable solely to the promise of the 80 acres. And our analysis gives no consideration to Ficke's testimony as to his intent. We emphasize that a claimant's testimony as to his or her intent in rendering performance is insufficient to establish the exception. Under the part performance exception, the alleged acts of performance must speak for themselves. We therefore disapprove of the Court of Appeals' reliance upon Ficke's testimony as to his intent. But because there was other sufficient evidence, we affirm the granting of specific performance in Ficke's favor.

Affirmed.

Stephan, J., not participating.

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[25] *Id.*

Nebraska Supreme Court
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# Hamilton County EMS Association, IAFF Local 4956, appellee, v. Hamilton County, Nebraska, appellant.

866 N.W.2d 523

Filed July 31, 2015. No. S-14-435.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Labor and Labor Relations.** Generally, supervisors are not to be included in a bargaining unit with other employees who are not supervisors.
3. **Commission of Industrial Relations: Labor and Labor Relations.** Three questions must be answered in the affirmative for an employee to be deemed a supervisor under Neb. Rev. Stat. § 48-801(14) (Cum. Supp. 2014): First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require the use of independent judgment? Third, does the employee hold the authority in the interest of the employer?
4. **Labor and Labor Relations.** The purpose of the exclusion of supervisors from bargaining units is to ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between the employer and the union.
5. **Commission of Industrial Relations: Labor and Labor Relations.** In order to ensure union protection to employees whom Neb. Rev. Stat. § 48-801(14) (Cum. Supp. 2014) is designed to protect, supervisory

status must not be interpreted too broadly as to deny employee rights to those whom the statute is intended to protect.

6. **Labor and Labor Relations: Proof.** Where an employer is attempting to show that employees were supervisors, the employer has the burden of proving their supervisory status in labor proceedings.
7. **Commission of Industrial Relations: Labor and Labor Relations.** While an employee may be authorized to direct coworkers, for the direction to be supervisory under Neb. Rev. Stat. § 48-801(14) (Cum. Supp. 2014), the employee must also be responsible, meaning answerable for the discharge of a duty or obligation.
8. ____: ____. To responsibly direct under Neb. Rev. Stat. § 48-801(14) (Cum. Supp. 2014), the employee must be held fully accountable and responsible for the performance and work product of the employees he directs.
9. ____: ____. In order for Neb. Rev. Stat. § 48-801(14) (Cum. Supp. 2014) to apply to an employee, 1 of the 12 enumerated duties that are associated with being a supervisor must also be exercised with independent judgment.
10. **Commission of Industrial Relations: Labor and Labor Relations: Words and Phrases.** The statutory term "independent judgment" is ambiguous with respect to the degree of discretion required for supervisory status.
11. **Labor and Labor Relations.** Many technically supervisory functions may be performed without the exercise of such a degree of judgment or discretion as would warrant a finding of supervisory status.
12. ____. The degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.
13. **Labor and Labor Relations: Proof.** Secondary indicia only aid in establishing supervisory status where there is evidence that one of the statutory or primary indicia is first satisfied.

Appeal from the Commission of Industrial Relations. Affirmed.

Erin L. Ebeler, of Woods & Aitken, L.L.P., and, on brief, Rachel K. Boyle for appellant.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellee.

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

McCormack, J.

## NATURE OF CASE

Hamilton County, Nebraska, appeals the finding of Nebraska's Commission of Industrial Relations (CIR) that two captains of an ambulance service were nonsupervisors and thus could be included in a bargaining unit with other employees. The issue is whether the shift captains of Hamilton County EMS Association, IAFF Local 4956 (Union), should be considered supervisors under Neb. Rev. Stat. § 48-801(14) (Cum. Supp. 2014). The CIR found that the shift captains were not supervisors and that therefore, they could be included in the bargaining unit. Hamilton County appeals. We affirm the finding of the CIR that the shift captains are not statutory supervisors under Nebraska's Industrial Relations Act.[1]

## BACKGROUND

### Union

In August 2013, the Union filed a petition with the CIR seeking to become the exclusive bargaining agent for employees of the Hamilton County Ambulance Service (Ambulance Service). The bargaining unit was to include all full-time emergency medical technicians (EMTs), paramedics, and shift captains. Eighty-eight percent of the claimed appropriate bargaining unit members had authorized the Union to represent them and requested the CIR to conduct a certification election.

The two captains, Brent Dethlefs and Jay Mack, were included in the bargaining unit. The director and assistant director were excluded from the bargaining unit. Hamilton County objected to the captains' inclusion in the bargaining unit.

The CIR held a hearing on December 10, 2013. The CIR found that the captains were not statutory supervisors because "[t]he evidence show[ed] that both the job responsibilities of

[1] Neb. Rev. Stat. §§ 48-801 through 48-842 (Reissue 2010 & Cum. Supp. 2014).

the Captain-Training Officer and Captain-Special Operations are more in line with the Paramedics and EMTs than the Director or Assistant Director." The CIR found persuasive the facts that "[c]aptains work the same work schedules, are paid hourly, and receive the same fringe benefits as full-time Paramedics and EMTs"; captains, paramedics, and EMTs are eligible for overtime pay; the duties of the captains are shared by other paramedics and EMTs; and any sole duties of the captains can be taken over by other employees.

### Organization of Ambulance Service

It is the responsibility of the Ambulance Service to respond to emergency calls and provide transfers for patients between medical facilities. The Ambulance Service is staffed with a director, an assistant director, two shift captains, and several full-time and part-time EMTs and paramedics. Three full-time employees are staffed on each shift. Each shift has a shift captain who doubles as either training officer, special operations, or assistant director. All of the shift captains double as paramedics. Currently, the shift captains are Mack, temporary captain/paramedic; Tim Graham, special operations captain/paramedic; and Dethlefs, training captain/paramedic.

### Shift Captains' Duties

Each shift has a daily checklist that the shift workers are responsible for completing before the end of the day. The shift captain is responsible for ensuring that the checklist is completed before the end of the shift. As one captain testified, "The captain doesn't tell you to do the checklist. The captain is there to make sure it gets done, but that's his — kind of one of his duties." The shift workers are also responsible for keeping up the "day book." Typically, the shift captain or senior medic maintains and makes entries into the day book and is responsible for all entries in the book, but other employees may write in the day book if asked to do so.

The primary function of shift captains, like regular employees, is to respond to 911 emergency dispatch calls. At an

emergency scene, captains are supposed to maintain control or command. Control of the emergency scene would, regardless, be with the paramedics, because they have the most training.

The shift captains also participate in interviews of new applicants for positions within the Ambulance Service. However, the captains do not determine who is hired. Instead, the captains are there to provide input on the decision. The director makes the ultimate hiring decision. The captains also do not have authority to determine who is promoted. Rather, promotions are done on a certification basis.

The shift captains do not have the authority to effectuate a layoff or to fire employees. The director is the officer who fires employees. Captains, however, send problems with employees on their shifts to the director. Mack and Dethlefs concurred that they felt they would have the authority to send someone home from a shift, if, for example, that worker came to work intoxicated. The captains do performance evaluations on their workers. The captains can also do writeups on both good and bad behavior. But both Mack and Dethlefs stated that they leave disciplinary matters to the director. Mack stated that he felt he would have a voice or right to express an opinion about whether someone's employment was terminated.

Captains can suggest shift changes, but cannot unilaterally make shift changes. In the role as captain, captains do have the authority to move someone from "backup" to "first call." Captains also have authority to make "special rules" for their shift. For example, Dethlefs has instituted a rule that workers are not to play games on their shift.

Under the Ambulance Service regulations, the chain of command is seven tiered. The regulations state that the force will consist of the director, the assistant director, three captains, full-time employees, and part-time employees. The rank of command is first, the county commissioners; second, the director; third, the assistant director; and fourth, the shift captains. The job description of a shift captain states that

"[t]his position encompasses supervisory and management work . . . ."

All captains are paid hourly, like the other full-time and part-time workers for the Ambulance Service. There are no differences between the benefits offered to supervisors and regular employees.

### Testimony

The director of the Ambulance Service, Catherine Sigler, testified that she would consider each shift captain a supervisor. Sigler believes other workers consider their shift captain their supervisor as well because they look to them for direction for the shift or on a scene. According to Sigler, "If the Director or Assistant Director is unavailable, then the captain is to do whatever needs to be done during their shift." She said this might include calls that need to be made or decisions that need to be made—including how many ambulances to send to a particular scene. Sigler also testified that captains exercise independent judgment by running their shift and dealing with problems that arise, by giving guidance in hiring, and by giving their workers rules on their shifts. However, Sigler did admit that the captains' primary function is to be on shift and respond to calls as they come in. She also admitted that captains cannot hire and fire employees as they wish.

Mack is a temporary shift captain, taking over the duties of another shift captain, Graham, when he went away on deployment in Texas. Mack states that he does not feel his duties have changed since he became a temporary shift captain from a paramedic for the Ambulance Service. Other shift workers testified that the captains do the checklist activities alongside the other workers and that the captains essentially perform the same duties as the rest of the shift workers.

## ASSIGNMENTS OF ERROR

Hamilton County assigns as error the CIR's finding that the shift captains could be included with the nonsupervisors' bargaining unit. Specifically, Hamilton County assigns as error

the findings that (1) the two captains were not statutory supervisors and (2) the captains' responsibilities were more akin to EMTs and paramedics, than to the director and assistant director, and thus shared a community of interest with the employees the captains supervise.

## STANDARD OF REVIEW

[1] Any order or decision of the CIR may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.[2]

## ANALYSIS

The issue before us is whether or not shift captains should be considered supervisors under the Industrial Relations Act. If the shift captains are supervisors, then they cannot be included in a bargaining unit with other lower level employees. However, if the shift captains are not statutory supervisors, then they may be included in the bargaining unit with the other employees. The CIR correctly classified the shift captains as nonsupervisors.

### Shift Captains as Statutory Supervisors

[2,3] Generally, supervisors are not to be included in a bargaining unit with other employees who are not supervisors.[3] "Supervisor" is defined by the Industrial Relations Act as follows:

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[2] § 48-825(4).

[3] § 48-816(3)(a); *IBEW Local Union No. 1597 v. Sack*, 280 Neb. 858, 793 N.W.2d 147 (2010); *PLPSO v. Papillion/LaVista School Dist.*, 252 Neb. 308, 562 N.W.2d 335 (1997). See *IBEW Local 1536 v. Lincoln Elec. Sys.*, 215 Neb. 840, 341 N.W.2d 340 (1983).

> [A]ny public employee having authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees, or responsibility to direct them, to adjust their grievances, or effectively to recommend such action, if in connection with such action the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.[4]

Three questions must be answered in the affirmative for an employee to be deemed a supervisor under this statute: "First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require 'the use of independent judgment'? Third, does the employee hold the authority 'in the interest of the employer'?"[5]

[4,5] The purpose of the exclusion of supervisors from bargaining units is to ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between the employer and the union.[6] However, in order to ensure union protection to employees whom the statute is designed to protect, supervisory status must not be interpreted too broadly as to deny employee rights to those whom the statute is intended to protect.[7]

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[4] § 48-801(14).

[5] *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 574, 114 S. Ct. 1778, 128 L. Ed. 2d 586 (1994). See *IBEW Local Union No. 1597 v. Sack, supra* note 3. See, also, *N.L.R.B. v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478 (6th Cir. 2003); *Cooper/T. Smith, Inc. v. N.L.R.B.*, 177 F.3d 1259 (11th Cir. 1999).

[6] *NLRB v. Yeshiva University*, 444 U.S. 672, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980).

[7] *N.L.R.B. v. GranCare, Inc.*, 170 F.3d 662 (7th Cir. 1999). See *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 116 S. Ct. 1396, 134 L. Ed. 2d 593 (1996).

The National Labor Relations Act[8] has a nearly identical definition of "supervisor." The National Labor Relations Act defines a "supervisor" as follows:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[9]

Since Nebraska's statute so closely resembles that of the federal statute, we find federal case law interpreting this statute instructive. We will use federal case law in examining each of the elements instructive in determining when employees are statutory supervisors.

[6] In general, the burden of proving an exemption rests on the party claiming it.[10] Particularly, where an employer is attempting to show that employees were supervisors, the employer has the burden of proving their supervisory status in labor proceedings.[11]

### Authority to Hire or Promote

If the employee has an ability to hire or promote other employees, then they can be considered supervisors under the Industrial Relations Act.[12] In *Cooper/T. Smith, Inc. v. N.L.R.B.*,[13] the "docking pilots" made recommendations as

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[8] See 29 U.S.C. §§ 151 through 187 (2012).

[9] 29 U.S.C. § 152(11).

[10] See, e.g., *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84, 128 S. Ct. 2395, 171 L. Ed. 2d 283 (2008); *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974).

[11] See *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 121 S. Ct. 1861, 149 L. Ed. 2d 939 (2001).

[12] See § 48-801(14).

[13] *Cooper/T. Smith, Inc. v. N.L.R.B., supra* note 5, 177 F.3d at 1264.

to hiring and firing, and their recommendations were almost always followed (the vice president "never made a personnel decision against the recommendations of the docking pilots"). The 11th Circuit Court of Appeals found that the authority to make recommendations alone does not indicate supervisory status.[14] Further, the Ninth Circuit Court of Appeals stated that it is merely "the practice of a prudent employer to seek the advice of his foreman in evaluating employees."[15]

Similarly to *Cooper/T. Smith, Inc.*, the Hamilton County shift captains sit in on interviews and give their opinions as to who should be hired in the department when a position opens. The shift captains also complete performance evaluations on other employees in their shift. However, the evidence is uncontroverted that the shift captains do not have the ultimate authority to hire, fire, or promote any employee in the department. As the Ninth Circuit stated, it is merely good practice to seek the opinions of someone present at the scene of the work before hiring or firing, and to evaluate employees. Thus, the shift captains do not have the authority to hire or promote under the statute.

### Authority to Transfer, Suspend, Lay Off, Recall, Discharge, or Discipline

If an employee has the authority to transfer, suspend, lay off, recall, discharge, or discipline other employees, then he or she may qualify as a statutory supervisor.[16] Because the shift captains do not ultimately have that authority, we disagree with Hamilton County.

In *Frenchtown Acquisition Co., Inc. v. N.L.R.B.*,[17] the charge nurses were able to complete "in-services," which led to the

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[14] *Cooper/T. Smith, Inc. v. N.L.R.B., supra* note 5.

[15] *George C. Foss Co. v. N.L.R.B.*, 752 F.2d 1407, 1411 (9th Cir. 1985).

[16] See § 48-801(14).

[17] *Frenchtown Acquisition Co., Inc. v. N.L.R.B.*, 683 F.3d 298, 307 (6th Cir. 2012).

discipline of other employees. However, these in-services were only the first step in a disciplinary process and only brought errors or misconduct to the manager's attention; then, the manager decided how to proceed. The court held that such limited involvement in the disciplinary process did not satisfy the employer's burden of proving that these charge nurses had statutory responsibilities under the statute.[18]

Hamilton County argues that because the shift captains complete performance evaluations on employees, they are effectively able to discipline the employees. Hamilton County also argues that because captains execute oral warnings and written warnings for positive and negative conduct, they effectively discipline the other employees. However, these types of duties are very similar to the in-services reports of the charge nurses which merely were the first step in a disciplinary process.

Hamilton County also points to the fact that shift captains stated that if they saw another shift worker appear at work intoxicated, they felt they would be able to send that worker home. However, one shift captain also testified that he would first attempt to call the director about the situation, and if unable to reach the director, he would most likely ask the intoxicated worker to leave. Hopefully other workers, particularly in the position of EMTs whose functions are to drive an ambulance and respond to medical emergencies, would also feel that their safety and professional integrity would be endangered by having an intoxicated worker on the shift and would also ask the intoxicated worker to leave if they could not contact a superior.

The shift captains cannot actually dispense disciplinary actions or recommend a level of discipline. Shift captains only report what has occurred on their shift. Disciplinary actions, such as suspensions, lay offs, recalls, transfers, discharges, or other types of discipline have to be approved

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[18] *Id.*

by the director. Thus, shift captains do not have the statutory authority to transfer, suspend, lay off, recall, discharge, or discipline.

### Authority to Responsibly Direct

[7,8] If an employee has the responsibility to direct workers, then the employee may be considered supervisory under the statute.[19] While an employee may be authorized to direct coworkers, for the direction to be supervisory under the statute, the employee must also be responsible, meaning "'answerable for the discharge of a duty or obligation.'"[20] To responsibly direct, the employee must be "held fully accountable and responsible for the performance and work product of the employees he directs."[21] Further, even though an employee holds a highly responsible position, this does not alone mean that an employee is a supervisor.[22] As the U.S. Supreme Court has stated:

> [E]mployees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress . . . .[23]

For example, in *Cooper/T. Smith, Inc.*, even though the employees were highly trained and directed others in complex and potentially dangerous work, the court found that "[t]he

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[19] See § 48-801(14).

[20] *NLRB v. KDFW-TV, Inc., Div. of Times Mirror Corp.*, 790 F.2d 1273, 1278 (5th Cir. 1986).

[21] *Id.* (quoting *Marine Yankee Atomic, Etc. v. N. L. R. B.*, 624 F.2d 347 (1980)).

[22] See, e.g., *Exxon Pipeline Co. v. N. L. R. B.*, 596 F.2d 704 (5th Cir. 1979).

[23] *NLRB v. Yeshiva University, supra* note 6, 444 U.S. at 690.

expertise is not . . . exercised with a management prerogative, but rather as an experienced employee."[24] Similarly, in *Neighborhood Legal Services*,[25] attorneys were not found to be supervisors, even though they trained, assigned, or directed work of legal assistants and paralegals. Instead, the training, assigning, or directing was an incident of their professional responsibilities as attorneys.

The position of a charge nurse, with some supervisory duties, but mainly professionally mandated duties, has been analyzed by many courts aiming to determine whether such a job should be classified as supervisory.[26] One court stated that "'nurses are professionals and their exercise of supervision is guided by professional training and norms.'"[27] There is no issue of divided loyalties when "'supervision is required to conform to professional standards rather than to the company's profit-maximizing objectives.'"[28]

Neither does a duty to train other workers mean that an employee has a duty to responsibly direct or that he or she is a supervisor. Even where employees are required to train their coworkers, this alone is not an indication of supervisory status, but, rather, reflects the experience and professional training that those more senior employees already possess.[29] For example, in *Cooper/T. Smith, Inc.*, the "docking pilots"

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[24] *Cooper/T. Smith, Inc. v. N.L.R.B., supra* note 5, 177 F.3d at 1267.

[25] *Neighborhood Legal Services*, 236 N.L.R.B. 1269 (1978).

[26] See, *NLRB v. Kentucky River Community Care, Inc., supra* note 11; *NLRB v. Health Care & Retirement Corp. of America, supra* note 5; *Frenchtown Acquisition Co., Inc. v. N.L.R.B., supra* note 17; *N.L.R.B. v. GranCare, Inc., supra* note 7; *Providence Alaska Medical Center v. N.L.R.B.*, 121 F.3d 548 (9th Cir. 1997).

[27] *N.L.R.B. v. GranCare, Inc., supra* note 7, 170 F.3d at 666 (quoting *Children's Habilitation Center, Inc. v. N.L.R.B.*, 887 F.2d 130 (7th Cir. 1989)).

[28] *Id.* at 666-67.

[29] See, *Cooper/T. Smith, Inc. v. N.L.R.B., supra* note 5; *N.L.R.B. v. ADCO Elec. Inc.*, 6 F.3d 1110 (5th Cir. 1993).

were required to train employees. However, docking pilots, by nature of their job, were required to have more training and experience. The court held that this was not an "indication of supervisory status, but rather reflects the nature of the docking pilot job itself."[30]

Though there is no written rule stating that the shift captains must be the most senior or most experienced on the shift, it seems that in the Hamilton County department, the shift captains are the most senior and experienced of the shift workers. Just because these shift captains have more experience than other employees does not make them supervisory. The fact that the shift captains also happen to be more senior paramedics, and thus often have more training than other shift workers, is not indicative of their supervisory status.

Similarly to the charge nurses in the federal cases and the docking pilots in *Cooper/T. Smith, Inc.*, the shift captains are required to give some level of direction to their coworkers. As a part of the shift captains' profession, it is their job to respond to 911 calls and to ensure that medical emergencies have a proper response. It is not merely because of their status as shift captains, but also because of their professional responsibility as a licensed paramedic to ensure that these responsibilities are carried out. Further, there is testimony that any shift captain's function at an emergency scene would be to take control or command of the scene—this function is not unique to shift captains. Rather, the paramedic on the scene should have control, regardless of the fact that the paramedic is also a shift captain.

During a typical day, the shift captain makes entries in the day book and makes sure work gets done that is on the daily checklist. However, one captain testified that "[t]he captain doesn't tell you to do the checklist." All of the workers participate in completing the duties before the day's end. Also, workers testified that though the shift captain typically makes the day book entries, anyone else on the shift can do so as

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[30] *Cooper/T. Smith, Inc. v. N.L.R.B., supra* note 5, 177 F.3d at 1264.

well. The three shift workers (including the shift captain) seem to be in the trenches together and working as a team during their shifts.

The shift captains do sometimes manage staffing on their shifts. For example, Dethlefs once needed to fill a space when shift workers went to a class. Dethlefs testified that he called the director first to check, but ended up calling people to fill in the shifts. Dethlefs also testified that he could ask the director to transfer a worker, but that would not necessarily happen—he could not unilaterally control whether or not someone was transferred. There is some testimony providing that shift captains have the ability to switch shift workers from backup to first call where they need to. However, the director first designates this schedule, and the shift captain then can redesignate as needed.

Because the shift captains' responsibilities are already circumscribed to the shift captains by Hamilton County and the director of the department, and because any other responsibilities are those that are professional responsibilities in the first place, we find that the shift captains do not responsibly direct their coworkers as defined by the statute.

### Authority to Adjust Grievances

If an employee has an authority to adjust grievances, then the employee may be classified as a supervisor under the statute. In this case, a shift captain testified that he did not have the ability or authority to adjust or resolve grievances and that if someone brought to him a dispute about his or her employment, he would direct that person to the director. And Hamilton County does not argue that the shift captains have the authority to adjust grievances.

### Exercise of Independent Judgment

Though we have found that none of the 12 enumerated duties are present in the shift captains' job, as a matter of thoroughness, we also find that the shift captains do not exercise the degree of independent judgment required of supervisors under statute.

[9-12] In order for § 48-801(14) to apply to an employee, 1 of the 12 enumerated duties that are associated with being a supervisor must also be exercised with independent judgment. The statutory term "independent judgment" is ambiguous with respect to the degree of discretion required for supervisory status.[31] Many technically supervisory functions may be performed without the "'exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding'" of supervisory status.[32] "[T]he degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer."[33] As a matter of policy, the U.S. Supreme Court has reiterated, if any person who uses independent judgment to assign tasks to others or direct their work is a supervisor, then few professionals employed by organizations subject to the labor laws would receive its protections.[34]

The duties of a Hamilton County shift captain, while requiring independent judgment as would be required in any job, do not fall outside of the normal duties of any other worker at the department. The shift captains are given a list of duties that need to be completed each day, and the shift captains make sure the duties are completed. Even though the shift captain can ask that other shift workers ensure that the duties are completed, the shift captain can only use this independent judgment as circumscribed by his employer, to ensure that all shift duties are completed by the end of each workday. Further, each shift captain is a paramedic, who also has professional responsibilities that sometimes include assignment of duties

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[31] *NLRB v. Kentucky River Community Care, Inc., supra* note 11.

[32] *Id.*, 532 U.S. at 713 (quoting *Weyerhaeuser Timber Company*, 85 N.L.R.B. 1170 (1949)).

[33] *NLRB v. Kentucky River Community Care, Inc., supra* note 11, 532 U.S. at 713-14.

[34] *NLRB v. Kentucky River Community Care, Inc., supra* note 11.

and direction of other workers. As a matter of policy, not all professionals who use independent judgment in carrying out their professional responsibilities are supervisors.

The independent judgment exercised by Hamilton County shift captains, though present as in any professional job, falls below the statutory threshold to make the shift captains supervisors under the statute.

### In Interest of Employer

Finding that the first two requirements of being a supervisor under the Industrial Relations Act are not met, we need not examine the third requirement that the duties be carried out "in the interest of the employer."

### Remaining Arguments

[13] Hamilton County also makes several arguments based on considerations that are not encompassed by the statute. These considerations are otherwise known as secondary indicia. Circuits have held that secondary indicia should be relied upon only in limited circumstances.[35] Secondary indicia only aid in establishing supervisory status where there is evidence that one of the statutory or primary indicia is first satisfied.[36] Because we do not find that one of the statutory indicia is satisfied, we do not address other remaining indicators of supervisory status.

We do not address Hamilton County's assignment of error that the CIR erroneously applied the community of interest exception to the department, because regardless of this exception's application, we find that the shift captains are not supervisors and can be considered in a bargaining unit with the other shift workers.

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[35] See, e.g., *Jochims v. National Labor Relations Bd.*, 480 F.3d 1161 (C.A.D.C. 2007); *N.L.R.B. v. Dole Fresh Vegetables, Inc., supra* note 5.

[36] See, e.g., *Public Service Co. of Colorado v. N.L.R.B.*, 405 F.3d 1071 (10th Cir. 2005); *Billows Electric Supply*, 311 N.L.R.B. 878 (1993); *Juniper Industries*, 311 N.L.R.B. 109 (1993).

Where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.[37] Further, Hamilton County had the burden of proving that the shift captains were supervisors, and it did not meet that burden. Therefore, we uphold the CIR's findings that the shift captains are not statutory supervisors under § 48-801(14) and that shift captains should be included in the bargaining unit.

## CONCLUSION

We find that the CIR did not err in classifying the two shift captains as nonsupervisors and allowing them to take part in the workers' bargaining unit.

Affirmed.

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[37] *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005); *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Mark Pettit, appellee, v. Nebraska Department of Correctional Services and Frank Hopkins, appellants.

867 N.W.2d 553

Filed August 7, 2015. No. S-14-676.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Declaratory Judgments: Appeal and Error.** In a declaratory judgment action treated as an action at law, an appellate court does not disturb factual determinations unless they are clearly wrong.
5. **Prisoners: Records: Good Cause: Appeal and Error.** Whether a person seeking access to an inmate's institutional file under Neb. Rev. Stat. § 83-178 (Reissue 2014) shows good cause is a mixed question of law and fact. What the parties show presents questions of fact, which an appellate court reviews for clear error. Whether the showing establishes good cause is a question of law, and an appellate court reviews questions of law independently. Where the facts are undisputed, the entire question becomes one of law.
6. **Statutes: Legislature: Intent: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court's duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
7. **Statutes: Actions: Legislature: Intent.** Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action.

8. **Prisoners: Records: Good Cause: Legislature: Intent: Words and Phrases.** For purposes of Neb. Rev. Stat. § 83-178(2) (Reissue 2014), "good cause" means a logical or legally sufficient reason in light of all of the surrounding facts and circumstances and in view of the very narrow access intended by the Legislature.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Reversed and remanded with directions.

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

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

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

Cassel, J.

## INTRODUCTION

The district court determined that Mark Pettit showed "good cause"[1] for public inspection and reproduction of an executed inmate's drawings placed by the Nebraska Department of Correctional Services (DCS) in the inmate's institutional file. DCS and Frank Hopkins appeal. We first settle the standard of appellate review, reviewing the factual findings for clear error and the existence of good cause as a question of law. We then examine the entire statute, recognizing its emphasis of confidentiality rather than openness. Finally, we define the phrase in view of the entire statute. We conclude that the undisputed facts present a question of law and that Pettit failed to demonstrate a legally sufficient reason for inspection of the drawings.

## BACKGROUND

Pettit, a former anchorman and investigative reporter for an Omaha, Nebraska, television station, reported on the murders

[1] See Neb. Rev. Stat. § 83-178(2) (Reissue 2014).

committed by John Joubert of two children in 1983 in Sarpy County, Nebraska. Joubert pled guilty to two counts of first degree murder and was sentenced to death. The State ultimately executed him.

While Joubert was on death row, Pettit interviewed him a number of times. Pettit was then in the process of writing a book in order to have a historical record about the Joubert case. During the interviews, Joubert confessed to a string of violent crimes and admitted that he continued to have fantasies about murdering children. Joubert told Pettit that he illustrated those fantasies in two graphic drawings that had been confiscated as contraband by authorities with DCS. The drawings were placed in Joubert's institutional file maintained by DCS under § 83-178.

Before Joubert was executed, Pettit attempted to gain access to the drawings. In 1988, Joubert handed Pettit a letter that he had written to the prison warden authorizing the release of the drawings to Pettit for analysis by a mental health professional. The body of the letter stated:

> Please release to . . . Pettit of KMTV, Channel 3, the two drawings which were confiscated from my cell on 05 May 87. He intends to take them to a psychiatrist for analysis. At this time there is no agreement for them to be used in the book he is writing, but that may change in the future. Thank you.

The warden refused to release the drawings to Pettit, citing pending appeals of Joubert's convictions. For the next 25 years, the status quo continued.

In 2013, with the 30th anniversary of Joubert's crimes approaching, Pettit requested access to the drawings for inspection and reproduction. DCS refused to permit Pettit to inspect the drawings, stating that the drawings had been placed in Joubert's institutional file and were not subject to further disclosure by DCS except as provided by § 83-178.

Pettit filed a complaint for declaratory judgment against DCS and Hopkins, its acting director. Pettit asked the court to declare that the drawings were not protected by the provisions

of § 83-178 or, to the extent that they were subject to § 83-178, to declare that good cause existed for inspection and reproduction by Pettit. In their responsive pleading, DCS and Hopkins alleged that Pettit lacked good cause for accessing the drawings and that he had presented no authorization for Joubert's personal property to be turned over to him.

During trial, the district court heard testimony in favor of and against making the drawings available for public inspection. Pettit wished to inspect the drawings because Joubert believed that he was "'gonna walk out of this prison'" and said that he was making drawings about killing more children. Pettit believed the drawings showed that something was "deeply wrong" with Joubert. Pettit wanted to have the drawings analyzed by a forensic psychiatrist and to take them to the behavioral science unit at the Federal Bureau of Investigation. He felt the drawings were "significant," "historical," and "educational." The Sarpy County Attorney—who formerly investigated the Joubert case as chief deputy and counsel with the Sarpy County Sheriff's Department—testified in support of Pettit's request. He thought it was a good idea for Pettit to have access to the drawings because "it rounds out the case . . . , and it's a topic of discussion and . . . it's important that people—the public know and understand real things happen, they know the facts." But the director of DCS did not feel Joubert's drawings should be released, stating that he did not believe any social benefit of the drawings would outweigh the harm they might cause.

The district court entered judgment ordering "[DCS] and those in its employ" to permit Pettit to inspect, examine, and reproduce the drawings. The court determined that the drawings were subject to restricted access, because they fell within the statute as material that reflected on Joubert's background, conduct, and associations. The court then considered whether good cause had been shown for inspection of the drawings by Pettit. The court stated:

> That the request for inspection is not being made for the purpose of distribution to the inmate population or

> to those who routinely associate with inmates weighs in favor of good cause. These drawings are nearly 30 years old. The inmate who made them is no longer alive. The purpose of the requested inspection appears to be legitimate. The court accepts that the drawings may be useful to law enforcement officers in further understanding the psychology of serial killers; at least those similar to Joubert.

The court also noted that before he was executed, Joubert did not object to the inspection. The court stated that an objection would have weighed against good cause. The court reasoned that the possibility of reproductions of the drawings appearing in a future publication of Pettit's book did not weigh in favor of or against good cause, but that the nature of the drawings was a factor against good cause. Ultimately, the court concluded that good cause had been shown for inspection and reproduction of the drawings by Pettit.

A timely appeal followed, and we moved the case to our docket.[2]

## ASSIGNMENT OF ERROR

DCS assigns that the district court erred in ordering "[DCS] and those in its employ" to permit Pettit to inspect, examine, and reproduce the confiscated drawings of Joubert.

## STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[3] To the extent that § 83-178(2) may create a special civil statutory remedy, it is more akin to an action at law.[4]

[2,3] The parties agree upon a standard of review, but we conclude that it is incomplete. They assert, and we agree,

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

[3] *Christiansen v. County of Douglas*, 288 Neb. 564, 849 N.W.2d 493 (2014).

[4] See *In re Interest of D.I.*, 281 Neb. 917, 799 N.W.2d 664 (2011).

that statutory interpretation presents a question of law.[5] And we have often said that when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[6]

We agree that we must independently determine the meaning of the statute as a whole and, in particular, the phrase "for good cause shown."[7] But once we have defined the term in light of the entire statute, this standard does not instruct us regarding our review of the district court's *application* of the definition to the facts presented in this specific instance.

Although we have previously considered whether "good cause" existed under § 83-178, we did not articulate the appropriate standard of review. In *State v. Vela*,[8] we considered whether the prosecution had good cause to obtain access to a defendant's mental health records that were in DCS' possession. The defendant objected to the release of any medical and psychological records. We held that good cause existed when the defendant in a capital sentencing proceeding placed his or her mental health at issue by asserting mental retardation as a basis for precluding the death penalty or by asserting mental illness as a mitigating circumstance. Because we concluded that the district court did not "err," it would appear that we did not employ a review for abuse of discretion.[9]

[4] But *State v. Vela* presented the question within the framework of an existing criminal case. Here, Pettit brought a declaratory judgment action for the sole and only purpose of viewing and reproducing Joubert's drawings. In a declaratory judgment action treated as an action at law, an appellate court does not disturb factual determinations unless they are clearly

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[5] *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

[6] See *id.*

[7] § 83-178(2).

[8] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

[9] *Id.* at 141, 777 N.W.2d at 301.

wrong.[10] But we have never held that § 83-178 creates a civil statutory remedy available to the public at large.

Nor does it appear that the Nebraska appellate courts have ever articulated a standard for an appellate court's review of a lower court's determination of the existence or nonexistence of good cause. This is more complicated than it may seem. The existence of good cause surely depends upon the factual circumstances. This suggests that some deference to the lower court is appropriate. But the critical question is how far this deference extends. And the dictates of a standard of review often prove dispositive.

Case law from other jurisdictions yields little help. In the context of unemployment compensation, for example, at least one jurisdiction has stated that the existence of good cause is a question of fact,[11] but others have held that it is a question of law,[12] while yet others have determined it to be a mixed question of law and fact.[13] Florida courts have variously held the question to be one of fact, strictly one of law, and a mixed question of law and fact.[14] Rhode Island recognizes the issue as a mixed question of law and fact, but has clarified that the determination of good cause will be made as a matter of law

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[10] *Glad Tidings v. Nebraska Dist. Council*, 273 Neb. 960, 734 N.W.2d 731 (2007).

[11] See, *Claim of Christophides*, 243 A.D.2d 807, 662 N.Y.S.2d 625 (1997); *Sandler v. Catherwood*, 22 A.D.2d 740, 253 N.Y.S.2d 328 (1964).

[12] See, e.g., *Cooper v U of M*, 100 Mich. App. 99, 298 N.W.2d 677 (1980); *Goodwin v. BPS Guard Services, Inc.*, 524 N.W.2d 28 (Minn. App. 1994); *Mo. Div of Employment Sec. v. Labor & Indus.*, 616 S.W.2d 138 (Mo. App. 1981); *McPherson v. Employment Division*, 285 Or. 541, 591 P.2d 1381 (1979).

[13] See, e.g., *Board of Educ., Mont. Co. v. Paynter*, 303 Md. 22, 491 A.2d 1186 (1985); *Snyder v. Virginia Employment Com'n*, 23 Va. App. 484, 477 S.E.2d 785 (1996).

[14] See *Tourte v. Oriole of Naples, Inc.*, 696 So. 2d 1283 (Fla. App. 1997) (collecting cases).

when the facts may lead only to one reasonable conclusion.[15] Utah has stated that a determination of good cause is a mixed question of law and fact, but that the determination is more fact-like in nature.[16]

[5] We hold that whether a person seeking access to an inmate's institutional file under § 83-178 shows good cause is a mixed question of law and fact. What the parties show presents questions of fact, which we review for clear error. But whether the showing establishes good cause is a question of law. As noted above, an appellate court reviews questions of law independently. Thus, where the facts are undisputed, the entire question becomes one of law.

## ANALYSIS

We now turn to an examination of the controlling statute. Section 83-178 states:

> (1) The director shall establish and maintain, in accordance with the regulations of the department, an individual file for each person committed to the department. Each individual file shall include, when available and appropriate, the following information on such person:
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> (a) His or her admission summary;
>
> (b) His or her presentence investigation report;
>
> (c) His or her classification report and recommendation;
>
> (d) Official records of his or her conviction and commitment as well as any earlier criminal records;
>
> (e) Progress reports and admission-orientation reports;
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> (f) Reports of any disciplinary infractions and of their disposition;
>
> (g) His or her parole plan; and

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[15] See *D'Ambra v. Board of Review*, 517 A.2d 1039 (R.I. 1986). See, also, *Murphy v. Fascio*, 115 R.I. 33, 340 A.2d 137 (1975).

[16] See *Sawyer v. Department of Workforce Services*, 345 P.3d 1253 (Utah 2015).

(h) Other pertinent data concerning his or her background, conduct, associations, and family relationships.

(2) Any decision concerning the classification, reclassification, transfer to another facility, preparole preparation, or parole release of a person committed to the department shall be made only after his or her file has been reviewed. *The content of the file shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall not be accessible to any person committed to the department.* An inmate may obtain access to his or her medical records by request to the provider pursuant to sections 71-8401 to 71-8407 notwithstanding the fact that such medical records may be a part of his or her individual department file. The department retains the authority to withhold mental health and psychological records of the inmate when appropriate.

(3) The program of each person committed to the department shall be reviewed at regular intervals and recommendations shall be made to the chief executive officer concerning changes in such person's program of treatment, training, employment, care, and custody as are considered necessary or desirable.

(4) The chief executive officer of the facility shall have final authority to determine matters of treatment classification within his or her facility and to recommend to the director the transfer of any person committed to the department who is in his or her custody.

(5) The director may at any time order a person committed to the department to undergo further examination and study for additional recommendations concerning his or her classification, custodial control, and rehabilitative treatment.

(6) Nothing in this section shall be construed to limit in any manner the authority of the Public Counsel to inspect and examine the records and documents of the department pursuant to sections 81-8,240 to 81-8,254, except

> that the Public Counsel's access to an inmate's medical or mental health records shall be subject to the inmate's consent. The office of Public Counsel shall not disclose an inmate's medical or mental health records to anyone else, including any person committed to the department, except as authorized by law.

(Emphasis supplied.)

[6] Although the parties have focused on the emphasized language of § 83-178(2), we examine the entire statute and apply the usual principles of statutory interpretation. Statutory language is to be given its plain and ordinary meaning, and an appellate court's duty in discerning the meaning of a statute is to 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.[17]

Numerous features of § 83-178 caution that the Legislature intended the remedy of subsection (2) to apply only in very narrow circumstances. First, subsection (2) declares that the content of the file is confidential. These are not "open" records. This contrasts markedly with the provisions generally governing access to public records.[18] Second, subsection (1) catalogs the required contents of an institutional file. And virtually all of these documents or materials are confidential in nature or by law. For example, the file contains an inmate's presentence report, which another statute expressly protects from public disclosure.[19] Third, DCS' use of the materials is driven by penological purposes. The first sentence of

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[17] *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011).

[18] See Neb. Rev. Stat. § 84-712 et seq. (Reissue 2014).

[19] See Neb. Rev. Stat. § 29-2261(6) (Cum. Supp. 2014) ("presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, the probation administrator or his or her designee, or others entitled by law to receive such information").

subsection (2) mandates that before undertaking any decision involving an inmate's classification, transfer, or release, prison officials must review the institutional file. Subsections (3), (4), and (5) focus entirely on internal prison matters regarding the particular inmate. Fourth, the statute's confidentiality provision was evidently considered so comprehensive and robust that in 2001, the Legislature deemed it necessary to expressly provide the Public Counsel—a state officer already empowered with broad investigative authority[20]—with limited access to the materials.[21] The "good cause" exception of subsection (2) must be viewed in the light of this rigorous statutory scheme.

[7] Moreover, we have considerable doubt that the Legislature intended to create a private right of action enforceable by a declaratory judgment. Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action.[22] First, § 83-178(2) does not authorize the director of DCS to unilaterally grant the privilege of inspection to a member of the public. Rather, the inspection may be allowed only by "court order." Thus, the remedy is clearly not directed toward review of a decision by the director—rather, the director has no discretion under the statute to allow public inspection. Second, the statutory language does not expressly create a private right of action. Third, the language seems calculated to apply in the context of an existing court proceeding, having a separate purpose or right of action, where the material in the institutional file would serve as evidence. But this issue was not raised in the district court. Thus, for purposes of this opinion, we assume without deciding that a private right of action exists.

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[20] See Neb. Rev. Stat. § 81-8,240 et seq. (Reissue 2014).

[21] See 2001 Neb. Laws, L.B. 15, § 1.

[22] *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012).

We now turn to the specific provision stating, "The content of the file shall be confidential and shall not be subject to public inspection except by court order for good cause shown and shall not be accessible to any person committed to the department."[23] Our decision in *State v. Vela*[24] did not define the phrase "for good cause shown."[25] Thus, we must determine its meaning in this particular context.

In other contexts, this court and the Nebraska Court of Appeals have quoted a dictionary definition of "good cause" as "'a cause or reason sufficient in law; one that is based on equity or justice or that would motivate a reasonable man under all the circumstances.'"[26] And we have declared that the meaning of good cause must be determined in light of all of the surrounding circumstances.[27] In the context of a statute concerning vacating an order in a formal testacy proceeding,[28] we stated that good cause meant "a logical reason or legal ground, based on fact or law, why an order should be modified or vacated."[29] In addressing a statute concerning the disposition of untried charges,[30] the Court of Appeals stated that "good cause is something that must be substantial, but also a factual question dealt with on a case-by-case basis."[31]

[8] We conclude that the same definition should apply to this statute. We hold that for purposes of § 83-178(2), "good

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[23] § 83-178(2).

[24] *State v. Vela, supra* note 8.

[25] § 83-178(2).

[26] *DeVries v. Rix*, 203 Neb. 392, 403, 279 N.W.2d 89, 95 (1979) (emphasis omitted). Accord *In re Conservatorship of Estate of Marsh*, 5 Neb. App. 899, 566 N.W.2d 783 (1997).

[27] See *DeVries v. Rix, supra* note 26.

[28] Neb. Rev. Stat. § 30-2437 (Reissue 2008).

[29] *DeVries v. Rix, supra* note 26, 203 Neb. at 403-04, 279 N.W.2d at 95.

[30] See Neb. Rev. Stat. § 29-3805 (Reissue 2008).

[31] *State v. Caldwell*, 10 Neb. App. 803, 808, 639 N.W.2d 663, 667 (2002).

cause" means a logical or "legally sufficient reason"[32] in light of all of the surrounding facts and circumstances and in view of the very narrow access intended by the Legislature. Because our decision is based on the plain and ordinary meaning of the statute, we need not resort to legislative history. However, for the sake of completeness, we observe that the first two sentences of § 83-178(2) remain essentially unchanged from their original enactment in 1969[33] and that the legislative history of that enactment does not speak to the meaning or purpose of the provision.[34]

The question then becomes whether, in light of all of the surrounding facts and circumstances and in view of the very narrow access intended by the Legislature, Pettit established a logical or legally sufficient reason. We conclude that he did not.

In essence, Pettit and the Sarpy County Attorney—individuals involved in reporting on and investigating Joubert's crimes—believed that the drawings had historical value and that the public had a right to know about the drawings. But as we have already explained, this is not an "open records" provision. Thus, their views or opinions cannot enlarge the purpose defined by the statute or detract from the statutory prescription of confidentiality.

Although Pettit also proffered a scholarly or forensic purpose, it was purely speculative. Pettit explained that Joubert believed he would be released from prison and that Joubert "left a roadmap" about killing more children upon release. Pettit wished to have the drawings examined by a forensic

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[32] Black's Law Dictionary 266 (10th ed. 2014).

[33] See 1969 Neb. Laws, ch. 817, § 9, p. 3076.

[34] See, Introducer's Statement of Intent, L.B. 1307, Committee on Government and Military Affairs, 80th Leg., 1st Sess. (Mar. 20, 1969); Committee on Government and Military Affairs Hearing, L.B. 1307, 80th Leg., 1st Sess. 8-24 (Mar. 20, 1969); Floor Debates, 1st Sess. 2990-93 (July 17, 1969), 1st Sess. 3231-32 (July 25, 1969), 1st Sess. 3304-11 (July 29, 1969), and 1st Sess. 3888 (Aug. 12, 1969).

psychiatrist and believed that police could learn from the drawings and resulting analysis. But Pettit presented no evidence that he possessed any scientific or other qualifications to make such a judgment. And he offered no evidence from any expert in psychology or penology supporting his belief regarding the value of such an examination.

On appeal, DCS focuses on the financial benefits that might flow to Pettit from sales of future editions of his book. Before the district court, the testimony of DCS' director did not emphasize this circumstance. We do not view Pettit's interest or expectation of financial gain as a significant factor in our analysis, but whatever weight it may have does not support his request. At oral argument, there was also a suggestion that the words "public inspection" omitted copying or duplication of the materials. In light of our conclusion that Pettit failed to show good cause, we need not discuss the nature and extent of a trial court's power in a proper case to impose conditions for "public inspection."

## CONCLUSION

Upon our de novo review of the undisputed facts, we conclude that Pettit failed to demonstrate good cause for inspection and reproduction of the drawings. We therefore reverse the district court's judgment and remand the cause with directions to dismiss Pettit's complaint.

Reversed and remanded with directions.

Stephan, J., not participating.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Tedd Bish Farm, Inc., a Nebraska corporation, appellant, v. Southwest Fencing Services, LLC, a Nebraska limited liability company, appellee.

867 N.W.2d 265

Filed August 7, 2015. No. S-14-915.

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 the party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
3. ____. Summary judgment is proper if the pleadings and admissible evidence offered 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.
4. ____. When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.
5. **Damages.** The issue of whether an injured party actually exercised reasonable efforts in mitigating the damage is a question of fact.
6. **Summary Judgment: Damages.** A trial court must decide the issue of mitigation of damages as a matter of law on summary judgment where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom.
7. **Damages.** Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury.

8. ____. A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts.
9. ____. The avoidable consequences doctrine creates responsibility only for those hypothetical ameliorative actions that could have been accomplished through ordinary and reasonable care.
10. ____. An injured party may be excused from the duty to mitigate if the injured party lacks the financial ability to do so.
11. ____. The duty to mitigate is often excused in cases where the defendant inhibits the plaintiff from taking actions to avoid additional damages.
12. **Damages: Intent.** The repeated assurances of a defendant after an injury has begun that he or she will remedy the condition is sufficient justification for a plaintiff's failure to take steps to minimize loss, so long, at least, as there is ground for expecting that the defendant will perform.

Appeal from the District Court for Hamilton County, Rachel A. Daugherty, Judge, on appeal thereto from the County Court for Hamilton County, Linda S. Caster Senff, Judge. Judgment of District Court affirmed.

Scott D. Pauley, of Conway, Pauley & Johnson, P.C., for appellant.

Matthew B. Reilly, of Erickson & Sederstrom, P.C., L.L.O., for appellee.

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

Heavican, C.J.

## I. NATURE OF CASE

Tedd Bish Farm, Inc., owns a 120-acre tract of farmland in Hamilton County, Nebraska. We refer to Tedd Bish Farm and its owner, Tedd Bish, collectively as "Bish." One 6.5-acre corner of the land is irrigated by a gravity irrigation system, which is fed by a pipe that runs along the property fence line. Southwest Fencing Services, LLC (Southwest Fencing), damaged a section of the pipe while removing and replacing the

fence along Bish's property. Bish discovered the damage to the pipe in July 2011. According to Bish, the pipe needed to be repaired by June 1, 2012, in order to avoid crop damage in the 6.5-acre corner for the 2012 crop year. Bish took the pipe in to be repaired on May 15, 2012, and was informed that repairs could be made by June 1. Bish, according to the county court, "chose not to authorize repairs" at that time, and the pipe was not repaired before June 1.

Bish filed a complaint in the county court for Hamilton County, seeking damages for repair of the pipe and lost profits from loss of use of the pipe for the 2012 crop year. The county court granted Southwest Fencing's motion for partial summary judgment on the issue of whether Bish failed to mitigate damages and complete the repairs within a reasonable amount of time. That order was affirmed by the district court for Hamilton County. Bish now appeals to this court from the district court's order affirming the county court's order granting Southwest Fencing's motion for partial summary judgment on the issue of whether Bish had made reasonable efforts to mitigate its damages.

We determine that summary judgment on an issue of fact, such as whether a party exercised reasonable efforts in mitigating damages, is appropriate when reasonable minds could draw but one conclusion from the facts. Further, we find that the district court did not err in affirming the county court's order, because the cost of the repair was reasonable in comparison to the damages avoided; Bish had the financial ability to pay for the repairs; and Southwest Fencing's own actions did not prevent Bish from authorizing the repairs itself.

## II. BACKGROUND

As acknowledged by the county and district courts, the underlying facts of the case are largely not in dispute by the parties. Bish owns a 120-acre tract of farmland in Hamilton County, and one side of Bish's property, lined by a fence, is directly adjacent to Interstate 80. The majority of Bish's land

is irrigated by a center pivot, but a 6.5-acre corner of Bish's land cannot be reached by the pivot and is instead irrigated by gravity irrigation.

Bish utilizes approximately 660 feet of irrigation pipe, which runs along the property fence line adjacent to Interstate 80, to supply water to the gravity irrigation system. Southwest Fencing contracted with Nebraska's Department of Roads to replace sections of fence separating private property from Interstate 80 in Hamilton County. During the course of replacing the fence on Bish's property in 2011, an employee from Southwest Fencing ran over portions of Bish's irrigation pipe with a skid loader and caused damage to the pipe.

On July 25, 2011, Bish discovered the damage to the pipe and contacted Southwest Fencing. A representative for Southwest Fencing denied that Southwest Fencing caused the damage and refused to pay for the repairs. On the same day, Bish contacted the Department of Roads. Bish testified in his deposition that the department informed him that Southwest Fencing's insurance company would pay for the damage to the pipe. Bish then contacted Southwest Fencing again that day, but its representative again denied any liability. Bish testified in his deposition that he did not remove the pipe or seek to get the pipe repaired at that time because Southwest Fencing had yet to admit to the damage.

Bish contacted Southwest Fencing again in 2012 regarding the damaged irrigation pipe, and its representative gave Bish the contact information for Southwest Fencing's insurer. On May 14, 2012, Bish met with an insurance claims investigator for Southwest Fencing's insurer. The claims investigator acknowledged that the damage to the pipe was caused by Southwest Fencing and told Bish to take the pipe to Northern Agri-Services, Inc., to get an estimate for the repair. Bish testified that he told the claims investigator the pipe needed to be repaired by June 1 in order to utilize the gravity irrigation system for the 2012 crop year. In its motion for partial summary judgment, Southwest Fencing did not dispute the significance of the June 1 cutoff date.

On May 15, 2012, Bish took the damaged pipe to Northern Agri-Services for an estimate. Bish also informed Northern Agri-Services that the pipe needed to be repaired by June 1. Northern Agri-Services estimated the cost to repair the pipe would be $1,772.40 and informed Bish that it could complete the repairs by June 1. Bish, however, did not authorize the repairs at that time. Bish testified in his deposition that he did not authorize the repairs because he believed Southwest Fencing's insurance company needed to approve the repairs before Northern Agri-Services could make the repairs. Bish testified that he had the financial ability to pay for the repairs himself at that time.

On June 5, 2012, Southwest Fencing requested its own estimate, and on July 13, it verbally offered Bish $1,772.40 to fix the pipe and later offered the same amount in writing on August 21. The pipe was not repaired in time for the 2012 crop year. Bish eventually had the pipe repaired before the 2013 crop season, and Northern Agri-Services sent Bish an invoice totaling $2,854.83 for the repairs. Southwest Fencing never paid Bish for the repairs.

Bish filed a complaint on May 22, 2013, in the county court for Hamilton County alleging that Southwest Fencing negligently damaged the irrigation pipe. In an amended complaint, Bish requested $13,578.62 in damages: $2,854.83 for the cost of the repair of the damaged irrigation pipe and $10,723.79 in lost profits for the 2012 crop year. In Southwest Fencing's answer to Bish's complaint, Southwest Fencing affirmatively pled that Bish failed to mitigate its damages with respect to the lost profits.

Southwest Fencing filed a motion for partial summary judgment on the issue of mitigation of damages. In support of its motion for partial summary judgment, Southwest Fencing submitted Bish's response to a request for admissions and a portion of Bish's deposition testimony. Bish submitted an affidavit from Bish and Southwest Fencing's answers to interrogatories. On January 31, 2014, the county court determined

that Bish did not seek to repair the pipe within a reasonable amount of time and that therefore, Bish could not recover any lost profits associated with not having the pipe repaired by June 1, 2012.

A bench trial on the issues of negligence and the amount of damages for repair or replacement of the pipe was held on May 12, 2014. On May 23, the county court entered judgment in favor of Bish and awarded Bish $2,854.83. Bish then appealed to the Hamilton County District Court the county court's order granting Southwest Fencing's partial motion for summary judgment. On September 19, the district court affirmed the county court's order granting Southwest Fencing's motion for partial summary judgment on the issue of whether Bish made reasonable efforts to mitigate its damages. Bish now appeals to this court.

## III. ASSIGNMENT OF ERROR

Bish assigns, consolidated and restated, that the district court erred in affirming the county court's order granting partial summary judgment on the issue of whether Bish failed to mitigate damages as to the 2012 crop year.

## IV. STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted, and gives the party the benefit of all reasonable inferences deducible from the evidence.[1]

## V. ANALYSIS

Bish assigns that the district court erred in affirming the county court's order granting partial summary judgment on the issue of mitigation of damages. Bish argues that (1) summary judgment was not appropriate and (2) the evidence, viewed in

[1] *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

a light most favorable to Bish, shows that Bish exercised reasonable efforts in attempting to mitigate the damages.

### 1. Summary Judgment

[2-4] Bish contends that summary judgment was not appropriate, because the issue of whether Bish acted reasonably in mitigating the damages is a question of fact and should have been resolved by the jury. Southwest Fencing, on the other hand, contends that mitigation is a question of law. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.[2] Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3] When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.[4]

[5,6] The decision over whether the issue of mitigation of damages should be presented to the jury lies with the court and is a question of law.[5] However, the issue of whether an injured party actually exercised reasonable efforts in mitigating the damage is a question of fact.[6] But a trial court must

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[2] *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014).

[3] *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015).

[4] *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015).

[5] See *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988).

[6] See, e.g., *Manufacturers Life Ins. v. Mascon Inform. Techn.*, 270 F. Supp. 2d 1009 (N.D. Ill. 2003); *Aircraft Guar. Corp. v. Strato-Lift, Inc.*, 991 F. Supp. 735 (E.D. Pa. 1998); *McCormick Intern. USA, Inc. v. Shore*, 152 Idaho 920, 277 P.3d 367 (2012); *Lewis v. Community First Nat. Bank, N.A.*, 101 P.3d 457 (Wyo. 2004); *Tincher v. Interstate Precision Tool Corp.*, No. 19093, 2002 WL 1396097 (Ohio App. June 28, 2002) (unpublished opinion) (cause dismissed at 96 Ohio St. 3d 1531, 776 N.E.2d 111 (table captioned "Supreme Court of Ohio Table Decisions")).

decide the issue of mitigation of damages as a matter of law on summary judgment "[w]here the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom . . . ."[7] Applying this same principle, courts in other jurisdictions have found summary judgment to be appropriate for the issue of mitigation "where the facts clearly demonstrated the injured party, by his own avoidable action or inactions, caused the damages about which he complained."[8] Thus, even though the issue of whether an injured party's actions constituted reasonable efforts to mitigate is a question of fact, summary judgment would still be appropriate so long as "reasonable minds could not differ concerning efforts to mitigate."[9]

### 2. Reasonable Efforts

[7,8] Keeping in mind that we view the evidence in a light most favorable to Bish, we next move to the question of whether Bish took reasonable steps to mitigate the damage as a matter of law.

> Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury.[10]

"A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts."[11] In assessing

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[7] *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313, 319, 739 N.W.2d 442, 447 (2007).

[8] *Lewis, supra* note 6, 101 P.3d at 460.

[9] *Id.*

[10] *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 95, 710 N.W.2d 71, 80 (2006).

[11] *Id.*

the reasonableness of Bish's efforts, we look to (a) the cost of mitigation, (b) Bish's financial ability to mitigate, and (c) the actions of Southwest Fencing.

(a) Cost of Mitigation

[9] The avoidable consequences doctrine creates responsibility only for "those hypothetical ameliorative actions that could have been accomplished through ordinary and reasonable care."[12] In property damage cases, courts generally measure reasonableness by comparing the cost of the threatened injury against the cost of the repair.[13] To put it another way, the injured party has the responsibility to protect himself or herself if it can be done at a "'"trifling expense."'"[14] "The word 'trifling' means a sum which is trifling in comparison with the consequential damages which the party is seeking to recover in a particular case."[15]

A New Hampshire case similarly involving lost crops illustrates this principle.[16] In that case, the plaintiffs, owners of farmland, entered into a landfill removal contract with the defendant. Pursuant to the terms of the agreement, the defendant was allowed to remove earthfill from the farmland, but was also obligated to restore the excavation area to its original condition after completion of the work. The defendant failed to satisfactorily complete the restoration of the land, and the plaintiffs sued for breach of contract. The trial court awarded the plaintiffs $10,500 in damages for the cost to restore the topsoil and $3,000 in lost profit for 2 years'

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[12] 25 C.J.S. *Damages* § 184 at 548 (2012) (citing *System Components Corp. v. Florida DOT*, 14 So. 3d 967 (Fla. 2009)).

[13] See 25 C.J.S., *supra* note 12, § 45.

[14] See, e.g., *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 857 (Tex. 1999).

[15] *Tatum v. Morton*, 386 F. Supp. 1308, 1311 (D.D.C. 1974) (citing 22 Am. Jur. 2d *Damages* § 32 (1965)).

[16] *Emery v. Caledonia Sand and Gravel Co.*, 117 N.H. 441, 374 A.2d 929 (1977).

worth of lost crops from the damaged area. On appeal, the defendant argued, with respect to the award of lost profit, that the plaintiffs failed to mitigate damages by replacing the topsoil themselves. The New Hampshire Supreme Court determined that it would not be reasonable to expect the plaintiffs to spend $10,500 in order to avoid $3,000 in lost profits. Cases from other jurisdictions have reached similar conclusions when the cost of mitigation outweighed the damages avoided.[17]

Contrary to the cases cited above, the cost of mitigation in this case is far less than the potential damages avoided. The $2,845 cost of the repair is a reasonable expense by comparison, considering Bish stood to gain almost four times that amount in additional income (Bish alleged approximately $10,700 in lost profits) if it was able to farm the 6.5-acre corner section for the 2012 crop year. An ordinarily prudent person in Bish's position would have viewed the cost of the repair as a reasonable expense given the circumstances.

(b) Bish's Financial Ability

[10] Even if mitigation could be achieved through reasonable expense compared to the damages avoided, an injured party may be excused from the duty to mitigate if the injured party lacks the financial ability to do so.[18] If Bish did not have the financial ability to pay for the repairs of the pipe before June 1, 2012, then it may be excused from the duty to mitigate. Bish admitted in his deposition that Bish had the ability to pay for the repairs, and eventually did fund the repair of the pipe before the 2013 crop year. Bish also stated in his deposition that had he caused the damage to the pipe himself, he would have immediately taken the pipe in

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[17] See, *Lochthowe v. C.F. Peterson Estate*, 692 N.W.2d 120 (N.D. 2005); *Avco Financial Services v. Ramsey*, 631 So. 2d 940 (Ala. 1994); *Lake Village Impl. Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

[18] See, e.g., *McPherson v. Kerr*, 195 Mont. 454, 636 P.2d 852 (1981).

to be repaired. The record reveals Bish had the wherewithal to make the repairs, which further leads us to the conclusion that Bish did not exercise reasonable efforts in minimizing the injury.

(c) Southwest Fencing's Actions

[11,12] The duty to mitigate is also often excused in cases where the defendant inhibits the plaintiff from taking actions to avoid additional damages.[19] For example, it has been said that "'[t]he repeated assurances of the defendant after an injury has begun that he will remedy the condition is sufficient justification for the plaintiff's failure to take steps to minimize loss, so long, at least, as there is ground for expecting that [the defendant] will perform.'"[20] Bish testified that he did not authorize the repair because he believed Southwest Fencing needed to request an estimate, and in his affidavit, he stated that after taking the pipe to Northern Agri-Services, he "had done everything reasonably necessary to ensure the irrigation pipe was repaired by June 1, 2012." But there is no evidence that a representative of Southwest Fencing actually assured Bish that Southwest Fencing would pay for the repairs before June 1. In both his deposition and affidavit, Bish stops short of stating that Southwest Fencing indicated to Bish that it should not or could not authorize the repairs itself. Bish also acknowledged in his deposition that nothing prevented Bish from authorizing Northern Agri-Services to start the repairs. Although we give Bish the benefit of all reasonable inferences, there is nothing in the record which indicates that Southwest Fencing, or anyone acting on behalf of Southwest Fencing, prevented Bish from authorizing and paying for the repairs to avoid the lost profits for the 2012 crop year.

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[19] See 22 Am. Jur. 2d *Damages* § 356 (2013) (citing *First Nat'l Bank v. Milford*, 239 Kan. 151, 718 P.2d 1291 (1986)).

[20] *Little v. Rose*, 285 N.C. 724, 728, 208 S.E.2d 666, 669 (1974). See, also, *United States v. Russell Electric Co.,* 250 F. Supp. 2 (S.D.N.Y. 1965).

Accordingly, we find the record indicates the cost to mitigate the damage was reasonable, Bish had the financial ability to mitigate the damages, and Southwest Fencing did not give any assurances that would justify Bish's inaction. In this case, the record clearly demonstrates that Bish, through its own inaction, did not exercise reasonable efforts in attempting to avoid the lost profits for the 2012 crop year; as a result, reasonable minds could not differ concerning the efforts to mitigate. The district court did not err in affirming the county court's order granting Southwest Fencing's motion for partial summary judgment with respect to the issue of mitigation.

## VI. CONCLUSION

The district court's order affirming the county court's order is affirmed.

Affirmed.

Stephan, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellant, v.
Breanna N. Kleckner, appellee.
867 N.W.2d 273

Filed August 7, 2015. No. S-14-960.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **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.
4. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case.
5. **Appeal and Error.** The purpose of appellate review under Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) is to provide an authoritative statement of the law to serve as precedent in future cases.
6. **Judgments: Appeal and Error.** Only those issues on which the district court made a ruling are subject to review under Neb. Rev. Stat. § 29-2315.01 (Reissue 2008).
7. **Double Jeopardy.** The Double Jeopardy Clauses of the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
8. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.

9. **Criminal Law: Double Jeopardy.** The *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), or "same elements" test, does not apply if the State charges the defendant with multiple counts of a statutory crime that can be committed in different ways.
10. **Criminal Law: Double Jeopardy: Legislature: Intent.** Absent a contrary legislative intent, multiple counts of assault are the "same offense" for double jeopardy purposes if a break occurred between the alleged assaults that allowed the defendant to form anew the required criminal intent.
11. **Criminal Law: Double Jeopardy: Convictions: Sentences.** Even if the government charges the defendant with multiple counts of the same offense, the multiple punishments prong of the double jeopardy bar is not violated if the jury convicts the defendant of only one count.
12. **Criminal Law: Double Jeopardy: Trial: Convictions.** For double jeopardy purposes, the presence of multiple counts in a single trial does not amount to a second prosecution for the same offense after an acquittal or conviction.
13. **Double Jeopardy.** The application of Neb. Rev. Stat. § 29-2316 (Reissue 2008) turns on whether the trial court placed the defendant in jeopardy, not whether the Double Jeopardy Clause bars further action.

Appeal from the District Court for Sarpy County, William B. Zastera, Judge, on appeal thereto from the County Court for Sarpy County, Stefanie A. Martinez, Judge. Exception sustained.

Philip K. Kleine, Deputy Sarpy County Attorney, for appellant.

Karen S. Nelson, of Shirber & Wagner, L.L.P., for appellee.

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

Connolly, J.

SUMMARY

On the day after Thanksgiving, former intimate partners Breanna N. Kleckner and Chase McGee had a dispute about which of them would care for their son over the weekend. The State charged Kleckner in county court with three counts

of third degree domestic assault arising from the dispute. Each count alleged that Kleckner had violated a different subsection of the same statute. The court dismissed one count after the State rested. Of the two remaining counts, the jury convicted Kleckner of one and acquitted her of the other. Kleckner appealed to the district court, arguing that the State could not charge her with multiple counts under a single statute if each count arose from the same incident. The district court agreed with Kleckner and vacated her sentence. The State filed an objection to the district court's judgment under Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). Because the State tried and punished Kleckner only once, we sustain the State's objection.

## BACKGROUND

### Factual Background

Kleckner and McGee had an intimate relationship that lasted more than 2 years. They have a son, T.M., who was about 14 months old at the time of the alleged assault. Kleckner and McGee do not have a "custody agreement" for T.M. Their childcare arrangements are informal.

On the evening of November 29, 2013, McGee was at his mother's house. He called Kleckner and asked her to give him a ride to a shoestore. Kleckner agreed, and she, McGee, and T.M. went to the store together.

On the way back to McGee's mother's house, Kleckner and McGee started to argue about who would have T.M. for the weekend. McGee testified that once they arrived, he carried T.M. to the house while Kleckner trailed behind and pushed McGee. McGee said that once inside, his niece took T.M. away and that Kleckner walked out of the house after making a telephone call.

According to McGee, he looked out the window and saw Kleckner throwing rocks at his car. McGee went outside and called the 911 emergency dispatch service. He testified that Kleckner hit him in his right eye about three times either

before or during the telephone call. McGee recalled that Kleckner drove away while he was on the telephone with the 911 operator.

Kleckner remembered the evening differently. She said that after returning from the shoestore, she walked into the house to speak with McGee's mother, with McGee following her. Kleckner said that after leaving the house, she got into her car, which was parked in the street, and backed it into the driveway. Then she got out, picked up a rock, and cocked her arm in the direction of McGee's vehicle because she "just felt really disrespected." But Kleckner said that she had a change of heart and either "threw [the rock] to the side" or "dropped it."

Kleckner said that at this point, she got into her car again and was prepared to leave. But McGee came out of the house and grabbed the interior of her car through an open window. Kleckner testified that she sidled out of her car and pushed McGee's shoulder to get his arm out of the way. Kleckner said that after she did so, she locked the doors and listened to McGee call 911 before driving away.

Kleckner testified that she did not touch McGee other than to push him from her car. But McGee's sister-in-law, who was at the house, testified that McGee's right eye was swollen and red after Kleckner left. Similarly, the police officer who responded to McGee's 911 call testified that McGee's right eye and cheek were swollen and red.

Kleckner testified that she did not "threaten to hurt" McGee. Neither McGee nor any of the State's other witnesses testified that Kleckner threatened McGee. But the State played a recording of the 911 call for the jury, during which McGee told the operator that Kleckner had "threatened to kill me." In a petition for a domestic abuse protection order, McGee wrote that Kleckner told him while they were in his mother's house that "she was going to have people beat me up and kill me."

County Court

The State filed a criminal complaint in county court charging Kleckner with three counts of third degree domestic assault under Neb. Rev. Stat. § 28-323(1) (Cum. Supp. 2014). Each count alleged that the conduct occurred in Sarpy County, Nebraska, on November 29, 2013; that McGee was the victim; and that McGee was Kleckner's intimate partner. Count I alleged that Kleckner intentionally and knowingly caused McGee bodily injury under § 28-323(1)(a). Count II alleged that Kleckner threatened McGee with imminent bodily injury under § 28-323(1)(b). Count III alleged that Kleckner threatened McGee in a menacing manner under § 28-323(1)(c).

Kleckner filed an omnibus motion to quash, a demurrer, and a motion to elect. In the operative filing, Kleckner asserted that the State "cannot charge [her] with violating all three subsection[s] simultaneously." She alleged that the complaint violated her double jeopardy rights under the federal and Nebraska Constitutions and her due process rights under the federal Constitution.

The county court overruled Kleckner's motion to quash and demurrer but held her motion to elect in abeyance until the close of the State's case.

After the State rested, Kleckner renewed her motion to elect and moved for a directed verdict. The court overruled Kleckner's motion for a directed verdict but sustained her motion to elect as to count III because the State had not made a "prima facie showing" for that count.

The jury returned a verdict finding Kleckner guilty of count I and not guilty of count II. The county court sentenced Kleckner to 1 year of probation.

District Court

Kleckner appealed her conviction to the district court. She assigned, in relevant part, that the county court erred by overruling her motion to quash because the State violated her

double jeopardy and due process rights by charging her with three counts under the same statute.

The district court concluded that § 28-323(1) was "a single offense committable alternative ways" and, without clearly explaining why, assumed that the presence of multiple counts in the information required it to reverse Kleckner's conviction. Because the Double Jeopardy Clause bars a second trial after an acquittal, the court determined that the State could not retry Kleckner.

## ASSIGNMENTS OF ERROR

The State assigns that the district court erred by (1) incorrectly interpreting *Blockburger v. United States*[1]; (2) determining that "two charges under the same statute were, for purposes of prosecution, the same as two charges for the same act" under the Double Jeopardy Clause; (3) determining that the state should have elected between multiple counts; and (4) "arbitrarily acquit[ting Kleckner] of all charges."

## STANDARD OF REVIEW

[1-3] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.[2] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary,

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[1] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[2] *State v. Avery*, 288 Neb. 233, 846 N.W.2d 662 (2014).

[3] *Id.*

capricious, nor unreasonable.[4] But we independently review questions of law.[5]

## ANALYSIS

[4-6] Before addressing the merits, we note that the State is the appellant. Absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case.[6] In this case, the State appeals under § 29-2315.01, which allows a county attorney to request appellate review of an adverse ruling by a district court.[7] The purpose of appellate review under § 29-2315.01 is to provide an authoritative statement of the law to serve as precedent in future cases.[8] But we cannot expound the law on whatever question the State might ask. Only those issues on which the district court made a ruling are subject to review.[9]

The State argues that the district court "erred in determining that because the three charges arose from violations of the same statute, that the violations constituted the same act and multiple prosecutions were therefore barred by the Double Jeopardy Clause."[10] The State contends that the three subsections of § 28-323(1) are "multiple offenses because each subsection includes a distinct and separate element that the others do not."[11] So, prosecuting Kleckner on multiple counts did not violate the double jeopardy bar.

Of course, Kleckner disagrees. She argues that third degree domestic assault is "one offense committable in multiple

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[4] *Id.*

[5] *Id.*

[6] See *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009).

[7] See *id.*

[8] *State v. Warner*, 290 Neb. 954, 863 N.W.2d 196 (2015).

[9] *State v. Figeroa, supra* note 6.

[10] Brief for appellant at 19.

[11] *Id.* at 14.

ways."[12] Kleckner asserts that each subsection of § 28-323(1) is but a part of "a single offense," but she is less clear about how this conclusion supports the district court's judgment.[13] As noted, Kleckner argued in her appeal to the district court that the State violated her double jeopardy and due process rights by charging her with multiple counts of the same crime.

[7,8] The Double Jeopardy Clauses of the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[14] The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.[15]

Kleckner argues that the information was multiplicitous. That is, the information charged the same offense in multiple counts.[16] Under § 28-323(1), a "person commits the offense of domestic assault in the third degree if he or she: (a) Intentionally and knowingly causes bodily injury to his or her intimate partner; (b) Threatens an intimate partner with imminent bodily injury; or (c) Threatens an intimate partner in a menacing manner."

To decide whether each subsection under § 28-323(1) is a different offense for double jeopardy purposes, the State urges us to apply the test derived from *Blockburger v. United States*.[17] Under the *Blockburger* or "same elements" test, we ask whether each offense has an element that the other does not or, restated, whether each offense requires proof of a fact that the other does not.[18]

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[12] Brief for appellee at 18.

[13] *Id.* at 12.

[14] *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009).

[15] *Id.*

[16] See, e.g., *U.S. v. Chipps*, 410 F.3d 438 (8th Cir. 2005).

[17] *Blockburger v. United States, supra* note 1.

[18] *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009).

We use the *Blockburger* test if the same act or transaction violates two distinct statutory provisions, but it is not appropriate for every double jeopardy question.[19] If the State argues that a course of conduct involves one or more distinct offenses under a single statute, we have instead focused on the allowable unit of prosecution.[20] And we have expressly refused to apply the *Blockburger* test if the State punishes the defendant with multiple counts of violating a single crime that can be committed in different ways.[21]

[9] Here, the *Blockburger* test is not appropriate because third degree domestic assault under § 28-323(1) is one offense that can be committed in different ways.[22] That the statute describes three different actions does not mean that it is three different offenses: "'Simply because the alternative ways for committing a single offense require proof of different acts and even different culpable mental states does not mean that a single offense has not been defined by the statute . . . .'"[23] For example, in *State v. Chavez*,[24] the South Dakota Supreme Court examined a statute that defined aggravated assault as causing serious bodily injury while manifesting extreme indifference to human life or attempting to put another in fear of serious bodily harm through physical menace with a deadly weapon, among other means. The court concluded that despite the different actions and mental states, the statute defined one crime that could be accomplished different ways.[25]

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[19] See *id.*

[20] See, *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004); *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

[21] See, *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007); *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

[22] See *id.*

[23] *Woellhaf v. People*, 105 P.3d 209, 217 (Colo. 2005). See *Brown v. State*, 107 Neb. 120, 185 N.W. 344 (1921).

[24] *State v. Chavez*, 649 N.W.2d 586 (S.D. 2002).

[25] See, also, *State v. Morato*, 619 N.W.2d 655 (S.D. 2000); *State v. Baker*, 440 N.W.2d 284 (S.D. 1989).

The State notes that the Legislature classified subsequent violations of § 28-323(1)(a) and (b) as Class IV felonies, whereas violations of § 28-323(1)(c) are always Class I misdemeanors.[26] We have said, however, that felony classifications have no bearing on whether two statutes are the same offense under *Blockburger* because a crime's classification is not part of its elements.[27] Similarly, we do not think that enhancement is part of third degree domestic assault's unit of prosecution.

[10] But a defendant is not immune from multiple punishments or trials simply because there is only one victim of the defendant's assaultive conduct. Absent a contrary legislative intent,[28] the test for assault offenses is whether a break occurred between the alleged assaults that allowed the defendant to form anew the required criminal intent:

> In assault cases, separate offenses can arise from a single set of facts each time the defendant forms an intent to attack the victim. . . . Thus, when a defendant has time to reconsider his actions, "each assault separated by time" constitutes a separate offense. . . . Factors such as time, place of commission, and the defendant's intent, as evidenced by his conduct and utterances determine whether separate offenses should result from a single incident.[29]

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[26] See § 28-323(4) and (5).

[27] *State v. Dragoo, supra* note 14.

[28] See, e.g., *Vick v. State*, 991 S.W.2d 830 (Tex. Crim. App. 1999).

[29] *State v. Garnett*, 298 S.W.3d 919, 923 (Mo. App. 2009). See, *State v. Baldwin*, 290 S.W.3d 139 (Mo. App. 2009); *Ocasio v. State*, 994 So. 2d 1258 (Fla. App. 2008); *State v. Harris*, 243 S.W.3d 508 (Mo. App. 2008); *Welborn v. Com.*, 157 S.W.3d 608 (Ky. 2005); *State v. Nixon*, 92 Conn. App. 586, 886 A.2d 475 (2005); *State v. Handa*, 120 N.M. 38, 897 P.2d 225 (N.M. App. 1995); *Weatherly v. State*, 733 P.2d 1331 (Okla. Crim. App. 1987). See, also, *People v. Wilson*, 93 Ill. App. 3d 395, 417 N.E.2d 146, 48 Ill. Dec. 744 (1981).

It is therefore not enough for the State to show that the fight moved from the living room to the driveway.[30] Double jeopardy "is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."[31] There must be a break in the action long enough to infer that the defendant stopped, reconsidered his or her actions, and then launched another assault.[32] As the State concedes, it could not, for example, punish a defendant for each repetitive punch to the victim.

But we will not decide whether the State could have punished or prosecuted Kleckner more than once under § 28-323(1) because the State did not in fact do so. Although the purpose of error proceedings is to provide an authoritative statement of the law, our review is limited to those issues on which the district court made a ruling on the facts before it.[33] Here, the district court made its ruling after the jury convicted Kleckner of one count after one trial.

[11,12] So, the district court erred for a basic reason: None of the three evils prohibited by the Double Jeopardy Clause befell Kleckner. Even if the government charges the defendant with multiple counts of the same offense, the multiple punishments prong of the double jeopardy bar is not violated if the jury convicts the defendant of only one count.[34] Nor does the presence of multiple counts in a single trial

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[30] See *U.S. v. Chipps, supra* note 16.

[31] *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

[32] See *State v. Harris, supra* note 29.

[33] See *State v. Figeroa, supra* note 6.

[34] See, *U.S. v. Chilingirian*, 280 F.3d 704 (6th Cir. 2002); *Arnold v. Wyrick*, 646 F.2d 1225 (8th Cir. 1981); *State v. Auch*, 39 Kan. App. 2d 512, 185 P.3d 935 (2008). See, also, *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Halsey*, 232 Neb. 658, 441 N.W.2d 877 (1989).

amount to a second prosecution for the same offense after an acquittal or conviction.[35] One trial on multiple counts is still one trial.

Put simply, Kleckner's conviction of one count after one trial in the county court did not implicate the three distinct abuses that the double jeopardy bar prohibits. There was only one prosecution, and Kleckner received only one punishment. So, the district court should not have reversed Kleckner's conviction to the extent it did so on double jeopardy grounds. And the only reason the court gave for reversing Kleckner's conviction was that the State charged her with multiple counts of the same crime. In her appeal to the district court, Kleckner argued only that charging her with multiple counts violated her double jeopardy and due process rights. She has not elaborated how the State violated her right to due process.

Kleckner's reliance on *State v. Parker*[36] is misplaced. In *Parker*, we held that if one offense can be committed different ways, the jury must be unanimous that the defendant committed the offense but need not be unanimous about which of the alternative means the defendant used. The unanimity of the jury's verdict—the only issue in *Parker*—is not an issue in this case. *Parker* did not involve multiple charges for the same offense.

Having decided that the district court should not have reversed Kleckner's conviction, we turn to the effect of our conclusion. The State argues that we should reverse, and remand with directions to reinstate Kleckner's conviction and sentence. But our power to reverse the judgment of the district court is limited. Specifically, Neb. Rev. Stat. § 29-2316 (Reissue 2008) provides: "The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy . . . ."

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[35] See, e.g., *U.S. v. Sharpe*, 996 F.2d 125 (6th Cir. 1993).

[36] *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986).

[13] Nearly a decade ago, we said in *State v. Vasquez*[37] that the application of § 29-2316 turns on whether the trial court placed the defendant in jeopardy, not whether the Double Jeopardy Clause bars further action. That is, § 29-2316 is not a gratuitous reference to the Double Jeopardy Clause. *Vasquez* broke with the approach of some of our earlier cases,[38] but we have since adhered to its reading of the statute's plain language.[39] In § 29-2316, the Legislature chose to prohibit reversal if the defendant was "placed legally in jeopardy," not if the Double Jeopardy Clause would prohibit reversal. The wisdom of that decision, of course, rests with the Legislature.

Here, Kleckner tried the case to a jury. Jeopardy therefore attached when the jury was impaneled and sworn.[40] Because the trial court placed Kleckner legally in jeopardy before the district court's erroneous ruling, we cannot reverse the district court's judgment.

The State argues that the posture of this case distinguishes it from *Vasquez* and its progeny. But, in *State v. Figeroa*,[41] we applied § 29-2316 in a case where a district court, like the district court here, erroneously reversed a county court's judgment. The conviction in *Figeroa* resulted from a guilty plea, and Kleckner's conviction resulted from a jury verdict, but that does not change matters. The district court entered a "judgment" after Kleckner was "placed legally in jeopardy." Under § 29-2316, we must let the judgment stand.

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[37] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[38] See, *State v. Figeroa*, *supra* note 6 (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join); *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join); *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

[39] See, *State v. Figeroa, supra* note 6; *State v. Head, supra* note 38; *State v. Hense, supra* note 38.

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

[41] See *State v. Figeroa, supra* note 6.

## CONCLUSION

The State did not punish Kleckner multiple times for the same offense or subject her to multiple prosecutions. So, the district court erred by reversing her conviction on the ground that the State charged her with the same offense in several counts. But § 29-2316 prevents us from reversing the district court's judgment because Kleckner has been placed in jeopardy.

EXCEPTION SUSTAINED.

STEPHAN, J., not participating.

CASSEL, J., concurring in part, and in part dissenting.

I entirely agree that the district court erred in reversing the county court conviction. And to that extent, I concur in the majority opinion.

But I dissent from the majority's conclusion that the county court conviction and sentence cannot be reinstated. Justice Gerrard's dissents in *State v. Hense*,[1] *State v. Head*,[2] and *State v. Figeroa*[3] powerfully articulate the error that the majority today perpetuates. As he aptly pointed out, "[u]nder this court's construction of the statute,[4] a district court's reversal of a lower court's judgment has become '"tantamount to a verdict of acquittal at the hands of the jury, not subject to review."'"[5]

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[1] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

[2] *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

[3] *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009) (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

[4] Neb. Rev. Stat. § 29-2316 (Reissue 2008).

[5] *State v. Figeroa, supra* note 3, 278 Neb. at 108, 767 N.W.2d at 783 (Gerrard, J., dissenting) (quoting *United States v. Wilson*, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975)).

Legislative acquiescence does not mandate adherence to the error that began in 2008. As Justice Gerrard noted, for nearly 20 years before the *Hense* decision, "we had held—without amendment from the Legislature—that the Legislature intended for errors to be correctible through error proceedings consistent with double jeopardy principles."[6] Only 7 years have passed since this court veered off course, and the Legislature's later silence commands no greater deference than its earlier silence.

A jury of Breanna N. Kleckner's peers convicted her of third degree domestic assault. The county court imposed a permissible sentence. She appealed to the district court, as she was entitled to do. But the district court's erroneous reversal, coupled with this court's incorrect statutory interpretation, allows her to escape any consequences for her crime. I can imagine the reaction of Kleckner's jury to this absurd result. It can only promote disrespect for the law. We should correct our own mistake before the public's patience runs out.

HEAVICAN, C.J., joins in this concurrence and dissent.

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[6] *State v. Figeroa, supra* note 3, 278 Neb. at 106, 767 N.W.2d at 782 (Gerrard, J., dissenting).

Nebraska Supreme Court
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D.I., appellant and cross-appellee,
v. William R. Gibson and
TyLynne Bauer, appellees
and cross-appellants.
867 N.W.2d 284

Filed August 7, 2015. No. S-14-980.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Statutes: Words and Phrases.** The general rule is that the word "shall" in a statute is mandatory and inconsistent with the idea of discretion.
4. **Statutes: Intent: Words and Phrases.** A court will construe the word "shall" as permissive if the spirit and purpose of the legislation requires such a construction.
5. **Mental Health: Time.** The 7-day time limit for holding a hearing under Neb. Rev. Stat. § 71-1207 (Reissue 2009) is directory, not mandatory.
6. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Affirmed.

Ryan J. Stover, of Stratton, DeLay, Doele, Carlson & Buettner, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, David A. Lopez, and James D. Smith for appellees.

Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ.

Connolly, J.

## SUMMARY

D.I. was taken into custody under the Sex Offender Commitment Act (SOCA)[1] on November 16, 2006. Under § 71-1207, the mental health board "shall" hold a hearing within 7 days after the subject is taken into emergency protective custody. The board did not hold a hearing until December 21. D.I. petitioned for a writ of habeas corpus, claiming that the mental health board did not have jurisdiction because the hearing was untimely. The district court dismissed D.I.'s petition. Because the 7-day time limit in § 71-1207 is directory, not mandatory, we affirm.

## BACKGROUND

In 2003, a jury convicted D.I. of sexual assault on a child. The court sentenced D.I. to 5 years' imprisonment.

Shortly before D.I. finished his sentence, the Douglas County Attorney filed a petition with the Mental Health Board of the Fourth Judicial District (Board) alleging that D.I. was a dangerous sex offender under the SOCA. The Board issued a warrant directing the Department of Correctional Services to hold D.I. in custody until the commitment hearing. Under the warrant, D.I. remained at the Omaha Correctional Center after serving the last day of his sentence on November 16, 2006.

On December 21, 2006, the Board held a commitment hearing and determined that D.I. was a dangerous sex offender. The Board placed D.I. in the Department of Health and Human Services' custody for inpatient treatment.

In May 2013, D.I. petitioned for a writ of habeas corpus in the Madison County District Court. He named two employees of the Norfolk Regional Center as the respondents. As

[1] Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Reissue 2009).

relevant here, the petition alleged that the Board's failure to hold a hearing within 7 days violated the SOCA and D.I.'s due process rights.

After the parties filed a joint stipulation of facts, the court dismissed D.I.'s habeas petition. The court concluded that the 7-day period in § 71-1207 was directory, rather than a mandatory condition to D.I.'s lawful commitment.

## ASSIGNMENTS OF ERROR

D.I. assigns that the court erred by dismissing his petition for a writ of habeas corpus.

On cross-appeal, the respondents assign that the court erred by not dismissing the petition on the ground that D.I. had an adequate remedy under the SOCA.

## STANDARD OF REVIEW

[1] On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.[2]

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

## ANALYSIS

### Appeal

D.I. argues that the Board's failure to hold a hearing within 7 days is a "jurisdictional defect" that makes the December 2006 commitment order void.[4] Under the SOCA, anyone who believes that another person is a dangerous sex offender can alert the county attorney of that belief.[5] If the county attorney agrees, he or she files a petition in district court and may request emergency protective custody.[6] The clerk of the

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[2] *Johnson v. Gage*, 290 Neb. 136, 858 N.W.2d 837 (2015).

[3] *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014).

[4] Brief for appellant at 5.

[5] § 71-1205.

[6] §§ 71-1205 and 71-1206(2).

district court prepares a summons which, under § 71-1207, "shall fix a time for the hearing within seven calendar days after the subject has been taken into emergency protective custody." At the hearing before the mental health board, the State has the burden to prove by clear and convincing evidence that the subject is a dangerous sex offender and that less restrictive treatment is not appropriate.[7]

The respondents do not dispute that the hearing was untimely. But they contend that the 7-day time limit in § 71-1207 is merely directory and that therefore, the Board's failure to hold a timely hearing did not deprive it of jurisdiction. D.I. argues that the word "shall" in § 71-1207 shows that the time limit is mandatory.

[3,4] The general rule is that the word "shall" in a statute is mandatory and inconsistent with the idea of discretion.[8] But we construe the word "shall" as permissive if the spirit and purpose of the legislation requires such a construction.[9] No universal test distinguishes mandatory from directory provisions.[10] Broadly, provisions that relate to the essence of the thing to be done are mandatory while provisions for which compliance is a matter of convenience rather than substance are directory.[11] Put another way, we have been reluctant to deem provisions mandatory if something less than strict compliance would not interfere with the statute's fundamental purpose.[12]

We have frequently applied these principles to statutory time limits. In most cases, we have decided that provisions

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[7] §§ 71-1208 and 71-1209.

[8] E.g., *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007). See Neb. Rev. Stat. § 49-802 (Reissue 2010).

[9] E.g., *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005).

[10] E.g., *id.*

[11] See *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987).

[12] See *Troshynski v. Nebraska State Bd. of Pub. Accountancy, supra* note 9.

specifying the time by which something "shall" be done are merely directory.[13] But we have given "shall" a mandatory construction if completion of the action within the specified period was essential to accomplishing a principal purpose of the law.[14]

We have not yet addressed whether the 7-day time limit in § 71-1207 is mandatory or directory. But the respondents argue that the Nebraska Court of Appeals' interpretation of a similar section of the Nebraska Mental Health Commitment Act (MHCA)[15] is persuasive. In *In re Interest of E.M.*,[16] the mental health board held a hearing and committed E.M. to inpatient treatment 8 days after law enforcement took him into custody. A section of the MHCA provided that "'[n]o person may be held in custody pending the hearing for a period exceeding seven days . . . .'"[17] E.M. argued that the board should have dismissed the proceeding because the hearing was untimely.

Despite reasoning that "the phrase 'no person may be held in custody' is comparable in meaning and effect to saying that the State 'shall not hold a person in custody,'" the Court of

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[13] See, *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996); *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990); *State v. Steele, supra* note 11; *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985); *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977); *Local Union No. 647 v. City of Grand Island*, 196 Neb. 693, 244 N.W.2d 515 (1976). See, also, *Glantz v. Daniel*, 21 Neb. App. 89, 837 N.W.2d 563 (2013); *Hendrix v. Sivick*, 19 Neb. App. 140, 803 N.W.2d 525 (2011); *Thomsen v. Nebraska Dept. of Motor Vehicles*, 16 Neb. App. 44, 741 N.W.2d 682 (2007); *Forgey v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 191, 724 N.W.2d 828 (2006); *Randall v. Department of Motor Vehicles*, 10 Neb. App. 469, 632 N.W.2d 799 (2001).

[14] *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000).

[15] Neb. Rev. Stat. §§ 71-901 to 71-963 (Reissue 2009 & Cum. Supp. 2014).

[16] *In re Interest of E.M.*, 13 Neb. App. 287, 691 N.W.2d 550 (2005).

[17] *Id.* at 293, 691 N.W.2d at 556, quoting Neb. Rev. Stat. § 83-1045.02 (Reissue 1999) (now found at § 71-932).

Appeals concluded that the prohibition was directory.[18] The court stated that the main objective of the statute was to ensure the effectiveness and viability of outpatient treatment for a mentally ill dangerous person. The 7-day period was not essential to this objective because it was only designed to ensure order and promptness.

The court was also persuaded by the difficulty of remedying tardiness:

> [I]t is apparent that the time specification in this case should be considered directory and not mandatory precisely because there is no effective sanction for noncompliance. Were we to accept E.M.'s position that the proceedings should have been dismissed, there is nothing whatsoever which would have prevented the board from dismissing the proceeding and, at the same time, issuing a new warrant and ordering that E.M. be taken back into custody immediately.[19]

And, the court noted, E.M. did not explain how the 1-day delay prejudiced him.

D.I. relies on two other cases to show that he is entitled to relief. First, he cites *Davis v. Settle*,[20] which involved a section of the MHCA that, similar to § 71-1207, said that the summons "'shall fix a time for the hearing within seven days after the subject has been taken into protective custody.'"[21] The mental health board took custody of the petitioner on September 13, 2001, but did not hold a hearing until September 25. On appeal, we concluded that the petitioner's claim for habeas relief was moot because the respondents no longer had custody of him. But we noted that under the order giving custody of the petitioner to the mental health board,

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[18] *Id.* at 294, 691 N.W.2d at 557.

[19] *Id.* at 295, 691 N.W.2d at 558.

[20] *Davis v. Settle*, 266 Neb. 232, 665 N.W.2d 6 (2003).

[21] *Id.* at 235, 665 N.W.2d at 9, quoting Neb. Rev. Stat. § 83-1027 (Reissue 1999) (now found at § 71-923).

the board "did not have authority to retain custody" after the seventh day.[22]

D.I. also cites the Court of Appeals' opinion in *Condoluci v. State*.[23] There, the sheriff took the petitioner into custody, purportedly under the SOCA, but the mental health board never held a hearing. The petitioner applied for a writ of habeas corpus, and the district court dismissed the application. The Court of Appeals held that the district court should have issued the writ because, if true, the petitioner's allegations showed that his detention was "quite clearly 'without any legal authority.'"[24]

Here, the critical issue is the fundamental purpose of the SOCA and its relationship with the 7-day time limit in § 71-1207. The Legislature's intent is expressed in § 71-1202, which states:

> The purpose of the [SOCA] is to provide for the court-ordered treatment of sex offenders who have completed their sentences but continue to pose a threat of harm to others. It is the public policy of the State of Nebraska that dangerous sex offenders be encouraged to obtain voluntary treatment. If voluntary treatment is not obtained, such persons shall be subject to involuntary custody and treatment only after mental health board proceedings as provided by the [SOCA]. Such persons shall be subjected to emergency protective custody under limited conditions and for a limited period of time.

D.I. and the respondents disagree about the breadth of the SOCA's purpose. The respondents argue that the paramount goal of the SOCA is to protect the public from dangerous sex offenders. D.I. concedes that the Legislature intended to protect the public but argues that this purpose is coequal with protecting a sex offender's liberty.

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[22] *Id.* at 236, 665 N.W.2d at 10.

[23] *Condoluci v. State*, 18 Neb. App. 112, 775 N.W.2d 196 (2009).

[24] *Id.* at 115, 775 N.W.2d at 198, quoting Neb. Rev. Stat. § 29-2801 (Reissue 2008).

We conclude that the respondents' reading most closely reflects the Legislature's intent. Although the SOCA has several aims, we have said that its "primary purpose" is to protect the public from sex offenders who continue to pose a threat.[25]

So understood, the fundamental purpose of the SOCA rebuts the presumption that the word "shall" in § 71-1207 creates a mandatory duty. We have noted our reluctance to find statutory time limits mandatory if they are not central to the purpose of the statute.[26] Holding a hearing within 7 days helps ensure that the basis for the mental health board's custody over the subject is adjudicated in a timely and orderly manner. A timely hearing is important, but we cannot say that it is necessary to accomplish the SOCA's fundamental purpose, such that the untimeliness of the hearing deprives the board of jurisdiction.

As was the Court of Appeals in *In re Interest of E.M.*, we are also impressed by the difficulty of remedying an untimely hearing. In D.I.'s petition for a writ of habeas corpus, he prayed for his "immediate release from the Norfolk Regional Center with no ongoing obligation for treatment." D.I. did not say how long he expected to be released. To the extent that he believed that he should forever be free of the Board's jurisdiction, because the 2006 hearing was untimely, the SOCA's purpose of protecting the public makes such a result unacceptable. But if D.I. is not so immune—and he conceded at oral argument that he is not—it appears that the county attorney could simply file another petition and request emergency protective custody.[27] While the absence of an express remedy is not the sine qua non of our inquiry,[28] it is hard to imagine a remedy in this case that would not be futile.

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[25] See *In re Interest of S.C.*, 283 Neb. 294, 301, 810 N.W.2d 699, 705 (2012).

[26] *State v. $1,947, supra* note 13. See, also, *State v. Steele, supra* note 11.

[27] See §§ 71-1205 and 71-1206(2).

[28] See *State on behalf of Minter v. Jensen*, *supra* note 14.

We are not persuaded by the cases that D.I. cites. In *Davis v. Settle*, we expressly "decline[d] to address the merits" of the petitioner's claim for habeas relief.[29] Our statement about the mental health board's authority was dicta. The mental health board in *Condoluci v. State* apparently never held a hearing at all.[30] Here, the Board held an untimely hearing.

[5] In conclusion, the 7-day time limit for holding a hearing under § 71-1207 is directory, not mandatory. D.I. did not show that the delay prejudiced him. He is not entitled to immediate release from his commitment at the Norfolk Regional Center.

## Cross-Appeal

[6] Because we conclude that the district court correctly decided that the 7-day time limit in § 71-1207 is directory, we do not reach the respondents' cross-appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[31]

## CONCLUSION

We conclude that the 7-day time limit for holding a hearing under § 71-1207 is directory. So, the untimeliness of the 2006 hearing did not deprive the Board of jurisdiction. We therefore affirm the order dismissing D.I.'s petition for habeas relief.

Affirmed.

Heavican, C.J., and Stephan, J., not participating.

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[29] *Davis v. Settle, supra* note 20, 266 Neb. at 236, 665 N.W.2d at 9.

[30] See *Condoluci v. State, supra* note 23.

[31] *Lang v. Howard County*, 287 Neb. 66, 840 N.W.2d 876 (2013).




**Nebraska Supreme Court**

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State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Thomas E. Ferneau, respondent.

867 N.W.2d 562

Filed August 7, 2015. No. S-15-482.

Original action. Judgment of disbarment.

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

Per Curiam.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Thomas E. Ferneau, on June 3, 2015. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 27, 1972. On or about February 24, 2014, two of respondent's former clients filed a grievance against respondent alleging, inter alia, that respondent had entered into a business transaction with them without first advising them in writing of the desirability of seeking independent legal counsel on the transaction and failing to obtain informed written consent from the clients regarding the transaction. Such actions constitute a violation of Neb. Ct. R. of Prof. Cond. § 3-501.8.

On June 3, 2015, respondent filed a voluntary surrender of license, in which he stated that he does not challenge or contest the truth of the suggested allegation that he violated professional conduct rule § 3-501.8. Respondent further stated that he freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

## ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the suggested allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the suggested allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice

law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

Nebraska Supreme Court
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# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Kristin Renee Walz, respondent.

869 N.W.2d 71

Filed August 14, 2015. No. S-12-275.

1. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
3. ____. Under Neb. Ct. R. § 3-304, the Nebraska Supreme Court may impose one or more of the following disciplinary sanctions: (1) disbarment; (2) suspension; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.
4. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
5. ____. When determining appropriate discipline, the Nebraska Supreme Court considers aggravating and mitigating factors.
6. ____. The propriety of a sanction in an attorney discipline case must be considered with reference to the sanctions imposed in prior similar cases.

Original action. Judgment of disbarment.

John W. Steele and Kent L. Frobish, Assistant Counsels for Discipline, for relator.

John D. Rouse for respondent.

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

Per Curiam.

## INTRODUCTION

The issue in this attorney discipline proceeding is what discipline should be imposed on Kristin Renee Walz (Respondent) for violating certain provisions of the Nebraska Rules of Professional Conduct.

Respondent pled no contest and was convicted of a felony. Respondent admits that she was convicted of making terroristic threats, a Class IV felony, pursuant to Neb. Rev. Stat. § 28-311.01 (Reissue 2008). The referee recommended disbarment, and after our review, we conclude that disbarment is the proper sanction.

## BACKGROUND

On September 3, 2010, Respondent was admitted to the practice of law in the State of Nebraska. At the time of the events set forth herein, Respondent was engaged in the private practice of law in Lancaster County, Nebraska.

Respondent was initially charged with second degree domestic assault and use of a weapon to commit a felony. She was accused of assaulting her husband with a knife. The State later amended the charges to first degree assault and use of a deadly weapon to commit a felony. Respondent has consistently denied causing her husband's injuries and has maintained that she was asleep when the injuries occurred.

At some point, Respondent's husband admitted to police that Respondent had cut him with a knife. He later recanted and explained his statement was made while he was sleep deprived, under the influence of drugs, and under pressure by

the police. He also stated that he made the statement to hide the fact that he had acquired drugs illegally and was under the belief that he could simply refuse to press charges. He stated that he was eating cake in bed and was under the influence of pain medication. He claimed he fell asleep, rolled over on the knife, and was injured as a result.

Pursuant to a plea agreement, Respondent pled no contest to one count of making terroristic threats. She was convicted on March 9, 2012, and was sentenced to 1 to 3 years' imprisonment with credit for 55 days served. She began her sentence July 3 and was released on parole in December. Her parole ended in July 2013.

On April 4, 2012, the Committee on Inquiry of the First Judicial District filed an application with this court for temporary suspension of Respondent's license to practice law. We entered an order suspending Respondent until further order of the court. Respondent remains under suspension pursuant to that order.

On October 31, 2012, formal charges were filed against Respondent based upon her felony conviction for making terroristic threats. The charges alleged that Respondent had violated the Nebraska Rules of Professional Conduct by committing a criminal act.

Respondent's answer to the formal charges denied she had violated her oath of office as an attorney or Neb. Ct. R. of Prof. Cond. § 3-508.4(a) and (b). A referee was appointed in January 2013, but due to a joint request to stay the proceedings while Respondent's criminal appeal and postconviction relief were pending, the case did not resume until 2014.

On April 30, 2014, a hearing on the formal charges was commenced. Respondent, her husband, and her treating clinical psychologist, Dr. Caryll Palmer Wilson, testified.

We granted the parties' joint motion to continue the report of the referee pending final resolution of Respondent's criminal charges and a motion to withdraw her plea. Respondent's motion to withdraw her no contest plea was subsequently

overruled. The court also found that postconviction relief was no longer available, because Respondent was no longer in custody and there was no allegation that she was on parole.

On August 18, 2014, the referee filed a report, finding that Respondent's conviction of a felony was a violation of her oath of office as an attorney and, specifically, a violation of § 3-508.4(a) and (b). The referee recommended that Respondent be disbarred.

In mitigation, Respondent asserted that she did not commit an act that harmed the public or her clients, she did not commit an act of dishonesty, she did not show herself to be untrustworthy, and she had diligently and capably represented her clients and their interests. She argued that she should be allowed to practice law in the future because the felony conviction did not render her unfit to practice law.

## ASSIGNMENT OF ERROR

Neither party has taken exception to the report or factual findings of the referee. Therefore, the only issue is the appropriate sanction under the circumstances. Respondent opposes the referee's recommendation and the Counsel for Discipline's request for disbarment.

## STANDARD OF REVIEW

[1,2] In attorney discipline and admission cases, we review recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[1] The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.[2]

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[1] *State ex rel. Counsel for Dis. v. Smith*, 287 Neb. 755, 844 N.W.2d 318 (2014).

[2] *State ex rel. Counsel for Dis. v. Cording*, 285 Neb. 146, 825 N.W.2d 792 (2013).

## ANALYSIS

[3] Under Neb. Ct. R. § 3-304, this court may impose one or more of the following disciplinary sanctions: "(1) Disbarment by the Court; or (2) Suspension by the Court; or (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or (4) Censure and reprimand by the Court; or (5) Temporary suspension by the Court."

Section 3-508.4 provides that it is professional misconduct for a lawyer to do either of the following: "(a) violate or attempt to violate the Rules of Professional Conduct[,] knowingly assist or induce another to do so[,] or do so through the acts of another [or] (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness[,] or fitness as a lawyer in other respects."

Respondent strenuously denied committing the crime of making terroristic threats, and her husband, the purported victim of the crime, also insisted that she did not commit a crime against him. He retracted all statements he had previously made to police and claimed that he originally made the statements while under the influence of drugs and sleep deprivation.

Respondent stated she took a plea deal because she feared a prolonged trial and a conviction of a far more serious crime that could result in years of incarceration. She wanted to avoid a lengthy trial because she had a 17-year-old daughter and a seriously ill husband who relied on her for support, and she wanted to avoid the bad publicity a trial would generate because she is an attorney. She claimed to have exculpatory evidence and intended to continue her pursuit to exonerate herself of the crime.

It is not uncommon for one who accepts a plea bargain to make similar claims after the fact. However, it is not our task in this case to determine the innocence or guilt of Respondent, but only the appropriate discipline to be imposed for the

conviction. We are instructed by Neb. Ct. R. § 3-326(A), which states:

> For the purposes of Inquiry of a Complaint or Formal Charges filed as a result of a finding of guilt of a crime, a certified copy of a judgment of conviction constitutes conclusive evidence that the attorney committed the crime, and the sole issue in any such Inquiry should be the nature and extent of the discipline to be imposed.

The certified copy of Respondent's judgment of conviction is conclusive evidence that she was convicted of making terroristic threats, in violation of § 28-311.01. Unless the conviction is vacated, Respondent remains a convicted felon. Therefore, the only issue before us is the discipline to be imposed.

[4] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance and reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.[3]

Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[4] The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[5]

### Nature of Offense and Deterrence

Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice require

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[3] *State ex rel. Counsel for Dis. v. Barnes*, 275 Neb. 914, 750 N.W.2d 668 (2008).

[4] *State ex rel. Counsel for Dis. v. Pivovar*, 288 Neb. 186, 846 N.W.2d 655 (2014).

[5] *State ex rel. Counsel for Dis. v. Beltzer*, 284 Neb. 28, 815 N.W.2d 862 (2012).

discipline.[6] Respondent was not convicted of a crime that involved actual physical violence—such as assault, domestic assault, or battery—but, rather, a crime of threatening to commit such violence.[7]

The referee found that the certified copy of Respondent's judgment of conviction was conclusive evidence that she had been convicted of a felony crime of violence. The evidence was clear and convincing that Respondent violated § 3-508.4(b) by committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other aspects.

### Reputation of Bar

This is our first case involving an attorney's conviction for a crime of violence, and the sanction must be tailored to maintain public confidence in the bar community.

### Protection of Public

Respondent's psychologist, Wilson, testified that there was no evidence that Respondent has violent or aggressive tendencies. However, protection of the public is not merely concern for a physical danger to the public. The goal of attorney discipline proceedings is not as much punishment as determination of whether it is in the public interest to allow an attorney to keep practicing law.[8] Therefore, an adequate sanction is necessary to maintain public confidence in the bar.

### Attitude of Respondent

Respondent has remained fully cooperative with the Counsel for Discipline. Such cooperation is always credited to a respondent when we consider sanctions. However, unlike other cases where sanctioned attorneys have acknowledged their misconduct and expressed genuine remorse, Respondent

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[6] See § 3-508.4, comment 2.

[7] See § 28-311.01.

[8] *State ex rel. Counsel for Dis. v. Sundvold*, 287 Neb. 818, 844 N.W.2d 771 (2014).

insists on her innocence. She intends to pursue ways to exonerate herself. But it is not our task in the instant case to review her conviction. Consequently, Respondent has not accepted responsibility for her actions. As an attorney, Respondent knew or should have known at the time she entered a plea of no contest that a felony conviction would result in severe sanctions.

### Fitness to Continue Practice of Law

Respondent's psychologist, Wilson, began seeing Respondent for therapy in 2008. Respondent needed assistance with learning how to cope with anxiety and other mental health issues. Respondent's IQ falls in the highly superior range. Wilson stated that Respondent shows no signs of aggressive or violent tendencies, or any signs of marital problems or domestic violence.

The referee gave consideration to Wilson's opinion that Respondent showed no aggressive tendencies in her clinical observations. Wilson testified that Respondent will need counseling to resolve these issues and "get back on her feet." Such counseling is needed before Respondent can manage her depression to a point where she would be fit to practice law. Wilson stated that given the circumstances, this would take at least 12 months. Wilson's psychotherapy notes indicate that all the diagnoses regarding Respondent's condition are neurologically based syndromes and that Respondent has acknowledged that she was not fit to practice law. At the time of the referee's report, the evidence indicated that Respondent was not fit to practice law.

### Mitigating Factors

[5] When determining appropriate discipline, the Nebraska Supreme Court considers aggravating and mitigating factors.[9] We note that there are some mitigating factors. The referee

[9] *State ex rel. Counsel for Dis. v. Palik*, 284 Neb. 353, 820 N.W.2d 862 (2012).

found that Respondent has been fully cooperative with the Counsel for Discipline.

The referee also noted several letters and affidavits from attorneys and former clients in support of Respondent, including evidence of pro bono legal work that she did before being suspended. The referee stated that Respondent has exhibited extraordinary compassion and dedication in representing indigent persons and persons of limited means.

Prior to her conviction and suspension, Respondent was in good standing and had no prior complaints, misconduct, or criminal history. However, in contrast to prior discipline cases in which an attorney's conduct was shown to be an isolated incident in a lengthy and otherwise unblemished career, Respondent was in practice approximately 6 months before the misconduct occurred. She was admitted to practice on September 3, 2010, and the misconduct which resulted in her conviction occurred on February 12, 2011.

## Prior Cases

[6] The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[10] There are few Nebraska cases of attorney discipline involving felony convictions, and none which involves a crime of violence. Some of our past attorney discipline cases have involved drug offenses,[11] fraudulent activity,[12] theft from clients,[13] conspiracy or aiding and abetting in a felony,[14] and

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[10] *State ex rel. Counsel for Dis. v. Connor*, 289 Neb. 660, 856 N.W.2d 570 (2014).

[11] *State ex rel. Counsel for Dis. v. Hubbard*, 276 Neb. 741, 757 N.W.2d 375 (2008); *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997).

[12] *State ex rel. Counsel for Dis. v. Council*, 289 Neb. 33, 853 N.W.2d 844 (2014).

[13] *State ex rel. Counsel for Dis. v. Tarvin*, 279 Neb. 399, 777 N.W.2d 841 (2010).

[14] *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

sexual offenses.[15] Although we have not stated a "bright line rule," our case law involving discipline for felony convictions indicates that such a conviction reflects adversely upon a lawyer's fitness to practice law and that disbarment is considered to be the appropriate sanction.

Respondent cites to the sanction we imposed in *State ex rel. Counsel for Dis. v. Mills*,[16] where we allowed an attorney, Stuart B. Mills, to be reinstated after serving a 2-year suspension for falsely notarizing documents and assisting a client in filing false tax returns based upon those documents. While on suspension, Mills was convicted in federal court of a felony involving the same false documents. We later reinstated Mills, despite the felony, because we had already sanctioned him for the conduct notwithstanding the felony conviction and, also, in light of the mitigating factors present in that case. We noted:

> It is clear from the record that Mills' behavior surrounding his handling of the [case] was an isolated incident in what has otherwise been an exemplary legal career. The record indicates that Mills is involved in his community and has countless letters of support from judges, lawyers, and laypersons. In addition, Mills has never been disciplined in the 30 years he has been authorized to practice law in Nebraska.
>
> . . . Furthermore, Mills has admitted his wrongdoing and has admitted that he engaged in conduct which violates the Code of Professional Responsibility.[17]

Unlike the attorney in *Mills*, Respondent had not received a sanction for the conduct leading to her conviction. Nor does

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[15] *State ex rel. Counsel for Dis. v. Lauby*, 270 Neb. 405, 703 N.W.2d 132 (2005) (child sexual assault); *State ex rel. NSBA v. Mellor*, 252 Neb. 710, 565 N.W.2d 727 (1997) (child pornography).

[16] *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003).

[17] *Id.* at 71, 671 N.W.2d at 776.

the instant case involve the mitigating circumstances we found in *Mills*.

## Sanction

Because this is the first attorney discipline case in Nebraska involving a felony conviction for a crime of violence, it is necessary to convey the serious consequences that attach to such misconduct. Although no clients were harmed by Respondent's misconduct, an attorney's conviction of a felony for a crime of violence requires a severe sanction.

It is clear that the stress caused by the inability to practice law has produced much anxiety for Respondent. However, this does not excuse the seriousness of her misconduct. Although Respondent may not be a danger to others, her felony conviction for a crime of violence damages the reputation of the bar and threatens public confidence in the profession. There is a need for sanctions to deter crimes of violence by members of the bar.

## CONCLUSION

It is the judgment of this court that Respondent should be and hereby is disbarred from the practice of law in Nebraska, effective immediately. Respondent shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, she shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323(B) of the disciplinary rules within 60 days after the order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Joshua D. Ballew, appellant.
867 N.W.2d 571

Filed August 14, 2015. No. S-13-1065.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Double Jeopardy: Convictions: Appeal and Error.** Whether two convictions result in multiple punishments for the same offense for double jeopardy purposes presents a question of law, on which an appellate court reaches a conclusion independent of the court below.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
5. **Constitutional Law: Due Process: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error. The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
6. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.

7. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
8. **Double Jeopardy: Sentences: Proof.** Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not. This test, otherwise known as the "same elements" test, asks whether each offense contains an element not contained in the other. If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. If so, they are not the same offense and double jeopardy is not a bar to additional punishment.
9. **Criminal Law: Statutes: Double Jeopardy.** In applying *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy.
10. **Rules of Evidence: Impeachment: Prior Statements.** Prior inconsistent statements are admissible as impeachment evidence, but they are not admissible as substantive evidence unless they are otherwise admissible under the Nebraska Evidence Rules.
11. **Trial: Testimony: Prior Statements: Appeal and Error.** The trial court has considerable discretion in determining whether testimony is inconsistent with prior statements, and absent an abuse of that discretion, the trial court's ruling will be upheld on appeal.
12. **Rules of Evidence: Hearsay: Proof.** 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.
13. **Criminal Law: Constitutional Law: Due Process: Rules of Evidence.** Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. However, the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.

14. **Criminal Law: Constitutional Law: Trial: Witnesses.** The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th Amendment to the U.S. Constitution, as incorporated in the 14th Amendment, as well as by article I, § 11, of the Nebraska Constitution. But the right is not unlimited, and only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense may wish.
15. **Trial: Testimony.** When the object of cross-examination is to collaterally ascertain the accuracy or credibility of the witness, the scope of the inquiry is ordinarily subject to the discretion of the trial court.
16. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness or (2) a reasonable jury would have received a significantly different impression of the witnesses' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.

Appeal from the District Court for Lancaster County: Stephanie F. Stacy, Judge. Affirmed.

Jessica L. Milburn for appellant.

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

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

Miller-Lerman, J.

## I. NATURE OF CASE

Joshua D. Ballew appeals his convictions and sentences in the district court for Lancaster County for two counts of first degree assault, two counts of second degree assault, and two counts of use of a deadly weapon to commit a felony. Ballew claims that the district court erred when it overruled his motion for a new trial, which motion was based on an alleged double jeopardy violation and on allegedly erroneous evidentiary rulings. We affirm Ballew's convictions and sentences.

## II. STATEMENT OF FACTS

Ballew attended a party at the house of Marshall Mock and his roommates. The party began on the night of March 9, 2012, and continued into the early morning hours of March 10. At around 1:30 a.m., a fight broke out in the front yard of the house. Among those who became involved in the fight were Mock and a guest, Tyler Waddell. Both Waddell and Mock were stabbed. Police responding to calls found Ballew in the area near Mock's house and took him into custody after noting that he fit the description of the suspect and that his right hand was bloody.

The State charged Ballew with two counts of first degree assault in violation of Neb. Rev. Stat. § 28-308 (Cum. Supp. 2014), two counts of second degree assault in violation of Neb. Rev. Stat. § 28-309 (Cum. Supp. 2014), and two counts of use of a deadly weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Cum. Supp. 2014). Ballew was charged with one count of each offense with respect to each of the two victims—Waddell and Mock. The State also charged Ballew with being a habitual criminal.

With respect to each charge of first degree assault, the State alleged that Ballew had intentionally or knowingly caused serious bodily injury to the victim, and with respect to each charge of second degree assault, the State alleged that Ballew had intentionally or knowingly caused bodily injury to the victim with a dangerous instrument or that he had recklessly caused serious bodily injury to the victim with a dangerous instrument. At the close of evidence at trial, the court sustained the State's motion to amend the second degree assault charges to conform to the evidence by removing the language alleging that Ballew had recklessly caused serious bodily injury with a dangerous instrument. Therefore, the second degree assault charges were presented to the jury as alleging that Ballew had intentionally or knowingly caused bodily injury to each victim with a dangerous instrument.

The evidence the State presented at trial included testimony by four witnesses who identified Ballew as the person

involved in the stabbings. These witnesses included the victims, Mock and Waddell, as well as Mikaela Perry and Blake Klapperich.

Mock testified that during the party, he heard screaming from outside and went to see what was happening. He saw people on the porch screaming at two men on the sidewalk. Mock identified Ballew as one of the men on the sidewalk, and he testified that he had seen Ballew in the house earlier that night. Mock went to the sidewalk to ask the men to leave. As Mock was talking with Ballew and the other man, the other man ran past Mock toward the house and grazed Mock's shoulder. As Mock turned to see what the other man was doing, he felt himself being struck in the back. Mock testified that when he was struck, he and Ballew were the only people in the immediate area. Ballew left, and as Mock returned to his house, he realized that he was bleeding and that he had been stabbed.

Perry testified that she was at the party at Mock's house and that a fight broke out between some of her male friends and another group of men. She stood on the porch and watched the fighting until she saw Mock come up the stairs. She saw that Mock was bleeding, and she went inside with him. Before Mock came up the stairs, Perry saw him standing with one man in front of him and one man behind. Perry identified Ballew as the man who was standing behind Mock. She testified that there were no other individuals standing behind Mock at that time and that she had seen Ballew at the party earlier that night.

Waddell testified that he was at the party at Mock's house. At around 1 a.m., a female friend of Waddell's came into the house and said that two men outside were harassing her. Waddell and some friends went outside and told the men to leave. Waddell returned to the house. Five to ten minutes later, Waddell heard someone say that there was a fight going on outside. He went outside and saw that one man had another in a headlock and was trying to pull him over a fence. Waddell broke up the fight and turned to help the man who

had been in the headlock. As his back was turned toward the fence, Waddell felt someone grab his shirt and pull him over the fence. Waddell fell to his knees and looked up to see a man who then grabbed Waddell's shirt and threw him into the side of a Jeep that was parked on the street. The man swung at Waddell for 2 to 3 minutes, and Waddell felt "something puncture" him, and remembered being hit in the head, ribs, and back. Waddell heard someone yell "we need to get out of here," and the fighting stopped. Waddell realized he had been stabbed, and he asked Klapperich to call the 911 emergency dispatch service.

Waddell identified Ballew as the man who had thrown him into the side of the Jeep and then swung at him. Waddell testified that he had seen Ballew inside the house earlier that night. Waddell stated that Ballew was wearing "baggy pants" and "a baggier shirt" that night but that he did not remember the color of the shirt. He also testified that he remembered Ballew as having "a lot of tattoos" on his face, neck, and body.

On cross-examination, Ballew questioned Waddell regarding the description of his assailant that he had given to an officer shortly after the stabbing. Waddell agreed that he had said the man was wearing "a white tank top, men's undershirt, and gym shorts and dreadlocks." Waddell testified that he had told the officer that the assailant had tattoos. Ballew attempted to refresh Waddell's memory with a report written by the officer, including the description Waddell had given of the assailant. After reviewing the report, Ballew asked Waddell whether the report stated that he had told the officer that the assailant had tattoos. Waddell answered, "No." The State objected on the basis of improper impeachment; the State argued that the report reflected only what the officer had written down and not necessarily everything Waddell had told the officer. The court sustained the State's objection, but the court did not strike any of Waddell's testimony, and the State did not ask it to do so. Ballew then stated that he had no further questions for Waddell.

Klapperich testified that he went with Waddell to the party at Mock's house. Around 1 a.m., Klapperich heard that Waddell was involved in an altercation outside. He went outside, where he saw a confrontation between Waddell and two other men. Klapperich identified Ballew as one of the men in the confrontation with Waddell. Klapperich convinced Waddell to come back inside. Soon after they got inside, Klapperich heard people yelling that there was a fight outside. Klapperich and Waddell ran back outside, and Klapperich saw Waddell pull two men apart, one of whom had been choking the other. Klapperich testified that a "giant fight" then erupted involving several people. Klapperich saw Ballew slam Waddell's head into the side of a Jeep. The fight continued, and Klapperich saw Ballew "swinging [at Waddell] with an object in hand." Klapperich testified that Ballew's motions were not punches but were instead "a swinging across action. Like there was an object in hand, such as a knife." Klapperich assisted Waddell after the fight was over. Klapperich could tell that Waddell had been cut, and when he pulled up Waddell's shirt, he saw a gash in his ribs. Klapperich helped Waddell inside and called for emergency assistance.

Mock and Waddell were taken to a hospital. A trauma surgeon who treated them testified that Mock had sustained stab wounds to the back and that Waddell had sustained stab wounds to the back, chest, head, and leg.

In Ballew's defense, he recalled police officers who had testified in the State's case and who had investigated the stabbings. Officer Paul Luce had interviewed Waddell shortly after the stabbing. When Ballew asked Luce, "And what did [Waddell] tell you?" the State objected based on hearsay. Ballew argued to the court that Luce's testimony was being offered in order to impeach Waddell's testimony regarding the description of his assailant. The court sustained the State's objection, stating that the question asked for hearsay and that none of the hearsay exceptions applied. Ballew then asked Luce whether Waddell had mentioned that the assailant had tattoos. Luce said he did not recall, and Ballew attempted to

refresh Luce's memory with his report. After Luce's memory had been refreshed, Ballew asked, "Did . . . Waddell mention anything to you about tattoos in regard to the description?" The State objected based on hearsay, and the court sustained the objection. Ballew then stated that he had no further questions for Luce.

Ballew also recalled Officer Patrick Tucker, who had interviewed several witnesses, including Klapperich, shortly after the stabbings. Ballew began to question Tucker about a photographic lineup he had shown Klapperich. The State objected on the basis that Tucker's testimony as to any identification Klapperich made would be hearsay. Ballew responded that the testimony would be used to impeach Klapperich's identification of Ballew. The court sustained the State's objection. Ballew then stated that he had no further questions for Tucker.

After the jury found Ballew guilty on all six counts, Ballew filed a motion for a new trial. Ballew asserted that convictions for both first degree assault and second degree assault with respect to each victim would result in multiple punishments for the same offense in violation of the Double Jeopardy Clauses of the state and federal Constitutions. Regarding the presentation of evidence, Ballew claimed that he was denied his rights to a complete defense and to confront witnesses. Ballew also asserted that the court prejudicially erred in its evidentiary rulings when it prohibited him from questioning Luce and Tucker about statements made by Waddell and Klapperich that were inconsistent with their testimony at trial.

The court overruled Ballew's motion for a new trial. As to procedure, the court sustained the State's objections to evidence that Ballew offered at the hearing on the motion. As to the merits of the motion, the court stated that under Nebraska law, first degree assault and second degree assault are two separate and distinct offenses for double jeopardy purposes. The court also stated that the evidentiary rulings were not erroneous and that even if they were, any error in excluding the evidence did not materially affect Ballew's substantial rights.

The court found Ballew to be a habitual criminal. The court sentenced Ballew to imprisonment for 10 to 22 years for each of the six convictions. The court ordered that the sentences for first degree assault and second degree assault with respect to Mock be served concurrently to one another and that the sentences for first degree assault and second degree assault with respect to Waddell be served concurrently to one another but consecutively to the sentences for assaults with respect to Mock. The court ordered that each of the sentences for use of a deadly weapon be served consecutively to all other sentences imposed.

Ballew appeals his convictions and sentences.

## III. ASSIGNMENTS OF ERROR

Ballew claims that the district court erred when it overruled his motion for a new trial in which he asserted that (1) his right against double jeopardy was violated when he was convicted of both first degree assault and second degree assault with respect to each victim and (2) the court's evidentiary rulings violated his right to present a complete defense and his right to confront the witnesses against him. Regarding the evidentiary rulings, Ballew also separately claims that the court prejudicially erred when it (a) sustained the State's objection to his questioning Waddell regarding Waddell's description of his assailant shortly after the stabbing, (b) sustained the State's objection to his questioning Luce regarding Waddell's description of his assailant shortly after the stabbing, and (c) sustained the State's objection to his questioning of Tucker regarding an identification made by Klapperich from a photographic lineup.

We note that Ballew also argues that the court erred when it sustained the State's objections to evidence he offered at the hearing on the motion for a new trial. However, Ballew made no assignment of error with regard to such ruling. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *State v. Smith*, 286 Neb.

856, 839 N.W.2d 333 (2013). Accordingly, we do not address this argument.

## IV. STANDARDS OF REVIEW

[1] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

[2] Whether two convictions result in multiple punishments for the same offense for double jeopardy purposes presents a question of law, on which an appellate court reaches a conclusion independent of the court below. See *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014).

[4] Apart from rulings under the residual hearsay exception, we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds. *State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014).

[5,6] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error. *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014). The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *Id*. When issues on appeal present questions of law, an appellate court has an obligation to reach

an independent conclusion irrespective of the decision of the court below. *Id*.

## V. ANALYSIS

In this appeal, Ballew claims that the district court erred when it made certain evidentiary rulings and when it overruled his motion for a new trial. With regard to the motion for a new trial, the district court rejected two arguments that Ballew also makes on appeal: (1) that his convictions and sentences for both first degree assault and second degree assault with respect to each victim violated his right against double jeopardy and (2) that the court's evidentiary rulings were erroneous, violated his right to present a complete defense, and violated his right to confront witnesses against him. We first consider Ballew's double jeopardy argument in the context of the motion for a new trial. We then consider the district court's evidentiary rulings, both with respect to Ballew's argument that the rulings were erroneous and with respect to his argument that such rulings violated his constitutional rights and required a new trial.

### 1. The District Court Did Not Abuse Its Discretion When It Denied Ballew's Motion for a New Trial Based on an Alleged Double Jeopardy Violation

Ballew first argues that he should have been granted a new trial because it was a double jeopardy violation for him to be convicted and sentenced for both first degree assault and second degree assault as to each victim based on the same set of facts. We conclude that such convictions and sentences did not violate double jeopardy and that therefore, the district court did not abuse its discretion when it rejected Ballew's double jeopardy arguments and denied a new trial on such basis.

[7,8] The Double Jeopardy Clauses of both the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal,

(2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). At issue in this case is whether convictions for both first degree assault and second degree assault as to a particular victim arising from the same incident result in multiple punishments for the same offense. Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not. *Huff, supra.* This test, otherwise known as the "same elements" test, asks whether each offense contains an element not contained in the other. If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. If so, they are not the same offense and double jeopardy is not a bar to additional punishment. See *id*.

The district court cited two cases in which this court considered the relationship between the crime of first degree assault under § 28-308 and the crime of second degree assault under § 28-309. In *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981), this court concluded that second degree assault was not a lesser-included offense of first degree assault and that instead, the two were distinct offenses. In *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004), this court concluded that it was not an abuse of discretion to impose consecutive sentences for convictions for first degree assault, second degree assault, and other offenses when the convictions arose from the same transaction. Neither *Billups* nor *Van* directly addressed the question presented here—whether convictions and sentences for first degree assault and second degree assault related to the same victim arising from the same incident result in multiple punishments for the same offense for double jeopardy purposes. We apply the *Blockburger* test and conclude as a matter of law that there is no double jeopardy violation where, as here, a defendant is charged and convicted

of first degree assault under § 28-308 and second degree assault under § 28-309(1)(a).

[9] Section 28-308 provides that one commits first degree assault when one "intentionally or knowingly causes serious bodily injury to another person." Section 28-309(1) provides that one may commit second degree assault in one of three alternative ways: One commits second degree assault (a) when one "[i]ntentionally or knowingly causes bodily injury to another person with a dangerous instrument"; (b) when one "[r]ecklessly causes serious bodily injury to another person with a dangerous instrument"; or (c) when one "[u]nlawfully strikes or wounds another (i) while legally confined in a jail or an adult correctional or penal institution, (ii) while otherwise in legal custody of the Department of Correctional Services, or (iii) while committed as a dangerous sex offender under the Sex Offender Commitment Act." We have stated that "in applying *Blockburger* to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy." *State v. Winkler*, 266 Neb. 155, 163, 663 N.W.2d 102, 108 (2003).

Ballew was charged throughout this case with first degree assault under § 28-308 and second degree assault under § 28-309, but the theory under § 28-309 evolved during the proceedings. The original information charged two counts of second degree assault, one as to each victim, using all three alternative ways of committing the offense described in § 28-309. At the beginning of the trial, the court allowed the State to amend the information to delete allegations based on subparagraph (1)(c) of § 28-309, and at the end of the trial and prior to instructing the jury, the court allowed the State to amend the information to delete allegations based on subparagraph (1)(b) of § 28-309 in order to conform to the evidence. Therefore, the second degree assault charges in this case were based solely on subparagraph (1)(a), which provides that one commits second degree assault when one "[i]ntentionally or

knowingly causes bodily injury to another person with a dangerous instrument."

Applying the *Blockburger* test, we note that both § 28-308 and § 28-309(1)(a) require proof that the person intentionally or knowingly caused bodily injury to another person. However, § 28-308, pertaining to first degree assault, requires proof that the accused caused "serious" bodily injury, whereas § 28-309(1)(a), pertaining to second degree assault, does not require that the injury be "serious." Furthermore, § 28-309(1)(a) requires proof that the accused caused bodily injury "with a dangerous instrument," whereas § 28-308 does not require the use of a "dangerous instrument." In sum, § 28-308 and § 28-309(1)(a) each require proof of a fact which the other does not require, and therefore under the *Blockburger* test, they are not the same offense and double jeopardy is not a bar to punishment for both offenses.

The dissent contends that the *Blockburger* test does not apply in this case because the Legislature has expressed an intent for first degree assault and second degree assault to be a single offense. We agree that the *Blockburger* test does not apply when there is clear legislative intent regarding whether conduct involves a single offense or multiple offenses. See *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007). However, Ballew directs us to nothing in the statutes that indicates such intent, and the statute referred to by the dissent does not show a clear indication of legislative intent that first degree assault under § 28-308 and second degree assault under § 28-309(1)(a) constitute a single offense.

The *Blockburger* test is "an aid to statutory interpretation" to determine the Legislature's intent and "not a constitutional demand." See *State v. Huff*, 282 Neb. 78, 103, 802 N.W.2d 77, 98 (2011). The *Blockburger* test "should not be controlling where . . . there is a clear indication of . . . legislative intent." *Albernaz v. United States*, 450 U.S. 333, 340, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981).

The U.S. Supreme Court has noted that "[t]he assumption underlying the [*Blockburger*] rule is that [a legislature]

ordinarily does not intend to punish the same offense under two different statutes." *Whalen v. United States*, 445 U.S. 684, 691-92, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). With regard to the present case, the offenses of first degree assault and second degree assault are defined in two different statutes, §§ 28-308 and 28-309(1)(a), a fact "which, by itself is some indication of legislative intent to authorize multiple prosecutions simply because the offenses are separately defined in different statutes." See *Vick v. State*, 991 S.W.2d 830, 832 (Tex. Crim. App. 1999). The assumption that two statutes define two separate offenses may be overcome by a clear indication of legislative intent that the statutes constitute a single offense.

We have recognized that offenses defined in different statutes may constitute a single offense if the Legislature has clearly shown its intent that the crimes described are a single offense, making a *Blockburger* analysis unnecessary. See *Miner, supra*. In *Miner*, we held that theft offenses defined in separate statutes, Neb. Rev. Stat. §§ 28-511 and 28-517 (Reissue 2008), constituted a single offense, because Neb. Rev. Stat. § 28-510 (Reissue 2008) specifically provides: "Conduct denominated theft in sections 28-509 to 28-518 constitutes a single offense . . . ." In *Miner*, we stated that we were not employing the *Blockburger* test "[b]ecause the Legislature has *unambiguously* defined theft as a single offense which can be committed in several different ways." 273 Neb. at 846, 733 N.W.2d at 899-900 (emphasis supplied). The Legislature's unambiguous statement in § 28-510 that the statutes defining different varieties of theft constituted a single offense was a clear indication of legislative intent, which made use of the *Blockburger* test unnecessary.

In the present case, there is no similar statute stating that different assault statutes constitute a single offense, and the statute relied on by the dissent does not show clear legislative intent to such effect. The dissent relies on Neb. Rev. Stat. § 29-2025 (Reissue 2008), which states in relevant part, "Upon an indictment for an offense consisting of different

degrees the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto . . . .” Although we need not determine the precise meaning of § 29-2025 in this case, we read it as addressing the issue of whether a defendant may be convicted of a lesser offense when a greater offense was charged in the information. Regardless of the contours of § 29-2025, contrary to the interpretation by the dissent, we do not read this statute as showing a clear indication of legislative intent that the crimes found in §§ 28-308 and 28-309(1)(a) define a single offense merely because one offense is denominated as “assault in the first degree” while the other is denominated as “assault in the second degree.”

Therefore, in the absence of clear legislative intent, we analyze the charges in this case, which charges are based on separate statutes, under the *Blockburger* “same elements” test. Such analysis leads us to conclude that the first degree assault and second degree assault charges upon which this case was tried do not constitute a single offense and that double jeopardy does not bar multiple punishments. Because double jeopardy was not a bar to punishment for both first degree assault under § 28-308 and second degree assault under § 28-309(1)(a) with respect to each victim, we conclude that the district court did not abuse its discretion when it rejected Ballew’s double jeopardy argument in support of his motion for a new trial.

### 2. The District Court Did Not Err in Its Evidentiary Rulings, Nor Did It Abuse Its Discretion When It Denied a New Trial Based on Such Rulings

Ballew also argues that he should have been granted a new trial, because his right to present a complete defense and his right to confront witnesses were violated when the district court’s evidentiary rulings prevented him from presenting evidence to impeach testimony by Waddell and Klapperich identifying him as the assailant. In addition to claiming that

the evidentiary rulings required a new trial, Ballew separately claims that the rulings were prejudicially erroneous in and of themselves. We first review each evidentiary ruling in light of Ballew's argument that the ruling was erroneous, and we then review his argument that the rulings violated his constitutional rights and required that he be granted a new trial.

### (a) The District Court Did Not Err When It Sustained the State's Impeachment Objection to Ballew's Cross-Examination of Waddell

Ballew first claims that the district court erred when it sustained the State's impeachment objection to his cross-examination of Waddell. We find no error.

Waddell was a witness for the State. He identified Ballew as the person who had assaulted him. On cross-examination, Ballew questioned Waddell regarding the description of his assailant that he had given to an officer shortly after the stabbing. After Waddell testified that he had told the officer that the assailant had tattoos, Ballew attempted to refresh Waddell's memory with a report written by the officer. Waddell reviewed the report, and Ballew then asked Waddell whether he saw anywhere in the report that he had told the officer that the assailant had tattoos. Waddell answered, "No." At that point, the State objected on the basis of improper impeachment and the court sustained the objection. The court did not strike any of Waddell's testimony, and the State did not ask it to do so. Ballew then stated that he had no further questions for Waddell.

Ballew argues that his use of the police report was an appropriate method to refresh Waddell's memory and that it was appropriate for him to impeach Waddell's testimony by showing that shortly after the incident, Waddell gave a description of the assailant that was inconsistent with the description he gave at trial.

We first note that it is unclear what evidence Ballew was prevented from presenting to the jury when the court

sustained the State's objection based on improper impeachment but did not strike any testimony. Ballew was not prevented from using the police report to refresh Waddell's memory, and before the State objected, Waddell had already testified that the report did not include a statement that the assailant had tattoos. After it sustained the State's objection, the court did not strike the testimony and the State did not ask it to do so. Ballew stated that he had no further questions for Waddell.

Given the record just noted, we will nevertheless consider Ballew's argument that the court erred when it sustained the State's objection based on improper impeachment to his question to Waddell regarding the contents of the police report. We find no abuse of discretion in the district court's ruling.

[10,11] Prior inconsistent statements are admissible as impeachment evidence, but they are not admissible as substantive evidence unless they are otherwise admissible under the Nebraska Evidence Rules. See, *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007); *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986). See, also, Neb. Rev. Stat. §§ 27-613 and 27-801 (Reissue 2008). The trial court has considerable discretion in determining whether testimony is in fact inconsistent with prior statements. See *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011), citing *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985). We have said that absent an abuse of that discretion, the trial court's ruling will be upheld on appeal. *First Nat. Bank in Mitchell v. Kurtz*, 232 Neb. 254, 440 N.W.2d 432 (1989).

Ballew contends that Waddell's trial testimony describing his assailant was inconsistent with the statement attributed to Waddell in the officer's report. Ballew asserts this inconsistency goes to Waddell's credibility. Ballew asserts that his line of questioning was permissible as showing a prior inconsistent statement, and he does not claim that the proposed testimony was otherwise admissible.

Fundamental to Ballew's argument is his assertion that the statements are inconsistent. However, as the district court

necessarily found, Waddell's alleged failure to tell a police officer shortly after the incident that the assailant had tattoos is not inherently inconsistent with his later testimony that the assailant had tattoos. If Waddell had explicitly told the police officer that the assailant did not have tattoos, then the statements would have been inconsistent. But the fact that the police report does not include a descriptive detail that Waddell included in his trial testimony does not establish that Waddell made a prior inconsistent statement. Therefore, to the extent the district court sustained the State's improper impeachment objection because it determined that Ballew had not shown that Waddell's trial testimony was inconsistent with a prior statement, we find no abuse of discretion.

We determine that the district court did not abuse its discretion when it sustained the State's objection based on improper impeachment. We therefore reject Ballew's claim that the evidentiary ruling was erroneous.

(b) The District Court Did Not Err When It Sustained the State's Objection to Ballew's Questioning of Luce

Ballew next claims that the district court erred when it sustained the State's hearsay objection to his questioning of Luce regarding Waddell's earlier description of his assailant. We find no error.

Ballew called Luce as a witness in his defense. Ballew asked Luce, "And what did [Waddell] tell you?" to which the State objected. Ballew explained to the court that Luce's testimony regarding what Waddell had previously said was being offered in order to impeach Waddell's trial testimony regarding the description of his assailant. Ballew essentially contends that Waddell's description of the assailant before trial was inconsistent with Waddell's testimony at trial.

The court sustained the State's objection and stated that the question asked for hearsay and that none of the hearsay exceptions applied. Ballew then asked Luce whether Waddell had mentioned that the assailant had tattoos. Luce

said he did not recall, and Ballew attempted to refresh Luce's memory with his report. After Luce's memory had been refreshed, Ballew asked, "Did . . . Waddell mention anything to you about tattoos in regard to the description?" The State objected based on hearsay, and the court sustained the objection. Ballew then stated that he had no further questions for Luce.

Ballew argues on appeal that Luce's testimony regarding Waddell's earlier description of his assailant was admissible as a prior inconsistent statement used to impeach Waddell's trial testimony describing the assailant. Ballew contends that the description Waddell gave to Luce roughly at the time of the incident differed from the description Waddell gave in his trial testimony. Ballew asserts that at trial, Waddell described his assailant as wearing baggy clothes and having a lot of tattoos, but shortly after the incident, Waddell told Luce that the assailant was wearing a tank top and gym shorts and Waddell did not mention to Luce that the assailant had tattoos.

[12] 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. § 27-801(3). Ballew contends that the proposed testimony by Luce regarding Waddell's description of the assailant shortly after the incident was not hearsay, because it was not being offered to prove the truth of the description but instead to impeach Waddell by showing that Waddell has made inconsistent statements regarding the description of the assailant. Ballew makes no alternative argument that proposed testimony is otherwise admissible, such as a hearsay statement made admissible pursuant to a hearsay exception.

By determining that the proposed testimony was hearsay, and given the context of the ruling, the district court inherently rejected Ballew's explanation for admissibility and determined that the proposed testimony was not proper impeachment evidence. Thus, we analyze the ruling according to impeachment jurisprudence and apply the standards recited in the prior section relating to impeachment and prior

inconsistent statements. Although our reasoning differs somewhat from the district court, we conclude that the district court did not abuse its discretion when it limited Ballew's questioning of Luce.

Ballew asserted that Waddell's description shortly after the incident was inconsistent with his description at trial with respect to whether the assailant had tattoos and the nature of the clothing the assailant was wearing. With regard to Ballew's questioning Luce about whether Waddell said the assailant had tattoos, as we observed above with regard to the State's objection during Waddell's testimony, the alleged failure to previously state that the assailant had tattoos was not inherently inconsistent with testimony at trial that the assailant had tattoos. As we determined with respect to the objection to Ballew's questioning of Waddell, we conclude that the district court did not abuse its discretion when it determined that Ballew's questioning of Luce about whether Waddell said that the assailant had tattoos would not show a prior inconsistent statement by Waddell and that therefore, the line of inquiry was not suitable for application of prior inconsistent statement impeachment.

With regard to Ballew's questioning Luce about the description Waddell gave of the assailant's clothing, we note that Ballew had earlier questioned Waddell on the same matter. Waddell testified at trial that the assailant was wearing "baggy clothes," including "baggy pants and kind of like a baggier shirt." During Ballew's cross-examination of Waddell, Ballew asked Waddell whether Waddell had given an officer a description of the assailant as wearing a tank top and gym shorts. Waddell answered, "Yes," but he also stated, "I saw gym shorts underneath, yes."

We conclude that the district court did not abuse its discretion when it rejected Ballew's argument in support of admissibility and determined that Waddell's statement to Luce regarding the assailant's clothing was not a proper subject for impeachment by use of a prior inconsistent statement. Waddell's statement during cross-examination indicated that

at least the gym shorts could have been worn underneath a baggier shirt and pants. And the description of the assailant's clothes in the report prepared by Luce was brief and did not appear to be intended as a detailed description. Given that at the time it made its ruling on the State's objection, the court knew both the contents of the police report and Waddell's testimony, it was not an abuse of discretion for the court to determine that the descriptions were not inconsistent and that therefore, impeachment was not warranted. We further note that because Waddell had already testified regarding the description he had given police of the assailant's clothing shortly after the incident, questioning Luce to elicit the same testimony would have been cumulative of testimony Ballew had already adduced during his cross-examination of Waddell.

We reject Ballew's claim that the district court erred when it sustained the State's objection during Luce's testimony in Ballew's defense.

#### (c) The District Court Did Not Err When It Sustained the State's Objection to Ballew's Questioning of Tucker Regarding an Alleged Identification Made by Klapperich

Ballew finally claims that the district court erred when it sustained the State's hearsay objection to his questioning Tucker regarding an alleged identification made by Klapperich from a photographic lineup. We find no error.

During his cross-examination of Klapperich in the State's case, Ballew asked Klapperich whether he remembered Tucker's showing him "some pictures"; Klapperich replied, "Yes." Ballew then asked Klapperich whether he picked out the assailant, and Klapperich replied, "I don't remember." Ballew did not question Klapperich further on the matter.

Ballew called Tucker as a witness in his defense. Ballew asked Tucker whether he had shown Klapperich a photographic lineup, and Tucker replied, "I did." Ballew then asked Tucker whether he recalled how many photographs he

had shown Klapperich. Before Tucker could reply, the State requested a sidebar. The State told the court it anticipated that Ballew would ask Tucker whether Klapperich identified someone from the photographic lineup; the State objected on the basis that Tucker's testifying to any identification Klapperich made would be hearsay. Ballew argued that the testimony would not be hearsay, because it would not be used to prove the truth of the matter asserted but instead would be "offered to show that the person made a mistake in the identification." The court sustained the State's objection. Ballew then stated that he had no further questions for Tucker.

Ballew argues that he should have been allowed to question Tucker further about an identification Klapperich allegedly made from the photographic lineup, because such previous identification would be inconsistent with Klapperich's identification at trial of Ballew as the assailant and would impeach Klapperich's trial testimony. However, after the State made its objection, Ballew made no offer of proof to show that Tucker would testify that Klapperich identified someone other than Ballew.

We note that at the hearing on the motion for a new trial, Ballew offered exhibits in support of his motion and the court sustained the State's objections to the exhibits. On appeal, Ballew refers us to one such exhibit, exhibit 74, which is a report written by Tucker, as support for his argument that when shown the photographic lineup, Klapperich identified a person other than Ballew—"a person depicted in photo 5"—as the assailant. Brief for appellant at 21. Even if exhibit 74 had been received, it does not support Ballew's contention. Contrary to Ballew's characterization of the lineup "identification," *id.* at 20, exhibit 74 indicates that Tucker showed Klapperich five photographs of persons who were not Ballew and that Klapperich indicated only that the person shown in photograph 5 more closely resembled the assailant than did the others. The report states that after viewing photograph 5, Klapperich said, "'Looks [m]ore like him, kind of looks like the guy out here.'" The report does not indicate that

Klapperich actually identified the person depicted in photograph 5 as the assailant, and therefore, the earlier lineup "identification" is not inconsistent with Klapperich's trial identification of Ballew as the assailant.

Klapperich's prior lineup identification could not be fairly characterized as an inconsistent statement, and we therefore determine that the district court did not abuse its discretion when it rejected Ballew's argument that his questioning of Tucker would produce nonhearsay evidence of a prior inconsistent statement with which it would be appropriate to impeach Klapperich. We therefore conclude that the court did not err when it limited the questioning of Tucker.

### (d) The District Court Did Not Abuse Its Discretion When It Denied Ballew's Motion for a New Trial Based on Constitutional Violations Resulting From Evidentiary Rulings

In addition to claiming the evidentiary rulings were erroneous, Ballew also argues that a new trial should have been granted, because the rulings deprived him of his right to present a complete defense and his right to confront witnesses. We conclude that the district court did not abuse its discretion when it denied a new trial on such bases.

[13] We have stated that whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013), *cert. denied* ___ U.S. ___, 134 S. Ct. 1899, 188 L. Ed. 2d 930 (2014). See, also, *Crane v. Kentucky*, 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). However, "'[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Phillips*, 286 Neb. at 996, 840 N.W.2d at 519,

quoting *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

[14-16] The right of a person accused of a crime to confront the witnesses against him or her is a fundamental right guaranteed by the 6th Amendment to the U.S. Constitution, as incorporated in the 14th Amendment, as well as by article I, § 11, of the Nebraska Constitution. *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014). But the right is not unlimited, and only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense may wish. *Id*. When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, the scope of the inquiry is ordinarily subject to the discretion of the trial court. *Id*. An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness or (2) a reasonable jury would have received a significantly different impression of the witnesses' credibility had counsel been permitted to pursue his or her proposed line of cross-examination. *Id*.

Ballew argues that the court's evidentiary rulings prevented him from presenting a complete defense and from confronting witnesses. As discussed above, we find no error in the district court's evidentiary rulings and, therefore, the evidence Ballew sought to admit was inadmissible under standard rules of evidence. Furthermore, Ballew was allowed to present a meaningful defense and he was allowed to cross-examine the witnesses who identified him as the assailant. With regard to Waddell, despite the court's rulings, Waddell's testimony was not stricken, and Ballew was able to cross-examine Waddell regarding the description of the assailant in the police report attributed to Waddell and the alleged inconsistencies with his description at trial. Ballew was also able to cross-examine Klapperich, and Ballew's contentions do not demonstrate that

Klapperich made any prior inconsistent statement about which Ballew was prevented from questioning Klapperich.

Because we find no violation of Ballew's rights to present a complete defense and to confront the witnesses against him, we conclude that the district court did not abuse its discretion when it denied Ballew's motion for a new trial on such bases.

## VI. CONCLUSION

We conclude that Ballew's convictions and sentences for both first degree assault and second degree assault with respect to each victim did not violate his rights against double jeopardy. We also conclude that the district court's evidentiary rulings were not erroneous and that such rulings did not violate Ballew's right of confrontation or his right to present a complete defense. We finally conclude that the district court did not abuse its discretion when it denied Ballew's motion for a new trial, and we therefore affirm Ballew's convictions and sentences.

AFFIRMED.

STEPHAN, J., not participating in the decision.

CONNOLLY, J., dissenting.

I dissent from the majority opinion for two reasons. I believe that double jeopardy barred Ballew's two convictions for second degree assault. I also conclude that the trial court erred in excluding prior inconsistent statements.

I believe the opinion's double jeopardy analysis overlooks a statute that governs Ballew's convictions for two different degrees of assault arising from the same act. I conclude that Neb. Rev. Stat. § 29-2025 (Reissue 2008) requires the vacation of Ballew's two convictions for second degree assault. Regarding the evidentiary rulings, the district court unmistakably excluded Ballew's impeachment evidence as hearsay or improper impeachment because an officer might have failed to record a more consistent statement. The court never considered whether the witnesses'

prior inconsistent statements were inconsistent enough to be admitted to impeach their credibility.

So I disagree with the majority's conclusions that the court implicitly determined that the witnesses' prior inconsistent statements were inadmissible for this nonhearsay purpose. I believe that the majority opinion erroneously concludes that for a witness' prior statement to be inconsistent, it must be diametrically opposed to the witness' trial testimony. I conclude that the district court erred in excluding proper impeachment evidence and that the error was not harmless when the witnesses' credibility was crucial to the State's convictions.

## COURT'S SENTENCING VIOLATES DOUBLE JEOPARDY

The record shows that the jury found Ballew guilty of first degree *and* second degree assault for a single act of attacking Mock with a knife. And it found Ballew guilty of first degree *and* second degree assault for a single act of attacking Waddell with a knife. The majority concludes that Ballew's convictions of first and second degree assault for the same conduct do not violate the double jeopardy prohibition of multiple punishments for the same offense. It concludes that the convictions are not for the same offense under the "same elements" test that we have adopted from *Blockburger v. United States*.[1] It acknowledges that we have not previously decided this issue in the two Nebraska cases dealing with different degrees of assault convictions: *State v. Billups*[2] and *State v. Van*.[3] But it summarily concludes that the *Blockburger* test is appropriate here. I disagree. *Blockburger* does not apply when the Legislature has expressed a contrary intent.

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[1] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[2] *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981).

[3] *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

As relevant here, the Double Jeopardy Clause protects individuals from multiple punishments for the same offense.[4] "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."[5]

Under the *Blockburger* test, "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.'"[6] "But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized."[7] The "*Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning [legislative] purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent."[8]

For federal courts, if Congress has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated if the trial court imposes the cumulative punishments in a single trial.[9] But the Double Jeopardy Clause "at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to

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

[5] *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

[6] *Brown v. Ohio*, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), quoting *Blockburger, supra* note 1.

[7] *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

[8] *Albernaz v. United States*, 450 U.S. 333, 340, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). See *Huff, supra* note 4.

[9] *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009), citing *Hunter, supra* note 5.

do so."[10] This rule stems from the framework of the federal Constitution that reserves the power to define criminal offenses and to prescribe their punishments to Congress.[11] So if "a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty."[12]

This court has recognized these same principles. Within constitutional boundaries, it is the Legislature's function to define crimes and punishments.[13] Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch.[14] Thus, a court may not impose harsher punishments than the Legislature has validly authorized.[15]

These holdings compel the conclusion that a court violates Nebraska's double jeopardy clause by imposing cumulative punishments if the Legislature has not authorized it. We have long held that the protection provided by Nebraska's double jeopardy clause[16] is coextensive with that provided by the U.S. Constitution.[17]

I conclude that under these principles, it is irrelevant that a *Blockburger* analysis would not preclude punishing Ballew for first degree and second degree assault. Under § 29-2025,

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[10] *Whalen, supra* note 7, 445 U.S. at 689.

[11] See *id.*

[12] *Id.*

[13] See, e.g., *State v. Armagost, ante* p. 117, 864 N.W.2d 417 (2015); *In re Petition of Nebraska Community Corr. Council*, 274 Neb. 225, 738 N.W.2d 850 (2007).

[14] *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

[15] See, e.g., *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010); *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980).

[16] See Neb. Const. art. I, § 12.

[17] See, e.g., *Dragoo, supra* note 9.

the Legislature did not intend to permit courts to impose cumulative punishments for different degrees of criminal assault arising from a single act.

Section 29-2025, in relevant part, contemplates choosing between a conviction for a charged offense or a lesser degree offense: "Upon an indictment for an offense consisting of different degrees the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto . . . ." The plain language of § 29-2025 shows that the Legislature intended a fact finder to convict a defendant of a lesser degree offense for the same act only if it finds the defendant not guilty of the greater degree offense. The statute does not permit the fact finder to convict the defendant of both the higher and lesser degree offenses for the same conduct.

It is true that in *State v. Billups*, we held that second degree assault is not a lesser-included offense of first degree assault.[18] But the opinion does not show that the court considered the application of § 29-2025. More important, *Billups* does not control whether second degree assault is a lesser *degree* offense of first degree assault when the Legislature has determined that it is. Notably, in *Billups*, we also held that no evidence supported a claim that the victim was not seriously injured or that the defendant had not acted intentionally. So the defendant could not have shown prejudice from not receiving an instruction on second degree assault under those facts.[19]

Nor does our decision in *State v. Van* apply here.[20] As the majority opinion states, in *Van*, we affirmed the defendant's consecutive sentences for first degree assault, second degree assault, and other offenses. But those offenses did not arise from a single transaction, as the defendant argued on appeal.

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[18] *Billups, supra* note 2.

[19] See *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

[20] *Van, supra* note 3.

The opinion shows that the assaults took place over several days with distinct breaks between them.[21] In affirming the defendant's sentences, we did not even address his argument that his offenses arose from the same transaction.

In sum, I agree with the majority that we have never addressed whether the State can convict a defendant of first and second degree assault when the offenses arose out of the exact same conduct. And I agree that, generally, if a legislature sets out separate offenses in separate and distinct statutes and cumulative punishments are permitted under *Blockburger*, then multiple punishments for those offenses are not a double jeopardy violation.[22] But we have previously recognized that a double jeopardy violation occurs even if the defendant was convicted for separate offenses under the *Blockburger* test if the Legislature has provided that a person shall not be convicted of two offenses arising from the same act.[23] And I similarly believe that we cannot apply *Blockburger* to circumvent the Legislature's intent in § 29-2025.

It seems to me that the majority fails to distinguish between lesser degrees of the same offense and lesser-included offenses. Under § 25-2025, the relevant question is whether the Legislature has authorized punishing a defendant for both first degree and second degree assault for the same act. It has not. It is true that § 29-2025 authorizes a conviction for an uncharged lesser degree of the charged offense. But the majority ignores the language in this sentence that requires an acquittal of the higher degree: "[T]he jury may find the defendant *not guilty of the degree charged*, *and* guilty of any degree inferior thereto." (Emphases supplied.) Normally, we try to avoid interpreting a statute in a manner that renders part of its words meaningless.[24]

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[21] See *State v. Kleckner, ante* p. 539, 867 N.W.2d 273 (2015).

[22] See *Whalen, supra* note 7.

[23] See *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[24] See, e.g., *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

I concede that the statute has been applied to instructions for uncharged lesser-included offenses.[25] But it is specifically directed at a conviction for a *lesser degree* of the same offense. It applies when the defendant allegedly committed only one offense—in this case, a single assault against each victim. That is why in states that have a statute like § 29-2025, due process does not preclude a conviction for an uncharged lesser degree of the same offense.[26]

So permitting a conviction for a lesser degree of the charged offense and putting a defendant on notice that such a conviction is possible are obvious purposes of § 29-2025. But the majority can't have it both ways. Due process permits a conviction for an uncharged lesser degree because it is same offense under § 29-2025. So it cannot become a separate offense if the State seeks to convict the defendant of both the greater and lesser degrees. Notably, the majority cites no case in which an appellate court has upheld convictions of two separate degrees of the same crime for the same act.

Finally, even if the meaning of § 29-2025 were unclear, the rule of lenity should preclude interpreting it to permit two different assault convictions for the same assault. We strictly construe penal statutes and will not apply a penal statute to situations or parties not fairly or clearly within its provisions.[27] Ambiguities in a penal statute are resolved in the defendant's favor.[28] I do not believe § 29-2025 is ambiguous. It is a clear indication of the Legislature's intent that a jury can convict a defendant of a lesser degree of the charged offense *only if* it acquits the defendant of the greater degree.[29] But even if the Legislature's intent is not clear enough for the majority, our

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[25] See, e.g., *Moore v. State*, 147 Neb. 390, 23 N.W.2d 552 (1946).

[26] See, *Salinas v. United States*, 277 F.2d 914 (9th Cir. 1960); *State v. Foster*, 91 Wash. 2d 466, 589 P.2d 789 (1979).

[27] *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014), *cert. denied* ___ U.S. ___, 135 S. Ct. 1505, 191 L. Ed. 2d 442 (2015).

[28] *Id.*

[29] See *State v. Corey*, 181 Wash. App. 272, 325 P.3d 250 (2014).

rules of statutory construction should require the majority to interpret § 29-2025 in Ballew's favor.

I would hold that the court's convictions of first and second degree assault ran afoul of the constitutional double jeopardy guarantee. The jury obviously found the defendant guilty of both counts of first degree assault. But under § 29-2025, it could not simultaneously find him guilty of two counts of second degree assault for the same acts. I believe those convictions should be vacated.

## COURT ERRED IN EXCLUDING PROPER IMPEACHMENT EVIDENCE

### Ballew Properly Attempted to Impeach Waddell's Testimony by Showing His Omission of Material Facts in a Prior Inconsistent Statement

The majority concludes that the court did not err in excluding evidence of Waddell's prior inconsistent statement because the court "necessarily found" that Waddell's previous description of his assailant to Luce was "not inherently inconsistent with his later testimony that the assailant had tattoos."

But the record shows that the court never considered whether Waddell's prior statement was sufficiently inconsistent with his trial testimony. So the majority's conclusion that the prior statement was not inconsistent enough is not a theory of exclusion that Ballew had a fair opportunity to argue against at trial.[30] More important, I believe the majority's standard of diametrically opposed prior statements is incorrect.

As the majority opinion states, during the State's direct examination of Waddell, he stated that he remembered Ballew had "a lot of tattoos" on his face and neck and "spread out on his body." On cross-examination, Waddell stated that he had told Luce that his assailant was a black male with tattoos. Ballew's attorney then showed Waddell an unidentified

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

writing to refresh his memory and asked if the writing showed that he had described his assailant as having tattoos. When Waddell said "No," the prosecutor immediately objected. In a sidebar conference, the parties stipulated that Ballew had asked Waddell to review Luce's report of Waddell's statements, and the court admitted the report for ruling on the objection. The prosecutor argued that the report contained only Luce's statement of what he remembered of Waddell's statements and that impeachment was improper because Luce might have omitted something Waddell had told him. Ballew's attorney argued that (1) Luce's report was the best evidence of what Waddell had told Luce, (2) it was proper impeachment to show that Luce had not recorded what Waddell claimed to have reported to him, and (3) the State could recall Luce if necessary. The court sustained the objection as improper impeachment.

Nothing in the sidebar conference shows that the court considered whether Waddell's prior statements to Luce were inconsistent enough with his testimony for the court to admit them as prior inconsistent statements. Instead, the court accepted the State's argument that impeaching Waddell with Luce's report was improper because Luce might not have recorded a *consistent* statement. That reasoning was incorrect.

A witness' prior inconsistent statements are admissible as impeachment evidence.[31] This rule includes a witness' failure to mention a fact of consequence under circumstances in which it would have been natural to assert it. Such an omission amounts to an assertion of the nonexistence of the fact.[32] And we have specifically held that a trial court errs in excluding this type of impeachment evidence.[33]

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[31] *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[32] See, *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980); 3A John Henry Wigmore, Evidence in Trials at Common Law § 1042 (James H. Chadbourn rev. ed. 1970).

[33] *Rodriguez, supra* note 31.

Witnesses in criminal trials are frequently impeached with their statements to police officers after a crime.[34] This is also true when the witness testifies to a fact of consequence at trial but failed to disclose this fact to the officer.[35] It seems to me that if evidence of a witness' prior inconsistent statement were inadmissible because a police report, a document, or a different witness' memory might be incomplete, then most prior inconsistent statements that were not made under oath would be inadmissible to impeach a witness. Because this is clearly not the law, I would reverse the court's ruling that Ballew's attempted impeachment of Waddell was error because the officer might have omitted a critical fact. No evidence called into question the reliability of Luce's report.

### Prior Inconsistent Statements Need Not Be Diametrically Opposed to a Witness' Trial Testimony

Even if—as the majority concludes—the trial court had actually ruled that Waddell's prior statement should be excluded as improper impeachment because it was not inconsistent with his trial testimony, I would reverse. We have explicitly stated that an "inconsistency is not limited to diametrically opposed answers but may also be found in evasive answers,

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[34] See, e.g., *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015); *State v. Stevens*, 290 Neb. 460, 860 N.W.2d 717 (2015); *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985), *disapproved in part on other grounds, Dominguez, supra*, and *Stevens, supra*; 21 Am. Jur. Proof of Facts 2d 101 *Impeachment of Witness—Prior Inconsistent Statements* § 16 (1980 & Supp. 2014).

[35] See, e.g., *Anderson v. Charles*, 447 U.S. 404, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980); *State v. Luther*, 152 Conn. App. 682, 99 A.3d 1242 (2014); *People v. Toney*, 337 Ill. App. 3d 122, 785 N.E.2d 138, 271 Ill. Dec. 487 (2003); *Com. v. Ragan*, 538 Pa. 2, 645 A.2d 811 (1994); *People v. Bock*, 242 Ill. App. 3d 1056, 611 N.E.2d 1173, 183 Ill. Dec. 525 (1993); *People v. Knight*, 173 A.D.2d 736, 570 N.Y.S.2d 617 (1991); *State v. Thompson*, No. COA02-1597, 2003 WL 22388024 (N.C. App. Oct. 21, 2003) (unpublished disposition listed in table at 160 N.C. App. 710 (2003)).

inability to recall, silence, or changes of position."[36] The question is whether it is reasonable to conclude that a witness who believed the truth of the fact asserted at trial would probably not have omitted that fact when he or she made the prior statement.

Here, Waddell confirmed that he gave a statement to Luce just a few minutes after the attack and that he provided this information so that the police could find the perpetrator. He did not know the assailant, so he would have known that details about the assailant's appearance were critical to identifying and apprehending him. So his omission of a prominent trait like tattoos on the assailant's face, neck, and body is sufficiently inconsistent with his description of the assailant at trial. A witness who believed the truth of this statement would probably not have failed to report this fact to the officers who would be searching for the perpetrator. Even the State's argument at trial tacitly admitted that if Luce's report was a full account of Waddell's description of his assailant soon after the assault, then his description at trial was inconsistent with what he reported to Luce. The same is true about the inconsistencies in Waddell's description of his assailant's clothing.

On direct examination, Waddell said he remembered that Ballew was wearing baggy pants and a baggier shirt but he could not remember what color they were. This description was most consistent with Ballew's appearance in a photograph that Luce took a few minutes after officers arrested Ballew. Waddell testified that he was shown a picture from a camera after he was placed in an ambulance and that he had seen Luce's photograph three other times before trial. The photograph depicts Ballew wearing a loose black T-shirt over a white crewneck T-shirt and low-hanging jeans that exposed

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[36] *Marco, supra* note 34, 220 Neb. at 100, 368 N.W.2d at 473. Accord, *U.S. v. Cody*, 114 F.3d 772 (8th Cir. 1997); *U.S. v. Denetclaw*, 96 F.3d 454 (10th Cir. 1996); 28 Charles Alan Wright & Victor J. Gold, Federal Practice & Procedure § 6203 (2d ed. 2012); G. Michael Fenner, The Hearsay Rule 61 (2003).

the upper half of his boxer shorts. But Waddell described his assailant to Luce before he saw any photographs, just a few minutes after the assault, while he was still in the house. The point of Ballew's cross-examination of Waddell was to demonstrate that the photograph (or photographs) Waddell saw after his interview with Luce affected his memory of the assailant's appearance.

Ballew asked Waddell if he had told Luce his assailant was wearing gym shorts and a "wife-beater" T-shirt, which was described as a white tank top. Waddell responded that he saw "gym shorts underneath." Ballew then asked Waddell whether he had told Luce that his assailant was a black male with dreadlocks and tattoos, wearing gym shorts and a "wife-beater" T-shirt, and he said yes. But his previous statement that he had seen "gym shorts underneath" implied that he had could have told Luce his assailant had on gym shorts underneath outer baggy pants. And his testimony at trial that his assailant was wearing a baggy shirt of an unknown color was not consistent with his original description that his assailant was wearing a white tank top. I believe that Ballew should have had the opportunity to point out discrepancies in Waddell's description to Luce and his testimony at trial about Ballew's appearance.

Moreover, even if I agreed that the description inconsistencies were not inconsistent enough, Waddell explicitly stated that he had told Luce that his assailant was a black male with tattoos. This inconsistency is relevant to his account of his own conduct and bears on his credibility as a witness.[37] So I disagree with the majority's conclusion that the court properly excluded evidence to impeach Waddell.

For similar reasons, I disagree with the majority's conclusion that the court correctly sustained the State's hearsay objection to Luce's testimony about Waddell's prior statement. It was not hearsay.

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[37] See, e.g., *Stevens, supra* note 34.

Ballew Properly Attempted to Impeach Waddell's Testimony Through Extrinsic Evidence of a Prior Inconsistent Statement

A witness' prior inconsistent statement that is admitted solely to impeach a witness' credibility is not offered for the truth of the matter asserted and is therefore not hearsay.[38] Neb. Rev. Stat. § 27-613 (Reissue 2008) authorizes a party to introduce extrinsic evidence of a witness' prior inconsistent statement of a material fact if the witness has an opportunity to explain or deny the statement and the opposing party has an opportunity to interrogate the witness.

Here, when Ballew asked Luce what Waddell had said to him about the assailant's description, the State objected that the question called for hearsay. In a sidebar conference, Ballew's counsel explained that she was seeking Luce's testimony to impeach Waddell's testimony about the assailant's description and what he was wearing on the night of the attack. The prosecutor argued that Ballew could only seek to refresh Waddell's memory on his description to Luce and ask him if he had said anything different at that time. The court concluded that Ballew's question called for hearsay and that no exceptions applied. When Ballew's counsel asked Luce if Waddell had mentioned any tattoos, Luce could not recall. After Luce was shown his report to refresh his memory, he was asked the question again. But the court again sustained the State's hearsay objection.

The majority concludes that because the court ruled that the question called for hearsay, it "inherently rejected Ballew's explanation for admissibility and determined that the proposed testimony was not proper impeachment evidence." Again, nothing in the sidebar discussion shows that the court even considered whether Waddell's prior statements were

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[38] See, *Stevens, supra* note 34; *Rodriguez, supra* note 31; 2 McCormick on Evidence § 249 (Kenneth S. Broun et al. eds., 7th ed. 2013); R. Collin Mangrum, Mangrum on Nebraska Evidence 811 (2015).

inconsistent enough to impeach his trial testimony. Logically, because the court determined that Ballew had offered the statement for the truth of the matter asserted, it did not simultaneously determine that even if he had not offered the prior statement for its truth, there was no inconsistency between Waddell's prior statement and trial testimony. It is true that the court stated no exceptions to the hearsay rule applied. But prior inconsistent statements are not an exception. They are excluded from the definition of hearsay. So the majority's conclusion that Luce's testimony about Waddell's prior statement was not admissible for a nonhearsay purpose is at odds with the court's exclusion of the testimony as hearsay. I conclude the trial court's hearsay rulings were also erroneous.

Regarding the majority's alternative reasoning for excluding Waddell's statement to Luce, I disagree it was not inconsistent enough with Waddell's testimony to be admissible as a prior inconsistent statement. As stated above, it is reasonable to conclude that a witness who believed that his assailant had tattoos on his face, neck, and body would not have failed to mention that fact when describing his assailant to the police. And if Waddell had believed that his assailant was wearing a baggy dark T-shirt and gym shorts underneath baggy pants, he would not have failed to mention those facts.

### Court Erred in Excluding Officer Tucker's Impeachment Testimony as Hearsay

At trial, Klapperich, Waddell's friend, identified Ballew as the person who slammed Waddell's head into a Jeep parked in front of the house and who fought with Waddell in the street. On cross-examination, Klapperich admitted that while he was sitting in Tucker's patrol car, Tucker had shown him photographs. But he could not recall identifying Waddell's assailant. Ballew called Tucker to impeach Waddell and Klapperich. First, Ballew asked if a woman at the party had showed him a photograph on her cell phone, which

photograph he then showed to Waddell. Ballew was not in the photograph. Tucker said after he showed the photograph to Waddell in the ambulance, Waddell told him it was "one of them with the dread locks." The State did not object. But when Tucker confirmed that he had shown a photographic lineup to Klapperich, the State objected that Ballew could not ask whether Klapperich had identified someone in the lineup because the question called for hearsay.

Ballew argued that he was offering the evidence to impeach Klapperich's statement that he could not recall looking at a photographic lineup or making an identification. The court responded that Ballew had impeached Klapperich when Tucker said that he showed Klapperich a photographic lineup and that any further questioning would be asking for identification. Ballew argued that he was not offering the testimony for its truth but to show Klapperich had made a mistake in the identification. The court sustained the hearsay objection.

The majority opinion states that Ballew failed to make an offer of proof to show that Tucker would testify that Klapperich had identified someone besides Ballew. Nonetheless, it concludes that the court did not err in rejecting Ballew's argument that Tucker's testimony would produce nonhearsay evidence of a prior inconsistent statement. The majority reasons that Klapperich's statements in Tucker's report—which the court excluded after the hearing on Ballew's motion for a new trial—shows that Klapperich's prior statement was not inconsistent with his trial testimony.

I think this reasoning is internally inconsistent and potentially misleading to practitioners. When the substance of excluded evidence "was apparent from the context within which questions were asked,"[39] an offer of proof is unnecessary.[40] If the substance was not apparent to the trial court, then the party waives an argument on appeal that the court erred

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[39] Neb. Rev. Stat. § 27-103(1)(b) (Reissue 2008).

[40] See *Rodriguez, supra* note 31.

in excluding the evidence.[41] So if Ballew's failure to make an offer of proof were fatal to his argument, that conclusion should be the end of the analysis. Nor should the majority address the substance of Tucker's report as a substitute for his presumed testimony. That report is not in evidence. The court excluded it as hearsay after the hearing on Ballew's motion for a new trial, and the majority has concluded that Ballew waived any objections regarding that ruling.

In short, we should evaluate the court's hearsay ruling from the questioning at trial to determine whether the court properly excluded Tucker's testimony. Here, the substance of the evidence that Ballew sought to introduce was clear. Both the State's argument and the court's reasoning confirm that the court excluded the evidence because Ballew sought confirmation that Klapperich had identified someone other than Ballew as the assailant. That is, Ballew sought to show that Klapperich had made a prior statement that was inconsistent with his testimony that Ballew was the assailant. An offer of proof was unnecessary under these circumstances.

More important, the court erred in excluding the evidence as hearsay because Ballew offered it to impeach Klapperich's credibility, not to prove the truth of his previous statement:

> The theory of impeachment does not depend upon the prior statement being true and the present one false. Instead, the mere fact that the witness stated the facts differently on separate occasions is sufficient to impair credibility. By "blowing hot and cold," doubts are raised as to the truthfulness or accuracy of both statements. Thus, the prior statement is not offered for its truth and is not hearsay.[42]

The State did not object that Klapperich's statements were not inconsistent enough to be inadmissible as a prior inconsistent statement. Moreover, even if Tucker's report were part

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[41] See, e.g., *State v. Sing*, 275 Neb. 391, 746 N.W.2d 690 (2008).

[42] 2 McCormick on Evidence, *supra* note 38 at 195.

of this record, we cannot know whether Ballew's questioning would have fleshed out that report. But I disagree that Klapperich's prior statement would be inconsistent only if he had positively identified someone besides Ballew as the assailant. If Klapperich identified someone as a possible or probable assailant and that person's appearance was different from his testimony at trial about Ballew's appearance, this discrepancy would bear on Klapperich's credibility as a witness. Unfortunately, because the court incorrectly excluded the evidence as hearsay, we cannot review whether it was admissible for a nonhearsay purpose. Instead, the relevant question is whether the rulings were harmless error. They were not.

## COURT'S EXCLUSION OF PROPER IMPEACHMENT EVIDENCE WAS NOT HARMLESS ERROR

An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless the error was harmless beyond a reasonable doubt.[43] 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 whether the actual guilty verdict rendered was surely unattributable to the error.[44]

Here, the witnesses gave conflicting testimony on key facts at the party, so determining their credibility was of paramount importance in finding Ballew guilty. Because the scene was crowded and chaotic, the discrepancies in their testimony were not insignificant.

There were 50 to 60 people at the party. Waddell and Klapperich both said around 15 to 20 black males came to the party and more than one them had a dreadlock hairstyle like Ballew's. A brawl broke out in the yard between a disputed

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[43] *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015).

[44] *Id.*

number of black males and white males, who did not previously know each other. Luce testified that the outside lighting was low. There were discrepancies in the witnesses' testimonies on where Mock was and what he was doing when he was stabbed. There were also discrepancies on Ballew's placement during the melee—whether he was in front of the house with a group of 4 or 5 other black males fighting against about 10 white males, including Mock, or whether he was fighting a few yards away with Waddell and others by the fence. Finally, there were discrepancies in the witnesses' testimony about Ballew's appearance.

Against this backdrop, prior inconsistent statements in Waddell's and Klapperich's descriptions of the assailant were obviously relevant to whether they had credibly identified Ballew as the assailant. This is especially true when Waddell's memory could have been affected by a photograph of Ballew that Waddell saw soon after his interview with Luce. This is not a case in which the evidence of Ballew's guilt was overwhelming. I conclude that the court's erroneous exclusion of evidence relevant to Waddell's and Klapperich's credibility was not harmless beyond a reasonable doubt. I would reverse the judgments of conviction and remand the cause for a new trial.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Dowd Grain Company, Inc., a Nebraska corporation, appellant, v. County of Sarpy, a corporate body politic, appellee.

867 N.W.2d 599

Filed August 14, 2015. No. S-14-611.

1. **Constitutional Law: Ordinances.** The constitutionality of an ordinance presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Zoning: Ordinances: Presumptions: Proof.** The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.
4. **Constitutional Law: Zoning: Ordinances: Proof.** The burden of demonstrating a constitutional defect in a zoning ordinance rests with the challenger.
5. **Municipal Corporations: Zoning: Ordinances: Proof.** To successfully challenge the validity of a zoning ordinance, the party challenging must prove that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance.
6. **Zoning: Legislature.** Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.
7. **Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors to a specific class. A legislative act constitutes special legislation if it either (1) creates an arbitrary and unreasonable method of classification or (2) creates a permanently closed class.
8. ____. A special legislation analysis focuses on a legislative body's purpose in creating a challenged class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation.

9. **Constitutional Law: Statutes: Special Legislation.** When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.
10. **Special Legislation: Public Policy.** To be valid, a legislative classification must rest upon some reason of public policy, some substantial difference in circumstances, which would naturally suggest the justice or expediency of diverse legislation regarding the objects to be classified.
11. **Special Legislation.** The Legislature has the power to enact special legislation where the subject or matters sought to be remedied could not be properly remedied by a general law and where the Legislature has a reasonable basis for the enactment of the law.
12. ____. Legislative classifications must be real and not illusive; they cannot be based on distinctions without a substantial difference. The distinctive treatment must bear some reasonable relation to the legitimate objectives and purposes of the legislative act. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class concerning the purpose of the act.
13. **Special Legislation: Words and Phrases.** A closed class is one that limits application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development.
14. **Special Legislation.** Generally, a class of property owners in a certain geographic area cannot form a closed class.
15. **Statutes: Special Legislation.** In determining whether a statute legitimately classifies, a court must consider the actual probability that others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, and Duane J. Dowd for appellant.

L. Kenneth Polikov, Sarpy County Attorney, and Michael A. Smith for appellee.

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

Cassel, J.

## I. INTRODUCTION

The County of Sarpy revised an overlay zoning ordinance to exempt properties platted before the effective date of the original ordinance. An owner of nonexempt property sought a judgment declaring the exemption unconstitutional as special legislation. The owner now appeals from a judgment for the county. Because the exemption did not create a closed class and its application was not arbitrary or unreasonable, we affirm the judgment.

## II. BACKGROUND

### 1. March 9, 2004, Ordinance

On March 9, 2004, the Sarpy County Board of Commissioners supplemented the Sarpy County zoning ordinances by adopting an overlay district zoning ordinance (overlay ordinance). In effect, the overlay ordinance imposed additional regulations on land along a specified road corridor. These regulations included design guidelines.

The original overlay ordinance applied only to future developments. It stated that "[t]he design guidelines are applicable for new development proposals within the area of application including plats, zoning changes or site plan review."

The Nebraska Court of Appeals considered a challenge to the applicability of the original overlay ordinance.[1] The court held that building permits constituted "'new development proposals'"[2] under the plain language of the ordinance. The court further reasoned that an administrative replat and a site development plan filed after March 9, 2004, were new development proposals to which the design guidelines applied.

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[1] See *Dowd Grain Co. v. County of Sarpy Bd. of Adj.*, No. A-06-681, 2008 WL 2511150 (Neb. App. June 24, 2008) (selected for posting to court Web site).

[2] *Id.* at *4.

### 2. 2007 Revision

In May 2007, the Sarpy County Board of Commissioners adopted a resolution amending the overlay ordinance. The revised ordinance contained a subsection designated "33.3 Project Application and Exceptions" (exemption), which stated that the overlay ordinance applied, in part, to the following:

> 33.3.1 Any new development requiring a building permit built on land within the boundaries of the HC Highway Corridor Overlay District after the effective date of this Ordinance, except any land that was platted prior to March 9, 2004; provided however, that land within the boundaries of the HC Highway Corridor Overlay District that was zoned other than agricultural prior to March 9, 2004[,] that was part of a Phased Development shall also be excepted.
>
> (a) Replats, lot line adjustments, and lot consolidations of such platted properties shall remain excepted.
>
> (b) Phased Developments shall m[e]an property that was, at a minimum, preliminary platted and at least a part of the property within the preliminary plat was final platted.

Thus, under the exemption, any land platted prior to March 9, 2004, did not have to comply with the design guidelines contained in the overlay ordinance.

### 3. Pleadings

Dowd Grain Company, Inc. (Dowd Grain), brought a declaratory judgment action against the county, claiming that the exemption was unconstitutional. Dowd Grain alleged that it owned real property subject to the overlay ordinance but not qualifying for the exemption. It claimed that its property was similarly situated to the exempted property. And it asserted that the exemption created special privileges and immunities in favor of the class of real property exempted from enforcement of the overlay ordinance, in violation of Neb. Const. art. III, § 18. Dowd Grain sought a declaration that the exemption was unconstitutional.

The county filed a responsive pleading. It alleged that the property exempted from the overlay ordinance formed a legitimate class. The exemption, it claimed, served a legitimate governmental purpose. This purpose was to "protect[] from harm property owners who have substantially changed position in good-faith reliance upon existing zoning by incurring substantial expenses related to construction and by incurring financial obligations to third parties."

### 4. Evidence at Trial

Several matters were undisputed at trial:

- Properties located within the overlay district that were not platted prior to March 9, 2004, could not be added to the class created by the exemption.
- The exemption's language prevented expansion of the exempt geographic area.
- Dowd Grain spent over $500,000 grading and preparing its property for development.

Other evidence focused on the effect of failing to exempt properties already under development. The district court received into evidence a partial transcript of a May 8, 2007, meeting of the county's board of commissioners. This meeting addressed the then-proposed amendments to the overlay ordinance.

At this meeting, several business representatives testified regarding the potential adverse effects. One representative stated that the proposed amendment to the overlay ordinance was consistent with the representations made to and relied upon by that business. An attorney for a different business stated that imposition of restrictions on land that had been purchased and planned for a number of years would undermine the business' ability to grow as it intended. And an attorney speaking on behalf of a partnership that was currently in the process of building in the affected area testified that the partnership would suffer damages if the county board voted against the "grandfathering clause." The attorney explained that the partnership had already laid the footings for its

building and placed steel framework and that if the grandfathering language was stricken, the partnership would have to redo that work at a cost of about $1 million.

### 5. District Court's Judgment

The district court entered judgment in favor of the county. Although other legal issues were raised before the district court, Dowd Grain assigns error only to the court's determination regarding its special legislation claim.

In determining whether the exemption constituted special legislation, the court first considered whether the ordinance created a closed class. The court noted that any replats would change the number of parcels and that any class consisting of property owners in a given area is subject to constant change. The court concluded that the exemption did not create a closed class, reasoning that "[a]lthough . . . the geographic area is restricted, [the court] cannot find that the class is closed as to the number of parcels or the ownership of the property."

The district court further reasoned that even if a closed class were created, there was a reasonable basis for the exemption. The court observed that the county board heard testimony about the harsh effects that the adoption of the overlay ordinance without an exemption would have on certain property owners. The court stated:

> It is clear to this Court that certain property owners within the overlay district relied in good faith on the validity of the exemptions contained in the Ordinance when they made substantial investments in developing their property prior to the Amendment, and were properly exempted from the retroactive effects of the Amendment according to the purposes of the Overlay Ordinance.

The court determined that treating similarly situated property differently was permissible in this case:

> The separate treatment of property owners who had platted prior to March 9, 2004, is proper because they are distinct from property owners who have yet to make

improvements on their land. This distinction bears a reasonable relation to the legitimate purposes of the Overlay Ordinance without penalizing those entities who took action in reliance on previous regulations.

Dowd Grain timely appealed. We moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

## III. ASSIGNMENT OF ERROR

Dowd Grain assigns six errors which can be condensed into one: The district court erred in failing to find that the exemption was special legislation.

## IV. STANDARD OF REVIEW

[1,2] The constitutionality of an ordinance presents a question of law.[4] An appellate court independently reviews questions of law decided by a lower court.[5]

## V. ANALYSIS

### 1. Governing Principles

#### (a) Validity of Zoning Ordinance

[3-6] The validity of a zoning ordinance will be presumed in the absence of clear and satisfactory evidence to the contrary.[6] The burden of demonstrating a constitutional defect in a zoning ordinance rests with the challenger.[7] To successfully challenge the validity of a zoning ordinance, the party challenging must prove that the conditions imposed by the city in adopting the zoning ordinance were unreasonable, discriminatory, or arbitrary, and that the regulation bears no relationship to the purpose sought to be accomplished by the ordinance.[8]

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

[4] *D-CO, Inc. v. City of La Vista*, 285 Neb. 676, 829 N.W.2d 105 (2013).

[5] *Id.*

[6] *Coffey v. County of Otoe*, 274 Neb. 796, 743 N.W.2d 632 (2008).

[7] See *id.*

[8] *Id.*

Where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.[9] These same principles apply when a party challenges the validity of a zoning ordinance on the basis of special legislation.[10]

(b) Special Legislation

Neb. Const. art. III, §18, provides in pertinent part that "[t]he Legislature shall not pass local or special laws" which grant "any special or exclusive privileges, immunity, or franchise whatever" and that "[i]n all other cases where a general law can be made applicable, no special law shall be enacted." The special legislation prohibition also applies to municipal ordinances.[11] And a zoning ordinance is a type of municipal ordinance.[12]

[7] The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants special favors to a specific class.[13] A legislative act constitutes special legislation if it either (1) creates an arbitrary and unreasonable method of classification or (2) creates a permanently closed class.[14]

[8-11] A special legislation analysis focuses on a legislative body's purpose in creating a challenged class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation.[15] When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges,

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[9] *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182 (1989).

[10] See *Appeal of Apgar From Bd. of Manheim Tp.*, 661 A.2d 445 (Pa. Commw. 1995).

[11] *D-CO, Inc. v. City of La Vista, supra* note 4.

[12] See, generally, Black's Law Dictionary 1857 (10th ed. 2014) (defining "zoning ordinance").

[13] *Banks v. Heineman*, 286 Neb. 390, 837 N.W.2d 70 (2013).

[14] *Id.*

[15] *J.M. v. Hobbs*, 288 Neb. 546, 849 N.W.2d 480 (2014).

without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.[16] To be valid, a legislative classification must rest upon some reason of public policy, some substantial difference in circumstances, which would naturally suggest the justice or expediency of diverse legislation regarding the objects to be classified.[17] Thus, the Legislature has the power to enact special legislation where the subject or matters sought to be remedied could not be properly remedied by a general law and where the Legislature has a reasonable basis for the enactment of the law.[18]

[12] Legislative classifications must be real and not illusive; they cannot be based on distinctions without a substantial difference.[19] The distinctive treatment must bear some reasonable relation to the legitimate objectives and purposes of the legislative act.[20] The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class concerning the purpose of the act.[21]

### 2. Whether Exemption Is Special Legislation

#### (a) Whether Exemption Created Closed Class

[13] In considering whether the exemption in the revised ordinance is special legislation, we first consider whether it created a closed class. A closed class is one that limits application of the law to a present condition, and leaves no room

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[16] *Id.*

[17] *Id.*

[18] *Banks v. Heineman, supra* note 13.

[19] *J.M. v. Hobbs, supra* note 15.

[20] *Id.*

[21] *Id.*

or opportunity for an increase in the numbers of the class by future growth or development.[22] The district court concluded that the exemption did not create a closed class. We agree.

The exemption, approved in 2007, excepted property platted prior to March 9, 2004—the date of adoption of the overlay ordinance—from certain of the overlay ordinance's provisions. Dowd Grain argues that the exemption created a permanently closed class. There is no dispute that Dowd Grain's property cannot be added to the class created by the exemption. Nor is there a dispute that the exemption prevented expansion of the geographic area that is exempt from the overlay ordinance. But that does not necessarily mean that the exemption created a closed class.

[14] Generally, a class of property owners in a certain geographic area cannot form a closed class. We previously determined that a class consisting of Nebraska property owners who possessed irrigated property not located within the Upper, Middle, and Lower Republican Natural Resources Districts and who were exempt from an occupation tax under a particular statute was not a closed class.[23] We reasoned that because real property is alienable, the composition of any class consisting of owners of property in a certain area is subject to constant change.[24]

[15] We agree with the district court that the exemption did not create a closed class. The number of parcels within the fixed geographic area is subject to change. And, as in *Kiplinger v. Nebraska Dept. of Nat. Resources*,[25] the owners composing the class can change via a sale of the real property. We are cognizant that in determining whether a statute legitimately classifies, we must consider the actual

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[22] *Banks v. Heineman, supra* note 13.

[23] See *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011), *disapproved on other grounds, Banks v. Heineman, supra* note 13.

[24] See *id.*

[25] *Id.*

probability that others will come under the act's operation; if the prospect is merely theoretical, and not probable, the act is special legislation.[26] The future transfer of property within the exemption's geographic area is certainly probable. Thus, the class is not closed.

(b) Whether Exemption Created Arbitrary and Unreasonable Method of Classification

The next question is whether the class benefited by the exemption was arbitrarily selected. The district court concluded that the exemption in the revised ordinance was not special legislation because there was a reasonable basis for the exemption. Again, we agree.

The prohibition against special legislation aims to prevent arbitrary classifications that favor select persons or objects while excluding others that are not substantially different in circumstance in relation to the legislation's purpose.[27] The legislative classification must (1) be based on some substantial difference of circumstances or situation that would indicate the justice or expediency of diverse legislation with regard to the objects classified and (2) further a public purpose.[28]

The evidence established substantial differences between those exempted and those who were not. Only those property owners who filed a plat prior to enactment of the overlay ordinance were exempt. The submission of a plat application requires the employment of an engineer, a surveyor, and possibly other professionals. It requires provisions for grading of the property, paving of streets, and the building of storm sewers and water mains. And any easements for utilities must be documented. Thus, the submission of a plat application entails significant expense and planning. To then "change the rules" and subject those property owners to the design

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[26] See *id.*

[27] See *J.M. v. Hobbs, supra* note 15.

[28] *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995).

requirements contained in the overlay ordinance after they had already submitted a plat based on the absence of those design requirements would be harsh and unfair.

We recognize that other property owners within the overlay district, such as Dowd Grain, may have similarly expended substantial funds and engaged in detailed planning. But limiting the exemption to those property owners who had completed the process of actually submitting a plat is a reasonable distinction. While the solution chosen by the county may not be perfect, perfection is not required. As we noted above, where the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.[29] We conclude that the exemption contained within the revised ordinance is not unconstitutional.

## VI. CONCLUSION

We conclude that the exemption did not create a closed class, because the number of parcels within the specified geographic area and the owners of the real property are subject to change in the future. We further conclude that there was a reasonable basis for exempting from enforcement of the overlay ordinance those property owners who had submitted a plat for their property prior to enactment of the overlay ordinance, because those property owners were in a substantially different situation from property owners who had not yet completed a plat for their property. Because the exemption was not unconstitutional special legislation, we affirm the district court's judgment.

Affirmed.

McCormack, J., participating on briefs.
Wright, J., not participating.

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[29] *Giger v. City of Omaha, supra* note 9.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Jin R. Wang, appellant.

867 N.W.2d 564

Filed August 14, 2015. No. S-14-671.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, the court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that the court reviews independently of the trial court's determination.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Drunk Driving: Blood, Breath, and Urine Tests: Police Officers and Sheriffs.** Neb. Rev. Stat. § 60-6,199 (Reissue 2010) does not require an arresting officer to inform the person to be tested of his or her right to obtain an evaluation by an independent physician and additional testing.
4. **Due Process: Drunk Driving: Blood, Breath, and Urine Tests: Police Officers and Sheriffs.** There is no due process violation if the officer does not give an advisement of the statutory right to an independent evaluation and testing under Neb. Rev. Stat. § 60-6,199 (Reissue 2010).
5. **Constitutional Law: Drunk Driving: Blood, Breath, and Urine Tests: Police Officers and Sheriffs.** Because there is no statutory or constitutional requirement that a defendant be advised of his or her rights under Neb. Rev. Stat. § 60-6,199 (Reissue 2010), there is no constitutional requirement that an advisement must be given in a language the defendant understands.

6. **Statutes: Equal Protection: Discrimination.** When a statute does not create a classification on its face, it violates equal protection only when the defendant can show the law was enacted or applied with a discriminatory purpose.

Appeal from the District Court for Lancaster County: Karen B. Flowers and Robert R. Otte, Judges. Affirmed.

Mark E. Rappl for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Miller-Lerman, J.

## NATURE OF CASE

Jin R. Wang appeals his conviction in the district court for Lancaster County for driving under the influence (DUI), third offense. Wang claims that the district court erred when it overruled his motion to suppress evidence of a chemical breath test and admitted the evidence at trial. Wang argues that the evidence should have been suppressed because his alleged statutory right to advisement under Neb. Rev. Stat. § 60-6,199 (Reissue 2010) and his constitutional rights to due process and equal protection were violated when the arresting officer failed to advise him, in a language he could understand, that he had a right to obtain an evaluation by an independent physician and additional laboratory testing. We find no error and affirm Wang's conviction.

## STATEMENT OF FACTS

At issue in this case is § 60-6,199 which provides:

> The peace officer who requires a chemical blood, breath, or urine test or tests pursuant to § 60-6,197 may direct whether the test or tests shall be of blood, breath, or urine. The person tested shall be permitted to have a

> physician of his or her choice evaluate his or her condition and perform or have performed whatever laboratory tests he or she deems appropriate in addition to and following the test or tests administered at the direction of the officer. If the officer refuses to permit such additional test to be taken, then the original test or tests shall not be competent as evidence. Upon the request of the person tested, the results of the test or tests taken at the direction of the officer shall be made available to him or her.

Wang, who is Chinese and only speaks "some English," was arrested on suspicion of driving under the influence. Wang was taken to a "Detox" center, where he was required to submit to a chemical breath test. The officer who arrested Wang read to him, in English, an advisement stating that under § 60-6,199, he was permitted to have a physician of his choice evaluate his condition and perform whatever laboratory tests the physician deemed appropriate.

Prior to trial, on October 18, 2013, Wang moved the district court to suppress evidence of the results of his breath test because, inter alia, he was not properly advised of his right to obtain testing by an independent physician. Wang claimed that despite an obvious language barrier, the arresting officer neglected to ensure that he understood his rights.

In an order filed February 6, 2014, the district court overruled Wang's motion to suppress. The court noted first that although § 60-6,199 provides that a person arrested for DUI has a right to be evaluated by an independent physician who may perform additional tests, the statute includes no requirement that the person be advised of these provisions. The court found that despite the lack of a statutory requirement that an advisement be given, the officer who arrested Wang read the statute to Wang in English and the evidence showed that a copy of the statute, also in English, was posted on the wall of the room in which Wang was tested. The court found that it was "highly doubtful" Wang understood the advisement

the officer read to him and that the officer made no effort to determine whether Wang understood it. However, the court concluded that because the statute did not require an advisement, there was no due process violation. The court noted that the results of the chemical breath test would be deemed incompetent as evidence if the State had hampered Wang's efforts to obtain an independent test, but the court concluded that the failure to communicate the advisement to Wang in his first language was not the equivalent of hampering his efforts to exercise his right to an independent test and that therefore, the failure to advise Wang in a language he understood was not a violation of Wang's rights.

Following a bench trial, the court found Wang guilty of DUI, and after an enhancement hearing, the court found that it was Wang's third offense. The court sentenced Wang to 60 days in jail and a 3-year term of probation.

Wang appeals.

## ASSIGNMENT OF ERROR

Wang claims that the district court erred when it overruled his motion to suppress and allowed the results of the chemical breath test into evidence. He argues that the failure to advise him of the provisions of § 60-6,199 in a language he understood violated statutory, due process, and equal protection rights.

## STANDARDS OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress evidence based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014). 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. Knutson, supra*.

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015).

## ANALYSIS

Wang claims on appeal that the district court erred when it overruled his motion to suppress evidence of the results of the chemical breath test and admitted the evidence at trial. He argues that the evidence was obtained in violation of his statutory, due process, and equal protection rights because the officer failed to advise him, in a language he understood, that in accordance with § 60-6,199, he "shall be permitted to have a physician of his or her choice evaluate his or her condition and perform or have performed whatever laboratory tests he or she deems appropriate in addition to and following the test or tests administered at the direction of the officer." We conclude that the district court did not err when it determined that there was no violation of Wang's statutory or constitutional rights and when it overruled his motion to suppress and received evidence of the chemical breath test at trial.

Wang concedes that in prior cases, we have held that § 60-6,199 creates no statutory right that a defendant be advised of the provisions therein. In *State v. Klingelhoefer*, 222 Neb. 219, 225, 382 N.W.2d 366, 370 (1986), we held that § 60-6,199, which was then codified at Neb. Rev. Stat. § 39-669.09 (Reissue 1984), "does not require the officer to inform the person to be tested of his privilege to request an independent test." In *Klingelhoefer*, we cited *State v. Miller*, 213 Neb. 274, 328 N.W.2d 769 (1983), and noted that in *Miller*, we had "reaffirmed" this holding, which had been followed in prior cases. 222 Neb. at 225, 382 N.W.2d at 370.

Wang urges us to review and overrule the holdings in *Klingelhoefer* and the prior cases cited therein. He contends that this court should recognize a statutory right to an

advisement. Wang notes that in *Klingelhoefer*, three judges dissented and opined an advisement should be required and that two of the three judges had previously dissented in *Miller*. We decline Wang's invitation to overrule the *Klingelhoefer* line of cases.

We begin our analysis by noting that fundamental to the reasoning of the dissenting judges in *Miller* was their view that the "underlying philosophy" that had led the U.S. Supreme Court to require *Miranda* warnings applied equally to § 60-6,199. 213 Neb. at 282, 328 N.W.2d at 774 (Krivosha, C.J., dissenting; White, J., joins). That is, they reasoned that before an individual can waive a constitutional right, he or she must have been informed of that right. The *Miller* dissent assumed the existence of a constitutional right to an independent test and thus a corresponding duty to advise. We decline to adopt the rationale of the dissent in *Miller*.

In considering Wang's argument, we keep in mind the distinction between constitutional rights and statutory rights. The U.S. Supreme Court has made clear that the rights that are the subject of *Miranda* warnings are of constitutional dimension. In contrast, statutory rights, such as the independent evaluation and testing privileges in § 60-6,199, are "simply a matter of grace bestowed by the . . . legislature." *South Dakota v. Neville*, 459 U.S. 553, 565, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983). Given the nature and origin of the right to independent evaluation and testing, we see no basis to adopt the rationale of the dissent in *State v. Miller, supra*.

[3] Turning to the terms of § 60-6,199, we see no language which would support a statutory requirement of an advisement. There is no explicit statutory language requiring an advisement, and we do not read such a requirement into the statute. See *State v. Rodriguez*, 288 Neb. 714, 850 N.W.2d 788 (2014) (it is not within appellate court's province to read meaning into statute that is not there). Other states that have found a statutory right to an advisement have based it on explicit language in the statute. For example, the Supreme

Court of Washington in *State v. Turpin*, 94 Wash. 2d 820, 823, 620 P.2d 990, 992 (1980), noted that the Washington statute, Wash. Rev. Code Ann. § 46.20.308(1) (West 1970), explicitly provided that the arresting "'officer shall inform the person of his right to refuse the test, and of his right to have additional tests administered by any qualified person of his choosing.'" See, also, *Hilliard v. Elfrink*, 77 Ohio St. 3d 155, 157, 672 N.E.2d 166, 168 (1996) (citing Ohio Rev. Code Ann. § 4511.19(D)(3) (LexisNexis Supp. 1995), which provided: "'The person tested may have a physician, a registered nurse, or a qualified technician or chemist of his own choosing administer a chemical test or tests in addition to any administered at the request of a police officer, and shall be so advised'"). Given the language of § 60-6,199, we agree with and reaffirm the holding in *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986), and prior cases, that § 60-6,199 does not require an arresting officer to inform the person to be tested of his or her right to obtain an evaluation by an independent physician and additional testing.

Wang raises additional arguments based on constitutional principles, specifically due process and equal protection. He contends that even if there is no statutory right to an advisement, it is a violation of constitutional due process for an arresting officer to fail to advise an arrestee of the right to independent evaluation and testing found in § 60-6,199. Challenges to a failure to give an advisement on due process grounds have been considered and repeatedly rejected by other courts. For example, in *Kesler v. Department of Motor Vehicles*, 1 Cal. 3d 74, 459 P.2d 900, 81 Cal. Rptr. 348 (1969), the California Supreme Court stated that the legislation at issue therein did not require the arresting officer to advise the driver of the availability of an additional test at his own expense and that the principles of due process did not so require. The court observed that due process required an opportunity for additional testing but not an advisement. Compare *Montano v. Superior Court Pima County*, 149 Ariz.

385, 719 P.2d 271 (1986) (stating that due process requires giving advisement that independent breath testing is available only where state does not perform chemical tests). In view of the language of § 60-6,199 and constitutional principles, we agree with the California Supreme Court that where an arrestee is unimpeded, due process does not require giving an advisement.

We have referred to *South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983), earlier in this opinion and again find its analysis helpful in our consideration of Wang's due process argument. *Neville* involved the use of evidence of a defendant's refusal to take a chemical test where the defendant had not been advised that refusal could be used against him in court. The U.S. Supreme Court held that the use of evidence of the defendant's refusal to take a test, albeit unwarned, "comported with the fundamental fairness required by Due Process." 459 U.S. at 566. The Court reasoned that due process did not require advisement of statutory, as opposed to constitutional, rights and that due process did not require an advisement of all potential consequences of a defendant's choices surrounding testing.

[4,5] By similar reasoning, we conclude that there is no due process violation if the officer does not give an advisement of the statutory right to independent evaluation and testing under § 60-6,199. No advisement is required by the statute, and because the rights are statutory rather than constitutional, due process does not require an advisement. Because there is no statutory or constitutional requirement that a defendant be advised of his or her rights under § 60-6,199, there is no constitutional requirement that an advisement must be given in a language the defendant understands. Other courts have applied similar reasoning. In *People v. Wegielnik*, 152 Ill. 2d 418, 428, 605 N.E.2d 487, 491, 178 Ill. Dec. 693, 697 (1992), the Supreme Court of Illinois stated: "Because due process does not require that . . . warnings [regarding the consequences of refusal] be given at all, it does not

require that they be given in a language the defendant understands." For the foregoing reasons, we reject Wang's due process argument.

[6] Finally, Wang contends that his right to equal protection was violated because the advisement was given in a language he did not understand. His argument is based on disparate treatment between those who speak English and those who do not. The State directs us to *Rodriguez v. State*, 275 Ga. 283, 565 S.E.2d 458 (2002). An argument similar to that asserted by Wang was rejected in *Rodriguez* wherein the defendant raised an equal protection challenge involving a statute which required that an implied consent notice be read to an arrestee. In *Rodriguez*, the Supreme Court of Georgia rejected the arrestee's challenge and noted, inter alia, that although the statute required that a certain notice be read to an arrestee, the statute did not require that the notice be read in English. The Georgia court stated that "[w]hen a statute does not create a classification on its face, it only violates equal protection when the defendant can show the law was enacted or applied with a discriminatory purpose." 275 Ga. at 286, 565 S.E.2d at 461.

In the present case, the Nebraska statute, § 60-6,199, does not require any advisement, much less require that an advisement be given in English. Therefore, the statute on its face does not differentiate between English speakers and others. Wang needed to show that, as applied, the officer's reading of the advisement in English was done with a discriminatory purpose. The district court found that the officer's failure to advise Wang in a language he understood was not the equivalent of hampering Wang's efforts to obtain an independent test. We construe this as a finding that there was no discriminatory purpose behind the officer's giving the advisement in English. Because the officer was not required to give an advisement, either statutorily or constitutionally, we agree with the district court's analysis that there was no discriminatory purpose in the officer's failure to give an advisement in

a language that Wang understood and that there was no equal protection violation.

## CONCLUSION

The district court did not err when it determined that there was neither a statutory nor constitutional requirement for the officer to advise Wang of his right to independent evaluation and testing under § 60-6,199. As such, the failure to give an advisement in a language Wang understood was not a violation of his due process or equal protection rights, as the district court found. We therefore conclude that the district court did not err when it overruled Wang's motion to suppress and received evidence of the results of the chemical breath test at trial. We affirm Wang's conviction for DUI, third offense.

AFFIRMED.

HEAVICAN, C.J., not participating.

Nebraska Supreme Court
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# Facilities Cost Management Group, LLC, appellee and cross-appellant, v. Otoe County School District 66-0111, also known as Nebraska City Public Schools, appellant and cross-appellee.

868 N.W.2d 67

Filed August 21, 2015. No. S-14-380.

1. **Summary Judgment.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
5. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
6. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
7. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Contracts.** The meaning of an ambiguous contract is generally a question of fact.
9. ____. Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous.

10. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
11. **Contracts.** A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
12. ____. When a court has determined that ambiguity exits in a document, an interpretive meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder.
13. **Contracts: Parol Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous.
14. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Reversed and remanded for a new trial.

Larry E. Welch, Sr., Larry E. Welch, Jr., and Damien J. Wright, of Welch Law Firm, P.C., for appellant.

Steven E. Achelpohl and John A. Svoboda, of Gross & Welch, P.C., L.L.O., for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

Otoe County School District 66-0111, also known as Nebraska City Public Schools (the District), and Facilities Cost Management Group, LLC (FCMG), entered into a contract wherein FCMG would provide architectural, representative, and managerial services in connection with the construction and renovation of three schools within the District. FCMG filed an amended complaint in the district court for Douglas County against the District, alleging that the District had breached the contract by failing to pay the full amount due under the contract, and FCMG sought approximately

$2 million in damages. The parties filed cross-motions for partial summary judgment; the District generally argued that the contract was ambiguous, specifically sections 11.2 and 12.7, and FCMG generally argued that the contract was not ambiguous. The district court granted FCMG's motion and denied the District's motion based upon its determinations that sections 11.2 and 12.7 were not ambiguous due to their language and the parties' course of dealings.

After a jury trial, the district court entered judgment on the jury's verdict for FCMG in the amount of $1,972,993. The district court denied the District's motion for judgment notwithstanding the verdict or for new trial. The District appeals, and FCMG cross-appeals. We determine that the district court did not err when it determined that section 12.7 of the contract is not ambiguous, but it erred when it determined that section 11.2 is not ambiguous. Accordingly, the court committed prejudicial error when it gave jury instruction No. 2, which stated that "the contract in this case is not ambiguous." As explained below, we reverse, and remand for a new trial.

## STATEMENT OF FACTS

The threshold issue presented in this appeal is whether sections 11.2 and 12.7 of the contract are ambiguous. The contract is based on a 1987 version of the American Institute of Architects' "Standard Form of Agreement Between Owner and Architect." As the Court of Special Appeals of Maryland has observed:

> The standard form contracts drafted by the [American Institute of Architects (AIA)] are widely used. One author has stated that the AIA documents are the most widely used standard form contracts in the construction industry. *See* 1 Steven G.M. Stein, *Construction Law*, ¶ 3.02[1][b] (Matthew Bender 1999)(footnote omitted) (stating that AIA forms "have the longest history and are the most widely used and well known of the standard forms.").

*Notre Dame v. Morabito*, 132 Md. App. 158, 174, 752 A.2d 265, 273-74 (2000). However, the parties customized some sections of the contract, including sections 11.2 and 12.7 at issue in this case. The contract defines the District as the "Owner" and FCMG as the "Architect" even though the activities of FCMG were not limited to architectural services.

Pertinent sections of the contract are quoted below. Section 11.2, one of the customized provisions of the contract, is titled "**BASIC COMPENSATION**," and it provides:

> Fees shall be as outlined in the attached Recommended Compensation schedule as applicable to each component facility of the Project and shall be included in various categories of the Project Budget for Basic Services for Site and Construction work, Master Planning, Equipment, Additional Services for Remodeling and Additions, and Contingency allowances. Corresponding Project Reimbursable Expenses and costs for [the District's] Representative/Project Management services shall also be paid as included in the Project Budget. These fees and costs are intended to be converted to Lump Sum amounts with the initial approval by the [District] and [FCMG] of the Project Scope, Budget, and concept to be advanced for funding. Lump Sum amounts and inclusions shall remain effective for the duration of the Project(s), except in the event of approved changes in the scope of work or alternatives to be bid adding two percent or more to the scope. In such event the Lump Sum fees and costs shall be increased proportionately to reflect the full percentage of changes.

A grid is attached to most copies of the contract in the record. The grid appears to be a schedule of fees for various services.

Section 12.7, another customized provision of the contract, is titled "**RESPONSE TO DISTRICT'S REQUEST FOR PROPOSAL**," and it provides:

> The Architect's Response to the District's Request for Proposal is attached to this Agreement for general

> reference purposes including overviews of projects and services. [The District's] approvals following execution of this Agreement and related to the scope of work on the individual projects and corresponding portions of Project Budgets during the various Phases shall incorporate applicable adjustments through the projects [sic] development.

The "Architect's Response to the District's Request for Proposal" referred to in section 12.7 is not attached to any copy of the contract in the record, and there is no such document bearing the title "Architect's Response to the District's Request for Proposal." The parties may have been referring to exhibit 72, which is FCMG's 72-page proposal submitted in response to the District's request for proposals, and possibly in addition, exhibit 19, which is 21 pages of questions and answers exchanged between the parties.

With respect to the background facts of this case, in March 2007, the District issued a request for proposals in connection with the construction and renovation of three schools within its school district. In response to the District's request for proposals, FCMG submitted its proposal dated March 29, 2007. FCMG's proposal is in the record as exhibit 72. In its proposal, FCMG stated that it was to serve as the project's architect, the District's representative, and the project's manager. Specifically, the proposal stated:

> FCMG is not a traditional architectural firm. We specialize as independent Owner's Representatives for program and project development and management services. From this independent perspective, we offer your District an opportunity to better control the costs, extended function, and flexibility within the proposed facilities. We have the unique ability to offer guaranteed maximum cost options to assure that the bonds requested and approved by the voters will do the job . . . so that they know before they vote what they will receive . . . and also know that

> the quality will be consistent with today's version of the Middle School success.

With respect to rates for the project, FCMG's proposal stated:

> FCMG negotiates its fees with its clients in order to provide the best value for the dollar and to respond directly to the nature of the actual projects selected to be funded or further developed. We utilize Lump Sum fees which are incorporated in the projects [sic] budgets. The examples in this Response each include allowances for all fees and expenses.
>
> . . . .
>
> We guarantee that the aggregate fees of our firm together with the Technical Services Consultants will not exceed typically published guidelines for full Basic Services of the entire professionals [sic] team.
>
> . . . .
>
> We encourage you to consider fees on a cost per square foot basis rather than simple percentage. Because our projects are typically 15% or more less in construction costs, technical fees typically follow suit and are less per square foot. Again, we encourage lump sum fees that produce the lowest bottom line at project completion.

After receiving FCMG's proposal, the board of directors of the District sent FCMG a series of written questions concerning the proposal, and FCMG provided its answers in a document dated June 22, 2007. These questions and answers are in the record as exhibit 19. In response to the question "[*d*]*o you have a guaranteed maximum price for the project*," FCMG stated:

> Yes. The $20.76 million figure provided the Board in our proposal response is an example of a guaranteed maximum funding equal or greater in square footage and quality to that which the District had proposed in its recent study. Another alternative, one which provided very substantially improved flexibility and square

> footage for educational delivery was also provided at a much lower cost than the recent study by others.
>
> Guaranteed maximum price options are clearly available to the District in our planning approach. Following establishment of the exact scope of the work by the Board as it assesses various options and alternatives, we can be in a position to set maximum required bond proceeds and related funding for the group of projects.
>
> . . . .
>
> The budgets offering a nearly $4 million savings which FCMG presented to [the District] represents a guaranteed maximum price approach matched to input provided by the District through its previous study for equivalent or greater footage and quality for the group of projects.

The District and FCMG entered into the contract, dated July 18, 2007, of which pertinent sections are quoted above. A bond to fund the project successfully passed in the fall of 2007, and the project subsequently commenced. During completion of the project, the board of the District made various changes to the project. FCMG at various times presented the District's board with budget grids regarding the project, and FCMG regularly sent invoices to the District. The invoices were for work performed by various contractors and FCMG's fees. The District paid the invoices from March 2008 until May 2009, when it stopped paying the invoices because it learned that the project was almost $2 million over budget. The parties seem to agree that contractors were paid and that the subject matter of this case is limited to amounts claimed by FCMG.

On June 29, 2012, FCMG filed its complaint against the District alleging breach of contract and seeking $2,016,747.52 in damages plus interest, attorney fees, and costs. FCMG filed an amended complaint on February 11, 2013, in which it added its claim of unjust enrichment. The District filed its answer to the amended complaint on March 13, in which it generally denied FCMG's allegations, raised various affirmative

defenses, and brought counterclaims which it later abandoned. The unjust enrichment claim was abandoned at trial.

The parties filed cross-motions for partial summary judgment on the issue of whether the contract was ambiguous, specifically sections 11.2 and 12.7, quoted above. The District reads the contract as providing for a guaranteed maximum price; but failing that interpretation, the District argued that the contract was ambiguous as to whether the parties intended to fix a guaranteed maximum price for the budget and, in the event increases were permitted, the method as to how to calculate FCMG's fees for increases to the scope of the project. FCMG argued that the contract was not ambiguous, based on the language of the contract. FCMG further argued that the parties' conduct during performance of the contract indicated the true intent of the parties as to the payment of costs and fees.

After a hearing, the district court concluded that neither section 11.2 nor section 12.7 was ambiguous. The district court filed its order on February 11, 2014, in which it granted FCMG's motion for partial summary judgment and denied the District's motion for partial summary judgment. In its order, with regard to section 12.7, the court stated that "[o]ne issue is the effect to be given to [FCMG's response] submitted . . . in response to questions from the [District] regarding the project." The court quoted section 12.7 of the contract and found that "while the words 'for general reference purposes' are possibly ambiguous they do not equate to incorporating [FCMG's response] into the terms of the contract between [FCMG] and [the District] and, therefore, cannot be a basis to determine fees and costs pursuant to the contract." With respect to section 11.2, the district court stated that the District routinely paid invoices submitted by FCMG from March 2008 through May 2009, and that therefore, "there was a course in dealing between the parties which evidences a lack of ambiguity in [section 11.2 of] the contract." Accordingly, the court granted FCMG's motion and denied the District's motion for partial summary judgment.

A jury trial was held February 10 through 14, 2014. When FCMG rested its case, the District moved for directed verdict, which the district court denied. At the close of all the evidence, both parties moved for directed verdict, and the court denied both motions. The case was submitted to the jury, and jury instruction No. 2 provided in pertinent part:

> The Court has determined as a matter of law that the following facts exist and that you must accept them as true:
>
> 1. That the parties entered into a contract related to the construction/remodeling of three facilities for the [District] on August 9, 2007.
>
> 2. That the Court has determined that *the contract in this case is not ambiguous*.

(Emphasis supplied.)

After trial, the jury returned a verdict in favor of FCMG in the amount of $1,972,993, and by order filed February 19, 2014, the district court accepted the jury's verdict and entered judgment for FCMG and against the District in the amount of $1,972,993. On February 27, the District filed its motion for judgment notwithstanding the verdict or, in the alternative, for new trial. The district court denied the District's motion in an order filed April 1.

The District appeals, and FCMG cross-appeals.

## ASSIGNMENTS OF ERROR

The District claims 10 assignments of error on appeal, and FCMG claims one assignment of error on cross-appeal; however, we restate only those assignments of error of the District that are necessary for the disposition of this case. See *Gray v. Kenney*, 290 Neb. 888, 863 N.W.2d 127 (2015) (stating appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it). The District claims the district court erred when it granted FCMG's motion for partial summary judgment based upon the court's determinations that sections 11.2 and 12.7 of the contract are not ambiguous and that the concept of

a guaranteed maximum price was not incorporated into the contract. The District also claims that the district court erred when it gave jury instruction No. 2, which stated that the contract was not ambiguous.

On cross-appeal, FCMG raises an issue pertaining to interest allegedly owed to it by the District. Given our disposition of the District's appeal, we need not reach the issue raised in the cross-appeal.

## STANDARDS OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Neun v. Ewing*, 290 Neb. 963, 863 N.W.2d 187 (2015).

[2,3] The meaning of a contract and whether a contract is ambiguous are questions of law. *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 860 N.W.2d 391 (2015). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id*.

[4] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *Warner v. Simmons*, 288 Neb. 472, 849 N.W.2d 475 (2014).

## ANALYSIS

The District claims that the district court erred when it determined that both section 11.2 and section 12.7 of the contract were not ambiguous. The District therefore argues that the court erred when it denied the District's motion for partial summary judgment and granted FCMG's motion for partial summary judgment. The District further claims that the court erred when it gave jury instruction No. 2, which states that "the contract in this case is not ambiguous." As a matter of law, we conclude that section 12.7 is not ambiguous but that

section 11.2 is ambiguous. That is, the court did not err when it determined that section 12.7 is not ambiguous, but it erred when it determined that section 11.2 is not ambiguous. As a result, the court erred when it entirely denied the District's motion for partial summary judgment and entirely granted FCMG's motion for partial summary judgment. Furthermore, based upon our determination that section 11.2 is ambiguous, the court erred when it gave jury instruction No. 2, which stated that the contract in this case as a whole is not ambiguous. The errors identified above require that we reverse, and remand for a new trial.

[5-8] The rules of law applicable to this contract case are familiar. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *David Fiala, Ltd. v. Harrison, supra*. 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). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *David Fiala, Ltd. v. Harrison, supra*. The meaning of an ambiguous contract is generally a question of fact. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005). See, also, *David Fiala, Ltd. v. Harrison, supra*.

*Section 12.7 Is Not Ambiguous.*

The District would prefer that the contract be read as providing a guaranteed maximum price and that it owes nothing further to FCMG. On appeal, the District argues that section 12.7 of the contract is ambiguous, that exhibits 19 and 72 are incorporated into the contract via section 12.7, and that by incorporating exhibits 19 and 72, the contract provides a guaranteed maximum price. The District challenges the district court's ruling to the contrary. We reject this argument.

In describing a guaranteed maximum price contract, the Indiana Court of Appeals has stated that "[a] guaranteed maximum price provides a cap on a party's financial obligations. It is the greatest amount a party is required to pay for the contracted services." *TRW, Inc. v. Fox Development Corp.*, 604 N.E.2d 626, 630 (Ind. App. 1992).

Section 12.7 is a provision customized by the parties, and it provides:

> The Architect's Response to the District's Request for Proposal is attached to this Agreement for general reference purposes including overviews of projects and services. [The District's] approvals following execution of this Agreement and related to the scope of work on the individual projects and corresponding portions of Project Budgets during the various Phases shall incorporate applicable adjustments through the projects [sic] development.

No copy of the contract in the record bears an attachment labeled "Architect's Response to the District's Request for Proposal" referred to in section 12.7, and there is no such document bearing that title in the record. The reference may be to exhibit 72 and/or exhibit 19.

In its February 11, 2014, order, in which the district court granted partial summary judgment in favor of FCMG, the district court rejected the District's argument that section 12.7 was ambiguous. The court stated that "while the words 'for general reference purposes' are possibly ambiguous they do not equate to incorporating [FCMG's responses] into the terms of the contract between [FCMG] and [the District] and, therefore, cannot be a basis to determine fees and costs pursuant to the contract."

We agree with the district court that section 12.7 does not incorporate FCMG's responses and the precontract negotiations into the contract. The expression "for general reference purposes," interesting though it may be, contrasts with a provision, common in contract law, which incorporates another document by reference. Compare *Baker's Supermarkets v.*

*Feldman*, 243 Neb. 684, 688, 502 N.W.2d 428, 432 (1993) (reading original lease and supplemental agreement as integrated where supplemental agreement stated that original lease was "'by this reference deemed incorporated'"). Section 12.7 simply does not incorporate FCMG's responses into the contract.

The District's suggestion that section 12.7 is ambiguous and establishes a guaranteed maximum price is belied by other contract language. The standard language of section 5.2.2 provides: "No fixed limit of Construction Cost shall be established as a condition of this Agreement by the furnishing, proposal or establishment of a Project budget, unless such fixed limit has been agreed upon in writing and signed by the parties hereto." In *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996), we examined a contract that contained the exact standard language of section 5.2.2. In *Anderzhon/Architects*, the parties entered into the contract for the design and construction of a residential apartment complex. The parties had anticipated that the construction costs of the project would be approximately $27,000 to $30,000 per unit, but ultimately, the costs of construction were approximately $39,000 to $43,000 per unit. We noted that there was no written term in the contract which established a construction budget constraint and stated that "[s]ection 5.2.2 of the contract specifies that construction costs are not a condition of the agreement unless such a condition is made by the parties in writing." *Id*. at 775, 553 N.W.2d at 161. We then noted that the record did not contain any evidence that the parties made a writing with respect to a fixed limit of construction costs, and we stated that the parties "intended the contract to be a final expression of the terms it contains with regard to the project budget limitations." *Id*.

Similarly, in the present case, there is no language in the contract that the parties intended there to be a fixed budget with respect to construction costs or otherwise. As determined above, section 12.7 is not ambiguous and does not incorporate any documents that would establish a guaranteed

maximum price. Accordingly, we conclude that section 12.7 is not ambiguous and does not incorporate a guaranteed maximum price into the contract and that therefore, the district court did not err when it so determined.

*Section 11.2 Is Ambiguous.*

The District also argues that section 11.2 of the contract dealing with increased charges is ambiguous and claims that the district court erred when it determined that it was not ambiguous in its order granting partial summary judgment in favor of FCMG. We agree with the District that section 11.2 is ambiguous; the district court's ruling to the contrary was reversible error.

As stated above, section 11.2 is a provision customized by the parties and it provides:

> Fees shall be as outlined in the attached Recommended Compensation schedule as applicable to each component facility of the Project and shall be included in various categories of the Project Budget for Basic Services for Site and Construction work, Master Planning, Equipment, Additional Services for Remodeling and Additions, and Contingency allowances. Corresponding Project Reimbursable Expenses and costs for [the District's] Representative/Project Management services shall also be paid as included in the Project Budget. These fees and costs are intended to be converted to Lump Sum amounts with the initial approval by the [District] and [FCMG] of the Project Scope, Budget, and concept to be advanced for funding. Lump Sum amounts and inclusions shall remain effective for the duration of the Project(s), except in the event of approved changes in the scope of work or alternatives to be bid adding two percent or more to the scope. In such event the Lump Sum fees and costs shall be increased proportionately to reflect the full percentage of changes.

In its February 11, 2014, order, the district court determined that section 11.2 is not ambiguous. In reaching its

determination, the court looked to the parties' course of dealing. The court noted that FCMG met with the board of the District in March 2008 to review the billing process and that the board continued to pay invoices submitted by FCMG through May 2009. The court then pointed to the parties' course of dealing "[a]s evidence of the manner in which fees on increases in the scope of the project were calculated . . . ."

As an example demonstrating the basis for its ruling, the court noted invoice No. 29-1006, dated November 30, 2008, which stated that the original project area was 69,000 square feet and that 5,619 square feet had been added to the original area. The court stated that the additional square footage was billed at $9.22 per square foot, which was calculated based on the square footage cost of the original project area. The court observed that invoice No. 29-1006 was paid in full by the District, and that "[t]hus, there was a course in dealing between the parties which evidences a lack of ambiguity in the contract." The district court erred in employing the foregoing approach to reaching its determination regarding ambiguity and, as a matter of law, erred in its result.

[9,10] We have previously stated that extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005); *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003). When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. *Spanish Oaks v. Hy-Vee, supra*. Accordingly, if section 11.2 of the contract was not ambiguous, as the district court determined, then it was not appropriate for the district court to look to extrinsic evidence, such as the parties' course of dealings, to so conclude.

The District contends that the language of section 11.2 is ambiguous because it is not clear how the "scope of work" is to be determined, which in turn serves as a basis for increased fees and costs which, in the language of the contract, "shall be increased proportionately."

"[S]cope of work" is not a defined term in the contract. It is not clear what is encompassed by "scope of work." There is some suggestion that square footage may be one way that scope of work may be determined, but there are arguably other ways to determine the scope of work under the contract. For example, FCMG asserts that the contract provides that "not only square footage increases, but increases relating to non-square footage items such as equipment and Owner's Representative fees" are included in scope of work. Brief for appellee at 8. We conclude as a matter of law that section 11.2, and in particular "scope of work," is ambiguous and that the district court erred when it determined that section 11.2 is not ambiguous and entered summary judgment orders accordingly.

*Jury Instruction No. 2 Was Prejudicial Error.*

The District claims that the district court erred when it gave jury instruction No. 2 because, inter alia, the contract was ambiguous and instruction No. 2 stated to the contrary. We understand, in addition, that the District believes jury instruction No. 2 was erroneous because it is confusing. In this regard, we note that during its deliberations, the jury sent out a note asking the court: "If we were to decide for [FCMG], are we allowed to reduce the amount of the award? And, if so, do we need to show how we calculated the reduced amount?" We determine that jury instruction No. 2 constituted prejudicial error.

[11-13] We have stated that a court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). Rather, when a court has determined that ambiguity exits in a document, an interpretive meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder. *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 860 N.W.2d 391 (2015). In this regard, we have stated in a jury case that when

the terms of the contract are in dispute and the real intentions of the parties cannot be determined from the words used, the jury, not the court, should determine the issue from all the facts and circumstances. *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005). A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

Because section 11.2 is ambiguous, parol evidence should have been permitted at trial and the court should have given the issue of the meaning of the ambiguous contract to the jury. However, in this case, the district court instructed the jury as follows:

> The Court has determined as a matter of law that the following facts exist and that you must accept them as true:
>
> 1. That the parties entered into a contract related to the construction/remodeling of three facilities for the [District] on August 9, 2007.
>
> 2. That the Court has determined that *the contract in this case is not ambiguous*.

(Emphasis supplied.) We determine it was error for the court to instruct the jury that the contract in this case is not ambiguous. Rather, the court should have instructed the jury that section 11.2 of the contract was ambiguous and that the jury was to determine its meaning.

[14] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *Warner v. Simmons*, 288 Neb. 472, 849 N.W.2d 475 (2014). In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id*.

We conclude that the district court's error in the giving of jury instruction No. 2 was prejudicial and constitutes

reversible error. Had the court not erroneously determined that section 11.2 was unambiguous and granted partial summary judgment in favor of FCMG based upon this determination, the parties could have presented evidence at trial with respect to the meaning of section 11.2, specifically the meaning of "scope of work." The parties could have framed their arguments differently at trial to address the meaning of section 11.2 and how they believed the jury should interpret it and award damages, if any. Therefore, we determine that jury instruction No. 2, which stated that "the contract in this case is not ambiguous," is prejudicial error, and we reverse, and remand for a new trial.

Because we conclude that a new trial is required, we do not reach the District's remaining assignments of error or FCMG's assignment of error on cross-appeal. See *Gray v. Kenney*, 290 Neb. 888, 863 N.W.2d 127 (2015) (stating appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

## CONCLUSION

We determine that the district court did not err when it determined that section 12.7 of the contract was not ambiguous, but did err when it determined that section 11.2 of the contract was not ambiguous. Accordingly, the district court prejudicially erred when it gave jury instruction No. 2, which stated that the contract in this case is not ambiguous. For the reasons explained above, we reverse, and remand for a new trial.

Reversed and remanded for a new trial.

Stephan, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Nathan A. Modlin, appellant.
867 N.W.2d 609

Filed August 21, 2015. No. S-14-590.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence 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: Appeal and Error.** When reviewing whether a consent to search was voluntary, as to the historical facts or circumstances leading up to a consent to search, an appellate court reviews the trial court's findings for clear error. However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which an appellate court reviews independently of the trial court. And where the facts are largely undisputed, the ultimate question is an issue of law.
3. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
4. **Constitutional Law: Search and Seizure: Blood, Breath, and Urine Tests.** The drawing of blood from a person's body for the purpose of administering blood tests is a search of the person subject to Fourth Amendment constraints.
5. **Constitutional Law: Search and Seizure.** Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment to the U.S. Constitution, subject only to a few specifically established and well-delineated exceptions.

6. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
7. **Constitutional Law: Search and Seizure: Duress.** To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne. Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.
8. **Search and Seizure.** Whether consent to a search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.
9. **Constitutional Law: Blood, Breath, and Urine Tests.** A court may not rely solely on the existence of an implied consent statute to conclude that consent to a blood test was given for Fourth Amendment purposes, and the determination of whether consent was voluntarily given requires a court to consider the totality of the circumstances.
10. **Blood, Breath, and Urine Tests.** In considering the totality of the circumstances, the existence of an implied consent statute is one circumstance a court may and should consider to determine voluntariness of consent to a blood test.
11. **Search and Seizure.** Once given, consent to search may be withdrawn. Withdrawal of consent need not be effectuated through particular "magic words," but an intent to withdraw consent must be made by unequivocal act or statement.
12. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?

Petition for further review from the Court of Appeals, Irwin, Bishop, and Riedmann, Judges, on appeal thereto from the District Court for Hall County, Teresa K. Luther, Judge, on appeal thereto from the County Court for Hall County, Arthur S. Wetzel, Judge. Judgment of Court of Appeals affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Douglas J. Peterson and Jon Bruning, Attorneys General, and Nathan A. Liss for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

Nathan A. Modlin was convicted in the Hall County Court for driving under the influence (DUI), first offense, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010). Modlin claims that the county court erred when it overruled his motion to suppress evidence of the result of a blood test and that the district court and the Nebraska Court of Appeals erred when they affirmed the county court's ruling. We granted Modlin's petition for further review.

Modlin argues that the evidence should have been suppressed because the warrantless drawing of his blood did not satisfy any exception to the Fourth Amendment requirement of a search warrant. We conclude that a blood draw of an arrestee in a DUI case is a search subject to Fourth Amendment principles and that when the State claims the blood draw was proper pursuant to the consent exception to the warrant requirement, actual voluntary consent is to be determined by reference to the totality of the circumstances, one of which is the implied consent statute. Because the facts show that Modlin voluntarily consented to the blood test, the overruling of his motion to suppress was not error. We affirm.

## STATEMENT OF FACTS

On June 15, 2013, Deputy Casey Dahlke initiated a traffic stop after he observed a vehicle cross the centerline of a two-lane highway three times. Dahlke observed that Modlin, who was the driver and sole occupant of the vehicle, had an odor of alcohol about him and glassy, bloodshot eyes. Modlin admitted to drinking two beers, and he exhibited signs of

impairment on all three field sobriety tests conducted by Dahlke. Modlin submitted to a preliminary breath test which showed a result of more than .08 grams of alcohol per 210 liters of breath.

Dahlke placed Modlin under arrest and transported him to a hospital for a blood test. Dahlke gave Modlin the "Post Arrest Chemical Test Advisement" form to read. The form stated that Modlin was under arrest for DUI and that the officer was "requiring [Modlin] to submit to a chemical test or tests of [his] blood, breath, or urine to determine the concentration of alcohol or drugs in [his] blood, breath, or urine." The form also stated, "Refusal to submit to such test or tests is a separate crime for which you may be charged." The form further stated that the officer had the authority to direct whether the tests should be of blood, breath, or urine. Under the heading, "Request for test," Dahlke selected a test of Modlin's blood to determine the alcohol content. Dahlke asked Modlin if he was capable of reading and understanding the form, and Modlin replied "yes." Modlin read the form, signed it, and indicated that he had no questions. Modlin's blood was then drawn, and the result of the blood test was .217 grams of alcohol per 100 milliliters of blood.

The State charged Modlin in county court with one count of DUI, first offense, aggravated, and one count of crossing over the centerline. Prior to trial, Modlin filed a motion to suppress and two supplemental motions to suppress. In the original motion, Modlin moved to suppress (1) all evidence obtained as a result of the stop, because the initial stop was not based upon probable cause; (2) statements made while in custody, before *Miranda* warnings were given; and (3) the result of the blood test which he asserted was taken without probable cause. In the first supplemental motion, he sought to suppress the result of the preliminary breath test, which he asserted was taken in violation of the Fourth Amendment, and in the second supplemental motion, Modlin sought to suppress the result of the blood test for the additional reason that it was

a warrantless search in violation of the Fourth Amendment. On further review, Modlin has abandoned all the bases for his motions to suppress except the Fourth Amendment challenge to the blood test.

A hearing was held on Modlin's motions to suppress, and both Modlin and Dahlke testified at the hearing. Dahlke testified that he gave Modlin the chemical test advisement form, which Modlin read to himself. Dahlke testified that Modlin signed the form and stated he understood it and that after Dahlke asked whether he had any question about the form, Modlin said "no."

Modlin testified that when he signed the chemical test advisement form, he was "just trying to comply with what [Dahlke] was asking [him]" but that he "never consented to the blood draw." Modlin testified that when he read the form, he did not believe there was any way that he could not submit to the test. On cross-examination, Modlin admitted that he had told Dahlke that he understood the form and that he signed the form. He further admitted that he did not at any time tell either Dahlke or the phlebotomist that he did not want his blood drawn and that he did not try to prevent the phlebotomist from drawing his blood.

The county court overruled the motions to suppress. The court concluded that the initial stop was proper. With regard to the result of the blood test, the court determined that by choosing to operate a motor vehicle on Nebraska highways, under Nebraska's implied consent law, Modlin had given his consent to submit to a chemical test. The court further found that Modlin read the chemical test advisement form and that Modlin did not withdraw his consent. The court stated: "[Modlin] was given the option of consenting to a test or suffering the consequences if he withdrew his consent. [Modlin] voluntarily agreed to the test and there was no Fourth Amendment violation."

After the county court overruled Modlin's motions to suppress, the parties agreed to a stipulated bench trial. At the

trial, the State dismissed the charge of crossing over the centerline and reduced the DUI charge to nonaggravated DUI, first offense. The parties stipulated that the county court could consider all the evidence received at the hearing on the motions to suppress, subject to Modlin's objections and issues raised by the motions to suppress, and that Modlin preserved the objections and issues raised in his motions to suppress. The parties further stipulated that there was probable cause to arrest Modlin for DUI, that Modlin's blood was drawn and tested in compliance with applicable statutes and regulations, and that the alcohol content of Modlin's "blood was in excess of .08 [sic] grams of alcohol per 100 milliliters" of blood. The county court found Modlin guilty of DUI, first offense. The court sentenced Modlin to 6 months' probation, revoked his driver's license for 60 days, ordered him to pay a fine of $500 and the costs of prosecution, and ordered him to apply for an ignition interlock permit.

Modlin appealed his conviction to the district court. In his statement of errors, he alleged that the county court erred when it overruled his motion to suppress and second supplemental motion to suppress and when it concluded that the warrantless seizure of his blood did not violate the Fourth Amendment. Following a hearing, the district court affirmed the conviction. In its order, the district court determined that "Modlin gave informed consent [to the blood draw] thus negating the argument that a search warrant was necessary." The district court concluded that the county court properly overruled Modlin's motions to suppress.

Modlin appealed to the Court of Appeals and claimed that the county court erred when it overruled his motion to suppress evidence of the result of the blood draw and that the district court erred when it affirmed the county court's ruling. In an unpublished memorandum opinion filed on February 2, 2015, the Court of Appeals rejected Modlin's argument and affirmed his conviction.

The Court of Appeals reviewed Nebraska's implied consent law, Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2014), which provides in subsection (1):

> Any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.

The statute further provides that peace officers may direct any person arrested for suspicion of driving under the influence of alcohol to submit to a chemical test of his or her blood, breath, or urine and that a person who refuses to submit to a test shall be subject to administrative license revocation procedures and shall be guilty of a crime. § 60-6,197(2) and (3). Under the statute, the person "shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." § 60-6,197(5). The Court of Appeals observed that this court has upheld the constitutionality of the implied consent law. See *State v. Williams*, 189 Neb. 127, 201 N.W.2d 241 (1972) (rejecting Fifth Amendment challenge to blood test evidence).

The Court of Appeals concluded that by driving his vehicle in Nebraska, Modlin consented to submit to chemical tests of his blood, breath, or urine pursuant to the implied consent statute. The Court of Appeals noted that consent was an exception to the warrant requirement of the Fourth Amendment. The Court of Appeals, however, acknowledged the difficult choice Modlin faced when he was advised that refusal to submit to the test was a separate crime for which he could be charged.

Modlin and the State directed the Court of Appeals to a recent U.S. Supreme Court case, *Missouri v. McNeely,* ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). The Court of Appeals addressed but rejected Modlin's contention

that under *McNeely*, Dahlke should have obtained a warrant in order to direct the blood test. In *McNeely*, the Court concluded that the natural metabolization of alcohol in the bloodstream, standing alone, did not present an exigent circumstance that justified an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases.

The Court of Appeals distinguished Modlin's situation from that of the defendant in *McNeely*. The Court of Appeals noted that whatever his internal feelings might have been, Modlin had not in any way expressed a withdrawal of his consent, whereas the defendant in *McNeely* had revoked his implied consent under Missouri's implied consent law. Therefore, the Court of Appeals concluded that Dahlke did not need a warrant before directing the blood draw, because Modlin had consented to it under Nebraska's implied consent law and had not manifested withdrawal of that consent. The Court of Appeals concluded that the county court had properly admitted evidence of Modlin's blood alcohol content over Modlin's motion to suppress and objections and that the district court had properly affirmed the ruling. The Court of Appeals affirmed his conviction.

We granted Modlin's petition for further review.

## ASSIGNMENT OF ERROR

Modlin claims, consolidated and restated, that the Court of Appeals erred when it determined that the warrantless drawing of his blood for alcohol testing was not a violation of his rights under the Fourth Amendment.

## STANDARDS OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress evidence based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). Regarding historical facts, we review 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 we review independently of the trial court's determination. *Id.*

[2] Likewise, we apply the same two-part analysis when reviewing whether a consent to search was voluntary. As to the historical facts or circumstances leading up to a consent to search, we review the trial court's findings for clear error. However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which we review independently of the trial court. And where the facts are largely undisputed, the ultimate question is an issue of law. See *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

## ANALYSIS

Modlin claims that the county court erred when it overruled his motion to suppress evidence of the result of his blood test and that the district court and Court of Appeals erred when they affirmed the county court's ruling. Modlin argues that the evidence should have been suppressed because the blood draw was a search for Fourth Amendment purposes, the search was conducted without a warrant, and no exception to the warrant requirement applied because implied consent does not constitute "consent" for Fourth Amendment purposes. The State maintains that, given the implied consent statute, Modlin gave his implied consent to the blood draw when he drove on a public roadway and did not withdraw that consent. We agree with both parties that the blood draw was a warrantless search for Fourth Amendment purposes, and we determine that after considering the totality of the circumstances, the county court did not err when it found that Modlin actually consented to the search.

[3,4] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. *State v. Rodriguez*, 288 Neb. 878, 852 N.W.2d 705 (2014). It has long been recognized

that the drawing of blood from a person's body for the purpose of administering blood tests is a search of the person subject to Fourth Amendment constraints. See, *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

[5,6] Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment to the U.S. Constitution, subject only to a few specifically established and well-delineated exceptions. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *Id.* In the present case, the exception relating to exigent circumstances is discussed briefly in connection with our consideration of *McNeely*, but we focus on consent.

The parties ask us to consider whether and to what extent the U.S. Supreme Court's decision in *Missouri v. McNeely, supra*, controls the issues in this case. In *McNeely*, a motorist was stopped after speeding and crossing the centerline. The motorist refused to consent to a blood draw for the purposes of measuring his blood alcohol content. Officers had the test performed without the motorist's consent and without first obtaining a warrant. As the Court of Appeals correctly observed, the U.S. Supreme Court framed the issue as "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for *nonconsensual* blood testing in all drunk-driving cases." *McNeely v. Missouri*, 133 S. Ct. at 1556 (emphasis supplied). The Court

answered this question in the negative and concluded that exigency in this context must be determined case by case based on the totality of the circumstances.

Because it had been found as a factual matter that the motorist in *McNeely* did not consent to the blood draw, the U.S. Supreme Court's decision in *McNeely* focused solely on the exigency exception to the warrant requirement. Although a plurality of the Court acknowledged that implied consent statutes are among the "broad range of legal tools [States have] to enforce their drunk-driving laws and to secure [blood alcohol content] evidence without undertaking warrantless nonconsensual blood draws," 133 S. Ct. at 1566, the Court in *McNeely* did not directly decide the separate question whether the consent exception to the Fourth Amendment warrant requirement was satisfied solely by the operation of Missouri's implied consent statute.

In *Missouri v. McNeely, supra*, the U.S. Supreme Court rendered holdings with regard to the exigency exception. But in the instant case, neither the State nor the county court relied on exigency to justify the warrantless search; instead, they relied on the consent exception. Therefore, we need not decide in this case whether the exigency exception applies, and the holdings in *McNeely* relative to exigency are not explicitly relevant to the disposition of this case. As noted, a plurality of the Court in *McNeely* made reference to implied consent laws; however, the Court rendered no holdings with regard to the consent exception, because the facts showed that the defendant did not consent to the blood draw and, therefore, *McNeely* is not directly applicable to whether the blood draw performed on Modlin was justified under the consent exception to the warrant requirement of the Fourth Amendment.

Other courts have analyzed *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), and agree with our reading that *McNeely* does not explicitly provide guidance regarding the consent exception to the Fourth Amendment warrant requirement. See, e.g., *People v. Harris*,

234 Cal. App. 4th 671, 184 Cal. Rptr. 3d 198 (2015) (concluding that *McNeely* does not govern where defendant freely and voluntarily consented to blood test and that such consent satisfies Fourth Amendment); *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013) (rejecting broad view of *McNeely* and finding that although *McNeely* eliminated single-factor exigency exception to warrant requirement, warrantless extraction of blood, breath, and urine was still permissible under Fourth Amendment when defendant freely and voluntarily consented to testing); *State v. Fetch*, 855 N.W.2d 389 (N.D. 2014) (noting *McNeely* held that natural dissipation of alcohol in bloodstream is not per se exigent circumstance justifying exception to warrant requirement for nonconsensual blood testing in all drunk driving investigations, but recognizing consent is separate exception to warrant requirement). In view of the limitations of *McNeely*, we agree with the Supreme Court of Georgia which stated: "[T]he analysis in this case must then focus on the voluntary consent exception to the warrant requirement because it is well settled in the context of a DUI blood draw that a valid consent to a search eliminates the need for . . . a search warrant." *Williams v. State*, 296 Ga. 817, 821, 771 S.E.2d 373, 376 (2015).

[7,8] We turn now to consideration of whether the consent exception justified the blood draw. We have stated the following with respect to the consent exception: To be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological. *Id*. The determination of whether the facts and circumstances constitute a voluntary consent, satisfying the Fourth Amendment, is a question of law. *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009). Whether consent was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent. See *State v. Tucker,*

*supra*. See, also, *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010).

At this juncture, it is important to distinguish between "implied consent" and "actual consent." The Court of Appeals of Wisconsin stated:

> "Implied consent" is not an intuitive or plainly descriptive term with respect to how the implied consent law works. [It may be] a source of confusion. [T]he term "implied consent" [may be] used inappropriately to refer to the consent a driver gives to a blood draw at the time a law enforcement officer requires that driver to decide whether to give consent. However, actual consent to a blood draw is not "implied consent" . . . .

*State v. Padley*, 354 Wis. 2d 545, 564, 849 N.W.2d 867, 876 (Wis. App. 2014). In connection with actual consent, the *Padley* court continued:

> [T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give *actual* consent to a blood draw when put to the choice between consent or automatic sanctions [for refusal].

345 Wis. 2d at 571, 849 N.W.2d at 879 (emphasis in original). That is, ordinarily, the point at which the driver chooses not to refuse is the point in time at which the driver actually consents to a blood draw. And the Supreme Court of Georgia in *Williams v. State, supra*, noted that the determination of actual consent to the procuring and testing of a driver's blood requires the determination of the voluntariness of the consent under the totality of the circumstances. *Id*. See, also, *People v. Harris*, 234 Cal. App. 4th 671, 184 Cal. Rptr. 3d 198 (2015); *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013).

[9] The Supreme Court of Georgia observed that post-*McNeely*, "the cases seem to indicate . . . that mere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the

constitutional mandate of a warrant." *Williams v. State*, 296 Ga. at 822, 771 S.E.2d at 377. Our reading of the cases is in accord. For example, in *Flonnory v. State*, 109 A.3d 1060, 1065 (Del. 2015), the Supreme Court of Delaware concluded that "the trial court erred when it concluded that 'Defendant's statutory implied consent exempted the blood draw from the warrant requirement' of the Fourth Amendment." The court in *Flonnory* remanded the cause for the trial court to "conduct a proper Fourth Amendment analysis" which would entail "considering the totality of the circumstances." 109 A.3d at 1066. The court in *Flonnory* noted that in *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), the U.S. Supreme Court had acknowledged that implied consent laws were a legal tool to enforce drunk driving laws but the Court had still explained that "'[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.'" *State v. Flonnory*, 109 A.3d at 1066. See, also, *Weems v. State*, 434 S.W.3d 655 (Tex. App. 2014) (implied consent and mandatory blood draw statutory scheme is not, per se, exception to Fourth Amendment warrant requirement); *Aviles v. State*, 443 S.W.3d 291 (Tex. App. 2014) (mandatory blood draw authorized by statute was not categorical per se exception to warrant requirement and consideration of totality of circumstances was required under Fourth Amendment). We agree with the rationale of the foregoing authorities. Accordingly, we conclude that a court may not rely solely on the existence of an implied consent statute to conclude that consent to a blood test was given for Fourth Amendment purposes and that the determination of whether consent was voluntarily given requires a court to consider the totality of the circumstances.

[10] In considering the totality of the circumstances, we believe that the existence of an implied consent statute is one circumstance a court may and should consider to determine voluntariness of consent to a blood test. In the present

case, the county court did not merely note that Modlin had given his implied consent by operation of § 60-6,197(1), but instead, the county court properly considered the totality of the circumstances before it when it concluded that Modlin had consented to the blood draw. The court held a hearing on Modlin's motions to suppress, at which hearing both Modlin and the State presented evidence regarding, inter alia, the issue of consent.

The State presented evidence that Modlin had operated a motor vehicle in Nebraska, which established that Modlin had given his implied consent as understood under § 60-6,197(1), and that he affirmed that consent at the hospital. The evidence showed that Modlin was given, read, and understood the chemical test advisement form. The form itself indicates the consequences if the driver exercises his or her refusal option. The State presented evidence that Modlin did not do or say anything to Dahlke or the phlebotomist to indicate that he wished to refuse the test, and Modlin conceded as much. Given this evidence, we conclude that the county court did not err in its determination that under the totality of the circumstances, Modlin actually consented to the test.

Notwithstanding the foregoing facts, Modlin makes a variety of arguments, all to the effect that he did not actually consent voluntarily to the blood test. Primary among his arguments is the claim that he was coerced because he was given a difficult choice between consenting to the blood test or refusing to give his consent, with its attendant consequences. In this regard, Modlin acknowledges that he was made aware that if he refused the test, he would be subject to the legal consequences of administrative license revocation and criminal charges. Although such consequences render refusal a difficult choice to make, courts in other jurisdictions have generally determined that the difficulty of such choice does not render consent involuntary. In *People v. Harris*, 234 Cal. App. 4th 671, 689, 184 Cal. Rptr. 3d 198, 213 (2015), the court stated: "That the motorist is forced to choose between

submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist's submission to be coerced or otherwise invalid for purposes of the Fourth Amendment." See, similarly, *State v. Brooks*, 838 N.W.2d 563, 570-71 (Minn. 2013) ("a driver's decision to agree to take a test is not coerced simply because [the State] has attached the penalty of making it a crime to refuse the test" and "while the choice to submit or refuse to take a chemical test 'will not be an easy or pleasant one to make,' the criminal process 'often requires suspects and defendants to make difficult choices'"); *State v. Fetch*, 855 N.W.2d 389, 393 (N.D. 2014) ("consent to a chemical test is not coerced and is not rendered involuntary merely by a law enforcement officer's reading of the implied consent advisory that accurately informs the arrestee of the consequences for refusal, including the criminal penalty, and presents the arrestee with a choice"); *State v. Moore*, 354 Or. 493, 502-03, 318 P.3d 1133, 1138 (2013) ("advising a defendant of the lawful consequences that may flow from his or her decision to engage in a certain behavior ensures that the defendant makes an informed choice whether to engage in that behavior or not. . . . accurately advising a defendant of a lawful penalty that could be imposed may well play a role in the defendant's decision to engage in the particular behavior, but that does not mean that the defendant's decision was 'involuntary'").

[11,12] For completeness, we note that we have said mere submission to authority is insufficient to establish consent to a search. *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001). However, we do not find mere submission in this case, but instead observe that Modlin made decisions, the totality of which show consent. Modlin made the choice to drive in Nebraska, thereby giving his implied consent under the statute. We have stated that once given, consent to search may be withdrawn. *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010). Withdrawal of consent need not be effectuated through

particular "magic words," but an intent to withdraw consent must be made by unequivocal act or statement. *Id*. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? *Id*.

In this case, there was no evidence of an act or statement, unequivocal or otherwise, made by Modlin to indicate a withdrawal of his implied consent. Modlin acknowledges that he was made aware of the choice to refuse the blood draw but that he did and said nothing to objectively manifest or choose refusal. Although Modlin may not have verbally indicated his consent, consent to search may be implied by action rather than words. See *State v. Brooks, supra*. In this case, Modlin's conduct indicated his consent, because he allowed the phlebotomist to draw his blood without doing anything to manifest a refusal to either Dahlke or the phlebotomist. The county court did not err when it determined that Modlin had consented and not merely submitted to authority.

Finally, we address the content and adequacy of the advisement form as it relates to the totality of the circumstances. We recognize that the chemical test advisement form did not explicitly state that Modlin was being asked to choose between the blood draw or refusal. The advisement form did, however, set forth the consequences of refusing the test, which we believe adequately notified Modlin that refusal was an option, albeit one with unpleasant consequences. The form states, "Refusal to submit to such test or tests is a separate crime for which you may be charged." We are aware that there exist more robust forms. See, e.g., *State v. Barnes*, 331 Ga. App. 631, 633 n.2, 770 S.E.2d 890, 891 n.2 (2015) (noting that Georgia statute provides for notice which describes submission to chemical test and consequences of refusal and concludes: "'Will you submit to the state administered chemical tests of your (designate which tests) under the implied consent law?'"). We note that other state courts which have considered a form

that notifies the driver of the consequences of refusal have characterized the form as presenting a "yes" or "no" option. E.g., *State v. Padley*, 354 Wis. 2d 545, 849 N.W.2d 867 (Wis. App. 2014). Because the chemical test advisement form in this case indicated to Modlin the consequences of exercising the option of refusal, the fact that he submitted after reading the form was among the circumstances that supported a finding of voluntary consent.

Having concluded that the county court did not err when it concluded that Modlin consented to the blood draw, we further conclude that the county court did not err when it concluded that the warrantless blood draw was not in violation of the Fourth Amendment and overruled Modlin's motion to suppress evidence of the result of the blood test. We therefore reject Modlin's claim that the Court of Appeals erred when it affirmed the district court's decision which had affirmed the county court's overruling of the motion to suppress.

## CONCLUSION

We conclude that a blood draw of an arrestee in a DUI case is a search subject to Fourth Amendment principles and that when the State claims the blood draw was proper pursuant to the consent exception to the warrant requirement, actual voluntary consent is to be determined by reference to the totality of the circumstances, one of which is the implied consent statute.

We conclude that the county court properly considered the totality of the circumstances and that it did not err when it determined Modlin consented to the blood draw. As a result, the county court did not err when it overruled Modlin's motion to suppress evidence of the result of the blood test and the district court and the Court of Appeals did not err when they affirmed that ruling. On further review, we affirm the decision of the Court of Appeals.

Affirmed.

Stephan, J., not participating.

**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# In re Appropriation A-7603, Water Division 2-A. Broken Bar Nine Living Trust, appellant, v. Nebraska Department of Natural Resources, appellee.

868 N.W.2d 314

Filed August 21, 2015. No. S-14-906.

1. **Administrative Law: Statutes: Appeal and Error.** In an appeal from the Department of Natural Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal conclusions made by the director.
2. **Irrigation: Statutes: Intent: Appeal and Error.** Statutory law on the subject of irrigation and the decisions of the appellate courts dealing therewith show a clear intention to enforce and maintain a rigid economy in the use of the public waters of the state.
3. **Waters: Irrigation: Administrative Law.** Concerning the administration of public waters, one purpose of the State is to avoid waste and to secure the greatest benefit possible from the waters available for appropriation for irrigation purposes.
4. **Waters.** It is the policy of statutory law to require a continued beneficial use of appropriated waters.
5. ____. An appropriator will not be permitted to retain an interest in public waters, to which he has a valid appropriation, which is not put to a beneficial use.
6. **Waters: Irrigation: Property: Words and Phrases.** In the context of an appropriation for irrigation, beneficial use requires actual application of the water to the land for the purpose of irrigation.
7. **Waters: Irrigation: Abandonment.** At common law, an appropriation of water for irrigation purposes may be lost by nonuse or abandonment.

8. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.
9. **Words and Phrases.** A capricious decision is one guided by fancy rather than by judgment or settled purpose.
10. **Administrative Law: Words and Phrases.** The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds.

Appeal from the Department of Natural Resources. Affirmed.

Jovan W. Lausterer, of Bromm, Lindahl, Freeman-Caddy & Lausterer, for appellant.

Douglas J. Peterson, Attorney General, Justin D. Lavene, and Emily K. Rose for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

Water appropriation A-7603, "Water Division 2-A" (Appropriation), was a surface water right to divert a specified volume of water from the North Loup River to "be used for irrigation purposes only." The Broken Bar Nine Living Trust (Trust), the appellant, held the Appropriation and the lands covered by it. The Nebraska Department of Natural Resources (Department), the appellee, issued a "Notice of Preliminary Determination of Nonuse of [the Appropriation]" to the Trust. After a hearing, the Department concluded that the lands designated under the Appropriation had not been irrigated for more than 5 consecutive years and that the Trust had failed to establish sufficient cause for nonuse under Neb. Rev. Stat. § 46-229.04(4) (Reissue 2010). The Department issued an order canceling the Appropriation in its entirety on September 9, 2014. The Trust appeals. We affirm.

## STATEMENT OF FACTS

The parties generally do not dispute the underlying facts of this case. In its "Order of Cancellation" dated September 9, 2014, the Department made the following findings of fact, which are supported by the record:

> 1. [The Appropriation] is a permit currently shown in the Department's records in the name of the . . . Trust with a priority date of May 27, 1955, to divert 1.15 cubic feet per second (cfs) of water from the North Loup River at points of diversion located in the S½ of Section 10 and the NE¼NE¼ of Section 15, Township 22 North, Range 20 West of the 6th P.M. in Loup County, for irrigation of the following described lands (Exhibit 10):
>
> | Township 22 North, Range 20 West of the 6th P.M. in Loup County | | Acres |
> |---|---|---|
> | Section 10: | Lot 5 | 24.8 |
> | | Lot 6 (E½SW¼) | 32.6 |
> | | Lot 7 (SW¼SE¼) | 16.1 |
> | Section 15: | NE¼NW¼ | 3.9 |
> | | NW¼NE¼ | 33.8 |
> | | NE¼NE¼ | 12.5 |
> | | SE¼NE¼ | 2.4 |
> | | TOTAL | 126.1 |
>
> 2. Based upon a verified field investigation report, a Notice of Preliminary Determination was issued on July 26, 2013, in accordance with Neb. Rev. Stat. §§ 46-229.02 and 46-229.03 [(Reissue 2010)] stating that it appeared that all of the water appropriation for irrigation of lands described above had not been used for more than five consecutive years and that the Department knew of no reason that constitutes sufficient cause as provided in . . . § 46-229.04.
>
> 3. A contest was filed on August 23, 2013, by [the] legal representative for [the] Trust.
>
> 4. Department staff reviewed the contest and on June 12, 2014, filed a motion for hearing.

5. Notice of a hearing was issued on June 26, 2014, and a corrected notice was mailed on July 1, 2014, in accordance with . . . §§ 46-229.02(5) and 46-229.03.

6. A hearing was held in Lincoln, Nebraska, on July 31, 2014, as provided by . . . § 46-229.04.

7. The Department . . . appeared and was represented by its attorney. [A] Department staff member . . . was called as a witness. The Department entered several exhibits, including a verified field investigation report which was entered into evidence as Exhibit 1. The field report indicates that all of the lands included under [the Appropriation] have not been irrigated for more than five consecutive years. [The Department staff member's] testimony showed that there was sufficient water in the North Loup River for [the] Appropriation.

8. [The] attorney . . . for [the] Trust [appeared]. In his opening statement, [the attorney] stated, "I would concur in that I think it's important for the Director and the Department to know that the . . . Trust is not arguing that there was agricultural beneficial use of the [A]ppropriation in question during the relevant five-year time span."

[The Trust] called . . . one of the trustees . . . as a witness. [The trustee's] testimony described the purpose of the [T]rust, which included providing income to support his grandmother during her lifetime. [The trustee] also described the rental agreement the [T]rust had with its tenant, and the poor shape that the existing irrigation equipment was in.

[The Trust] entered several exhibits, including: pictures of the irrigation equipment; lease agreements; an unsigned copy of a trust; and the death certificate of . . . the recipient of the trust.

Under examination and cross examination, [the trustee] marked on Exhibit 9 several areas of land that

> are included under [the A]ppropriation . . . and that he knew had been irrigated in the past. His testimony indicated that two of these areas were last irrigated in 1993, and one in 1997 or 1998, and two areas were irrigated approximately eight years ago. He stated that the rest of the lands under the [A]ppropriation had probably not been irrigated. . . .
>
> 9. In his opening statement, [the attorney for the Trust] stated that the owners were arguing that they met the exceptions for nonirrigation under . . . § 46-229.04[(4)](a), (b), (c) and (d). In his closing argument, he again reiterated these four subsections and described how the Trust had provided testimony or evidence relating to the four. [The attorney for the Department] also provided his argument in closing relative to the exceptions.
>
> Attached to the original Contest filed by [the Trust] was a document marked Exhibit "A" in which the Trust asserted that Neb. Rev. Stat. § 46-229 [(Reissue 2010)] is legally unenforceable as against the Trust and the property as a three year non-use rule was originally added to the statutory scheme in 1983 and later amended to a five year rule in 2004. The Trust asserts that the use restriction did not exist when the Department issued its [A]ppropriation in 1956 and thus it would be unconstitutional for the Department to retroactively apply this rule against the Trust's vested water right. [The Trust] also entered a copy of this document as part of Exhibit 10.

In its analysis, the Department first determined that Neb. Rev. Stat. § 46-229 (Reissue 2010) is legally enforceable as it relates to the Appropriation. The Department quoted *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 164, 313 N.W.2d 271, 274 (1981), which case states, "'The [Department of Water Resources] is expressly

authorized by statute, after notice and hearing, to forfeit a water right where it appears that the water appropriation has not been used for some beneficial or useful purpose . . . for more than three years. . . .'" The Department stated that it must follow the statutes. The Trust does not directly challenge this ruling on appeal.

The Department referred to the controlling statutes in its order. Section 46-229.04 provides for the cancellation of an appropriation after 5 consecutive years of nonuse. Section 46-229.04(1) states:

> (1) At a hearing held pursuant to section 46-229.03, the verified field investigation report of an employee of the [D]epartment, or such other report or information that is relied upon by the [D]epartment to reach the preliminary determination of nonuse, shall be prima facie evidence for the forfeiture and annulment of such water appropriation. If no person appears at the hearing, such water appropriation or unused part thereof shall be declared forfeited and annulled. If an interested person appears and contests the same, the [D]epartment shall hear evidence, and if it appears that such water has not been put to a beneficial use or has ceased to be used for such purpose for more than five consecutive years, the same shall be declared canceled and annulled unless the [D]epartment finds that (a) there has been sufficient cause for such nonuse as provided for in subsection (2), (3), or (4) of this section or (b) subsection (5) or (6) of this section applies.

Section 46-229.04(2) generally provides that sufficient cause for nonuse shall exist for up to 30 consecutive years if such nonuse was caused by the unavailability of water. And § 46-229.04(3) generally provides that sufficient cause for nonuse shall exist as a result of inadequate supply or storage issues. Subsections (2) and (3) of § 46-229.04 are not implicated in the present case.

Section 46-229.04(4) provides:

> (4) Sufficient cause for nonuse shall be deemed to exist for up to fifteen consecutive years if such nonuse was a result of one or more of the following:
>
> (a) Federal, state, or local laws, rules, or regulations temporarily prevented or restricted such use;
>
> (b) Use of the water was unnecessary because of climatic conditions;
>
> (c) Circumstances were such that a prudent person, following the principles of good husbandry, would not have been expected to use the water;
>
> (d) The works, diversions, or other facilities essential to use the water were destroyed by a cause not within the control of the owner of the appropriation and good faith efforts to repair or replace the works, diversions, or facilities have been and are being made;
>
> (e) The owner of the appropriation was in active involuntary service in the armed forces of the United States or was in active voluntary service during a time of crisis;
>
> (f) Legal proceedings prevented or restricted use of the water; or
>
> (g) The land subject to the appropriation is under an acreage reserve program or production quota or is otherwise withdrawn from use as required for participation in any federal or state program or such land previously was under such a program but currently is not under such a program and there have been not more than five consecutive years of nonuse on that land since that land was last under that program.
>
> The [D]epartment may specify by rule and regulation other circumstances that shall be deemed to constitute sufficient cause for nonuse for up to fifteen years.

Subsection (5) of § 46-229.04 applies to appropriations held by an irrigation district, et cetera; subsection (6) applies to temporary appropriations; and subsection (7) applies to issues

involving underground storage. These three subsections are not involved in this case.

The Department concluded that "the verified field investigation report information is correct, and that the land under [the Appropriation] has not been irrigated from the North Loup River for more than five consecutive years." The Department noted that two fields of the land at issue were last irrigated 8 years before and that thus, they had been irrigated in the past 15 years. The Department further stated that the rest of the land under the Appropriation had not been irrigated for more than 15 years.

The Department determined that there was no evidence to show that the excusable reasons provided in § 46-229.04(2) or (3) were applicable in this case for the land that had not been irrigated for more than 15 years. Therefore, the Department stated that the "part of the [A]ppropriation attached to lands not irrigated for more than 15 years should be cancelled as provided by . . . § 46-229.04."

With respect to the two tracts of land that had been irrigated in the past 8 years, the Department determined that none of the excusable reasons for nonuse provided in § 46-229.04(4)(a), (b), (c), or (d) were established in this case. The Department stated:

> In general, it appears that the reason for nonuse was that the Trustees chose to lease the property to an individual that wanted to raise cattle and did not want to irrigate due to age, difficulty of irrigation, lack of good equipment, and the tenant's intended use of the land.

Based on its determinations, the Department ordered that the Appropriation be canceled.

The Trust appeals.

## ASSIGNMENTS OF ERROR

Restated, the assignments of error which the Trust has both assigned and argued are as follows: (1) The Department's finding that the Appropriation should be canceled is arbitrary,

capricious, or unreasonable, and (2) the Department erred when it determined that the Appropriation should be canceled because it failed to find sufficient cause for the Trust's nonuse as provided by § 46-229.04(4)(a) to (d).

## STANDARD OF REVIEW

[1] In an appeal from the Department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal conclusions made by the director. *In re 2007 Appropriations of Niobrara River Waters*, 288 Neb. 497, 851 N.W.2d 640 (2014).

## ANALYSIS

### *Summary of Relevant Nebraska Surface Water Law.*

At issue in this case is the Appropriation which authorized the Trust to divert up to a specified volume of water from the North Loup River to "be used for irrigation purposes only" using "the least amount of water necessary for the production of crops in the exercise of good husbandry." Before addressing the specific issues in this appeal, we set forth some general principles regarding Nebraska surface water law applicable to this case.

[2,3] The Nebraska Constitution declares the necessity of water for domestic use and for irrigation purposes in this state to be a natural want. Neb. Const. art. XV, § 4. The inadequacy of supply to meet the demands of the public requires strict administration to prevent waste. *State, ex rel. Cary, v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940). We have observed:

> Our statutory law on the subject of irrigation and the decisions of this court dealing therewith show a clear

> intention to enforce and maintain a rigid economy in the use of the public waters of the state. It is the policy of the law in all the arid states to compel an economical use of the waters of natural streams. One of the very purposes of the State in the administration of public waters is to avoid waste and to secure the greatest benefit possible from the waters available for appropriation for irrigation purposes. *Farmers Canal Co. v. Frank*, 72 Neb. 136, 100 N.W. 286 [(1904)].

*State v. Birdwood Irrigation District*, 154 Neb. 52, 55, 46 N.W.2d 884, 887 (1951).

[4,5] This case involves an appropriation of surface water for irrigation. An appropriation right is a right to divert unappropriated surface water for beneficial use. Neb. Rev. Stat. § 46-204 (Reissue 2010); *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009). It is "[t]he policy of the law . . . to require a continued beneficial use of appropriated waters . . . ." *State v. Birdwood Irrigation District*, 154 Neb. at 57, 46 N.W.2d at 888. We have stated "[a]n appropriator will not be permitted to retain an interest in public waters, to which he has a valid appropriation, which [is] not put to a beneficial use." *Id*. at 58, 46 N.W.2d at 889.

[6] In the context of an appropriation for irrigation, we have ruled that beneficial use requires "actual application of the water to the land for the purpose of irrigation." *Hostetler v. State*, 203 Neb. 776, 781, 280 N.W.2d 75, 78 (1979). Appropriators who fail to comply with the beneficial use requirement are subject to cancellation of their rights to use the water by the Department pursuant to proceedings brought under § 46-229 and Neb. Rev. Stat. §§ 46-229.02 to 46-229.05 (Reissue 2010).

*Appropriation Statutes.*

The framework for our consideration of this appeal is found in chapter 46 of the Nebraska Revised Statutes pertaining to

"Irrigation and Regulation of Water." In particular, we apply §§ 46-229 and 46-229.02 to 46-229.05 which generally cover the procedural and substantive law pursuant to which an appropriation may be canceled.

Section 46-229 provides:

> All appropriations for water must be for a beneficial or useful purpose and . . . when the owner of an appropriation or his or her successor in interest ceases to use it for such purpose for more than five consecutive years, the right may be terminated only by the director [of the Department] pursuant to sections 46-229.02 to 46-229.05.

Sections 46-229.02 and 46-229.03 generally address the procedural aspects of cancellation and provide the following: the procedure by which the Department makes a preliminary determination of nonuse, notice of the preliminary determination of nonuse to the owner of the appropriation, the manner by which the owner can contest the preliminary determination, and the format of the hearing at which the decision whether an appropriation should be canceled is made.

Section 46-229.04, considered in detail below, provides the substantive principles to be applied to resolve the issue of whether the appropriation should be canceled, in whole or in part, for nonuse, and § 46-229.05 provides for an appeal in accordance with Neb. Rev. Stat. § 61-207 (Reissue 2009).

Regarding § 46-229.04(1), we note that this subsection provides that at the hearing, the verified field investigation report preliminarily concluding that there has been nonuse "shall be prima facie evidence for the forfeiture and annulment" of the appropriation. If an interested person appears, the Department shall hear evidence, and

> if it appears that such water has not been put to a beneficial use or has ceased to be used for such purpose for more than five consecutive years, the same shall be declared canceled and annulled unless the [D]epartment finds that (a) there has been sufficient cause for such

> nonuse as provided for in subsection (2), (3), or (4) of this section or (b) subsection (5) or (6) of this section applies.

As noted above, § 46-229.04(2) generally provides that sufficient cause for nonuse shall exist for up to 30 consecutive years if such nonuse was caused by the unavailability of water. And § 46-229.04(3) generally provides that sufficient cause for nonuse shall exist as a result of inadequate supply or storage issues. Subsections (2) and (3) of § 46-229.04 are not implicated in the present case.

The provisions of § 46-229.04(4)(a) to (d) are at the center of the Trust's appeal, and we set them forth again here:

> (4) Sufficient cause for nonuse shall be deemed to exist for up to fifteen consecutive years if such nonuse was a result of one or more of the following:
>
> (a) Federal, state, or local laws, rules, or regulations temporarily prevented or restricted such use;
>
> (b) Use of the water was unnecessary because of climatic conditions;
>
> (c) Circumstances were such that a prudent person, following the principles of good husbandry, would not have been expected to use the water;
>
> (d) The works, diversions, or other facilities essential to use the water were destroyed by a cause not within the control of the owner of the appropriation and good faith efforts to repair or replace the works, diversions, or facilities have been and are being made.

*Arbitrary, Capricious, or Unreasonable.*

As we understand it, the Trust is generally challenging the scheme by which an appropriation once conferred can be canceled. That is, the Trust claims that the act of cancellation is arbitrary, capricious, or unreasonable. We find no merit to this claim.

[7] To the extent the Trust contends that once an application for an appropriation has been approved, the appropriation

cannot be constitutionally canceled, we reject this argument. We have observed that at common law, an appropriation of water for irrigation purposes may be lost by nonuse or abandonment. *State v. Birdwood Irrigation District*, 154 Neb. 52, 46 N.W.2d 884 (1951). Furthermore, our jurisprudence generally provides that after an appropriation is granted, under the Nebraska Constitution and the police powers of the State, the Department, after notice and hearing, continues to regulate the use of waters of natural rivers and streams. E.g., *State, ex rel. Cary, v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940). Specifically, as relevant to this case, the constitutionality of statutes regarding forfeiture of water rights has long been "settled in this state." See *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 165, 313 N.W.2d 271, 274 (1981). See, also, *State v. Birdwood Irrigation District, supra*; *Dawson County Irrigation Co. v. McMullen*, 120 Neb. 245, 231 N.W. 840 (1930); *Kersenbrock v. Boyes*, 95 Neb. 407, 145 N.W. 837 (1914). We believe the rationale of these cases based on the necessity for the rigid administration of a scarce resource (referred to above in our summary of Nebraska surface water law) remains valid, and we have not been provided a reason to overrule these cases.

[8-10] To the extent the Trust contends that the Department's processing of this case and its decision are arbitrary, capricious, or unreasonable, we also reject this argument. We addressed such a challenge in *In re Water Appropriation A-4924*, 267 Neb. 430, 434, 674 N.W.2d 788, 791 (2004), wherein we stated:

> In an appeal from the Department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable. *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002). A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which

> would lead a reasonable person to the same conclusion. *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 640 N.W.2d 398 (2002). A capricious decision is one guided by fancy rather than by judgment or settled purpose. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000). The term "unreasonable" can be applied to an administrative decision only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999).

The record in this case shows that the field investigation report by a Department staff member was introduced at the hearing as evidence that the Appropriation should be canceled. Section 46-229.04(1) provides that "the verified field investigation report of an employee of the [D]epartment . . . shall be prima facie evidence for the forfeiture and annulment of such water appropriation." Under the scheme set out in § 46-229.04(1), the burden then shifts to an interested party to present evidence to the Department that the Appropriation has been put to a beneficial use during the prior 5 consecutive years or that a recognized excuse for nonuse exists.

We have recognized the burden-shifting analysis described above in our cases. In *In re Water Appropriation A-4924, supra*, we noted that the Department bore the burden to establish nonuse for the statutory period and that this fact could be established by the verified report of the Department. Once the report has been presented, then the appropriator must show cause why the appropriation should not be terminated. That is, the language of the statute clearly indicates that the burden is upon the appropriator to present evidence showing either that water was taken, contrary to the report filed by the Department, or that some excuse existed for nonuse.

In this case, the Trust did not contend that the water had been put to a beneficial use for irrigation during the prior 5 consecutive years. Once it had been established that the

Appropriation had not been used for more than 5 consecutive years, it was the burden of the interested party, in this case the Trust, to present evidence that there was sufficient cause for nonuse. See § 46-229.04(1). The procedure followed by the Department was not arbitrary, capricious, or unreasonable. And as we explain below, the decision itself was supported by competent and relevant evidence and was not arbitrary, capricious, or unreasonable.

*Evidence Regarding Excuse for Nonuse: § 46-229.04(4)(a) to (d).*

The Trust contends that its evidence established sufficient cause for nonuse under § 46-229.04(4)(a) to (d) and claims the Department erred when it did not so find. The record and applicable law do not support the Trust's contentions, and as such, the decision to cancel the Appropriation was not arbitrary, capricious, or unreasonable.

Section 46-229.04(4)(a) generally excuses nonuse where an appropriator is temporarily prevented from using its appropriation by federal, state, or local laws, rules, or regulations. The Trust refers us to the Uniform Trust Code in general and contends that its decision to provide income to the trust beneficiary and its decision to lease the land to its tenant prevented it from using Trust funds for repairing irrigation equipment, growing crops, and ultimately using the Appropriation. The Department found that these decisions were choices made by the Trust, but not impediments as contemplated by § 46-229.04(4)(a). We agree with the Department.

We recognize that administration of the Trust required adherence to good faith, see Neb. Rev. Stat. § 30-3866 (Reissue 2008), and prudence, see Neb. Rev. Stat. §§ 30-3869 and 30-3884 (Reissue 2008), for the benefit of the beneficiary, but the Trust has not explained how these obligations prevented it from making land lease choices which would have used and preserved its Appropriation asset. In particular, the 2008 lease between the Trust and its tenant refers

to the cattle operation to be run by the tenant on the lands associated with the Appropriation; that is, the Trust chose to enter into a lease which had the tendency to underutilize the Appropriation which had been granted for the "production of crops." The Trust did not establish it was prevented from using the Appropriation under trust principles and did not show sufficient cause for nonuse under § 46-229.04(4)(a).

Section 46-229.04(4)(b) generally excuses nonuse where an appropriator's nonuse is explained by the weather. That is, "[u]se of the water was unnecessary because of climatic conditions." The Department found the evidence established, inter alia, that 2012 was a "drought year," thus establishing the necessity for use for irrigation in 2012 and a circumstance contrary to legitimate nonuse. The evidence included precipitation tables and testimony. The Trust offered no evidence to show that it either used its Appropriation in 2012 or had sufficient cause for its failure to use its Appropriation in the drought year, 2012. The Department did not err when it determined that the Trust did not establish sufficient cause for nonuse under § 46-229.04(4)(b).

Section 46-229.04(4)(c) generally excuses nonuse where an appropriator, following the principles of good husbandry, would not have been expected to use the water. The Department correctly rejected the Trust's claim under this subsection. The Trust notes that "husbandry" is not defined in the statute, and the Trust contends that the word "husbandry" should be read to include using the land and water for cattle. Black's Law Dictionary defines "husbandry," in part, as "[a]griculture or farming; cultivation of the soil for food." Black's Law Dictionary 859 (10th ed. 2014). Although we do not necessarily endorse the Trust's reading of "husbandry" as including cattle operations, the more fundamental reason we reject the Trust's interpretation of the statute is that its construction of § 46-229.04(4)(c) is not a sensible one. See *Walton v. Patil*, 279 Neb. 974, 983, 783 N.W.2d 438, 445-46 (2010) (stating that "in construing a statute, appellate courts are guided by

the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute").

The Trust asserts that properly running a cattle operation invariably underutilizes an appropriation. The Trust refers us to the record which shows that the tenant used the property and minimal water in a cow-calf operation; the Trust asserts that in doing so, it followed the principles of good husbandry, thus excusing nonuse. We reject the Trust's argument.

It is fundamental under §§ 46-229 and 46-229.04 that the appropriation for water must be put to a beneficial use and that if it has ceased to be so used for more than 5 consecutive years, the appropriation is at risk of cancellation. As relevant to this case, we have stated that "beneficial use requires, in the case of an appropriation for irrigation purposes, actual application of the water to the land for the purpose of irrigation." *Hostetler v. State*, 203 Neb. 776, 781, 280 N.W.2d 75, 78 (1979).

We have previously rejected an argument similar to that proffered by the Trust. In *Hostetler, supra*, we rejected the contention that the use of creek water subject to an appropriation for irrigation to water cattle was a use within the meaning of the appropriation. It would be an illogical reading of § 46-229.04(4)(c) to construe the statute in a manner which would endorse an outcome antithetical to the strict administration of the surface water of this state. See *State, ex rel. Cary, v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940). The interpretation urged upon us by the Trust illustrates the point.

We reject the Trust's statutory construction which would effectively have us endorse a nonpermitted use of some amount of water as an excuse for nonuse of the one described in the appropriation. We do not agree with the Trust's reading of § 46-229.04(4)(c) and conclude that the Department did not err when it determined that the Trust did not establish sufficient cause for nonuse under § 46-229.04(4)(c).

Section 46-229.04(4)(d) generally excuses nonuse where the works or equipment essential to use the water were destroyed

by a cause not within the control of the appropriator and good faith efforts to repair "have been and are being made." As the Department correctly found, the evidence upon which the Trust relies is insufficient.

The Trust refers us to evidence that a "Vermeer boom" was destroyed in a windstorm "prior to 2000" and that it obtained quotes for the costs of replacing the nonfunctioning irrigation equipment. Nothing in the record suggests meaningful good faith efforts were made to repair such equipment after 2000, and the quotes to which the Trust refers were obtained after the Department issued its "Preliminary Determination of Nonuse," and there is no evidence that repairs have been pursued. In an earlier case, we found unpersuasive the "diversion of some amount of water" only after the Department's inspection showed nonuse for the statutory period. See *Hostetler v. State*, 203 Neb. at 781, 280 N.W.2d at 78. Similarly, we agree with the Department that obtaining a quote without more only after the "Preliminary Determination of Nonuse" was issued did not establish good faith efforts at repair or sufficient cause for nonuse under § 46-229.04(4)(d).

## CONCLUSION

For the reasons explained above, we determine the Trust failed to establish sufficient cause to excuse its nonuse of the Appropriation and we therefore affirm the Department's "Order of Cancellation."

Affirmed.

Stephan, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Bradley A. Boyum, respondent.

868 N.W.2d 326

Filed August 28, 2015. No. S-14-578.

Original action. Judgment of suspension.

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

Per Curiam.

## INTRODUCTION

On February 4, 2015, amended formal charges containing one count were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Bradley A. Boyum. Respondent filed an answer to the amended formal charges on February 9. A referee was appointed, and the referee held a hearing on the charges. Respondent and a client of respondent appeared at the hearing and testified, and exhibits were admitted into evidence.

The referee filed a report on May 13, 2015. With respect to the amended formal charges, the referee concluded that respondent's conduct had violated Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence), 3-501.4(a)(3) (communications), and 3-508.4 (misconduct). The referee further found that respondent had violated his oath of office as an attorney licensed to practice law in the State of Nebraska. See Neb. Rev. Stat. § 7-104 (Reissue 2012). With respect to the discipline to be imposed, the referee recommended a 60-day suspension, and

as a condition of reinstatement, that respondent complete 6 hours of legal education in the area of professional responsibility, and that upon reinstatement, if accepted, respondent be placed on monitored probation for a period of 2 years. Neither relator nor respondent filed exceptions to the referee's report. Relator filed a motion for judgment on the pleadings under Neb. Ct. R. § 3-310(L) (rev. 2014) of the disciplinary rules. We grant the motion for judgment on the pleadings as to the facts and impose discipline as indicated below.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 21, 2004. At all times relevant to these proceedings, he was engaged in the practice of law in Omaha, Nebraska.

On June 30, 2014, relator filed formal charges against respondent, and on February 4, 2015, relator filed amended formal charges against respondent. The amended formal charges contained one count generally regarding respondent's failure to communicate with a client and respondent's failure to perform the legal work for the client for which respondent had been paid. The formal charges alleged that by his conduct, respondent violated his oath of office as an attorney and §§ 3-501.3, 3-501.4(a)(3) and (4), and 3-508.4(a) and (d). On February 9, 2015, respondent filed his answer to the amended formal charges, generally denying the allegations set forth in the amended formal charges.

A referee was appointed on October 24, 2014, and the referee held a hearing on the amended formal charges. Respondent and the client testified at the hearing, and exhibits were admitted into evidence.

After the hearing, the referee filed his report and recommendation on May 13, 2015. The substance of the referee's findings may be summarized as follows: Respondent first met the client in December 2011, and on February 26, 2012, the client emailed respondent to schedule a meeting "'to start our estate process.'" The initial estate planning meeting occurred

on March 2 and lasted approximately 1 hour. At the end of the meeting, respondent gave the client a folder containing an asset information booklet.

No followup meeting was scheduled. At the hearing, the client was asked whether he told respondent how quickly he wanted to proceed, and the client stated, "'Quite the opposite. I told him I was not in a hurry.'" Respondent testified that he believed the client would contact him when the client was ready to take the next step. There were no additional contacts between respondent and the client in 2012.

On January 16, 2013, the client called respondent to discuss an unrelated matter, and at that time, respondent brought up the topic of estate planning. Respondent's notes from the January 16 telephone call stated that "'[the client] is still working on the asset booklet but they are planning on doing the Living Trust packet.'" Respondent's notes further stated that respondent "'[d]id [an] estate plan draft,'" and respondent testified at the hearing that that meant he had "'entered information into a drafting program.'"

On January 28, 2013, respondent created a document titled the client's "**Estate Plan Drafting Notes**" (emphasis in original), and according to these notes, respondent "'[d]rafted Estate Plan for [the client] after our conversation from January 16, 2013 because he said he was going forward with the Living Trust packet.'" Respondent testified at the hearing that he did not intend to show the original draft of the estate plan to the client. Respondent's notes listed some of the information that respondent still needed to gather in order to complete the estate plan for the client.

Respondent took no steps between January 28 and June 17, 2013, to gather the missing information for the estate plan. Respondent testified at the hearing that he took no action at this time, because the client "'wanted to control the speed of the process, the estate planning process.'" The client testified at the hearing that he did not remember whether he wanted to move forward with the estate planning process in January 2013.

The client initiated a meeting with respondent for estate planning purposes, and that meeting was held on June 17, 2013. At that meeting, the client formally told respondent that he wanted to go forward with the estate planning process. The client paid respondent a retainer of $1,700, and the client signed a legal services agreement. The legal services agreement provided that respondent "'will prepare the following estate planning documents for client: [six documents are identified],'" and it further provided that the client agreed that "'Attorney's Fees shall be paid as follows: Initial Retainer of $1700.'" The legal services agreement set forth the client's responsibilities, including: "'Before Law Firm has an obligation to perform any services for Client, Client must sign this agreement and make the payment required in paragraph 3 above.'" The client and his wife both signed the contract. The legal services agreement did not explicitly set forth other details of how and when the work was to be performed.

Respondent contended that at the conclusion of the June 17, 2013, meeting, he did not have all of the information he needed to complete the work identified in the legal services agreement. The referee noted in his report that at the hearing, respondent "was unable to describe what additional information he needed" and that respondent "became clearly evasive about what information he may have needed to complete work on the estate plan." Respondent did not inform the client that respondent might need additional information from the client and that respondent might be contacting the client to obtain additional information.

At the end of the June 17, 2013, meeting, the client's understanding was that he would receive a draft of the estate plan from respondent and that he would be able to review the draft before the plan was finalized. The client was unaware that respondent did not intend to send a draft of the estate plan to the client. The referee stated in his report that he found that the client had "expressed desire to receive a draft to review at the June 17, 2013 meeting."

The referee stated in his report that the schedule to complete the estate planning work was left open. The referee further stated that respondent asserted that the arrangement was for the client to contact respondent when he needed some work completed. Conversely, the client expected respondent to call him sometime after the meeting on June 17, 2013, to inform the client when the documents were ready to be reviewed.

On August 19, 2013, the client called respondent and left a message. Respondent returned the call and left a message. On September 9, the client called respondent "'to get this estate process going.'" Respondent did not answer, and the client left a message. Late on September 9, respondent sent the client an e-mail stating, "'I saw I missed your call. I will call you in the morning.'" Respondent called the client at 6:22 p.m. on September 10. The client answered the call, but he indicated that it was not a convenient time to talk. The client stated that he would call respondent back, but he did not.

Beginning on January 21, 2014, the client attempted numerous times to contact respondent to let respondent know he was ready and wanting to move forward. The client attempted to contact respondent via: a call on January 21, a call on January 27, two calls on February 4, an e-mail on February 4, two calls on February 6, a call on February 18, a call on February 20, and three calls on February 25. Respondent did not respond to any of the client's attempts to contact him.

On February 25, 2014, the client called relator because he was upset that he could not reach respondent. The client wrote a grievance letter, which relator received on February 27. On March 4, relator sent respondent a letter with a copy of the grievance. The March 4 letter was mailed certified, return receipt, and addressed to respondent's correct office address. The referee noted in his report that return receipt has never been returned, and the letter itself has never been returned. Respondent testified at the hearing that he did not receive the

March 4 letter. An exhibit received at the hearing showed a copy of a U.S. Postal Service tracking screen which showed that the March 4 letter was delivered on March 5 to area code 68154, although not the specific address or addresses.

On April 2, 2014, the client was in respondent's office building on an unrelated matter, and the client asked respondent to meet with him. Respondent met the client, and the client indicated that "it was time for them to part" and asked for his money back. Respondent immediately wrote the client a check for the entire $1,700 retainer.

With respect to relator's efforts to reach respondent, on April 15, 2014, relator sent a followup letter by regular mail to respondent's correct address. The letter was never returned to relator. Respondent testified that he did not receive the April 15 letter.

Relator sent respondent a third letter to respondent's correct address on May 8, 2014, and respondent acknowledged receiving this letter. Respondent e-mailed a response to relator on May 19. Thereafter, relator filed a complaint with the appropriate Committee on Inquiry and subsequently filed formal charges against respondent as described above.

The referee stated in his report that two additional grievance letters were submitted against respondent. With respect to the second grievance letter, two of respondent's clients asserted that respondent failed to communicate with them and failed to return their estate planning documents. The referee noted that respondent apparently did not respond promptly to relator regarding the second grievance; however, respondent eventually sent a letter to relator regarding the grievance in which he denied receiving some of the calls claimed to have been made by the clients and stated that "'[t]he fact of the matter is that I handled the matter poorly. It is my fault for not being proactive in my attempt to contact them as time passed.'" The second grievance did not result in the filing of a complaint or the filing of formal charges against respondent.

With respect to the third grievance submitted against respondent, two of respondent's clients asserted that respondent failed to complete work for which the clients had paid. Relator sent five letters to respondent regarding the third grievance between August and December 2013, and respondent did not respond to any of relator's five letters. Relator called respondent on December 12, and on December 13, respondent mailed a written response to relator regarding the third grievance. Relator subsequently filed a complaint, and on February 20, 2014, the Committee on Inquiry issued a private reprimand to respondent. The referee noted in his report that the allegations supporting the private reprimand were that respondent violated §§ 3-501.3, 3-501.4(a)(3) and (4), and 3-508.4(a) and (d).

In his report, the referee determined with respect to the allegations set forth in the amended formal charges, based on his actions, respondent did not act promptly or diligently, that respondent did not keep the client reasonably informed about the status of the matter, and that respondent failed to cooperate with relator in a timely manner. Accordingly, the referee found that respondent violated his oath of office as an attorney and professional conduct rules §§ 3-501.3, 3-501.4(a)(3), and 3-508.4. However, the referee found that respondent did not violate § 3-501.4(a)(4) of the professional conduct rules.

The referee identified certain aggravating factors, including that two other grievances had been submitted against respondent that involved similar misconduct. In both situations, respondent failed to adequately communicate with his clients as to the status of their matters and respondent failed to promptly respond to the investigation of relator. The referee further stated that one of the other grievances resulted in a private reprimand, and a prior reprimand is considered an aggravating factor.

The referee also identified certain mitigating factors. The referee noted that the client involved in the events at issue

in this case was a "difficult" client who provided confusing direction regarding when work was to be done, but the referee stated "[t]his fact is barely mitigating since the exact same fact provides notice to [respondent] that extra care was needed to ensure adequate communication." The referee acknowledged that many letters of support were submitted on respondent's behalf. However, the referee stated that some of the letters were "templates which have merely been signed," and the referee did not give the form letters any mitigating weight. The referee further stated that other letters appeared to be sincere, original compositions and that those letters were entitled to some mitigating weight. The referee further stated that "[a]s a matter of proportionality, [respondent's] failure to respond to the investigation into his misconduct was a clear violation but was not profoundly significant. . . . I find that [respondent] violated the rule but I do not exaggerate the seriousness of this particular violation."

With respect to sanctions to be imposed for the foregoing actions, considering the aggravating and mitigating factors, the referee recommended that respondent be suspended for a period of 60 days; that reinstatement be conditioned on respondent's proof that respondent completed 6 hours of continuing legal education prior to reinstatement; and that upon reinstatement, respondent be placed on monitored probation for a period of 2 years.

## ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under § 3-310(L). When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Council*, 289 Neb. 33, 853 N.W.2d 844 (2014). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude that the amended formal charges are supported

by clear and convincing evidence, and the motion for judgment on the pleadings as to the facts is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Thebarge*, 289 Neb. 356, 854 N.W.2d 914 (2014). Violation of a disciplinary rule concerning the practice of law is a ground for discipline, and disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Sundvold*, 287 Neb. 818, 844 N.W.2d 771 (2014).

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated §§ 3-501.3, 3-501.4(a)(3), and 3-508.4 of the professional conduct rules. The record also supports a finding by clear and convincing evidence that respondent violated his oath of office as an attorney, and we find that respondent has violated said oath.

We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances. See *State ex rel. Counsel for Dis. v. Council, supra*. Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

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

> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, § 3-310(N).

With respect to the imposition of attorney discipline in an individual case, each attorney discipline case must be evaluated in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Council, supra*. For purposes of determining the proper discipline of an attorney, we consider the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors. *Id*.

To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *State ex rel. Counsel for Dis. v. Connor*, 289 Neb. 660, 856 N.W.2d 570 (2014).

The evidence in the present case establishes, among other facts, that respondent agreed to prepare estate planning documents for the client and was paid a retainer to complete such work. However, respondent failed to prepare the documents and failed to effectively communicate with the client regarding the status of the work to be completed. In addition, respondent repeatedly failed to cooperate with relator's investigation.

As aggravating factors, we note, as did the referee, that two other grievances had been submitted against respondent for similar misconduct and that in those situations, respondent similarly failed to cooperate with relator's investigation in a timely manner. Further, the record shows that respondent has received a private reprimand.

As mitigating factors, we acknowledge, as did the referee, that the client involved with the events at issue in this case was

a "difficult" client. We also recognize that several letters of support were written on respondent's behalf.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent should be suspended for a period of 60 days. Before the filing of an application for reinstatement, respondent must complete 6 hours of legal education in the area of professional responsibility. Should respondent apply for reinstatement, his reinstatement shall be conditioned upon the application's being accompanied by a proposed monitored plan and further conditioned on respondent's being placed on monitored probation for a period of 2 years, and the monitoring shall be by an attorney licensed to practice law in the State of Nebraska, who shall be approved by the Counsel for Discipline. Respondent shall submit a monitoring plan with this application for reinstatement which shall include, but not be limited to, the following: During the first 6 months of the probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible, which list shall include the date the attorney-client relationship began; the general type of case; the date of last contact with the client; the last type and date of work completed on the file (pleading, correspondence, document preparation, discovery, or court hearing); the next type of work and date that work should be completed on the case; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly, contingency, et cetera). After the first 6 months through the end of probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information as set forth above; respondent shall reconcile his trust account within 10 days of receipt of the monthly bank statement and provide the monitor with a copy within 5 days; and respondent shall submit a quarterly compliance report with the Counsel for Discipline, demonstrating that respondent is

adhering to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of the probation.

## CONCLUSION

The motion for judgment on the pleadings is granted as to the facts. With respect to discipline, it is the judgment of this court that respondent should be and is hereby suspended from the practice of law for a period of 60 days, effective immediately, after which period respondent may apply for reinstatement to the bar. Before the filing of an application for reinstatement, respondent must complete 6 hours of legal education in the area of professional responsibility. Should respondent apply for reinstatement, his reinstatement shall be conditioned upon respondent's being on probation for a period of 2 years, including monitoring, following reinstatement, subject to the terms outlined above, and acceptance of an application for reinstatement is conditioned on the application's being accompanied by a proposed monitored probation plan the terms of which are consistent with this opinion. Respondent shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and § 3-310(P) and Neb. Ct. R. § 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Dallas L. Huston, appellant.

868 N.W.2d 766

Filed August 28, 2015. No. S-14-752.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Appeal and Error.** To be considered by an appellate court, an appellant must both assign and specifically argue any alleged error.
3. **Effectiveness of Counsel.** A pro se party is held to the same standards as one who is represented by counsel.
4. **Postconviction: Constitutional Law: Proof.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
5. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
6. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.

7. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
8. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
9. ____: ____: ____. To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.
10. **Proof: Words and Phrases.** A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
11. **Effectiveness of Counsel.** A court may address the two prongs of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, deficient performance and prejudice, in either order.
12. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.
13. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.
14. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
15. ____: ____. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
16. **Trial: Attorneys at Law.** The decision whether or not to object has long been held to be part of trial strategy.

17. **Effectiveness of Counsel: Trial.** When reviewing claims of alleged ineffective assistance of counsel, an appellate court affords trial counsel due deference to formulate trial strategy and tactics.
18. **Effectiveness of Counsel: Presumptions: Appeal and Error.** There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Dallas L. Huston, pro se.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

Dallas L. Huston was convicted by a jury of second degree murder and sentenced to 50 years' to life imprisonment. We affirmed his conviction and sentence on direct appeal. See *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013) (*Huston I*). On January 17, 2014, Huston filed a pro se motion for postconviction relief in the district court for Lancaster County, claiming ineffective assistance of trial and appellate counsel. On June 9, the State filed its response and motion to deny an evidentiary hearing. On July 28, the district court filed an order which denied Huston's motion for postconviction relief without an evidentiary hearing. Huston appeals. We determine that the district court erred when it denied Huston an evidentiary hearing on his claim that his trial counsel was ineffective for failing to object to the admission of exhibits 38, 81, and 95, and we reverse the decision of the district court on this point and remand the cause for an evidentiary hearing on this single claim. In all other respects, the decision of the district court is affirmed.

## STATEMENT OF FACTS

After a jury trial, Huston was convicted of second degree murder and sentenced to imprisonment for 50 years to life. We affirmed his conviction and sentence on direct appeal. See *Huston I*. A full recitation of the facts can be found in our opinion of the direct appeal in *Huston I*, and we quote pertinent portions below.

Huston and Ryan Johnson were "living together as a couple in a nonsexual relationship," when in September 2009, Huston allegedly found Johnson in their bedroom with plastic wrap wrapped around his face. *Huston I*, 285 Neb. at 12, 824 N.W.2d at 728. Huston called the 911 emergency dispatch service. Paramedics performed lifesaving measures, but they were unable to revive Johnson. As part of the investigation of Johnson's death, law enforcement interviewed Huston numerous times. During the interviews, Huston took varying positions about his involvement in Johnson's death. Also during the interviews, Huston's multiple personalities emerged, one of whom was called Vincent. Huston later admitted at trial that "he made up these different personalities as part of a 'social experiment' and that he controlled them completely." *Id*. at 13, 824 N.W.2d at 728.

Huston had told his friends, Nicholas Berghuis and Christopher Wilson, that one of his "personalities" had been involved in Johnson's death. Berghuis and Wilson arranged with the police to set up video surveillance in Wilson's house, and Huston's conversations with Berghuis and Wilson on October 6 and 7, 2009, were recorded. In *Huston I*, we stated:

> During these conversations, Huston's various personalities admitted that "Vincent" assisted in Johnson's death at Johnson's request. Specifically, the personality "Vincent" admitted to (1) wrapping the plastic wrap around Johnson's face, during which time Johnson yelled, "Get it off"; (2) holding a pillow over Johnson's face when Johnson broke through the plastic wrap while

trying to breathe; and (3) listening to Johnson's last heartbeats "with enjoyment."

285 Neb. at 13-14, 824 N.W.2d at 728.

We repeat *Huston I* at length wherein we quoted from the trial testimony and stated:

> Prior to trial, Huston filed a motion requesting the district court to redact the video recordings of his police interviews. The State agreed with some of the proposed redactions, and the court ruled on the proposed redactions to which the parties did not agree. Some of Huston's proposed redactions were sustained, but others were not. After receiving the court's rulings, the State edited the video recordings to reflect the redactions that had been agreed to by the State or ordered by the court. These video recordings were admitted into evidence at Huston's subsequent trial and were published to the jury. When asked whether there were any objections to the admission of these video recordings, Huston's counsel responded by stating that he had either no objection or no "further" objection.
>
> The testimony at trial included both the video recordings of Huston's police interviews—including the proposed redactions that were not sustained—and testimony from the police officers who had conducted those interviews. Of this plethora of evidence, we mention only the nine specific portions that have been identified by Huston on appeal. These segments include evidence relating to (1) Huston's "homosexual encounter" with Wilson, (2) speculation that Huston is a serial killer and Huston's future dangerousness, and (3) the opinions of police officers that Huston's actions constituted murder as opposed to assisted suicide.
>
> First, in the video recording of Huston's interview with the police on the day of Johnson's death, Huston described his "homosexual encounter" with Wilson. Huston's conversation with the police officer conducting the interview went as follows:

"[Huston:] Okay, to be completely honest, me and [Wilson] were together once. Only once. Um, it's how it came out to [Johnson] that we might have been interested in each other, but [Wilson] decided he didn't want to do that.

"[Police officer:] Okay, and was this early in your relationship with [Johnson]? Or—

"[Huston:] [Interrupting.] Oh, no, no. . . . [Wilson] is only been back around—. See, [Wilson] has only been back in the picture as a friend of ours for like a month. . . . I believe in being upfront. Yes, one time and only one time me and [Wilson] were together and we—. Well, we went to bed together, and—

"[Police officer:] [Interrupting.] How long ago was that?

. . . .

"[Huston:] . . . Three weeks ago.

"[Police officer.] So, it is pretty recent, then.

"[Huston:] Yep. . . . You probably don't want to hear this, but me and [Johnson] had kind of a unique relationship. . . . I know it's kind of a weird situation to be in [be]cause in the 4 years of our relationship, there was never anything sexual. Um, and we allowed ourselves . . . an 'open relationship.' We allowed ourselves what he'd call '[expletive] buddies.' . . . That one and only one time that me and [Wilson] ended up . . . was kind of a 'heat of the moment,' you know, 'spur of the moment' type thing. . . . We ended up in bed together. We kissed. We, we made out. But it never went anywhere further than that."

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

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

"[Huston:] . . . This is what I meant, though, when I've told everybody that I want to get help. I never thought this could happen, and now that this has happened, I am so scared that I'm capable of doing it again.

"[Sorensen:] Yeah, I think that that's probably really true.

"[Huston:] And that scares me to death because, like I said, I have never thought of myself as a violent person, and now I don't know what to think of myself.

"[Sorensen:] Well, especially when you consider that you have urges to kill the people that you're attracted to.

"[Huston:] And I've done everything that I could for the last, you know . . . . You know, the earliest memories of this I have are, say, 9, 10 years old. So 18 years I have fought myself.

"[Sorensen:] But most serial killers do the same thing at some point in time.

"[Huston:] Oh, wow.

"[Sorensen:] At some point in time, they crossed that line. I mean, when you talk about—

"[Huston:] [Interrupting.] I've asked myself that.

"[Sorensen:] Whether you're a serial killer?

"[Huston:] Uh-hum [yes]. I've asked myself that . . . . You've asked me if I have been suicidal in the past.

"[Sorensen:] Yeah.

"[Huston:] To be completely honest, I lied to you. Because of this, I have been. I have thought about killing myself so I wouldn't hurt anyone." Later in the same interview, Huston stated, "I am so scared now that this could happen again."

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

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

"[Sorensen:] . . . [Y]ou or Vincent were the person or persons that killed [Johnson]. And maybe at the time, it started out as a suicide, but it didn't end that way. It just didn't end that way.

"[Huston:] See, I don't believe that.

"[Sorensen:] You don't believe that it didn't end in a homicide?

. . . .

"[Huston:] No, I don't.

. . . .

"[Huston:] They asked me that. They asked me that. Did he fight? Did he—

"[Sorensen:] [Interrupting.] He doesn't have to fight. [All] he had to do was break the seal. [All] he had to do was try to breathe, and . . . that was his intent to stay alive—he tried to breathe." Later in the same interview, Sorensen stated: "[W]hen you put the pillow over his face, you're killing him. He's not killing himself. You're killing him."

Huston identified two more similar comments made by Sorensen in the video recordings, the first during the interview with Huston on October 8, 2009, and the

second during the October 10 interview. On October 8, Sorensen said the following:

"You made a pact to commit suicide. When he started to breathe, you put the pillow over the face, which was a continuation of the act. But, say I have a gun in my hand, and say that I want to commit suicide. And so I put it to my head, but before I pull the trigger, I put the gun down. That stops me from committing suicide. Think of this: [Johnson] didn't get a chance. [Johnson] didn't get a chance to make that decision. You made it for him, with the pillow. . . . You know I'm right. He didn't get that chance. He did not get a chance." On October 10, Sorensen and Huston engaged in the following dialog after Huston asserted that he "didn't murder [Johnson]":

"[Sorensen:] But I don't know how else you can describe it, [Huston]. . . . This isn't assisting a suicide. This, this is just not assisting a suicide. . . . I don't know if you can understand this, but if [Johnson] looks at me right now and he says, 'I can't take it anymore. You got to kill me,' and I pull a gun out and I shoot him dead—

"[Huston:] [Interrupting.] You've tried to say that before and I do understand what you mean.

"[Sorensen:] [Johnson's] just asked me to kill him and I don't have that right to do that. He can ask me all he wants, but I don't have the right to do it. And this isn't any different . . . . I know that you think that it is, but it's not." The video recordings, including all of the aforementioned evidence that the police believed Huston committed murder, were received at trial and published to the jury without objection by Huston's counsel.

The various police officers present for Huston's interviews also testified at trial. Both Sorensen and Sgt. Kenneth Koziol, also of the Lincoln Police Department, testified before the jury, and each stated that, in his opinion, Huston committed murder. While on the stand, Sorensen explained that he called the Lancaster County Attorney during the investigation of Johnson's death

> "because at that point we no longer had any type of assisting a suicide . . . . So I wanted to inform the county attorney that this was a murder case." And when asked why the police were "a little bit more confrontational" when questioning Huston on October 7, 2009, Koziol explained that by that time they were "pretty confident that it [was] a homicide. We [felt] that . . . Huston caused . . . Johnson's death . . . ." Huston's counsel made no objection to these statements at trial.
>
> Although not identified by Huston on appeal, there were numerous other instances during trial when similar opinion evidence was received into evidence. In none of these instances did Huston's counsel object.

285 Neb. at 14-19, 824 N.W.2d at 729-32.

Huston had different counsel for his direct appeal than he had had as trial counsel. In his direct appeal, Huston assigned that the district court erred when it admitted evidence "(1) of Huston's 'homosexual encounter' with Wilson; (2) of the discussion relating to serial killers, speculation that Huston is a serial killer, and Huston's future dangerousness; and (3) of the opinions of police officers that Huston's actions constituted murder as opposed to assisted suicide." *Id*. at 19, 824 N.W.2d at 732.

Huston's argument on direct appeal related to certain statements in video recordings of the police interviews, marked as exhibits 38 (September 16, 2009), 81 (October 7), and 95 (October 10), that the district court did not order redacted. These exhibits contain the material that form the basis, in part, of Huston's motion for postconviction relief currently under consideration.

In *Huston I*, we noted that when the State offered exhibits 38, 81, and 95 at trial, the district court specifically asked Huston whether he had any objections, and Huston's counsel responded that he had "'[n]o further objection . . . .'" 285 Neb. at 20, 824 N.W.2d at 732. Huston contended these responses were sufficient to preserve for appeal any error that

resulted from admitting these video exhibits into evidence. We determined that, despite the filing of his pretrial motion to redact, Huston was required to object at trial to those portions of the interviews the district court refused to order redacted and that trial counsel's responses of "no further objection" were not sufficient to preserve the issue for appeal. We concluded that "[b]ecause Huston did not object to exhibits 38, 81, and 95—or any allegedly inadmissible statements contained therein—when they were offered into evidence at trial, any evidentiary error that resulted from admitting these exhibits into evidence was not preserved for appeal." *Id*. at 28, 824 N.W.2d at 737.

In *Huston I*, we went on to state that "[a]nticipating our conclusion that Huston did not preserve for appeal any error relating to the admission of exhibits 38, 81, and 95 into evidence, he argues that his trial counsel was ineffective for failing to preserve these errors for appeal." 285 Neb. at 28, 824 N.W.2d at 737. We determined that the record was insufficient to adequately address on direct appeal whether trial counsel's failure to object denied Huston the effective assistance of counsel. In particular, we stated:

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

*Id.* at 30, 824 N.W.2d at 738-39. Accordingly, we affirmed Huston's conviction and sentence.

On January 17, 2014, Huston filed a pro se verified motion for postconviction relief alleging 16 claims of reversible error, including numerous claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel. It is the denial of this postconviction motion without an evidentiary hearing which forms the basis of the instant appeal. Huston's

first four allegations were claims of ineffective assistance of trial counsel for failing to preserve issues for appeal by failing to object to exhibits 38, 81, and 95, which included statements regarding Huston's "homosexual encounter" with Wilson, Sorensen's speculation that Huston is a serial killer, and Sorensen's opinion that Huston committed murder rather than assisted suicide. Huston alleged that he was prejudiced because had his trial counsel made the proper objections, the evidence would not have been admitted into evidence and he would not have been convicted, or we would have considered his claims on direct appeal, leading to a reversal.

Huston next alleged that his trial counsel was ineffective for failing to object to the admission of the video recording of his conversations with Berghuis and Wilson, who were working with law enforcement, because, according to Huston, Berghuis lied to Huston about going to the police. Huston contends that Sorensen testified that confidential informants, such as Berghuis, cannot lie about their involvement with the police if asked. Huston alleged that he was prejudiced because of his trial counsel's failure to object to the admission of this video recording. Huston claimed that his appellate counsel was ineffective for failing to raise the admissibility of the video recording as an issue on direct appeal.

Huston next alleged that his trial counsel was ineffective for failing to challenge the credibility of Berghuis, who provided several conflicting statements. Huston contends that had his trial counsel challenged the credibility of Berghuis, "inadmissible and irrelevant testimony of said witness would have been excluded as unduly prejudicial." Huston further alleged that if trial counsel had made the proper objection, then we would have considered errors on direct appeal. Huston further claimed that his appellate counsel was ineffective for failing to raise this issue on direct appeal.

Huston next alleged that his trial counsel was ineffective for committing "willful misconduct" and that he was prejudiced by his trial counsel's willful misconduct. Huston further

claims that his appellate counsel was ineffective for failing to raise the issue of trial counsel's willful misconduct on direct appeal.

Huston next alleged that his trial counsel was ineffective for failing to raise at trial, "through cross examination, or otherwise," that there were at least two eyewitnesses who contradicted Berghuis' statements who were never spoken to and that there were other witnesses identified after Huston's arrest. Huston contended he was prejudiced because had trial counsel made inquiry and properly objected, we would have considered his claims on direct appeal and the outcome on appeal would have been different. Huston further claimed that his appellate counsel was ineffective for failing to raise this issue on direct appeal.

Huston alleged his trial counsel was ineffective for failing to object at trial regarding the lack of evidence of murder. Huston asserted that he was prejudiced because had trial counsel made the proper argument, we would have considered his claims on direct appeal and the outcome on appeal would have been different. Huston further claimed that his appellate counsel was ineffective for failing to raise this issue on direct appeal.

Finally, Huston alleged that his appellate counsel was ineffective for failing to raise on direct appeal that the district court committed prejudicial error when it instructed the jury that "this is not a death penalty case." Huston alleged that he was prejudiced because had appellate counsel raised this issue, we would have considered it on direct appeal and the outcome on appeal would have been different.

On June 9, 2014, the State filed its response and motion to deny an evidentiary hearing on Huston's motion for postconviction relief. On July 28, the district court filed an order in which it denied Huston's motion for postconviction relief without holding an evidentiary hearing. In its order, the district court determined variously that Huston's allegations were

refuted by the record or were too conclusory to demonstrate a violation of Huston's constitutional rights.

Huston appeals.

## ASSIGNMENT OF ERROR

Huston assigns, restated, that the district court erred when it denied his motion for postconviction relief without holding an evidentiary hearing on his claims of ineffective assistance of trial and appellate counsel.

## STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

## ANALYSIS

Huston generally claims that the district court erred when it denied his claims of ineffective assistance of counsel without conducting an evidentiary hearing. As an initial matter, we note that although Huston alleged numerous claims of ineffective assistance of counsel and error by the court in his postconviction motion, he argues only four claims in his appellate brief. Huston argues that he received ineffective assistance of counsel when (1) counsel failed to object at trial to the admission of exhibits 38, 81, and 95, which were video recordings regarding Huston's "homosexual encounter" with Wilson, Sorensen's statements speculating that Huston is a serial killer, and Sorensen's opinion that Huston committed murder; (2) counsel failed to object at trial to video recordings of Huston's conversations with Berghuis and Wilson; (3) counsel failed to challenge the credibility of Berghuis; and (4) counsel failed to object and argue that there was insufficient evidence to convict Huston of murder.

[2,3] To be considered by an appellate court, an appellant must both assign and specifically argue any alleged error. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). Although we acknowledge that Huston filed his brief pro se, a pro se party is held to the same standards as one who is represented by counsel. *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015). Accordingly, our consideration of Huston's motion for postconviction relief is limited to those claims for relief which Huston has both assigned as error and argued on appeal.

*Relevant Law Regarding Postconviction Relief and Ineffective Assistance of Counsel.*

We begin by reviewing general propositions relating to postconviction relief and ineffective assistance of counsel claims before applying those propositions to the claims alleged and argued by Huston in this appeal.

[4] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014). Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *Id*.

[5,6] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Thorpe, supra*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is

entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

[7-11] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *Id*. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014). To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. Thorpe, supra*. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *State v. Armstrong*, 290 Neb. 991, 863 N.W.2d 449 (2015). A court may address the two prongs of this test, deficient performance and prejudice, in either order. *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

[12-15] A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review. *Id*. When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. *Id*. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise. *Id*. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Id*. When a case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the

*Strickland* test. *Id*. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim. *Id*.

*Huston's Claim That Trial Counsel Was Ineffective for Failing to Object to Exhibits 38, 81, and 95.*

Huston alleges that he received ineffective assistance of counsel when his trial counsel failed to object at trial to exhibits 38, 81, and 95, which were video recordings of statements regarding Huston's "homosexual encounter" with Wilson; of Sorensen's speculation that Huston is a serial killer; and of Sorensen's opinion that Huston committed murder. We have recited at length above the nature of the evidence at trial, and Huston argues generally that the receipt of exhibits 38, 81, and 95, in the context of this matter, denied him a fair trial. Huston contends that because his trial counsel failed to object to exhibits 38, 81, and 95, his trial counsel failed to preserve for appeal any error relating to the admission of these exhibits. Huston alleges that he was prejudiced by trial counsel's failure to object to these exhibits, because consideration of the issues surrounding the admissibility of exhibits 38, 81, and 95 on appeal would have changed the result of the appeal. Huston's allegations of prejudice are sufficient.

We note that in its appellate brief, the State conceded that "[i]f this court determines that Huston made sufficient allegations of prejudice, then the State submits that the decision of the district court on these claims [surrounding exhibits 38, 81, and 95] needs to be reversed and the case remanded for an evidentiary hearing on these claims." Brief for appellee at 10. We determine that the district court erred when it failed to grant Huston an evidentiary hearing on trial counsel's failure to object to this evidence in the video recordings. For completeness, we note that effectiveness of appellate counsel is not implicated in connection with this claim, because

appellate counsel did in fact raise trial counsel's alleged ineffectiveness in this regard. See *Huston I*.

[16-18] On direct appeal, Huston claimed, inter alia, that his trial counsel was ineffective for failing to object to exhibits 38, 81, and 95 and that therefore, his trial counsel was ineffective for failing to preserve for appeal any error relating to the admission of these exhibits. In reviewing these failures to object, we recognized that the decision whether or not to object has long been held to be part of trial strategy. *Huston I*, citing *State v. Lieberman*, 222 Neb. 95, 382 N.W.2d 330 (1986), and *State v. Newman*, 5 Neb. App. 291, 559 N.W.2d 764 (1997), *overruled on other grounds, State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998). We further recognized that when reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics. *Huston I*. See, also, *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013). There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions. *Id*. See, also, *State v. Armstrong*, 290 Neb. 991, 863 N.W.2d 449 (2015).

Given this deference, we stated in *Huston I* that the question of whether trial counsel's failure to object to exhibits 38, 81, and 95 was part of counsel's trial strategy was essential to the resolution of this ineffective assistance of trial counsel claim. We then stated that there was "no evidence in the record that would allow us to determine whether Huston's trial counsel consciously chose as part of a trial strategy not to object to the evidence identified on appeal." *Huston I*, 285 Neb. at 30, 824 N.W.2d at 738. Thus, "because the record [was] insufficient to adequately review Huston's claims of ineffective assistance of counsel," we could not reach those claims regarding failure to object to exhibits 38, 81, and 95 on direct appeal. *Id*. at 30, 824 N.W.2d at 739.

In *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012), we were presented with a procedural situation similar to the instant case. In *Seberger*, the defendant claimed on direct

appeal that his trial counsel was ineffective for failing to properly advise him of his right to testify in his own behalf. We declined to address the issue on direct appeal, because we determined that the record was insufficient to analyze the claim. See *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010). Subsequently, the district court denied the defendant's motion for postconviction relief encompassing the advice regarding the right-to-testify issue without holding an evidentiary hearing. In the defendant's appeal from the denial of postconviction relief, we determined that because there was no evidentiary hearing, the record was still insufficient to analyze the defendant's claim of ineffective assistance of counsel. Therefore, we concluded that the district court erred when it failed to grant the defendant an evidentiary hearing on that issue, and we reversed the decision of the district court on this point and remanded the cause for an evidentiary hearing on this allegation.

Similarly, in the present case, after we noted in *Huston I* that we lacked a sufficient record regarding trial counsel's strategy on direct appeal, the district court denied Huston an evidentiary hearing which would have further developed the record with respect to trial counsel's strategy. Thus, there is still no record before us which would permit us to determine whether Huston's trial counsel's failure to object to exhibits 38, 81, and 95 was a strategic decision.

Because it is settled that trial counsel failed to object to the admission of exhibits 38, 81, and 95, as was required to preserve a challenge, and based on our determination that Huston has made sufficient allegations in his postconviction motion of prejudice regarding this issue, the record is still in need of development regarding trial counsel's strategy. Thus, we determine that the district court erred when it failed to grant Huston an evidentiary hearing on this issue, and we reverse the district court's ruling denying this claim without an evidentiary hearing and remand the cause for an evidentiary hearing on this point.

*Huston's Claim That Trial Counsel Was Ineffective for Failing to Object to Video Recordings of Conversations of Huston, Berghuis, and Wilson.*

Huston alleges that he received ineffective assistance of counsel when his trial counsel failed to object to the video recordings of conversations Huston had with Berghuis and Wilson, both of whom were working with law enforcement. In support of his contention, Huston characterizes the record as providing that Berghuis lied to Huston about working with the police and that Sorensen testified that confidential informants, such as Berghuis, cannot lie about their involvement with police. Because the record refutes Huston's claim, no evidentiary hearing was required and the district court did not err when it so ruled.

When asked what Berghuis and Wilson could and could not do as confidential informants, Sorensen testified:

> [Berghuis and Wilson] weren't allowed to say or do anything that myself as a police officer wasn't allowed to do. They couldn't make any promises to . . . Huston that he wouldn't be prosecuted if he made any statements to them. I instructed them that basically they were acting in our behalf, and because they were acting in our behalf anything they said to . . . Huston was like I was saying it to . . . Huston. So we cautioned them about things that they could and couldn't say.

The premise of Huston's argument is belied by the record. Furthermore, the allegations surrounding this claim do not demonstrate a violation of Huston's constitutional rights. Following our examination, we determine that Huston's allegations of trial counsel's purported deficiency are not supported by the record and that appellate counsel was not deficient for not claiming error on appeal.

Therefore, the district court did not err when it denied relief without an evidentiary hearing on Huston's claim that trial counsel was deficient for failing to object to recordings of

Huston, Berghuis, and Wilson, on the basis alleged in Huston's postconviction motion. We affirm this portion of the district court's order.

*Huston's Claim That Trial Counsel Was Ineffective for Failing to Challenge Berghuis' Credibility.*

Huston alleges that his trial counsel was ineffective for failing "to impeach, or otherwise challenge the credibility" of Berghuis. In his motion for postconviction relief, Huston alleged that his trial counsel should have challenged Berghuis' credibility, because "over trial preparation, and at trial . . . Berghuis gave several conflicting statements for the record." The district court correctly rejected this claim.

The records and files in this case refute Huston's allegation. The record shows that Huston's counsel cross-examined Berghuis at trial and that Huston's trial counsel challenged the credibility of Berghuis' direct testimony. The record shows that Huston was not prejudiced by trial counsel's conduct, and appellate counsel was not deficient for not claiming error on appeal. The district court did not err when it denied postconviction relief on this claim without an evidentiary hearing, and we affirm this portion of the district court's order.

*Huston's Claim That Trial Counsel Was Ineffective for Failing to Object to Lack of Evidence.*

Huston alleges that the evidence at trial did not show Johnson was murdered and that there was a lack of physical evidence that showed that Huston murdered Johnson. Huston contends that his trial counsel was ineffective for failing to object to this lack of evidence. The district court correctly rejected this claim.

The records and files in this case refute Huston's allegations. The record shows that after the State rested its case, Huston's trial counsel made a motion to dismiss and argued that the State had failed to make a prima facie case that

Huston was responsible for Johnson's death. At the close of all the evidence, Huston's trial counsel renewed his motion based on "insufficient evidence being adduced in this matter." Trial counsel did not fail to bring the issue of the sufficiency of evidence to the trial court's attention.

With respect to physical evidence, the record shows that Huston's trial counsel cross-examined Sorensen regarding the lack of physical evidence connecting Huston to Johnson's death. In addition, trial counsel argued in closing that there was a lack of physical evidence that Johnson had been murdered. Thus, the matter was developed by trial counsel and brought to the attention of the jury for its consideration.

Given the foregoing, we determine that the records and files in this case affirmatively show Huston was entitled to no relief on this claim and that appellate counsel was not deficient for not claiming error on appeal. The district court did not err when it denied relief on this claim without an evidentiary hearing, and we affirm this portion of the district court's order.

## CONCLUSION

The district court erred when it denied Huston relief without an evidentiary hearing on his claim that his trial counsel was ineffective for failing to object to the admission of exhibits 38, 81, and 95. We reverse the decision of the district court on this point and remand the cause for an evidentiary hearing on this single claim. In all other respects, the decision of the district court is affirmed.

Affirmed in part, and in part reversed and remanded for further proceedings.

Stephan, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Donald V. Cain, Jr., appellant, v. Custer County Board of Equalization, appellee.

868 N.W.2d 334

Filed August 28, 2015. No. S-14-764.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Jurisdiction.** A question of jurisdiction is a question of law.
5. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
6. ____. 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.
7. **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.
8. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
9. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
10. **Taxation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach

its conclusions independent of the determination made by the Tax Equalization and Review Commission.

11. **Statutes: Legislature: Presumptions.** The Legislature is presumed to know the general condition surrounding the subject matter of a legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.
12. **Constitutional Law: Rules of the Supreme Court: Notice: Statutes: Appeal and Error.** Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) is required in order for an appellate court to consider a challenge to the constitutionality of a statute.
13. **Taxation: Valuation: Presumptions: Proof.** In protests before a county board of equalization, the valuation by the assessor is presumed to be correct. The burden of proof rests upon the taxpayer to rebut this presumption and to prove that an assessment is excessive.
14. **Counties: Evidence.** The standard generally applicable in proceedings before county boards, including monetary disputes, is a preponderance, or greater weight, of the evidence.
15. **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 Tax Equalization and Review Commission. Reversed and remanded.

Patrick M. Heng and Lindsay E. Pedersen, of Waite, McWha & Heng, and Steven P. Vinton, of Bacon & Vinton, L.L.C., for appellant.

Steven R. Bowers, Custer County Attorney, and Glenn A. Clark for appellee.

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

Wright, J.

## I. NATURE OF CASE

In 2012, the Custer County assessor (Assessor) increased the assessed value of property owned by Donald V. Cain, Jr., from $734,968 to $1,834,925. Cain challenged this valuation increase by filing petitions with the Tax Equalization

and Review Commission (TERC) pursuant to Neb. Rev. Stat. § 77-1507.01 (Reissue 2009). A divided panel of two TERC commissioners affirmed the Assessor's increased valuations for 2012, and Cain appeals. Because we find plain error in the standard of review applied by TERC to Cain's petitions, we reverse the order of TERC which affirmed the Assessor's valuations and remand the cause for reconsideration on the record using the preponderance, or greater weight, of the evidence standard applicable to protests before a county board of equalization.

## II. SCOPE OF REVIEW

[1,2] Appellate courts review decisions rendered by TERC for errors appearing on the record. *Krings v. Garfield Cty. Bd. of Equal.*, 286 Neb. 352, 835 N.W.2d 750 (2013). 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*.

[3,4] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Id*. A question of jurisdiction is a question of law. *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013).

[5,6] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012). 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. *Id.*

## III. FACTS

Cain owns 10 contiguous parcels of land in Custer County, Nebraska, which total over 1,093 acres. Approximately 70 percent of the property, or 756 acres, is irrigated "native grass" upon which Cain grazes cattle. The remainder of the property is nonirrigated grassland.

In 2012, as the result of a change in the way the Assessor classified irrigated grassland for purposes of valuation, there was a dramatic increase in the assessed value of the irrigated portions of Cain's property. The manner in which the Assessor classified and valued the nonirrigated portions of his property did not change. Almost entirely due to the change in valuation of the irrigated grassland, the total assessed value of the parcels increased from $734,968 to $1,834,925.

In situations such as this, where there is a change in the assessed value of real property, Neb. Rev. Stat. § 77-1315(2) (Supp. 2011) requires the county assessor to send notice to the property owners on or before June 1. But in the instant case, for reasons that are not clear from the record, Cain never received such notice. He did not learn of the change in assessed values until November 2012, when he contacted the Assessor.

By the time Cain learned of the change in assessed values, the deadline to file protests with the county board of equalization pursuant to Neb. Rev. Stat. § 77-1502(1) (Cum. Supp. 2014) had passed. Consequently, he sought to challenge the valuation increases pursuant to § 77-1507.01. This statute provides that "on or before December 31," a person may petition TERC "to determine the actual value or special value of real property . . . if a failure to give notice prevented timely filing of a protest or appeal provided for in sections 77-1501 to 77-1510."

On December 28, 2012, Cain petitioned TERC to determine the actual value of each parcel pursuant to § 77-1507.01. He alleged that he had not received the notices of valuation increase required by § 77-1315(2) and that he would have filed valuation protests with regard to each parcel if he had received the required notices. He claimed that the actual value of the parcels was $778,625 and asked TERC to hold a hearing to determine the actual value of his property for tax year 2012.

TERC held two separate hearings on Cain's petitions. On each occasion, the hearing was held before commissioners

Nancy J. Salmon and Thomas D. Freimuth. At the time of these hearings, TERC had three commissioners, and two commissioners constituted a quorum to transact business. See Neb. Rev. Stat. §§ 77-5003(1) and 77-5005(2) (Cum. Supp. 2014).

The first hearing was a "show cause hearing" to determine if TERC had jurisdiction over Cain's petitions. The jurisdictional question was whether Cain was entitled to file his petitions pursuant to § 77-1507.01. TERC determined (1) that Cain had "provided sufficient evidence that the . . . Assessor failed to provide proper notice as required by . . . section 77-1315"; (2) that "this failure prevented [Cain] from timely filing protests by June 30, 2012, under . . . section 77-1502"; and (3) that Cain "had until December 31, 2012, to file appeals with [TERC] concerning his tax valuations under . . . section 77-1507.01." Therefore, TERC concluded that it had jurisdiction to consider Cain's petitions.

At a hearing on the merits, Salmon and Freimuth heard evidence that for purposes of valuation, the Assessor has divided Custer County into five "market areas" based on her analysis of real estate markets and recent sales. Market area 1 covers the majority of Custer County and is the market area with the highest average sale price. Within each market area, property is classified according to a use category (irrigated, dryland, grassland, canyon, Sandhills-type land, "frequently flooded," and waste) and a soil type (a numeric value between 1 and 4, with 1 representing the highest quality). For each market area, there is a standard value per acre for property of the same use and soil type.

Cain's property is located within market area 1 and has been valued as part of that market area for some time. In terms of use category, for tax year 2012, the Assessor classified the nonirrigated portions of Cain's property (approximately 337 acres) as grassland and valued them between $495 and $505 per acre, depending on soil type. The Assessor classified the irrigated parts of his property (approximately 756 acres) as irrigated

land. Almost 600 of these irrigated acres were valued at $2,100 per acre, because they were determined to have type "4A" soil, which is the poorest quality. The remaining irrigated acres were valued between $2,105 and $2,930 per acre, depending on soil type.

Cain adduced evidence that the irrigated portions of his land had been "inequitably classified" and valued. He presented testimony that in 2012, the irrigated portions of his property were valued similarly to irrigated cropland, but that his property was not comparable to irrigated cropland in terms of soil type or topography. He also presented testimony that his property was located in market area 1 for purposes of valuation but that because of the soil type, it was more comparable in value to the property in market area 2 or area 3. Cain argued that a "more equitable" way of valuing his property would be to lower its assessed value to the level of the irrigated grassland in market area 2 or area 3.

The Assessor explained how she classified Cain's property. She testified that Cain's property had a different soil type than the properties in market area 2, even though both had sandy soils. She also testified that under the relevant statutes and regulations, she was allowed to differentiate between parcels of irrigated land according to soil type but not actual use of the land and that, as a consequence, she could not treat irrigated grassland differently than other irrigated land.

On July 31, 2014, Salmon entered an order on behalf of TERC on the merits of Cain's petitions. She first addressed whether the lack of notice rendered the valuation increases void. She stated that in prior cases, this court held that assessments were void where there was a failure to provide the required notice. But she concluded that these cases were "supersede[d]" by the adoption of § 77-1507.01. She explained as follows:

> In cases concerning failures to provide sufficient notice, the [Nebraska Supreme Court and Court of Appeals] concluded that because the taxpayer had lost its access

> to review, the increased assessment was void. However, all of these cases were prior to the adoption of . . . section 77-1507.01.
>
> Under . . . section 77-1507.01 taxpayers now have an avenue for appeal by December 31 of each tax year if notice was not timely provided. [TERC], therefore, has jurisdiction over petitions which it did not otherwise have prior to the passage of the statute. Because [TERC] now has jurisdiction and the taxpayer has an avenue for review, the previous Nebraska Supreme Court and Court of Appeals decisions are no longer applicable; it appears that . . . section 77-1507.01 now supersedes these decisions in instances where a taxpayer petitions [TERC] prior to December 31 of a tax year where a failure of notice from the County Assessor or County Board prevents timely filing under other statutes.

Salmon therefore dismissed Cain's argument that the increased assessments were void due to lack of notice. Freimuth agreed with this determination.

On the merits, Salmon rejected Cain's argument that his property should have been valued within market area 2 or area 3. She concluded that there was not clear and convincing evidence that the Assessor's decision to classify Cain's property within market area 1 for 2012 was arbitrary or unreasonable. She explained that the soil types on Cain's property were "more suitable to irrigation and production than the soils located in Market Area 2 and Market Area 3" and that this difference in soil "support[ed] the . . . Assessor['s] assertion that the Subject Property [was] more valuable than irrigated grassland in Market Area 2 and Market Area 3."

Freimuth dissented from the determination that the increased valuations were neither arbitrary nor unreasonable. He stated that he would find Cain had "provided sufficient evidence to show that the [Assessor's] valuation determinations . . . were arbitrary or unreasonable . . . in part because the Subject Property is unique as compared to other Market Area 1

property and is substantially similar to the northern portion of Custer County (i.e., Market Areas 2 and 3)." Freimuth would have accepted Cain's opinion as to the actual value of the property.

Neb. Rev. Stat. § 77-5016(13) (Cum. Supp. 2014) provides that TERC "shall deny relief to the appellant or petitioner in any hearing or proceeding unless a majority of the commissioners present determine that the relief should be granted." As such, given that Salmon and Freimuth did not agree, TERC denied Cain's petitions and affirmed the Assessor's increased valuations for 2012.

Cain timely appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

## IV. ASSIGNMENTS OF ERROR

Cain assigns, reordered and restated, that TERC erred (1) in determining that it had jurisdiction over the case; (2) in determining that the notice required under § 77-1315(2) was not essential to the validity of the assessments; (3) in denying Cain due process; (4) in failing to properly apply the standard of review; and (5) in finding that he had failed to meet his burden of establishing by clear and convincing evidence that the Assessor's valuations were arbitrary, capricious, and unreasonable.

## V. ANALYSIS

The issues tried by TERC were (1) whether the Assessor failed to provide proper notice under § 77-1315(2) and thereby prevented Cain from timely filing protests pursuant to § 77-1502(1), (2) whether the Assessor's failure to provide proper notice voided the 2012 assessments on Cain's property, and (3) whether the Assessor's valuations for tax year 2012 were consistent with the market value of his property. As will be discussed below, Cain raises numerous other issues on appeal that were not presented to TERC.

1. Jurisdiction

(a) Final Order

[7] We first address whether TERC's decision was a valid order. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

The dissent to this opinion argues that under § 77-1507.01, when a taxpayer petitions TERC after having been denied a hearing before a county board of equalization, TERC must strictly comply with the same procedural requirements for a protest hearing before the county board of equalization. In counties under township organization, like Custer County, questions before the board of equalization "shall be determined by the votes of a majority of the supervisors present." See Neb. Rev. Stat. § 23-277 (Reissue 2012). For this reason, the dissent asserts that the two-member panel that heard Cain's petitions could not enter a decision without a tie-breaking vote and that the order entered was consequently invalid.

We respectfully disagree with the dissent. Given that § 77-1507.01 has never before been interpreted by this court, there is no case law which provides that a hearing held under § 77-1507.01 must strictly comply with the procedures for a protest before a county board of equalization. More important, the statute itself does not impose such a requirement. Section 77-1507.01 provides in its entirety as follows:

> Any person otherwise having a right to appeal may petition [TERC] in accordance with section 77-5013, on or before December 31 of each year, to determine the actual value or special value of real property for that year if a failure to give notice prevented timely filing of a protest or appeal provided for in sections 77-1501 to 77-1510.

[8] Section 77-1507.01 does not specify that a hearing held pursuant to this section must strictly conform to the

procedural requirements for a protest before a county board of equalization. Nor does the plain language of § 77-1507.01 state that the procedural rules governing other TERC proceedings do not apply to a hearing held pursuant to this section. Therefore, we find that a hearing held under § 77-1507.01 shall follow the procedural rules applicable to other proceedings before TERC. An appellate court will not read into a statute a meaning that is not there. See *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 844 N.W.2d 276 (2014).

Under the procedural rules which normally govern TERC proceedings and which we find applicable in the instant case, the order denying Cain's petitions was a valid order. Section 77-5005(2) provides that a "majority of [TERC] shall at all times constitute a quorum to transact business, and one vacancy shall not impair the right of the remaining commissioners to exercise all the powers of [TERC]." At all times relevant to this case, TERC had three commissioners. See § 77-5003(1). Consequently, two commissioners constituted a majority and could transact business under § 77-5005(2).

The two commissioners who heard Cain's petitions did not agree about whether to grant the relief requested by Cain. But this did not prevent TERC from entering an order denying Cain's petitions. Section 77-5016 provides that "[i]n any hearing or proceeding heard by [TERC]: . . . (13) [TERC] shall deny relief to the appellant or petitioner in any hearing or proceeding unless a majority of the commissioners present determine that the relief should be granted." Since one commissioner did not constitute a majority, pursuant to § 77-5016(13), TERC was required to deny Cain's petitions. In effect, the tie between the two commissioners was broken by § 77-5016(13), which required TERC to enter an order denying Cain's petitions. We therefore conclude that the order entered by a divided panel of two commissioners was a valid order.

[9] In his petition for review, Cain alleged that the use of a two-member panel violated his due process. His assignment

of error related to due process may be sufficiently broad to encompass this argument. However, he did not argue in his brief that the use of a two-member panel was a violation of due process. 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. *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 843 N.W.2d 820 (2014). Additionally, during oral arguments, Cain took the position that two commissioners constituted a quorum and that he needed the votes of two commissioners to be granted relief. He did not assert that the use of a two-member panel violated due process. Accordingly, we do not address whether the use of a two-member panel violated Cain's due process.

(b) Increased Assessments Not Void

We next address Cain's argument that TERC did not have jurisdiction over his petitions, because the Assessor's failure to provide the notices of increased valuation required by § 77-1315(2) rendered the assessments void. If TERC lacked jurisdiction, we acquire no jurisdiction. See *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

For purposes of our analysis, we find that the Assessor did not provide the necessary notices to Cain. Both TERC commissioners found that the Assessor failed to provide the notices of increased valuation required by § 77-1315(2). And although the county board of equalization strenuously argues that the Assessor actually "complied with the notice statute," it did not file a cross-appeal to challenge TERC's finding on the issue. See brief for appellee at 17. As such, TERC's factual finding that the Assessor did not provide the notices required by § 77-1315(2) is not challenged on appeal, and it is therefore an established fact for purposes of our analysis.

We consider whether this lack of notice voided the assessments and thereby deprived TERC of jurisdiction to consider Cain's petitions. Cain argues that under our case law, the

assessments based upon the increased valuations were voided by the Assessor's failure to provide the notice required by § 77-1315(2), which in turn prevented TERC from acquiring jurisdiction. Conversely, the county board of equalization argues that because Cain filed petitions pursuant to § 77-1507.01, the assessments were not void.

[10] Based upon our interpretation of § 77-1507.01, we conclude that the assessments on Cain's property were not void for lack of notice and that TERC had jurisdiction to consider Cain's petitions. "The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by [TERC]." *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 295, 631 N.W.2d 492, 496 (2001).

*(i) Statutory Background*

In the event that the assessed value of real property is increased for any particular tax year, our statutes require notices to be sent to the taxpayer at various points throughout the proceedings arising from such increase. See §§ 77-1315(2) and 77-1502(6) and Neb. Rev. Stat. §§ 77-1504 and 77-1507(1) and (2) (Cum. Supp. 2014). These notices inform the taxpayer of either an increase in the assessed value of real property or the decision of a county board of equalization on a protest. See §§ 77-1315(2), 77-1502(6), 77-1504, and 77-1507(1) and (2). There are specific deadlines for protesting increased valuations and for appealing decisions of a county board of equalization. See §§ 77-1502(1), 77-1504, and 77-1507(1) and (3), and Neb. Rev. Stat. § 77-1510 (Reissue 2009). Consequently, the failure of the county to provide one of the required notices may prevent a taxpayer from filing a protest or appeal to which he otherwise would have been legally entitled.

Prior to 2005, there was no statutory remedy for a taxpayer who was prevented by a lack of notice from filing a protest or appeal. But in 2005, the Legislature enacted § 77-1507.01 to allow the filing of petitions directly with TERC "if a failure

to give notice prevented timely filing of a protest or appeal provided for in sections 77-1501 to 77-1510."

*(ii) Case Law*

Prior to the enactment of § 77-1507.01, we considered several increased valuation cases in which a lack of proper notice prevented the taxpayer from filing a protest or appeal. See, e.g., *Falotico, supra*; *Reed v. County of Hall*, 199 Neb. 134, 256 N.W.2d 861 (1977); *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954), *disapproved on other grounds, Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972), *modified on denial of rehearing* 188 Neb. 798, 197 N.W.2d 655; *Rosenbery v. Douglas County*, 123 Neb. 803, 244 N.W. 398 (1932). In each of these cases, we concluded that the assessments which had been based upon the increased valuations (increased assessments) were void due to lack of proper notice. We review these cases and their applicability to the case at bar.

In *Rosenbery, supra*, the taxpayer had not received the notice of increased valuation required by a predecessor to § 77-1315. The lack of notice prevented the taxpayer from protesting the valuation before the county board of equalization, and so he brought an action to enjoin the collection of taxes based on the increased assessment. The district court denied relief, but we concluded that the taxpayer was entitled to an injunction, because the increased assessment was void due to lack of notice. We explained that it was contrary to the intent of the Legislature and to the decisions of other state courts to impose taxes based on an increased valuation where the taxpayer had not received notice and an opportunity to be heard. We reached similar conclusions in *Gamboni, supra*, and *Reed, supra*, which also involved the failure to provide proper notice of increased valuation under § 77-1315.

In *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001), the assessed values for several pieces of property were increased by the county assessor for tax

year 1999 and the taxpayers protested. The county board of equalization denied the protests, but it did not notify the taxpayers of the decision within the time set by § 77-1502. Consequently, the taxpayers' appeal to TERC was untimely. Nonetheless, TERC heard the appeal and ultimately sustained the county board of equalization's motion to dismiss for lack of evidence.

On appeal from TERC's order, we determined that the notice required by § 77-1502 was essential to the validity of the increased assessments. We explained that the notice required by § 77-1502 was intended to

> ensure[] that a taxpayer will be notified of the board's decision in order that the taxpayer may have time to prepare and file an appeal within the statutory 30-day period. Without this notice provision, the board could very well delay notification to the taxpayer, thereby preventing review of the board's decision. Likewise, if a violation of this provision were without consequence, the board could similarly engage in such delay and defeat the taxpayer's appeal, effectively denying the taxpayer the process that is due under the statutes.

See *Falotico*, 262 Neb. at 298-99, 631 N.W.2d at 498. Viewing these facts in light of our decision in *Rosenbery, supra*, we concluded that because there was a failure to comply with the notice requirement of § 77-1502, the increased valuations were void. Accordingly, we held that TERC did not have jurisdiction over the appeal. *Falotico, supra*, is the last case in which we held an increased assessment void due to lack of notice.

*(iii) Resolution*

In our cases before the Legislature enacted § 77-1507.01, our rationale for declaring increased assessments void if the taxpayer did not receive proper statutory notice was based upon a denial to the taxpayer of the process due under the statutes. See, *Falotico, supra*; *Reed v. County of Hall*, 199

Neb. 134, 256 N.W.2d 861 (1977); *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954), *disapproved on other grounds, Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972), *modified on denial of rehearing* 188 Neb. 798, 197 N.W.2d 655; *Rosenbery v. Douglas County*, 123 Neb. 803, 244 N.W. 398 (1932). The process being denied by the lack of notice was the opportunity either to protest an increased assessment or to appeal from the county board of equalization.

But the failure of the county to provide notice of an increased assessment or the county board of equalization's decision no longer deprives a taxpayer of an opportunity to be heard on the increased assessment or decision. After our decision in *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001), the Legislature adopted § 77-1507.01. See 2005 Neb. Laws, L.B. 15, § 5. Under § 77-1507.01, a taxpayer who does not receive notice has the opportunity to be heard by filing a petition directly with TERC. Because this opportunity to be heard now exists, we conclude that the failure to provide notice of an increased assessment or the decision of a county board of equalization no longer renders increased assessments void for a denial of due process.

[11] The language of § 77-1507.01 confirms that a lack of notice no longer renders an increased assessment void. When it enacted § 77-1507.01, the Legislature was aware of our past decisions that the failure to provide notice rendered an increased assessment void specifically because it deprived the taxpayer of an opportunity to be heard. See, *Falotico, supra*; *Reed, supra*; *Gamboni, supra*; *Rosenbery, supra*. Section 77-1507.01 was enacted subsequent to these decisions. See 2005 Neb. Laws, L.B. 15, § 5. The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation. *State ex*

*rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008).

In light of the knowledge of our past decisions, it is significant that the Legislature adopted language which expressly created a new procedure that allowed taxpayers who had not received notice to protest increased assessments or to appeal decisions of a county board of equalization if the taxpayer had not received the required statutory notice. See § 77-1507.01. By authorizing such protests and appeals, the Legislature eliminated the circumstance (no opportunity to be heard) which was the basis for our decisions declaring increased assessments void due to lack of notice.

Moreover, the Legislature provided that TERC's role within this new procedure would be "to determine the actual value or special value of real property for that year." See § 77-1507.01. TERC could not reach the issue of valuation if a failure of notice rendered an assessment void, because every petition filed under § 77-1507.01 would then be dismissed for lack of jurisdiction due to the void assessment. Therefore, based on the language of § 77-1507.01, we conclude the Legislature intended that the failure to provide notice would no longer render increased assessments void.

TERC correctly determined that the assessments were not void and that it had jurisdiction under § 77-1507.01. Cain did not receive the notices of increased valuation required by § 77-1315(2) and did not learn of the changes until long after the deadline for filing protests pursuant to § 77-1502(1) had passed. Because the lack of notice prevented him from filing protests, § 77-1507.01 permitted him to file petitions with TERC before December 31, 2012, which was done. Because this opportunity was available, none of the increased assessments were void due to lack of notice. TERC had jurisdiction over Cain's petitions, and we have jurisdiction over this appeal.

2. Constitutionality of § 77-1507.01

At oral argument, Cain asserted for the first time that § 77-1507.01 was unconstitutional. He claimed that it deprived him of due process because he did not have a hearing before the county board of equalization.

Cain's assignment of error related to due process might be sufficiently broad to encompass this argument. But he did not argue in his brief that § 77-1507.01 deprived him of due process because he did not have a hearing before the county board of equalization. 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. *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 843 N.W.2d 820 (2014).

[12] Moreover, Cain did not satisfy the procedural prerequisites for appellate review of such a claim. Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) provides:

> A party presenting a case involving the federal or state constitutionality of a statute must file and serve notice thereof with the Supreme Court Clerk by a separate written notice or by notice in a Petition to Bypass at the time of filing such party's brief. If the Attorney General is not already a party to an action where the constitutionality of the statute is in issue, a copy of the brief assigning unconstitutionality must be served on the Attorney General within 5 days of the filing of the brief with the Supreme Court Clerk; proof of such service shall be filed with the Supreme Court Clerk.

Strict compliance with § 2-109(E) is required in order for an appellate court to consider a challenge to the constitutionality of a statute. *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000). Although Cain served the Attorney General with a copy of his brief, he did not file a notice of constitutional question. Therefore, because Cain did not comply with § 2-109(E) or with our rules regarding

the assignment and argument of errors, we do not address his claim regarding the constitutionality of § 77-1507.01.

### 3. Plain Error

In considering Cain's petitions filed pursuant to § 77-1507.01, TERC applied the standard of review found in § 77-5016(9). At the hearing before TERC, Cain did not object to the application of this standard. And although Cain now assigns that the manner in which TERC applied § 77-5016(9) was error, he does not argue that TERC used the wrong standard of review.

Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012). 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. *Id.* In the instant case, we note plain error in the standard of review applied by TERC to Cain's petitions.

TERC applied the standard of review found in § 77-5016(9), which provides:

> In all appeals, excepting those arising under section 77-1606, if the appellant presents no evidence to show that the order, decision, determination, or action appealed from is incorrect, the commission shall deny the appeal. If the appellant presents any evidence to show that the order, decision, determination, or action appealed from is incorrect, such order, decision, determination, or action shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.

We have interpreted this section as providing that there is "'"a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action."'" See *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of*

*Equal.*, 285 Neb. 120, 124, 825 N.W.2d 447, 451 (2013). The presumption "remains until rebutted by clear and convincing evidence." See *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 398, 603 N.W.2d 447, 453 (1999). See, also, *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008). "'"From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. . . ."'" See *JQH La Vista Conf. Ctr.*, 285 Neb. at 124, 825 N.W.2d at 451-52.

TERC should not have applied § 77-5016(9) to Cain's petitions. Section § 77-5016(9) sets forth the standard of review applicable in "all appeals" before TERC. But the instant case was not before TERC as an appeal from the board of equalization. Pursuant to § 77-1507.01, Cain "petition[ed]" TERC directly without first appearing before the board of equalization. Consequently, TERC's role in the instant case was not that of an appellate body. Because the lack of notice prevented Cain from filing protests with the board of equalization, TERC was not reviewing decisions of the board of equalization. Rather, pursuant to § 77-1507.01, TERC was in a position to perform an initial review of Cain's challenges to the increased assessments.

In performing this initial review of the increased assessments on Cain's property, TERC should have applied the same standards and burdens of proof as the board of equalization would have used in a protest. As explained above, in enacting § 77-1507.01, the Legislature provided a remedy to taxpayers who were prevented by a lack of notice from filing protests with the board of equalization. It did so by creating a new procedure for protesting increased valuations by filing petitions directly with TERC. This substitute protest should be governed by the same standard of review and corresponding burdens of proof as a protest before a county board of equalization.

[13,14] In protests before a county board of equalization, "the valuation by the assessor is presumed to be correct."

See *Helvey v. Dawson Cty. Bd. of Equal.*, 242 Neb. 379, 386, 495 N.W.2d 261, 267 (1993). The burden of proof rests upon the taxpayer to rebut this presumption and "'to prove that an assessment is excessive.'" See *Ainsworth v. County of Fillmore*, 166 Neb. 779, 784, 90 N.W.2d 360, 364 (1958). Our case law indicates that the standard generally applicable in proceedings before county boards, including monetary disputes, is a preponderance, or greater weight, of the evidence. See *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010). The statutes governing protests before the board of equalization do not alter this burden. See § 77-1502. As such, in protests before the board of equalization, the taxpayer can rebut the presumption by a preponderance, or greater weight, of the evidence. Cain should have been held to this same standard in the TERC proceedings on his petitions, which constituted an initial review of his challenge to the increased assessments.

By considering Cain's petitions under § 77-5016(9), TERC erroneously increased the burden placed upon him as the taxpayer from a preponderance, or greater weight, of the evidence to a clear and convincing standard. If uncorrected, this error would damage the fairness of the proceedings authorized by § 77-1507.01, where a lack of notice prevented the filing of a protest with the board of equalization. We therefore conclude that TERC's consideration of Cain's petitions using the appellate standard of review described in § 77-5016(9) constituted plain error. We reverse TERC's decision and remand the cause for reconsideration on the record of Cain's petitions using the preponderance, or greater weight, of the evidence standard applicable to protests before a county board of equalization.

### 4. Remaining Assignments of Error

[15] Because we have determined that TERC's order should be reversed, we do not address Cain's remaining assignments

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. *Tierney v. Four H Land Co.*, 288 Neb. 586, 852 N.W.2d 292 (2014).

## VI. CONCLUSION

For the foregoing reasons, we reverse the decision of TERC which affirmed the Assessor's valuations of Cain's property for purposes of tax year 2012. We remand the cause for reconsideration on the record using the preponderance, or greater weight, of the evidence standard applicable to protests before a county board of equalization.

Reversed and remanded.

Connolly, J., dissenting

I dissent. I disagree with the majority's conclusion that two TERC commissioners can render a valid decision on a taxpayer's assessment protest if they disagree. I believe that TERC is bound by the rules that would apply to a protest hearing before the county board of equalization. So does the majority—to an extent. It finds plain error in TERC's application of a clear and convincing standard of proof and holds that TERC must apply the same standard that would apply before a county board of equalization. But it seems that it inconsistently concludes that TERC is not bound by the rules relevant to whether the adjudicating body has issued a valid decision. I believe that our case law compels TERC to comply with those rules, or the increased assessment is void. And those rules require a decision on the merits, not a statutory default decision. Because TERC failed to render a valid decision under the statutes that apply to protest hearings, I conclude that there is no final order and that we do not have jurisdiction to consider the merits of the appeal. I would remand the cause for a tie-breaking decision on the merits.

No statute governing protest hearings provides that taxpayers shall be denied relief if a county board of equalization splits evenly on the action to be taken. In my opinion,

absent a default statute, a split of opinion among fact finders is a failure to act, particularly under the protest statutes. Neb. Rev. Stat. § 77-1502(4) (Cum. Supp. 2014) provides that no protest hearing shall be held before a single county commissioner or supervisor, and there are no default rules affirming an assessor's valuation if the board fails to issue a decision. Additionally, as the majority opinion acknowledges, in Custer County, a majority vote by all the county supervisors present is required to determine any matter before the board.[1]

I recognize that Neb. Rev. Stat. § 77-5016(13) (Cum. Supp. 2014) provides that TERC "shall deny relief to the appellant or petitioner in any hearing or proceeding unless a majority of the commissioners present determine that the relief should be granted." But the Legislature enacted § 77-5016(13) in 2003,[2] before it enacted Neb. Rev. Stat. § 77-1507.01 (Reissue 2009) in 2005.[3] Before 2005, TERC heard *petitions* from a county board of equalization, but not from taxpayers seeking an original evidentiary hearing to protest an increased assessment.[4] So I do not believe the majority rule under § 77-5016(13) was intended to apply to a protest hearing. More important, our case law precluded TERC from relying on this statute to conclude that it had rendered a valid decision. Under our case law, an increased assessment is valid only if the taxpayer received the procedural protections afforded at every stage of the assessment proceedings. And I disagree with the majority's characterization of our case law to eliminate strict compliance with those procedural requirements.

Obviously, due process requires adequate notice and the opportunity to be heard when the State seeks to deprive persons of their property interests.[5] So it has always been

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[1] See Neb. Rev. Stat. § 23-277 (Cum. Supp. 2014).

[2] 2003 Neb. Laws, L.B. 291, § 9.

[3] See 2005 Neb. Laws, L.B. 15, § 5.

[4] See Neb. Rev. Stat. § 77-1504.01 (Cum. Supp. 2014).

[5] See *Potter v. Board of Regents*, 287 Neb. 732, 844 N.W.2d 741 (2014).

the law in this state that a county board of assessment lacks jurisdiction to increase a property assessment if the taxpayer did not receive notice of the increase and an opportunity to be heard—such assessments are void.[6] In *Rosenbery v. Douglas County*,[7] where the taxpayer received no notice of an increased assessment until after the county board had adjourned, we held, largely out of due process concerns, that the county should be enjoined from collecting taxes on the increased valuation. But we did not simply hold that a county must provide notice and an opportunity to be heard. We agreed with other state courts that the statutory procedures for levying property taxes are mandatory and must be strictly observed because they are intended to protect taxpayers and safeguard against excessive levies.

We expanded on this reasoning in *Gamboni v. County of Otoe*.[8] There, the county assessor sent notice to the taxpayers of increased assessments, but the notice did not provide the date that the county board would convene, as required by statute. We recognized that the board's meeting time was set out by statute, that the board had published notice of the increases and the deadline for filing protests, and that most of the property owners had received notice of the increased assessments for their tax returns. But we concluded that

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[6] See, *Northwestern Bell Tel. Co. v. State Board of Equalization and Assm't.*, 119 Neb. 138, 227 N.W. 452 (1929); *Crane Co. v. Douglas County*, 112 Neb. 365, 199 N.W. 791 (1924); *Farmers Co-operative Creamery & Supply Co. v. McDonald*, 100 Neb. 33, 158 N.W. 369 (1916); *Brown v. Douglas County*, 98 Neb. 299, 152 N.W. 545 (1915); *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469, 131 N.W. 1034 (1911); *Grant v. Bartholomew*, 57 Neb. 673, 78 N.W. 314 (1899); *Spiech v. Tierney*, 56 Neb. 514, 76 N.W. 1090 (1898); *South Platte Land Co. v. Buffalo County*, 7 Neb. 253 (1878).

[7] *Rosenbery v. Douglas County*, 123 Neb. 803, 244 N.W. 398 (1932).

[8] *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954), *disapproved in part on other grounds, Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972), *modified on denial of rehearing* 188 Neb. 798, 197 N.W.2d 655.

these actions did not fulfill the statutory requirements. In rejecting the argument that the taxpayers had adequate notice of the increases, we relied on the strict compliance rule from *Rosenbery*:

> What has been said of the notice itself being mandatory we think is equally applicable to what the Legislature has said shall be contained herein. . . .
>
> . . . .
>
> We find the statute requires the notice must be given *by the assessor* and that it must specifically *contain all the information the statute requires* shall be set forth therein.[9]

In sum, while it is true that due process requires notice and an opportunity to be heard, our case law goes beyond minimal due process requirements. We have required strict compliance with statutory procedures for increasing property assessment because they are intended to protect taxpayers and safeguard against excessive levies. Our more recent decision in *Falotico v. Grant Cty. Bd. of Equal.*[10] reaffirmed these principles.

In *Falotico*, we required counties to strictly comply with the statutory time limit for notifying a taxpayer of a county board's decision. Because the notice was late, the taxpayer did not file a timely appeal with TERC. In relying on *Rosenbery*, we reiterated its strict compliance requirement: "[T]he procedure prescribed by the Legislature in respect to levying a tax must be strictly observed. We further stated [in *Rosenbery*] that the statutory provision relating to a tax levy, the objects of which are the protection of taxpayers and to safeguard against excessive levies, is mandatory."[11]

We concluded that under *Rosenbery* and *Gamboni*, all statutory requirements intended to protect taxpayers and guard

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[9] *Id.* at 426-27, 67 N.W.2d at 497 (emphasis supplied).

[10] *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001).

[11] *Id.* at 298, 631 N.W.2d at 498.

against excessive levies are mandatory and that the county must strictly comply with them:

> The notice requirements under § 77-1502 occur at a different point in time in the assessment process than the notice required by what is now § 77-1315. However, its object is largely the same, namely, notice. Given that appeals to TERC must be taken within 30 days after the adjournment of a board of equalization, § 77-1502 ensures that a taxpayer will be notified of the board's decision in order that the taxpayer may have time to prepare and file an appeal within the statutory 30-day period. Without this notice provision, the board could very well delay notification to the taxpayer, thereby preventing review of the board's decision. Likewise, if a violation of this provision were without consequence, the board could similarly engage in such delay and defeat the taxpayer's appeal, *effectively denying the taxpayer the process that is due under the statutes*. We conclude that just as notice by the county assessor under § 77-1315 is essential to the validity of the levy, so too is notice by the county clerk under § 77-1502.[12]

We held that because the county had violated this statutory duty, the valuation increase was void. *Falotico* emphasizes that under our case law, even if the taxpayer received notice of the increased assessment and an opportunity to be heard, an increased assessment is void if a taxpayer does not receive the statutory "process that is due" at every stage of an assessment proceeding.

I agree that in enacting § 77-1507.01, the Legislature intended to give a taxpayer the right to petition TERC when the taxpayer lost the right to protest an assessment to the county board due to lack of notice. But § 77-1507.01 implicitly contemplates that TERC will provide an equivalent evidentiary hearing by authorizing taxpayers to file a "petition" with

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[12] *Id.* at 298-99, 631 N.W.2d at 498 (emphasis supplied).

TERC if lack of notice prevented them from timely filing a protest with a county board of equalization. I agree with the majority's conclusion that when a taxpayer files a petition for a protest hearing, TERC must act as factfinding body—not an appellate tribunal.

I also agree with the majority that because TERC is providing a substitute protest hearing, it erred in applying a clear and convincing standard of proof in reliance on what is now § 77-5016(9). The majority specifically reasons that because the hearing before TERC is a substitute protest hearing, it must be governed by the standard of proof that applies to a hearing before the county board of equalization. But applying the wrong standard of proof is not the only way in which Cain was denied the process that he would have received if the county had provided timely notice of his increased assessments.

As the majority opinion explains, under the statutes governing TERC's procedures,[13] if only two TERC commissioners hear a taxpayer's protest, the taxpayer must obtain a unanimous decision to prevail. But the majority opinion also acknowledges that the protest statutes do not contemplate a procedure in which a single adjudicator has veto power, as in this case. So Cain did not received the procedures that he would have received under the protest statutes.

I see no reason to distinguish the statutory adjudication requirement from the statutory standard of proof. If taxpayers are entitled to the benefit of one procedure, they are entitled to the benefit of the other. And our case law requiring strict compliance with the protest procedures would be meaningless if a county could simply avoid the procedures by delaying notice and depriving a taxpayer of a protest hearing before a county board. Because § 77-1507.01 must be construed as providing a substitute protest hearing, a decision on the merits is required under the same procedural protections. At

[13] See Neb. Rev. Stat. § 77-5005 (Cum. Supp. 2014) and § 77-5016(13).

an original protest hearing, a finder of fact is not deciding whether to maintain the status quo. It is deciding whether to increase a property assessment. And a split vote by a county board of equalization is not a decision to take that action.

Because TERC failed to render a valid decision under the protest statutes, I conclude that we do not have a final order or jurisdiction to consider the merits of the appeal. The lack of a final order, however, does not preclude us from vacating the order and remanding the cause for a tie-breaking decision on the merits under the same standards that apply to a county board of equalization.[14] But I would hold that unless TERC provides a hearing equivalent to the procedure that Cain would have received before the county board had the Assessor complied with notice requirements, the increased assessment is void.

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[14] See, *Conroy v. Keith Cty. Bd. of Equal.*, 288 Neb. 196, 846 N.W.2d 634 (2014), citing *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011); *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Kimberly L. Hynes, appellee, v.
Good Samaritan Hospital,
a Nebraska nonprofit
corporation, appellant.
869 N.W.2d 78

Filed September 4, 2015. No. S-15-002.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), 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. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. **Workers' Compensation: Evidence: Appeal and Error.** Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
4. **Expert Witnesses.** Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion, as distinguished from a mere guess or conjecture.
5. **Trial: Expert Witnesses.** It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question.
6. **Workers' Compensation: Proof.** In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment

proximately caused an injury which resulted in disability compensable under the act.

7. **Workers' Compensation: Mental Health.** A worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's injury and results in disability.
8. ____: ____. A claim for a psychological or mental condition requires that the mental condition must be related to or caused by the physical injury.
9. ____: ____. An injury caused by a mental stimulus does not meet the requirement that a compensable accidental injury involve violence to the physical structure of the body.
10. **Workers' Compensation: Appeal and Error.** 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.
11. **Workers' Compensation.** 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.
12. **Trial: Proximate Cause.** The determination of causation is ordinarily a matter for the trier of fact.
13. **Workers' Compensation: Words and Phrases.** When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results."
14. **Proximate Cause.** A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster.
15. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.
16. ____: ____: ____. If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
17. **Workers' Compensation: Expert Witnesses.** It is the role of the Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe.

18. **Workers' Compensation: Mental Health: Evidence.** Where the evidence is sufficient to permit the trier of fact to find that a psychological injury is directly related to an accident and the employee is unable to work, the employee is entitled to be compensated.

Appeal from the Workers' Compensation Court: Michael K. High, Judge. Affirmed.

Thomas D. Wulff, of Wulff & Freeman, L.L.C., for appellant.

John C. Fowles, of Fowles Law Office, P.C., L.L.O., for appellee.

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

Wright, J.

## NATURE OF CASE

Good Samaritan Hospital (Good Samaritan) appeals from an award entered by the Nebraska Workers' Compensation Court on November 24, 2014. The court found the claimant, Kimberly L. Hynes, sustained a 100-percent loss of earning power due to psychological injuries resulting from three assaults that occurred in the course of her employment at a hospital. Good Samaritan contends that Hynes failed to produce sufficient evidence to sustain the award, that the Workers' Compensation Court improperly connected noncompensable injuries to the compensable injury, and that the compensation court should have excluded the psychiatric report of Hynes' expert from evidence.

For the reasons discussed below, we affirm the findings and award of the Workers' Compensation Court.

## SCOPE OF REVIEW

[1-3] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), 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. *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009). Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence. *Giboo v. Certified Transmission Rebuilders*, 275 Neb. 369, 746 N.W.2d 362 (2008). Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

## FACTS

This is the second time the case has been before this court. In *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013), we vacated the award because the testimony of the employer's witnesses had been lost due to no fault of either party and, therefore, the record was insufficient to undertake a meaningful appellate review of the case. We remanded the cause for a new trial.

On remand, the parties stipulated that Hynes had been employed as a registered nurse by Good Samaritan in Kearney, Nebraska, and also stipulated to her average weekly wage. Hynes alleged that she suffered from posttraumatic stress disorder (PTSD) and depression as a result of three incidents which occurred in the course of her employment as a nurse in the mental health unit of Good Samaritan and that these incidents left her unable to work.

On April 16, 2008, a patient "whipped" Hynes several times with a large vacuum cleaner cord and punched her in the jaw. Hynes suffered bruising and substantial pain as a result of the assault. This was the only incident for which Hynes sought medical treatment for a physical injury.

Following this incident, Hynes tearfully discussed the assault with an employee assistance program counselor, Roni Norman. She reported having difficulty eating and sleeping following the assault and stated she did not feel safe returning to the adolescent unit. On April 23, 2008, Hynes again visited Norman. Hynes was tearful and described experiencing feelings of extreme hypervigilance and sensitivity to noises and movement, as well as nightmares and disturbing dreams. Followup meetings between Hynes and Norman on May 22, May 28, and June 2, revealed Hynes' increasing feelings of hopelessness and helplessness, flashbacks, dreams of the assault, strained communication problems, and difficulty functioning in her professional, social, and personal life.

In the meeting with Norman on June 2, 2008, Hynes described a second incident, where she was assaulted by a patient the previous week. Hynes was kicked and was bitten on the arm by a patient. She did not seek medical treatment for the alleged physical injuries.

Following these assaults, Hynes' symptoms worsened severely. On June 11, 2008, Hynes reported to Norman that she had been experiencing panic attacks, hypersensitivity to loud noises, loss of appetite, social withdrawal, and general feelings of anxiety and depression.

On July 6, 2008, Hynes reported a third incident to Norman which occurred while Hynes was working in the male portion of the adolescent/youth unit of the hospital. A male adolescent grabbed Hynes and made "extremely aggressive" sexual comments to her. Hynes did not receive treatment for physical injuries associated with this assault.

On July 20, 2008, Norman received a late night "crisis call" from Hynes, who expressed suicidal thoughts and feelings of hopelessness. Concerned with Hynes' safety, Norman facilitated Hynes' admission to a medical center in North Platte, Nebraska, for treatment relating to anxiety and suicidal thoughts, eating and sleeping disorders, and depression. She was diagnosed with an adjustment disorder with depressed mood and anxiety.

Five days later, Hynes was transferred to Two Rivers Psychiatric Hospital (Two Rivers)—an inpatient treatment facility in Kansas City, Missouri—in order to receive more specialized trauma care. While at Two Rivers, Hynes underwent psychiatric evaluations by two separate doctors and was diagnosed with major depressive disorder and PTSD. She remained hospitalized at Two Rivers until August 8, 2008.

Hynes was admitted to Two Rivers a second time several weeks later for major depressive disorder and PTSD. A psychiatric evaluation was performed by a doctor who had not previously evaluated Hynes. She was diagnosed with major depressive disorder and PTSD with "suicidal ideas and plan." She was discharged on September 12, 2008, but was subsequently readmitted on September 16 and then discharged on October 3.

Later in October 2008, Hynes began treatment at a medical center in Lincoln, Nebraska, for PTSD and depressive disorder. From November 2008 through March 2009, Hynes had multiple hospitalizations for her psychiatric injuries.

Subsequently, Hynes began treatment with a psychiatric group in Lincoln. During the course of this treatment, she was given high doses of numerous medications which ultimately proved ineffective at treating her psychiatric episodes. In March 2009, Hynes began electroconvulsive therapy to treat her depression and PTSD. These treatments were initially administered three times a week. The frequency of the treatments was gradually reduced, but at the time of trial, Hynes was still receiving treatments.

In April 2009, Hynes commenced this action in the Workers' Compensation Court. She alleged that her mental injuries occurred in the course of her employment at Good Samaritan and that the injuries rendered her unable to work. Good Samaritan denied the occurrence of the second and third incidents and alleged Hynes suffered no injury beyond slight bruising from being whipped by a vacuum cleaner cord. It claimed there was insufficient medical causation for the alleged mental injuries of PTSD or depression, for which Hynes sought

compensation. The compensation court found in favor of Hynes. On appeal, we remanded the cause for a new trial based on insufficiency of the record. See *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013).

Hynes, Hynes' husband, and Norman testified at the second trial. Hynes testified about the three incidents, her subsequent therapy and treatment, and her psychological condition after the incidents. The court also received Hynes' medical records and evaluations.

Good Samaritan conceded that the initial assault on April 16, 2008, involved a physical injury during the scope of Hynes' employment and therefore was compensable under the Nebraska Workers' Compensation Act. However, it claimed that there was no medical evidence of a physical injury in either the second or third incident and that, therefore, any psychological injuries that resulted from them were not compensable. It sought to exclude any evidence relating to the second and third incidents, arguing that neither the second nor third incident was compensable under the Nebraska Workers' Compensation Act and that the evidence was, therefore, irrelevant.

Good Samaritan sought to exclude the report of Paula Malin, M.D., Hynes' expert psychiatric witness. Hynes retained Malin to provide an expert opinion regarding the causation and extent of Hynes' injuries. In her report, Malin opined that Hynes suffered psychological and physical injuries in the April 16, 2008, assault and that the second and third assaults caused cumulative trauma. She also opined that Hynes had been unable to work since July 2008. Malin based her opinions on an in-person evaluation of Hynes and a review of the records of Hynes' psychiatric treatment following the assaults. Good Samaritan claimed that Malin's opinions were not relevant, because they were based in part upon the cumulative effect of the second and third incidents, which Good Samaritan claimed were not compensable under the Nebraska Workers' Compensation Act and therefore irrelevant. The compensation court overruled all of Good Samaritan's relevancy objections.

Good Samaritan also sought to exclude Malin's opinions for lack of foundation. Good Samaritan claimed that Malin lacked the necessary facts to form a reliable opinion, because Hynes was allegedly untruthful about her personal and psychiatric history during her face-to-face interview with Malin. The court overruled Good Samaritan's foundational objection, finding the deficiencies claimed by Good Samaritan went only to the weight and credibility of the opinion.

Good Samaritan offered the testimony of Terry Davis, M.D. Davis, a psychiatrist, opined that Malin's report lacked foundation because it did not specifically reference past trauma—including instances of sexual assault, rape, physical and mental abuse, sexual promiscuity, and counseling for past physical and substance abuse. Davis opined that such trauma was significant in conducting psychiatric evaluations and forming opinions. The court received a report from Howard Entin, M.D., the court-appointed psychiatrist from Colorado. Entin opined that while Hynes had a major depressive disorder, she did not meet the criteria for PTSD and "did not experience an event that was a significant threat to her life at work." Entin suggested that Hynes might have PTSD related to significant preexisting stressors.

The Workers' Compensation Court found that Hynes was a credible witness and generally accepted her testimony regarding the three incidents. The court found that the first incident was an "accident" within the meaning of the Nebraska Workers' Compensation Act, that it left Hynes temporarily totally disabled, and that she subsequently sustained a permanent partial disability to the body as a whole with complete loss of earning power. The court accepted the opinion of Hynes' expert, Malin. It found that Hynes' psychological injury began with the first incident on April 16, 2008, and that the second and third assaults aggravated or cumulatively added to the injury. The court reasoned that the three assaults created "one continuous chain through which . . . the cause operated to produce the totality of mental illness [Hynes] is suffering from."

The compensation court expressly rejected the opinion of Good Samaritan's expert, Davis, and that of Entin, the court-appointed expert. It found that Davis' opinion placed too much emphasis on Hynes' past trauma, much of which occurred 10 to 20 years prior to the incidents in the case at bar. The court noted that Hynes was consistently employed from 1992 through 2008 without significant or relevant physical or mental incident and that during this time, she married and had a family. The court rejected Entin's opinions, partially because he "seemed to be using the burden's [sic] placed upon [a plaintiff in Colorado,] which is a burden not applicable to [t]his case."

The compensation court ordered Good Samaritan to pay Hynes the sum of $578.14 per week for 142⅖ weeks for temporary total disability, and $644 per week for so long as Hynes remained permanently and totally disabled. Good Samaritan was also ordered to pay past and future medical bills.

## ASSIGNMENTS OF ERROR

Good Samaritan asserts that (1) the trial court erred in finding Hynes suffered physical injury in the second and third incidents, (2) the trial court erred in tying the three alleged incidents together and finding that Hynes' psychological injuries flowed from some combination of them, and (3) the trial court erred in overruling Good Samaritan's objections to the medical report of Hynes' expert witness, Malin.

## ANALYSIS

When considered together, Good Samaritan's assignments of error present two issues. The first issue is whether Malin's opinions had sufficient foundation. Good Samaritan claims that Malin did not possess sufficient facts to form a reliable opinion regarding Hynes' condition.

The second issue is whether the compensation court erred in considering the second and third incidents in its determination of Hynes' disability. Good Samaritan asserts that there was no proof Hynes suffered a physical injury in either the

second or third incident and that, therefore, neither was independently compensable. Consequently, Good Samaritan contends that the court should not have considered these incidents in its analysis and that Malin's inclusion of such incidents in her report makes her opinions irrelevant. This argument suggests that each incident must be independently compensable under the Nebraska Workers' Compensation Act in order to be relevant.

### Foundation for Malin's Report

We first address Good Samaritan's foundational objection to Malin's opinions. The compensation court found that Malin's opinions had sufficient foundation and were credible and reliable. The court adopted the opinions as carrying the greater weight of evidential probability with respect to causation, diagnosis, and need for medical care. Good Samaritan claims Malin was unaware of various pertinent facts, such as previous psychological counseling, supposed visual and auditory hallucinations, past work in psychiatric units at hospitals, a past sexual assault, sexual promiscuity, physical and mental abuse by a former fiance, a terminated pregnancy, and Hynes' continued work at Good Samaritan after the first assault. It argues that because Malin did not consider these facts, her opinions were based on insufficient information and, therefore, lacked sufficient foundation and should have been excluded. Good Samaritan claims that without Malin's opinions, Hynes has no evidence of causation and failed to meet her burden of proof.

[4,5] Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007). Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion, as distinguished from a mere guess or conjecture. *City*

*of Lincoln v. Realty Trust Group*, 270 Neb. 587, 705 N.W.2d 432 (2005). It is within the trial court's discretion to determine whether there is sufficient foundation for an expert witness to give his or her opinion about an issue in question. *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

We conclude that the Workers' Compensation Court did not abuse its discretion in finding Malin's opinions had sufficient foundation. We reach this conclusion for several reasons. First, Good Samaritan makes some factually incorrect allegations regarding Malin's report. It claims Malin stated that Hynes did not experience hallucinations in her discussion of symptomology, but Malin's report notes that Hynes exhibited "an increase in intensity of symptoms of Major Depressive Disorder that featured frequent suicidality as well as emergence of psychotic symptoms, including hallucinations." Malin later states: "She continues to have fluctuating suicidality and intermittent hallucinations." Good Samaritan also alleges Malin was unaware that Hynes continued to work after the first incident, which occurred on April 16, 2008, but this is contradicted by the fact that Malin considered the second and third assaults that occurred while Hynes worked at Good Samaritan.

Another basis for our conclusion is Malin's statement that she formed her opinions following a detailed review of Hynes' psychiatric records. Those records detailed Hynes' personal and psychological history that Good Samaritan alleges was not considered by Malin. We have previously held that for purposes of determining whether a medical expert's testimony is admissible, it is acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). The defense expert, Davis, conceded that he used many—if not all—of Hynes' records as a basis for his opinion. Regardless of whether the information was disclosed in an in-person examination of Hynes or noted

in a report, we find that Malin possessed the relevant information by virtue of her review of Hynes' records.

Whether Malin possessed or considered the entirety of Hynes' personal or psychological history in forming her opinion ultimately concerns the weight to be given to Malin's opinions by a trier of fact, rather than the admissibility of the opinions. An appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider; such matters go to the weight and credibility of the opinion itself and not to its admissibility. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Malin's opinions had sufficient foundation based on her review of Hynes' medical records and her in-person evaluation of Hynes.

## Causation

We next consider Good Samaritan's challenges to both the compensation court's and Malin's consideration of the second and third incidents in their analyses of Hynes' injuries. At trial, Good Samaritan conceded that the first incident resulted in physical injury and was compensable. At oral arguments, it conceded that the second and third incidents occurred. However, Good Samaritan claims that Hynes failed to present any evidence to demonstrate she suffered physical injuries associated with the second and third incidents and that, therefore, neither incident is compensable. Based upon this premise, it asserts that the second and third incidents were irrelevant to the determination of the causation of Hynes' injuries.

Good Samaritan's relevancy objection to Malin's report was based on Malin's consideration of the second and third incidents in forming her opinions regarding Hynes' injuries. These incidents were the basis of Malin's opinion that the injury sustained by Hynes in the first incident was exacerbated or aggravated by those incidents. As discussed in detail below, each incident was not required to be independently compensable to be considered by either Malin or the court.

[6,7] In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009). A worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's injury and results in disability. *Id*.

[8,9] A claim for a psychological or mental condition requires that the mental condition must be related to or caused by the physical injury. See *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007). An injury caused by a mental stimulus does not meet the requirement that a compensable accidental injury involve violence to the physical structure of the body. *Id.*

[10] 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. *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013). Using this standard, we first review the compensation court's findings regarding the second incident. The court stated: "This Court finds that [Hynes] was a credible witness at this second trial. This Court finds the three incidents in this case happened as [Hynes] described." It also determined that "[t]here is evidence that the first and second assaults involved physical injury with psychological injury."

Good Samaritan argues that the compensation court erred in finding that Hynes suffered a physical injury in the second incident, because she did not present evidence of such injury. We disagree. Evidence was provided by Hynes' testimony and the notes of her employee assistance program counselor. Hynes testified that an assault occurred in which a patient bit her on her forearm, causing a welt and bruises, and then kicked her several times. The incident was reported to the counselor, who recorded the incident and symptomology in

her medical notes. The incident report noted bruising to Hynes' right forearm. That Hynes did not receive immediate medical treatment for a physical injury does not negate the fact that she sustained one.

[11] Good Samaritan claims that Hynes' testimony regarding the assault was self-serving, suggesting that the compensation court should not have accepted it. But this is a matter of witness credibility. 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. *Manchester v. Drivers Mgmt., supra*. We decline to second-guess the Workers' Compensation Court's acceptance of Hynes' testimony. Good Samaritan has not shown that the compensation court was clearly wrong in finding that Hynes suffered a physical injury during the second incident.

[12-14] Next, we consider the compensation court's inclusion of the third incident in its causation analysis. The issue is whether the court erred in considering the incident in its causation analysis notwithstanding the fact that the incident was not independently compensable. Good Samaritan claims that the court erred in "tying the three alleged incidents together and finding that [Hynes'] psychiatric issues flowed from some combination of them." The determination of causation is ordinarily a matter for the trier of fact. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). When the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results." *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008). A cause of an injury may be a proximate cause, notwithstanding that it acted through successive instruments of a series of events, if the instruments or events were combined in one continuous chain through which the force of the cause operated to produce the disaster. *Id.*

The compensation court found that "[t]he first (with physical injury) and the second and third incidents can combine in

one continuous chain through which the force of the cause operated to produce the totality of mental illness [Hynes] is suffering from." It further reasoned:

> Although the third incident may not be an accident within the meaning of the Nebraska Worker's [sic] Compensation Act (if it were the only incident and not the third this would be an issue) the result of the continued abuse which happened in the workplace on the underlying compensable mental injury is compensable.
>
> . . . .
>
> . . . The Court does not view [Hynes'] claim to be for three separate accidents but rather . . . as an initial accident with two subsequent incidents which aggravated or cumulatively added to the damage and injury to [her] mental health which began with the first accident. In this regard there is clear evidence that the first assault with physical injury caused immediate mental difficulties for which [Hynes] sought treatment. There is evidence that the first and second assaults involved physical injury with psychological injury. . . . There is evidence in the record to support a finding that the third assault aggravated the preceding compensable injuries all of which injuries are compensable under the Nebraska Workers' Compensation Act.

The parties stipulated that the April 16, 2008, assault involved a physical injury and was independently compensable. In its analysis, the Workers' Compensation Court found that Hynes was not mentally stable or healthy after the first and second incidents and that her mental health deteriorated. This determination was not clearly wrong. A separate compensable injury for each and every work aggravation is not required if the initial cause of the injuries is a direct and natural result of the compensable injury. See *Stacy v. Great Lakes Agri Mktg., supra*.

Good Samaritan claims the facts of the present case are similar to *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). We disagree. In *Sweeney*, the employee's

depression was entirely attributable to a loss of earning capacity report that the employee believed would have a negative impact on the litigation. There was no physical injury that was related to the employee's depression. We found that the worker's litigation stress was an intervening event which broke the causal connection between his depression and the original work-related accident and that, therefore, the psychological injury was unconnected to a physical injury. We distinguished *Sweeney* from our decision in *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991), in which we affirmed an award of workers' compensation benefits to a worker whose traumatic neurosis was attributed to both his physical injury and the psychological loss resulting from the worker's immobility and inability to work.

In the case at bar, the psychological injuries resulted directly from an assault in which Hynes suffered a physical injury. The causation opinion was that Hynes' psychological injuries were the result of the physical injuries sustained during the assaults. In Malin's report, she stated:

> It is my opinion beyond a reasonable degree of medical and psychiatric certainty that . . . Hynes sustained both physical and psychological injury as a proximate result of the work-related assaults detailed in medical records. . . .
>
> The first assault on April 16, 2008, . . . resulted in both physical and psychological injury. . . .
>
> . . . .
>
> . . . Hynes went on to experience two other assaults by patients in May and June 2008 . . . . These caused cumulative trauma to her already fragile [PTSD] as had been rendered with the April assault.

Malin noted that "[t]he psychological injury that . . . Hynes sustained from this first assault . . . was apparent almost immediately." Hynes reported difficulty sleeping and eating and having fear of returning to the unit where the assault occurred. The symptoms worsened with persistent flashbacks and greatly affected her personal, occupational, and social

functioning. Malin determined those symptoms were consistent with acute stress disorder and PTSD, which eventually led to a major depressive disorder requiring several hospitalizations. She opined that Hynes was extremely cooperative with the evaluation and did not exhibit any common features of malingering. She further opined that Hynes has been unable to work since July 2008 and that all of Hynes' medical treatment and therapy needs were caused as a result of the injuries—both physical and psychological—that she sustained in the course of her employment.

[15,16] Good Samaritan argues, "At issue is whether there was sufficient competent evidence to support [Hynes'] alleged mental injuries . . . ." Brief for appellant at 1-2. In testing the sufficiency of evidence to support findings of fact made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000). If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, we are precluded from substituting our view of the facts for that of the compensation court. *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013).

The record contains ample evidence to support the Workers' Compensation Court's findings. This includes Hynes' testimony as to the facts surrounding her injuries. The court found that "[Hynes] was consistently employed from 1992 through 2008 without significant or relevant incident either physical or mental. During this time she worked, was married and had a family." There is no indication that Hynes experienced symptoms of PTSD, major depressive disorder, or any other significant psychiatric problems in the 15 years prior to the initial assault in April 2008. Nor did she have any issues related to substance abuse in the decade prior to her injuries. Hynes required extensive treatment following the

three incidents, including electroconvulsive therapy, which Malin stated is "a treatment option of last resort for Major Depressive Disorders." We find sufficient evidence to support the court's determination that Hynes' injuries arose as a result of her work-related accident.

[17] Regarding the medical evidence, the compensation court found that Malin's evaluation was credible and reliable, and it adopted and relied upon her opinions. Malin opined that the treatment Hynes received was directly related to the assaults, that she has been incapable of working since the assaults, and that she will require future treatment. It is the role of the Workers' Compensation Court as the trier of fact to determine which, if any, expert witnesses to believe. *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004).

[18] The Workers' Compensation Court was not clearly wrong in finding that Hynes' injuries were the result of the initial "accident" which occurred on April 16, 2008, with two subsequent incidents that aggravated or cumulatively added to the injury. Where the evidence is sufficient to permit the trier of fact to find that a psychological injury is directly related to the accident and the employee is unable to work, the employee is entitled to be compensated. *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006).

## CONCLUSION

The Workers' Compensation Court was not clearly wrong in finding that Hynes suffered from major depressive disorder and PTSD as a result of her injury while working for Good Samaritan and that she was left permanently and totally disabled as a result. For the reasons stated above, we affirm the award of the compensation court.

Affirmed.

Stephan, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Janice K. Litherland, appellant, v. Gary Martin Jurgens and Velda Lee Lenners, appellees.

869 N.W.2d 92

Filed September 11, 2015. No. S-14-818.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Principal and Agent: Fraud: Proof.** A prima facie case of fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself.
4. **Principal and Agent: Fraud: Proof: Intent.** Once it is shown that the defendant used the power of attorney to make a gift to himself or herself, the burden is upon the defendant to establish by clear and convincing evidence that the transaction was made with the clear intent of the donor.
5. **Trusts: Agency: Equity.** An agent or other fiduciary who deals with the subject matter of the agency so as to make a profit for himself or herself will be held to account in equity as trustee for all profits and advantages acquired by him or her in such dealings.
6. **Decedents' Estates: Executors and Administrators.** Where the beneficiary seeks to challenge the personal representative's administration of the estate, a special administrator can be appointed to pursue the claims.
7. **Conspiracy: Torts.** A conspiracy is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort.

Appeal from the District Court for Gage County: Daniel E. Bryan, Jr., Judge. Affirmed.

Lyle J. Koenig, of Koenig Law Firm, for appellant.

J. L. Spray and Patricia L. Vannoy, of Mattson Ricketts Law Firm, for appellees.

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

Wright, J.

## NATURE OF CASE

Janice K. Litherland appeals from the dismissal of her action against the appellees, Gary Martin Jurgens and Velda Lee Lenners, for unjust enrichment, intentional interference with an inheritance, and conspiracy to commit those acts. Litherland was to receive certain real estate under the terms of the decedent's will, but the property was sold by Jurgens as attorney in fact for the decedent prior to her death. The proceeds from the sale were deposited into the decedent's bank accounts and divided equally among Litherland, Jurgens, and Lenners upon the decedent's death, under a separate provision of the will.

For the reasons stated below, we decline to adopt the tort of intentional interference with an inheritance and affirm the judgment of the district court.

## SCOPE OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo. *Brothers v. Kimball Cty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015). When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion. *SID No. 1. v. Adamy*, 289 Neb. 913, 858 N.W.2d 168 (2015).

## FACTS

Litherland was the daughter of Etta J. Ideus Jurgens (Etta), who died on January 2, 2013, as a resident of Beatrice, Gage County, Nebraska. Jurgens and Lenners were Etta's stepchildren. Each is a beneficiary under Etta's will dated November 4, 2004, which was offered for probate in the county court. Under the terms of the will, Litherland was to receive certain real estate if it was owned by Etta at the time of her death. The will devised all the decedent's savings accounts, certificates, and money deposited in any financial institution to Litherland, Jurgens, and Lenners in equal shares. The will named Jurgens and Lenners as joint personal representatives of the estate.

On February 17, 2006, Etta executed a durable power of attorney appointing Jurgens as her attorney in fact. Jurgens used the durable power of attorney to cause the sale of the real estate that Litherland would have received under the will. The sale proceeds were deposited in the decedent's bank accounts. And upon Etta's death, the bank account was distributed equally among Litherland, Jurgens, and Lenners in accordance with her will.

On February 4, 2014, Litherland filed a complaint against Jurgens and Lenners in Gage County District Court alleging three theories of recovery: unjust enrichment, intentional interference with an inheritance, and conspiracy. The first claim was against Jurgens for improperly using the power of attorney to unjustly enrich himself by selling the real estate. Litherland requested that the court create a constructive trust regarding the proceeds of the sale. The second claim was against Jurgens for the tort of intentional interference with an inheritance. The third claim was against both Jurgens and Lenners for conspiracy to commit the acts alleged in the first and second claims.

Jurgens and Lenners moved to dismiss Litherland's complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6), alleging that the district court lacked jurisdiction and

that Litherland failed to state a claim for which relief may be granted.

On July 10, 2014, the district court dismissed Litherland's unjust enrichment claim. The court concluded that because the claim was related to the decedent's estate, it should have been brought in the probate court. At the time this action was commenced, a probate proceeding concerning Etta's estate was pending in the county court for Gage County and, therefore, the probate court had acquired jurisdiction over the decedent's estate. The district court found that Litherland's claim against Jurgens for improperly using the power of attorney to unjustly enrich himself and her request for a constructive trust over the proceeds from the sale of the real estate were both related to Etta's estate. The district court concluded that Litherland could petition the probate court to impose a constructive trust on the proceeds of the sale of the real estate if the probate court found that Jurgens had improperly used the power of attorney to redirect estate property to himself or Lenners. As a result, the district court found that Litherland should bring the claim in the probate court to determine whether the sale of real estate was a proper use of the power of attorney that constituted "a valid ademption" of the anticipated devise.

The district court sustained Jurgens and Lenners' motion to dismiss based upon § 6-1112(b)(1) as to Litherland's first claim, because of the judicial administration rule. The court stated:

> Because both courts have subject matter jurisdiction, if [the probate court] either terminates its jurisdiction or feels for whatever reason it does not want to exercise such equity jurisdiction and formally waives its jurisdiction to hear and decide this issue, within thirty (30) days from filing of this order, [Litherland] may within fifteen (15) days of the [probate court's] waiver or termination of jurisdiction order, re-file her complaint in the District Court . . . .

Regarding Litherland's claim for intentional interference with an inheritance, the district court assumed for purposes of its decision that Nebraska recognized the tort as a cause of action, but held that the claim failed for two reasons. First, Litherland failed to show that probate remedies were inadequate. It stated, "[T]his court has already ruled under the [§ 6-11]12(b)(1) motion [to dismiss] that [Litherland] has an equity action that may be brought before the probate court . . . . Therefore, [Litherland] can not [sic] show that the probate remedies are inadequate."

Second, Litherland failed to allege that Jurgens and Lenners were aware of the contents of the will prior to the sale of the real estate. As a result, the district court found that Litherland did not allege tortious conduct which *intentionally* interfered with the inheritance. Because the court found that Litherland did not state a cause of action for an underlying tort, the court also dismissed her conspiracy claim. The court did not give Litherland an opportunity to amend her pleadings as to the second and third claims. Litherland timely appealed.

## ASSIGNMENTS OF ERROR

Litherland assigns, consolidated and restated, that the district court erred in (1) requiring that remedies in probate court be exhausted in order to sustain a claim for intentional interference with an inheritance, (2) finding that Litherland was required to plead that Jurgens and Lenners were aware of the terms of the will to show intent, and (3) refusing to allow Litherland to amend her pleadings. Litherland's assignments of error relate only to the district court's dismissal of her claims for interference with an inheritance and conspiracy. No appeal was taken from the dismissal of Litherland's action for unjust enrichment.

## ANALYSIS

The question is whether Nebraska recognizes a cause of action for the tort of intentional interference with an inheritance.

For the reasons set forth, we decline to adopt the tort as a cause of action that is permitted in Nebraska.

The Restatement defines the tort as follows: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." Restatement (Second) of Torts § 774B at 58 (1979).

There is a jurisdictional split between the states that recognize intentional interference with an inheritance as a cause of action and those that do not. The U.S. Supreme Court has referred to the tort as "widely recognized." See *Marshall v. Marshall*, 547 U.S. 293, 312, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006). However, even among those states that recognize this tort, most have held that a claim may be brought only in limited circumstances.

These states have concluded the tort is generally unavailable where a conventional will contest is available to the plaintiff, the plaintiff has not exhausted probate remedies, and a successful probate contest would provide adequate relief. See, e.g., *Moore v. Graybeal*, 843 F.2d 706 (3d Cir. 1988) (applying Delaware law); *Firestone v. Galbreath*, 895 F. Supp. 917 (S.D. Ohio 1995) (applying Ohio law); *Jackson v. Kelly*, 345 Ark. 151, 44 S.W.3d 328 (2001); *Benedict v. Smith*, 34 Conn. Supp. 63, 376 A.2d 774 (1977); *DeWitt v. Duce*, 408 So. 2d 216 (Fla. 1981); *Robinson v. First State Bank*, 97 Ill. 2d 174, 454 N.E.2d 288, 73 Ill. Dec. 428 (1983); *Huffey v. Lea*, 491 N.W.2d 518 (Iowa 1992); *Axe v. Wilson*, 150 Kan. 794, 96 P.2d 880 (1939); *Allen v. Lovell's Adm'x*, 303 Ky. 238, 197 S.W.2d 424 (1946); *Brignati v. Medenwald*, 315 Mass. 636, 53 N.E.2d 673 (1944); *Gianella v. Gianella*, 234 S.W.3d 526 (Mo. App. 2007); *Griffin v. Baucom*, 74 N.C. App. 282, 328 S.E.2d 38 (1985). These courts have concluded that where probate remedies are adequate and available, a plaintiff cannot maintain an action for intentional interference with an inheritance.

The Florida Supreme Court has stated, "The vast majority of these cases characterize as collateral a later tort action whenever the plaintiff has failed to pursue an adequate remedy in the probate proceedings." *DeWitt v. Duce*, 408 So. 2d at 218. The Arkansas Supreme Court determined that adopting the tort where an adequate probate remedy exists "'would only lead to duplicative litigation, encouraging inefficient relitigation of issues better handled within the context of the core cause of action.'" *Jackson v. Kelly*, 345 Ark. at 157, 44 S.W.2d at 331 (quoting *Goff v. Harold Ives Trucking Co., Inc.*, 342 Ark. 143, 27 S.W.3d 387 (2000)).

One commentator has noted:

> One frequently cited reason for allowing recovery for intentional interference with inheritance is that every wrong should have a remedy. Yet the facts giving rise to the tort are often identical to facts giving rise to a will contest. If either action would provide an adequate remedy, the plaintiff should be limited to the probate action because that is the preferred method for resolving issues related to wills. Accordingly, most jurisdictions prohibit a plaintiff from pursuing the tort action unless a probate action is either unavailable or inadequate.

Nita Ledford, Note, *Intentional Interference With Inheritance*, 30 Real Prop. Prob. & Tr. J. 325, 340-41 (1995).

Although this court has not reached the issue directly, we expressed strong disapproval of the tort in *Manon v. Orr*, 289 Neb. 484, 491, 856 N.W.2d 106, 111 (2014), stating:

> We expressly decline to opine on the interplay between [Neb. Rev. Stat.] § 30-3855(a) [(Reissue 2008)] and § 774B of the Restatement. Even if we were to conclude that the statute did not prevent the adoption of a cause of action for intentional interference with an inheritance or gift, we would nevertheless decline to adopt this tort.

Our language in *Manon v. Orr* is consistent with the general preference for resolving disputes pertaining to wills and

inheritances in probate court. Therefore, we consider whether Litherland's probate remedies were adequate.

In deciding Litherland's claim for unjust enrichment, the district court concluded that the probate court had jurisdiction of this claim. It therefore sustained Jurgens and Lenners' § 6-1112(b)(1) motion, concluding the probate court had jurisdiction because of the judicial administration rule. The district court concluded that had Litherland filed a proper petition in the probate court, the probate court could hear and decide the issue as easily as the district court. It further stated that Litherland could file a petition in the probate court to determine whether Jurgens improperly used the power of attorney to sell the real estate prior to Etta's death and whether the sale defeated the intended devise to Litherland. If the probate court determined that the sale was intended to improperly enrich Jurgens, the court could have imposed a constructive trust over the real estate proceeds in favor of Litherland.

[3] The remedies available to Litherland in the probate court were adequate. When compared to the tort of intentional interference with an inheritance, the action in the probate court would be to impose a constructive trust over the proceeds of the sale of real estate, as compared to an action for damages based upon the tort. The adoption of the tort would duplicate theories of recovery available to Litherland. A cause of action for fraud, which is the basis for the tort, already exists in Nebraska in the context of self-dealing through the use of a power of attorney. We have held:

> [A] prima facie case of fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself. . . . The burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power

> expressly granted in the power of attorney document and made pursuant to the clear intent of the donor.

*Crosby v. Luehrs*, 266 Neb. 827, 836, 669 N.W.2d 635, 645 (2003).

[4] Thus, once it is shown that the defendant used the power of attorney to make a gift to himself or herself, the burden is upon the defendant to establish by clear and convincing evidence that the transaction was made with the clear intent of the donor. See *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007). This is contrasted with the tort's requirement that the plaintiff must prove the intent of the defendant to deprive the plaintiff of receiving the inheritance. Thus, the action in the probate court presented an adequate remedy for Litherland and did not require proof of Jurgens' intent in selling the real estate as Etta's attorney in fact.

More important, we have long recognized that because of the agency relationship created by a power of attorney, the authority and duties of an attorney in fact are governed by the principles of the law of agency, including the prohibition against an agent profiting in transactions in which the agent represents the principal. See *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008). In these cases, we have stated that the policy concern underlying the law is primarily focused on the potential for fraud that exists when an agent acting under a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated. See *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

[5] Because of these concerns, we have held that a party establishes a prima facie case of fraud by showing that an attorney in fact used the principal's power of attorney to make a gift of the principal's assets to himself or herself. See *id.* Whether the fiduciary acted in good faith or had actual intent to defraud is immaterial; when these circumstances are shown, the law presumes constructive fraud. *Id*. The significance is that the burden of going forward with evidence then shifts to

the fiduciary to establish by clear and convincing evidence that (1) the transaction was made under the power expressly granted in the instrument and the clear intent of the donor and (2) the fairness of the transaction. *Id*. An agent or other fiduciary who deals with the subject matter of the agency so as to make a profit for himself or herself will be held to account in equity as trustee for all profits and advantages acquired by him or her in such dealings. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997).

We have decided several cases involving alleged wrongful conduct and self-dealing through the use of a power of attorney. See, e.g., *In re Estate of Hedke, supra*; *Archbold v. Reifenrath, supra*; *Crosby v. Luehrs, supra*. These cases contain facts similar to those alleged by Litherland in her complaint.

In *Archbold v. Reifenrath*, a successor personal representative of a decedent's estate brought an action for constructive fraud against the decedent's brother, who had durable power of attorney, to recover assets formerly belonging to the decedent. We held that the decedent's brother did not have the power to make substantially gratuitous transfers of the decedent's property to the brother and his family. Although the power of attorney granted plenary power exercisable in the brother's absolute discretion, that power was limited by statute to those acts an agent was otherwise authorized to do, and the power of attorney did not contain a specific authorization for the making of gratuitous transfers, which an agent is not otherwise authorized to do.

[6] Litherland could have challenged the administration of the estate. Where the beneficiary seeks to challenge the personal representative's administration of the estate, a special administrator can be appointed to pursue the claims. Such an appointment can occur based on an allegation that the personal representative is perpetrating fraud, has colluded with another to deprive the estate of a potential asset, is conflicted to properly administer the estate, or the existence of some

other equitable circumstance, plus some evidence of the personal representative's alleged dereliction of duty. *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010).

[7] For the above reasons, we decline to adopt the tort of intentional interference with an inheritance. Because we decline to adopt the tort, we do not address the other issues related to it. Litherland does not appeal the district court's dismissal of her unjust enrichment claim. Therefore, she has no separate cause of action on which to rest her conspiracy claim. A conspiracy is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort. *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015). Without such underlying tort, there can be no claim for relief for a conspiracy to commit the tort. *Id*.

## CONCLUSION

For the reasons stated above, we affirm the judgment of the district court. The motion for attorney fees filed by Jurgens and Lenners is overruled.

AFFIRMED.

STEPHAN, J., not participating.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Rent-A-Roofer, Inc., appellant and cross-appellee, v. Farm Bureau Property & Casualty Insurance Company, appellee and cross-appellant.

869 N.W.2d 99

Filed September 11, 2015. No. S-14-895.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact, or the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from the trial court's conclusion.
4. **Insurance: Liability: Notice: Proof.** In order to escape liability or the duty to defend on account of an insured's unreasonable and unexcused delay in giving notice of claim, a liability insurer is required to show that it was prejudiced.
5. **Insurance: Liability: Notice.** An insurer's relief from the duty to defend, just the same as its overall liability to its insured, is dependent on whether the insurance company's defense suffered prejudice from the insured's failure to notify.
6. **Insurance: Notice: Time.** Prejudice is determined by examining whether the insurer received notice in time to meaningfully protect its interests.
7. ____: ____: ____. The mere passage of time generally does not establish prejudice to the insurer.

8. **Insurance: Contracts: Notice: Claims.** The purpose of a notice provision is to alert the insurer of a possible claim to give it the opportunity to make an investigation in order to enable it to process any future claim.
9. ____: ____: ____: ____. When the failure to give notice is shown to prejudice the insurer's opportunity to make an investigation or enable it to process a claim, that failure to give notice is prejudicial and a material breach of the insurance contract.
10. **Insurance: Contracts: Proof.** Prejudice must be shown when an insurer seeks to avoid the policy for breach of a voluntary payments provision.
11. **Insurance: Contracts: Proof: Compromise and Settlement.** In the context of voluntary payment provisions, prejudice may be shown as a matter of law where the insured's settlement deprived the insurer of the opportunity to protect its interests in litigation or participate in the litigation and settlement discussions.
12. **Insurance: Liability: Notice: Waiver.** Where an insurer has already denied liability for a claim, it is neither necessary nor proper for the insured to notify the insurer again, and the insured's duty to notify may be waived through such denial.
13. **Insurance: Liability: Waiver.** An insurer's denial of a claim must be express or unequivocal, or in an instance where the facts or circumstances warrant the inference that liability was denied.
14. **Insurance: Claims: Notice.** Where two claims against an insured are so different as to involve different parties, different complaints, and different occurrences, the insured must give notice to its insurer of both claims.

Appeal from the District Court for Lancaster County: Stephanie F. Stacy, Judge. Affirmed.

Cynthia R. Lamm, of Law Office of Cynthia R. Lamm, and Jacob Tewes, Senior Certified Law Student, for appellant.

Gary J. Nedved, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

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

McCormack, J.

## NATURE OF CASE

The appellant, Rent-A-Roofer, Inc., doing business as A-J Roofing & Waterproofing, settled a lawsuit without notifying its insurer—the appellee, Farm Bureau Property & Casualty Insurance Company (Farm Bureau)—of the lawsuit. After settlement, Rent-A-Roofer attempted to claim damages from Farm Bureau. Farm Bureau declined coverage because Rent-A-Roofer failed to meet the notice and voluntary payments provisions of its insurance policy. The district court found that, where the insured failed to meet both the notice and voluntary payments provisions, prejudice had been established as a matter of law and allowed Farm Bureau to avoid liability under the policy. Rent-A-Roofer appeals, claiming it is entitled to costs of defense for the suit.

## BACKGROUND

At all relevant times, Rent-A-Roofer held a commercial general liability insurance policy with Farm Bureau.

In September 2007, the State of Nebraska filed a lawsuit in the district court for Lancaster County for damages arising from Rent-A-Roofer's alleged failure to install a roof in a good and workmanlike manner. The date of the State's loss was during the policy year of 2004 to 2005. Rent-A-Roofer disputed the faultiness of its workmanship and submitted the defense of the matter to Farm Bureau.

Farm Bureau decided that the complaint sought damages only for faulty workmanship and determined that the policy excluded such faulty workmanship under the "'your work'" exclusion. Farm Bureau informed Rent-A-Roofer that the property damage did not arise out of a covered "'occurrence,'" so Farm Bureau would not indemnify or defend its insured. Thereafter, Rent-A-Roofer hired its own counsel to defend the suit and reached a settlement in exchange for a release and dismissal of the suit.

In August 2010, the National Research Corporation (NRC) filed a lawsuit against Rent-A-Roofer and six other defendants in the district court for Lancaster County. Similar to the case brought by the State, NRC also alleged that Rent-A-Roofer and the other defendants had failed to construct and renovate its property in a workmanlike manner, among other claims. Rent-A-Roofer did not notify Farm Bureau of the NRC claim at that time because, "based upon the company's experience in the case brought by the State, [Rent-A-Roofer] did not believe there was coverage for the claim."[1]

Instead of notifying Farm Bureau of the claim against it, Rent-A-Roofer hired and paid for its own legal counsel. Rent-A-Roofer proceeded with its hired counsel to mediation, where, on August 17, 2011, Rent-A-Roofer reached a settlement with NRC. On September 12, Rent-A-Roofer notified Farm Bureau of its involvement in litigation with NRC and made a demand under Rent-A-Roofer's policy with Farm Bureau.

The insurance policy held by Rent-A-Roofer contained a notice provision which stated: "**2. Duties In The Event Of Occurrence, Offense, Claim Or Suit[:] a.** You must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." The policy further contained a voluntary payments provision stating:

> **c.** You and any other involved insured must:
>
> **(1)** Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
>
> **(2)** Authorize us to obtain records and other information;
>
> **(3)** Cooperate with us in the investigation or settlement of the claim or defense against the "suit[.]"
>
> . . . .
>
> **d.** No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation,

[1] Brief for appellant at 7.

> or incur any expense, other than for first aid, without our consent.

Farm Bureau refused Rent-A-Roofer's claim on the grounds that Rent-A-Roofer breached the policy's notice provision and the voluntary payments provision. In June 2012, Rent-A-Roofer filed suit against Farm Bureau, alleging breach of contract and bad faith stemming from Farm Bureau's denial of coverage.

Farm Bureau moved for summary judgment, arguing that the undisputed evidence showed coverage was properly denied under the policy and that Farm Bureau was entitled to judgment as a matter of law. Specifically, Farm Bureau argued that it properly declined coverage because Rent-A-Roofer failed to give Farm Bureau notice of the NRC claim as required under the policy and because Rent-A-Roofer voluntarily consented to a settlement with NRC without Farm Bureau's knowledge or consent as also required under the policy.

As a "threshold matter," the district court addressed whether, in actions where an insurer asserts voluntary payment as a basis for denying coverage under the policy, the insurer must also prove it had been prejudiced by the insured's breach of those policy conditions. In Nebraska, as a matter of law, an insurer must show prejudice before declining coverage due to failure to meet a notice provision.[2] However, we have not yet determined whether an insurer must show prejudice before declining coverage due to a failure to meet a voluntary consent provision. The district court concluded that for an insurer to deny coverage based on breach of a voluntary settlement condition, the insurer is required to show prejudice in connection with its claim.

The district court then went on to hold, however, that in cases where both the notice provision and the voluntary consent provisions are breached by the insurer's not being given

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[2] See *Herman Bros. v. Great West Cas. Co.*, 255 Neb. 88, 582 N.W.2d 328 (1998).

an opportunity to take part in a final settlement or agreement to pay, there is prejudice as a matter of law. Specifically, when Rent-A-Roofer entered into an agreement to pay without bringing the suit or settlement to the attention of the insurer, Farm Bureau was prejudiced as a matter of law. The court further stated, "[t]his court need not engage in guess or speculation or conjecture as to what [Farm Bureau] would have done if given proper notice, as it is the abrogation of [Farm Bureau's] contractual rights and loss of a meaningful opportunity to protect its interests that constitute prejudice under Nebraska law."

## ASSIGNMENTS OF ERROR

Rent-A-Roofer assigns as error the court's grant of summary judgment to Farm Bureau, after the finding that Farm Bureau was prejudiced as a matter of law by Rent-A-Roofer's failure to give notice of the lawsuit until after Rent-A-Roofer's settlement. Rent-A-Roofer also assigns as error the court's failure to specifically address whether Farm Bureau was obligated to pay the costs of Rent-A-Roofer's defense.

## STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact, or the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.[3]

[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.[4]

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[3] *Marcovitz v. Rogers*, 276 Neb. 199, 752 N.W.2d 605 (2008).

[4] *Shada v. Farmers Ins. Exch.*, 286 Neb. 444, 840 N.W.2d 856 (2013); *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013).

[3] As to questions of law, an appellate court has an obligation to reach a conclusion independent from the trial court's conclusion.[5]

## ANALYSIS

The district court found that in actions where an insurer asserts untimely notice and voluntary payment as a basis for denying coverage under the policy, the insurer must also prove it has been prejudiced by the insured's breach of those policy conditions in order to avoid liability. The district court then continued to find that Farm Bureau was prejudiced as a matter of law when Rent-A-Roofer did not report the claim to Farm Bureau until after it reached a settlement agreement with NRC, because Farm Bureau was unable to take any action whatsoever to protect its interests or the interests of the insured.

At the trial court level, and in its brief on appeal, Rent-A-Roofer sought complete recovery of costs of the suit, including indemnity and defense costs from Farm Bureau. However, at oral argument, Rent-A-Roofer changed its argument and prayer for relief to ask only for the costs of defending the suit against NRC. We must now determine whether an insurer's duty to defend is relieved when the insured fails to notify the insurer of a claim until after it has reached a binding settlement agreement with the claimant, in breach of both the notice and voluntary payments provisions of its insurance policy. We conclude that, as a matter of law, an insurer is not liable for defense costs where defense of the claim concluded before the insured brought the suit to the attention of the insurer and after the parties entered into the final settlement agreement, because this complete lack of an opportunity to engage in the defense is prejudicial to the insurer.

Rent-A-Roofer's commercial general liability policy with Farm Bureau contained the following provisions:

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[5] *Herman Bros. v. Great West Cas. Co., supra* note 2.

> **2. Duties In The Event Of Occurrence, Offense, Claim Or Suit**
>
> **a.** You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. . . .
>
> . . . .
>
> **d.** No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

### Requirement of Prejudice

[4,5] With regard to notice provisions in insurance contracts, we have stated that "[i]n order to escape liability *or the duty to defend* on account of an insured's unreasonable and unexcused delay in giving notice of claim, a liability insurer is required to show that it was prejudiced."[6] Of particular importance to Rent-A-Roofer's claim for defense costs, an insurer's relief from the *duty to defend*, just the same as its overall liability to its insured, is dependent on whether the insurance company's defense suffered prejudice from the insured's failure to notify.[7]

[6-9] Prejudice is determined by examining whether the insurer received notice in time to meaningfully protect its interests.[8] The mere passage of time generally does not establish prejudice to the insurer.[9] The purpose of a notice provision is "to alert the insurer of a possible claim to give it the

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[6] *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 828, 716 N.W.2d 87, 102 (2006) (emphasis supplied). See, also, *Herman Bros. v. Great West Cas. Co., supra* note 2.

[7] See, *Dutton-Lainson Co. v. Continental Ins. Co., supra* note 6; *Herman Bros. v. Great West Cas. Co., supra* note 2; Stephen A. Klein, *Insurance Recovery of Prenotice Defense Costs*, 34 Tort & Ins. L.J. 1103 (1999).

[8] *Dutton-Lainson Co. v. Continental Ins. Co., supra* note 6.

[9] *Herman Bros. v. Great West Cas. Co., supra* note 2.

opportunity to make an investigation in order to enable it to process any future claim."[10] Therefore, when the failure to give notice is shown to prejudice the insurer's opportunity to make an investigation or enable it to process a claim, that failure to give notice is prejudicial and a material breach of the insurance contract.

We have not yet addressed whether the breach of a voluntary payments provision amounts to a material breach of an insurance contract, allowing the insurer to avoid liability, or whether the additional element of prejudice must be proved before the insurer can prove a material breach and avoid liability. Courts around the country differ in their approach to voluntary payments provisions. Some states find that an insured's failure to comply with a voluntary payments provision means that the insurer is not liable to the insured under the policy, and do not require the insurer to be prejudiced as a result of the settlement.[11] Other states still require the insurer to show prejudice resulting from the breach of the voluntary payments provision, but presume prejudice as a matter of law where the insurer did not have an opportunity to participate in the defense or the settlement process.[12]

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[10] *Id.* at 95, 582 N.W.2d at 333.

[11] See 1 Allan D. Windt, Insurance Claims & Disputes: Representation of Insurance Companies and Insureds § 3:09 (3d ed. 1995 & Cum. Supp. 1998). See, e.g., *Fisher v. USAA Cas. Ins. Co.*, 973 F.2d 1103 (3d Cir. 1992); *Central Bank v. St. Paul Fire & Marine Ins.*, 929 F.2d 431 (8th Cir. 1991); *Dietz Intern. Public Adjusters v. Evanston Ins.*, 796 F. Supp. 2d 1197 (C.D. Cal. 2011); *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267 (Ind. 2009); *Phillips Way v. American*, 143 Md. App. 515, 795 A.2d 216 (2002); *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 281 Mich. App. 429, 761 N.W.2d 846 (2008).

[12] See, e.g., *Perini/Tompkins Joint Venture v. Ace American Ins.*, 738 F.3d 95 (4th Cir. 2013); *Motiva Enterprises v. St. Paul Fire and Marine*, 445 F.3d 381 (5th Cir. 2006); *Harrisburg Area Com. College v. Pacific Emp. Ins.*, 682 F. Supp. 805 (M.D. Pa. 1988); *Augat, Inc. v. Liberty Mutual Ins. Co.*, 410 Mass. 117, 571 N.E.2d 357 (1991); *Roberts Oil v. Transamerica Ins.*, 113 N.M. 745, 833 P.2d 222 (1992).

[10] The purpose of a voluntary payments provision is similar to notice, consent-to-settlement, and cooperation provisions in a contract—the purpose is to ensure that an insurer has an opportunity to protect its interests.[13] The voluntary payments provision allows the insurance company an "opportunity to protect itself and its insured by investigating any incident that may lead to a claim under the policy, and by participating in any resulting litigation or settlement discussions."[14] Given the similarity in purpose between notice provisions and voluntary payments provisions, we find that it is proper to maintain the prejudice requirement when an insurer seeks to avoid the policy for breach of a voluntary payments provision.

### Determination of Prejudice

We now turn to the issue of whether prejudice has been proved where the claim was not tendered to the insurer until after the defense is completed and the insured has entered into a binding settlement agreement.

In *Herman Bros. v. Great West Cas. Co.*,[15] an insured asked its liability insurer to recover costs of defending and settling an action filed by the National Labor Relations Board. The labor board filed a formal complaint, hearings were held, and the parties engaged in negotiations resulting in a settlement between the insured and the labor board. At that point, the insured met with the insurer to notify the insurer of the claim against it. The claimant then sent the insurer written notice of its claim, the complaint, and the proposed settlement. The insurer denied coverage, and the insured filed suit to recover the amount of the settlement plus attorney fees incurred. There, we determined that the insurance company was "not

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[13] See, e.g., *West Bend Mut. Ins. Co. v. Arbor Homes LLC*, 703 F.3d 1092 (7th Cir. 2013); *Augat, Inc. v. Liberty Mutual Ins. Co., supra* note 12.

[14] *West Bend Mut. Ins. Co. v. Arbor Homes LLC, supra* note 13, 703 F.3d at 1095.

[15] *Herman Bros. v. Great West Cas. Co., supra* note 2.

given an opportunity to meaningfully protect its interests, and therefore, [the insurance company] was prejudiced as a matter of law."[16]

In *Herman Bros.*, we cited the Wisconsin case of *Gerrard Realty Corp. v. American States Ins. Co.*,[17] in which the insurer was not given knowledge of the claim or ensuing litigation until 22 months after the suit commenced and after the trial was completed, and the insurer had no opportunity to investigate or defend the claim, nor did it have any opportunity to participate in decisions regarding the settlement of the claim. The Wisconsin Supreme Court determined that the failure to give notice until after defense of the case was completed was prejudicial to the insurer as a matter of law.[18]

[11] We conclude that prejudice may be shown as a matter of law where the insured's settlement deprived the insurer of the opportunity to protect its interests in litigation or participate in the litigation and settlement discussions. In this case, at the time the insured entered into an enforceable settlement agreement, it was too late for Farm Bureau to act to protect its interests. There was nothing left for Farm Bureau to do but issue a check. An insurer cannot fail in defending a suit that it has no knowledge of. In this case, we conclude that this complete denial of Farm Bureau's opportunity to engage in the defense, take part in the settlement discussions, or consent to the settlement agreement was prejudicial as a matter of law to Farm Bureau and find that Farm Bureau is not liable for defense costs.

[12-14] As a final matter, Rent-A-Roofer argues that its duty to notify Farm Bureau of the claim was waived when Farm Bureau declined coverage over a prior, allegedly similar claim. However, the prior claim for which coverage was

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[16] *Id.* at 99, 582 N.W.2d at 335.

[17] *Gerrard Realty Corp. v. American States Ins. Co.*, 89 Wis. 2d 130, 277 N.W.2d 863 (1979).

[18] *Id.*

denied involved a different occurrence, different parties, and different allegations, and in short, it had no relation whatsoever to the claim by NRC against Rent-A-Roofer. We have held that where an insurer has already denied liability for a claim, it is neither necessary nor proper for the insured to notify the insurer again, and the insured's duty to notify may be waived through such denial.[19] But, an insurer's denial of the claim must be "'express or unequivocal,'" or in an instance where "'the facts and circumstances warrant the inference that liability was . . . denied.'"[20] Where the two claims against the insured are so different as to involve different parties, different complaints, and different occurrences, the insured must give notice to its insurer of both claims. The insurer does not waive notice by denying coverage over a prior, and wholly different, claim.

## CONCLUSION

The district court was correct in its finding that Farm Bureau is not liable for settlement by NRC against Rent-A-Roofer, and, by way of that finding, Farm Bureau is not liable for Rent-A-Roofer's defense costs. We affirm.

Affirmed.

Stephan, J., not participating.

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[19] See, *Dutton-Lainson Co. v. Continental Ins. Co., supra* note 6; *Thomas Kilpatrick & Co. v. London Guarantee & Accident Co.*, 121 Neb. 354, 237 N.W. 162 (1931).

[20] *Dutton-Lainson Co. v. Continental Ins. Co., supra* note 6, 271 Neb. at 829, 716 N.W.2d at 103. See, also, *Otteman v. Interstate Fire & Cas. Co., Inc.*, 172 Neb. 574, 111 N.W.2d 97 (1961).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Claims Against Pierce Elevator. John A. Fecht, director, Grain Warehouse Department, Nebraska Public Service Commission, appellee and cross-appellee, v. Matthew Christensen, claimant, appellant, and Donnelly Trust et al., claimants, appellees and cross-appellants, David Uecker, claimant, appellee and cross-appellee, and Linda Alfs et al., claimants, appellees.

868 N.W.2d 781

Filed September 11, 2015. No. S-14-899.

1. **Public Service Commission: Appeal and Error.** Determinations of the Public Service Commission are reviewed de novo on the record.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
3. **Public Service Commission: Constitutional Law: Administrative Law.** The Public Service Commission's authority to regulate public grain warehouses is purely statutory, in contrast to its plenary authority to regulate common carriers under Neb. Const. art. IV, § 20.
4. **Public Service Commission: Administrative Law.** The authority of the Public Service Commission in the case of a grain warehouseman must spring from legislative enactment, and nothing else.
5. **Constitutional Law: Jurisdiction: Equity.** Neb. Const. art. V, § 9, confers equity jurisdiction upon the district courts.
6. **Jurisdiction: Equity.** Equity jurisdiction of the district courts is exercisable without legislative enactment and exists independently of statute.
7. **Jurisdiction: Equity: Legislature.** Equity jurisdiction of the district courts may not be divested by the Legislature.
8. **Administrative Law.** Administrative agencies have no general judicial powers, such as equitable powers, notwithstanding that they may perform some quasi-judicial duties.

9. ____. Only a judicial tribunal, and not an administrative agency acting as a quasi-judicial tribunal, can provide relief that is within the general power of the court to provide.
10. **Constitutional Law: Administrative Law: Courts.** Unless permitted by the constitution, under the principle of separation of powers, an administrative agency may not perform purely judicial functions or interfere with the court's performance of those functions.
11. **Public Service Commission: Administrative Law.** When the Public Service Commission adjudicates claims under the Grain Warehouse Act, its objective is to determine those owners, depositors, storers, or qualified check holders at the time a warehouse is closed.
12. **Public Service Commission: Jurisdiction: Time.** The Public Service Commission has limited jurisdiction under the Grain Dealer Act to determine the claims that exist on the date of a warehouse closure.
13. **Statutes: Intent.** Statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.
14. **Actions: Equity: Jurisdiction.** An action in equity must be founded on some recognized source of equity jurisdiction.
15. **Rescission: Fraud.** Fraud and misrepresentation give rise to the remedy of rescission of a contract.
16. **Actions: Rescission: Equity.** An action for rescission sounds in equity.
17. **Actions: Trusts: Equity.** An action to impose a constructive trust is an equitable action.
18. **Public Service Commission: Administrative Law: Time.** The Grain Warehouse Act establishes a temporal requirement, or a point in time at which the rights of entities claiming to be either owners, depositors, or storers of grain are fixed, and a physical requirement that the grain be stored in a warehouse at the time the Public Service Commission takes possession of the grain.
19. **Sales.** Issuance of a check under Neb. Rev. Stat. § 88-530 (Reissue 2014) occurs when the check is first delivered by the maker or drawer.
20. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
21. ____. Errors that are assigned but not argued will not be addressed by an appellate court.
22. **Parol Evidence: Contracts.** The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement that alters, varies, or contradicts the terms of a written agreement.
23. ____: ____. The parol evidence rule is designed to preserve the integrity and certainty of written documents against disputes arising

from fraudulent claims or faulty recollections of the parties' intent as expressed in the final writing.

24. **Contracts.** Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous.
25. ____. A determination as to whether an ambiguity exists is made as a matter of law and on an objective basis, not by the subjective contentions of the parties.
26. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
27. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
28. **Testimony: Parol Evidence: Parties: Intent.** Testimony seeking to prove the parties' intent is considered parol evidence.
29. **Contracts.** An argument that the party did not read or understand the document he or she was signing is no defense to the formation of a contract.
30. **Directed Verdict: Evidence: Proof.** Prima facie proof is evidence sufficient to submit an issue to the fact finder and precludes a directed verdict on the issue.
31. **Administrative Law: Statutes: Sales: Evidence: Proof.** Although the statutes and regulations prescribe one form of evidence to establish a prima facie case that an in-store transfer occurred, other forms of evidence may also provide proof.
32. **Actions: Parties: Standing.** 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.
33. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, 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 the exercise of the court's remedial powers on the litigants' behalf.
34. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining a direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.
35. **Standing: Jurisdiction.** If the party appealing the issue lacks standing, the court is without jurisdiction to decide the issues in the case.

Appeal from the Public Service Commission. Affirmed in part, and in part reversed and dismissed.

Rocky C. Weber and Andrew C. Pease, of Crosby Guenzel, L.L.P., for appellant.

Richard P. Garden, Jr., Austin L. McKillip, and Gregory S. Frayser, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees Donnelly Trust et al.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellee John A. Fecht.

Heavican, C.J., Connolly, Stephan, McCormack, and Cassel, JJ., and Pirtle, Judge.

McCormack, J.

## I. NATURE OF CASE

This appeal arises out of proceedings initiated by the Nebraska Public Service Commission (PSC) following the insolvency of Pierce Elevator, Inc. (PEI), to determine claims under the Grain Warehouse Act[1] and the Grain Dealer Act.[2] PEI voluntarily surrendered its grain warehouse license to the PSC on March 4, 2014, and the PSC took title to all PEI grain in storage in trust for all valid owners, depositors, or storers of grain pursuant to the Grain Warehouse Act. The PSC then determined valid claims under the Grain Warehouse Act and the Grain Dealer Act. The appellant and cross-appellants are claimants who are dissatisfied with the PSC's classification of their claims.

## II. BACKGROUND

### 1. PEI

PEI operated licensed grain warehouses in Pierce, Randolph, and Foster, Nebraska. Brian Bargstadt was PEI's president and one-third owner.

PEI maintained a banking relationship with Citizens State Bank (the Bank) and obtained operating loans from the Bank.

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[1] Neb. Rev. Stat. §§ 88-525 through 88-552 (Reissue 2014).

[2] Neb. Rev. Stat. §§ 75-901 through 75-910 (Reissue 2009).

PEI borrowed funds from the Bank on a line of credit to facilitate the purchase of grain from its producers.

PEI's accountant testified that PEI was "in trouble" by the end of 2012 and that PEI needed to raise capital to address the negative owner's equity. At the end of 2012, PEI had a working capital deficiency in excess of $2.2 million.

On August 30, 2013, PEI's line of credit matured and the Bank permitted the line of credit to go past due until September 19. On that date, the Bank and PEI entered into a new contract extending the due date until October 31. The Bank agreed to continue to extend the maturity of PEI's line of credit on a monthly basis while PEI, its accountant, and the Bank addressed the working capital deficiency. Bargstadt testified that he requested the monthly extensions of the line of credit "[t]o satisfy John Fecht [the director of the PSC's grain warehouse department]" because "he wanted to know if we had money in our account to pay our bills and pay the grain."

During this time, the PSC became concerned about PEI's ability to pay producers. The PSC intensified its scrutiny of PEI because PEI's grain warehouse and dealer's licenses were set to expire at the end of September 2013. The PSC's grain warehouse department's director, John A. Fecht, expressed his concern that the Bank had not extended its line of credit for another year, stating:

> With harvest coming soon, it is imperative that I know you have money available to pay for any grain expense or anything else for that matter. . . .
>
> . . . .
>
> It would seem that there is still uncertainty with the bank going forward . . . . You realize that if things would go bad, it will mean the license and the ability to continue will come to a halt.

The PSC then began to require PEI to submit bank account and loan balances to the PSC every 3 days.

In the months ensuing, PEI attempted to work out a solution to its impending insolvency. On March 3, 2014, Fecht sent an e-mail to the Bank, stating:

> I'm hoping you folks have made a decision on whether you're renewing this line of credit in the short term or long term? . . .
>
> I really need to know if the bank will continue to honor checks written by [PEI] for today and going forward. . . . I must look after the farmers doing business with [PEI].

The Bank officials met on March 3, 2014, and decided to terminate the loan relationship with PEI. The Bank informed Bargstadt the afternoon of March 3 that the Bank would not renew the line of credit. The PSC learned of the Bank's decision not to renew the line of credit and to no longer honor PEI's checks via an e-mail sent the evening of March 3.

### 2. PSC Claims

PEI voluntarily surrendered its grain warehouse license on March 4, 2014, and on March 5, the PSC entered an order closing PEI's warehouse locations and taking title to all grain in storage in trust for distribution to all valid owners, depositors, or storers of grain pursuant to the Grain Warehouse Act. The PSC also was required to determine valid claims against PEI's grain dealer bond pursuant to the Grain Dealer Act.

The PSC examined PEI's records and compiled possible claims, and then mailed claim forms to potential warehouse and dealer claimants. After receiving returned claim forms, the PSC held a hearing on July 8, 2014, to take evidence to determine valid claimants under the Grain Warehouse Act and the Grain Dealer Act.

The PSC ultimately approved warehouse claims totaling $4,620,184.02. This amount was satisfied in full by proceeds from the sale of grain in storage.[3] The proceeds from the

[3] See 291 Neb. Admin. Code, ch. 8, § 002.05B (2014).

grain in storage were in excess of the amount necessary to settle the grain warehouse claims. According to the PSC's order, "[i]n the event that any proceeds from the sale of grain remain after all valid claims are satisfied, the remainder will be returned to [PEI]."

The PSC also approved dealer claims totaling $3,342,793.54. Under the Grain Dealer Act, the only monetary relief available for satisfaction of these claims was PEI's required statutory bond in the amount of $300,000.[4] This bond provided each dealer with $.09 per $1 for each approved claim.

### 3. David Uecker Transaction

In mid-January 2014, PEI was in need of money to make payments to producers. Bargstadt called an official at the Bank and requested an advance to cover outstanding checks, but the official refused. Bargstadt contacted a local farmer, David Uecker, and asked Uecker to loan PEI $800,000. Uecker agreed to give PEI the money. As collateral, Uecker took a security interest in 200,000 bushels of corn at $4 per bushel. Thereafter, PEI repaid Uecker $200,000.

The PSC determined that Uecker was entitled to an approved grain dealer claim on the remaining amount of $600,000. Uecker is not an appellant or a cross-appellant in this appeal, but the PSC's determination of his claim as a dealer claim is disputed by some of the cross-appellants. These cross-appellants argue that the $600,000 was a secured loan and should not be classified as a dealer claim and prioritized against the dealer bond.

### 4. Daniel Gansebom

On December 24, 2013, Daniel Gansebom contracted to sell 75,000 bushels of corn to PEI with delivery to be completed by March 2014. The contract provided that title to the grain passed to PEI upon delivery, stating "[t]itle to, all rights

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[4] § 75-903(4).

of ownership and risk of loss of the grain shall remain in Seller until physical delivery to Buyer's designated **Delivery Location** whereupon it shall pass to Buyer." In November 2013, pursuant to a separate contract, Gansebom had also agreed to sell additional corn to PEI.

Between October 31, 2013, and January 27, 2014, 84,442.33 bushels of corn were picked up from Gansebom by PEI and delivered to Elkhorn Valley Ethanol, L.L.C.; Husker AG, LLC; and Agrex Inc. (third-party grain terminals). None of the corn was delivered directly to PEI. Of those bushels, 75,000 were in satisfaction of Gansebom's obligation under the December 2013 contract, and the additional 9,402.51 bushels were applied to Gansebom's obligation under the November 2013 contract.

PEI prepared check No. 43157 in the amount of $321,350.25 as payment under the December 2013 contract. Gansebom avers that Bargstadt told him that this check was dated March 3, 2014, and stored in PEI's safe at that time. The check was delivered to Gansebom on July 8. However, the funds in PEI's accounts were insufficient to pay the check and Gansebom has not been paid for any of the 84,442.33 bushels of corn picked up by PEI.

At the proceedings before the PSC, Gansebom claimed the 84,442.33 bushels were stored grain, arguing he sold the grain to PEI only as a result of PEI's fraudulent inducement. Additionally, Gansebom claimed he should be treated as a qualified check holder with regard to his claims related to check No. 43157.

The PSC classified Gansebom's claims as dealer claims and denied recovery because the "loads were not delivered within the thirty-day coverage period of the bond." Further, the PSC found that Gansebom agreed to direct deliver 135,000 bushels of corn. The PSC found that the grain was direct delivered in partial satisfaction of a contract and that the remainder of the contract was voided by Gansebom and PEI and, therefore, could not constitute a claim against the dealer bond.

5. Donnelly Trust

Donnelly Trust, with the assistance of its contracted farm manager, owns and operates a farm in northeast Nebraska. During the fall of 2013, the trust harvested and delivered corn and soybeans to PEI's facilities in Pierce and Randolph for storage. The trust received scale tickets evidencing that the corn and soybeans were delivered to Pierce and Randolph and held there by PEI in open storage.

Donnelly Trust's farm manager testified that it was his standard practice to call PEI and ask PEI to sell the trust's grain in storage at a point in time when he felt commodity prices had reached a level favorable to the farm. This sale was initiated through the manager's telephone call, and the contract was executed orally. PEI and the manager would agree on a price at the time of his call. The manager testified that storage stopped at the time he called PEI to sell the grain. PEI would typically pay for the sold grain by mailing a check, which the trust usually received anywhere from 2 to 15 days after the sale.

On February 24, 2014, Donnelly Trust decided to sell certain amounts of corn and soybeans from open storage to PEI. Also on February 24, PEI executed checks Nos. 43095, 43081, and 43080, which were made payable to the trust. The checks were in the total aggregate amount of $136,010.51.

However, PEI did not deliver the checks to Donnelly Trust prior to the PSC takeover on March 5, 2014. Upon learning that the PSC held the checks executed by PEI, the trust made demand for delivery of the checks. The PSC did not deliver the checks.

Donnelly Trust made a claim in the proceeding before the PSC for treatment as a qualified check holder. However, with regard to portions of checks Nos. 43095, 43081, and 43080, the PSC denied the trust's qualified check holder claims, specifically stating that title to the grain passed to PEI when the agreement to sell from open storage was reached. More generally, the PSC found that the language of § 88-530 is

susceptible to differing reasonable interpretations. In looking at the context of the Grain Warehouse Act as a whole, the PSC stated that "[p]roducers have a responsibility to be prudent and reasonable businesspeople and seek payment for sold grain in a timely fashion" and that the act is "clearly intended to encourage timely demand for payment by producers and timely payment by warehousem[e]n."

Donnelly Trust's grain dealer claims were also denied because the deliveries were completed outside the 30-day coverage period of the grain dealer bond.

### 6. TTK Investments, Inc.

TTK Investments, Inc. (TTK), owns and operates a farm in northeast Nebraska. During the fall of 2013, TTK harvested and delivered corn to PEI's facilities in Pierce and Randolph for storage. TTK received scale tickets evidencing that the corn was delivered to Pierce and Randolph and held by PEI in open storage.

On February 24, 2014, TTK sold 5,615.61 bushels of corn from open storage to PEI. The contract was executed, and PEI prepared check No. 43083 as payment for the corn sold by TTK. The check was for the total amount of $22,003.50 and was dated February 24, 2014. PEI did not deliver the check prior to the PSC takeover of PEI on March 5.

TTK made a claim to the PSC as a qualified check holder. The PSC denied TTK's qualified check holder claim, specifically stating that title to the grain passed to PEI when the agreement to sell from open storage was reached. On appeal, TTK challenges the PSC's finding. TTK also appeals the PSC's classification of Uecker's claim as an approved dealer claim.

### 7. Curt Raabe

Curt Raabe is a farmer in Pierce County, Nebraska, and was a customer of PEI from approximately 2004 until its closure on March 5, 2014. During the fall of 2013, Raabe harvested 7,192.99 bushels of soybeans. In September and

October 2013, PEI picked up the soybeans from Raabe's farm and transported the soybeans to PEI's open storage facility in Pierce. Raabe received scale tickets evidencing that the soybeans were delivered to Pierce and held by PEI in open storage.

On February 5, 2014, Raabe executed a contract, selling his soybeans in open storage to PEI. Thereafter, Raabe did not receive payment on account of the sale, and on February 25, Raabe contacted Bargstadt regarding the missing payment. Bargstadt informed Raabe that a check had been written. Raabe demanded immediate payment. On February 28, Raabe received check No. 42900 in the amount of $88,510.54, which was the amount due on the sale of the soybeans from open storage. On March 3, Raabe deposited the check, and on March 6, it was returned for insufficient funds.

Raabe filed a claim seeking to participate in the distribution of the proceeds from the sale of grain in the warehouse as a qualified check holder. The PSC found that Raabe was not a qualified check holder because he was not an owner of grain stored in the warehouse within 5 business days prior to the closure of the warehouse.[5]

Raabe challenges this finding on appeal. He also argues that Uecker's claim should not have been classified as a dealer claim.

### 8. James Herian and Diane Herian

James Herian and Diane Herian are corn farmers in Pierce County. The Herians were customers of PEI, and their practice was to store some of their corn in on-farm storage bins and store any excess corn in storage at PEI's warehouse. In accordance with this practice, during the 2013 corn harvest, the Herians delivered 37,543.78 bushels of corn into PEI's warehouse. At that time, the Herians did not sell the grain to PEI, but instead directed that their corn be placed in open storage at PEI's warehouse. Despite the Herians' understanding

[5] See § 88-530.

that their grain would be stored at PEI, the Herians' bushels were instead taken directly to third-party grain terminals.

In January 2014, the Herians decided to sell 9,801.428 bushels of their corn that they believed to be in storage at PEI to PEI. The Herians were paid for this January 2014 sale.

After the January 2014 sale, the Herians were still uncompensated for the 27,742.05 remaining bushels of corn that they believed they held in open storage at PEI. James stated he did not learn that the remaining bushels had been direct delivered in the fall of 2013 to other locations instead of the PEI facility until after the PSC closed PEI. The Herians never agreed, orally or by written contract, to sell the remaining bushels to PEI or to any other third party. The Herians were never paid for the remaining bushels. James avowed that Bargstadt told him he owed the Herians money as a result of mishandling the remaining bushels and that Bargstadt indicated he would give the Herians cattle to make up for the mishandling.

When the PSC took control of PEI, the Herians obtained a grain settlement sheet, in which their bushels were listed under "Open Storage." The location code of the bushels is listed as "010." The deputy director of the PSC's grain warehouse department explained that a location code of 10 is used to identify grain delivered to other locations. He also testified that PEI's computer software used a default setting of "open storage" on all transactions.

When the PSC prepared claim forms for the Herians, the PSC indicated that their claim was a grain "dealer" claim. And the PSC denied the Herians' claim. The PSC reasoned that the corn was not in storage at the warehouse but that instead, the corn had been directly delivered to third-party grain terminals. Because PEI had completed no in-store transfer document or notice, the PSC found the Herians' claim was a dealer claim. Since the grain had been delivered beyond the 30-day coverage period for the grain dealer bond, the Herians were not allowed recovery under the Grain Dealer Act.

The Herians appeal, arguing the PSC should have found that the Herians were owners of the 27,742.05 remaining bushels of corn in open storage at PEI's warehouse at the time of PEI's closure and that therefore, the Herians' claim should have been classified as a warehouse claim and not as a dealer claim. In the alternative, the Herians argue that the PSC should have placed a constructive trust upon their bushels of corn by reason of PEI's fraudulent conduct.

### 9. Matthew Christensen

Matthew Christensen is a farmer in Pierce County. Christensen delivered 38,628.05 bushels of corn to PEI for which he holds scale tickets proving receipt of the corn by PEI and delivery of the corn into open storage under his name. As a matter of practice, Christensen never sold his grain using unpriced or priced-later (delayed-price) contracts, but limited any cash-forward contract sales of grain to set price contracts at current or near term delivery dates.

On February 7, 2014, an employee of PEI called Christensen at the request of Bargstadt. Christensen testified that the employee asked him to come to the offices of PEI to sign a form requested of PEI by the PSC. When Christensen arrived at PEI, the employee gave him a form entitled "Delayed Price Contract #9133" and was told that the form needed to be executed by Christensen and faxed to the PSC before the close of business that day. Christensen averred that he "reviewed Contract #9133" and "noted that there was no set price, there was no basis month, basis or price fix date identified even though the contract language purported to require that information."

Christensen testified that he signed the contract solely for the reason that he believed the PEI employee's representation to him that the PSC required PEI to obtain the signed document from him and that the document merely verified the number of bushels of corn that he had in storage at PEI at the time. Christensen testified that he believed the contract

to be a "form" requested by the PSC which reported and verified the number of bushels Christensen stored at PEI. Christensen testified that he did not believe it was a document that would transfer title of Christensen's stored corn. Christensen also averred that his "course of dealing" with PEI had never included entering into a delayed-price contract. The PEI employee testified that she knew the document was a contract, but that she did not recall her conversation with Christensen or whether she mentioned that the PSC was involved in the document.

Bargstadt also testified that he did not consider a delayed-price contract to be a sale of corn which transferred title. Bargstadt stated "delayed price is not a sale." Instead, Bargstadt described the intent of PEI with this contract as "Christensen still has [a] say about [the] bushels because he hasn't sold them. They're — they're his until they're sold . . . ." With respect to priced-later grain, Bargstadt testified that "the day [the PSC] closed us down, all the grain that's in delayed pricing or priced later, this [grain is] all in the elevators and everybody deserves to have that grain back."

The PSC had not requested that PEI have Christensen sign any form or contract for delivery to the PSC. Instead, pursuant to contract No. 9133, PEI transferred the 38,628.05 bushels of corn from open storage to priced-later contract status on its daily grain position report on February 3, 2014. February 3 was 4 days before Christensen testified that he signed the contract. The contract, as signed, stated, "Title to, all rights of ownership and risk of loss of the grain shall remain in Seller until physical delivery to Buyer's designated **Delivery Location** whereupon it shall pass to Buyer." Christensen admits that he signed the contract, but asserts that he did not intend to transfer title to the corn or enter into a contract to price his corn at a later date.

Christensen filed a claim asserting that he was an owner, depositor, or storer of corn in PEI as of the date of its closure by the PSC and that the contract was void or voidable by

reason of fraud. The PSC denied Christensen's claim, finding that ultimately, Christensen was not an owner, depositor, or storer of grain and that "the relief sought by . . . Christensen on the basis of his allegations of fraud must be sought in the scope of a private action against the appropriate parties and not within the scope of this claims hearing."

Christensen appeals, arguing that the PSC erred in finding the contract effectively transferred title to his grain and in failing to assert jurisdiction over his fraudulent inducement claim.

## III. ASSIGNMENTS OF ERROR

Cross-appellants Donnelly Trust, Raabe, and TTK appeal the PSC's classification of their claims as dealer claims and not as qualified check holder claims.

Cross-appellant Gansebom appeals the classification of his claim as a dealer claim rather than as a warehouse claim and the refusal of the PSC to classify Gansebom as a "storer of grain with regard to the 84,442.33 bushels of corn which were delivered as a result of PEI's fraud."

Cross-appellants the Herians appeal the PSC's classification of their claim as a dealer claim rather than as a warehouse claim. The Herians also argue that the PSC should have imposed a constructive trust upon the Herians' claimed bushels due to PEI's fraudulent conduct.

Appellant Christensen appeals the PSC's finding that the delayed-price contract he signed was enforceable, despite his lack of intent to enter into a contract transferring title to his grain. Alternatively, Christensen argues that he was fraudulently induced to execute the contract and that the PSC should have exercised its jurisdiction to adjudicate the fraudulent inducement claim as a part of the July 2014 proceedings.

Cross-appellants Donnelly Trust, Raabe, TTK, and Gansebom appeal the PSC's grant of Uecker's dealer claim in the amount of $600,000, instead of classifying it as a secured loan.

## IV. STANDARD OF REVIEW

[1,2] Determinations of the PSC are reviewed de novo on the record.[6] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.[7]

## V. ANALYSIS

### 1. PSC Does Not Have Jurisdiction Over Equitable Claims

Appellant Christensen argues that the PSC erred in failing to find that he was fraudulently induced into executing the delayed-price contract and that the PSC erred in determining that it lacked jurisdiction to adjudicate this fraud claim. Cross-appellants the Herians and Gansebom argue that the PSC failed to find that a constructive trust should have been imposed upon grain in storage by reason of PEI's fraudulent conduct. They also ask that their contracts be voided or rescinded due to PEI's fraudulent conduct. They reason that in the scope of its limited proceedings the PSC did not have jurisdiction to address such equitable claims. We agree.

[3,4] The PSC's authority to regulate public grain warehouses is purely statutory, in contrast to its plenary authority to regulate common carriers under Neb. Const. art. IV, § 20.[8] "The authority of the [PSC] in the [case of a grain warehouseman] must spring from legislative enactment, and nothing else."[9]

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[6] Neb. Rev. Stat. § 75-136(2) (Cum. Supp. 2014); *Telrite Corp. v. Nebraska Pub. Serv. Comm.*, 288 Neb. 866, 852 N.W.2d 910 (2014).

[7] *Id.*

[8] *In re Complaint of Fecht*, 224 Neb. 752, 401 N.W.2d 470 (1987); *In re Complaint of Fecht*, 216 Neb. 535, 344 N.W.2d 636 (1984).

[9] *In re Complaint of Fecht, supra* note 8, 216 Neb. at 539, 344 N.W.2d at 639.

[5-7] Neb. Const. art. V, § 9, confers equity jurisdiction upon the district courts.[10] This equity jurisdiction is exercisable without legislative enactment and exists independently of statute.[11] Further, this equity jurisdiction may not be divested by the Legislature.[12]

[8-10] In contrast, as a general rule, administrative agencies have no general judicial powers, such as equitable powers, notwithstanding that they may perform some quasi-judicial duties.[13] "Only a judicial tribunal, and not an administrative agency acting as a quasi-judicial tribunal, can provide relief that is '"within the general power of the court"' to provide."[14] Unless permitted by the constitution, under the principle of separation of powers, an administrative agency may not perform purely judicial functions or interfere with the court's performance of those functions.[15]

[11] By statute, the PSC is given jurisdiction over, among other things, "Grain pursuant to the Grain Dealer Act and the Grain Warehouse Act and sections 89-1,104 to 89-1,108."[16] More specifically, under the Grain Warehouse Act, the PSC explicitly is given the power to "close the warehouse and [t]ake title to all grain stored in the warehouse . . . in trust for distribution . . . to all valid owners, depositors, or storers of grain who are holders of evidence of ownership of grain."[17] Additionally, the PSC "determine[s] the value of the shortage

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[10] See *Charleen J. v. Blake O.*, 289 Neb. 454, 855 N.W.2d 587 (2014).

[11] See, *State, ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933); *Hall v. Hall*, 123 Neb. 280, 242 N.W. 607 (1932).

[12] *State, ex rel. Sorensen, v. Nebraska State Bank, supra* note 11.

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

[14] *Id.* at 650, 820 N.W.2d at 62 (quoting *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998)).

[15] 73 C.J.S. *Public Administrative Law and Procedure* § 94 (2014).

[16] Neb. Rev. Stat. § 75-109.01(2) (Reissue 2009).

[17] § 88-547(1)

and the . . . loss to each owner, depositor, or storer of grain."[18] Read in conjunction with other provisions of the act, the PSC is to determine which claimants receive the "priority lien" under the act.[19] That priority may only be given to "valid owners, depositors, or storers of grain who are holders of evidence of ownership of grain"[20] or those who hold a check for purchase of grain stored in such warehouse which was issued by the warehouse licensee not more than 5 business days prior to closure of the warehouse.[21] When the PSC adjudicates claims under the Grain Warehouse Act, its objective is to determine those owners, depositors, storers, or qualified check holders at the time a warehouse is closed.

[12] Under the Grain Dealer Act, the PSC explicitly is given the power to "demand that such dealer's security be forfeited and may place the proceeds of the security in an interest-bearing trust until it fully determines each claim on the security. The [PSC] shall disburse the security according to each claim determined."[22] This statute gives the PSC limited jurisdiction to determine the claims that exist under the Grain Dealer Act on the date of a warehouse closure.

[13,14] Statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.[23] Since it is a matter of common law that administrative bodies do not have juridical powers, such as equitable jurisdiction, unless otherwise conferred by statute, we will not read such equitable powers into the PSC's

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[18] § 88-547(2).

[19] See §§ 88-547 and 88-547.01.

[20] § 88-547.01(2).

[21] § 88-530. See, also, 291 Neb. Admin. Code, ch. 8, § 002.18C5 (2014).

[22] § 75-906.

[23] *In re 2007 Appropriations of Niobrara River Waters, supra* note 13.

jurisdiction unless the statute explicitly says to do so. An action in equity must be founded on some recognized source of equity jurisdiction.[24]

[15-17] Fraud and misrepresentation give rise to the remedy of rescission of a contract.[25] An action for rescission sounds in equity.[26] Further, an action to impose a constructive trust is an equitable action.[27]

The sole duty of the PSC in these proceedings is to determine who has a claim under the Grain Warehouse Act and the Grain Dealer Act at the time of the closure of the warehouse. The determination of these claims is a limited proceeding.

The acts do not address the common-law theories of fraud, nor do they confer equitable jurisdiction on the PSC. Theories which ask for rescission of a contract or imposition of a constructive trust are equitable in nature. Therefore, the PSC was correct in limiting its jurisdiction in these proceedings and declining to exercise jurisdiction to determine the fraud claims. In its order determining claims in this case, the PSC properly recognized the limits of its statutory authority and the absence of any authority to grant equitable relief. The PSC was correct to decline jurisdiction over Gansebom's claims of fraudulent misrepresentation, concealment, and operation of a "Ponzi scheme" and correct to decline to impose a constructive trust. Further, the PSC was correct in declining to impose a constructive trust as a result of the fraud alleged by the Herians. Finally, the PSC was correct to decline to adjudicate the fraud claims of Christensen and to rescind or void his contract with PEI.

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[24] *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

[25] See, *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011); *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997).

[26] *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

[27] *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

It very well may be true that all of these claimants are entitled to some form of relief against PEI based on claims of fraud or other wrongdoing. However, the Grain Warehouse Act and the Grain Dealer Act simply do not allow all forms of relief through its terms. The limited scope of those acts does not allow the PSC to determine all claims of wrongdoing against PEI.

### 2. Grain Warehouse and Dealer Claims

Appellant Christensen argues that he should have been classified as an owner of grain in storage, rather than as a dealer, because the delayed-price contract he signed was not an enforceable contract for the sale of grain and that therefore, he never transferred title to his grain in storage. The PSC found that the contract was enforceable and, thus, denied Christensen's warehouse claim.

Cross-appellants the Herians argue that their claim was improperly classified as a dealer claim rather than as a warehouse claim and that it was improper to deny their claim as a whole. The Herians base their argument on the fact that they retained ownership in grain in storage by way of an in-store transfer. The PSC found that because the Herians did not show an official in-store transfer notice, the Herians had not satisfied their burden of proving that an in-store transfer occurred.

Cross-appellants Donnelly Trust, TTK, and Gansebom argue that they should have received treatment as qualified check holders under the Grain Warehouse Act, because PEI executed checks to each in satisfaction of an oral contract.

Cross-appellant Raabe also argues that he should have received treatment as a qualified check holder, because he held a check executed by PEI but it was returned for insufficient funds after PEI closed. The PSC denied Raabe recovery as a qualified check holder.

(a) Statutory Scheme

As the PSC stated, "[t]he Grain Warehouse Act and the Grain Dealer Act . . . cover very distinct activity." Those who are licensed as grain warehouses can buy, sell, and store grain.[28] In contrast, grain dealers can act only as a dealer among buyers and sellers of grain.[29] Both the Grain Warehouse Act and the Grain Dealer Act require that a business licensed under such acts carry a "security" or bond that is available for the benefit of the licensee's customers and clients in the event that the licensee is closed down or goes out of business.[30] The security is in an amount set by the PSC, pursuant to its rules and regulations.[31] The warehouse bond and the dealer bond cannot be combined, because the activity covered by each bond is unique and the requirements for bond protection under each bond are different. Despite the different activities, a business, such as PEI, may, and often does, have a business model under which it is licensed to both store grain and deal grain, and thus, both acts apply to the business, but each act applies to a different part of the business.[32]

Upon the closure of a licensed grain warehouseman under the Grain Warehouse Act, the PSC takes title to and may sell all of the grain in storage to satisfy, pro rata, those entitled to payment under the Grain Warehouse Act.[33] Proceeds from the sale of this grain is subject to a first priority lien in favor of valid owners, depositors, or storers of grain who are holders

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[28] See, e.g., *D.K. Buskirk & Sons v. State*, No. A-94-270, 1996 WL 45196 (Neb. App. Feb. 6, 1996) (not designated for permanent publication), *affirmed and remanded* 252 Neb. 84, 560 N.W.2d 462 (1997).

[29] *Id.*

[30] See §§ 88-530 and 75-903(4).

[31] *Id.*

[32] See, also, *D.K. Buskirk & Sons v. State, supra* note 28.

[33] § 88-547(1).

of evidence of ownership of grain.[34] This lien is preferred to any other lien or security interest in favor of any creditor of the warehouse licensee.[35] If the proceeds from the sale of grain are not enough to compensate all claimants, then the warehouse bond is also available for claimants that qualify under the Grain Warehouse Act.[36]

In contrast, upon the closure of a licensed grain dealer, those who have a dealer claim have only the dealer bond from which to recover.[37] In this case, this results in a full reimbursement to all claimants classified as warehouse claimants, as opposed to the $.09 per $1 due to those claimants under the Grain Dealer Act. Therefore, it is imperative to determine which claimants fall under which act.

### (b) Qualifications for Recovery Under Grain Warehouse Act

In order to qualify for the first priority lien under the Grain Warehouse Act, one must qualify as a valid owner, depositor, or storer of grain or as a qualified check holder.[38]

#### *(i) Storer of Grain in Warehouse*

As the PSC stated in its order, the Grain Warehouse Act applies and covers "those who store their grain in a warehouse, but still own the grain." "Grain in storage" is defined as "any grain which has been received at any warehouse and to which title has not been transferred to the warehouseman by signed contract or priced scale ticket."[39] Therefore, anyone who owns

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[34] *Id.*

[35] *Id.*

[36] §§ 88-530 and 88-547.01(2).

[37] § 88-547.

[38] See, § 88-547; 291 Neb. Admin. Code, ch. 8, §§ 001.01W, 002.05B, and 002.18C5 (2014).

[39] § 88-526(6).

"grain in storage" is considered a storer and entitled to recovery under the Grain Warehouse Act.

[18] We discussed the determination of an entity's status as owner, depositor, or storer of grain in *In re Claims Against Atlanta Elev., Inc.*[40] We stated that the statute

> establishes a temporal requirement, that is, a point in time at which the rights of entities claiming to be either "owners, depositors, or storers" of grain are fixed. . . . [A]n entity's status is determined "at that time" at which the PSC takes title to the grain stored in the warehouse, and it is an entity's status as an owner, depositor, or storer of grain in storage at such time that determines such entity's right to subsequently receive a pro rata distribution of the proceeds.[41]

In addition to a temporal requirement, we found that the statute also contains a physical requirement.[42] The grain must be "'stored in the warehouse'" at the time the PSC takes possession of the grain.[43] "The temporal and physical requirements necessarily result in preference being given to certain claimants who meet the requirements as compared to other entities who do not meet the requirements but nonetheless may have rights against the insolvent warehouse."[44]

Thus, it is significant to our analysis to determine the status of each individual or entity at the time the PSC took title to the grain on March 5, 2014.[45] In order to recover as an owner or

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[40] *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004) (superseded by statute as stated in *Telrite Corp. v. Nebraska Pub. Serv. Comm., supra* note 6).

[41] *Id.* at 606, 685 N.W.2d at 485 (quoting § 88-547(1)).

[42] *Id*. See, also, § 88-547(1).

[43] *Id.*

[44] *Mayfield v. Nebraska Pub. Serv. Comm.*, No. A-09-287, 2009 WL 5851467 at *2 (Neb. App. Dec. 15, 2009) (selected for posting to court Web site). See, also, *In re Claims Against Atlanta Elev., Inc., supra* note 40.

[45] See *In re Claims Against Atlanta Elev., Inc., supra* note 40.

storer of grain, each claimant must have held title to grain in storage on the date of the warehouse closure.

*(ii) Owner of Grain in Storage by Way of In-Store Transfer*

A claimant may also qualify as an owner of grain in storage if an in-store transfer has been completed in satisfaction of a direct delivery obligation.[46] The Grain Warehouse Act provides that grain is considered "[d]irect delivery" if the grain is "bought, sold, or transported in the name of a warehouse licensee, other than grain that is received at the licensed warehouse facilities."[47] Typically, when grain is direct delivered, such grain falls under the Grain Dealer Act until such time as a postdirect delivery storage position is created.[48] However, "a producer may . . . direct-deliver grain to a third-party warehouse and, through an instore transfer, the warehouse licensee or grain dealer can transfer title to warehouse-owned grain to the producer, creating a postdirect delivery storage position in the producer."[49]

The warehouse licensee may incur a "[d]irect delivery obligation" upon delivery of direct delivery grain.[50] A direct delivery obligation means "the obligation of a warehouse licensee or grain dealer to transfer title to warehouse-owned grain to a producer by an in-store transfer upon the delivery of direct delivery grain."[51] Further, "[a] direct delivery obligation is treated as a grain dealer obligation until such time as it is satisfied by an in-store transfer."[52] However, if an

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[46] § 88-526(2), (3), (7), and (8).

[47] § 88-526(2).

[48] See § 75-905(2).

[49] *Mayfield v. Nebraska Pub. Serv. Comm., supra* note 44, 2009 WL 5851467 at *3. See, also, § 88-526(2), (3), (7), and (8).

[50] § 88-526(3).

[51] *Id.*

[52] *Id.*

in-store transfer occurs, a postdirect delivery storage position occurs, and the producer or seller of grain acquires a position of a storer or owner of grain in the grain warehouse.[53]

In-store transfers occur when "a warehouse licensee transfers title to warehouse-owned grain to any person in satisfaction of a direct delivery obligation between the warehouse licensee or grain dealer and the producer, and the grain remains in the warehouse."[54] The PSC's regulations state that prima facie evidence of an in-store transfer is an "In-Store Transfer Notice" by the grain warehouse.[55]

*(iii) Qualified Check Holders*

Also statutorily entitled to protection under the Grain Warehouse Act are those "qualified check holders" who hold "a check for purchase of grain stored in such warehouse which was issued by the warehouse licensee not more than five business days prior to the cutoff date of operation of the warehouse, which shall be the date the [PSC] officially closes the warehouse."[56]

The PSC interpreted all check holder claims under one rationale. The PSC stated that "[g]enerally, the [Grain] Warehouse Act is intended to provide protection for producers storing grain at the warehouse." However, the PSC went on to discuss grain storers' responsibility to act as "prudent and reasonable businesspeople and seek payment for sold grain in a timely fashion." The PSC then ruled that "[t]hose claimants who *sold* stored grain prior to [the 5 days prior to PEI's official closing] are not valid owners, depositors, or storers of grain or qualified check holders" and that thus, they were not valid claimants under the Grain Warehouse Act. (Emphasis supplied.)

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[53] § 88-526(7).

[54] *Id.*

[55] 291 Neb. Admin. Code, ch. 8, § 002.07I (2014).

[56] § 88-530.

However, the PSC's interpretation of § 88-530 is incorrect. The plain language of the statute says that the check must have been "*issued* by the warehouse licensee not more than five business days prior to the cutoff date of operation of the warehouse."[57] The plain language of the statute makes the operative date for check holder claims the date the check was *issued*. In contrast, the PSC analyzed the check holders' claims from the date their grain was *sold* and *title transferred* to PEI. In order to determine which claims should have been granted pursuant to the issuance of checks, we must first determine what it means to "issue" a check in the context of the Grain Warehouse Act.

Black's Law Dictionary defines "issue" as "[t]o be put forth officially" or "[t]o send out or distribute officially."[58] Under Neb. Rev. Stat. U.C.C. § 3-105 (Reissue 2001), "issue" is defined as "the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person." "Delivery" is defined in Neb. Rev. Stat. U.C.C. § 1-201(15) (Cum. Supp. 2014) as the "voluntary transfer of possession." Black's Law Dictionary defines "delivery" as: "1. The formal act of voluntarily transferring something; esp., the act of bringing goods, letters, etc. to a particular person or place. 2. The thing or things so brought and transferred."[59]

[19] Accordingly, issuance of a check does not occur when the sale of grain occurs. Nor should the issuance of a check be defined as the date the check was written. Instead, issuance is the date that a check is first delivered by the maker or drawer, in this case, PEI.

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[57] *Id.* (emphasis supplied).

[58] Black's Law Dictionary 960 (10th ed. 2014).

[59] *Id.* at 521.

### (c) Qualifications for Recovery Under Grain Dealer Act

A claimant who can qualify for recovery under the Grain Dealer Act must (1) be a producer or owner within Nebraska who has "a valid claim arising from a sale to or purchase from a grain dealer" and (2) takes action to recover payment for grain "*within thirty days*" of shipment, issuance of negotiable instrument, or any apparent loss to be covered under the terms of the grain dealer's security.[60] Therefore, the operative date under the Grain Dealer Act is 30 days from the time that the individual or entity last had contact with the grain dealer.

[20,21] Cross-appellants Donnelly Trust, Raabe, TTK, and Gansebom were classified as grain dealers by the PSC and denied recovery because their grain was not delivered within 30 days prior to the closure of the warehouse. These four cross-appellants assigned as error the denial of their recovery in general, but they did not specifically argue that they were erroneously denied recovery under the Grain Dealer Act, but instead merely argued that they were erroneously denied recovery under the Grain Warehouse Act. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[61] Errors that are assigned but not argued will not be addressed by an appellate court.[62] Because Donnelly Trust, Raabe, TTK, and Gansebom do not argue that the PSC erred in finding that their dealer claims were time barred, we will not address this issue.

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[60] See §§ 75-903(4) and 75-905 (emphasis supplied).

[61] *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

[62] *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006); *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006); *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005).

### (d) Application of Grain Warehouse Act and Grain Dealer Act to Individual Claimants

#### *(i) Christensen's Delayed-Price Contract Is Valid Contract*

Appellant Christensen argues that the contract he signed was never validly formed because it lacked the requisite "meeting of the minds" or mutual intent, and the price term was not fixed in the contract. The PSC found the plain terms of the contract stated that title to Christensen's grain in storage had transferred to PEI upon the signing of the contract.

[22-28] The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement that alters, varies, or contradicts the terms of a written agreement.[63] The parol evidence rule is designed to preserve the integrity and certainty of written documents against disputes arising from fraudulent claims or faulty recollections of the parties' intent as expressed in the final writing.[64] "Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous."[65] A determination as to whether an ambiguity exists is made as a matter of law and on an objective basis, not by the subjective contentions of the parties.[66] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[67] "When a contract is unambiguous, the intentions of the parties must be determined from the contract itself."[68]

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[63] *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

[64] *Traudt v. Nebraska P. P. Dist.*, 197 Neb. 765, 251 N.W.2d 148 (1977).

[65] *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 147, 655 N.W.2d 390, 403 (2003).

[66] *Sack Bros. v. Tri-Valley Co-op, supra* note 63.

[67] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[68] *Spanish Oaks v. Hy-Vee, supra* note 65, 265 Neb. at 147, 655 N.W.2d at 403.

Testimony seeking to prove the parties' intent is considered parol evidence.[69]

[29] Further, an argument that the claimant did not read or understand the document he or she was signing is no defense to the formation of a contract.

> [C]ourts will not permit a party to avoid a contract into which that party has entered on the grounds that he or she did not attend to its terms, that he or she did not read the document which was signed and supposed it was different from its terms, or that it was a mere form.[70]

In *In re Claims Against Atlanta Elev., Inc.*,[71] the claimants argued that they did not understand the terms of the contracts and that notwithstanding the terms of the contracts, they did not intend to sell grain to the elevator. The claimants also argued that because the priced-to-arrive contracts did not contain a specified price, the contracts were incomplete and therefore unenforceable.[72] We refused to allow the parties to avoid their contracts on the grounds that they did not understand or read the contracts' terms or assumed the contracts said something different from their terms.[73]

Also, Neb. Rev. Stat. U.C.C. § 2-204(3) (Reissue 2001) provides that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness . . . ." With regard to an open price term, Neb. Rev. Stat. U.C.C. § 2-305(1) (Reissue 2001) provides that parties "can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if . . .

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[69] See, e.g., *Gibbons Ranches v. Bailey*, 289 Neb. 949, 857 N.W.2d 808 (2015); *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010); *Sack Bros. v. Tri-Valley Co-op, supra* note 63.

[70] *In re Claims Against Atlanta Elev., Inc., supra* note 40, 268 Neb. at 617, 685 N.W.2d at 493.

[71] *In re Claims Against Atlanta Elev., Inc., supra* note 40.

[72] *Id.*

[73] *Id.*

(a) nothing is said as to price." Again, in *In re Claims Against Atlanta Elev., Inc.*, we found that even though the contracts did not contain a price term, the contracts were still enforceable, and that thus, title to the claimants' grain in storage passed and they could no longer make claims under the Grain Warehouse Act.[74]

The delayed-price contract Christensen signed is not ambiguous. The language plainly and clearly states that title transfers to PEI at the time the document is executed. The contract was signed and executed by both Christensen and PEI. Because we look only at evidence of the parties' intent when the contract is otherwise ambiguous—and this contract is unambiguous—we must follow the plain terms of the contract. Testimony as to the intent of both parties is inadmissible in this case. Finally, as we have previously established, the fact that Christensen did not read or have knowledge of what he was signing is no defense. The fact that the price term was not supplied is not determinative in priced-later or delayed-price contracts and does not make the contract unenforceable under §§ 2-204(3) and 2-305(1).

We affirm the determination of the PSC that Christensen did not hold title to grain in storage at the time of the closure of the warehouse.

*(ii) Herians' Potential Status as Owners of Grain in Storage Via In-Store Transfer*

The PSC found that an in-store transfer was not executed in favor of the Herians. The PSC stated that "only upon the execution of an in-store transfer will an ownership interest in grain stored in a warehouse arise for a producer that direct delivered grain. Absent such a document, direct delivered grain will never result in an ownership position in grain stored in the elevator." The Herians argue that a document providing formal notice of an in-store transfer is merely prima facie

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[74] *Id.*

evidence of an in-store transfer, but not determinative of whether an in-store transfer occurred. We agree.

In this case, there is no question that the Herians' grain was direct delivered to other licensed public grain warehouses. When PEI took possession of the Herians' grain and delivered it to third-party grain terminals rather than PEI's warehouse, the Herians' grain became direct delivery grain. According to § 88-526(3), this direct delivery should have created a "direct delivery obligation" on the part of PEI. This obligation is treated as a dealer obligation (and thus as a dealer claim) until such time as it is satisfied by an in-store transfer. Therefore, if the obligation was satisfied by an in-store transfer, then the Herians can be considered owners of grain in storage at the time PEI closed.

PEI did not issue a formal notice of an in-store transfer. The PSC treated the nonexistence of a formal and executed in-store transfer notice as determinative of whether an in-store transfer occurred. The PSC said that "[a]bsent such a document, direct delivered grain will never result in an ownership position in grain stored in the elevator." This is incorrect.

[30,31] Though notice of an in-store transfer is considered prima facie evidence that an in-store transfer occurred, it is not the only evidence that can establish the occurrence of an in-store transfer. Prima facie proof is evidence sufficient to submit an issue to the fact finder and precludes a directed verdict on the issue.[75] Black's Law Dictionary defines "prima facie evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced."[76] However, although the statutes and regulations prescribe one form of evidence to establish a prima facie case that an in-store transfer occurred, other forms of evidence may also provide proof. A claimant may produce other forms of evidence that an in-store transfer occurred.

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[75] See, *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990).

[76] Black's Law Dictionary, *supra* note 58 at 677.

Title to grain, or "goods" within the meaning of the Uniform Commercial Code, passes in any manner agreed to by the parties.[77] Therefore, without any legislation to the contrary, an in-store transfer may still be accomplished, even though the grain warehouse did not create a written notice, as it is commanded by statute. Also, while PEI certainly should have issued a notice of in-store transfer, the failure to issue that notice does not defeat the case that an in-store transfer occurred.

We find significant the fact that when the Herians chose to sell grain from "open storage" in January 2014, they were allowed to do so. Had PEI not completed an in-store transfer of the grain delivered in 2013, and given the Herians a postdirect delivery storage position, it is inexplicable why the Herians would not have been able to sell grain from open storage in January 2014. Though a representative of PEI explained that an indication of "open storage" on a settlement sheet is the default setting on all transactions, there is no reason why PEI would allow the Herians to "sell" 9,801.428 bushels, pay the Herians for such sale, and show in the records 27,742.05 remaining bushels in the Herians' name. There is also no explanation by PEI of this particular transaction or whether the "open storage" indication on the settlement sheet was indicative of the Herians' grain's position in this particular case.

As further support for its finding that no in-store transfer occurred, the PSC reiterated evidence that the Herians' grain was direct delivered to third-party terminals. The direct delivery of grain to third-party terminals does not defeat the claim of an in-store transfer. In fact, a direct delivery is the very thing that gives rise to an in-store transfer under § 88-526(7).

Acknowledging that the lack of an in-store transfer notice does not defeat the existence of an in-store transfer, and because the Herians produced other strong indicators that an in-store transfer occurred and that they had a postdirect

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[77] See Neb. Rev. Stat. U.C.C. § 2-401 (Cum. Supp. 2014).

delivery storage status, we find that the Herians may recover under the Grain Warehouse Act as owners of grain in storage for their remaining bushels.

*(iii) Qualified Check Holder Claims*

As an opening matter, the cutoff date according to statute is "five *business* days" before the PSC officially closes the warehouse.[78] The official closure date is the date that the PSC entered an order closing the warehouse, which was March 5, 2014. Five business days prior to the closure of the warehouse is Wednesday, February 26. Therefore, those who were holders of checks that were issued by PEI between February 26 and March 5 will qualify as check holders under § 88-530.

a. Raabe Is Qualified Check Holder Under Grain Warehouse Act

PEI issued check No. 42900 to Raabe in the amount of $88,510.54 when PEI took the affirmative action of transferring possession of the check to Raabe on February 28, 2014. PEI's purpose in delivering the check was to create rights on the instrument in Raabe.

The closure of PEI's grain warehouse occurred on March 5, 2014. The statute allows recovery to all those holders of checks issued within 5 business days of the closure. When Raabe took delivery of the check on February 28, and became holder of the check on that date, he met the requirement of § 88-530. Thus, Raabe is entitled to recovery under the Grain Warehouse Act as a holder of check No. 42900 in the amount of $88,510.54.

b. Donnelly Trust, TTK, and Gansebom Are Not Qualified Check Holders Under Grain Warehouse Act

Checks Nos. 43095, 43081, and 43080 to Donnelly Trust, check No. 43083 to TTK, and check No. 43157 to Gansebom

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[78] § 88-530 (emphasis supplied).

were written, dated, and signed by PEI, but left undelivered in PEI's office at the time that PEI surrendered its license and the PSC took control of PEI.

Because the checks had yet to be delivered, PEI had not yet issued them. The delivery of the checks involves an affirmative action; and in this case, PEI took no action to deliver these checks to anyone. The cross-appellants argue that delivery occurred when PEI surrendered the warehouse to the PSC or when the PSC took control of PEI. However, in surrendering its business license to the PSC, PEI was taking no formal action regarding the checks specifically. The checks that remained in PEI's office or safe were never formally acted on, or delivered, and therefore, the checks that remained in PEI's office at the time of its closure were never issued.

Therefore, checks Nos. 43095, 43081, and 43080 to Donnelly Trust, check No. 43083 to TTK, and check No. 43157 to Gansebom were never issued and Donnelly Trust, TTK, and Gansebom do not qualify as check holders. As such, the PSC was correct to deny these three cross-appellants recovery under the Grain Warehouse Act.

### 3. No Standing to Challenge Classification of Uecker Transaction

Finally, cross-appellants Donnelly Trust, Raabe, TTK, and Gansebom argue that Uecker's transaction with PEI was a loan, and not a sale or forward contract, and that as such, he is not entitled to any recovery under the Grain Dealer Act. The PSC argues that the cross-appellants do not have standing to contest the classification of the Uecker transaction on appeal. We agree that Donnelly Trust, Raabe, TTK, and Gansebom do not have standing to contest the classification of the Uecker transaction.

[32-35] 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.[79] As an aspect of jurisdiction and justiciability, 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 the exercise of the court's remedial powers on the litigants' behalf.[80] In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining a direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.[81] If the party appealing the issue lacks standing, the court is without jurisdiction to decide the issues in the case.[82]

Though all of the cross-appellants challenging the classification of Uecker's claim originally made claims as dealers, those claims were denied, and those cross-appellants do not argue on appeal that their grain dealer claim was improperly denied. Since none of the cross-appellants who contest the classification of this transaction are classified, or still stand to be classified as "dealers" under the Grain Dealer Act, none of them will receive a benefit from the grain dealer bond. Because claims under the Grain Warehouse Act and Grain Dealer Act seek recovery from two separate pots of money, one seeking an interest in the warehouse recovery is not asserting an interest in the dealer bond. Without an interest in the dealer bond, the cross-appellants have no standing to challenge the distribution of the dealer bond.

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[79] *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010); *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005).

[80] *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[81] *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009); *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000); *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

[82] *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008).

Because these cross-appellants do not argue that the PSC erred in denying their dealer claims, they cannot show any injury or personal stake in that determination that would permit them to contest the allowance of Uecker's grain dealer claim. These cross-appellants thus lack standing to contest the PSC's approval of Uecker's claim under the Grain Dealer Act.

## VI. CONCLUSION

We affirm the finding of the PSC that it did not have jurisdiction to determine the fraud claims of appellant Christensen and of cross-appellants Gansebom and the Herians.

We affirm the finding of the PSC that appellant Christensen and cross-appellants Donnelly Trust, TTK, and Gansebom are not entitled to recovery under the Grain Warehouse Act.

We reverse the finding that cross-appellant Raabe is not a qualified check holder and find that he is entitled to recovery under the Grain Warehouse Act.

We reverse the finding that an in-store transfer did not occur, creating a postdirect delivery storage position in cross-appellants the Herians and find that they are entitled to recovery under the Grain Warehouse Act.

We find that cross-appellants Donnelly Trust, Raabe, TTK, and Gansebom do not have standing to challenge the classification of the Uecker transaction, and dismiss such claims.

Affirmed in part, and in part
reversed and dismissed.

Wright and Miller-Lerman, JJ., not participating.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# Lenard Arens, appellant, v. NEBCO, Inc., appellee.

870 N.W.2d 1

Filed September 18, 2015. No. S-14-290.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by these rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and an appellate court will not reverse a trial court's decision regarding relevance absent an abuse of discretion.
3. **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.
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 or exclude evidence on hearsay grounds.
5. **Directed Verdict: Appeal and Error.** In reviewing rulings on motions for directed verdict, an appellate court gives the nonmoving party the benefit of all evidence and reasonable inferences in his or her favor, and the question is whether a party is entitled to judgment as a matter of law.
6. **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.

7. **Evidence: Proof.** For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.
8. **Fair Employment Practices: Discrimination: Words and Phrases.** Under the Nebraska Fair Employment Practice Act, the threshold fact of consequence in a disability discrimination action is whether the plaintiff is a qualified individual with a disability—i.e., one who can perform the essential functions of the job with or without reasonable accommodations.
9. **Fair Employment Practices: Discrimination: Proof.** Under the Nebraska Fair Employment Practice Act, a covered employer's failure to make reasonable accommodations for a qualified individual's known physical or mental limitations is discrimination, unless the employer demonstrates that the accommodations would impose an undue hardship on business operations.
10. **Appeal and Error.** Unless an appellate court elects to notice plain error, it does not consider arguments and theories not presented to the lower court.
11. **Rules of Evidence: Hearsay: Records: Words and Phrases.** Under Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Reissue 2008), the business record exception to hearsay is not limited to records created by the holder of the records. It applies to a memorandum, report, record, or data compilation. The term "data compilation" is broad enough to include records furnished by third parties with knowledge of the relevant acts, events, or conditions if the third party has a duty to make the records and the holder of the record routinely compiles and keeps them.
12. **Rules of Evidence: Hearsay: Records.** Unlike Fed. R. Evid. 803(6), Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Reissue 2008), excludes opinions and diagnoses from the business record exception to hearsay.
13. **Trial: Evidence: Appeal and Error.** When part of an exhibit is inadmissible, a trial court has discretion to reject the exhibit entirely or to admit the admissible portion. Furthermore, because it is the proponent's responsibility to separate the admissible and inadmissible parts when offering evidence, an appellate court will ordinarily uphold a court's exclusion of an exhibit if the proponent did not properly limit its offer to the part or parts that are admissible.
14. ____: ____: ____. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.

15. **Evidence: Witnesses.** A party is generally permitted to present corroborating evidence on key issues, unless such evidence becomes excessive. But evidence from a neutral witness that corroborates a party's evidence on a central, contested issue is not cumulative—particularly if it is the party's best or most persuasive evidence.
16. **Fair Employment Practices: Discrimination: Proof.** Apart from an exception for summary judgments, in a discrimination action brought under the Nebraska Fair Employment Practice Act, a court evaluates the evidence under the three-part burden-shifting framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under that framework, (1) the plaintiff has the burden of proving a prima facie case of discrimination; (2) if the plaintiff proves a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action; and (3) if the employer articulates a nondiscriminatory reason for its action, the employee maintains the burden of proving that the stated reason was pretextual.
17. **Directed Verdict: Evidence: Appeal and Error.** A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law. In reviewing that determination, an appellate court gives the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.
18. **Fair Employment Practices: Legislature: Intent: Discrimination: Courts.** The Legislature intended that its 1993 amendments to the Nebraska Fair Employment Practice Act would provide the same protections from employment discrimination that are provided under title I of the Americans with Disabilities Act of 1990. So it is appropriate for a court to consider how federal courts have interpreted the act's counterparts to those amendments.
19. **Fair Employment Practices: Discrimination: Proof.** To show a business necessity for requiring an employee (as distinguished from an applicant) to submit to a medical examination under Neb. Rev. Stat. § 48-1107.02(10) (Reissue 2010), an employer has the burden to show that (1) the business necessity is vital to the business; (2) it has a legitimate, nondiscriminatory reason to doubt the employee's ability to perform the essential functions of his or her duties; and (3) the examination is no broader than necessary. There must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his or her job. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions.

20. ____: ____: ____. Under Neb. Rev. Stat. § 48-1107.02(10) (Reissue 2010), the business necessity standard for required medical examinations is an objective test.
21. ____: ____: ____. Under Neb. Rev. Stat. § 48-1107.02(10) (Reissue 2010), whether an employer requires similarly situated employees to submit to a medical examination is relevant to whether the employer considers such examinations a business necessity. But any comparison between employees must be made with an eye to the ultimate inquiry, i.e., the necessity of the examination of the plaintiff. An employer's disparate treatment of employees regarding medical examinations cannot override substantial evidence that the employer had good reason to doubt the plaintiff's ability to perform the essential functions of the job.
22. **Employer and Employee: Discrimination.** An employer's doubts about an employee's ability to perform the essential functions of a job may be created by an employee's request for accommodations, frequent absences, or request for leave because of his or her medical condition. Such doubts can also be raised by the employer's knowledge of an employee's behavior that poses a direct threat to the employee or others.
23. **Employer and Employee: Discrimination: Proof.** Requiring an employee to submit to a medical examination is consistent with a business necessity only if the employer shows significant evidence that a reasonable person would doubt that the employee could perform the essential functions of the job, with or without reasonable accommodations, because of a medical condition.

Appeal from the District Court for Lancaster County: Jodi Nelson, Judge. Reversed and remanded for a new trial.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Shannon L. Doering and Luke F. Vavricek for appellee.

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

Connolly, J.

## I. SUMMARY

The appellant, Lenard Arens, appeals from a jury verdict for NEBCO, Inc. (Nebco), in his disability discrimination action

under the Nebraska Fair Employment Practice Act (the Act).[1] He argues that the court's adverse evidentiary rulings prejudiced him and that the court erred in failing to direct a verdict for him. He moved for a general directed verdict and a directed verdict on his claim that Nebco required him to take medical examinations that were unlawful under the Act.

## II. PARTIES' GENERAL CONTENTIONS

In his complaint, Arens alleged that work-related accidents had limited his ability to climb and caused memory impairments that required him to have written instructions. He alleged that Nebco was aware of his disabilities and discriminated against him under the Act. And he alleged that Nebco terminated his employment for violating standards or conditions of employment that did not apply to employees without disabilities.

At trial, Arens primarily sought to prove that Nebco failed to accommodate his known mental and physical limitations, accommodations that it had previously considered reasonable. He argues the court deprived him of a fair trial by improperly excluding evidence that was crucial to this claim. Additionally, he sought to show that Nebco transferred him for driving incidents or conduct that it accepted from other drivers. He argues that this evidence showed Nebco's purported reasons for its adverse employment actions against him were pretextual as a matter of law. He moved for a directed verdict for that reason. He also moved for a directed verdict on his claim that Nebco discriminated against him by requiring him to complete medical examinations to perform work he was already doing. He argues that the court erred in overruling his motion because the examinations were per se unlawful discrimination under the Act.

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[1] See Neb. Rev. Stat. §§ 48-1101 to 48-1126 (Reissue 2010 & Cum. Supp. 2014).

Nebco counters that it suspended Arens from driving a tractor-trailer and transferred him to driving a concrete truck because he was "irresponsible, insubordinate and reckless."[2] It further argues that driving a concrete truck required different physical abilities than those required for driving a tractor-trailer. So Nebco contends that it properly required Arens to take a "'fit for duty'" examination, as any other employee would have to do.[3] Finally, Nebco claims that it discharged Arens for failing to comply with employer-mandated counseling as a condition for laid-off employment status.

## III. BACKGROUND

### 1. Statutory Prohibitions

Under the Act, it is unlawful for a covered employer to take any of the following actions because of a person's disability: "To fail or refuse to hire, to discharge, or to harass any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment . . . ."[4] Apart from exceptions that do not apply, disability means "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (b) a record of such an impairment, or (c) being regarded as having such an impairment."[5] The Act does not define major life activities. A person is a "[q]ualified individual with a disability" under the Act if he or she can perform the essential functions of the job with or without reasonable accommodations.[6]

Reasonable accommodations include employer actions such as job restructuring, reassignment to a vacant position, and appropriate adjustment or modification of examinations

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[2] Brief for appellee at 12.

[3] *Id.*

[4] See § 48-1104(1).

[5] See § 48-1102(9).

[6] See § 48-1102(10)(a).

or policies.[7] It does not include accommodations that would impose an undue financial hardship on the employer.[8]

In addition to the Act's general prohibition against discriminatory employment practices, § 48-1107.02 sets forth a nonexclusive list of conduct that constitutes discrimination against a qualified individual with a disability. Under subsection (5), it is discrimination for a covered employer not to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer demonstrates that the accommodations would impose an undue hardship on business operations.[9] Under subsection (7), it is discrimination for a covered employer to use "qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability . . . unless the standard, test, or other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity."[10] And under subsection (10), it is discrimination to require an employee who is a qualified individual with a disability to take a medical examination unless the examination "is shown to be job-related and consistent with business necessity."[11]

### 2. Arens' Excluded Evidence

Before trial, the court heard Nebco's motion in limine to exclude exhibits 1 and 2, which comprised a letter and reports that were prepared in 1996 and 1998 by David Utley, a vocational rehabilitation counselor. Arens intended to offer this evidence to show Nebco's knowledge and previous accommodation of his mental impairments after a work-related

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[7] See § 48-1102(11).

[8] See *id.*

[9] See § 48-1107.02(5).

[10] § 48-1107.02(7).

[11] § 48-1107.02(10).

accident. The court excluded the exhibits as hearsay. At trial, the court allowed Arens to make an offer of proof of Utley's testimony out of the jury's presence, after which Arens reoffered exhibits 1 and 2.

In the offer of proof, Utley testified that he had gathered facts and reviewed Arens' medical evaluations to determine his permanent work restrictions after a 1996 work-related accident. Arens sustained a traumatic brain injury in the accident. Utley said the reports from Arens' neuropsychological evaluations showed that (1) he had difficulty with attention, concentration, information recall, and emotional distress; and (2) he would likely need accommodations for his job, including written instructions. In 1998, Utley spoke to Nebco's agents about the accommodations that Arens would need for his permanent work restrictions. He said Nebco's agents knew Arens had memory problems and conflicts with coworkers but told him that they could accommodate his needs. Utley said that if Nebco had not been willing to accommodate Arens' mental impairments, his evaluation of Arens' loss of earning capacity could have been much higher.

Utley testified that his loss of earning report was a document that he regularly kept in the course of his consulting business. He admitted on cross-examination that (1) his consulting firm had destroyed his original reports before 2003 because the firm had closed Arens' case and (2) his testimony rested on his review of his reports. Nebco objected that (1) Utley could not provide a medical opinion; (2) his testimony was irrelevant, because it had nothing to do with Arens' discharge; (3) his testimony was cumulative because Arens had already testified that he received written instructions; and (4) Utley's testimony rested on documents that were hearsay.

In his offer of proof, Arens argued that the court should minimally allow Utley to state what his permanent work restrictions were in 1998 and that Nebco was willing to accommodate them. Additionally, Arens argued that Utley's report was relevant to prove that before Nebco discharged him, he had

shown the report to Lynn Blodgett, Nebco's human resources director. The court ruled that Utley's testimony was irrelevant to the proceedings. The court also excluded his reports in exhibits 1 and 2 as containing layers of hearsay.

### 3. Historical Facts

Nebco terminated Arens' employment in 2010. He had worked for Nebco since 1976. Beginning in 1978, he drove a concrete truck. But about 1986, he sustained a shattered kneecap in a work accident. Afterward, driving a concrete truck in the city was difficult because it required him to use his "clutch leg" often. He also said that concrete truckdrivers must climb a high ladder to wash out the mixing drum, often several times a day, which was difficult for him because there is little to hold onto. In 1990, his supervisor, Ron Hansen, assigned him to drive a tractor-trailer to deliver unmixed concrete materials to jobsites because it was easier on Arens' leg.

Later, Arens sustained a brain injury while making a delivery with a flatbed truck. Although he did not remember the accident, he knew he had fallen off the truck and been found unconscious. He was absent from work for 6 months and required rehabilitative care for speech and memory problems. He said he could not drive a concrete truck after this injury because he could not climb higher than his own height. He said that he was unstable above that height because after his injury, he experienced fear and dizzy spells when climbing ladders.

Arens' coworkers told him that he was not the same, but he thought he had not changed because "that's the way head injuries are." He continued to see a mental health professional after returning to work. He said Nebco employees would give him written instructions on order sheets because of his short-term memory problems.

Hansen was Arens' supervisor from 1978 until Hansen retired in the summer of 2006. Afterward, Gordon Wisbey was Arens' supervisor. Arens believed that Wisbey singled him out

for complaints about his work and ignored his disabilities. In October 2006, Wisbey documented an oral reprimand that he gave to Arens over a truck accident that damaged an electrical switchbox at a jobsite. Arens had hit the switchbox with his trailer while making a sharp turn into the driveway at the jobsite. Arens documented the accident in a damage report the day after it occurred. He reported that he had to watch a guard directing his tractor-trailer during the turn, which distracted him for a few seconds. Wisbey reprimanded him the next day. The reprimand stated that Nebco would not tolerate this behavior and that further instances of such behavior would result in more severe discipline, "up to and including termination." (Emphasis omitted.)

Arens testified that Hansen had never assigned him to drive Nebco's sole flatbed trailer with a forklift on the back because of Arens' climbing difficulties. (The driver must climb up onto the back of the trailer and then climb up into the forklift.) Instead, Hansen had assigned him to drive a flatbed trailer without a forklift. This testimony was uncontroverted.

But in 2008, Wisbey required Arens to drive the forklift truck. Arens said that he told Wisbey driving that truck was difficult for him because of his disabilities but that he feared losing his job if he did not comply. Wisbey denied that Arens had expressed an unwillingness to drive the forklift truck or told him that Hansen would not require him to drive it because of his disabilities. Wisbey conceded that driving the forklift truck was a more strenuous job and that two previous drivers with less seniority than Arens had also driven it. Wisbey had reassigned one of the junior drivers because he did not like driving the forklift truck and Wisbey wanted to accommodate his preference.

(a) Truckyard Incident

On December 6, 2010, Arens avoided a vehicle accident when he turned his truck into the driveway of Nebco's

truckyard from a highway in Lincoln. He stated that as he was turning the corner into the driveway, cars rapidly approached the driveway from the opposite direction, which required him to turn the corner sharply to avoid an accident. This maneuver caused the back tires of the trailer to go over the grass close to a culvert. Arens said he was going only about 10 m.p.h. but was afraid to come to a complete stop on the highway because of heavy traffic. He said he maneuvered the turn the best he could, but a "tarp box" on the underside of the trailer hit the ground, scraping up some sod beside the driveway. Arens said he had someone from the garage check the tarp box and was told that it was not damaged.

When Arens clocked out on that Monday, a damage report was attached to his timecard. The damage report form required drivers to check whether they were reporting an auto accident or property damage. A separate acknowledgment signed by Arens in November 2010 stated that the employee understood the following required procedures:

- An incident report had to be completed within 24 hours after an incident even if no medical aid was provided to the employee, which form was to be provided by the driver's supervisor;
- an injury report had to be completed within 2 hours of an injury; and
- a "Truck Accident/Property Damage Report" had to be completed within 2 hours after an accident.

The acknowledgment did not define an "incident," and the record does not contain an "incident report" that is distinguishable from a "damage report."

Arens told a dispatcher that completing a damage report was unnecessary because there was no damage. He said that because tractor-trailer drivers frequently drive over grass, he did not think ripping up some sod required an incident report. Arens pointed to tracks in a photograph of the truckyard driveway that he believed showed other trucks had run over the grass in the same place that his truck did. Arens did fill

out a maintenance report to explain why the tarp box needed to be checked for damage.

(b) Roundabout Incident

On Tuesday, December 7, 2010, Wisbey asked Arens why he did not file an incident report on December 6. Arens responded that there was no damage and walked away. Arens said that on the same day, Nebco employees overloaded his truck for a delivery in Lincoln on Wednesday. Arens complained about the weight of the materials and the way they were stacked around the forklift, but he complied with Nebco's directive to make the delivery on Wednesday. When he maneuvered a roundabout, however, the truck was damaged when the front frame of the trailer hooked the tractor. He said that it was difficult to make the maneuver because of the excessive weight on the truck. Arens said that the same problem had occurred numerous times, including one other time to himself, and that it would have happened to any driver making this delivery. He stated that Nebco did not direct him to take a route that would have avoided the roundabout.

When Arens arrived at the delivery site on Wednesday, December 8, 2010, the customer said he had not ordered that much material, did not want it all unloaded, and had asked for delivery on a different type of truck. Arens said that making the delivery in the forklift truck was unnecessary. He did not file a damage report but did complete a maintenance report. He considered the incident an unavoidable problem that he had not caused. Wisbey said that other drivers had safely maneuvered roundabouts in trucks of similar lengths.

That Wednesday, Wisbey did not discuss the roundabout incident with Arens or place a damage report on his timecard. He said he had already talked to the general manager and had developed a plan for dealing with Arens. On Thursday, December 9, 2010, Wisbey completed a damage report for the roundabout incident that stated Arens "somehow got truck and trailer in a bind" and damaged the truck. He estimated

the damage to be $2,500. He also called Arens on Thursday while Arens was driving and said that if he had been at work on Monday, the day of the truckyard incident, he would have fired Arens. Arens said that he was dumbfounded and terrified by Wisbey's statement.

### (c) Nebco's Adverse Employment Actions

Early on Friday morning, December 10, 2010, Wisbey called Arens into his office. Arens said Wisbey told him that he could not work at Nebco. Arens said Wisbey's tone was angry and berating and left him in tears. Arens believed that Nebco had discharged him. Wisbey admitted that he told Arens he could not drive a tractor-trailer again. He said he told Arens that he was reassigning him to drive a concrete truck. Wisbey filled out a damage report that Friday about the truckyard incident on the previous Monday. The report stated that Arens had cut his turn short rather than stopping his truck, causing his inside trailer wheels to drop off the drive and into the ditch. It further stated that the maneuver had caused property damage to the yard and a toolbox under the trailer and that Arens was seen replacing the sod. Wisbey estimated the damage to be $250.

Because it was a slow time for delivering premixed concrete, Arens' transfer meant that he was laid off and would not receive any income unless the company called him back to duty the following year. Wisbey did not consider reassigning Arens to a mechanic position. He said Arens cried and repeatedly asked to just go back to driving his former truck, without a forklift. Wisbey said that he was frustrated during the 3-hour meeting because Arens had his head in his hands, would not look at Wisbey, and did not appear to understand Wisbey's statements. Wisbey denied knowing that Arens had sustained a head injury, that he had emotional problems, or that he could not drive a concrete truck. Wisbey admitted that he would have permitted Arens to continue driving the forklift

truck and would not have laid him off except for the driving incidents on December 6 and 8, 2010.

Wisbey also admitted that in 2009 and 2010, other drivers under his supervision possibly had as many as 20 total accidents. He admitted that when he drove a concrete truck, he also had accidents. He admitted that other truckdrivers besides Arens had not filed incident reports and that he had filled out reports for other drivers. He could not recall reassigning any of these drivers to different positions because they had an accident or failed to file an incident report.

Before Arens left Wisbey's office on Friday, December 10, 2010, Wisbey scheduled an appointment for him on the following Monday at an occupational health facility for a screening examination to determine if he could drive a concrete truck. Wisbey knew Arens had just completed a physical to maintain his commercial driver's license. He admitted that Arens did not have problems when he drove the flatbed truck without a forklift and that a screening physical would not have been required if Wisbey had allowed Arens to return to driving his former truck.

On Monday morning, December 13, 2010, Arens spoke to Blodgett, the human resources director. Blodgett said that Arens told her he was going to a screening physical and was not sure why. He wanted an appointment with her and Wisbey. Blodgett scheduled the appointment for that afternoon. Blodgett said Arens showed her a letter or accommodation report that stated Nebco should give Arens written instructions. When Arens' attorney asked her if Arens had shown her exhibit 1—Utley's 1998 report—Nebco objected that the court had excluded this evidence. The court allowed Arens to ask Blodgett whether Arens had shown her exhibit 1 but warned that he could not ask her about the document itself. Blodgett said she had not seen the document well enough to know whether Arens had shown it to her. After Arens impeached Blodgett with her meeting notes, she admitted that Nebco's nurse knew about Arens' need to have instructions written

down so that he could understand them because the nurse had worked with his doctor many years earlier.

Wisbey said that on Monday afternoon, Arens was distraught that Nebco was transferring him. During the meeting, Wisbey called Nebco's nurse and learned that Arens had failed the screening physical to drive a concrete truck. Nebco's examiner failed Arens because he could not climb an 18-inch step or perform repetitive squats. Arens said that he informed Wisbey and Blodgett that driving a concrete truck was a problem for him because he could not climb ladders anymore to wash out the drum. Arens asked several times if he could drive a dump truck or his former truck.

Blodgett admitted that Arens said he had injured his knee but had learned to compensate for the injury and drive his former truck. She originally documented that the physical showed Arens could drive his former truck. But on cross-examination by Nebco, Blodgett said that after further investigation, she later documented that the physical showed Arens should not perform either job—driving a concrete truck or his former truck. She said Wisbey told Arens that he could not put Arens back in his former truck because he could not meet the physical requirements.

Only after informing Arens that he failed the physical did Wisbey discuss Arens' driving accidents and failure to file a report. Wisbey admitted that the concrete truckdriver who replaced Arens did not have to take another physical before driving the tractor-trailer with a forklift because Nebco's drivers are cross-trained and moved around.

At the December 13, 2010, meeting, Arens became very upset that Wisbey would not let him drive his former truck without the forklift. Wisbey and Blodgett were concerned that he would hurt himself. Wisbey said he gave Arens a card and a pamphlet for counseling through the employee assistance program and told Arens that he needed to attend a meeting with those providers. Blodgett said that Wisbey told Arens that he must attend employer-mandated counseling as a

condition for laid-off employment status. Wisbey denied that Arens told him that he already had a psychologist whom he was seeing.

Arens said Wisbey "threw a card" at him but did not write out instructions to go to counseling, state the purpose of the counseling, or inform him that Nebco would discharge him if he failed to attend. Blodgett said she called the employee assistance program provider and reported that Nebco was referring Arens for employer-mandated services, that he was very upset, and that Nebco's agents did not know how to handle the situation. She said the counseling was for Arens' benefit to help him work through his problems. She did not state any problems that Nebco wanted Arens to correct, such as not following instructions. She spoke to Arens again on December 16, 2010, and reminded him that the counseling was mandated.

Arens said he believed that Nebco had discharged him on December 10 and 13, 2010. But he called back after December 13 and asked to be transferred to a mechanic position. Wisbey said he did not have authority to hire someone for employment in the garage. But Wisbey admitted that he had frequently transferred another concrete truckdriver to a mechanic position so that he would not be laid off during slow times. Blodgett said those positions are filled by employees who have been transferring in for several years.

Wisbey said he intended to offer Arens laid-off status at this meeting, not to terminate him. He said that he suspended Arens on December 10, 2010, but allowed him to take vacation days starting December 13. Nebco pointed to this evidence to show that it did not discharge Arens on December 10 or 13. But Wisbey admitted that he did not have a plan for Arens to show up for work and earn wages after December 13.

Arens said he called the provider's office on the card that Wisbey had given him and reported that he was already seeing a psychologist. He said the provider told him it was not mandatory that he also receive counseling from that office. On

December 21, 2010, Wisbey informed Arens by letter that his employment had been terminated because he failed to report to employer-mandated counseling "as you represented you would do at our meeting." The provider could not verify whether Nebco had referred Arens for counseling or whether Arens had called to ask whether he could continue to see his own psychologist. Wisbey admitted that when he wrote the termination letter on December 21, he knew that Arens had told Blodgett he was entitled to disability accommodations.

On cross-examination, Nebco showed Arens two medical releases from 2007 that were issued after he had a hip replacement surgery in December 2006. The March 2007 release recommended that he return to work but restricted him from climbing ladders or stairs. The June 2007 release imposed no restrictions. But on redirect examination, Arens stated that the physician who treated his hip had never treated him for his head injury.

### (d) Procedural History

At the close of the evidence, Arens moved for a general directed verdict. He also moved for a directed verdict because under the Act, Nebco's demand that Arens submit to medical examinations was illegal as a matter of law. He asked the court to instruct the jury to that effect and allow it to determine damages. The court overruled the motions. The jury returned a verdict for Nebco.

## IV. ASSIGNMENTS OF ERROR

Arens assigns, restated, that the court erred as follows:

(1) sustaining Nebco's motion in limine to exclude the testimony of Utley and exhibits 1 and 2;

(2) upholding the jury's verdict for Nebco because it was unsupported by the evidence and no reasonable jury could have concluded that Nebco's articulated reason for its disparate treatment of Arens was not a pretext for discrimination;

(3) overruling Arens' motion for a directed verdict because Nebco's physical examination of Arens was per se unlawful and its treatment of him was based on his disability; and

(4) overruling Arens' motion for a new trial because the verdict was not supported by the evidence, the court erroneously ruled on the admissibility of evidence and trial motions, and the court's evidentiary rulings prevented Arens from receiving a fair trial.

We note that Arens also argues that the court improperly instructed the jury on the *McDonnell Douglas Corp.*[12] framework for shifting burdens of production. But we do not address this argument because it is not assigned as error in his brief.[13]

## V. STANDARD OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by these rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[14] The exercise of judicial discretion is implicit in determining the relevance of evidence, and we will not reverse a trial court's decision regarding relevance absent an abuse of discretion.[15] 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.[16]

[4] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's

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[12] See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[13] See, e.g., *Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015).

[14] *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015).

[15] *Id.*

[16] *Credit Mgmt. Servs. v. Jefferson*, 290 Neb. 664, 861 N.W.2d 432 (2015).

ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.[17]

[5] In reviewing rulings on motions for directed verdict, we give the nonmoving party the benefit of all evidence and reasonable inferences in his or her favor, and the question is whether a party is entitled to judgment as a matter of law.[18]

## VI. ANALYSIS

### 1. Court Erred in Excluding Utley's Testimony

As noted, the court excluded Utley's testimony as irrelevant and exhibits 1 and 2 as hearsay. From this evidence, Arens intended to show that he had permanent mental impairments following his 1996 brain injury, that Nebco had accommodated them in the past, and that Nebco could have accommodated him in 2010. Arens contends that the court erred in excluding this evidence, depriving him of a fair trial.

Regarding Utley's testimony, Nebco contends that because Utley had not seen Arens since 1998, his testimony was not relevant to any issue at trial. We disagree.

[6,7] 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] For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.[20]

[8] Under the Act, the threshold fact of consequence in a disability discrimination action is whether the plaintiff is a qualified individual with a disability—i.e., one who can

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

[18] *First Express Servs. Group v. Easter*, 286 Neb. 912, 840 N.W.2d 465 (2013).

[19] *Griffith, supra* note 14.

[20] *Id.*

perform the essential functions of the job with or without reasonable accommodations. Utley's testimony was obviously relevant to establishing whether Arens had a disability and whether he had previously performed his job with reasonable accommodations.

[9] Furthermore, under the Act, a covered employer's failure to make reasonable accommodations for a qualified individual's *known* physical or mental limitations is discrimination, unless the employer demonstrates that accommodating the individual's limitations would impose an undue hardship on business operations.[21] So Utley's testimony was also relevant to establishing Nebco's knowledge of Arens' mental impairments, including his conflicts with coworkers after his 1996 accident. It was also relevant to whether Nebco had previously considered its accommodations of his mental impairments reasonable. Nebco does not argue that Arens' mental impairments did not affect a major life activity. And even if Utley had not seen Arens since 1998, his testimony would have established that Arens' impairments and work restrictions in 1998 were permanent. Although Utley relied upon medical opinions to describe Arens' impairments, as a vocational rehabilitation counselor, he could relate his own opinions based on other experts' conclusions.[22] Thus, the court should have admitted Utley's opinions bearing on these issues. We conclude that the court erred in excluding Utley's testimony as irrelevant.

### 2. Court Did Not Abuse Its Discretion in Excluding Exhibits 1 and 2

Regarding exhibits 1 and 2, Arens argues that Utley's documents were in Nebco's personnel file for Arens and constituted its business records. Nebco does not respond to this

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[21] See § 48-1107.02(5).

[22] See, e.g., *Brennan v. Reinhart Institutional Foods*, 211 F.3d 449 (8th Cir. 2000); 2 McCormick on Evidence § 324.3 (Kenneth S. Broun et al. eds., 7th ed. 2013).

argument. Instead, it argues that the court properly excluded the exhibits because they contained multiple levels of hearsay. It argues that Arens could have presented only the testimony of the individuals whose opinions and reports Utley had reviewed to reach the conclusions in his reports. In Arens' reply brief, he responds that Nebco's argument is contrary to its own reliance on Arens' medical records in its personnel file. Specifically, he notes that Nebco presented evidence from its personnel file that a physician released Arens to return to work without restrictions following his hip replacement surgery in December 2006.

[10] We recognize that Nebco also relied on medical records of Arens' physical limitations in its files. But we do not consider here whether the documents in exhibits 1 and 2 were admissible under a different theory because Arens argued only that they were admissible as business records. Unless we elect to notice plain error, we do not consider arguments and theories not presented to the lower court.[23]

Under Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Reissue 2008), business records are an exception to the general exclusion of hearsay evidence:

> A memorandum, report, record, *or data compilation*, in any form, of acts, events, or conditions, other than opinions or diagnoses, made at or near the time of such acts, events, or conditions, in the course of a regularly conducted activity, if it was the regular course of such activity to make such memorandum, report, record, or data compilation at the time of such act, event, or condition, or within a reasonable time thereafter, as shown by the testimony of the custodian or other qualified witness unless the source of information or method or circumstances of preparation indicate lack of trustworthiness.

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[23] See, *Wayne G. v. Jacqueline W.*, 288 Neb. 262, 847 N.W.2d 85 (2014); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

(Emphasis supplied.) Parenthetically, we note that in 2014, after this trial, the Legislature amended § 27-803(5) to add an exception for acquired business records.[24] But that amendment is not relevant to our analysis.

[11] The important point here is that under § 27-803(5), the business record exception to hearsay is not limited to records created by the holder of the records. It applies to a memorandum, report, record, or *data compilation*. The term "data compilation" is broad enough to include records furnished by third parties with knowledge of the relevant acts, events, or conditions if the third party has a duty to make the records and the holder of the record routinely compiles and keeps them.[25]

Utley's documents in exhibits 1 and 2 were prepared by him as a regular part of his duties at the relevant times. Because Utley prepared them, he was a person qualified to authenticate them. Nebco did not deny that the records were from its own files or object that Arens' foundation evidence for the exception was insufficient. And there was evidence that Nebco had relied on the records.[26] We note that federal courts have held that medical records routinely made by a medical provider are admissible as business records when they are kept in an employee's file and the plaintiff shows that the physician who made the record did so in the relevant timeframe and as part of his or her regular practice.[27] We

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[24] See, 2014 Neb. Laws, L.B. 788, § 7, codified at Neb. Rev. Stat. § 27-803(5)(b) (Cum. Supp. 2014); Floor Debate, 103d Leg., 2d Sess. 94-95 (Apr. 9, 2014) (explaining that amendment 2929 to L.B. 788 was originally presented as L.B. 151 and carried over); Judiciary Committee Hearing, L.B. 151, 103d Leg., 1st Sess. 1 (Jan. 25, 2013).

[25] See, e.g., *Gallegos v. Swift & Co.*, 237 F.R.D. 633 (D. Colo. 2006).

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

[27] See, *Hansen v. Fincantieri Marine Group, LLC*, 763 F.3d 832 (7th Cir. 2014); *Pace v. National R.R. Passenger Corp.*, 291 F. Supp. 2d 93 (D. Conn. 2003).

conclude that under these circumstances, the foundational requirements for admission were satisfied.

[12] But Nebraska's business record exception to hearsay is not a carbon copy of its federal counterpart.[28] Unlike Fed. R. Evid. 803(6), Nebraska's rule 803(5) excludes opinions and diagnoses from the business record exception. So Utley's opinions and Arens' medical diagnoses in these records were not admissible under this exception.

[13] It is true there were factual statements in Utley's reports which were admissible. Moreover, factual statements by Nebco's agents did not present a layered hearsay problem.[29] But when part of an exhibit is inadmissible, a trial court has discretion to reject the exhibit entirely or to admit the admissible portion. Furthermore, because it is the proponent's responsibility to separate the admissible and inadmissible parts when offering evidence, we will ordinarily uphold a court's exclusion of an exhibit if the proponent did not properly limit its offer to the part or parts that are admissible.[30]

Because Arens did not limit his offer of proof to admissible factual statements in Utley's reports, we conclude that the court did not abuse its discretion in excluding the exhibits.

### 3. Court's Exclusion of Utley's Testimony Was Reversible Error

[14] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a

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[28] See R. Collin Mangrum, Mangrum on Nebraska Evidence 865, 870 (2015).

[29] See Neb. Evid. R. 801(4)(b)(iv), Neb. Rev. Stat. § 27-801(4)(b)(iv) (Reissue 2008).

[30] See, *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013); *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994); 1 McCormick on Evidence § 51 (Kenneth S. Broun et al. eds., 7th ed. 2013); 88 C.J.S. *Trial* § 182 (2012).

substantial right of the complaining party.[31] Nebco argues that even if the court incorrectly excluded Utley's testimony, the errors did not prejudice Arens because he testified that his brain injury affected his daily interactions with his coworkers and that Nebco had agreed to accommodate this issue. Nebco contends that a court's improper exclusion of evidence is not ordinarily prejudicial when the court admitted substantially similar evidence without objection. Arens responds that Utley's testimony was different from his own testimony about his injuries. We agree.

First, we note that Nebco incorrectly argues that "Arens testified that he had 'a permanent traumatic brain injury which affected his daily interactions with his coworkers' and that 'Nebco agreed to accommodate [that] issue.'"[32] Nebco pulls this quote from Arens' brief on appeal. But in this quote, Arens was arguing what his excluded evidence would have proved. And Nebco's citations to the record do not support its argument that Arens testified to the same facts that Utley's testimony would have shown.

It is true that Arens testified that after his brain injury, his coworkers told him that his personality had changed and that there was something wrong with him. But Arens could not express what had changed because he believed that he was the same as he had always been. He did not testify about his emotional distress, and he lacked objective awareness regarding his conflicts with coworkers. Although he acknowledged his relationship with Wisbey had deteriorated over the years, he said Wisbey had never discussed his conduct with him. Arens attributed their deteriorating relationship solely to Wisbey's discrimination. In contrast, Utley would have testified that one of Arens' permanent impairments was emotional distress. He would have stated that Nebco's agents

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[31] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

[32] Brief for appellee at 14.

knew, after Arens' brain injury, he had expressed discontent with coworkers and had conflicts with them but that Nebco's agents had stated that they could make accommodations, through instruction and providing some latitude in his interactions with coworkers.

Arens also testified that after his brain injury, Nebco employees would write down instructions for him on order sheets because of his short-term memory problems. He said that without the instructions, he might go to the wrong delivery site or load the wrong materials. But his testimony failed to convey the extent of his known cognitive problems, which Nebco's agents had said they could accommodate. And the record shows that Arens was not the most persuasive witness on the issue of his impairments because he lacked command of the historical facts. For instance, he could not provide the date of his brain injury. So his testimony failed to establish the length of time that Nebco had accommodated his memory impairments.

[15] Whether Nebco knew the extent of Arens' mental impairments and whether it had previously considered accommodations of his impairments reasonable were central, contested issues in this trial. A party is generally permitted to present corroborating evidence on key issues, unless such evidence becomes excessive.[33] But evidence from a neutral witness that corroborates a party's evidence on a central, contested issue is not cumulative—particularly if it is the party's best or most persuasive evidence.[34]

Utley was a neutral witness, and his testimony was Arens' best evidence of Nebco's knowledge and previous accommodations. In contrast to Arens' testimony, Utley would

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[33] See, also, 2 Clifford S. Fishman, Jones on Evidence Civil and Criminal § 11:17 (7th ed. 1994 & Cum. Supp. 2001).

[34] See *Ipock v. Union Ins. Co.*, 242 Neb. 448, 495 N.W.2d 905 (1993). Accord, *Zaken v. Boerer*, 964 F.2d 1319 (2d Cir. 1992); *Wasserman v. Bartholomew*, 923 P.2d 806 (Alaska 1996).

have testified that Nebco was willing to accommodate Arens' impairments after his brain injury. And those impairments included Arens' difficulty with attention, concentration, information recall, and emotional distress. These impairments were obviously relevant to whether Arens (1) accurately recalled the reporting requirement at issue, which Nebco did not explicitly explain on the damage report, and (2) understood oral instructions to attend employer-mandated counseling as a condition for his continued employment, despite a mental health care provider telling him that its counseling was not mandatory if he was seeing his own psychologist. Additionally, Utley would have testified that Nebco was willing to make reasonable accommodations for Arens' conflicts with coworkers. So a jury could have determined that Arens' inappropriate interactions with Wisbey were part of his known mental impairments instead of deliberate insubordination.

In sum, Utley's excluded testimony was probative of whether Nebco took adverse employment actions against Arens because of his known mental impairments without making accommodations that it had previously considered reasonable. Only Utley's testimony in the offer of proof showed Nebco had knowledge of Arens' impairments and its agents had said they could accommodate them. We conclude that the court's exclusion of his testimony was reversible error.

### 4. The Court Did Not Err in Overruling Arens' Motion for a General Directed Verdict

Arens contends that no reasonable jury could have concluded that Nebco's articulated reason for its disparate treatment of him was not a pretext for discrimination. He argues that Nebco took adverse employment actions against him for driving incidents that were not out of the ordinary. He points to Wisbey's admissions that other drivers besides Arens had accidents and that he had filed incident reports for other drivers, without reassigning or discharging these drivers, and

without requiring them to comply with employer-mandated counseling. He further claims that the pretext was shown by Nebco's allegedly per se unlawful requirement that he pass a physical examination for the new position. Finally, Arens contends that the emotional lability he displayed in meetings with Wisbey was precisely the permanent impairment that was caused by his brain injury, not insubordination.

[16] Apart from an exception for summary judgments,[35] in a discrimination action brought under the Act, a court evaluates the evidence under the three-part burden-shifting framework from *McDonnell Douglas Corp*.[36] Under that framework, (1) the plaintiff has the burden of proving a prima facie case of discrimination; (2) if the plaintiff proves a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action; and (3) if the employer articulates a nondiscriminatory reason for its action, the employee maintains the burden of proving that the stated reason was pretextual.[37] Only the final requirement is at issue here.

[17] A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[38] In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.[39]

There were primarily two separate adverse employment actions at issue in this trial: (1) Nebco's December 13, 2010,

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[35] See *Marshall v. EyeCare Specialties*, 291 Neb. 264, 865 N.W.2d 343 (2015).

[36] See, *McDonnell Douglas Corp., supra* note 12; *IBP, inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997).

[37] See, *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007); *Sands, supra* note 36.

[38] *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

[39] *Id.*

transfer of Arens to a position that placed him in indefinite laid-off status after he failed a fit-for-duty examination and (2) Nebco's December 21 discharge of Arens for failing to comply with psychological counseling. Arens argues that Nebco's stated reasons for both actions were pretextual.

It is true that there was evidence to support Arens' claim that the transfer was pretextual. Nebco argues that it transferred Arens because he was "irresponsible, insubordinate and reckless."[40] Yet, Nebco had previously reassigned Arens from driving a concrete truck because it was too difficult for him after his knee injury. Nebco is charged with knowledge of that action,[41] and Blodgett admitted Arens reported at the December 13, 2010, meeting that he had injured his knee but learned to compensate for it enough to drive his former truck. Wisbey admitted that Arens could drive the flatbed truck without a forklift and that a screening physical would not have been required if Wisbey had allowed Arens to return to driving that truck. So Nebco's transfer of Arens to a more strenuous position is inconsistent with its reason for transferring him.

But Blodgett also said that at the December 13, 2010, meeting, Wisbey discussed Arens' driving accidents, which is relevant to Nebco's claim that it transferred Arens for reckless driving. It is true that Wisbey admitted that other drivers had been in accidents or caused property damage and failed to complete damage reports without incurring adverse employment actions. But the court excluded evidence that would have shown the nature of those accidents and the number of times that Wisbey filled out reports for other drivers. And Arens has not assigned these rulings as error on appeal.

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[40] Brief for appellee at 12.

[41] See 3 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 789 (rev. vol. 2010).

We agree with Arens that Nebco could not transfer him for his known physical and mental impairments without first making reasonable accommodations or showing that it could not make accommodations. Obviously, the excluded evidence would be relevant to that determination on remand. But there was also evidence from which the jury could have concluded that Arens presented a safety risk that Nebco could not ignore. And the record fails to show as a matter of law that Nebco transferred Arens from driving a tractor-trailer for conduct which was no different from that of other drivers or that he did not present a greater safety risk.

Regarding the discharge, there was also evidence from which a jury could have found that Nebco's stated reason for the action—Arens' failure to comply with employer-mandated counseling—was pretextual. Wisbey informed Arens at the December 13, 2010, meeting that the fit-for-duty examination had disqualified him from driving a concrete truck and a tractor-trailer. Before Nebco discharged Arens on December 21, Wisbey had refused Arens' request to transfer to a mechanic position. Although Arens said he also asked to drive a dump truck on December 13, Wisbey testified that Nebco did not have plans for Arens to return to work and earn wages after that date.

But we cannot say as a matter of law that Nebco would not have rehired Arens for any driving position if he had complied with counseling. And there was some evidence from which a jury could have concluded that Arens refused to attend counseling despite Nebco's efforts to inform him that he must do so as a condition to continue in laid-off employment status.

In short, there was sufficient evidence to support reasonable, contrary inferences on the issue of pretext. We conclude that on this record, the court did not err in overruling Arens' motion for a general directed verdict.

5. The Court Applied the Wrong Legal Standard in Overruling Arens' Motion for a Directed Verdict for Unlawful Medical Examinations

The Act defines disability discrimination to include an employer's requirement of medical examinations in two different circumstances. Section 48-1107.02(9)(c) applies to required medical examinations of job *applicants* to whom the employer has extended an offer of employment—i.e., employment entrance examinations. In that circumstance, the employer can require a medical examination to determine the applicant's ability to perform job-related functions if it (1) subjects all entering employees to the same examination; (2) keeps the examination information in a separate medical file and confidential, unless disclosure is authorized by the statute; and (3) does not use the examination results in a manner that is inconsistent with the Act.

But § 48-1107.02(10) is the subsection that applies to employees. As stated, under § 48-1107.02(10), disability discrimination includes "[r]equiring a medical examination or making inquiries of an employee as to whether the employee is an individual with a disability or as to the nature or severity of the disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity."

Arens contends that Nebco's requirement that he complete a medical examination to drive a concrete truck violated § 48-1107.02(10). He argues that because he had difficulty climbing, the medical examination was required only to preclude him from returning to work. And he contends the examination was unlawful because there was no medical incident that warranted the screening. He similarly argues that Nebco's requirement that he attend counseling was unlawful. He contends that under federal case law, employers may not use a medical examination to disqualify an employee with a disability from work the employee can perform with or without accommodations, because of fear or speculation that the

disability indicates a risk of future injury, absenteeism, or insurance costs.

Nebco argues that once it decided to transfer Arens to driving a concrete truck, it had a right to ensure that he could safely operate the truck. It argues that the fitness-for-duty examination was therefore job related and a business necessity.

[18] The Legislature enacted § 48-1107.02 as part of the 1993 amendments to the Act.[42] Nebraska's two provisions governing discriminatory medical examinations mirror two provisions of the federal Americans with Disabilities Act of 1990 (ADA).[43] The close similarity of § 48-1107.02's medical examination provisions and the ADA provisions is not a coincidence. The Legislature specifically intended that its 1993 amendments to the Act would provide the same protections from employment discrimination that are provided under title I of the ADA.[44] So it is appropriate to consider how federal courts have interpreted the ADA counterparts to the 1993 amendments.

The ADA counterpart to § 48-1107.02(10) is 42 U.S.C. § 12112(d)(4)(A). It reflects the policy judgment that once an employee is doing a job, actual performance is the best measure of his or her ability and that medical examinations should be rarely required of employees.[45] Thus, under both federal regulations and federal case law, the requirement that an employer show that a medical examination requirement for employees was "consistent with business necessity" is a

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[42] See 1993 Neb. Laws, L.B. 360, § 6.

[43] See 42 U.S.C. § 12112(d)(3) and (4) (2012).

[44] See Introducer's Statement of Intent, L.B. 360, Business and Labor Committee, 93d Leg., 1st Sess. (Jan. 29, 1993).

[45] 1 Jonathan R. Mook, Americans with Disabilities Act: Employee Rights & Employer Obligations § 5.04[3][a] (2014). See, also, Annot., 159 A.L.R. Fed. 89 (2000).

high standard.[46] Under 42 U.S.C. § 12112(d)(4)(A), courts generally consider psychological counseling to be a medical examination.[47]

We agree with the standards set out by federal courts to show a business necessity for requiring an employee to submit to a medical examination. Because the Legislature intended for the 1993 amendments to provide the same protections as title I of the ADA, we adopt them to evaluate the legality of a required medical examination under § 48-1107.02(10).

[19,20] Accordingly, to show a business necessity for requiring an employee (as distinguished from an applicant) to submit to a medical examination under § 48-1107.02(10), an employer has the burden to show that (1) the business necessity is vital to the business; (2) it has a legitimate, nondiscriminatory reason to doubt the employee's ability to perform the essential functions of his or her duties; and (3) the examination is no broader than necessary.[48]

> [F]or an employer's request for an exam to be upheld, there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can "perform job-related functions."[49]

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[46] See, 1 Mook, *supra* note 45, § 5.04[3][b]; Annot., 159 A.L.R. Fed., *supra* note 45.

[47] See, *Kroll v. White Lake Ambulance Authority*, 691 F.3d 809 (6th Cir. 2012); *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005).

[48] See, *Kroll v. White Lake Ambulance Authority*, 763 F.3d 619 (6th Cir. 2014); *Wisbey v. City of Lincoln, Neb.*, 612 F.3d 667 (8th Cir. 2010), *abrogated on other grounds, Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011); *Conroy v. New York Dept. of Correctional*, 333 F.3d 88 (2d Cir. 2003).

[49] *Sullivan v. River Valley School Dist.*, 197 F.3d 804, 811 (6th Cir. 1999). Accord *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010).

The business necessity standard for required medical examinations is an objective test.[50]

[21] For disputed discrimination claims under § 48-1107.02(10), we further adopt the federal holding that whether an employer requires similarly situated employees to submit to a medical examination is relevant to whether the employer considers such examinations a business necessity.[51] But "any comparison between employees must be made with an eye to the ultimate inquiry, i.e., the necessity of the examination of the *plaintiff*."[52] An employer's disparate treatment of employees regarding medical examinations cannot override substantial evidence that the employer had good reason to doubt the plaintiff's ability to perform the essential functions of the job.[53]

[22] An employer's doubts about an employee's ability to perform the essential functions of a job may be created by an employee's request for accommodations, frequent absences, or request for leave because of his or her medical condition.[54] Such doubts can also be raised by the employer's knowledge of an employee's behavior that poses a direct threat to the employee or others.[55]

[23] Here, there is no question that Arens' physical ability to drive a truck was vital to Nebco's business. But even so, requiring an employee to submit to a medical examination is consistent with a business necessity only if the employer shows significant evidence that a reasonable person would doubt that the employee could perform the essential

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[50] See, e.g., *Brownfield, supra* note 49; *Tice v. Centre Area Transp. Authority*, 247 F.3d 506 (3d Cir. 2001).

[51] See *Tice, supra* note 50.

[52] *Id.* at 519 (emphasis in original).

[53] See *id.*

[54] See, *Kroll, supra* note 48; *Wisbey, supra* note 48; *Gajda v. Manhatt., Bronx Surf. Trans. Oper. Auth.*, 396 F.3d 187 (2d Cir. 2005).

[55] See, *Kroll, supra* note 48; *Brownfield, supra* note 49.

functions of the job, with or without reasonable accommodations, because of a medical condition.

But this is not the business necessity standard that the court applied when Arens sought a directed verdict on the issue of unlawful medical examinations. In response to this motion, Nebco argued only that the fit-for-duty examination and psychological counseling were tailored to the job's duties. In overruling the motion for a directed verdict, the court relied on Nebco's argument. On appeal, Nebco argues that Arens was required to undergo a fit-for-duty examination to operate a concrete truck like every other employee who does that job. It contends that the examination was necessary because the job had different physical requirements. But it inconsistently argues that Wisbey did not anticipate any problems with transferring Arens because climbing the ladder on a concrete truck was very similar to the climbing that Arens had to do to get into the forklift on the back of his tractor-trailer.

We agree with Arens that Nebco's argument to the court confused the standard of medical examinations for applicants with the standard for employees. It is irrelevant that all newly entering employees must take a medical examination to drive and operate a concrete truck. Wisbey admitted that because Nebco's drivers are cross-trained, the employee who replaced Arens in driving a tractor-trailer was not required to take a medical examination. So the primary question regarding the fit-for-duty examination is whether Nebco presented substantial evidence that it had a nondiscriminatory reason to doubt Arens' physical ability to perform the essential functions of driving a concrete truck or tractor-trailer, with or without reasonable accommodations. Regarding the psychological counseling, the question is whether Nebco presented substantial evidence that it had a nondiscriminatory reason to doubt Arens' mental ability to perform the essential functions of these jobs, with or without reasonable accommodations.

Arens argues that under the ADA standard for requiring a medical examination, he was entitled to a directed verdict.

We decline to decide that factual question for the first time on appeal.[56] Instead, because the court's exclusion of Utley's testimony was prejudicial error, we reverse the court's judgment and remand the cause for a new trial. If the issue arises again, we direct the court to decide the issue under the legal standard that we have adopted here.

## VII. CONCLUSION

We conclude that the court erred in excluding Utley's testimony as irrelevant. Utley's testimony was relevant to show Nebco's knowledge of Utley's permanent mental impairments and whether it had previously accommodated them. The exclusion of this evidence was reversible error.

We conclude that the factual statements in Utley's reports were admissible as Nebco's business records. But because Arens did not offer only the admissible parts of these exhibits, the court did not abuse its discretion in excluding them.

We conclude that the court did not err in overruling Arens' motions for directed verdicts. But on remand, if the issue arises again, the court must apply the business necessity standard for medical examinations that we have set out above.

Reversed and remanded for a new trial.

McCormack, J., participating on briefs.

Stephan, J., not participating in the decision.

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[56] See *Jacobitz v. Aurora Co-op*, 291 Neb. 349, 865 N.W.2d 353 (2015).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Daniel A. Meints, appellant.
869 N.W.2d 343

Filed September 25, 2015. No. S-14-750.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Judgments: Final Orders: Time: Appeal and Error.** Typically, a party seeking to appeal from a judgment, decree, or final order made by the district court must file a notice of appeal in the district court within 30 days.
3. **Judgments: Jurisdiction: Appeal and Error.** Orders which specify that a trial court will exercise its jurisdiction based upon future action or inaction by a party are conditional and therefore not appealable.
4. **Judgments: Records: Words and Phrases.** Rendition of a judgment is the act of the court in making and signing a written notation of the relief granted or denied in an action.
5. **Final Orders.** Entry of a final order occurs when the clerk of the court places the file stamp and date upon the final order.
6. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2008) 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.

Petition for further review from the Court of Appeals, Inbody, Riedmann, and Bishop, Judges, on appeal thereto from the District Court for Lancaster County, Robert R. Otte, Judge, on appeal thereto from the County Court for Lancaster

County, Thomas W. Fox, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

John C. McQuinn, Chief Lincoln City Prosecutor, and Robert E. Caples for appellee.

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

Cassel, J.

## INTRODUCTION

The Nebraska Court of Appeals summarily dismissed Daniel A. Meints' appeal for lack of jurisdiction, and we granted Meints' petition for further review. The Court of Appeals' jurisdiction depends upon the finality and effectiveness of a series of district court orders. Because the district court's first order was conditional and its second order was never entered, Meints timely filed his notice of appeal from the only final, appealable order entered by the district court. We reverse the decision and remand the cause to the Court of Appeals with direction.

## BACKGROUND

The county court convicted Meints of three municipal ordinance violations and sentenced him to pay fines and court costs. Meints appealed his county court convictions to the district court.

We summarize the timeline of the pertinent district court proceeding as follows:

- May 1, 2014: The district court purportedly dismissed the appeal because Meints failed to pay for the preparation of the transcript. The order stated that the "case is dismissed . . . as of this date subject to being reinstated if, within 14 days of the date of this order, [Meints] sets a motion for

reinstatement of the case for hearing with the court and files a motion for reinstatement with notice to the plaintiff."

- May 15, 2014: Meints filed a motion for an order reinstating his appeal and set the matter for hearing on May 30.
- May 30, 2014: Meints' request was denied via a docket entry. The docket entry was neither signed by the judge nor file stamped by the court clerk.
- June 10, 2014: Meints filed a motion asking the court to reconsider its May 30 order.
- July 25, 2014: The district court overruled the motion for reconsideration.
- August 25, 2014: Meints filed a notice of appeal from the district court.

The Court of Appeals summarily dismissed Meints' appeal under Neb. Ct. R. App. P. § 2-107(A)(2) (rev. 2012). Its minute entry quoted the following proposition from *State v. Hausmann*[1]: "A party can move the court to vacate or modify a final order—but if the court does not grant the motion, a notice of appeal must be filed within 30 days of the entry of the earlier final order if the party intends to appeal it." Meints moved for rehearing, which motion the Court of Appeals overruled. We granted Meints' petition for further review.

## ASSIGNMENT OF ERROR

In Meints' petition for further review, he assigns that the Court of Appeals erred in dismissing his appeal as being out of time, because the order denying his motion for reconsideration was a final, appealable order.

## STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2]

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[1] *State v. Hausmann*, 277 Neb. 819, 827, 765 N.W.2d 219, 225 (2009).

[2] *Castellar Partners v. AMP Limited*, 291 Neb. 163, 864 N.W.2d 391 (2015).

## ANALYSIS

[2] The issue before us is whether the Court of Appeals erred in dismissing Meints' appeal as being untimely. Typically, a party seeking to appeal from a judgment, decree, or final order made by the district court must file a notice of appeal in the district court within 30 days.[3] Meints filed a notice of appeal on August 25, 2014, stating an intent to appeal the orders from May 1, May 30, and July 25. We consider the finality and appealability of each order.

### First Order

[3] The Court of Appeals' minute entry suggests that it did not consider whether the May 1, 2014, order was conditional and, thus, not a final order. Orders which specify that a trial court will exercise its jurisdiction based upon future action or inaction by a party are conditional and therefore not appealable.[4]

Whether the May 1, 2014, order was conditional depends upon its specific wording. Contrary to the State's assertion at oral argument, the order did not state that the appeal was dismissed "period." The May 1 order stated that the case was dismissed, but the same sentence qualified the dismissal by adding that it was "subject to being reinstated" if, within 14 days, Meints filed a motion for reinstatement and set the motion for hearing. Thus, the "subject to" phrase expressly modified the purported dismissal.

This order differs from other conditional orders we have addressed which first state that if a specified action is not taken within a set amount of time, then the case will stand dismissed.[5] Here, the order first stated that the case was

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[3] See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008).

[4] *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999).

[5] See, e.g., *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014); *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992); *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987).

dismissed, then provided for a way to "undo" the dismissal. And in a similar situation, we found an order to be conditional where it denied a temporary injunction, but gave the parties 14 days to advise the court of any reason why the decision should not become the final decision.[6]

We conclude that the May 1, 2014, order did not finally and conclusively dismiss Meints' appeal; rather, the order was conditional, because under its terms, the dismissal was not effective if a motion for reinstatement was filed within 14 days. And because it was conditional, the May 1 order was not a final, appealable order.

This conclusion flows from the particular words used in the May 1, 2014, order. Had the order simply stated that the appeal was "dismissed as of this date," it would have been final and appealable. But in this context, the word "subject" means "[d]ependent on . . . some contingency."[7] Here, the contingency was the opportunity afforded Meints to file a motion for reinstatement properly set for hearing and with notice to the State. By making the May 1 dismissal "subject to" the contingency, the district court created a conditional order. Having concluded that the May 1 order was not a final order, we turn to the court's next order.

### Second Order

The May 30, 2014, order would have been final, but it was never entered. The content of the docket entry was not conditional; it expressly denied Meints' motion for reinstatement.

[4,5] But the docket entry for that date was neither signed nor file stamped. Rendition of a judgment is the act of the court in making and signing a written notation of the relief granted or denied in an action.[8] Entry of a final order occurs when

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[6] See *State ex rel. Stenberg v. Moore, supra* note 4.

[7] Black's Law Dictionary 1651 (10th ed. 2014).

[8] See Neb. Rev. Stat. § 25-1301(2) (Reissue 2008).

the clerk of the court places the file stamp and date upon the final order.[9]

The May 30, 2014, docket entry was not a final order, because it was neither signed by the judge nor file stamped and dated by the clerk. Both counsel conceded as much at oral argument. Thus, for different reasons, neither the May 1 nor the May 30 order was final and appealable.

### Third Order

[6] The July 25, 2014, order was a final, appealable order. In this order, the district court noted that it had "signed the Order (Of Dismissal)" on April 30 and that it had been filed on May 1. By this language, the court confirmed the dismissal, but without any condition. And the July 25 order expressly overruled Meints' motion for reconsideration. The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2008) 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.[10] The July 25 order was one which affected a substantial right and which determined the action and prevented a judgment. And it did so regarding both the dismissal of the appeal for failure to pay for the transcript and the denial of the motion for reconsideration.

Meints timely appealed from the July 25, 2014, order. Ordinarily, the deadline for appeal would have been August 24, but because that day fell on a Sunday, Meints' notice of appeal filed on August 25 was timely.[11] Because Meints timely filed a notice of appeal from the only final order properly

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[9] See § 25-1301(3).

[10] *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007).

[11] See Neb. Rev. Stat. § 25-2221 (Cum. Supp. 2014).

entered in this case, the Court of Appeals erred in dismissing the appeal.

## CONCLUSION

Because Meints filed his notice of appeal within 30 days of the district court's final order, we conclude that the Court of Appeals erred in dismissing his appeal for lack of jurisdiction. We therefore reverse the decision of the Court of Appeals and remand the cause to that court with direction to reinstate Meints' appeal. We recognize that at the time of the Court of Appeals' dismissal, the parties had not yet filed appellate briefs. Thus, the court will need to establish a briefing schedule on the merits.

Reversed and remanded with direction.

Nebraska Supreme Court
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# State of Nebraska, appellee, v. Christian A. Mendoza-Bautista, appellant.

869 N.W.2d 339

Filed September 25, 2015. No. S-14-1165.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.

Appeal from the District Court for Hall County, William T. Wright, Judge, on appeal thereto from the County Court for Hall County, Philip M. Martin, Jr., Judge. Sentence vacated, and cause remanded with direction.

Jeff E. Loeffler and Matthew A. Works, Deputy Hall County Public Defenders, for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

Heavican, C.J.

## INTRODUCTION

Christian A. Mendoza-Bautista was convicted of one count of violating Neb. Rev. Stat. § 60-4,108(1)(b) (Cum. Supp. 2014), third offense, and was sentenced to 30 days' imprisonment. The district court, sitting as an intermediate court of appeals, affirmed. Mendoza-Bautista appeals to this court. At issue on appeal is whether Mendoza-Bautista's two prior

convictions for driving under suspension under § 60-4,108(2) were sufficient to enhance to a third offense his current conviction for driving under revocation.

## FACTUAL BACKGROUND

Mendoza-Bautista was charged in Hall County Court by complaint on August 7, 2014. That complaint alleged a violation of "driving during suspension 2nd or 3rd offense 60-4,108(1)(b)" and alleged that Mendoza-Bautista had previously been convicted of operating a motor vehicle during a period that his license had been "suspended or revoked."

Although the complaint references the crime of driving under suspension, the charged subsection of § 60-4,108(1) is the crime of driving under revocation. Mendoza-Bautista does not assign this inaccuracy in the complaint as error, and there is no assertion by either party that the current charge against Mendoza-Bautista, or his conviction thereon, was for anything other than driving under revocation.

Mendoza-Bautista pled no contest to the August 7, 2014, complaint, and an enhancement hearing was held on September 19. At that hearing, exhibits 1 and 2 were introduced. Exhibit 1 was a September 5, 2013, conviction for violations of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) (aggravated driving under influence), § 60-4,108(2) (driving under suspension), and Neb. Rev. Stat. § 28-905 (Reissue 2008) (operating motor vehicle to avoid arrest), all arising from events occurring on August 5, 2013. On the driving under the influence conviction, Mendoza-Bautista was sentenced to 2 days in jail and fined $500, and his driver's license was revoked for 1 year. He was sentenced to a $100 fine for each of the other two convictions, including the conviction under § 60-4,108(2). Exhibit 2 reflects another September 5 conviction, under a separate docket number, for a violation of § 60-4,108(2) (driving under suspension) arising from events occurring on May 23, 2013. In that case, Mendoza-Bautista was fined $100.

Mendoza-Bautista objected to the admission of exhibits 1 and 2, arguing they were convictions for driving under suspension under § 60-4,108(2) and could not be used to enhance his current conviction for driving under revocation under § 60-4,108(1).

The county court disagreed, found the prior convictions admissible for enhancement purposes, enhanced Mendoza-Bautista's conviction to third offense, sentenced him to 30 days' imprisonment, and revoked his driving privileges for 2 years. The district court affirmed the judgment in a written order.

Mendoza-Bautista appeals.

## ASSIGNMENT OF ERROR

Mendoza-Bautista assigns that the district court erred in concluding that his prior convictions for driving under suspension under § 60-4,108(2) were valid convictions to enhance his conviction for driving under revocation under § 60-4,108(1).

## STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[1]

## ANALYSIS

The sole question presented by this appeal is whether a conviction under § 60-4,108(1) can be enhanced by the use of convictions under § 60-4,108(2).

Some background is helpful to understanding our resolution of this issue. Under Nebraska law, an otherwise eligible driver can lose his or her license to operate a motor vehicle for a variety of reasons. The law generally terms such loss as either a suspension or a revocation.

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[1] *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013).

A suspension is "the temporary withdrawal by formal action of the Department of Motor Vehicles of a person's operator's license for a period specifically designated by the department, if any, and until compliance with all conditions for reinstatement."[2] On the other hand, a revocation is

> the termination by a court of competent jurisdiction or by formal action of the Department of Motor Vehicles of a person's operator's license, which termination shall not be subject to renewal or restoration. Application for reinstatement of eligibility for a new license may be presented and acted upon by the department after the expiration of the applicable period of time prescribed in the statute providing for revocation.[3]

This distinction was first set forth by the Legislature in a series of amendments and revisions to the transportation code in 2001.

Prior to 2001, the law stated that it was illegal for an individual to drive when his or her operator's license had been suspended or revoked, and provided that such was a Class III misdemeanor. But as part of the 2001 changes, § 60-4,108 was amended to provide for a distinction between revocation and suspension. That section now provides in relevant part:

> (1) It shall be unlawful for any person to operate a motor vehicle during any period that he or she is subject to a court order not to operate any motor vehicle for any purpose or during any period that his or her operator's license has been revoked or impounded pursuant to conviction or convictions for violation of any law or laws of this state, by an order of any court, or by an administrative order of the director. Except as otherwise provided by subsection (3) of this section or by other law, any person so offending shall (a) for a first such offense, be

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[2] Neb. Rev. Stat. § 60-476.02 (Reissue 2010).

[3] Neb. Rev. Stat. § 60-476.01 (Reissue 2010).

guilty of a Class II misdemeanor, and the court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of one year from the date ordered by the court and also order the operator's license of such person to be revoked for a like period, (b) for a second or third such offense, be guilty of a Class II misdemeanor, and the court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of two years from the date ordered by the court and also order the operator's license of such person to be revoked for a like period, and (c) for a fourth or subsequent such offense, be guilty of a Class I misdemeanor, and the court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of two years from the date ordered by the court and also order the operator's license of such person to be revoked for a like period. Such orders of the court shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked, whichever is later.

(2) It shall be unlawful for any person to operate a motor vehicle (a) during any period that his or her operator's license has been suspended, (b) after a period of revocation but before issuance of a new license, or (c) after a period of impoundment but before the return of the license. Except as provided in subsection (3) of this section, any person so offending shall be guilty of a Class III misdemeanor, and the court may, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of one year from the date ordered by the court, except that if the person at the time of sentencing shows proof of reinstatement of his or her suspended operator's license, proof of issuance of a new license, or proof of

> return of the impounded license, the person shall only be fined in an amount not to exceed one hundred dollars. If the court orders the person not to operate a motor vehicle for a period of one year from the date ordered by the court, the court shall also order the operator's license of such person to be revoked for a like period. Such orders of the court shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked, whichever is later.

It is the interplay between subsections (1) and (2) of this section at issue on appeal.

A review of the plain language of the relevant statutory provision reveals that the county court erred in concluding that the driving under revocation conviction could be enhanced to a third offense through the use of Mendoza-Bautista's two prior convictions for driving under suspension. A driving under revocation conviction under § 60-4,108(1) can be enhanced to a second or third, or even fourth or subsequent, offense. But the statutory language providing for enhancement refers to "such offense." In the context of the subsection, it is clear that "such offense" refers to the crime referenced in that same subsection, § 60-4,108(1), that "[i]t shall be unlawful for any person to operate a motor vehicle during any period that he or she is subject to a court order not to operate any motor vehicle for any purpose or during any period that his or her operator's license has been revoked . . . ." Thus, a driving under revocation conviction under § 60-4,108(1) can be enhanced only by another driving under revocation conviction charged under that same subsection.

Driving under suspension and driving under revocation are two separate crimes. They are defined in two separate statutory subsections; they are each a different class of misdemeanor. The term "suspended" or "suspension" does not appear in § 60-4,108(1). There is no crossover between subsection (1) regarding "revocation" and subsection (2) regarding

"suspension." The violation of § 60-4,108(2) is simply not available to enhance a violation of § 60-4,108(1).

We agree with Mendoza-Bautista that the county court erred when it enhanced his conviction for driving under revocation under § 60-4,108(1) to a third offense through the use of two prior convictions for driving under suspension under § 60-4,108(2). We also agree that the district court erred in affirming that decision.

## CONCLUSION

The county court erred in enhancing Mendoza-Bautista's conviction to a third offense, and the district court erred in affirming that enhancement. Mendoza-Bautista's sentence is vacated and the cause remanded to the district court with direction to remand to the county court for resentencing.

Sentence vacated, and cause remanded with direction.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# Peter M. Stekr, appellant, v. Kelly Beecham, formerly known as Kelly Shannon Stekr, appellee.

869 N.W.2d 347

Filed September 25, 2015. No. S-15-003.

1. **Modification of Decree: Child Support: Appeal and Error.** Although an appellate court reviews the modification of child support payments de novo on the record, it affirms the trial court's decision absent an abuse of discretion.
2. **Child Support: Rules of the Supreme Court.** The obligor's non-income-producing assets are relevant to whether application of the Nebraska Child Support Guidelines would be unjust or inappropriate.
3. ____: ____. In determining the amount of child support, courts should not deviate from the Nebraska Child Support Guidelines based on the obligor's equity in his or her residence unless the obligor made an extravagant investment in his or her residence.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

John A. Kinney and Jill M. Mason, of Kinney Law, P.C., L.L.O., for appellant.

Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellee.

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

Connolly, J.

## SUMMARY

Peter M. Stekr (Peter) filed a complaint to modify his child support obligation after his income substantially decreased. The trial court dismissed the complaint. It concluded that under the Nebraska Child Support Guidelines, Peter's payments would be substantially reduced. But it decided to deviate from the guidelines in part because Peter owned non-income-producing real estate. On appeal, Peter argues that his non-income-producing assets did not warrant a deviation from the guidelines. We conclude that the trial court did not abuse its discretion.

## BACKGROUND

Peter and Kelly Beecham, formerly known as Kelly Shannon Stekr (Kelly), divorced in 2001. The court granted Kelly custody of the parties' minor daughter and ordered Peter to pay child support of $985.84 per month. In 2007, the court raised Peter's child support obligation to $1,801.51 per month.

In January 2010, Peter filed a complaint to modify the child support order because his income had decreased. The court referred the case to a referee, who held a hearing in August.

At the hearing, Peter testified that he had traded and sold bonds and mortgage-backed securities since 1993. He worked for a securities company for about 5 years, during which time he had the ability to earn substantial commissions. Peter's adjusted gross income was $129,057 in 2007, $331,354 in 2008, and $345,689 in 2009.

The securities company laid Peter off in February 2010. He found another job trading securities with an annual salary of $60,000 and a bonus of up to 5 percent of his salary.

Peter testified that he is the sole shareholder of Golden Asset Management, which has one asset: a "spec home" in Denver, Colorado. Peter built the house in 2007 "to sell it and make money," but this proved difficult. He listed the house

for $950,000, then $880,000, then $825,000, and finally, as of the hearing, $799,000. Peter testified that the mortgage on the Denver house was $690,000 and that he had personally been making the monthly payments of $2,400 to $2,600 since 2007. No one has ever rented or lived in the house.

Peter personally owns two other houses. One is in Golden, Colorado, and is Peter's residence. The Golden house is not subject to any debt and was valued at $500,000 for tax purposes. But Peter thought that it was worth only $450,000.

The other house is in Bennington, Nebraska. The Bennington house is not subject to any debt and was valued at $525,000 for tax purposes. But Peter thought that it was worth only $400,000.

Kelly lives in Omaha, Nebraska, with her husband of 8 years. Kelly is not employed outside the home, but she testified that she has an earning capacity of $4,750 per month.

After hearing arguments from both parties, the referee stated that "[o]ne of the things that caught my attention is that [Peter] appears to be paying a mortgage of 24 to 26 hundred dollars a month on his house." The referee reasoned that the money was "coming from somewhere" and said that "[i]f he's got access to that money, I want to know why that money isn't going to the kid . . . ." The referee sustained Peter's motion to reopen the record, and Peter's attorney recalled him as a witness.

Peter testified that he had made the mortgage payments on the Denver house "through my savings, which are [now] non-existent." He explained that he saved money during his profitable years and had accumulated an undefined amount of "savings" and "about $100,000.00 in cash at home." Asked if he was now paying the mortgage from his $5,000 monthly salary, Peter said that "[i]t's kind of like a shuffle game. One thing to the other. You pay one bill and then the other, you know, savings . . . ."

The referee recommended that the court dismiss Peter's complaint. He explained that Peter might be entitled to a

modification under the guidelines, but that the case was "outside the normal financial framework" because of Peter's real estate holdings.

In October 2010, the court overruled Peter's exception to the referee's report. The court stated that the evidence of Peter's "significant real estate holdings and his willingness to spend his savings and borrow monies to protect his financial situation" supported the referee's conclusion.

A series of three appeals by Peter and three remands by the Nebraska Court of Appeals followed the October 2010 order. The Court of Appeals remanded the cause first because the district court failed to attach a child support worksheet to its order and then because the district court failed to comply with the Court of Appeals' mandates. As is relevant here, in Peter's first appeal, the Court of Appeals concluded that "the district court essentially found that Peter's decrease in income was a material change in circumstances warranting a reduction in child support under the guidelines, but further found that a deviation from the guidelines was justified."[1] In Peter's third appeal, case No. A-13-398, an unpublished memorandum opinion filed May 13, 2014, the Court of Appeals said that its construction of the district court's October 2010 order (i.e., a modification was warranted under the guidelines but the court decided to deviate from them) had become the law of the case.

In December 2014, the district court entered a responsive order to the Court of Appeals' third mandate. The district court stated that the worksheet 1 submitted by Peter, and attached to the order, showed how much support Peter owed under the guidelines. According to the worksheet, both Peter and Kelly had total monthly incomes of $5,000 and Peter's share of the support obligation was $647.51 per month. So, the court explained that under "a strict application of [the]

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[1] *Stekr v. Beecham*, No. A-10-1047, 2011 WL 4635141 at *3 (Neb. App. Sept. 27, 2011) (selected for posting to court Web site).

Nebraska Child Support Guidelines," Peter would owe $647.51 per month.

But the court decided to deviate from the guidelines because Peter had "a large sum of money available from all sources including but not limited to substantial real estate holdings, . . . and for the reason that [Peter] has had savings . . . and an undisclosed amount of other funds to pay on the mortgage for his real estate." The court ordered Peter to pay $1,801 per month "based upon the relative financial circumstances of the parties and history of established support for the minor child."

## ASSIGNMENTS OF ERROR

Peter assigns and argues that the court erred by deviating from the Nebraska Child Support Guidelines.

Peter assigns several other issues but does not specifically argue them, other than to say that they "flow from" the court's decision to deviate from the guidelines.[2] To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the party's brief.[3] We do not consider the errors that Peter assigned but did not argue.

## STANDARD OF REVIEW

[1] Although we review the modification of child support payments de novo on the record, we affirm the trial court's decision absent an abuse of discretion.[4]

## ANALYSIS

Peter and Kelly disagree about the relevance of Peter's assets to his child support obligation. Peter argues that his ownership of non-income-producing real estate was not a basis to deviate from the Nebraska Child Support Guidelines.

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[2] Brief for appellant at 11.

[3] *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015).

[4] See *Pearson v. Pearson*, 285 Neb. 686, 828 N.W.2d 760 (2013).

Kelly notes that Peter chose to invest his money in non-income-producing real estate.

We have stated that trial courts may consider the circumstances of the parties in determining the amount of child support.[5] The parties' circumstances includes their financial condition.[6] Other courts have recognized that the parties' assets—including those that are not currently producing income—are relevant to the support calculation.[7]

Courts generally factor non-income-producing assets into the child support calculation in one of two ways.[8] First, courts sometimes impute to the parent's income a hypothetical reasonable rate of return from a nonproducing or underproducing asset.[9] The rationale is that funds devoted to unproductive assets have untapped earning potential.[10] Courts do not have to defer to a parent's investment decisions, and the parent's choice to devote resources to growth instead of income must sometimes yield to the child's best interests.[11]

The second way courts consider non-income-producing assets is as a reason to deviate from the presumptive child

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[5] *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015).

[6] *Id.*

[7] See, e.g., *Adam v. Adam*, 624 A.2d 1093 (R.I. 1993). But see *Sutherland v. Sutherland*, 14 Va. App. 42, 414 S.E.2d 617 (1992).

[8] See *In re Marriage of Berger*, 170 Cal. App. 4th 1070, 88 Cal. Rptr. 3d 766 (2009).

[9] See, e.g., *In re Marriage of Williams*, 150 Cal. App. 4th 1221, 58 Cal. Rptr. 3d 877 (2007). See, also, American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations § 3.14(4)(b) (2002). But see *Clark v. Clark*, 172 Vt. 351, 779 A.2d 42 (2001).

[10] See, *Weinstein v. Weinstein*, 280 Conn. 764, 911 A.2d 1077 (2007); *In re Marriage of Williams, supra* note 9; *Kay v. Kay*, 37 N.Y.2d 632, 339 N.E.2d 143, 376 N.Y.S.2d 443 (1975).

[11] See, *In re Marriage of Schlafly*, 149 Cal. App. 4th 747, 57 Cal. Rptr. 3d 274 (2007); *Weinstein v. Weinstein, supra* note 10; *In re Marriage of Destein*, 91 Cal. App. 4th 1385, 111 Cal. Rptr. 2d 487 (2001); American Law Institute, *supra* note 9, § 3.14, comment *a*. But see *Barton v. Hirshberg*, 137 Md. App. 1, 767 A.2d 874 (Md. Spec. App. 2001).

support formula.[12] For deviations, the theory is that parents should sometimes liquidate assets to meet their paramount obligation to support their children.[13] Relevant factors include the obligor's total wealth, the custodial parent's total wealth, the children's needs, and whether liquidating the asset would interfere with the obligor's livelihood or ability to earn income.[14]

Here, the district court deviated from the guidelines. It found that Peter's obligation under the guidelines would be $647.51 per month, but that he should instead pay $1,801 per month because of the parties' financial circumstances.

We must answer two questions: (1) Are an obligor's non-income-producing assets relevant to whether the circumstances justify a deviation from the guidelines? (2) If so, did the district court abuse its discretion by deviating from the guidelines?

[2] As to the first question, we conclude that a court may consider the obligor's non-income-producing assets in determining whether to deviate from the guidelines. Courts have the discretion to depart from the guidelines if their application would be unjust or inappropriate.[15] The obligor's resources are relevant to the justness and appropriateness of the guidelines.

So, we turn to whether Peter's resources made the application of the guidelines unjust or inappropriate. According to the court, Peter had "substantial real estate holdings." The

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[12] See, e.g., *Cody v. Evans-Cody*, 291 A.D.2d 27, 735 N.Y.S.2d 181 (2001). But see *Barton v. Hirshberg, supra* note 11.

[13] See *Cody v. Evans-Cody, supra* note 12. See, also, *Clark v. Clark, supra* note 9; *Green v. Green*, 447 N.E.2d 605 (Ind. App. 1983).

[14] See, *Jurado v. Jurado*, 119 N.M. 522, 892 P.2d 969 (N.M. App. 1995); *Linard v. Hershey*, 489 N.W.2d 599 (S.D. 1992); *Quaid v. Quaid*, 403 N.W.2d 904 (Minn. App. 1987). See, also, *Anthony v. Anthony*, 21 Mass. App. 299, 486 N.E.2d 773 (1985); American Law Institute, *supra* note 9, § 3.14, comment *d*.

[15] Neb. Ct. R. § 4-203(E) (rev. 2011).

court also found that Peter "has had savings . . . and an undisclosed amount of other funds to pay on the mortgage for his real estate."

We note that Golden Asset Management owns the house in Denver, and not Peter. But he has not argued that the corporate ownership is relevant, and we do not address that issue. More pertinent to our analysis is that the record does not show how much equity, if any, Peter has in the Denver house. Peter initially listed the house for $950,000 but reduced the listing price several times to its current level of $799,000. The plummeting listing price was approaching the $690,000 mortgage, and Peter's ability to sell the house at the reduced price was far from certain. On these facts, the court could not assume that the difference between the most recent listing price and the outstanding debt was the measure of Peter's equity.

[3] Nor is Peter's ownership of his personal residence in Golden a basis to deviate from the guidelines. Courts have been reluctant to impute income from an obligor's home equity.[16] For example, the American Law Institute suggests that courts should not impute income from a parent's residence if the investment is "commensurate with the parent's economic resources."[17] Similarly, we believe that obligors should not ordinarily have to mortgage their homes or live in their cars in order to pay child support that is above the guidelines. The record does not suggest that Peter made an extravagant investment in his home.

But Peter also owned a house in Bennington. Peter testified that the Bennington house was assessed for tax purposes at $525,000 and was not encumbered by a mortgage. Even if the house was worth only $400,000, as Peter thought, he still has $400,000 of equity in real estate other than his home. Peter's

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[16] See *In re Marriage of Henry*, 126 Cal. App. 4th 111, 23 Cal. Rptr. 3d 707 (2005). See, also, Vt. Stat. Ann. tit. 15, § 653(5)(A) (Cum. Supp. 2014).

[17] American Law Institute, *supra* note 9, § 3.14(4)(b) at 583 & comment *d*.

equity in the Bennington house was relevant to the appropriateness of a deviation.

Furthermore, the court found that Peter had "an undisclosed amount of other funds to pay on the mortgage for his real estate," which he should instead use to support his daughter. So, the court decided that Peter's protestations of imminent bankruptcy were not credible. Although our review is de novo, we may still give weight to the fact that the trial court observed the witnesses and accepted one version of the facts instead of another.[18] This rule is particularly apt for issues of credibility.[19]

We conclude that the district court did not abuse its discretion by deviating from the guidelines because of Peter's financial resources, including his equity in non-income-producing real estate. The guidelines do not incorporate the obligor's non-income-producing assets into the child support formula, and courts should not require obligors to liquidate such assets as a matter of course. But the best interests of the child are the paramount concern,[20] and sometimes the preservation of assets must yield to the child's needs.

## CONCLUSION

We conclude that the district court did not abuse its discretion by deviating from the guidelines. The court could find that Peter's financial resources, including his non-income-producing real estate, made the application of the guidelines unjust or inappropriate.

Affirmed.

Cassel, J., not participating.

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[18] See *Binder v. Binder*, 291 Neb. 255, 864 N.W.2d 689 (2015).

[19] See *id.*

[20] *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

Nebraska Supreme Court
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# In re Interest of Sloane O., a child under 18 years of age.

State of Nebraska, appellee, v.
Christopher O., appellant.

State of Nebraska, appellee, v.
Sabrina O., appellant.

870 N.W.2d 110

Filed September 25, 2015. Nos. S-15-012, S-15-074.

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. **Rules of the Supreme Court: Appeal and Error.** Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2014) requires a separate "assignments of error" section stating the assigned errors apart from the arguments in a brief. In the absence of such assignments of error, an appellate court may proceed as though the appellant has failed to file a brief or, alternatively, may examine the proceedings for plain error.
3. **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.
4. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
5. **Parental Rights: Due Process: Appeal and Error.** In deciding due process requirements in a particular case, an appellate court must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use. Due process is flexible and calls for such procedural protections as the particular situation demands.

6. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers to the parent-child relationship and the preferences of the child.
7. **Constitutional Law: Child Custody: Parental Rights.** Unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child.
8. **Constitutional Law: Parental Rights: Presumptions.** Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.
9. **Juvenile Courts: Parental Rights.** The parental preference doctrine is applicable to an adjudicated child.

Appeals from the Separate Juvenile Court of Douglas County: Douglas F. Johnson, Judge. Judgment in No. S-15-012 affirmed. Judgment in No. S-15-074 reversed, and cause remanded for further proceedings.

Christopher O., pro se, in No. S-15-012.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellant in No. S-15-074.

Donald W. Kleine, Douglas County Attorney, Anthony Clowe, and Kati Kilcoin, Senior Certified Law Student, for appellee.

Beau G. Finley, of Finley & Kahler Law Firm, P.C., L.L.O., guardian ad litem.

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

Heavican, C.J.

## I. INTRODUCTION

The juvenile court adjudicated Sloane O. as a child under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013) with respect to allegations of abuse and neglect by her biological father,

Christopher O. It also denied a motion for custody filed by Sloane's mother, Sabrina O. Christopher appeals from the order of adjudication. Sabrina appeals from the denial of the motion for custody.

## II. FACTUAL BACKGROUND

Both of the above-entitled appeals arise from the same set of facts. On August 4, 2014, the State filed a petition seeking to adjudicate Sloane as a child under § 43-247(3)(a). That petition alleged that Christopher had used excessive discipline toward Sloane, causing her injury, and that he had failed to provide Sloane with proper parental care, support, and supervision, thus placing Sloane at risk for harm.

Also on August 4, 2014, the State filed an ex parte motion for immediate custody of Sloane. That motion was granted. A hearing was set for August 14. On August 12, counsel was appointed for Christopher and a guardian ad litem was also appointed. Several preadjudication hearings were held, including the one on August 14. Adjudication was set for November 13 and December 17.

At the same time this case was proceeding, a separate probation docket for possession of a controlled substance involving Sloane was continuing. The juvenile court apparently presided over this probation docket as well. Our record does not contain this docket, but there are references to it throughout our record.

On October 9, 2014, Sabrina filed a motion for custody of Sloane. Sabrina alleged that she had been physically separated from Christopher "for some time" and that a complaint for dissolution of marriage had been filed on October 1, 2014. In her motion, Sabrina indicated that she was fit to have custody of Sloane and that custody should be placed with her, while the Department of Health and Human Services (DHHS) should be "reliev[ed] of custody."

The adjudication hearing was held beginning November 13, 2014. Prior to the start of the hearing, the juvenile court held a hearing on Sabrina's motion for custody, with Sabrina

testifying that she was Sloane's mother and expressing her desire and fitness for custody. Also offered at this hearing was Sloane's birth certificate listing Sabrina as Sloane's mother. In her testimony, Sabrina acknowledged the separate docket and indicated that she was willing to comply with it. Following Sabrina's testimony, the juvenile court moved to the adjudication portion of the proceedings.

Sloane was the first witness. She testified that on July 29, 2014, while at home in Ralston, Nebraska, a pill fell out of her pocket. Christopher saw the pill and was able to identify it as Percocet. Sloane testified that after identifying the pill, Christopher hit her on the face with a closed fist and put a pillow over her face. Apparently because he believed the pill belonged to Sloane's grandmother, Christopher then drove Sloane to her grandparents' home in Council Bluffs, Iowa.

While at her grandparents' home, Sloane testified that she asked Christopher what he would do if she killed herself and that he "shrugged his shoulders." Sloane then testified that she pretended to drink a bottle of hand sanitizer. At that point, according to Sloane, Christopher grabbed her by the hair and threw her down on the floor, where he held her down with his hand over her mouth and nose. Sloane testified that her grandfather witnessed this incident. Sloane indicated that both incidents caused her pain and injury. Photographs of various injuries suffered by Sloane were admitted into evidence at the hearing.

After leaving her grandparents' home, Sloane testified that Christopher drove her to the Ralston Police Department. Sloane reported that she informed an officer of what had happened, including her possession of the Percocet pill. Sloane was charged with possession, taken to the Douglas County Youth Center, and eventually released to Christopher's home with an ankle monitor.

Upon arriving at home, Sloane testified that she was chained to the family's couch with a bicycle chain. Sloane testified that this was not the first time she had been chained to the

couch; previous incidents had apparently been witnessed by Sabrina and Sloane's grandparents. On July 30, 2014, Sloane attended her court hearing. Afterward, Sloane was taken to a child advocacy center and interviewed by April Carlson, a DHHS caseworker.

Carlson testified. She indicated that she interviewed Sloane, Christopher, Sabrina, Sloane's brother, Sloane's therapist, and a nurse practitioner who had examined Sloane at the advocacy center. Carlson also indicated that she had reviewed the juvenile intake form from the Douglas County Youth Center and the report from the Ralston Police Department.

Carlson testified that Christopher admitted to her that he had struck Sloane on the face on at least two separate occasions. Carlson stated there were safety concerns with returning Sloane to Christopher's home and that she felt that Sloane would be "unsafe in the care of [Christopher]."

Christopher testified. He stated that he did not strike Sloane at any point after he discovered the pill, but instead drove her to his parents' home to determine the source of the pill. According to Christopher, while at his parents' home, Sloane "said she wanted to kill herself" and screamed something about "getting a knife." Sloane then grabbed the hand sanitizer, "wedged herself between a dresser and a bookshelf, and tried drinking it." Christopher testified that he tried to stop Sloane from drinking the hand sanitizer and that he tried to remove her "out of the corner and out of the situation." Christopher said that he did not slap or punch Sloane. He later clarified that after discovering the pill, he "popped" Sloane in the mouth with two or three of his fingers, leaving no visible mark on her.

Christopher further testified that he did not strike Sloane when struggling over the hand sanitizer, but that he did "wrestl[e] with her" to keep her from harm. Christopher indicated that some of Sloane's injuries were the result of his restraining Sloane when she was trying to drink the hand sanitizer.

On cross-examination, Christopher was confronted with statements he allegedly made to Carlson indicating that he had hit Sloane. Christopher was asked whether he admitted to Carlson that he had secured Sloane with a chain around her ankle and whether he had said that doing so was "okay because [he] had run it by the Council Bluffs Police Department." Christopher denied he made these statements.

Christopher stated on cross-examination that Sloane's injuries might have been caused by a group of girls who had beat her up a few days before the pill incident. Christopher admitted that he had not called the police about the beating because Sloane hid it from him and because he did not know who perpetrated the assault. Christopher indicated that there was a video of the assault on a social media site and that he had told Carlson's supervisor about the incident.

Carlson was then called in rebuttal to testify that Christopher told her during her investigation that he had struck Sloane on the face on two occasions. In addition, Carlson testified that Christopher and Sabrina informed her that they had chained Sloane to the couch and that the Council Bluffs Police Department had allegedly told Christopher that this was appropriate. Finally, Carlson testified that the allegation regarding the beating by other juveniles was something that would have been passed along to her by her supervisor had it been reported, but that Carlson never received such a report.

Following a hearing, the juvenile court entered an order on December 3, 2014, adjudicating Sloane and placing her in the temporary custody of DHHS with placement to exclude the parental home. It is from this order that Christopher appeals.

On December 22, 2014, the juvenile court denied Sabrina's motion for custody. The court's reasoning was somewhat unclear in that it referenced Sloane's ongoing probation docket as a reason for not granting the motion, and it also indicated that Sabrina had failed to intervene and was not a party to the action. It is from this order that Sabrina appeals.

## III. ASSIGNMENTS OF ERROR

On appeal in case No. S-15-012, Christopher, pro se, does not assign any error to the juvenile court.

On appeal in case No. S-15-074, Sabrina assigns, renumbered, restated, and summarized, that the juvenile court erred in (1) concluding that a parent who has no allegations of abuse or neglect must first intervene before filing a motion for custody, (2) denying her motion for custody, (3) adjudicating Sloane despite having not served Sabrina, and (4) adjudicating Sloane when there were no allegations of abuse or neglect against Sabrina.

## IV. 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.[1]

## V. ANALYSIS

### 1. Christopher's Appeal in Case No. S-15-012

[2] Christopher's brief assigns no error to the juvenile court, thus violating this court's rules requiring a separate "assignments of error" section stating the assigned errors apart from the arguments in a brief.[2] Accordingly, we may proceed as though Christopher failed to file a brief or, alternatively, may examine the proceeding for plain error.[3] In this case, we have reviewed the record of the adjudication proceedings for plain error. Finding none, we affirm the order of adjudication.

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[1] *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014).

[2] Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2014).

[3] *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

## 2. Sabrina's Appeal in Case No. S-15-074

### (a) Issues Preserved for Appeal

Sabrina's notice of appeal, filed January 21, 2015, specifically notes that Sabrina is appealing from the December 22, 2014, order of the juvenile court denying her motion for custody. This notice of appeal was timely, and we conclude that Sabrina has timely appealed from the denial of custody order.

But Sabrina has not timely appealed from the juvenile court's adjudication order. As noted, Sabrina's appeal was filed on January 21, 2015, which is more than 30 days from the December 3, 2014, entry of the adjudication order. As such, we have jurisdiction over Sabrina's assignments of error relating to the custody order, but not as to the adjudication order.

### (b) Motion to Intervene

In her first assignment of error, Sabrina assigns that the juvenile court erred in finding that she had failed to intervene in this action and thus was not a party to this case. Sabrina argues that the definition of "[p]arties" as stated in Neb. Rev. Stat. § 43-245(19) (Cum. Supp. 2014) includes the juvenile and his or her parent and that she is a party because she is Sloane's parent.

In its order, the juvenile court did not explain why it thought Sabrina was required to intervene. But at the hearing on Sabrina's motion, the county argued that intervention was required by this court's decision in *In re Interest of Kiana T.*[4] The county renews this argument on appeal and suggests that Sabrina's reliance on the definition of "parties" from § 43-245(19) is premature, because Sloane had not yet been adjudicated. Meanwhile, the guardian ad litem concedes that there is tension between *In re Interest of Kiana T.* and § 43-245(19) and requests that we clarify that tension.

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[4] *In re Interest of Kiana T.*, 262 Neb. 60, 628 N.W.2d 242 (2001).

In *In re Interest of Kiana T.*, the child was born with cocaine in her system and the county attorney filed a petition alleging that she was a child under § 43-247(3)(a). During a "detention" hearing, the mother's attorney noted that the "'natural father [was] also present'" and "'would like to be a party to this petition.'"[5] Eventually, a public defender was appointed to represent the putative father, and the putative father was represented by counsel at the adjudication hearing and at the disposition hearing.

The guardian ad litem objected and sought genetic testing to prove that the putative father was in fact the child's biological father (it does not appear that this testing was completed prior to the appeal). The evidence showed that the child's biological mother had not completed an affidavit of identity and that the putative father had refused to sign any paperwork at the time of the child's birth.

On appeal, both the guardian ad litem and the county attorney argued that the putative father should not have been allowed to intervene without following the procedures set forth in Neb. Rev. Stat. §§ 25-328 through 25-330 (Reissue 1995). We agreed and held that the putative father was not entitled to participate in dependency proceedings without properly intervening in the matter.

*In re Interest of Kiana T.* is distinguishable from the appeal before us. The evidence in that case did not establish that the putative father was in fact the child's biological father. He was not listed on the birth certificate, no paternity tests had been conducted, and the child's biological mother did not complete an affidavit of identity naming him as the biological father. Thus, requiring the putative father to file for intervention and prove that he had standing was appropriate under the circumstances.

In this case, however, Sabrina produced a copy of Sloane's birth certificate identifying her as Sloane's mother. Sabrina

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[5] *Id.* at 62, 628 N.W.2d at 243.

additionally testified that she was Sloane's mother. Under § 43-245(19), Sabrina was a party.

The county's argument that Sabrina's reliance on § 43-245 was premature is without merit. That section defines terms "[f]or purposes of the Nebraska Juvenile Code, unless the context otherwise requires." It would strain the interpretation of the Nebraska Juvenile Code to conclude that a term in the code does not mean what the code says it means simply because a juvenile had not yet been formally adjudicated.

The juvenile court erred to the extent that it concluded Sabrina needed to file a motion to intervene in this case.

### (c) Denial of Motion for Custody

Sabrina also argues that the juvenile court erred when it denied her motion for custody. Sabrina argues that the parental preference doctrine applies, that her due process rights were violated, and that there was insufficient evidence to show that it was in Sloane's best interests to be placed outside of the parental home.

Before addressing the merits of this claim, we recognize that there is some dispute about whether the juvenile court addressed the merits of Sabrina's motion for custody. We find that it did.

At the hearing, the juvenile court noted the intervention issue. But the court also indicated that it could not award custody to Sabrina even if it wished to do so because of the ongoing probation docket—an indication that it at least considered the merits of Sabrina's motion.

Further supporting the conclusion that the juvenile court reached the merits of Sabrina's motion is the fact that the motion was denied. If the juvenile court had made its ultimate determination based upon Sabrina's failure to intervene, the proper disposition of the motion would have been to dismiss it for lack of standing. We conclude that the juvenile court did address the merits of Sabrina's motion.

Sabrina's appeal raises the issue of what persons or entities are eligible to be awarded custody of a child when that child is both (1) under the supervision of probation and under a dispositional order requiring out-of-home placement and (2) subject to an abuse and neglect docket.

When a child is subject to a probation docket, the Office of Probation Administration has placement and care responsibility for the juvenile,[6] but does not have custody of that juvenile. Though not easily discernible from this record, at the time of adjudication, the probation office had the care, responsibility, or supervision of Sloane. But pursuant to the ex parte and temporary detention orders, Sloane was under the custody of DHHS. If the abuse and neglect docket had not existed, Sloane would have remained under her parents' custody even when undergoing treatment on the probation docket. We also note that temporary custody of Sloane and her brother had been awarded to Sabrina by the district court in Sabrina and Christopher's separate divorce action.

The question presented, then, is where custody of Sloane should lie given the abuse and neglect docket. Under this abuse and neglect docket, the juvenile court had authority pursuant to Neb. Rev. Stat. § 43-284 (Cum. Supp. 2014) to leave Sloane's custody with her parents.

[3-5] Indeed, 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.[7] The concept of due process embodies the notion of fundamental fairness and defies precise definition.[8] In deciding due process requirements in a particular case, we must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use.[9]

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[6] Neb. Rev. Stat. § 43-297.01 (Cum. Supp. 2014).

[7] *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004).

[8] *Id.*

[9] *Id.*

Due process is flexible and calls for such procedural protections as the particular situation demands.[10] As Sloane's mother, due process considerations safeguard Sabrina's right to custody of Sloane, subject only to the State's interest in protecting Sloane from harm.

[6-9] Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers, including the State, to the parent-child relationship and the preferences of the child.[11] Therefore, unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child.[12] Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.[13] The doctrine is applicable even to an adjudicated child.[14]

The Office of Probation Administration was not awarded, nor could it have been awarded,[15] custody of Sloane when she was entrusted to its supervision. Nor was the juvenile court required to give DHHS custody of Sloane by virtue of Sloane's adjudication on the abuse and neglect docket.[16] The parental preference doctrine generally protects Sabrina's right to custody of Sloane.[17]

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[10] *Id.*

[11] See *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011).

[12] See *id.*

[13] *Id.*

[14] See *id.*

[15] See § 43-297.01.

[16] See § 43-284.

[17] See *In re Interest of Lakota Z. & Jacob H., supra* note 11.

On these facts, it was error for the juvenile court to overlook Sabrina's status as Sloane's mother in making its custody determination. Sabrina was, and is, presumed to be the best person to parent Sloane unless and until the State shows otherwise. During the hearing on Sabrina's motion, the State did not present sufficient evidence to meet its burden.

However, the original hearing on Sabrina's motion for custody was held in November 2014. As such, the record before this court does not provide us with the most up-to-date information regarding Sloane. This information is presumably available to the juvenile court and should be considered by that court on remand. We reverse the juvenile court's denial of Sabrina's motion for custody and remand the cause for further proceedings.

In so remanding, we note that Sloane's probation docket does not affect Sabrina's basic right to legal custody over Sloane. But we emphasize that because the Office of Probation Administration has "placement and care responsibility"[18] over Sloane, Sabrina's right to custody is subject to that probation docket.

## VI. CONCLUSION

The decision of the juvenile court in case No. S-15-012 is affirmed. The decision of the juvenile court in case No. S-15-074 is reversed, and the cause remanded for further proceedings.

Judgment in No. S-15-012 affirmed.
Judgment in No. S-15-074 reversed, and cause remanded for further proceedings.

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[18] § 43-297.01(1).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
— Nebraska Reporter of Decisions

# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Jon Placke, respondent.

870 N.W.2d 109

Filed September 25, 2015. No. S-15-393.

Original action. Judgment of disbarment.

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

Per Curiam.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Jon Placke, on August 24, 2015. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on April 26, 1993. On May 5, 2015, the Committee on Inquiry of the Fifth Judicial District filed an application for temporary suspension of respondent's license, and attached to the application was an affidavit of the Counsel for Discipline of the Nebraska Supreme Court. The application and affidavit alleged that respondent had failed to pay fees and assessments to renew his license to practice law in the State of Nebraska in 2015 and that he failed to submit evidence showing that he completed his mandatory continuing legal education requirements for 2014. The

application and affidavit alleged that three criminal charges had been filed against respondent in Hall County, Nebraska, between October and December 2014, which included driving a motor vehicle on a suspended license and two charges of third degree domestic assault, and that two grievances had been filed against respondent, which generally alleged trust account violations, neglect, failure to communicate, and failure to provide requested information to the Counsel for Discipline. The application and affidavit also alleged that in two separate probate cases in which respondent was appointed as the personal representative in intestacy, respondent failed to file inventories and failed to appear in court, and that in a separate criminal case, respondent failed to communicate with his client.

Respondent was temporarily suspended on June 24, 2015. On August 24, respondent filed a "Receipt" acknowledging the receipt of the order of temporary suspension as well as the Neb. Ct. R. 3-316 (rev. 2014) notification information.

On August 24, 2015, respondent filed a voluntary surrender of license, in which he stated that he does not challenge or contest the truth of the suggested allegations set forth in the application for temporary suspension. Respondent further stated that he freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

## ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly

> does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the suggested allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the suggested allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of § 3-316 of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Kena G. Jackson, appellant.

870 N.W.2d 133

Filed October 2, 2015. No. S-14-677.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
5. **Criminal Law: Final Orders: Sentences: Words and Phrases.** The final judgment in a criminal case means sentence, and the sentence is the judgment.
6. **Final Orders: Appeal and Error.** The general rule prohibiting immediate appeals from interlocutory orders seeks to avoid piecemeal appeals arising out of one set of operative facts, chaos in trial procedure, and a succession of appeals in the same case to secure advisory opinion to govern further actions of the trial court.
7. **Judgments.** As a general matter, an order on summary application in an action after judgment under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an order ruling on a postjudgment motion in an action.
8. **Words and Phrases.** A substantial right is an essential legal right, not merely a technical right.
9. **Final Orders: Appeal and Error.** An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.

10. **Final Orders.** Whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter.
11. **Final Orders: Appeal and Error.** An order affects a substantial right when the right would be "significantly undermined" or "irrevocably lost" by postponing appellate review.
12. **Habeas Corpus.** The certified copy of the judgment of a court of record constitutes the authority of the warden to retain the prisoner.
13. **Arrests: Warrants: Appeal and Error.** An order for an arrest and commitment warrant is not a final, appealable order.

Appeal from the District Court for Lancaster County: Jodi Nelson, Judge. Appeal dismissed.

Jerry L. Soucie for appellant.

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

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

McCormack, J.

## NATURE OF CASE

A parolee appeals from the district court's arrest and commitment warrant that was issued ex parte after the Nebraska Department of Correctional Services (the Department) alerted the court that it had erroneously discharged him before his mandatory release date. The parolee attacks the subject matter jurisdiction of the district court to issue the order for an arrest and commitment warrant. Alternatively, the parolee asserts that the lack of notice and a hearing violated procedural due process and his right to counsel. We dismiss the appeal for lack of a final, appealable order.

## BACKGROUND

Kena G. Jackson was convicted of possession of a controlled substance with enhancement pursuant to the habitual

criminal statute.[1] On June 9, 2004, Jackson was sentenced by the district court to 10 to 15 years' imprisonment, with 196 days' credit for time served.

The Department erroneously discharged Jackson from custody on November 11, 2013. With the 196 days' credit, Jackson had served only 3,650 days at the time of his discharge. This would correspond to his 10-year mandatory minimum sentence under the habitual criminal statutes. However, Jackson's discharge date should have been calculated upon serving 12½ years of his sentence.[2] Jackson's parole eligibility date was calculated upon serving 10 years of his sentence.[3]

On June 26, 2014, the State filed a motion in the district court, under the same docket number as the original conviction and sentence, asking that the court issue a warrant for Jackson's arrest and commitment, so that he could serve the remainder of the June 9, 2004, sentence. The State filed an accompanying affidavit in which the director of the Department averred that by deducting good time credit from Jackson's mandatory minimum sentence, the Department had erroneously released Jackson before his mandatory discharge date. Thus, at the time Jackson was erroneously released, he still had 2 years 6 months to serve on his sentence before mandatory discharge. Jackson was not notified of the State's motion, and no hearing was held on the motion.

The court issued an order on June 26, 2014, finding that Jackson had not served the entirety of his sentence and that he had been prematurely and erroneously released. The court ordered that an arrest and commitment warrant be issued. The court concurrently issued the arrest and commitment warrant. Upon his return to custody, the Department released Jackson on parole. The Department has indicated that other similarly

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[1] See Neb. Rev. Stat. § 29-2221 (Reissue 1995).

[2] See Neb. Rev. Stat. §§ 83-1,107 and 83-1,110 (Reissue 2014). See, also, e.g., *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), *disapproved on other grounds, State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

[3] See *id*.

released inmates have not always been brought back into custody through an arrest and commitment warrant.

Jackson appeals the court's order for an arrest and commitment warrant.

## ASSIGNMENTS OF ERROR

Jackson asserts (1) that the district court lacked subject matter jurisdiction to order his arrest and commitment and (2) that issuing the arrest and commitment warrant without notice or a hearing was "in violation of the Due Process Clause of the Fourteenth Amendment and Sixth Amendment to the United States Constitution."

## STANDARD OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law.[4] We independently review questions of law decided by a lower court.[5]

## ANALYSIS

[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.[6] For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.[7]

[5] The "final judgment in a criminal case means sentence and the sentence is the judgment."[8] Accordingly, the order for an arrest and commitment warrant in this case occurred after the final judgment. It could only be directly appealed if it constituted a final order.

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

[5] *Id.*

[6] *Id.*; *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

[7] *Id.*

[8] *State v. Adamson*, 194 Neb. 592, 593, 233 N.W.2d 925, 926 (1975).

There are three types of final orders that may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2008): (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 judgment is rendered. In addition, the collateral order doctrine provides that an interlocutory order is immediately appealable if it (1) finally decides an important matter, (2) that is separate and distinct from the merits, and (3) is effectively unreviewable at the end of the litigation.[9]

[6] These are the limited exceptions to the general rule that interlocutory orders are not immediately appealable. The general rule prohibiting immediate appeals from interlocutory orders seeks to avoid piecemeal appeals arising out of one set of operative facts, chaos in trial procedure, and a succession of appeals in the same case to secure advisory opinion to govern further actions of the trial court.[10]

Jackson asserts that the order for an arrest and commitment warrant was final, because it affected a substantial right and was made on summary application in an action after judgment is rendered.

[7] We agree with Jackson that the order for an arrest and commitment warrant was an order on summary application in an action after judgment. As a general matter, an order on "'summary application in an action after judgment'" under § 25-1902 is an order ruling on a postjudgment motion in an action.[11] In *State v. Perry*,[12] we held that the trial court's amended commitment order, changing the defendant's sentence

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[9] See *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997).

[10] See, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000).

[11] *Heathman v. Kenney*, 263 Neb. 966, 969, 644 N.W.2d 558, 561 (2002).

[12] *State v. Perry*, 268 Neb. 179, 681 N.W.2d 729 (2004).

from 40 to 42 years' imprisonment to 200 months' to 42 years' imprisonment and issued upon the court's own motion 2 years after the original sentence, was made on summary application in an action after judgment was rendered. And in *Heathman v. Kenney*,[13] we held that an order denying the defendant's request for reimbursement of photocopying expenses, made after a final judgment of dismissal of the underlying writ of habeas corpus and while the defendant's appeal from the dismissal was pending, was made upon a summary application in an action after judgment.

Similarly here, the State's motion for an arrest and commitment warrant related to a prior final judgment, the June 9, 2004, sentencing order. The court's order granting the motion was a postjudgment ruling in the underlying criminal action. It was an order in an action after judgment is rendered.

But we disagree with Jackson's contention that the order for an arrest and commitment warrant affected a substantial right. Numerous factors have been set forth defining when an order affects a substantial right. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue.[14] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[15]

[8,9] Regarding the importance of the right affected, we often state that a substantial right is an essential legal right, not merely a technical right.[16] It is a right of "substance."[17] We

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[13] *Heathman v. Kenney, supra* note 11.

[14] See John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239 (2001).

[15] See *id*. See, also, e.g., *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); *Egan v. Bunner*, 155 Neb. 611, 52 N.W.2d 820 (1952); *Ribble v. Furmin*, 69 Neb. 38, 94 N.W. 967 (1903).

[16] See *Hernandez v. Blankenship*, 257 Neb. 235, 596 N.W.2d 292 (1999).

[17] See, *Clarke v. Nebraska Nat. Bank*, 49 Neb. 800, 803, 69 N.W. 104, 106 (1896); Lenich, *supra* note 14.

have elaborated further that an order affects a substantial right if it "affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing."[18]

Thus, in *State v. Schlund*,[19] we held that an order disqualifying the public defender did not affect a substantial right. We explained that while there is a right to effective counsel, there is no right to counsel of one's choice. Moreover, the motion to disqualify counsel affected a "peripheral matter," rather than the subject matter of the case.[20]

Likewise, we held in *In re Estate of Peters*[21] that even though an order reopening a formally closed probate estate and reappointing a personal representative required the heirs to defend distributions that were approved 2 years earlier, the order was not dispositive of the heirs' rights to those distributions. The heirs did not yet suffer a diminishment of any claim or defense as a result of the order. Therefore, the order did not affect a substantial right.

[10,11] Whether the effect of an order is substantial depends on "whether it affects with finality the rights of the parties in the subject matter."[22] This aspect of "affecting a substantial right" also depends on whether the right could otherwise be effectively vindicated.[23] An order affects a substantial right when the right would be "significantly undermined"[24] or "irrevocably lost"[25] by postponing appellate review. The duration of

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[18] *Jarrett v. Eichler*, 244 Neb. 310, 314, 506 N.W.2d 682, 685 (1993). See, also, *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996).

[19] *State v. Schlund, supra* note 18.

[20] *Id.* at 176, 542 N.W.2d at 423.

[21] *In re Estate of Peters, supra* note 10.

[22] *Id*. at 159, 609 N.W.2d at 27.

[23] See, e.g., *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010); *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006).

[24] *State v. Gibbs*, 253 Neb. 241, 245, 570 N.W.2d 326, 330 (1997).

[25] *State v. Vela, supra* note 23, 272 Neb. at 290, 721 N.W.2d at 635.

the order is relevant to whether its effect on the substantial right is substantial.[26]

Thus, in *State v. Cisneros*[27] the Nebraska Court of Appeals held that an order denying the defendant's request to withdraw his pleas of no contest did not affect a substantial right. The order clearly affected the defendant's important rights to a presumption of innocence and to a trial by jury. But the Court of Appeals reasoned that the withdrawal of the pleas, even if allowed, would not have resulted in the defendant's immediate release from custody. Therefore, the rights at issue could effectively be vindicated in an appeal after a conviction and sentence.[28]

And in *In re Interest of T.T.*,[29] the Court of Appeals held that a temporary gag order against a parent in juvenile proceedings was not a final, appealable order. The order was only intended to operate for 5 days. The court observed that the object of the order was of sufficient importance; the right of free speech is "'constitutional bedrock.'"[30] But the Court of Appeals concluded that the timeframe over which the order could reasonably be expected to operate was not sufficient to be directly appealable.[31]

In Nebraska, an arrest, with or without a judicially ordered warrant, is not immediately appealable in other contexts.[32] Even the denial of a motion to quash, based on the alleged illegality of the arrest, is not immediately appealable.[33]

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[26] See *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009).

[27] *State v. Cisneros*, 14 Neb. App. 112, 704 N.W.2d 550 (2005).

[28] *Id.*

[29] *In re Interest of T.T., supra* note 26.

[30] *Id.* at 184, 779 N.W.2d at 612.

[31] *In re Interest of T.T., supra* note 26.

[32] See, e.g., *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008); *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996). See, also, *United States v. One Parcel of Real Property*, 767 F.2d 1495 (11th Cir. 1985).

[33] See *State v. Sinsel, supra* note 32.

Likewise, an order of commitment is not considered an appealable order in its more typical context.[34]

In other jurisdictions, attempts to appeal directly from orders for arrest or commitment are exceedingly rare. But when presented, courts in other jurisdictions likewise hold, either directly or indirectly, that such orders are not immediately appealable absent specific statutory authorization.[35] And although there are many cases considering the consequences of mistaken and erroneous release, none involve immediate appeals from orders pertaining to the act of bringing the inmate back into a department of corrections' custody.

[12] Jackson acknowledges that he is currently serving parole under the legal custody of the Department by virtue of the June 9, 2004, sentencing order. We have said, "The certified copy of the judgment of a court of record . . . constitutes the authority of the warden to retain the [prisoner]."[36] When a judgment includes a statement of the nature of the imprisonment imposed and the duration thereof, it fulfills all purposes contemplated by the relevant statute, Neb. Rev. Stat. § 29-2401 (Reissue 2008), and constitutes the authority for the Department's exercise of custody over the convicted person.[37]

In *Hawk v. O'Grady*,[38] we applied these principles to affirm the denial of habeas corpus relief for a petitioner who alleged that the district court acted in excess of its powers when it ordered federal officers to return the petitioner to the custody of Douglas County upon the completion of his federal sentence. We explained that even if the petitioner's

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[34] See, e.g., *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

[35] See, *United States v. One Parcel of Real Property, supra* note 32; *State v. Royer, supra* note 32; *Nnoli v. Nnoli*, 389 Md. 315, 884 A.2d 1215 (2005).

[36] *Dunham v. O'Grady*, 137 Neb. 649, 651, 290 N.W. 723, 724 (1940).

[37] *Id.*

[38] *Hawk v. O'Grady*, 137 Neb. 639, 290 N.W. 911 (1940).

allegations were true, they would not entitle him to habeas relief. We said that despite any possible error in the directions concerning his delivery into custody, the petitioner was serving time in State custody pursuant to a valid conviction and sentence.[39]

We have also repeatedly said that "'where the judgment and sentence is imprisonment for a certain term, *and from any cause the time elapses without the imprisonment being endured*, it will still be a valid, subsisting, unexecuted judgment.'"[40] The June 9, 2004, order did not lose its presumed validity and effect simply because the Department mistakenly released Jackson, and any attack on the enforceability of the June 9 order was beyond the scope of the proceedings for an arrest and commitment warrant. The court was merely acting, through the arrest and commitment warrant, as an enforcer of its prior order.

The district court enforced the June 9, 2004, order after observing through a straightforward mathematical calculation that Jackson had not yet served the entirety of his sentence. The court was not deciding any important right or issue affecting the subject matter of the underlying criminal action or of any rights allegedly derived from the mistaken release. The court did not diminish any claim or defense that was available to Jackson prior to the order for an arrest and commitment warrant. This is distinguishable from the final order in *State v. Perry*, wherein the court had amended one of the defendant's sentences from 40 to 42 years' imprisonment to 200 months' to 42 years' imprisonment.[41]

Because the Department's continuing exercise of custody is pursuant to the June 9, 2004, order, setting aside the order for an arrest and commitment warrant would not result in

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[39] *Id.*

[40] *Riggs v. Sutton*, 113 Neb. 556, 560, 203 N.W. 999, 1000 (1925) (emphasis supplied). See, also, *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

[41] *State v. Perry, supra* note 12.

Jackson's release from the Department's custody, even if we were to entertain Jackson's appeal and find it meritorious. And the court's order for an arrest and commitment warrant was by its nature an order of limited duration. The warrant was issued pursuant to the order, and its sole purpose was completed when Jackson was brought back into the Department's custody.

Any rights of substance that Jackson might claim stem from his mistaken release can be effectively vindicated through a petition for a writ of habeas corpus relief. This is distinguishable from the final order in *Heathman v. Kenney* denying the defendant's request for reimbursement of photocopying expenses,[42] because there was no apparent future opportunity to litigate that question. Jackson's objective is his absolute discharge from the Department's custody. Habeas is especially crafted for persons who believe they are confined without legal authority.[43]

The scope of the proceedings inherent to the consideration of a motion for an arrest and commitment warrant are necessarily more limited in comparison to an action for habeas corpus relief. This is due to both the scope of the issue presented and the need for expediency when a mistakenly released inmate is at large. We reject Jackson's apparent contention that motions for arrest and commitment warrants should be turned into ad hoc habeas actions in which both parties fully litigate the enforceability of the unserved sentencing order before a warrant to arrest can issue.

Were we to address appeals from orders for arrest and commitment warrants, our review would be limited to the questions presented to and decided by the district court,[44] as well as any inherent due process or jurisdictional questions relating to the motion. All other questions unrelated to the act of

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[42] *Heathman v. Kenney, supra* note 11.

[43] See Neb. Rev. Stat. § 29-2801 (Reissue 2008).

[44] See *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012).

issuing an arrest and commitment warrant would have to be litigated elsewhere. To recognize an order for an arrest and commitment warrant as a final order would thus create piecemeal appeals arising out of one set of operative facts. Further, since not all mistakenly released inmates are brought back into custody through an order for an arrest and commitment warrant, recognizing such orders as final would create chaos in trial procedure.

[13] For all these reasons, we conclude that the order for an arrest and commitment warrant is not a final, appealable order. But most fundamentally, the temporary order did not affect the underlying authority of the Department's continuing exercise of custody over Jackson, and the order did not diminish any claim or defense that was available to Jackson before it was issued.

## CONCLUSION

A habeas action provides an "adequate and unimpaired opportunit[y]" to "test the validity and sufficiency" of Jackson's claims stemming from the mistaken release.[45] Until such an action succeeds in altering the June 9, 2004, sentence or its enforceability, the June 9 sentence remains the authority under which the Department currently has Jackson in custody. The district court's order for an arrest and commitment warrant was simply a temporary order of enforcement. Therefore, the order for an arrest and commitment warrant was not a final order and we have no jurisdiction over the present appeal.

Appeal dismissed.

Stephan, J., not participating in the decision.

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[45] *Rehn v. Bingaman*, 157 Neb. 467, 481, 59 N.W.2d 614, 621 (1953).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Avery R. Tyler, appellant.

870 N.W.2d 119

Filed October 2, 2015. No. S-14-702.

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: Appeal and Error.** When reviewing whether a consent to search was voluntary, as to the historical facts or circumstances leading up to a consent to search, an appellate court reviews the trial court's findings for clear error. However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which an appellate court reviews independently of the trial court.
3. **Motions to Suppress: Appeal and Error.** Where a district court denies a motion to suppress without making explicit findings, an appellate court's review is framed by the factual findings and legal conclusions implicit in the district court's decision.
4. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
5. **Search and Seizure.** In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.
6. **Search and Seizure: Duress.** Consent to a search must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.

7. **Search and Seizure.** Whether consent to a search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.
8. **Constitutional Law: Search and Seizure: Search Warrants.** A warrant satisfies the particularity requirement of the Fourth Amendment if it leaves nothing about its scope to the discretion of the officer serving it.
9. **Search Warrants: Motions to Suppress.** Absent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution.
10. **Constitutional Law: Search and Seizure: Evidence.** That a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies.
11. **Search Warrants: Evidence: Police Officers and Sheriffs.** The exclusionary rule is inapplicable to evidence obtained pursuant to an invalid warrant upon which police officers acted in objectively reasonable good faith reliance.
12. **Search and Seizure: Police Officers and Sheriffs.** The good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization.
13. **Police Officers and Sheriffs: Presumptions.** Officers are assumed to have a reasonable knowledge of what the law prohibits.
14. **Search Warrants: Affidavits: Police Officers and Sheriffs: Appeal and Error.** In assessing the good faith of an officer's conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.
15. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs.** Evidence suppression will still be appropriate if one of four circumstances exists: (1) The magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth, (2) the issuing magistrate wholly abandoned his judicial role, (3) the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ., and Moore, Chief Judge.

Cassel, J.

## I. INTRODUCTION

In this direct appeal from criminal convictions and sentences, Avery R. Tyler challenges the denial of his pretrial motions to suppress evidence seized in the execution of four search warrants. Although we will explain our conclusions in detail, we begin by summarizing them.

- The district court's implicit rejection of Tyler's testimony—claiming that his cell phone was taken from his person and not pursuant to the search warrant—was not clearly wrong.
- Tyler's written consent to an examination of the cell phone's contents was voluntarily given.
- Tyler's challenge that the warrants were not sufficiently particular fails because (1) a gunlock was seized pursuant to a sufficiently particular, severable portion of the warrant, and (2) the detectives acted in good faith reliance on the warrants.

Accordingly, we affirm Tyler's convictions.

## II. BACKGROUND

### 1. Shooting

In the early morning hours of September 3, 2012, Delayno Wright was shot and killed outside Halo Ultra Lounge (Halo) in Omaha, Nebraska. Before the shooting, Wright, his girlfriend Brittany Ashline, and his cousin LaRoy Rivers left Halo together and walked through the parking lot toward Wright's car. As they were walking, two men walked past them, one of whom grabbed or brushed against Ashline's

buttocks. Ashline turned around and confronted the men, and so did Wright.

Rivers thought he recognized one of the men, who was wearing a brown, striped shirt. Rivers saw the man in the brown, striped shirt break away from the group and go into the parking lot.

Rivers saw a dome light turn on in the parking lot. Seconds later, Rivers heard the voice of the man in the brown, striped shirt yelling, "'What's up now?'" and he heard gunshots. Rivers could not see the shooter. Ashline, who had walked away from the group, said she saw a man run to a tan or gold sport utility vehicle or Jeep and leave the scene after the shots were fired.

Wright indicated he had been hit, and friends drove him to a hospital. He was then transferred by ambulance to another hospital, where he was pronounced dead. His cause of death was a gunshot wound to his torso.

### 2. Investigation

Rivers remained at Halo and was taken to the police station. There, Rivers told a detective that he thought he recognized the man in the brown, striped shirt as a person he played basketball with in high school. Rivers told the detective that he thought the man's first name was Avery, but that he was unsure of the man's last name. The detective began searching high school basketball rosters on the Internet. Rivers accessed "Facebook" on the detective's computer and viewed the profile picture of Tyler. In the course of the investigation, investigators obtained a photograph of Tyler from a wedding he attended on September 2, 2012; in the photograph, he was wearing a brown, striped shirt.

Investigators obtained security footage that showed a sport utility vehicle leaving the scene at a high rate of speed near the time of the shooting. In the course of the investigation, detectives learned that Tyler's girlfriend owned a silver Jeep Commander.

Investigators found eight shell casings at the scene. A crime laboratory (lab) technician reported that the casings were all fired from the same gun and that there are about 20 guns capable of firing them, including an "FN Five-seveN" pistol. Investigators discovered Tyler had recently purchased an FN Five-seveN pistol at a sporting goods store in La Vista, Nebraska.

### 3. Searches

Detectives applied for, and the county court issued, four search warrants authorizing police to search (1) Tyler's car, (2) Tyler's grandparents' residence, (3) Tyler's mother's residence, and (4) Tyler's girlfriend's residence. Each affidavit supporting the first three warrant applications contained the same information. The first three warrants each authorized a search of the described property for:

> 1) Any and all firearms, and companion equipment to include but not limited to ammunition, holsters, spent projectiles, spent casings, cleaning kits/cases and boxes, paperwork, and the like.
>
> 2) The ability to seize any item(s) of evidentiary value; to include clothing and cellular phones[.]
>
> 3) Venue items identifying those parties in control of [the property described].

Investigators executed the warrants and recovered a cell phone from Tyler's car, a gunlock bearing the "FN" logo from his grandparents' residence, and a letter from his mother's residence. Tyler signed a consent form that allowed detectives to download and search the contents of his cell phone.

In the data downloaded from Tyler's cell phone, investigators discovered another picture of Tyler at the wedding reception wearing a brown, striped shirt. They also extracted deleted text messages from the cell phone, including a message sent from the cell phone at 11:38 p.m. on September 2, 2012, that read: "Whats it like and where is halo?" Detectives obtained the cell phone's call records and location information separately from the cell phone service provider.

4. Suppression Hearing

Tyler was charged with murder in the first degree and use of a firearm to commit a felony for the death of Wright. Before trial, Tyler filed four separate motions to suppress the evidence. Relevant to this analysis, the motions argued that Tyler was unlawfully arrested and searched, that he did not voluntarily consent to the search of the contents of his cell phone, and that the warrants authorizing the searches were not sufficiently particular.

At the suppression hearing, testimony established that detectives had a uniformed officer watch Tyler's car while they obtained the search warrants. The car was parked at Tyler's place of employment, and detectives instructed the officer to pull Tyler over if he tried to leave. When Tyler left work, the officer pulled him over. Tyler testified that the officer immediately drew his weapon and had him exit the vehicle. Tyler said the officer then searched his person, taking his cell phone and wallet from his pockets and placing them "on the seat of my vehicle, in the driver's seat." The officer then handcuffed him and immediately placed him in the back of his squad car. Tyler waited in the squad car for about 10 to 15 minutes until detectives, Chris Gordon and Dave Schneider, arrived and showed him the warrant. They waited together for the crime lab to arrive; the crime lab took pictures before the search began. Gordon and Schneider then searched his car.

At the suppression hearing, the State did not present evidence contradicting Tyler's claim that the officer removed his cell phone and wallet from his pockets. The uniformed officer who stopped and held Tyler did not testify at the hearing. Gordon and Schneider testified that the cell phone was in the car when they arrived, which was after the stop occurred.

After the search, the detectives released Tyler from the squad car and handcuffs. What happened next was disputed. Tyler testified that Gordon and Schneider told him they were going to take his cell phone because it was part of his vehicle.

He claimed the detectives did not ask him permission to search the cell phone or indicate they would get a search warrant. Tyler asked when he would get his cell phone back, and the detectives told him that they could download the data from the cell phone "'pretty quickly,'" but that if there was a lock code, the process would take longer. According to Tyler, one detective said, "'If you sign this [form], then it gives us permission to allow you to unlock your code, then you will be able to get it back sooner.'"

Tyler signed the form, titled "Permission to Search Digital Media Device," without reading it. Tyler testified, "'I thought that I was signing permission to be able to touch my phone . . . .'" The form provided, in relevant part:

> I, Avery Tyler, voluntarily authorize Det. Herfordt #1746, or any other employee of the OMAHA POLICE DEPARTMENT or its designees, to search all cell phones, computers, electronic or data storage devices and/or retrieval systems, digital mediums or any related peripherals described below[.]
>
> . . . .
>
> I hereby knowingly, intelligently and voluntarily give permission for this search freely and voluntarily, and not as the result of threats or promises of any kind.

The detectives then took the cell phone to the station to download its data. Tyler admitted on cross-examination that he has a degree in business administration and that he was 2 weeks from graduating with his master's degree when the search occurred.

The detectives told a different version of events. Schneider testified that he told Tyler, "'We're going to take your phone as part of the search of your vehicle to be processed or searched later.'" He then explained to Tyler that "it would either be via a search warrant or a permission to search" and that it was "completely his decision if he wanted to give permission." He told Tyler that waiting for a warrant would take longer because no one was available to get a warrant over the weekend. Tyler

wanted his cell phone back quickly, and he agreed to give permission to search to speed up the process. To accommodate Tyler, Schneider told him that he could come pick up his cell phone at the station as soon as they were done downloading its data. Because Schneider did not have any permission forms with him, Tyler and Schneider met at the station, where Tyler signed the form. Schneider admitted he was not sure whether the form was signed on the scene or at the station. Detectives then downloaded the data on the cell phone, and Tyler picked it up the next day.

The detectives also testified regarding the contents of the search warrants. Schneider admitted that at the time they obtained the warrants, investigators had no information about any cell phones registered to Tyler. Gordon testified that he includes a request to seize all cell phones in his search warrants, regardless of whether he has any evidence that a cell phone was used in the criminal act. He does the same for firearms. Gordon also explained that a venue item is "some sort of documentation, a letter, mail, an ID correlating [a person] with that particular residence." He admitted that when looking for a "venue item," police can look virtually anywhere throughout the whole house. He also testified that he had applied for over 100 search warrants during his time in the homicide unit and was never denied one.

The district court did not articulate any findings from the bench. It denied all four motions to suppress in a subsequent order. There, the district court specifically determined that the warrants were sufficiently particular and that Tyler signed the consent form voluntarily. It made no finding regarding whether Tyler was unlawfully searched and seized pursuant to the search of his car.

### 5. Trial

The challenged evidence was admitted at trial, over Tyler's renewed objections. The State also introduced a photograph of Tyler's car, taken before the search. It depicts his cell

phone in the center console, rather than on the front seat as Tyler claimed.

Tyler was convicted by a jury on both counts. The district court sentenced Tyler to life in prison for the murder and 20 to 30 years' imprisonment for the firearm conviction. Tyler filed this timely appeal.

## III. ASSIGNMENTS OF ERROR

Tyler assigns, restated, that the district court erred in overruling his motions to suppress (1) evidence obtained from his cell phone, because it was seized during the unlawful arrest and search of his person and car; (2) evidence obtained from his cell phone, because his consent to its search was not voluntary; and (3) the gunlock seized during the search of his grandparents' residence and the cell phone seized from his car, because the warrants were not sufficiently particular.

## IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, 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.[1]

[2] Likewise, we apply the same two-part analysis when reviewing whether a consent to search was voluntary. As to the historical facts or circumstances leading up to a consent to search, we review the trial court's findings for clear error. However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which we review independently of the trial court.[2]

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[1] *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

[2] *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

## V. ANALYSIS

### 1. Seizure of Cell Phone

Tyler claims the district court erred when it overruled his "motion to suppress evidence obtained from the cell phone seized during the unlawful arrest and search of [Tyler] and his automobile."[3] In his brief, he argues, "The seizure of the phone is the fruit of the unlawful arrest of [Tyler] and the evidence obtained from that seizure should be suppressed."[4] He also argues the call records and location information investigators secured separately from the cell phone service provider are "fruit of the original unlawful seizure of the phone."[5] It is not clear which motion Tyler intended to reference in this first assignment of error. Though it references a single "motion," the assignment could denote either of two motions. We will assume Tyler challenges the district court's denial of both motions.

The district court made no specific finding regarding whether Tyler was unlawfully searched and arrested. We note that Tyler did not assign this omission as error. We have directed district courts to "articulate in writing or from the bench their general findings when denying or granting a motion to suppress."[6] We noted in *State v. Osborn*[7] that such findings may be essential to proper appellate review, for "[w]ithout guidance, we might not know whether the trial court rejected a defendant's factual contentions or had acted on some legal basis." We stated that "[t]he degree of specificity required will vary" from case to case.[8]

[3,4] Articulated findings by the district court would have been helpful to our review of this appeal. Nevertheless, where

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[3] Brief for appellant at 11.

[4] *Id.* at 14.

[5] *Id.* at 15.

[6] *State v. Osborn*, 250 Neb. 57, 67, 547 N.W.2d 139, 145 (1996).

[7] *Id.* at 66-67, 547 N.W.2d at 145.

[8] *Id.* at 67, 547 N.W.2d at 145.

a district court denies a motion to suppress without making explicit findings, "[o]ur review is framed by the factual findings and legal conclusions implicit in the district court's decision . . . ."[9] Furthermore, when a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[10]

We upheld a district court's implicit finding in *Osborn*.[11] There, the defendant claimed that he was locked in a room while waiting to be interviewed and that this detention constituted an illegal seizure. The district court denied the defendant's motion to suppress without making factual findings. We stated that the "trial court clearly found the testimony of the police officers that the interview room door was unlocked and that the door was generally open to be more credible than [the defendant's] testimony."[12] We also upheld a district court's implicit finding in *State v. Martin*.[13] There, the defendant testified at a suppression hearing that a detective promised him that only certain charges would be filed in exchange for his confession. The detective denied making such a promise. The district court denied the defendant's motion to suppress without making factual findings. We upheld the district court's decision and inferred that the court "obviously disbelieved and rejected" the defendant's testimony.[14]

Here, the district court implicitly rejected Tyler's claim that his cell phone was taken from his person when it denied his motions to suppress. The trial judge was entitled to disbelieve Tyler's version of events. And at trial, evidence

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[9] *Id.*

[10] *State v. Bromm*, 285 Neb. 193, 826 N.W.2d 270 (2013) (citing *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006)).

[11] *State v. Osborn, supra* note 6.

[12] *Id.* at 67, 547 N.W.2d at 145.

[13] *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993).

[14] *Id.* at 381, 500 N.W.2d at 519.

supported the district court's negative assessment of Tyler's credibility.

A photograph taken by the crime lab and presented at trial supports the district court's implicit finding by contradicting Tyler's testimony regarding the cell phone's location. It shows the cell phone was located in the cup holder of the car's center console, rather than on the driver's seat as Tyler claimed. Tyler testified that only one officer pulled him over. He claimed that after the officer placed his cell phone and wallet "in the driver's seat," the officer took Tyler to the squad car "[i]mmediately," and that they waited there together. Schneider testified that the vehicle was not searched before he arrived, and Tyler said that the crime lab took pictures before the search began. Tyler never presented any evidence to explain how his cell phone moved from the seat of the vehicle, where he claimed it was placed by the officer, to the center console, where it was depicted in the photograph. This inconsistency renders his testimony suspect.

We conclude that the district court's implicit finding was not clearly erroneous. Thus, the cell phone was obtained pursuant to the search warrant for Tyler's car and not pursuant to a search of his person.

Because the cell phone was not taken from his person, we need not address whether Tyler was unlawfully arrested. The district court implicitly concluded that the cell phone and its contents were not derived from the act of holding Tyler. Police held Tyler while they searched his car. But the cell phone was located in the car, and the search of the car was performed pursuant to a warrant. It necessarily follows that the cell phone was discovered pursuant to the warrant and not because of an arrest. Thus, even if holding Tyler did constitute an arrest, the cell phone was not the fruit of the arrest, and suppression is not an appropriate remedy.

Tyler also argues that the call records and location information obtained separately from the cell phone service provider should have been excluded as fruit of the original

unlawful seizure of the cell phone. Because we uphold the district court's implicit finding that the cell phone was not taken from his person, we need not address this claim.

### 2. Voluntary Consent to Examination of Contents

Tyler also claims the district court erred in denying his motion to suppress evidence from his cell phone, because his consent to its search was not freely, voluntarily, and intelligently made. The district court concluded that Tyler "voluntarily and with knowledge signed a document specifically granting law enforcement" consent to search his cell phone.

[5-7] In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.[15] Consent must be given voluntarily and not as the result of duress or coercion, whether express, implied, physical, or psychological.[16] The determination of whether the facts and circumstances constitute a voluntary consent, satisfying the Fourth Amendment, is a question of law.[17] Whether consent was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.[18]

We upheld consents given under factually similar circumstances in *State v. Horn*[19] and *State v. Prahin*.[20] Because our standard of review has since changed, we merely note these cases.

More recently, we concluded that consent to search was given voluntarily in *State v. Hedgcock*.[21] There, an officer asked the defendant for consent to search his vehicle, and the

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[15] *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012).

[16] *State v. Modlin*, 291 Neb. 660, 867 N.W.2d 609 (2015).

[17] *Id.*

[18] *Id.*

[19] *State v. Horn*, 218 Neb. 524, 357 N.W.2d 437 (1984).

[20] *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990).

[21] *State v. Hedgcock, supra* note 2.

defendant replied, "'Go ahead.'"[22] We noted that the officer used a conversational tone and that there was no evidence of any coercive conduct by the officers.

Here, the totality of the circumstances surrounding Tyler's consent demonstrates that it was given voluntarily. Several factors drive this conclusion.

First, Tyler was released from the squad car and the handcuffs before the discussion regarding his cell phone took place, and he participated in the search by helping the officers unlock the cell phone's lock code.

Second, although Tyler testified that the detectives never told him they needed a warrant to search his cell phone, Schneider testified that they did. We cannot say that the district court's implicit credibility assessment was clearly wrong. Schneider said he told Tyler that either they would hold his cell phone over the weekend until a search warrant could be obtained or Tyler could give permission for the search. Schneider testified that he told Tyler it was "completely [Tyler's] decision." A statement of a law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion.[23]

Finally, although Tyler claimed that he did not read the permission form, he admitted that he signed it. The form specifically stated that it authorized the Omaha Police Department to search electronic devices. Tyler had a degree in business administration, he was about to receive his master's degree, and he worked as a business intelligence analyst. Given Schneider's statements and Tyler's background, the district court could properly infer that Tyler knowingly signed the form.

We conclude Tyler voluntarily consented to the search of his cell phone. The district court did not err when it denied Tyler's motion to suppress on this issue.

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[22] *Id.* at 818, 765 N.W.2d at 481.

[23] *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001).

### 3. Particularity of Search Warrants

In his last claim of error, Tyler argues the gunlock and cell phone discovered pursuant to the searches of his car and grandparents' home should have been suppressed because the warrants authorizing the searches were not sufficiently particular. We conclude that the provision authorizing police to search for "[a]ny and all firearms" was sufficiently particular. Therefore, the gunlock was properly seized pursuant to this valid, severable portion of the warrants under the rule we adopted in *State v. LeBron*.[24] We do not address whether the other provisions were valid, because we conclude that even if they were not, investigators acted in good faith reliance on the warrants.

#### (a) Particularity Required

[8] The Nebraska Constitution provides in part that "no warrant shall issue but upon probable cause . . . and particularly describing the place to be searched, and the person or thing to be seized."[25] The Fourth Amendment similarly provides that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." A warrant satisfies the particularity requirement if it leaves nothing about its scope to the discretion of the officer serving it.[26]

#### (b) Particularity of These Warrants

The challenged warrants authorized searches of Tyler's car and his grandparents' house for:

> 1) Any and all firearms, and companion equipment to include but not limited to ammunition, holsters, spent projectiles, spent casings, cleaning kits/cases and boxes, paperwork, and the like.

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[24] *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984).

[25] Neb. Const. art. I, § 7.

[26] *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014) (citing *U.S. v. Clark*, 754 F.3d 401 (7th Cir. 2014)).

2) The ability to seize any item(s) of evidentiary value; to include clothing and cellular phones[.]

3) Venue items identifying those parties in control of [the property described].

Tyler claims the first provision violates the particularity requirement, because police knew the caliber of the weapon used in the murder. He asserts that the particularity requirement limits the scope of a search to weapons of that caliber. We disagree.

We have noted that the particularity requirement of the Fourth Amendment protects against open-ended warrants that leave the scope of the search to the discretion of the officer executing the warrant, or permit seizure of items other than what is described.[27] The 10th Circuit has recognized that "'[A] warrant that describes the items to be seized in broad or generic terms may be valid when the description is as specific as the circumstances and the nature of the activity under investigation permit.'"[28]

This provision was not open-ended. It authorized police to search for firearms and companion equipment; the scope of the search was not left to the discretion of the officers. Furthermore, the nature of the activity under investigation justifies its scope. Police were investigating a murder performed with a gun. They learned from the crime lab that about 20 guns were capable of firing the bullets recovered from the scene. The provision was sufficiently particular.

The gunlock Tyler sought to suppress was discovered pursuant to this valid portion of the warrant. The portion is severable under our decision in *LeBron*.[29] There, we approved of the approach adopted by the Eighth Circuit in *United States v. Fitzgerald*,[30] where the court held that a warrant may be

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[27] *Id.*

[28] *U.S. v. Pulliam*, 748 F.3d 967, 972 (10th Cir. 2014) (quoting *U.S. v. Riccardi*, 405 F.3d 852 (10th Cir. 2005)).

[29] *State v. LeBron, supra* note 24.

[30] *United States v. Fitzgerald*, 724 F.2d 633 (8th Cir. 1983) (en banc).

severable and valid in part, even though it may be invalid in part for lack of particularity.

[9] We noted that the Eighth Circuit stated:

> "Accordingly, we follow the approach which the First, Third, Fifth, Sixth, and Ninth Circuits, and several states, have adopted, and hold that, absent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution. More precisely, we hold that the infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant (assuming such evidence could not otherwise have been seized, as for example on plain-view grounds during the execution of the valid portions of the warrant), but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain[-]view grounds, for example—during their execution). This approach, we think, complies with the requirements of the fourth amendment."[31]

Applying this rule in *LeBron*, we concluded a stolen video cassette recorder was described with sufficient particularity and was discovered pursuant to the particular portion of the warrant. We thus severed that portion and determined that suppression was not required. We reach the same conclusion here.

The gunlock in question was seized pursuant to the valid portion of the warrant authorizing police to search for firearms and companion equipment. Any infirmity of the other portions of the warrant does not require suppression of this evidence.

(c) Good Faith

We need not address the constitutionality of the other provisions of the search warrants. Even if they violated the

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[31] *State v. LeBron, supra* note 24, 217 Neb. at 454-55, 349 N.W.2d at 921 (quoting *United States v. Fitzgerald, supra* note 30).

particularity requirement, exclusion is not required, because the good faith exception applies.

[10,11] That a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies.[32] The exclusionary rule is a judicially created remedy designed to deter police misconduct.[33] It is inapplicable to evidence obtained pursuant to an invalid warrant upon which police officers acted in objectively reasonable good faith reliance.[34]

[12-14] We have said that the good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization.[35] Officers are assumed to have a reasonable knowledge of what the law prohibits.[36] In assessing the good faith of an officer's conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.[37]

[15] Evidence suppression will still be appropriate if one of four circumstances exists: (1) The magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth, (2) the issuing magistrate wholly abandoned his judicial role, (3) the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.[38]

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[32] *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

[33] *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014).

[34] *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

[35] *State v. Sprunger, supra* note 32.

[36] *Id.*

[37] *Id.*

[38] *Id.*

We recently applied the good faith exception in *State v. Henderson*,[39] where officers searched a cell phone pursuant to warrants that authorized searches for "'[a]ny and all information.'" Although we concluded that the warrants at issue in *Henderson* were not sufficiently particular, we determined that the good faith exception applied, in part because "they also contained references to specific items that did not make the warrants so facially deficient that the officers could not reasonably presume them to be valid and the search legal."[40] We also noted that the evidence obtained and admitted was relevant and would have been found pursuant to a properly limited warrant.

Considering the totality of the circumstances, we reach the same conclusion here. The warrants at issue listed both specific categories and specific individual items for the search. They were not so deficient that a reasonably well-trained officer would have known the warrants were illegal, and the evidence that the officers obtained was relevant to the murder under investigation.

None of the other criteria for suppression applies. There is no suggestion that the officers' affidavits misled the magistrate or that the magistrate abandoned his judicial role. And the supporting affidavit was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. We conclude that the good faith exception applies to the execution of these search warrants.

## VI. CONCLUSION

We conclude the district court did not err by overruling Tyler's motions to suppress. Accordingly, we affirm the judgment of the district court.

Affirmed.

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[39] *State v. Henderson, supra* note 26, 289 Neb. at 276-77, 854 N.W.2d at 625.

[40] *Id.* at 292, 854 N.W.2d at 635.




**Nebraska Supreme Court**

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Bruce Caton, appellant, v.
State of Nebraska, appellee.
869 N.W.2d 911

Filed October 2, 2015. No. S-14-1144.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
2. **Habeas Corpus.** The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
3. **Habeas Corpus: Probation and Parole.** A parolee may seek relief through Nebraska's habeas corpus statute.
4. **Constitutional Law: Criminal Law: Statutes: Sentences.** The ex post facto prohibitions found in the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, forbid Congress and the states from enacting any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.
5. **Constitutional Law: Judgments.** The Ex Post Facto Clauses do not concern judicial decisions.
6. **Constitutional Law: Judgments: Due Process.** Limitations on ex post facto judicial decisionmaking are inherent in the notion of due process, and retroactive judicial decisionmaking may be analyzed in accordance with the more basic and general principle of fair warning under the Due Process Clause.
7. **Judgments: Due Process.** Under the Due Process Clause, the question is whether the judicial decision being applied retroactively is both unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.
8. **Sentences.** Good time reductions under Neb. Rev. Stat. § 83-1,107 (Reissue 2014) do not apply to mandatory minimum sentences.

9. ____. Logically, a defendant must serve the mandatory minimum portion of a sentence before earning good time credit toward the maximum portion of the sentence.
10. ____. A defendant is unable to earn good time credit against either the minimum or maximum sentence until the defendant has served the mandatory minimum sentence.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

Bruce Caton, pro se.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ., and Moore, Chief Judge, and Riedmann, Judge.

McCormack, J.

## NATURE OF CASE

Bruce Caton was discharged from the custody of the Department of Correctional Services (Department) upon serving 10 years of his sentence. Caton was later taken back into custody after the Department realized that the mandatory discharge date had been erroneously calculated by giving good time credit on the 10-year mandatory minimum term of Caton's sentence. Caton filed a petition for a writ of habeas corpus, challenging the Department's continuing exercise of custody. Caton alleged that in calculating his mandatory discharge date, the Department's reliance on *State v. Castillas*[1] violated the prohibition against ex post facto laws. The district court granted summary judgment for the State. We affirm.

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[1] *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), *disapproved on other grounds, State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

## BACKGROUND

Caton was sentenced on October 27, 2004, to 10 to 20 years' imprisonment with 363 days' credit for time served, after being convicted of burglary with habitual criminal enhancement. An order of commitment into the custody of the Department was signed by the clerk of the district court that same date. The date Caton committed the acts that led to this conviction is not in the record. The 10-year minimum sentence was mandatory under the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1995).

The State discharged Caton after erroneously calculating good time on the 10-year mandatory minimum sentence. The correct mandatory discharge date will be upon serving 15 years of his sentence. Approximately 8 months after Caton's erroneous discharge, Caton was brought back into the Department's custody after the district court granted the State's motion to secure an arrest warrant. Caton was immediately released on parole. An affidavit by the records manager of the Department reflects that the Department has for purposes of his mandatory discharge date given Caton credit for the time spent mistakenly at liberty.

Caton filed a petition for a writ of habeas corpus. Caton argued that in calculating his discharge date, the Department's reliance on *Castillas*, in which we discussed how discharge and parole eligibility dates should be calculated under the relevant good time statutes, violated the prohibition against ex post facto laws.[2] The court granted the State's motion for summary judgment. Caton appeals.

## ASSIGNMENTS OF ERROR

Caton assigns as error: (1) "Due Process cannot be refused on the basis of a person's possible choice to flee jurisdiction, or a right to appeal," and (2) a "Nebraska Supreme Court

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[2] *Id.*

opinion issued in 2002 cannot 'foretell' an opinion of 2013 where the meaning of a law is altered to limit good time credit causing arrest and re-incarceration for 5 more years, 8 months after discharge from sentence for crime commit[t]ed 9½ years before 2013 definition."

## STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.[3]

## ANALYSIS

[2] The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a person's detention, imprisonment, or custodial deprivation of liberty.[4] The State agrees that habeas corpus was the proper procedure for Caton to challenge the Department's exercise of custody.

[3] Although Caton was a parolee, we have held in other contexts that a parolee is "in custody under sentence." In *State v. Thomas*,[5] we reasoned:

> [A parolee] is subject to revocation of his parole and return to prison if he violates the terms of his parole in any way. . . . As a condition of parole he may be required to be employed, remain in a certain geographical area unless granted written permission to leave the area, report to his parole officer, submit to certain medical or psychological treatment, refrain from associating with certain persons, or abide by any other conditions determined by the Board of Parole. [A parolee] does not possess the

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[3] *State v. Armagost*, 291 Neb. 117, 864 N.W.2d 417 (2015).

[4] *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008); *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007). See, also, Neb. Rev. Stat. § 29-2801 (Reissue 2008).

[5] *State v. Thomas*, 236 Neb. 553, 557, 462 N.W.2d 862, 866 (1990) (citations omitted).

same degree of liberty and freedom as a citizen not under the jurisdiction of the Board of Parole.

We also noted in *Thomas* that the U.S. Supreme Court, in *Jones v. Cunningham*,[6] held that a parolee is "'in custody'" for purposes of the federal habeas corpus statute.[7] The majority view in other jurisdictions is that parole is a sufficient restraint of liberty as will entitle a petitioner to relief.[8] We similarly hold here that a parolee may seek relief through our habeas corpus statute.

Caton argues that the Department's application of our opinion in *Castillas*, explaining how good time should be calculated for mandatory minimum sentences,[9] violated the prohibition against ex post facto laws, because such interpretation was "'[u]nforeseeable.'"[10] Caton makes no other fully articulated argument that was both assigned as error and

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[6] *Jones v. Cunningham*, 371 U.S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963).

[7] *Id.*, 371 U.S. at 238, quoting 28 U.S.C. § 2241 (1958).

[8] See, *Mainali v. Virginia*, 873 F. Supp. 2d 748 (E.D. Va. 2012); *Banks v. Gonzales*, 496 F. Supp. 2d 146 (D.D.C. 2007); *In re Wessley W.*, 125 Cal. App. 3d 240, 181 Cal. Rptr. 401 (1981); *Schooley v. Wilson*, 150 Colo. 483, 374 P.2d 353 (1962); *Carnley v. Cochran*, 123 So. 2d 249 (Fla. 1960), *reversed on other grounds* 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); *In re Application of Horst*, 270 Kan. 510, 14 P.3d 1162 (2000); *Staples v. State*, 274 A.2d 715 (Me. 1971); *State ex rel. Atkinson v. Tahash*, 274 Minn. 65, 142 N.W.2d 294 (1966); *State v. Gray*, 406 S.W.2d 580 (Mo. 1966); *Garnick v. Miller*, 81 Nev. 372, 403 P.2d 850 (1965); *Com. ex rel. Ensor v. Cummings*, 420 Pa. 23, 215 A.2d 651 (1966); *Ex parte Elliott*, 746 S.W.2d 762 (Tex. Crim. 1988); *Monohan v. Burdman*, 84 Wash. 2d 922, 530 P.2d 334 (1975). But see, *Williams v. State*, 42 Ala. App. 140, 155 So. 2d 322 (1963); *Sorrow v. Vickery*, 228 Ga. 191, 184 S.E.2d 462 (1971); *People ex rel. Williams v. Morris*, 44 Ill. App. 3d 39, 357 N.E.2d 851, 2 Ill. Dec. 631 (1976); *McGloin v. Warden*, 215 Md. 630, 137 A.2d 659 (1958); *State v. Ballard*, 15 N.J. Super. 417, 83 A.2d 539 (1951); *People ex rel. Ali v. Sperbeck*, 66 A.D.2d 827, 411 N.Y.S.2d 344 (1978); *Ex parte Davis*, 11 Okla. Crim. 403, 146 P. 1085 (1915); *White v. Gladden*, 209 Or. 53, 303 P.2d 226 (1956).

[9] *State v. Castillas, supra* note 1.

[10] Brief for appellant at 10.

preserved below, challenging the current custodial deprivation of liberty.[11]

[4] The Ex Post Facto Clause provides simply that "[n]o State shall . . . pass any . . . ex post facto law."[12] The ex post facto prohibitions found in the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, forbid Congress and the states from enacting any law "'"'"which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."'"'"[13] Stated another way, the Ex Post Facto Clauses "'"'"forbid[] the application of any new punitive measure to a crime already consummated."'"'"[14]

The Ex Post Facto Clauses ensure that individuals have fair warning of applicable laws, and the clauses guard against vindictive legislative action.[15] Even where these concerns are not directly implicated, the clauses also safeguard "'"'"a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life."'"'"[16]

In *Weaver v. Graham*,[17] the U.S. Supreme Court held that it is a violation of the prohibition against ex post facto laws to apply a new formula for calculating future good time credits

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[11] See, *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013); *State v. Paul*, 256 Neb. 669, 592 N.W.2d 148 (1999).

[12] U.S. Const. art. I, § 10, cl. 1.

[13] *Shepard v. Houston*, 289 Neb. 399, 410, 855 N.W.2d 559, 568 (2014), quoting *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[14] *Id.*, quoting *California Dept. of Corrections v. Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995).

[15] *Shepard v. Houston, supra* note 13.

[16] *Id.* at 410, 855 N.W.2d at 568, quoting *Peugh v. U.S.*, ___ U.S. ___, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

[17] *Weaver v. Graham, supra* note 13.

to a person incarcerated for a crime committed before the new law was passed.

[5] However, Caton challenges the alleged retroactive application of our decision in *Castillas* interpreting our good time statutes, not any change to the statutes themselves. Technically, the Ex Post Facto Clauses do not concern judicial decisions. "As the text of the [Ex Post Facto] Clause makes clear, it 'is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government.'"[18]

[6,7] Nevertheless, limitations on ex post facto judicial decisionmaking are inherent in the notion of due process, and retroactive judicial decisionmaking may be analyzed in accordance with the more basic and general principle of fair warning under the Due Process Clause.[19] Under the Due Process Clause, the question is whether the judicial decision being applied retroactively is both unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.[20]

We have explained that indefensible in this context means "'incapable of being justified or excused.'"[21] Thus, "where a court interprets a statute in a surprising manner that has little in the way of legal support, the interpretation could not be applied retroactively."[22]

Neb. Rev. Stat. § 83-1,107(2)(a) (Reissue 2014) concerns calculation of the mandatory discharge date in light of good time. Under § 83-1,107(2)(a), a prisoner's term of confinement shall be reduced by 6 months for each year of the committed offender's term and pro rata for any part thereof

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[18] *Rogers v. Tennessee*, 532 U.S. 451, 456, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001).

[19] See, *id.*; *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001).

[20] *State v. Redmond, supra* note 19.

[21] *Id.* at 420, 631 N.W.2d at 508.

[22] *Id.*

which is less than a year. Under § 83-1,107(2)(c), the total reductions under § 83-1,107(2) shall be credited from the date of sentence and shall be deducted from the maximum term, to determine the date when discharge from the custody of the state becomes mandatory. Also, under Neb. Rev. Stat. § 83-1,108 (Reissue 2014), a parolee's parole term shall be reduced by the Board of Parole for good conduct while under parole by 10 days for each month. Such reduction shall be deducted from the maximum term, less good time granted pursuant to § 83-1,107, to determine the date when discharge from parole becomes mandatory.

Neb. Rev. Stat. § 83-1,110 (Reissue 2014) states in relevant part that every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence as provided in §§ 83-1,107 and 83-1,108, but that "[*n*]*o such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term*." (Emphasis supplied.) Section 83-1,110 is the only statute that specifically refers to the relationship between any statutory reductions and a mandatory minimum term.

[8-10] We said in *Castillas* that § 83-1,110 makes clear that good time reductions under § 83-1,107 do not apply to mandatory minimum sentences.[23] We further explained that, logically, a defendant must serve the mandatory minimum portion of a sentence before earning good time credit toward the maximum portion of the sentence.[24] Thus, a defendant is unable to earn good time credit against either the minimum or maximum sentence until the defendant has served the mandatory minimum sentence.[25] We set forth the following rule of calculation:

> [T]he parole eligibility date is determined by subtracting the mandatory minimum sentence from the court's

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[23] *State v. Castillas, supra* note 1.

[24] *Id.*

[25] *Id.*

> minimum sentence, halving the difference, and adding that difference to the mandatory minimum. Similarly, the mandatory discharge date is computed by subtracting the mandatory minimum sentence from the maximum sentence, halving the difference, and adding that difference to the mandatory minimum.[26]

Before *Castillas*, we explained in *Johnson v. Kenney*[27] that while § 83-1,110 does not specifically refer to the mandatory discharge date, logic and the legislative history dictate that calculations under the statutory good time scheme ought not result in a discharge date that is before the inmate's parole eligibility date. We said further that "the intent of habitual criminal sentencing is thwarted if good time credit is applied to the maximum term of the sentence before the mandatory minimum sentence has been served. The minimum portion of the sentence would have no meaning."[28]

It is unclear from the record whether *Johnson* predates the conduct for which Caton is currently serving his sentence. Regardless, our reading of the good time statutes in *Johnson* and *Castillas* was neither surprising nor legally unsupportable. Accordingly, the Department did not violate Caton's right to due process when it calculated his mandatory discharge date in accordance with the calculation method set forth in *Castillas*.

## CONCLUSION

We affirm the district court's grant of summary judgment in favor of the State in Caton's action for habeas corpus relief.

Affirmed.

Heavican, C.J., not participating.

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[26] *Id*. at 190-91, 826 N.W.2d at 268. See, also, *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012).

[27] *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002).

[28] *Id*. at 51, 654 N.W.2d at 194.

Nebraska Supreme Court
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# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Ralph E. Peppard, respondent.

869 N.W.2d 700

Filed October 2, 2015. No. S-15-346.

Original action. Judgment of public reprimand.

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

Per Curiam.

## INTRODUCTION

This case is before the court on the conditional admission filed by Ralph E. Peppard, respondent, on August 31, 2015. The court accepts respondent's conditional admission and enters an order of public reprimand.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 22, 1980. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska.

On April 21, 2015, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent. The formal charges consist of one count against respondent. With respect to the one count, the formal charges generally allege that respondent simultaneously represented parties who had conflicting and adverse interests in the same or similar transaction, as noted by the Court of Appeals

in *In re Estate of Morrell*, 22 Neb. App. 384, 853 N.W.2d 525 (2014). The formal charges state that in 2009, Johanna Morrell began showing early signs of dementia, and on September 13, 2010, Morrell executed a will drafted by an independent attorney leaving her entire estate to her surviving siblings. On October 28, Lee Lorenz filed a petition for appointment of guardian-conservator, requesting that he be appointed guardian-conservator for Morrell. The petition was prepared and submitted by respondent. The formal charges state that respondent stated that he represented Morrell in this proceeding.

On the same day, October 28, 2010, the Department of Health and Human Services, Adult Protective Services (the Department), also filed a petition for appointment of guardian-conservator based upon its investigation regarding Morrell's finances being taken advantage of and her inability to protect herself. The Department requested that Mark Malousek, an attorney, be appointed as Morrell's guardian-conservator. The Department also filed an objection to Lorenz' petition that he be appointed Morrell's guardian-conservator, because the Department was investigating Lorenz for financial exploitation of Morrell. The formal charges state that respondent stated that he represented Lorenz in the Department's investigation. Malousek was appointed temporary guardian-conservator for Morrell on October 28, and he was appointed permanent guardian-conservator in April 2011.

On March 11, 2011, Morrell executed a new will drafted by respondent which left her entire estate to Lorenz.

In January 2012, Morrell passed away. Following her death, Morrell's surviving family members and Lorenz separately filed petitions for probate of the respective September 2010 and March 2011 wills. According to the formal charges, the probate court held separate hearings and determined that Morrell lacked capacity and was subjected to undue influence by Lorenz. In its first order, the court stated that the March 2011 will was invalid and of no force and effect, and then the

court issued a second order that the September 2010 will was validly executed and allowed to be probated.

At the hearings for probating the September 2010 and March 2011 wills, Malousek submitted an affidavit stating that at no time did respondent contact him regarding a new will in 2011, nor did Malousek give consent or authority to participate in any way in the drafting of any will during the entire time he was temporary or permanent guardian-conservator.

Respondent submitted his own affidavit in the probate matter which, according to the formal charges, basically stated the facts as set forth above. Respondent indicated that he represented Morrell in the initial guardian-conservator proceeding. Respondent also stated that he represented Lorenz in a meeting with the Department regarding allegations Lorenz was taking advantage of Morrell as a vulnerable adult and that he also represented Lorenz in a meeting with the Douglas County Attorney involving the same allegations.

In affirming the orders of the trial court upholding the 2010 will and finding the March 2011 will invalid, the Court of Appeals stated:

> [T]he admission of [respondent's] affidavit shows that [respondent] had represented both [Morrell] and Lorenz, indicating that [Morrell] did not have advice from an independent attorney when she executed the March 2011 will. As the trial court found, Lorenz, through his attorney [respondent], sought to influence [Morrell] into changing her will.
>
> Lorenz' evidence also establishes that despite [respondent's] knowing about the Department's investigation into Lorenz' financial exploitation of [Morrell] and despite a temporary guardian-conservator's having been appointed, [respondent] imprudently drafted and executed the March 2011 will for [Morrell], giving all of her estate to the very person whom the Department was trying to protect her from. We find this conduct by a Nebraska lawyer to be deeply troubling.

*In re Estate of Morrell*, 22 Neb. App. 384, 397, 853 N.W.2d 525, 535-36 (2014).

The formal charges allege that by his actions, respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-501.7 (conflict of interest; current clients) and 3-508.4(a) (misconduct).

On August 31, 2015, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he violated conduct rule § 3-501.7. In the conditional admission, respondent knowingly and voluntarily waived all proceedings against him in connection to the matters conditionally admitted in exchange for a public reprimand.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's proposed discipline is consistent with sanctions imposed in other disciplinary cases with similar acts of misconduct.

## ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or

> matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rule § 3-501.7 and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

## CONCLUSION

Respondent is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

Judgment of public reprimand.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Joseph S. et al., children under 18 years of age. State of Nebraska, appellee, v. Kerri S., appellant.

870 N.W.2d 141

Filed October 9, 2015. No. S-14-1025.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When credible evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
3. **Parental Rights: Proof.** In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2014) exists and that termination is in the children's best interests.
4. **Parent and Child: Child Custody.** A parent's failure to provide an environment to which his or her children can return can establish substantial, continual, and repeated neglect.
5. **Parental Rights.** Past neglect, along with facts relating to current family circumstances which go to best interests, are all properly considered in a parental rights termination case under Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2014).
6. ____. One need not have physical possession of a child to demonstrate the existence of neglect contemplated by Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2014).
7. **Parental Rights: Parent and Child.** In proceedings to terminate parental rights, 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 Douglas County: Elizabeth Crnkovich, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Zoë R. Wade, and Lauren A. Walag for appellant.

Donald W. Kleine, Douglas County Attorney, Jennifer Chrystal-Clark, and Amy Schuchman for appellee.

Maureen K. Monahan, guardian ad litem.

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

Wright, J.

## NATURE OF CASE

This case involving termination of parental rights first came before us in *In re Interest of Joseph S. et al.*[1] The State appealed to the Nebraska Court of Appeals the findings of the separate juvenile court of Douglas County that the three minor children of Kerri S. did not come within the meaning of Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2014) and that it was not in their best interests to terminate Kerri's parental rights. As a matter of first impression, the Court of Appeals held that a parent's noncompliance with a voluntary placement agreement that did not comport with procedural due process could not serve as a basis for termination of parental rights under § 43-292(2).

We granted further review, reversed the Court of Appeals' decision, and remanded the cause for further proceedings. On remand, the juvenile court concluded that the State had demonstrated by clear and convincing evidence that termination of Kerri's parental rights was appropriate and in the best interests of the children. We affirm.

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[1] *In re Interest of Joseph S. et al.*, 288 Neb. 463, 849 N.W.2d 468 (2014).

## FACTS

Kerri is the biological mother of the minor children: Joseph S., William S., and Steven S. The family first came to the attention of the Nebraska Department of Health and Human Services (DHHS) on March 16, 2009. In that case, DHHS became involved with the family due to concerns about Kerri's drug use and improper supervision of the children. The children remained out of Kerri's care for exactly 1 year. In the fall of 2010, Kerri tested positive for cocaine. During the first case, Kerri did not consistently participate in services offered by DHHS, but ultimately completed a court-ordered and court-monitored plan, and the children were returned to her care. The case was closed in November 2011.

Shortly thereafter, in January 2012, DHHS received an "intake" reporting that Kerri had left the children with a relative and was unable to be reached. Calls to DHHS expressed concerns that Kerri was failing to properly supervise the children and that she might be using drugs.

Following this intake, Kerri was contacted by DHHS. Kerri agreed to a 180-day voluntary out-of-home placement of the children. In a voluntary placement agreement, a parent voluntarily signs an agreement that his or her children be state wards for 180 days, with either relatives or an agency, while the parent participates in rehabilitative services. In the present case, Kerri's brother and his wife took physical custody of the children during the 180-day placement period. At any time during the 180-day placement period, a parent can request his or her child to be returned, provided the parent has met certain requirements. Upon entering into the voluntary placement agreement, the case was referred to Nebraska Families Collaborative (NFC) for management with the goal of returning the children to the home. Kerri worked voluntarily with NFC from January until August 2012, which encompassed the duration of the placement agreement.

Melissa Misegadis, an employee with NFC, was the family's service coordinator in the first case and the family

permanency supervisor in the second case. Misegadis testified that in the first case, various services were offered to the family, including supervised visitations; family support; peer-to-peer mentoring; mental health services, including individual and family therapy; random drug testing; and psychotropic medication management. Misegadis again had contact with the family after receiving an intake on January 12, 2012, less than 3 months after the first case closed. Misegadis testified that as a supervisor, the family permanency specialist (FPS) reported to her and it was Misegadis' duty to determine whether a parent had complied with services and to ensure the safety of the children. Misegadis attended at least two family meetings with Kerri and her FPS. At the first meeting, Kerri denied using drugs and agreed to submit to drug testing.

Brenda Alvarado was the drug test specialist responsible for testing Kerri. Beginning in January 2012, at the outset of the placement period, Kerri was required to be drug tested weekly. While Kerri was Alvarado's client, Kerri had three "non-negative" or "positive" drug testing results—one in January for amphetamines; another in April for amphetamines, methamphetamine, and marijuana; and a third in May for methamphetamine. Kerri was present each time Alvarado received the preliminary drug testing results, and Alvarado discussed the results with Kerri each time. Kerri admitted to smoking marijuana once, but denied having taken the other substances for which she tested positive.

In June 2012, the testing was increased to eight times per month and prior to any visits with her children. Beginning in July, Alvarado had difficulty contacting Kerri for her scheduled drug testing due to problems with Kerri's telephone. When Alvarado was unable to contact Kerri, Alvarado would either go to Kerri's house or contact her FPS. Alvarado went to Kerri's house four to five times per month, but from July through December, Alvarado was able to complete Kerri's required drug testing only one or two times. Most of the

successful drug testing was obtained during either family visits or "team meetings."

Nine days before the voluntary placement period was set to expire, Anne Petzel, the FPS assigned to the case conducted an unannounced home visit at Kerri's residence to check its safety. The visit revealed the home was in disarray, with piles of clothes, numerous beds without sheets, and graffiti on the walls, some of which made drug references. Petzel observed empty alcohol bottles around the home and approximately five unknown adults in the home who appeared to be residing there, including a woman sleeping on one of the mattresses. Kerri described them as friends there to help her get the home ready for the children's return and to paint the home. Several cans of paint were found, but not brushes, rollers, or other supplies.

Shortly before the voluntary placement period was set to expire, an affidavit for removal of the children was filed due to information about Kerri that NFC had received from the Omaha Police Department which concerned the safety of the children. Additionally, NFC had received reports from Kerri's family members that her visits with her children and participation in therapy had been extremely inconsistent. NFC also received information regarding Kerri's lack of participation in her regularly scheduled drug screening, leading to concerns of ongoing drug use.

On August 9, 2012, the State filed a petition alleging the minor children came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). On December 19, the State amended its petition to further allege that the children came within the meaning of § 43-292(2) and that Kerri's parental rights should be terminated. The State alleged Kerri had substantially and continuously or repeatedly neglected and refused to give necessary parental care and protection to the children.

On March 8, 2013, Kerri moved to bifurcate the adjudication as to whether the children came within the meaning of

§ 43-247(3)(a) from the adjudication for termination under § 43-292(2). The juvenile court denied the motion to bifurcate and found that the children came within the meaning of § 43-247(3)(a). It ordered that the adjudication proceed to determine whether the children were within the meaning of § 43-292(2) and if terminating Kerri's parental rights was in their best interests.

After the petition was filed, the case was transferred from Petzel to Tiffany Martin, another FPS. Martin met with Kerri at two family team meetings in September 2012. Martin testified that at those meetings, she offered to set up supervised visits with the children, but that Kerri declined because she did not think the children would want a stranger to conduct them. Kerri's brother had previously conducted the visits, but no longer wanted to do so because of Kerri's inconsistency in participation. On several occasions, Martin attempted to help set up a psychiatric evaluation for Kerri.

In November 2012, Martin met with Kerri, who told her that she no longer had her own residence, but was living at a friend's house. Martin denied Kerri's request to have supervised visitations at her friend's house.

Due to a lack of compliance with services in October and November 2012, Kerri's parenting time was discharged. Although visits with the children were still allowed in December, Kerri did not participate in such visits except for approximately 10 minutes on Christmas. From January to March 2013, Kerri met with her children on only two occasions.

Following our remand, an adjudication hearing was held on October 16, 2014. The State adduced evidence from both the 2009 case and the present case. Both cases involved the children's being placed outside the home for concerns of improper supervision and Kerri's drug use. Misegadis, Alvarado, Petzel, and Martin all testified on behalf of the State. Kerri testified in her own behalf.

On October 28, 2014, the juvenile court found by clear and convincing evidence that the children were within the

meaning of § 43-292(2) in relation to Kerri and that it was in their best interests to terminate Kerri's parental rights. The court ordered the children to remain in the custody of DHHS for adoptive planning and placement. Kerri timely appealed the juvenile court's order.

## ASSIGNMENTS OF ERROR

Kerri argues that the juvenile court erred in finding clear and convincing evidence the children came within the meaning of § 43-292(2), that termination of Kerri's parental rights is in the children's best interests, and that the juvenile court abused its discretion in denying Kerri's motion to bifurcate. As in her first appeal, Kerri asserts that her due process rights were violated when she entered into the voluntary placement agreement.

## STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[2] When credible evidence is in conflict, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.[3]

## ANALYSIS

We first address Kerri's arguments relating to alleged violations of her due process rights. Kerri and the guardian ad litem for the children assert that Kerri was denied due process when the juvenile court terminated her parental rights based on her participation in a voluntary placement agreement with DHHS. She claims that she was coerced into entering the agreement and that the consequences or requirements of such agreement were not conveyed to her prior to her consent.

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[2] *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014).

[3] See *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999).

We resolved this issue in our first review of this case. We noted that the record demonstrated that Kerri was afforded all of the due process requirements set forth in *In re Interest of L.V.*[4] We found that the record did not show that the coercive tactics used by state officials in cases cited by Kerri were present in the present case. Nor did Kerri argue that her compliance was not voluntary, and we declined to make such an assumption. We further found Kerri did not argue that the State lacked reasonable grounds in January 2012 for believing she was unable to properly care for the children, and the record does not support such a finding. In our instructions to the juvenile court on remand, we stated, "On remand, the juvenile court should consider all of the evidence presented to determine whether the State has demonstrated by clear and convincing evidence that termination of Kerri's parental rights is appropriate and in the best interests of the children."[5] Thus, we gave no instruction to determine whether Kerri's due process rights were violated when she entered into the voluntary placement agreement. Consequently, we decline to address this issue.

We next examine whether the State proved by clear and convincing evidence that termination of Kerri's parental rights was appropriate under § 43-292(2). We conclude that the State showed by clear and convincing evidence that termination of Kerri's parental rights was in the children's best interests and that she continuously or repeatedly neglected and refused to provide necessary parental care and protection.

[3-5] 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.[6] One such

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[4] *In re Interest of L.V.,* 240 Neb. 404, 482 N.W.2d 250 (1992).

[5] *In re Interest of Joseph S. et al., supra* note 1, 288 Neb. at 471, 849 N.W.2d at 475.

[6] *In re Interest of Walter W.,* 274 Neb. 859, 744 N.W.2d 55 (2008).

ground is when the parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.[7] A parent's failure to provide an environment to which his or her children can return can establish substantial, continual, and repeated neglect.[8] Past neglect, along with facts relating to current family circumstances which go to best interests, are all properly considered in a parental rights termination case under § 43-292(2).[9]

At the adjudication hearing, the State showed that in the first case in March 2009, DHHS became involved with the family due to concerns about Kerri's drug use and improper supervision of the children. Misegadis testified that in February 2010, the children had been returned to Kerri's care, but that they returned to foster care shortly after Misegadis became involved in the case. The children were removed from the home for exactly 1 year from July 2010 to July 2011. The case was closed in November 2011. Kerri was referred to aftercare for assistance "if things didn't go as planned." It was up to Kerri to engage in such services, but she never did so.

Less than 3 months after the first case closed, DHHS received an intake reporting that Kerri had left the children with a relative and that Kerri could not be reached. The intake expressed concerns that Kerri was not properly supervising the children and might be using methamphetamine. These were the same concerns that were presented in the first case and demonstrated that Kerri had not made progress toward rehabilitation.

With respect to Kerri's participation in voluntary services, the record shows a consistent pattern of noncompliance. In her

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[7] § 43-292(2).

[8] *In re Interest of L.C., J.C., and E.C.*, 235 Neb. 703, 457 N.W.2d 274 (1990).

[9] *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

voluntary placement agreement, Kerri agreed to a chemical dependency evaluation and therapy. Therapy was later discharged due to noncompliance from Kerri. During the 180-day voluntary placement agreement, drug testing on three occasions showed the presence of various drugs in Kerri's system, including amphetamines, methamphetamine, and marijuana. Kerri subsequently became very inconsistent in her required drug testing. Despite the requirement of drug testing eight times a month, Kerri submitted to drug testing only once or twice between July and December 2012.

Kerri was also inconsistent in visitations with her children when these were supervised by her relatives. As a result of this inconsistency, her relatives were unwilling to continue supervising visits. When visitations were established with Nebraska Children's Home Society, Kerri was noncompliant in October and November 2012, resulting in discharge of this service. Kerri has also missed family team meetings, designed to discuss the progress of Kerri's case.

The record shows that Kerri has also repeatedly failed to put her children's needs ahead of her own by not providing a safe environment. Nine days prior to the anticipated return of the children to Kerri's home following the voluntary placement agreement, a visit by Petzel, an FPS, revealed the home was in disarray, with graffiti on the walls which included drug references, empty alcohol bottles around the home, numerous unmade beds without sheets, and approximately five unknown adults in the home who appeared to be residing there. NFC received information from relatives of Kerri, as well as information from law enforcement, which raised additional concerns about Kerri's ability to care for the children and provide a safe environment for them. In November 2012, Kerri requested to have visitations at a friend's house because she no longer had her own residence.

[6] Although much of the above-described conduct occurred while the children were not in the custody of Kerri, we have held that one need not have physical possession of a

child to demonstrate the existence of neglect contemplated by § 43-292(2).[10] Based on the record, we find clear and convincing evidence establishes that Kerri substantially and continuously or repeatedly neglected to provide the children necessary parental care and protection.

[7] Because the State met its burden with respect to neglect, we turn to whether the State established by clear and convincing evidence that termination was in the best interests of the minor children. Generally, when termination is sought under other subsections of § 43-292, the evidence adduced to prove the statutory grounds for termination will also be highly relevant to the best interests of the juvenile, as it would show abandonment, neglect, unfitness, or abuse.[11] In proceedings to terminate parental rights, 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.[12]

Misegadis testified that when the first case was closed in November 2011, she had concerns that Kerri might go back to her "old ways." Less than 3 months later, after having recently spent 1½ years working with Kerri on the same issues, DHHS received an intake regarding Kerri's drug use and improper supervision of the children. During the temporary placement period, Kerri continued using drugs and failed to consistently participate in mental health, drug, and family services. Misegadis testified that she does not know what other services could be offered to Kerri that have not already been offered. The record establishes that Kerri has been afforded ample opportunity to rehabilitate and improve herself, but has failed to avail herself of the services offered.

We examine the best interests of the children in the context of Kerri's repeated failure to provide a safe, stable, and

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[10] *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

[11] *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

[12] *Id.*

drug-free environment for the children. Kerri's actions did not reflect her concern for the best interests of the children. Her failure to attend visitations with the children demonstrates a lack of motivation for reunification. The inconsistency in her attendance at the visitations led her own family members to decline to continue their supervision.

The record shows that the children have remained in foster care with only limited supervised visitations with Kerri since being removed from Kerri's home. The minor children have been out of the home for more than 3 years in the present case and for a year in the preceding case. NFC workers testified the children are well adjusted to their current placement. Martin opined that the children need to have permanency provided to them and that the children are in an adoptive home where their stability and safety needs are being met.

We agree that constant movement of the children into and out of foster care is not advisable or in the best interests of the children. The evidence related to best interests of the children was largely derived from the history associated with the various rehabilitative and reunification services which had been offered to Kerri and her children. Based on the record, the State established by clear and convincing evidence that it was in the best interests of the minor children that Kerri's parental rights be terminated. We reject Kerri's assignments of error in which she claimed that the evidence was insufficient to terminate her parental rights under § 43-292(2).

## CONCLUSION

For the reasons stated above, we affirm the juvenile court's order.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# In re Interest of Enyce J. and Eternity M., children under 18 years of age. State of Nebraska, appellee, v. Erica J., appellee, Mark S., appellant, and Roberta S., appellee.

870 N.W.2d 413

Filed October 16, 2015. No. S-14-1168.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Judgments: Jurisdiction.** A jurisdictional question that does not involve a factual dispute is a question of law.
3. **Interventions.** Whether a party has the right to intervene is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
5. **Standing: Words and Phrases.** Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.
6. **Standing: Parties.** The purpose of the standing inquiry is to determine whether a person has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
7. **Standing: Proof.** Persons claiming standing must show that their claim is premised on their own legal rights and not the rights of another.
8. **Parent and Child: Words and Phrases.** Persons stand in loco parentis to a child if they put themselves in the position of lawful parents by assuming the obligations incident to the parental relationship without formally adopting the child.
9. **Parent and Child.** The rights, duties, and liabilities of persons standing in loco parentis to a child are the same as those of the lawful parents.

10. **Parent and Child: Standing: Appeal and Error.** Foster parents, as such, do not have standing to appeal from an order changing a child's placement.
11. **Interventions: Juvenile Courts.** The rules for intervention in civil cases provide a guidepost in determining whether a person has the right to intervene in juvenile proceedings.
12. **Interventions.** As a prerequisite to intervention, the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which the court may render in the action.
13. ____. An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.
14. **Interventions: Parties.** An intervenor joins the proceedings as a party to defend his own rights or interests.
15. **Parent and Child: Interventions: Juvenile Courts.** Foster parents, as such, do not have an interest that entitles them to intervene in a juvenile case as a matter of right.
16. **Interventions: Jurisdiction: Equity.** Independent of the intervention statutes, a court with equitable jurisdiction may allow intervention as a matter of equity in a proper case.
17. **Juvenile Courts: Jurisdiction: Statutes.** A juvenile court is a statutorily created court of limited and special jurisdiction, and it has only the authority which the statutes confer on it.
18. **Juvenile Courts: Interventions: Equity: Statutes.** A juvenile court cannot allow persons to equitably intervene independently of the statutes.

Appeal from the Separate Juvenile Court of Douglas County: Wadie Thomas, Judge. Affirmed.

Nicholas E. Wurth, of Law Offices of Nicholas E. Wurth, P.C., for appellant Mark S. and appellee Roberta S.

Donald W. Kleine, Douglas County Attorney, Shakil Malik, and Jocelyn Brasher, Senior Certified Law Student, for appellee State of Nebraska.

Patrick A. Campagna and Britt H. Dudzinski, of Lustgarten & Roberts, P.C., L.L.O., for appellee Erica J.

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

Connolly, J.

## SUMMARY

The juvenile court determined that it had jurisdiction over a minor child, Eternity M., because of the faults or habits of her mother, Erica J. The Nebraska Department of Health and Human Services (Department) placed Eternity with foster parents Mark S. and Roberta S. The court later dismissed Mark and Roberta's complaint to intervene and ordered the Department to place Eternity with her maternal aunt in Nevada.

Mark appeals. He argues that the court should have allowed him and Roberta to intervene and that a change of placement was not in Eternity's best interests. Erica argues that we do not have jurisdiction to review the placement order because Mark—as a foster parent—does not have standing. We conclude that Mark lacks standing to appeal the order changing Eternity's placement and that the court did not err by dismissing Mark and Roberta's complaint to intervene. We affirm.

## BACKGROUND

The Douglas County Sheriff arrested Erica in August 2013 regarding a homicide. Erica had one child, Enyce J., at the time of her arrest. In September 2013, the State petitioned to adjudicate Enyce under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

Erica gave birth to a daughter, Eternity, in April 2014. A Department employee spoke with Erica, who was under police restraint, at the hospital within 24 hours of the birth. Erica declined to identify the father but suggested that her sister, Deseyre M., who lived in Nevada, might be a placement resource.

On April 4, 2014, the State filed a second supplemental petition alleging that Eternity was within the juvenile court's jurisdiction under § 43-247(3)(a) (Supp. 2013). The court gave the Department temporary custody of Eternity.

One day later, the Department placed Eternity with Mark and Roberta. Six days later, the court ordered the Department to start background checks on several relatives for possible placement, including Deseyre.

In August 2014, the court held a hearing on the second supplemental petition. A family permanency specialist testified that she contacted Deseyre, gathered information from her, and requested an investigation under the Interstate Compact for the Placement of Children (ICPC).[1] The specialist explained that an ICPC investigation had to be completed because Deseyre did not live in Nebraska.

Later in August, the court determined that it had jurisdiction under § 43-247(3)(a). The court continued the Department's temporary custody and stated that the permanency objective was reunification.

In October 2014, Mark and Roberta filed a complaint to intervene. They alleged that they had been the "sole primary care takers, physical custodians and foster parents" of Eternity "since her birth." As a result, they had bonded with Eternity and stood in loco parentis to her. Mark and Roberta claimed that they wanted to intervene to object to any placement change.

About a week later, Erica moved to place Eternity with Deseyre. Erica was sentenced to 60 to 100 years' imprisonment for two felony convictions shortly thereafter. Mark and Roberta filed an objection to Erica's placement motion because the change would not be in Eternity's best interests.

In November 2014, the court held a hearing on Erica's motion to change placement. An attorney appeared for Mark and Roberta. The county attorney indicated that the ICPC report was not finished. The Department's attorney said that the Department favored placement with Deseyre "pending the ICPC results." On November 25, the court stated that it would

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[1] Neb. Rev. Stat. § 43-1103 (Cum. Supp. 2014).

sustain the placement motion subject to the completion of the ICPC investigation.

About a week later, the court held a review hearing and a hearing on Mark and Roberta's complaint to intervene. Mark and Roberta's attorney was again present. The court told him that "foster parents are entitled to present evidence related to the issue of their fitness to serve as foster parents" and asked him if he had any evidence to offer. Mark and Roberta's attorney offered exhibit 30, an affidavit of Mark. The court received Mark's affidavit and asked the county attorney if the ICPC investigation was done. The county attorney said that it was, so the court decided to "combine the hearings." The court received several exhibits offered by the State, including the ICPC report. The court stated that Mark's affidavit "will be considered for purposes of all matters set today." Mark and Roberta's attorney did not offer any other evidence.

In Mark's affidavit, he averred that he was an accountant and that his wife, Roberta, was an elementary school teacher. Mark said that Eternity had bonded with him and Roberta. Mark did not think that removing Eternity from his and Roberta's home was in Eternity's best interests.

The ICPC report approved Deseyre for placement. Deseyre lives in Las Vegas, Nevada, with her mother. The report found that Deseyre was financially stable and had "the desire, resources and ability to provide a safe, nurturing home to a child."

On December 4, 2014, the court dismissed Mark and Roberta's complaint to intervene. The court stated that it had received an approved ICPC report for Deseyre and that Deseyre was Eternity's maternal aunt. It ordered the Department to "take immediate steps for placement of the child Eternity pursuant to and consistent with this Court's order today."

Mark appealed from the November 25 and December 4, 2014, orders.

## ASSIGNMENTS OF ERROR

Mark assigns, restated and renumbered, that the juvenile court erred by (1) determining that he lacked standing, (2) dismissing the complaint to intervene as a matter of right, (3) dismissing the complaint to intervene under equity principles, and (4) changing Eternity's placement.

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.[2]

[2-4] A jurisdictional question that does not involve a factual dispute is a question of law.[3] Whether a party has the right to intervene is a question of law.[4] When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.[5]

## ANALYSIS

### Placement

Erica argues that we do not have jurisdiction to review the change of placement because, among other reasons, Mark does not have standing to appeal. Before reaching the legal issues presented for review, we must decide if we have jurisdiction.[6]

[5-7] Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.[7] The purpose of the standing inquiry is to determine whether a person has a

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[2] *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015).

[3] *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

[4] *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d 737 (2012).

[5] *Id.*

[6] *Murray v. Stine, supra* note 3.

[7] See *Marcuzzo v. Bank of the West*, 290 Neb. 809, 862 N.W.2d 281 (2015).

legally protectable interest or right in the controversy that would benefit by the relief to be granted.[8] Persons claiming standing must show that their claim is premised on their own legal rights and not the rights of another.[9]

So, the standing issue turns on Mark and Roberta's rights, if any, and how the placement order affected their rights.[10] A parent has a fundamental liberty interest in the care, custody, and management of the child.[11] And the State has an interest in the placement of a child derived from its role as parens patriae.[12] Eternity's interests are represented by her guardian ad litem.[13] But what right or interest in a child's placement does a foster parent have?

Nearly 20 years ago, we held that a pair of foster parents had standing in *In re Interest of Jorius G. & Cheralee G.*[14] There, the children's mother relinquished her parental rights to the foster parents and entered into an open adoption with them. But the Department formed a negative opinion of the foster parents and sought to change the children's placement. The foster parents offered evidence in opposition to the change of placement, and the juvenile court decided to leave the children with them. The State appealed, arguing that the foster parents did not have standing to object to the proposed placement change.

We concluded that the foster parents did have standing. Under Neb. Rev. Stat. § 43-285(3) (Reissue 1993), a juvenile court could review a proposed change of placement "on its

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[8] *Id.*

[9] See *id.*

[10] See *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

[11] *In re Interest of Artharena D.*, 253 Neb. 613, 571 N.W.2d 608 (1997).

[12] See *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

[13] *In re Interest of Jassenia H.*, 291 Neb. 107, 864 N.W.2d 242 (2015).

[14] *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. 892, 546 N.W.2d 796 (1996).

own motion or upon the filing of an objection to the change by an interested party." Furthermore, Neb. Rev. Stat. § 43-1314 (Reissue 1993) gave foster parents the right to notice of and participation in court reviews of a child's placement.

Furthermore, the foster parents had standing because the mother had relinquished her parental rights to them. We had previously held that in a private adoption, the adoptive family stands on equal ground with a natural mother with respect to a determination of custody. So the foster parents had standing as "prospective adoptive parents."[15]

Relying on *In re Interest of Jorius G. & Cheralee G.*, the Nebraska Court of Appeals recently held in *In re Interest of Montana S.*[16] that a child's grandmother, who was the foster parent and successful intervenor, had standing to appeal from an order changing the child's placement. The Court of Appeals emphasized that the State had considered the grandmother for adoptive placement.

But we believe that *In re Interest of Jorius G. & Cheralee G.* and this case are distinguishable for several reasons. First, the relevant statutes have changed. For example, § 43-1314(2) (Cum. Supp. 2014) now cautions that notice to the foster parent of a hearing "shall not be construed to require that such foster parent . . . is a necessary party to the review or hearing."

And, after we decided *In re Interest of Jorius G. & Cheralee G.*, we held that the foster parent's right of participation under § 43-1314 is a narrow one.[17] The foster parent's right to participate does not extend to discovery, questioning, cross-examining, or calling witnesses beyond what is personally applicable to the foster parent's own qualifications.[18] Section 43-1314 gives foster parents a role in the proceeding, but it

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[15] *Id.* at 896, 546 N.W.2d at 799.

[16] *In re Interest of Montana S.*, 21 Neb. App. 315, 837 N.W.2d 860 (2013).

[17] See *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

[18] *Id.*

does not confer on them a right, title, or interest in the subject matter of the controversy.

Finally, unlike the mother in *In re Interest of Jorius G. & Cheralee G.*, Erica has emphatically not relinquished her parental rights to Mark and Roberta. We have said that one with parental authorization to assume even the temporary care of a child has standing to appeal the State's interference with that parentally created relationship.[19] The right of a parent to authorize another to assume the care of a child is part of the bundle of fundamental rights which the federal constitution confers to parents.[20] The foster parents in *In re Interest of Jorius G. & Cheralee G.* came to court with some of the mother's fundamental rights. Erica did not share her bundle of rights with Mark and Roberta.

[8,9] Mark argues that he and Roberta could nevertheless exercise the rights of parents because they stood in loco parentis to Eternity. Persons stand in loco parentis to a child if they put themselves in the position of lawful parents by assuming the obligations incident to the parental relationship without formally adopting the child.[21] And the rights, duties, and liabilities of such persons are the same as those of the lawful parents.[22]

But Mark and Roberta did not stand in loco parentis to Eternity. Foster care is generally a short-term placement: It is a temporary measure for maintaining the child until the court can make a permanent disposition.[23] In fact, Mark averred that he knew of the request to place Eternity with Deseyre because the family permanency specialist "informed us early on that a potential relative existed."

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[19] *In re Interest of Artharena D., supra* note 11.

[20] See *id.*

[21] *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011).

[22] *Id.*

[23] *In re Interest of Hastings*, 211 Neb. 209, 318 N.W.2d 80 (1982).

Furthermore, the Department's regulations limit a foster parent's role to something that is decidedly less than that of a lawful parent. For example, the caseworker, the parents, and the court decide if a ward who is at least 17 years of age can marry.[24] Foster parents do not have a say.[25] The caseworker, with the involvement of the parents, is responsible for making decisions about the child's medical treatment.[26] Foster parents can obtain emergency or routine medical treatment for the child only with the caseworker's consent.[27] Foster parents cannot require the child to practice their religious faith.[28] The child can change his religious faith to that of the foster parents only if the child's parents approve or, if the court has terminated parental rights, the caseworker believes that the religious conversion is in the child's best interests.[29] Foster parents cannot discipline a ward with "[p]hysical punishment of any kind"[30] or let the child be included on a hunting trip without the caseworker's approval.[31] And they absolutely cannot give the child a "BB gun."[32]

[10] In conclusion, Mark and Roberta—as foster parents—do not have a legal or equitable right, title, or interest in the subject matter of the controversy that gives them standing to appeal from the order changing Eternity's placement. So, we do not have jurisdiction to review the placement change. Foster parents have a statutory right to participate in review hearings, but this does not give them an interest in the child's

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[24] 390 Neb. Admin. Code, ch. 11, § 002.01N (1998).

[25] See *id.*

[26] 390 Neb. Admin. Code, ch. 11, § 002.04F (2000).

[27] *Id.*

[28] 390 Neb. Admin. Code, ch. 11, § 002.01S (1998).

[29] *Id.*

[30] 390 Neb. Admin. Code, ch. 11, § 002.01E (1998).

[31] 390 Neb. Admin. Code, ch. 11, § 002.01H (1998).

[32] *Id.*

placement akin to the interest of a parent or the State. We disapprove of *In re Interest of Jorius G. & Cheralee G.*[33] and *In re Interest of Montana S.*[34] to the extent that they are inconsistent with this opinion.

### Intervention

Although Mark does not have standing to appeal the order changing Eternity's placement, we do have jurisdiction over the order dismissing the complaint to intervene.[35] We note that the record betrays some confusion about the relationship between Mark and Roberta's statutory right to participate as foster parents and their complaint to intervene. Foster parents have a right to participate in review hearings under § 43-1314, and they may so participate whether or not they are parties.[36] But their ability to participate under the statute is less than that of a party. Particularly, the statutory right does not go beyond adducing evidence of the foster parent's own qualifications.[37] Mark and Roberta sought to intervene in the case, and if successful, they would have become parties and been able to participate beyond the narrow limits of § 43-1314. Mark argues that the juvenile court erred by not letting him and Roberta do so.

[11-14] The rules for intervention in civil cases provide a guidepost in determining whether a person has the right to intervene in juvenile proceedings.[38] As a prerequisite to intervention, the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by

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[33] *In re Interest of Jorius G. & Cheralee G., supra* note 14.

[34] *In re Interest of Montana S., supra* note 16.

[35] See *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985).

[36] See *In re Interest of Destiny S., supra* note 17.

[37] See *id.*

[38] See *id.*

the direct operation and legal effect of the judgment which the court may render in the action.[39] An indirect, remote, or conjectural interest in the result of a suit is not enough to establish intervention as a matter of right.[40] An intervenor joins the proceedings as a party to defend his own rights or interests.[41]

[15] We held that foster parents are not entitled to intervene as a matter of right in *In re Interest of Destiny S.*[42] We are not inclined to overrule that decision, and as we understand from oral argument, Mark is not asking us to do so. As discussed, Mark and Roberta did not have a right, title, or interest in the subject matter of the controversy that gave them standing. Similarly, they did not have an interest that entitled them to intervene in the juvenile case as a matter of right.

[16] Nevertheless, Mark argues that the juvenile court should have let him and Roberta intervene as a matter of equity. Independent of the intervention statutes, a court with equitable jurisdiction may allow persons to intervene as a matter of equity in a proper case.[43] We review for an abuse of discretion a court's decision to allow or disallow equitable intervention.[44]

[17,18] But a juvenile court is a statutorily created court of limited and special jurisdiction.[45] It has only the authority

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[39] *State ex rel. Lanman v. Board of Cty. Commissioners*, 277 Neb. 492, 763 N.W.2d 392 (2009).

[40] *Spear T Ranch v. Knaub*, 271 Neb. 578, 713 N.W.2d 489 (2006).

[41] See *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

[42] *In re Interest of Destiny S., supra* note 17.

[43] See, *Jeffrey B. v. Amy L., supra* note 4; *Colman v. Colman Foundation, Inc.*, 199 Neb. 263, 258 N.W.2d 128 (1977); *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 115 N.W.2d 796 (1962); 59 Am. Jur. 2d *Parties* § 148 (2012).

[44] *Colman v. Colman Foundation, Inc., supra* note 43.

[45] *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011).

which the statutes confer on it.[46] So, the juvenile court could not allow Mark and Roberta to equitably intervene independently of the statutes. We recognize that we discussed equitable intervention in the context of a juvenile court in *In re Interest of Destiny S.*[47] To the extent that *In re Interest of Destiny S.* suggests that juvenile courts may allow persons to equitably intervene, we disapprove of it.

## CONCLUSION

We do not have jurisdiction to review the order changing Eternity's placement because Mark and Roberta, as foster parents, lack standing. We also conclude that Mark and Roberta were not entitled to intervene as of right and that the juvenile court lacked the power to allow them to equitably intervene.

Affirmed.

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[46] *Id.*

[47] *In re Interest of Destiny S., supra* note 17.

Nebraska Supreme Court
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# James A. Adams, appellant, and Rebecca Z. Adams, appellee, v. Manchester Park, L.L.C., a Nebraska limited liability company, and Southfork Homes, Inc., a Nebraska corporation, appellees.

871 N.W.2d 215

Filed October 23, 2015. No. S-13-429.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered 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. **Limitations of Actions: Breach of Warranty: Contractors and Subcontractors.** Where the basis of a claim is improper workmanship resulting in defective construction, the Neb. Rev. Stat. § 25-223 (Reissue 2008) statute of limitations runs from the date of substantial completion of the project, not the date of any specific act which resulted in the defect.

Petition for further review from the Court of Appeals, Inbody, Chief Judge, and Irwin and Bishop, Judges, on appeal thereto from the District Court for Douglas County, J. Michael Coffey, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James A. Adams, of Law Offices of James A. Adams, P.C., L.L.O., pro se.

Larry E. Welch, Sr., of Welch Law Firm, P.C., for appellee Manchester Park, L.L.C.

Patrick S. Cooper and David J. Substad, of Fraser Stryker, P.C., L.L.O., for appellee Southfork Homes, Inc.

Edward H. Tricker, Jerry L. Pigsley, and Erin L. Ebeler, of Woods & Aitken, L.L.P., for amici curiae AGC Nebraska Chapter and Nebraska Building Chapter of AGC.

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

McCormack, J.

## NATURE OF CASE

Southfork Homes, Inc. (Southfork), petitioned this court for further review after the Nebraska Court of Appeals found an action brought against it for defective construction of a home was not barred by the applicable statute of limitations. We conclude the Court of Appeals erred, and we reverse, and remand to the Court of Appeals with directions to affirm the judgment of the district court.

## BACKGROUND

The underlying facts are fully set forth in the opinion issued by the Court of Appeals.[1] We restate only the most relevant ones here.

In August 2006, James A. Adams and Rebecca Z. Adams, the homeowners, executed a purchase agreement with Southfork for the construction of a new home. The home was to be built on a lot purchased by Southfork in 2004 from Manchester Park, L.L.C. (Manchester), a developer. Manchester had completed grading on the lot in 2003.

The home was substantially completed and a final walk-through inspection occurred on September 19, 2007. On September 20, Southfork issued the homeowners a 1-year limited warranty for material defects in workmanship or materials.

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[1] *Adams v. Manchester Park*, 22 Neb. App. 525, 855 N.W.2d 819 (2014).

Within 6 months, the homeowners noticed cracks in walls and tiles, roof leaks, and windows that would not open. Southfork told the homeowners that they should wait until the expiration of the 1-year limited warranty to request repairs, and the homeowners did so. Southfork then attempted to make repairs, but the issues persisted.

In December 2009, a specialist hired by the homeowners reported potential issues with the foundation of the home. In July 2011, another specialist hired by the homeowners performed test borings on the soil of the lot and concluded the soil was improperly compacted. On September 22, 2011, the homeowners filed this action against both Southfork and Manchester.

The complaint alleged there was improper workmanship because the soil compaction on the lot was done in a substandard manner, the foundation was improperly installed, and the plans and specifications relating to the earthwork did not meet the Omaha, Nebraska, city code. The complaint specifically alleged that the defendants (1) breached the implied duty to perform in a workmanlike manner, (2) breached the implied warranty of habitability, (3) negligently constructed the home, (4) fraudulently concealed facts which prevented the homeowners from discovering the negligence, and (5) breached the express 1-year limited warranty issued on September 20, 2007.

Southfork and Manchester both moved for summary judgment, asserting the action was barred by the 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-223 (Reissue 2008), which provides:

> Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency.

> If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. In no event may any action be commenced to recover damages for an alleged breach of warranty on improvements to real property or deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property more than ten years beyond the time of the act giving rise to the cause of action.

The district court granted summary judgment in favor of both defendants; it determined that the 4-year limitations period began to run in 2003, when the soil on the lot was improperly compacted by Manchester, reasoning that was the alleged act or omission constituting the breach of warranty or deficiency. It then reasoned that because the homeowners did not take possession of the home until September 2007, they could not reasonably have discovered the cause of action within the 4-year period, and thus had 2 years from the date of discovery to file suit. The district court reasoned the homeowners discovered facts that should have put them on notice of the defects no later than September 2008, because they were aware of the roof leaks and wall and tile cracks by that time. It thus held that the statute of limitations ran in September 2010 and that the action filed on September 22, 2011, was untimely.

James appealed, and the Court of Appeals affirmed as to Manchester, finding it had no contractual obligation to the homeowners. But it reversed as to Southfork, finding the action against it was not barred by § 25-223. The Court of Appeals reasoned that the 4-year statute of limitations in § 25-223 did not begin to run in 2003, because at that time, the

homeowners were not "in any position to have any knowledge about the grading completed."[2] Instead, it held that the 4-year period began to run against the homeowners at the expiration of the express 1-year limited warranty issued by Southfork on September 20, 2007, and that thus, the action filed on September 22, 2011, against Southfork was timely. Because the court found the action was filed within the statute of limitations, it did not reach James' assignment of error related to fraudulent concealment.

Southfork petitioned this court for further review. It alleges the Court of Appeals erred in finding the statute of limitations ran from the expiration of the 1-year limited warranty, instead of from the date of substantial completion of the home. An amicus curiae brief filed by the Nebraska Building Chapter of AGC and AGC Nebraska Chapter concurs with Southfork's argument.

## ASSIGNMENTS OF ERROR

In its petition for further review, Southfork assigns, restated and summarized, that the Court of Appeals erred in holding that the statute of limitations began to run on the homeowners' claims at the expiration of the 1-year limited warranty. Southfork asserts that the Court of Appeals should have held that the limitations period began to run from the date the home was substantially completed.

## STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3]

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[2] *Id*. at 534, 855 N.W.2d at 827.

[3] *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015); *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015).

## ANALYSIS

Section 25-223 is a special statute of limitations governing actions against builders and contractors for improvements to real property.[4] It is applicable here because the homeowners alleged that Southfork (1) breached the implied duty to perform in a workmanlike manner, (2) breached the implied warranty of habitability, (3) negligently constructed the home, (4) fraudulently concealed facts which prevented the homeowners from discovering the negligence, and (5) breached the express 1-year limited warranty issued on September 20, 2007. All of these theories are based on the underlying allegation that improper soil compaction on the lot caused issues with the foundation of the home, resulting in defective construction.

Section 25-223 states that its 4-year limitations period begins upon the "alleged act or omission constituting [the] breach of warranty or deficiency." Here, the specific "act or omission" alleged to have caused the defective condition of the home was the improper soil compaction in 2003. The district court concluded that the 4-year limitation began to run from the 2003 date of soil compaction.

[2] But we have held that where the basis of the claim is improper workmanship resulting in defective construction, the § 25-223 statute of limitations runs from the date of substantial completion of the project, not the date of any specific act which resulted in the defect.[5] In *Witherspoon v. Sides Constr. Co.*,[6] a home suffered damages when a pipe supplying water to it broke. The homeowner brought an action against the builder, and we specifically held that the time limitations of § 25-223 began to run from the date construction of the home

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[4] *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

[5] See *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985).

[6] *Id.*

was completed, not from the date when the pipe was installed, because the underlying theory was that the builder failed to erect the home in a good and workmanlike manner. In various other cases, we also have either expressly held or strongly implied that when the claim is improper workmanship, the § 25-223 statute of limitations begins to run from the date the project is substantially completed.[7]

Thus, pursuant to our established precedent, the latest date the 4-year limitations period of § 25-223 commenced in this case was September 19, 2007, the date of substantial completion. Because the lawsuit was not filed until September 22, 2011, it was outside the statute of limitations. And the discovery rule exception in § 25-223 cannot save the action, because it is clear the homeowners knew of the defects in the home no later than December 2009, when they were aware of problems with the foundation of the home. Because this discovery occurred during the first 3 years of the 4-year statute of limitations, the statutory discovery exception cannot apply to them.

The Court of Appeals found that the 1-year limited warranty issued by Southfork to the homeowners on September 20, 2007, extended the 4-year time limitations of § 25-223, and that thus, the limitations period on all of James' claims did not begin to run until the expiration of that warranty. But that holding is at odds with at least one prior opinion of this court. In *Board of Regents v. Lueder Constr. Co.*,[8] a university brought an action for defective construction of a campus building. It specifically alleged that the builder breached its contract by failing to install supporting structures pursuant to specifications and failing to properly install steel reinforcing

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[7] See *Board of Regents v. Lueder Constr. Co.*, 230 Neb. 686, 433 N.W.2d 485 (1988). See, also, *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013); *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988).

[8] *Board of Regents v. Lueder Constr. Co., supra* note 7.

bars to floor slabs. Even though the builder had issued a 1-year warranty on the building, we held that the relevant "act or omission" in § 25-223 occurred on the date the construction was substantially completed.[9]

The facts in the instant case are very similar, and we reach the same conclusion here. As noted, in the complaint, the homeowners alleged a breach of the implied duty to perform in a workmanlike manner, a breach of the implied warranty of habitability, negligent construction, fraudulent concealment of material facts, and breach of the 1-year express warranty. The homeowners alleged each of these theories were supported because the soil compaction was improper, resulting in defective construction of the home. The homeowners, like the university in *Lueder & Constr. Co.*, made no claim that Southfork failed to make repairs when requested to do so pursuant to the express warranty. Thus, under the facts of this case, the act or omission which served as the basis for all of the homeowners' claims was the defective construction itself. In such a scenario, the existence of the 1-year express warranty, which was issued in this case after substantial completion of the home, does not extend the § 25-223 statute of limitations as to the homeowners' claims.

Because the Court of Appeals found the action was not barred by the statute of limitations, it did not address the fraudulent concealment claim. In the interest of judicial economy, we address that claim here.[10] We find it without merit as a matter of law. Evidence in the record clearly establishes that Southfork did not conceal any material facts from the homeowners and that the homeowners knew, at least by December 2009, that there were substantial problems with the foundation of the home. This knowledge was sufficient to put them on notice of the underlying construction defects.

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[9] *Id.*

[10] See, *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011); *Capitol Construction v. Skinner*, 279 Neb. 419, 778 N.W.2d 721 (2010).

## CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals, with directions to affirm the judgment of the district court.

Reversed and remanded with directions.

Stephan, J., not participating.

Connolly, J., concurring.

I agree that Neb. Rev. Stat. § 25-223 (Reissue 2008) bars the Adamses' claims as a matter of law. But a reader might conclude that *all* claims to which § 25-223 applies accrue upon substantial completion. I write separately to preempt any such misconception.

The Adamses' claims of negligence, breach of the implied warranty to perform in a workmanlike manner, and breach of the implied warranty of habitability were based on the defective construction of their house. Because the "breach of warranty or deficiency" which triggered the limitation period in § 25-223 was the defective construction, and a house is constructed when it is substantially completed, the statute of limitations for those claims began running upon substantial completion. That date was September 19, 2007.

The Adamses also alleged that Southfork breached its promise in the 1-year express warranty to construct a house free of material defects. If there were material defects, Southfork breached this promise as soon as it issued the express warranty. We seem to imply that the statute of limitations began to run on the Adamses' express warranty claim on September 19, 2007, even though Southfork did not issue the express warranty until September 20. One wonders if a warranty can be breached before it exists, but the 1-day difference is not material here.

As the Court of Appeals noted, Southfork also promised in the 1-year express warranty to repair or replace "any material defects in workmanship or materials" if the Adamses

gave notice of such defects within 1 year. We correctly note, however, that the Adamses did not allege in their complaint that Southfork breached its promise to repair. This failure was significant.

For an express warranty to make repairs, the "act or omission constituting such breach of warranty" under § 25-223 is the warrantor's failure or refusal to make repairs. Restated, the rule is that a cause of action for the breach of a warranty to repair defects accrues when the defendant fails or refuses to repair defects.[1] So, Southfork breached its promise to repair defects (if it breached its promise) not when it substantially completed the house, but when it failed to make repairs after a timely request by the Adamses.

The Maryland Court of Appeals summarized how a warrantor might breach an express warranty to make repairs:

> Had [the builder] simply guaranteed the condition of the property as of the date of closing with a Unit Owner, any breach of that guarantee would necessarily occur at closing . . . . Here, however, [the builder] additionally promised to repair if notified timely. The breach of that covenant to repair does not occur at closing or necessarily when notice is given. Conceptually, the ways in which one who has contracted to repair could breach that contract include repudiating the obligation before any notice is given, or, after being on notice of the defect, failing to undertake the repairs within a reasonable time,

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[1] See, *Hewitt v. Kirk's Remodeling & Custom Homes*, 49 Kan. App. 2d 506, 310 P.3d 436 (2013); *Feinour v. Ricker Co.*, 255 Ga. App. 651, 566 S.E.2d 396 (2002); *Hersh Companies v. Highline Village Assoc.*, 30 P.3d 221 (Colo. 2001); *Lipscomb v. Chilton*, 793 P.2d 379 (Utah 1990); *Antigua Condominium v. Melba Investors*, 307 Md. 700, 517 A.2d 75 (1986); *Beaudry Motor Co. v. New Pueblo Constructors*, 128 Ariz. 481, 626 P.2d 1113 (Ariz. App. 1981); *Bulova Watch v Celotex Corp*, 46 N.Y.2d 606, 389 N.E.2d 130, 415 N.Y.S.2d 817 (1979); *Fowler v. A. & A. Company*, 262 A.2d 344 (D.C. 1970). See, also, *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000).

> expressly refusing to repair, or, after undertaking to repair, abandoning the work before completion.[2]

The Adamses did not allege that Southfork breached its promise in the express warranty to repair or replace material defects. All of the claims that they did allege accrued more than 4 years before they filed their complaint. I therefore concur that § 25-223 bars the Adamses' claims as a matter of law.

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[2] *Antigua Condominium v. Melba Investors*, *supra* note 1, 307 Md. at 715, 517 A.2d at 82-83. See *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993).

Nebraska Supreme Court
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# State of Nebraska, appellee, v. Brandon Dye, appellant.

870 N.W.2d 628

Filed October 23, 2015. No. S-14-792.

1. **Waiver: Appeal and Error.** The validity of an appeal waiver is a question of law.
2. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Constitutional Law: Waiver: Appeal and Error.** A defendant can waive a constitutional right, including the right to appeal, if done knowingly and voluntarily.
4. **Convictions: Sentences: Waiver: Appeal and Error.** When a defendant appeals a conviction or sentence despite having waived his or her right to appeal, an appellate court should enforce the waiver only after having reviewed (1) whether the appeal falls within the scope of the waiver, (2) whether the defendant knowingly and voluntarily waived his or her right to appeal, and (3) whether enforcing the waiver would result in a miscarriage of justice.
5. **Waiver: Proof: Appeal and Error.** The burden of proof is on the State to demonstrate that an agreement clearly and unambiguously waives a defendant's right to appeal.
6. **Waiver: Appeal and Error.** Waivers of the right to appeal are to be applied narrowly, with any ambiguities construed against the State and in favor of the defendant's right to appeal.
7. **Sentences: Waiver: Appeal and Error.** Even when a defendant has made a valid waiver of appeal rights, an appellate court may reverse a sentence that is outside of statutory limits or otherwise not authorized by law.
8. **Waiver: Appeal and Error.** Once an appellate court has determined that an appeal waiver is enforceable, the proper remedy is for the appellate court to dismiss the appeal.

Appeal from the District Court for Hall County: Teresa K. Luther, Judge. Appeal dismissed.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Brandon Dye, pro se.

Heavican, C.J., Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ., and Moore, Judge.

Miller-Lerman, J.

## NATURE OF CASE

Brandon Dye was convicted by a jury of six crimes: one felony count of robbery, two felony counts of first degree false imprisonment, one misdemeanor count of third degree assault, one misdemeanor count of third degree sexual assault, and one misdemeanor count of carrying a concealed weapon. After trial, the parties entered into a sentencing agreement pursuant to which the State recommended, inter alia, that a sentence of imprisonment for 12 to 13 years for the robbery conviction be imposed and that the other sentences be served concurrently to such sentence. The district court for Hall County imposed sentences in conformity with the recommendation. Dye appeals. The State argues that this appeal should be dismissed because, as part of the sentencing agreement, Dye waived his right to appeal. Dye argues that the waiver is unenforceable. We conclude that the waiver is enforceable, and we therefore dismiss this appeal.

## STATEMENT OF FACTS

The incident giving rise to the charges against Dye occurred on the afternoon of November 7, 2013, when Dye kicked in the door of a hotel room in Grand Island, Nebraska, that was

occupied by three sisters. Dye entered the hotel room because he was searching for a relative of the sisters for the purpose of retrieving a debt the relative owed to him. While in the hotel room, Dye grabbed and bent the arm of one of the sisters and took a cell phone from her and he attempted to take cell phones from the other sisters. Dye also made a number of sexually suggestive comments to the sisters, which they interpreted as offering money in exchange for sexual favors, and he touched one of the sisters on the backside. Based on these actions, the State charged Dye with robbery, two counts of first degree false imprisonment, third degree assault, third degree sexual assault, and carrying a concealed weapon. The State also alleged that Dye was a habitual criminal.

Dye's defense at trial was based primarily on his assertion that at the time of the incident, he was temporarily insane as the result of having involuntarily consumed a drug that another person put in his drink. Dye admitted that shortly before the incident, he had been drinking alcohol and smoking marijuana with his sister and her boyfriend. He testified that he had consumed a similar amount of alcohol and marijuana on other occasions and that it had not caused him problems but that on this occasion, he temporarily lost consciousness. Although he recalled a taxi arriving at his house shortly before the incident occurred, he did not recall anything further until he regained consciousness when police arrived at the scene of the incident. He testified that even at that point, he did not feel fully conscious.

As part of his defense, Dye made an offer of proof of testimony by his girlfriend, Ann Chapman, regarding statements made to her by Chad Willis, the boyfriend of Dye's sister. In a hearing on the admissibility of her testimony, Chapman testified that Willis had told her that on the day of the incident, he had put something into Dye's drink without Dye's knowledge. Chapman testified that Willis said that he had "drugged" Dye's drink with a substance he identified as "'E.'" Dye argued that Chapman's testimony regarding Willis'

statements should be admitted as an exception to the hearsay rule pursuant to Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008) because they were statements tending to expose the declarant to criminal liability. The court found that Willis, who was incarcerated, was unavailable as a witness; however, the court concluded that the hearsay statements were not admissible under § 27-804(2)(c), because the circumstances did not demonstrate the trustworthiness of the statements.

The jury found Dye guilty of all counts. When the matter came for sentencing, the State presented evidence to support its allegation that Dye was a habitual criminal. At the sentencing hearing, the court noted that a plea agreement had been offered to Dye prior to the trial and that a sentencing agreement had been offered to Dye after the convictions but prior to the sentencing hearing. The court expressed concern that Dye did not understand the potential benefit of the agreements, because he did not understand the constraints that would be placed on the court's sentencing discretion if it found Dye to be a habitual criminal, specifically, that the court would be required to sentence him to imprisonment for a mandatory minimum of 10 years and that he would not be eligible for parole during that 10-year period. The court therefore continued the sentencing to a later date in order to give Dye an opportunity to review his options with his attorney.

At the next sentencing hearing, the court was informed that the State and Dye had reached an agreement as to a sentencing recommendation. The sentencing agreement required the State to withdraw the habitual criminal allegation, and, as part of the sentencing agreement, Dye signed a waiver which stated as follows:

> I, Brandon Dye, after receiving counsel from my attorney . . . hereby voluntarily and knowingly and intelligently waive any rights to appeal this case and to any post-conviction relief that I may otherwise be entitled. I understand this waiver includes appellant

> [sic] and post-conviction relief that may arise from both statutory or constitutional authority. This waiver comes pursuant to a bargain [sic] for agreement, whereby the State agrees to dismiss the habitual criminal charge against me and recommend a 12 - 13 year sentence on Count I, with the remaining counts to be run concurrent to that charge.

The court questioned Dye regarding his understanding of the sentencing agreement and the waiver. Dye replied in the affirmative to the court's questions regarding whether he wished to waive his right to appeal and to go with the sentencing recommendation and whether he understood the effect of the waiver and the sentencing agreement. The court then stated that it would follow the sentencing recommendation. In accordance with the sentencing recommendation, the court sentenced Dye to imprisonment for 12 to 13 years for the robbery conviction, for 2 to 4 years for each of the two false imprisonment convictions, and for 1 year each for the assault, sexual assault, and concealed weapon convictions, and the court ordered that all the sentences be served concurrently to one another.

Dye filed a pro se notice of appeal, and his trial counsel thereafter filed a motion to withdraw as counsel. The Nebraska Court of Appeals allowed trial counsel to withdraw and required the district court to appoint new counsel for appeal. We later sustained the State's petition to bypass the Court of Appeals.

## ASSIGNMENTS OF ERROR

In a brief prepared by appellate counsel, Dye claims that (1) the sentencing agreement, pursuant to which he waived his right to appeal, is unenforceable, and (2) the district court erred when it determined that Chapman's testimony regarding Willis' statements was inadmissible hearsay.

We note that after the State filed its brief, Dye filed a pro se reply brief in which he made several new assignments of

error. For reasons including our disposition of this appeal, these purported assignments of error are neither properly before nor considered by the court.

## STANDARD OF REVIEW

[1,2] The validity of an appeal waiver is a question of law. See *U.S. v. Walters*, 732 F.3d 489 (5th Cir. 2013). 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. Casterline*, 290 Neb. 985, 863 N.W.2d 148 (2015).

## ANALYSIS

Dye contends that the sentencing agreement, pursuant to which he waived his right to appeal, is unenforceable and that we should consider the merits of his assigned error regarding the district court's evidentiary ruling. He argues that appeal waivers are against public policy and should not be enforced. The State contends that the waiver is enforceable. We agree with the State, and we therefore dismiss this appeal.

[3] We have previously stated that a "defendant can waive a constitutional right, including the right to appeal, if done knowingly and voluntarily." *State v. Anderson*, 279 Neb. 631, 637, 781 N.W.2d 55, 60 (2010). In *Anderson*, the defendant argued that two prior driving under the influence convictions could not be used to find him guilty of driving under the influence, third offense, because he was denied due process in connection with those convictions when he waived his right to appeal those prior convictions by pleading guilty under the uniform waiver system. We rejected the defendant's argument and concluded that the waiver of appeal rights in the prior convictions did not violate due process and render the prior convictions invalid for purposes of characterizing the current offense.

Our analysis in *Anderson* was modest due to the nature of the issue presented. In the instant case, we must now analyze

the legal landscape where a defendant waives the right to appeal but nevertheless directly attempts to appeal the conviction or sentence. The obvious obstacle to the appeal lies in Dye's waiver of his appellate rights. We consider this issue in three parts: First, do appeal waivers violate public policy? Second, if not, what should an appellate court review before enforcing a specific waiver? And third, what is the remedy to enforce an appeal waiver?

*Appeal Waivers Do Not Violate Public Policy in Nebraska.*

As noted above, in *Anderson*, we generally acknowledged that a defendant may waive the right to appeal. This is in line with the weight of authority from other state jurisdictions which holds that a waiver of appeal rights is enforceable when made knowingly and voluntarily. See Annot., 89 A.L.R.3d 864 (1979). See, also, *Gwin v. State*, 456 So. 2d 845 (Ala. Crim. App. 1984); *Staton v. Warden*, 175 Conn. 328, 398 A.2d 1176 (1978); *People v. Fearing*, 110 Ill. App. 3d 643, 442 N.E.2d 939, 66 Ill. Dec. 378 (1982); *Creech v. State*, 887 N.E.2d 73 (Ind. 2008); *State v. Hinners*, 471 N.W.2d 841 (Iowa 1991); *State v. Perkins*, 108 Wash. 2d 212, 737 P.2d 250 (1987). But see, *State v. Ethington*, 121 Ariz. 572, 592 P.2d 768 (1979); *People v. Harrison*, 386 Mich. 269, 191 N.W.2d 371 (1971); *Spann v. State*, 704 N.W.2d 486 (Minn. 2005).

In the federal courts, the Court of Appeals for the Eighth Circuit observed that "[a]s a general rule, a defendant is allowed to waive appellate rights" and that "[e]very [federal] circuit that has considered this issue has reached the conclusion that at least some forms of appeal waivers are permissible." *U.S. v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003). The court in *Andis* noted that "the right to appeal is not a [federal] constitutional right but rather 'purely a creature of statute.'" *Id*. (citing *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977)). The court reasoned that given a defendant can waive certain constitutional rights, such as

the right to a jury trial, the right to confront accusers, and the privilege against self-incrimination, it "would be hard-pressed to find a reason to prohibit a defendant from waiving a purely statutory right." *Id*.

We note that although *Andis* states that the U.S. Constitution does not guarantee the right to appeal a criminal conviction, Neb. Const. art. I, § 23, does provide that in capital cases, appeal to this court is a matter of right. The state Constitution continues that "[i]n all other cases, criminal or civil, an aggrieved party shall be entitled to one appeal to [the Court of Appeals] or to the Supreme Court as may be provided by law." Furthermore, an earlier version of Neb. Const. art. I, § 23, provided for the right of appeal in felony cases. Thus, in Nebraska, the right to appeal has long been guaranteed by the state Constitution. Nevertheless, as noted in *Andis*, constitutional rights can be waived; therefore, the right to appeal, even if provided by our state Constitution, can be waived. See *Leach v. State*, 914 So. 2d 519 (Fla. App. 2005) (right to appeal, which is protected by state constitution, may be waived by defendant).

We note that Dye's waiver was not made pursuant to a plea agreement but that instead, Dye had already been convicted of six crimes before he signed the waiver as part of a sentencing agreement reached with the State. The authorities cited above, to the effect that appeal waivers do not violate public policy, mostly involve appeal waivers made pursuant to plea agreements. In this regard, we are aware that some courts have expressed concern regarding appeal waivers made as part of a sentencing agreement for the reason that after the defendant has been convicted, the prosecutor is in a stronger position to demand concessions. See, e.g., *Spann, supra*. However, we are more persuaded by the reasoning of the courts which have endorsed appeal waivers in sentencing agreements and have observed that, if anything, a "defendant's appreciation of the value of the right to appeal is far more refined after guilt or innocence has been decided by trial than before." *People*

*v Seaberg*, 74 N.Y.2d 1, 10, 541 N.E.2d 1022, 1026, 543 N.Y.S.2d 968, 972 (1989).

We believe the defendant is in a better position after conviction than before trial to assess the potential value of an appeal when negotiating with a prosecutor. Other courts have offered similar reasoning and approved appeal waivers as part of sentencing agreements. See, *Leach*, 914 So. 2d at 522 ("[w]e see no reason to treat a plea bargain waiver of the right to appeal differently from a waiver that occurs in a sentencing bargain after a jury's finding of guilt"); *Cubbage v. State*, 304 Md. 237, 247, 498 A.2d 632, 638 (1985) (reasoning that appeal waiver "is equally applicable to one who faces sentencing after having been found guilty and who bargains for sentencing advantages in consideration of a waiver of appeal [as one who bargains before trial]"). To the extent there is concern regarding the bargaining power of the State after the defendant has been convicted, we think that such concern may be addressed in the review, discussed further below, that an appellate court must exercise to determine whether the appeal waiver was made knowingly and voluntarily and whether enforcement of the waiver would result in a miscarriage of justice. We conclude that appeal waivers do not violate Nebraska public policy.

For completeness, we note that Dye's agreement reached after he was convicted contained a second feature, specifically, this "waiver includes . . . post-conviction relief that may arise from both statutory or constitutional authority." Because Dye is presently attempting to bring a direct appeal, the enforceability of the waiver of the right to appeal is at issue here, but the enforceability from a public policy standpoint of his waiver of postconviction rights is not directly implicated. It would not be prudent for us to remark on the waiver of postconviction relief at this time. See *U.S. v. Rollings*, 751 F.3d 1183 (10th Cir. 2014) (where only appellate waiver provision is challenged, appellate court not obligated to consider validity of other parts of agreement). We next turn to issues

an appellate court should consider when deciding whether a specific waiver of appeal is enforceable.

*Limited Review by Appellate Court: Before Enforcing an Appeal Waiver, an Appellate Court Should Review (1) Whether the Appeal is Within the Scope of the Waiver, (2) Whether the Waiver was Made Knowingly and Voluntarily, and (3) Whether Enforcement Would Result in a Miscarriage of Justice.*

Having determined as a general matter that appeal waivers do not violate public policy, we next set forth the process for an appellate court to determine whether an appeal waiver is enforceable in a specific case. We adopt a three-step inquiry developed in federal courts for this purpose.

As discussed above, the Court of Appeals for the Eighth Circuit in *U.S. v. Andis*, 333 F.3d 886 (8th Cir. 2003), stated that a defendant is generally allowed to waive appeal rights. However, the court in *Andis* acknowledged certain limits that are imposed on the enforceability of such waivers. The court stated that when reviewing an appeal waiver, an appellate court "must confirm that the appeal falls within the scope of the waiver and that both the waiver and plea agreement were entered into knowingly and voluntarily." *Id.* at 889-90. The court further stated that "[e]ven when these conditions are met, [an appellate court] will not enforce a waiver where to do so would result in a miscarriage of justice." *Id.* at 890. The limits set forth in *Andis* were described in *U.S. v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004), as a "three-prong analysis" which calls for an appellate court,

> in reviewing appeals brought after a defendant has entered into an appeal waiver, to determine: (1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice . . . .

[4] We similarly hold that when a defendant appeals a conviction or sentence despite having waived his or her right to appeal, an appellate court should enforce the waiver only after having reviewed (1) whether the appeal falls within the scope of the waiver, (2) whether the defendant knowingly and voluntarily waived his or her right to appeal, and (3) whether enforcing the waiver would result in a miscarriage of justice. We therefore apply these considerations in the present case and discuss concepts related to each consideration in connection therewith.

[5,6] First, we determine whether this appeal falls within the scope of Dye's waiver. The court in *Andis, supra*, noted that the burden of proof is on the State to demonstrate that an agreement clearly and unambiguously waives a defendant's right to appeal and that waivers of the right to appeal are to be applied narrowly, with any ambiguities construed against the State and in favor of the defendant's right to appeal. We agree with and adopt this approach. In the present case, the waiver signed by Dye states that he waives "any rights to appeal this case." We determine that the present direct appeal is clearly and unambiguously within the scope of Dye's waiver.

Second, we review whether the record shows that Dye knowingly and voluntarily waived his right to appeal. The court in *Andis* recognized that an agreement or waiver may not be knowing or voluntary if, for example, it is entered into upon the ineffective assistance of counsel or upon undue coercion. Other courts also recognize that a waiver of appeal rights does not waive "an ineffectiveness [of counsel] claim having to do with the waiver (or the plea agreement as a whole) and its negotiation." *U.S. v. Smith*, 759 F.3d 702, 707 (7th Cir. 2014), *cert. denied* ___ U.S. ___, 135 S. Ct. 732, 190 L. Ed. 2d 457. See, also, *MacDonald v. State*, 778 A.2d 1064 (Del. 2001). In the present case, however, Dye does not assert, and there is no indication in the record, that the waiver was the result of ineffective assistance of counsel or undue coercion. Instead, the record shows that the district court

questioned Dye at length regarding his understanding of the sentencing agreement, the waiver, and the consequences and that Dye replied in the affirmative to the court's questions regarding whether he wished to waive his right to appeal and whether he understood the effect of the waiver. The record demonstrates that Dye knowingly and voluntarily waived his right to appeal.

[7] Finally, we consider whether enforcing the waiver would result in a miscarriage of justice. With respect to a miscarriage of justice, the Court of Appeals for the Eighth Circuit in *U.S. v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003), noted that "this exception is a narrow one and will not be allowed to swallow the general rule that waivers of appellate rights are valid." However, the court in *Andis* acknowledged, in connection with the miscarriage of justice consideration, that, inter alia, "a defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver." 333 F.3d at 891-92. The court further noted that a sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or lesser than the permissible statutory penalty for the crime. Therefore, even when a defendant has made a valid waiver of appeal rights, an appellate court may reverse a sentence that is outside of statutory limits or otherwise not authorized by law.

The *Andis* court noted that some federal circuits have included within the miscarriage of justice exception sentences based on impermissible factors and claims of ineffective assistance of counsel. However, the sentences in this case are within statutory limits. And, other than Dye's argument that appeal waivers in general violate public policy, he makes no claim, and we see no indication in the record, that enforcement of the specific waiver in this case would result in a miscarriage of justice.

Having determined that this appeal is within the scope of Dye's waiver, that Dye waived his appeal rights knowingly and voluntarily, and that enforcement of the waiver will not

result in a miscarriage of justice, we conclude that Dye's waiver of appeal is enforceable.

*Remedy to Enforce Waiver of Appeal: Proper Remedy to Enforce a Valid Waiver of Appeal Rights Is to Dismiss the Appeal.*

[8] Having determined that the appeal waiver is enforceable, we must determine how the waiver is to be enforced when the defendant ignores the waiver and attempts to appeal the convictions or sentences. We agree with the majority of courts which have concluded that once an appellate court has determined that an appeal waiver is enforceable, the proper remedy is for the appellate court to dismiss the appeal. E.g., *U.S. v. Smith*, 759 F.3d 702 (7th Cir. 2014); *U.S. v. Rollings*, 751 F.3d 1183 (10th Cir. 2014); *U.S. v. Walters*, 732 F.3d 489 (5th Cir. 2013); *Cubbage v. State*, 304 Md. 237, 498 A.2d 632 (1985).

Contrary to the weight of authority, we are aware that in *State v. Gibson*, 68 N.J. 499, 512, 348 A.2d 769, 775 (1975), the Supreme Court of New Jersey held that "a defendant [who has signed an appeal waiver and] who has not pleaded guilty, but has been convicted after trial, remains desirous of securing appellate review of the conviction and files therefor in time, should be allowed his appeal." The New Jersey court distinguished an appeal waiver as part of a plea agreement from the situation in which the defendant was convicted at trial and waived appeal rights as part of a sentencing agreement. The New Jersey court warned that "a defendant who has obtained sentence or charge concessions in consideration of the appeal-waiver would be subject to their revocation, at the option of the State, immediately upon the filing of the appeal." *Id*. The New Jersey court therefore required that the trial court advise the defendant that "notwithstanding his agreement not to appeal the conviction he may nevertheless file a timely appeal, but that if he does so, then, at the option of the prosecutor, the agreement will become inoperative and he may be resentenced

. . . and that any charges dismissed pursuant thereto may be reinstated." *Id.* at 513, 348 A.2d at 776. As we read *Gibson*, the consequence to a convicted defendant who files an appeal notwithstanding an appeal waiver is that all concessions agreed to by the prosecution are revoked.

The Court of Appeals of Maryland considered *Gibson* in *Cubbage, supra*, and rejected the *Gibson* holding. We agree with the analysis in *Cubbage*. The court in *Cubbage* noted, inter alia, "difficulties with the New Jersey approach," including concerns with regard to judicial economy and with regard to situations in which the waiver is part of an agreement involving multiple cases. 304 Md. at 249, 498 A.2d at 638. Because of such concerns, the court concluded that "the better rule is to hold the defendant to the knowing and voluntary waiver which he made" and that "[o]nce the appellate court confirms that the waiver is indeed knowing and voluntary, the appeal going to the merits of the judgment of conviction should be dismissed." *Id*. at 250, 498 A.2d at 639.

We similarly hold that once an appellate court has made the determinations that an appeal falls within the scope of the appeal waiver, that the defendant knowingly and voluntarily waived his or her right to appeal, and that enforcing the appeal waiver would not result in a miscarriage of justice, then the appeal going to the merits of the judgment of conviction and sentence should be dismissed. This is the remedy followed in *U.S. v. Andis*, 333 F.3d 886 (8th Cir. 2003), and the majority of cases, and we employ it here.

Because dismissal is the proper remedy, we do not consider the evidentiary issue Dye has raised in this appeal.

## CONCLUSION

We conclude that Dye's waiver of his right to appeal entered into as part of a sentencing agreement after trial is enforceable. We therefore dismiss this appeal without considering the other issue raised by Dye.

Appeal dismissed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Larry F. Duncan, appellant.

870 N.W.2d 422

Filed October 23, 2015. No. S-15-083.

1. **Statutes: Appeal and Error.** The meaning of a statute is a question of law which an appellate court resolves independently of the lower court's conclusion.
2. **Criminal Law: Statutes: Legislature: Sentences.** Generally, if the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.
3. **Sentences: Final Orders: Appeal and Error.** If a defendant appeals his or her sentence, then the sentence is not a final judgment until the entry of a final mandate.
4. **Criminal Law: Statutes: Evidence: Sentences.** A mitigatory amendment to a criminal statute does not apply to a pending case if the amendment changed the substantive elements of the crime such that a new evidentiary hearing would be needed to determine the defendant's punishment under the law as amended.
5. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits unless the trial court abused its discretion.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Shawn Elliott for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Connolly, J.

## SUMMARY

Larry F. Duncan pleaded no contest to one count of operating a motor vehicle without an ignition interlock device. When the criminal act occurred, driving without an ignition interlock device was a Class IV felony.[1] The Legislature amended the statute while Duncan's case was pending to make the crime a Class I misdemeanor unless the offender had a breath alcohol concentration of .02 of 1 gram per 210 liters or a blood alcohol concentration of .02 of 1 gram per 100 milliliters, in which case the crime remained a Class IV felony.[2] Duncan argues that the amendment retroactively applies to pending cases because it mitigates the punishment. We conclude that the amendment does not apply to Duncan's case because it substantively redefined the crime of driving without an ignition interlock device. We therefore affirm.

## BACKGROUND

In March 2014, the State charged Duncan with one count of operating a vehicle without an ignition interlock device under § 60-6,211.11 (Cum. Supp. 2012) and one count of driving during revocation under Neb. Rev. Stat. § 60-6,197.06 (Reissue 2010), both Class IV felonies.

In October 2014, the parties advised the court that they had reached a plea agreement. Duncan pleaded no contest to driving without an ignition interlock device and to one count of driving during revocation charged in another case. In exchange, the State dismissed the driving during revocation charge in this case.

According to the State's factual basis, on August 30, 2013, a police officer saw Duncan driving a motor vehicle. The

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[1] See Neb. Rev. Stat. § 60-6,211.11(1) (Cum. Supp. 2012).

[2] See § 60-6,211.11 (Cum. Supp. 2014).

officer recognized Duncan because he had cited Duncan for driving during revocation earlier in the month. He pursued the vehicle and verified that Duncan's operator's license was still revoked. After the vehicle stopped, the officer searched it and did not find an ignition interlock device.

The court received evidence of Duncan's third driving under the influence conviction. As part of the sentence, the trial court forbade Duncan from operating a motor vehicle without an ignition interlock device.

In January 2015, the court sentenced Duncan to 1 to 2 years' imprisonment.

Duncan appeals.

## ASSIGNMENTS OF ERROR

Duncan assigns that the court erred by (1) not sentencing him under a mitigatory amendment that became effective during the pendency of his case and (2) imposing an excessive sentence.

## STANDARD OF REVIEW

[1] The meaning of a statute is a question of law which an appellate court resolves independently of the lower court's conclusion.[3]

## ANALYSIS

### Mitigatory Amendment

Duncan claims that a statutory amendment during the pendency of his case made his crime a misdemeanor, rather than a felony. At the time of his criminal act, § 60-6,211.11(1) provided:

> Any person who tampers with or circumvents an ignition interlock device installed under a court order or Department of Motor Vehicles order while the order is in effect or who operates a motor vehicle which is not equipped with an ignition interlock device in violation of

[3] See *State v. Frederick, ante* p. 243, 864 N.W.2d 681 (2015).

> a court order or Department of Motor Vehicles order shall be guilty of a Class IV felony.

In 2014, the Legislature passed L.B. 998, which amended § 60-6,211.11.[4] Section 60-6,211.11, in relevant part, now provides:

> (1) Except as provided in subsection (2) of this section, any person ordered by a court or the Department of Motor Vehicles to operate only motor vehicles equipped with an ignition interlock device is guilty of a Class I misdemeanor if he or she . . . operates a motor vehicle which is not equipped with an ignition interlock device in violation of the court order or Department of Motor Vehicles order.
>
> (2) Any person ordered by a court or the Department of Motor Vehicles to operate only motor vehicles equipped with an ignition interlock device is guilty of a Class IV felony if he or she . . . operates a motor vehicle which is not equipped with an ignition interlock device in violation of the court order or Department of Motor Vehicles order . . . when he or she has a concentration of two-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or a concentration of two-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

L.B. 998 became effective after Duncan committed the criminal act but before he pleaded no contest. The bill had an emergency clause,[5] and the Governor signed it into law in April 2014.[6] The State filed the information in March, Duncan pleaded no contest in October, and the court sentenced Duncan in January 2015. L.B. 998 does not have a saving clause or any other express statement concerning retroactivity.

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[4] 2014 Neb. Laws, L.B. 998, § 13.

[5] *Id.*, § 20.

[6] Legislative Journal, 103d Leg., 2d Sess. 1490 (Apr. 9, 2014).

[2,3] Generally, if the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.[7] We sometimes refer to this rule as the "*Randolph* doctrine," after its progenitor.[8] If a defendant appeals his or her sentence, then the sentence is not a final judgment until the entry of a final mandate.[9]

The starting point of the *Randolph* doctrine is our decision in *State v. Randolph*.[10] There, a jury convicted the defendants of kidnapping and the court sentenced them to life imprisonment. When the criminal acts occurred, a life sentence was mandatory.[11] But an amendment took effect during the pendency of the case which reduced the maximum penalty to 50 years' imprisonment.[12] The defendants argued that the amendment made their life sentences excessive.

In the absence of an express statement of intent, we presumed that the Legislature wanted the new punishment, which it now believed to fit the crime, to apply wherever possible:

> "It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the

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[7] E.g., *State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014).

[8] See *State v. Urbano*, 256 Neb. 194, 205, 589 N.W.2d 144, 153 (1999), citing *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971).

[9] See *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997).

[10] *State v. Randolph, supra* note 8.

[11] See Neb. Rev. Stat. § 28-417 (Reissue 1964).

[12] See *id.* (Cum. Supp. 1969).

> Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology."[13]

So, we vacated the defendants' life sentences and remanded the cause for resentencing.

But later, we constricted the *Randolph* doctrine in a series of cases involving changes to the rape and sexual assault statutes.[14] For example, in *State v. Country*,[15] the defendant pleaded no contest to forcible rape and the court sentenced him to 10 to 30 years' imprisonment. After the court sentenced the defendant, L.B. 23 became effective and "redefined most nonconsensual sexual crimes."[16] The maximum term of imprisonment for any sexual assault under L.B. 23, § 3, was 25 years.

We identified several reasons why the *Randolph* doctrine did not apply. First, L.B. 23 was "not merely an amendatory act changing the penalty for a particular offense."[17] Instead, it "define[d] new crimes."[18] L.B. 23 repealed several sections, including those defining common-law and statutory rape, rape against a sister or daughter, and assault with intent to rape. In their place, it created two new crimes: sexual assault in the first degree and sexual assault in the second degree. Whether the victim suffered "serious personal injury" was

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[13] *State v. Randolph, supra* note 8, 186 Neb. at 302, 183 N.W.2d at 228, quoting *In re Estrada*, 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965).

[14] See, *State v. Crisp*, 195 Neb. 833, 241 N.W.2d 129 (1976); *State v. Ashby*, 194 Neb. 585, 234 N.W.2d 600 (1975); *State v. Trowbridge*, 194 Neb. 582, 234 N.W.2d 598 (1975); *State v. Country*, 194 Neb. 570, 234 N.W.2d 593 (1975), *disapproved in part on other grounds, State v. Bunner*, 234 Neb. 879, 453 N.W.2d 97 (1990).

[15] *State v. Country, supra* note 14.

[16] *Id.* at 571, 234 N.W.2d at 594, citing Neb. Laws 1975, L.B. 23.

[17] *Id.* at 572, 234 N.W.2d at 594.

[18] *Id.*

relevant to the sentence for both degrees of sexual assault.[19] Serious injury to the victim was not an element of the former statutes.

The record did not show if the defendant seriously injured his victim, and we stated that a remand for an evidentiary hearing was contrary to the Legislature's intent:

> Probably, this determination can be made only by means of an evidentiary hearing unless serious personal injury is admitted. The Legislature, when it enacted L.B. 23, did not contemplate that cases pending on appeal would require [an] evidentiary hearing to determine a new and reduced penalty. Yet as a practical matter this is the only way in which the Randolph doctrine could be made applicable in the present and similar cases.[20]

Furthermore, L.B. 23's "primary purpose" was not to mitigate the punishment for rape.[21] Instead, the law was "procedural and directed to protecting the dignity of the victim and also to [e]nsure effective due process for the person charged."[22] Finally, the State had dismissed a habitual criminal charge under a plea agreement. Applying L.B. 23 retroactively would have been "unfair to the State by introducing after the fact an element which it had no opportunity to consider when it made the bargain."[23]

The State compares this case to *Country*. It notes that L.B. 998 does not just reduce the punishment, but also distinguishes between persons with and without a blood or breath alcohol concentration of at least .02. In that sense, L.B. 998 "created a new category of crime."[24] The State claims that it would be unfair to apply L.B. 998 retroactively because

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[19] See L.B. 23, § 4.

[20] *State v. Country, supra* note 14, 194 Neb. at 573-74, 234 N.W.2d at 595.

[21] *Id.* at 574, 234 N.W.2d at 595.

[22] *Id.* See L.B. 23, § 1.

[23] *State v. Country, supra* note 14, 194 Neb. at 575, 234 N.W.2d at 596.

[24] Brief for appellee at 9.

Duncan's alcohol concentration was irrelevant when he committed the offense: "At the time the crime was committed, the State had no incentive to investigate that issue (beyond ruling out [driving under the influence]), to collect evidence of it, or to include any such evidence in the factual basis."[25]

Duncan, of course, disagrees. He argues that L.B. 998 did not "create a new crime."[26] Instead, he suggests that the Legislature "essentially reclassified the offense as a misdemeanor unless the person so charged had alcohol in his or her system, in which case, the offense would be classified as a felony."[27] Duncan contends that the State was on notice of the amendment because the change took effect more than 6 months before he pleaded no contest.

As Duncan points out, there are several differences between this case and *Country*. In *Country*, the amendment took effect after the State reached a plea agreement with the defendant. In contrast, L.B. 998 became effective well before the State agreed to dismiss the driving during revocation charge. Moreover, the legislative history shows that L.B. 998's main purpose—at least before a welter of unrelated floor amendments—was to reduce the punishment for driving without an ignition interlock device.[28]

[4] But L.B. 998 did not merely reduce the penalty for driving without an ignition interlock device. It also introduced a new substantive element: Whether the offender's breath or blood alcohol concentration was .02 or higher. The State had no reason to gather such evidence when Duncan's criminal act occurred. Even if such evidence could still be adduced at this point, an evidentiary hearing would be necessary. As we explained in *Country*, we assume that the Legislature does not

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[25] *Id.* at 9-10.

[26] Brief for appellant at 16.

[27] *Id.*

[28] See, Judiciary Committee Hearing, L.B. 998, 103d Leg., 2d Sess. 8 (Jan. 31, 2014); Floor Debate, 103d Leg., 2d Sess. 75, 76, 78 (Mar. 20, 2014).

want us to apply mitigatory amendments to pending cases if doing so would require a new evidentiary hearing.

Put simply, Duncan is not entitled to a lesser punishment under L.B. 998, because it is not clear if he would, in fact, be punished less severely under the law as amended. We do not know what his offense would be under L.B. 998 because the record lacks evidence of the alcohol concentration of his breath or blood. And we will not remand the cause for an evidentiary hearing to find out. So, the district court correctly sentenced Duncan under the law in effect when the criminal act occurred.

## Excessive Sentence

Duncan argues that his sentence is excessive. He notes that this is his first felony conviction, that he completed intensive outpatient treatment in 2013, and that driving without an ignition interlock device is a nonviolent crime. Duncan does not argue that the court should have placed him on probation, but he believes that a prison sentence is inappropriate.

[5] The principles of law governing the review of sentences are so familiar that we need not repeat them here.[29] An appellate court will not disturb a sentence imposed within the statutory limits unless the trial court abused its discretion.[30] Duncan's sentence is within the statutory limits for a Class IV felony.[31]

The court stated that imprisonment was "necessary for the protection of the public because the risk is substantial that, during any period of probation, [Duncan] would engage in additional criminal conduct and because a lesser sentence would depreciate the seriousness of [Duncan's] crimes and promote disrespect for the law." At the sentencing hearing, the court told Duncan that "at some point you've got to treat these things seriously."

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[29] See *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

[30] See *id*.

[31] See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014).

We conclude that Duncan's sentence is not an abuse of discretion. His criminal history did not include any felonies, but it was extensive. Duncan's crimes include three convictions for driving under the influence and four assault convictions. The probation investigation assessed him as a "very high risk to reoffend." And a sentence of 1 to 2 years' imprisonment was considerably less than the maximum of 5 years' imprisonment for a Class IV felony.

## CONCLUSION

Duncan seeks the benefit of a mitigatory amendment that changed the substantive elements of the offense. The record does not show what crime Duncan committed under the statute as amended. So, he is not entitled to a more lenient sentence under the new law. His sentence is not otherwise excessive.

Affirmed.

Stacy, J., not participating.

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