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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 6, 2015 and JUNE 4, 2015

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCXC

PEGGY POLACEK
OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		Steven B. Timm	Beatrice
		Linda A. Bauer	Fairbury
Second	Cass, Otoe, and Sarpy	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd J. Hutton	Papillion
		Stefanie A. Martinez	Papillion
Third	Lancaster	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	Douglas	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	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	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

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

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

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

WORKERS' COMPENSATION COURT AND JUDGES

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

ATTORNEYS
Admitted Since the Publication of Volume 289

KATHRYN LEIGH ADEN
MATTHEW JAMES AKSAMIT
MICHAEL WADE ANDERSON
CHRISTOPHER RYAN BARONDEAU
ERIN BRAMHALL
ZACHARY JOE BUXTON
CHRISTINA ERIN CARR
KATELYN NICOLE CHERNEY
JERRY DUANE CLINCH
MATTHEW SCOTT CLINE
SHEILA DIANE CORBINE
PHILIP OWEN CUSIC
NATHAN CRAIG DALLON
RICHARD DAVID DALY
GREGORY THOMAS DEEMER
JOSEPH EMMANUEL DOBESH
KAITLYN DIANE DOBESH
CHRISTOPHER OSITA ESTWICK
DAVID JAMES GRAUMAN
JAMIE C.M. HERMANSON
JUSTIN NEWELL HESSER
KERSTEN HIGGINS
BRIAN M. HISKEY
JOHN D. (JACK) HORGAN
SCOTT M. HUESCHEN
ANDREW KOCH JOYCE
JESSICA KALLSTROM-SCHRECKENGOST
CAITLIN RUTH KILBURG
ERIN JOELLE KOOIKER
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NICOLE LYNN MASON
VIRGINIA JANETTE MAYNES
KEVIN MARK MCVOY
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BRAD EDWARD MILLER
DAVID JEFFREY MYERS
MEGAN ELIZABETH OSLER
JEFFERSON CHE PAPPAS
ABAGAIL LEA PIERPOINT
LILLY ARLEEN RICHARDSON-SEVERN
CHRISTOPHER DANIEL SANDY
CHAD ALAN SCHAUB
JENNIFER SUE SCHUELKE
SHANE EBEN STRONG
AMY ELIZABETH SWOBODA
JILLIAN NICOLE WALKER
DEJA LYNN WEBER
GUY KRISS WEINSTEIN
STEPHEN ALEXANDER WEST
JONATHAN EVAN SLOAN WILLIAMS
KEN ANDREW WINJUM
LORIANNE JENAE WOLF
JOSHUA ROBERT WOOLF

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No. S-14-291: **State v. Holloway**. Reversed and remanded with directions. Per Curiam.

No. S-14-363: **State v. Robertson**. Reversed and remanded for further proceedings. Heavican, C.J.

No. S-14-557: **State v. Vela**. Vacated and remanded. Per Curiam. Heavican, C.J., and Stephan, J., not participating.

No. S-14-804: **In re Estate of Graham**. Reversed and remanded for a new trial. Wright, J.

No. S-14-887: **State v. Floyd**. Affirmed. Connolly, J. Stephan, J., participating on briefs. Wright, J., not participating.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-12-103: **State v. Galindo**. State's suggestion of remand granted. Judgment of district court vacated and cause remanded for appointment of counsel.

No. S-14-1085: **Neferu Ra v. Gage**. Motion of appellee for summary affirmance granted. See § 2-107(A)(1). Grounds underlying petition for writ of habeas corpus frivolous. See, Neb. Rev. Stat. § 25-2301.02 (Reissue 2008); *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

No. S-15-103: **State v. Hansen**. Stipulation allowed; appeal dismissed.

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

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-13-181: **Zapata v. Cline, Williams**. Petition of appellees for further review denied on February 19, 2015.

No. A-13-269: **Lyman-Richey Corp. v. Nebraska Dept. of Rev.**, 22 Neb. App. 412 (2014). Petition of appellant for further review denied on February 11, 2015.

No. A-13-364: **Wertman v. Bollinger**. Petition of appellant for further review denied on March 18, 2015.

No. S-13-429: **Adams v. Manchester Park**, 22 Neb. App. 525 (2014). Petition of appellee for further review sustained on March 18, 2015.

No. A-13-640: **Jones v. Sellers**. Petition of appellant for further review denied on March 6, 2015. See § 2-102(F)(1).

No. A-13-675: **Breit v. Breit**. Petition of appellant for further review denied on March 18, 2015.

No. A-13-760: **State v. Brooks**, 22 Neb. App. 419 (2014). Petition of appellant for further review denied on February 19, 2015.

No. A-13-761: **State v. Brooks**, 22 Neb. App. 435 (2014). Petition of appellant for further review denied on February 19, 2015.

No. S-13-769: **In re Estate of Clinger**, 22 Neb. App. 692 (2015). Petition of appellant for further review sustained on April 15, 2015.

No. A-13-781: **State v. Glazebrook**, 22 Neb. App. 621 (2015). Petition of appellant for further review denied on April 22, 2015.

No. A-13-876: **State v. Kollekowski**. Petition of appellant for further review denied on February 11, 2015.

No. A-13-893: **In re Guardianship & Conservatorship of Forster**, 22 Neb. App. 478 (2014). Petition of appellant for further review denied on February 19, 2015.

No. A-13-895: **Herman Trust v. Brashear 711 Trust**, 22 Neb. App. 758 (2015). Petition of appellant for further review denied on April 15, 2015.

No. A-13-896: **Herman Trust v. Brashear LLP**, 22 Neb. App. 758 (2015). Petition of appellant for further review denied on April 15, 2015.

No. A-13-897: **Herman Trust v. Brashear**, 22 Neb. App. 758 (2015). Petition of appellant for further review denied on April 15, 2015.

No. S-13-906: **Ficke v. Wolken**, 22 Neb. App. 587 (2014). Petition of appellant for further review sustained on April 8, 2015.

No. A-13-938: **In re Guardianship of Jordan M**. Petition of appellant for further review denied without prejudice on February 2, 2015.

No. A-13-938: **In re Guardianship of Jordan M**. Petition of appellant for further review denied on April 22, 2015.

No. A-13-946: **Curtis Acres Assn. v. Hosman**, 22 Neb. App. 652 (2015). Petition of appellant for further review denied on March 18, 2015.

No. S-13-1015: **Mejia v. Chapman**. Petition of appellant for further review sustained on April 15, 2015.

No. A-13-1042: **State v. Holroyd**. Petition of appellant for further review denied on April 13, 2015.

No. A-13-1079: **State v. Tapia**. Petition of appellant for further review denied on March 25, 2015.

No. A-13-1117: **State v. Cahuichchii**. Petition of appellant for further review denied on March 11, 2015.

No. A-13-1136: **State v. Watts**, 22 Neb. App. 505 (2014). Petition of appellant for further review denied on May 21, 2015.

No. A-14-009: **State v. Vance**. Petition of appellant for further review denied on April 22, 2015.

No. A-14-022: **State v. Kozisek**, 22 Neb. App. 805 (2015). Petition of appellee for further review denied on May 6, 2015.

Nos. A-14-026, A-14-027: **State v. Glasson**. Petitions of appellant for further review denied on February 11, 2015.

No. A-14-029: **State v. Bowman**. Petition of appellant for further review denied on February 11, 2015.

No. A-14-038: **State v. Kellogg**, 22 Neb. App. 638 (2015). Petition of appellant for further review denied on February 25, 2015.

No. A-14-050: **Hartley v. Metropolitan Utilities Dist**. Petition of appellee for further review denied on May 6, 2015.

No. A-14-051: **Meisinger v. Metropolitan Utilities Dist**. Petition of appellee for further review denied on May 6, 2015.

No. S-14-058: **State v. Armagost**, 22 Neb. App. 513 (2014). Petition of appellant for further review sustained on January 29, 2015.

No. S-14-058: **State v. Armagost**, 22 Neb. App. 513 (2014). Petition of appellee for further review sustained on January 29, 2015.

No. A-14-080: **Mahler v. Marshall**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-086: **State v. Dlouhy**. Petition of appellant for further review denied on May 21, 2015.

No. A-14-100: **State v. Patterson**. Petition of appellant for further review denied on February 6, 2015, as untimely. See § 2-102(F)(1).

No. A-14-107: **Macias v. Bader**. Petition of appellant for further review denied on February 11, 2015.

No. A-14-162: **State v. Wabashaw**. Petition of appellant for further review denied on April 8, 2015.

No. A-14-170: **State v. White**. Petition of appellant for further review denied on February 19, 2015.

No. A-14-197: **State v. Ruegge**. Petition of appellant for further review denied on March 11, 2015.

Nos. A-14-202 through A-14-205: **State v. Joynes**. Petitions of appellant for further review denied on February 11, 2015.

No. A-14-207: **Onuachi v. Meylan Enters**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-233: **State v. Hill**. Petition of appellant for further review denied on May 6, 2015.

No. A-14-239: **State v. Chamberlain**. Petition of appellant for further review denied on May 13, 2015.

No. A-14-319: **State v. Anderson**. Petition of appellant for further review denied on May 21, 2015.

No. A-14-341: **State v. Baker**. Petition of appellant for further review denied on May 20, 2015, as untimely. See § 2-102(F)(1).

No. A-14-343: **Sims v. Nebraska Technical Servs**. Petition of appellant for further review denied on February 11, 2015.

No. S-14-378: **Gray v. Kenney**, 22 Neb. App. 739 (2015). Petition of appellant for further review sustained on March 11, 2015.

Nos. A-14-393, A-14-394: **State v. Livingston**. Petitions of appellant for further review overruled on March 9, 2015, for lack of jurisdiction.

No. A-14-421: **State v. Castonguay**. Petition of appellant for further review denied on April 8, 2015.

No. A-14-441: **Prater v. Kenney**. Petition of appellant for further review denied on January 29, 2015.

No. A-14-492: **Bohnet v. Bohnet**, 22 Neb. App. 846 (2015). Petition of appellant for further review denied on May 20, 2015, as premature. See § 2-102(F)(1).

No. A-14-534: **State v. Dickey**. Petition of appellant for further review denied on March 16, 2015, as untimely. See § 2-102(F)(1).

Nos. A-14-585, A-14-673: **State v. Voter**. Petitions of appellant for further review denied on April 15, 2015.

No. S-14-590: **State v. Modlin**. Petition of appellant for further review sustained on March 18, 2015.

No. A-14-601: **Evensen v. George Risk Indus**. Petition of appellee for further review denied on May 6, 2015.

No. A-14-617: **State v. Haggan**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-621: **State v. Gardner**. Petition of appellant for further review denied on April 15, 2015.

No. A-14-624: **Koerber v. Koerber**. Petition of appellant for further review denied on March 16, 2015, as premature. See § 2-102(F)(1).

No. A-14-624: **Koerber v. Koerber**. Petition of appellant for further review denied on April 22, 2015.

No. A-14-635: **State v. Olsen**. Petition of appellant for further review denied on May 6, 2015.

No. A-14-668: **State v. Ryan**. Petition of appellant for further review denied on May 13, 2015.

No. A-14-678: **State v. Vandorien**. Petition of appellant for further review denied on March 25, 2015.

No. A-14-715: **ACI Worldwide Corp. v. BHMI, Inc**. Petition of appellant for further review denied on February 11, 2015.

No. A-14-728: **Quinn v. Archbishop Bergan Mercy Hosp**. Petition of appellant for further review denied on April 13, 2015, as untimely.

No. A-14-737: **State v. Ramirez**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-737: **State v. Ramirez**. Petition of appellant for further review denied on March 13, 2015.

No. A-14-739: **In re Interest of Brendon J**. Petition of appellant for further review dismissed on May 5, 2015.

No. S-14-750: **State v. Meints**. Petition of appellant for further review sustained on February 25, 2015.

No. A-14-763: **Davlin v. Sabatka-Rine**. Petition of appellant for further review denied on May 6, 2015.

No. A-14-779: **State v. Buford**. Petition of appellant for further review denied on May 21, 2015.

No. A-14-795: **State v. Jones**. Petition of appellant for further review denied on February 11, 2015.

No. A-14-802: **State v. Friedrichsen**. Petition of appellant for further review denied on February 11, 2015.

Nos. A-14-819, A-14-820: **State v. Liner**. Petitions of appellant for further review denied on May 8, 2015, as untimely.

No. A-14-827: **State v. Cardenas**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-832: **In re Interest of Brendon J**. Petition of appellant for further review dismissed on May 5, 2015.

No. A-14-854: **State v. Daisley**. Petition of appellant for further review denied on March 25, 2015.

No. A-14-857: **Pruitt v. Dollar General**. Petition of appellant for further review denied on May 13, 2015.

No. A-14-865: **In re Estate of Warner**. Petition of appellant for further review denied on May 21, 2015.

No. A-14-888: **State v. Sessions**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-912: **State v. Cutler**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-930: **Cohrs v. Bruns**. Petition of appellant for further review denied on March 25, 2015.

No. A-14-946: **Tyler v. McDermott**. Petition of appellant for further review denied on April 21, 2015, for failure to file brief in compliance with § 2-102(F)(1).

No. A-14-1036: **State v. Garcia**. Petition of appellant for further review denied on March 25, 2015.

No. A-14-1050: **State v. Garcia**. Petition of appellant for further review denied on March 11, 2015.

No. A-14-1111: **Hall v. Kenney**. Petition of appellant for further review denied on May 6, 2015.

No. A-15-082: **Quraishi v. Grady**. Petition of appellant for further review denied on May 21, 2015.

No. A-15-113: **State v. Tyler**. Petition of appellant for further review denied on April 21, 2015, for failure to file brief in compliance with § 2-102(F)(1).

No. A-15-118: **Moore v. Blomstedt**. Petition of appellant for further review denied on April 13, 2015, for failure to comply with § 2-102(F)(1).

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

Sanitary and Improvement District No. 196 of Douglas County, Nebraska, appellant, v. City of Valley, Nebraska, appellee.

858 N.W.2d 553

Filed February 6, 2015. No. S-13-880.

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. **Annexation: Ordinances: Equity.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.
3. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
4. **Municipal Corporations: Annexation.** Neb. Rev. Stat. § 17-405.01 (Reissue 2012) provides that cities of the second class may annex contiguous or adjacent lands which are urban or suburban in character and not agricultural lands which are rural in character.
5. **Municipal Corporations: Annexation: Constitutional Law: Legislature: Statutes.** The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring such power, because a municipal corporation has no power to extend or change its boundaries other than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do.
6. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law.
7. ____: ____. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.

8. **Summary Judgment: Evidence.** A summary judgment involves a judicial evaluation of evidence to determine whether an issue of material fact exists and, therefore, is a factual determination resulting in a disposition of the factual merits of a controversy.
9. **Summary Judgment: Expert Witnesses: Testimony.** A conflict of expert testimony regarding an issue of fact establishes a genuine issue of material fact which precludes summary judgment.
10. **Municipal Corporations: Annexation: Agriculture.** Neb. Rev. Stat. § 17-405.01 (Reissue 2012) expressly limits a city of the second class from exercising its annexation power over any agricultural lands which are rural in character.
11. **Municipal Corporations: Annexation.** To determine whether lands are urban or suburban, the test is whether a city has arbitrarily and irrationally used the power granted in Neb. Rev. Stat. § 17-405.01 (Reissue 2012) to include lands entirely disconnected, agricultural in character, and bearing no rational relation to the legitimate purposes of annexation.
12. **Agriculture: Words and Phrases.** Agriculture is defined as the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock.
13. **Municipal Corporations: Annexation.** The contiguous or adjacent requirement in statutes governing the annexation powers of cities determines how substantial the link between the city and the annexed area must be.
14. **Municipal Corporations: Annexation: Words and Phrases.** The terms "contiguous" and "adjacent" are used synonymously and interchangeably, and if the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect.
15. **Annexation: Boundaries: Words and Phrases.** Contiguity means that the two connecting boundaries should be substantially adjacent.
16. **Municipal Corporations: Annexation.** Substantial adjacency between a municipality and annexed territory exists when a substantial part of the municipality's boundary is adjacent to a segment of the boundary of the city or village.
17. ____: ____. A municipality may annex several tracts as long as one tract is substantially adjacent to the municipality and the other tracts are substantially adjacent to each other.
18. ____: ____. The annexation of land to cities and towns is a legislative function, and it is for their governing bodies to determine the facts which authorize the exercise of the power granted.
19. **Annexation: Taxation.** It is improper for an annexation to be solely motivated by an increase in tax revenue.
20. **Ordinances: Proof.** The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

James E. Lang and Kathleen M. Foster, of Laughlin, Peterson & Lang, for appellant.

Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, and Jeffrey B. Farnham and Andrea M. Griffin, of Farnham & Simpson, P.C., L.L.O., for appellee.

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

HEAVICAN, C.J.

NATURE OF CASE

Sanitary and Improvement District No. 196 (SID 196) filed a complaint in Douglas County District Court seeking to declare ordinance No. 611 of the City of Valley, Nebraska, invalid and enjoin its enforcement. Ordinance No. 611 authorized the annexation of land near Valley's corporate border, some of which includes SID 196. The district court granted Valley's motion for summary judgment and declared the ordinance valid. SID 196 appeals. We affirm the district court's order granting Valley's motion for summary judgment.

BACKGROUND

Valley is a city of the second class, located between Omaha and Fremont, Nebraska. On November 9, 2010, the Valley City Council passed three different ordinances to annex three different areas near Valley. Ordinance No. 611, the subject of this litigation, authorized, pursuant to Neb. Rev. Stat. § 17-405.01 (Reissue 2012), the annexation of land near Valley. This annexed land is labeled annexation "Area A" on the map we have attached as appendix A to our opinion, which map is a portion of an exhibit. Annexation area A consists of six different parcels: A1 through A6. SID 196 is located in area A1. The legal description in ordinance No. 611 describes annexation area A as a whole, and does not individually describe the parcels which make up area A.

Area A1—Ginger Cove.

Area A1 consists of SID 196 and is commonly known as the Ginger Cove subdivision. The area is an almost completely developed residential area with 155 residential homes

surrounding a sandpit lake. At the time of the proposed annexation, it did not share any common borders with Valley, but did share common borders with areas A2 and A3.

Area A2—Ginger Woods.

Area A2 consists of sanitary and improvement district No. 254 and is commonly known as the Ginger Woods subdivision. This area is also an almost completely developed residential area with 65 homes surrounding a sandpit lake. In 2010, it did not share any common borders with Valley, but did share common borders with areas A1 and A3.

Area A3—Plant Site 11.

Area A3 consists of a sandpit lake and surrounding area owned by Lyman-Richey Corporation (Lyman-Richey). Lyman-Richey refers to the area as "Plant Site 11." This area was used as a gravel and sand mine for approximately 50 years, until operations were substantially completed in 2007. It shares a common border with Valley, along with areas A1, A2, A4, and A5. In his deposition, Patrick Gorup, vice president of Lyman-Richey and its parent company, stated that plant site 11 was mined out under current market conditions and that Lyman-Richey had plans to potentially develop the area into a residential property or sell the property. At the time of the summary judgment, there was no residential development on plant site 11.

Area A4—Plant Site 7.

Area A4 is also owned by Lyman-Richey and consists of a currently operating gravel and sand mine. This area is east of area A3 and shares a common border with Valley, along with areas A3 and A5. Lyman-Richey expects that mining operations on this site will continue for at least another 7 to 10 years, depending on market conditions. Gorup stated that Lyman-Richey is conducting mining operations on the site in a manner that will better accommodate residential development after mining is completed. Land within the area not used in mining operations is leased to a farmer.

Area A5—McCann's Lake.

Area A5 consists of a private lake with two residences on it. This area borders areas A3 and A4. In 2010, it did not share a border with Valley.

Area A6.

This area, which is not labeled on the attached map, primarily consists of seven different individual acreages and makes up the rest of annexation area A.

Ordinance No. 611.

In 2006, Valley, SID 196, and Lyman-Richey entered into an interlocal agreement regarding wastewater and sewer services. Under the agreement, SID 196 and Lyman-Richey agreed to pay Valley for the cost to construct a lift station and a force main for the purpose of routing wastewater from SID 196 and the Lyman-Richey properties to the regional pumping station in Valley. According to Gorup, Lyman-Richey and SID 196 split the cost of the system. Lyman-Richey reserved the capacity for 233 residential lots to use the wastewater system on plant site 11, with the option to expand capacity for an additional fee. Gorup stated that they did this because Lyman-Richey was contemplating developing plant site 11 into a residential community.

In its annexation plan, Valley explains that it borrowed $4.5 million from the Nebraska Department of Environmental Quality to construct two regional pumping stations and a force main to transport wastewater in Valley to the treatment facility in Fremont. To finance repayment of the loan, Valley charges its residents a fee for use of the sewer system. Valley charges residents in Ginger Cove and Ginger Woods a monthly fee to use the system, which is substantially the same as what is charged to residents of Valley. The fee charged to the users of the sewer system is less than the cost to repay the loan. The balance of the debt is repaid using revenue from Valley's sales tax.

Before the ordinance passed, police services were provided to annexation area A by the Douglas County Sheriff, with the Valley Police Department as a secondary responder. After the

annexation, police services would primarily be handled by the Valley Police Department. Fire and paramedic services were provided by the Valley Suburban Fire and Rescue Department and would continue to be provided by that department after the annexation. Snow removal services were provided by Douglas County and upon annexation would be provided by Valley. Valley was already providing all building inspection and building code enforcement within the area.

After the ordinance passed, SID 196 filed a complaint in Douglas County District Court seeking to have the ordinance be declared invalid and seeking to enjoin Valley from enforcing the ordinance. No other residents or entities within the proposed annexation area challenged the ordinances. As stated earlier, at the same time, Valley also annexed two other areas near the city. Those annexations have not been challenged and are not at issue in this litigation.

On January 9, 2013, Valley filed a motion for summary judgment. Both parties presented evidence from expert witnesses. Essentially, the experts chiefly differed in their ultimate conclusions regarding the classification of the land and which facts they used to arrive at those conclusions. There does not appear to be any dispute, however, over the use or physical nature of any of the particular parcels within annexation area A or the immediate surrounding area.

Valley's expert came to the conclusion that all of the land within annexation area A is urban or suburban. He stated that he looked at the entire character of the area and surrounding properties in arriving at his conclusion. SID 196's expert stated that "the Lyman-Richey property is not annexable because it is undeveloped and rural in character, and thus, SID 196 is not annexable because it would not be contiguous with the existing corporate limits of the city." In a deposition, he stated that he would classify SID 196 as "rural residential."

On September 9, 2013, the district court granted Valley's motion for summary judgment and declared the ordinance valid. Issuing its opinion from the bench, the district court found that area A was contiguous with or adjacent to Valley because it shares a common border with Valley. Further, the

court determined that the area should be classified as urban or suburban because of the presence of the Ginger Cove and Ginger Woods subdivisions and the fact that the area's value as a residential area would exceed its value as an agricultural area. SID 196 filed an appeal on October 9.

ASSIGNMENTS OF ERROR

SID 196 assigns, consolidated and restated, that the trial court erred in (1) failing to find that there was a genuine issue of material fact, (2) finding that the property named in ordinance No. 611 was urban or suburban in character, (3) finding that the property named in ordinance No. 611 met the contiguous or adjacent requirement, and (4) failing to find that the annexation was solely motivated by increasing tax revenues.

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]

[2,3] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.[2] On appeal from an equity action, we decide factual questions de novo on the record and, as to questions of both fact and law, are obligated to reach a conclusion independent of the trial court's determination.[3]

ANALYSIS

[4,5] Section 17-405.01 provides that cities of the second class may annex contiguous or adjacent lands which are urban or suburban in character and not agricultural lands which are rural in character.[4]

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[1] *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

[2] *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007).

[3] *Id.*

[4] See *Holden v. City of Tecumseh*, 188 Neb. 117, 195 N.W.2d 225 (1972).

> The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring such power, because a municipal corporation has no power to extend or change its boundaries other than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do.[5]

SID 196 challenges the validity of ordinance No. 611 on several grounds. SID 196 alleges that (1) some land within annexation area A is not urban or suburban in character; (2) area A1, the parcel SID 196 is located on, fails to meet the contiguous or adjacent requirement; and (3) annexation area A was annexed for an improper purpose. First, we must address whether there existed a material issue of fact to make summary judgment improper.

Summary Judgment.

[6-8] SID 196 assigns that the trial court erred in granting Valley's motion for summary judgment because the conflicting expert testimony created a genuine material issue of fact. A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law.[6] After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.[7] A summary judgment involves a judicial evaluation of evidence to determine whether an issue of material fact exists

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[5] *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 491, 536 N.W.2d 56, 62 (1995), *disapproved on other grounds, Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

[6] See *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

[7] *SID No. 57 v. City of Elkhorn, supra* note 5.

and, therefore, is a factual determination resulting in a disposition of the factual merits of a controversy.[8]

[9] According to SID 196, the conflicting testimony between the parties' experts created a factual issue regarding the character of the Lyman-Richey property. SID 196 also argues that statements made in a report authored by Valley's expert in 2007, concerning the characterization of annexation area A, conflict with statements later made by that same expert at a deposition. A conflict of expert testimony regarding an issue of fact establishes a genuine issue of material fact which precludes summary judgment.[9] The key element of the rule is whether the experts conflict on a question of fact or a question of law. Two experts coming to different legal conclusions on the same issue does not create a material issue of fact.[10]

There is no disagreement between the parties and their experts over the physical nature of the land or what is contained on each parcel within annexation area A. There is no dispute that there are ongoing mining operations at plant site 7, no dispute over the state of plant site 11 at the time of the ordinance, and no dispute over the number of residences on the other properties within the area. The experts in this case simply emphasized different facts in coming to their conclusions about how the land should be classified under the statute.

The issue of whether the character of the land to be annexed meets the legal standard proscribed in the statute is a question of law. Although the characterization of the land depends on the particular facts of each case, "the question of whether the facts fulfill a particular legal standard" presents a question of law.[11] The fact that the experts came to two different legal conclusions, based upon the same set of facts, does not create

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[8] *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993).

[9] *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013).

[10] See *id.*

[11] 5 C.J.S. *Appeal and Error* § 818 at 77 (2007) (citing *State v. Trudeau*, 139 Wis. 2d 91, 408 N.W.2d 337 (1987)).

a material issue of fact and does not defeat Valley's motion for summary judgment. SID 196's assignment of error that the conflicting expert testimony created a material issue of fact is without merit.

Characterization of Annexation Area A.

[10] SID 196 assigns that the trial court erred in finding that the two properties owned by Lyman-Richey and located within annexation area A were urban or suburban in character. Section 17-405.01 expressly limits a city of the second class from exercising its annexation power "over any agricultural lands which are rural in character." Rural is defined as "of or pertaining to the country as distinguished from a city or town," and urban is defined as "of or belonging to a city or town."[12]

Gorup's deposition testimony indicated that Lyman-Richey contemplated future residential development on both sites before the ordinance was passed. SID 196 argues that the parcels should not be classified as urban or suburban, because the primary use of the property at the time of annexation was Lyman-Richey's mining operations, which it contends is an agricultural use of the property. SID 196 also argues that both of the Lyman-Richey parcels are zoned as transitional agriculture and that at the time of summary judgment, there had been no residential development on either Lyman-Richey property. SID 196 believes that the possible future use of the property cannot be used as a justification for classifying the property as urban or suburban.

[11] Land need not already be zoned and developed into a nonagricultural use, however, before it can be annexed. We have stated that such a construction of the statute "would seriously impair intelligent planning and coordination of the change-over in the use of land for urban purposes."[13] The test is "whether a city has arbitrarily and irrationally used the power granted therein to include lands entirely disconnected,

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[12] *Wagner v. City of Omaha*, 156 Neb. 163, 168, 55 N.W.2d 490, 494 (1952).

[13] *Voss v. City of Grand Island*, 186 Neb. 232, 237, 182 N.W.2d 427, 430 (1970).

agricultural in character, and bearing no rational relation to the legitimate purposes of annexation."[14]

The land in question, at the time of annexation, did bear a "rational relation to the legitimate purposes of annexation." Lyman-Richey's actions prior to the passage of ordinance No. 611 indicated that the two mining sites would eventually be used for residential development. In 2007, Lyman-Richey made a request for proposals to several developers in the region to explore development opportunities on plant site 11. Additionally, Lyman-Richey financed part of the regional pumping station in order to reserve capacity for over 200 residential lots on plant site 11. Gorup also indicated that Lyman-Richey was mining plant site 7 in a manner that would make conditions on the property more favorable for future residential development after mining operations at the site are completed.

[12] We also do not find that the parcels used for mining gravel and sand qualify as agricultural land under § 17-405.01. We have previously defined agriculture as "'the art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock.'"[15] Neb. Rev. Stat. § 77-1363 (Cum. Supp. 2014), which defines agricultural land for tax purposes, states that agricultural land includes, but is not limited to, "irrigated cropland, dryland cropland, grassland, wasteland, nurseries, feedlots, and orchards." A regulation interpreting that statute defines land used for an agricultural purpose as land that is "used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture, aquaculture, or horticulture."[16]

Under Nebraska law, mining operations have traditionally never fallen under the definition of an agricultural use of land. There is also no indication that the mining operations on either of the Lyman-Richey properties were used to further an

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[14] *Id.* at 237-38, 182 N.W.2d at 430.

[15] *Wagner v. City of Omaha*, *supra* note 12, 156 Neb. at 168, 55 N.W.2d at 494 (quoting 3 C.J.S. *Agriculture* § 1 (1936)).

[16] 350 Neb. Admin. Code, ch. 11, 002.08 (2014).

agricultural purpose, such as the creation of a pond to irrigate crops.[17] The mining operations were and are solely for the purpose of selling the gravel and sand that Lyman-Richey mined. The mining operations in no way involve the "production of any plant or animal product."[18] And while the record indicates that Lyman-Richey's practice was to rent out to farmers portions of the yet-to-be-mined land within the two plant sites, any farming that may take place on the land is merely incidental to the overall mining operations.[19]

There is no merit to SID 196's assignment of error that the Lyman-Richey properties should be classified agricultural land that is rural in character.

Contiguous or Adjacent Requirement.

SID 196 assigns that the trial court erred in finding that SID 196 was contiguous with or adjacent to Valley. SID 196 has a common connection with plant site 7, plant site 11, and McCann's Lake. At the time the ordinance passed in 2010, plant site 7, plant site 11, and McCann's Lake shared a common border with Valley.

[13-16] "The 'contiguous or adjacent' requirement in statutes governing the annexation powers of cities determines how substantial the link between the city and the annexed area must be."[20] "The terms are used synonymously and interchangeably, and if the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect."[21] "Contiguity means that the two connecting boundaries should be substantially adjacent."[22] "Substantial adjacency between a municipality and annexed territory exists when a substantial

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[17] See *Co. of Kendall v. Nat'l Bk. Trust No. 1107*, 170 Ill. App. 3d 212, 524 N.E.2d 262, 120 Ill. Dec. 497 (1988).

[18] 350 Neb. Admin. Code, *supra* note 16.

[19] See *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968).

[20] *County of Sarpy v. City of Gretna, supra* note 2, 273 Neb. at 96, 727 N.W.2d at 694.

[21] *Id.*

[22] *Id.*

part of the municipality's boundary is adjacent to a segment of the boundary of the city or village."[23]

[17] At the time the suit was filed, SID 196, by itself, did not share a common border with Valley. Generally, a municipality may annex several tracts as long as one tract is substantially adjacent to the municipality and the other tracts are substantially adjacent to each other.[24] SID 196 argues that the annexation of plant site 7, plant site 11, and McCann's Lake are in effect a "'strip annexation'" designed to satisfy the contiguous or adjacent requirement under the statute for SID 196.[25] We have consistently held that cities are not permitted to annex a strip or corridor of land in order to reach a larger area of land that is not itself contiguous with or adjacent to the annexing city.[26] SID 196 argues that the strip annexation cases are analogous to the case at bar, because SID 196 and Valley do not share a "community of interest." According to SID 196, citing its expert, "'community of interest' implies that one area is dependent on the other for its existence or that there is commonality in the needs and desires of the citizens of each."[27]

The "strip annexation" cases primarily focus on the extent to which the city shared a border with the land to be annexed. In *Johnson v. City of Hastings*,[28] the city wished to annex a community college campus that was three-quarters of a mile outside the city limits. To meet the contiguous or adjacent requirement, the city also annexed a 120-foot strip of highway and right-of-way leading to the campus. We held that "[t]he requirement of contiguity has not been achieved in this case, since the boundary of the area sought to be annexed is

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[23] *Id.*

[24] *County of Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456 (2009); *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[25] Brief for appellant at 34.

[26] See, e.g., cases cited *supra* note 24.

[27] Brief for appellant at 36.

[28] *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992).

not substantially adjacent to the boundary of the city."[29] Our "strip annexation" cases all hinge on the lack of substantial adjacency to the existing city border. In *County of Sarpy v. City of Gretna*,[30] we explained how "[t]he invalidity of a strip annexation is not based upon the existence of a larger tract at the distal end of the strip, but, rather, upon the lack of substantial adjacency where the proximal end meets the corporate limits of the city." Similarly, in *County of Sarpy v. City of Papillion*,[31] it was not the shape of the tract to be annexed that was controlling, but "lack of substantial adjacency" to an existing corporate boundary which precluded annexation. The nature of the land within the "strip" has never factored into the analysis.

SID 196 is seeking to extend the rule in those cases, where a municipality is seeking to annex a narrow corridor of land in order to connect a larger community farther away from the city, to a case such as this where Valley is seeking to annex a larger portion of undeveloped land that borders a large part of the existing corporate boundary of Valley. There is no authority, in either the statutes or our case law interpreting those statutes, to support the notion that annexations must meet a "community of interest" requirement. When addressing the validity of an annexation, we have never sought to compare the land to be annexed with the annexing city or examined whether one community depended on the other.

[18] Whether the annexation is ill advised is a question for the legislative body that authorizes the annexation. "The annexation of land to cities and towns is a legislative function, and it is for their governing bodies to determine the facts which authorize the exercise of the power granted."[32] The scope of inquiry for the courts is limited to "whether the conditions

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[29] *Id.* at 297, 488 N.W.2d at 24.

[30] *County of Sarpy v. City of Gretna, supra* note 2, 273 Neb. at 98, 727 N.W.2d at 695.

[31] *County of Sarpy v. City of Papillion, supra* note 24, 277 Neb. at 839, 765 N.W.2d at 465.

[32] *SID No. 57 v. City of Elkhorn, supra* note 5, 248 Neb. at 491, 536 N.W.2d at 62.

exist which authorize the annexation thereof."[33] Annexation area A, as a whole, met the contiguous or adjacent requirement in § 17-405.01. The significant shared border between annexation area A and the existing corporate boundary of Valley constituted substantial adjacency. Therefore, at the time the ordinance was passed, SID 196 was contiguous with or adjacent to Valley because it was within annexation area A. SID 196's assignment of error that SID 196 is not contiguous with or adjacent to Valley is without merit.

Purpose of Annexation.

[19,20] SID 196 assigns that the district court erred in not finding that the annexation was for an improper purpose. It is improper for an annexation to be solely motivated by an increase in tax revenue.[34] "The burden is on one who attacks an ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity."[35] The burden is not on Valley to prove that it did not annex the land for tax revenues, but instead rests with SID 196 to prove that Valley was motivated by an impermissible purpose.

In *Swedlund v. City of Hastings*,[36] the city's planning consultant stated that the city took revenue issues into consideration because "it would be fiscally irresponsible of the City" not to consider whether it could fund the additional services required. We determined that the landowners failed to meet their burden to show that the annexation was "enacted primarily or solely for the purpose of raising revenue for the City."[37]

SID 196's argument rests on allegations that Valley was motivated to annex SID 196 because of SID 196's extremely low debt. SID 196 points out that Valley chose not to annex

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[33] *Sullivan v. City of Omaha, supra* note 19, 183 Neb. at 514, 162 N.W.2d at 229.

[34] See *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933).

[35] *Swedlund v. City of Hastings*, 243 Neb. 607, 614, 501 N.W.2d 302, 307 (1993).

[36] *Id.*

[37] *Id.* at 615, 501 N.W.2d at 308.

another sanitary and improvement district because of its much higher level of debt. SID 196 has alleged only that Valley took into account the relative financial health of the sanitary and improvement districts it considered annexing, not that it ever considered increasing its tax base. As in *Swedlund*, it would be "fiscally irresponsible" for Valley to not at least take into consideration the debt load of the areas it was annexing. Furthermore, the debt level of a sanitary and improvement district has no relation to the increase in tax revenue the city stands to gain from an annexation. The fact Valley compared the debt of several different districts does not create an inference that Valley's sole motivation was an increase in its tax revenue.

The record on appeal indicates that Valley was motivated to annex SID 196, at least in part, to equalize the burden on both the residents of Valley and SID 196 in financing the recent improvements to the sewer system that serves the region. Currently, the residents of Valley are effectively partially subsidizing SID 196's use of the sewer system through Valley's sales tax. Valley does not have to allow its citizens to pay a bigger share of the cost of the sewer system improvements when the system is used by residents of both Valley and SID 196. Even though there is a connection to tax revenue, SID 196 has not met its burden in proving that Valley was motivated to annex the area solely for the purpose of increasing tax revenue. SID 196's assignment of error is without merit.

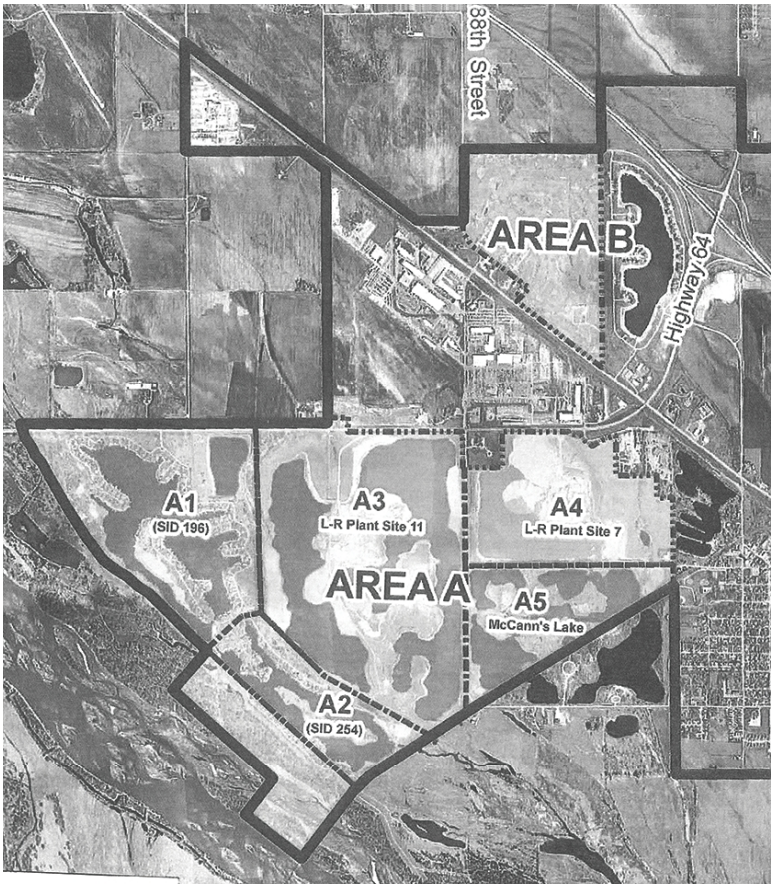
CONCLUSION

Accordingly, we find that ordinance No. 611 is valid and that the trial court properly granted summary judgment. We affirm.

AFFIRMED.

WRIGHT, J., not participating.

(*See page 17 for appendix A.*)


88th Street
AREA B
Highway 64
A1
(SID 196)
A3
L-R Plant Site 11
A4
L-R Plant Site 7
AREA A
A5
McCann's Lake
A2
(SID 254)

APPENDIX A

STATE OF NEBRASKA, APPELLEE, V. TERRY J. SELLERS, APPELLANT.

858 N.W.2d 577

Filed February 6, 2015. No. S-13-1049.

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. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
3. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
4. **Effectiveness of Counsel.** A pro se party is held to the same standards as one who is represented by counsel.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
6. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
7. **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.
8. **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.
9. ____: ____. 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.

10. ____: ____. 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 test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). 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.
11. **Postconviction: Effectiveness of Counsel: Proof.** A petitioner's postconviction claims that his or her trial counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case.
12. **Postconviction: Appeal and Error.** In a postconviction motion, an appellate court will not consider as an assignment of error a claim that was not presented to the district court.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Terry J. Sellers, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

CASSEL, J.

I. INTRODUCTION

This appeal follows the denial, without an evidentiary hearing, of Terry J. Sellers' motion for postconviction relief. With one exception, our analysis breaks no new ground. Sellers asserted a claim that the separation of the jury without his consent created a rebuttable presumption of prejudice which entitled him to an evidentiary hearing. But we conclude that this type of presumed prejudice is not the kind of prejudice necessary to establish a claim of ineffective assistance of counsel. We affirm.

II. BACKGROUND

Sellers was convicted by a jury of two counts of first degree murder, one count of attempted first degree murder, and three counts of use of a deadly weapon to commit a felony. Sellers was represented by counsel at trial and was provided with

different counsel on direct appeal, where we affirmed his convictions and sentences.[1] The facts surrounding Sellers' convictions are contained in *State v. Sellers*[2] and are not repeated herein, except as otherwise indicated.

Over the course of 4 days in late February 2005, Sellers and Taiana Matheny engaged in a scheme whereby Matheny would lure men to secluded locations so that she and Sellers could rob and murder them. Sellers and Matheny successfully robbed and shot to death two men and robbed and unsuccessfully attempted to murder another. Sellers was sentenced to life imprisonment for each of the murder convictions, 40 to 50 years' imprisonment for the attempted murder conviction, and varying terms of imprisonment for the use of a deadly weapon convictions.

In April 2011, Sellers moved for postconviction relief. His motion raised seven principal claims:

- His appellate counsel was ineffective in failing to raise, on direct appeal, the failure of his trial counsel to conduct a reasonable pretrial investigation.
- His appellate counsel was ineffective in failing to raise, on direct appeal, the failure of his trial counsel to assert *Miranda*[3] violations.
- His appellate counsel was ineffective in failing to raise, on direct appeal, the failure of his trial counsel to assert a violation of his speedy trial right.
- His appellate counsel was ineffective in arguing significantly weaker issues on direct appeal.
- His trial counsel was ineffective in failing to object to jury instructions Nos. 22 and 24.
- His trial counsel was ineffective in failing to make a *Batson*[4] challenge during the selection of the jury.

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[1] See *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[2] *Id.*

[3] See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

- Because of his actual innocence, his convictions were a fundamental miscarriage of justice.

In addition to the above seven claims, Sellers made numerous allegations concerning the performance of his trial counsel. Among these allegations, Sellers asserted that his trial counsel was ineffective in:

- failing to call important witnesses;
- failing to investigate the "cross section" jury requirement;
- failing to suppress illegally obtained statements and confessions;
- failing to object to evidence that limited Sellers' ability to present a defense;
- failing to argue and present mitigating evidence, including expert testimony, at sentencing;
- failing to object to the State's presentence investigation report; and
- failing to present "the Constitutionality of the statute" and specific aggravating circumstances at sentencing.

However, these allegations were not clearly stated as independent claims of ineffective assistance of trial counsel, or as the basis for appellate counsel's ineffectiveness in failing to raise them on direct appeal. As explained in more detail below, because Sellers had been provided with new counsel for his direct appeal, the district court decided to treat each allegation as a claim of ineffective assistance of appellate counsel.

Sellers supplemented his motion with a subsequent filing in December 2011, raising two additional claims. First, Sellers alleged that his appellate counsel was ineffective in failing to raise, on direct appeal, the failure of his trial counsel to object to the separation of the jury without Sellers' consent. And Sellers further alleged that his trial counsel was ineffective in failing to inform Sellers that such consent was required. Second, Sellers asserted that the trial court should have instructed the jury on the premeditated murder theory of first degree murder and its lesser-included offenses.

The district court denied postconviction relief without an evidentiary hearing. The court concluded that all of Sellers' claims of ineffective assistance of counsel failed to include a single fact or allegation establishing prejudice. Rather, Sellers'

allegations consisted solely of conclusory statements to the effect that the outcome of his trial and direct appeal would have been different but for the ineffectiveness of his counsel. And he failed to identify any specific witness, statement, violation, or evidence forming the basis for his claims.

As to Sellers' claims regarding instructions Nos. 22 and 24, the district court observed that this court analyzed the instructions in Sellers' direct appeal. In his direct appeal, Sellers alleged both that the trial court erred in giving instructions Nos. 22 and 24, and that his trial counsel was ineffective in failing to object to them. We determined that the record was insufficient to address the performance of Sellers' trial counsel. But we concluded that the instructions were not plainly erroneous. Based upon this conclusion, the district court determined that Sellers' trial counsel was not ineffective in failing to object.

The district court similarly found no basis for Sellers' claim of actual innocence or a fundamental miscarriage of justice. The court observed that Sellers failed to identify any new exculpatory evidence or any constitutional deprivation in violation of the Nebraska or federal Constitution. And the court also found no merit to the claims raised in Sellers' supplemental motion. Sellers' claim regarding the failure of the trial court to instruct the jury on the premeditated murder theory of first degree murder was procedurally barred. And Sellers failed to allege any prejudice resulting from his trial counsel's failure to object to the jury's separation.

Sellers filed a timely notice of appeal from the denial of postconviction relief.

III. ASSIGNMENTS OF ERROR

Sellers assigns, restated and reordered, that the district court erred in denying postconviction relief, because his appellate counsel was ineffective in failing to raise, on direct appeal, (1) trial counsel's failure to object to the separation of the jury without Sellers' consent, and the corresponding failure to inform Sellers that such consent was required; (2) trial counsel's failure to conduct a reasonable pretrial investigation; (3) trial counsel's failure to object to instructions Nos. 22 and

24; and (4) trial counsel's failure to request that the jury be instructed on the premeditated murder theory of first degree murder and its lesser-included offenses.

IV. STANDARD OF REVIEW

[1,2] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[5] An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[6] However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[7]

V. ANALYSIS

[3,4] We first dispose of a preliminary issue. The arguments made in Sellers' brief are not limited to his assignments of error, but extend to many of the claims raised in his postconviction motion. Among others, he makes assertions regarding actual innocence, the composition of the jury, and alleged violations of his *Miranda* rights and speedy trial right. However, an appellate court does not consider errors which are argued but not assigned.[8] We acknowledge that Sellers filed his brief pro se. But a pro se party is held to the same standards as one who is represented by counsel.[9] We restrict our analysis to Sellers' assignments of error.

[5] We next review governing principles of law regarding a claim of ineffective assistance of counsel. To establish a

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[5] *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015).

[6] *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

[7] *Id.*

[8] *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

[9] See *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994).

right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, under *Strickland v. Washington*,[10] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[11] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[12] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[13] A court may address the two prongs of this test, deficient performance and prejudice, in either order.[14]

[6] However, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.[15] As noted above, Sellers was represented by new counsel in his direct appeal. He was therefore required to assert, on direct appeal, any alleged deficiencies in trial counsel's performance known to him or apparent from the record in order to preserve them for postconviction review.[16]

Sellers raised only one claim of ineffective assistance of trial counsel on direct appeal, relating to his trial counsel's failure to object to instructions Nos. 22 and 24. But Sellers' postconviction motion made numerous allegations concerning the performance of his trial counsel. Thus, the majority of Sellers' claims of ineffective assistance of trial counsel were potentially barred from postconviction review. However, the ineffective assistance claims raised in Sellers' motion were presented in a very confusing manner, making it difficult to distinguish

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

[11] See *Duncan, supra* note 8.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] See *Hessler, supra* note 6.

[16] See *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009).

between claims of ineffective assistance of trial and appellate counsel. Consequently, the district court decided to treat each ineffective assistance claim as a claim of ineffective assistance of appellate counsel. We will do likewise.

[7-10] This postconviction proceeding was Sellers' first opportunity to assert that his appellate counsel was ineffective. A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.[17] 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.[18] That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.[19] 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.[20] 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.[21] 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.[22]

We now turn to Sellers' specific allegations of ineffective assistance of appellate counsel. And we begin with the primary issue presented by this appeal—whether the separation of the jury without Sellers' consent created a presumption of prejudice which entitled him to an evidentiary hearing.

1. Separation of Jury

Sellers assigns that his appellate counsel was ineffective in failing to raise, on direct appeal, the failure of his trial counsel

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[17] *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[18] *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

[19] *Id.*

[20] *Id.*

[21] See *id.*

[22] *Id.*

to object to the jury's separation without Sellers' consent. He further alleges that his trial counsel was ineffective in failing to advise him that such consent was required.

Nebraska law provides that in a criminal case, "[w]hen a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court."[23] Although this provision can be waived by agreement of the defendant and the State, it is otherwise mandatory.[24]

Sellers asserts that he was entitled to an evidentiary hearing on this claim, because the separation of the jury without his consent created a rebuttable presumption of prejudice. He cites to our holding in *State v. Robbins*[25] that in the absence of an express agreement or consent by the defendant, the failure to comply with § 29-2022 creates a rebuttable presumption of prejudice and places the burden upon the prosecution to show that no injury resulted.

We first note that in *State v. Collins*,[26] we overruled the holding of *Robbins* that a defendant's express agreement or consent is required to waive the right under § 29-2022 to sequester the jury. But our ruling in *Collins* was prospective only.[27] Sellers was tried before *Collins* was decided, and the case at bar is governed by the rule from *Robbins*.

Sellers misconstrues the applicability of the presumption of prejudice of *Robbins* to this postconviction proceeding. In applying *Robbins* to a petitioner's claim of ineffective assistance of counsel in a habeas proceeding, the U.S. Court of Appeals for the Eighth Circuit observed that the presumption of prejudice created by a violation of § 29-2022 is distinct from *Strickland* prejudice.[28] A violation of the statute will not,

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[23] Neb. Rev. Stat. § 29-2022 (Reissue 2008). See *State v. Barranco*, 278 Neb. 165, 769 N.W.2d 343 (2009).

[24] *Barranco, supra* note 23.

[25] *State v. Robbins*, 205 Neb. 226, 287 N.W.2d 55 (1980), *overruled, State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

[26] *Collins, supra* note 25.

[27] See *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013).

[28] See *Kitt v. Clarke*, 931 F.2d 1246 (8th Cir. 1991).

by itself, justify reversal of a conviction.[29] Thus, § 29-2022 prejudice does not alter the prejudice analysis required by *Strickland*.[30] Under *Strickland*, a defendant has the burden to show that he would have prevailed on appeal because the State could not have overcome the rebuttable presumption of prejudice created by the violation of § 29-2022.[31]

We agree with the conclusion reached by the Eighth Circuit and adopt its reasoning. A defendant requesting postconviction relief must establish the basis for such relief.[32] In order to establish the prejudice prong of the *Strickland* test, Sellers was required to allege sufficient facts to show that he would have prevailed on appeal because the State could not have overcome the rebuttable presumption of prejudice created by the violation of § 29-2022. But Sellers alleged only that his trial counsel did not inform him of the requirement for his consent. He failed to allege any facts as to the State's ability to overcome the presumption. Consequently, Sellers' allegations were insufficient to show that his appellate counsel was ineffective in failing to raise the issue on direct appeal. We find no error in the denial of postconviction relief on this claim without an evidentiary hearing.

2. Reasonable Pretrial Investigation

Sellers asserts that his appellate counsel was ineffective in failing to raise, on direct appeal, the failure of his trial counsel to conduct a reasonable pretrial investigation. In his postconviction motion, he identified several activities that his trial counsel failed to undertake. These activities included filing a motion for discovery, hiring an independent investigator, reviewing the crime scene, consulting with a ballistics expert, and identifying and interviewing potential witnesses.

However, Sellers failed to allege how undertaking the above activities would have produced a different outcome at trial. More specifically, he did not identify any exculpatory evidence

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[29] See *id.*

[30] *See id.*

[31] See *id.*

[32] See *Hessler, supra* note 6.

that the activities would have procured. As the district court observed, his allegations consisted solely of conclusory statements, such as, "'[I]f trial and/or appellate counsel would have investigated and hired an investigator to fully investigate the case at bar, there surely would have been a different outcome in [Sellers'] trial.'"

[11] Such conclusory allegations are insufficient to establish the prejudice prong of the *Strickland* test. We have previously observed that a petitioner's postconviction claims that his or her trial counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case.[33] And in assessing postconviction claims that trial counsel was ineffective in failing to call a particular witness, we have upheld dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called.[34]

There is nothing in Sellers' motion that would suggest the nature of the exculpatory evidence which his trial counsel would have obtained through the above activities. And his motion neither identified a single witness that was not called to testify nor described the testimony that the witness would have given. As such, Sellers' allegations were insufficient to show that his appellate counsel was ineffective in failing to raise this issue on direct appeal. "If defendant does not choose to specify what [he] is claiming, a trial court need not conduct a discovery hearing to determine if anywhere in this wide world there is some evidence favorable to defendant's position."[35]

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[33] See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[34] See, *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *Davlin, supra* note 18.

[35] *State v. Threet*, 231 Neb. 809, 813, 438 N.W.2d 746, 749 (1989), *disapproved on other grounds, State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

The district court correctly concluded that this claim did not entitle Sellers to postconviction relief.

3. Instructions Nos. 22 and 24

Sellers assigns that his appellate counsel was ineffective in failing to raise, on direct appeal, the failure of his trial counsel to object to jury instructions Nos. 22 and 24. However, as noted above, Sellers' appellate counsel raised and argued this issue on direct appeal, but we determined that the record was insufficient to resolve the issue of trial counsel's performance.

Thus, it appears that Sellers assigns that his appellate counsel was ineffective in failing to take an action which his appellate counsel did in fact undertake. But in his postconviction motion, Sellers correctly identified this claim as one of ineffective assistance of trial counsel. Given the district court's decision to treat each ineffective assistance claim raised in Sellers' motion as a claim of ineffective assistance of appellate counsel, we overlook the wording of the assigned error and proceed to the merits.

(a) Instruction No. 22

Instruction No. 22 provided:

> There has been testimony from Taiana Matheny, a claimed accomplice of the Defendant. You should closely examine her testimony for any possible motive she might have to testify falsely. You should hesitate to convict the Defendant if you decide that Taiana Matheny testified falsely about an important matter and that there is no other evidence to support her testimony.

In his postconviction motion, Sellers alleged that instruction No. 22 created an improper presumption that Matheny was his accomplice. Thus, he claimed that the instruction negated his defense that Matheny was the principal architect of the crimes. Finally, he asserted that the instruction was erroneous because it omitted a sentence from the pattern jury instruction that "[the jury] should convict the defendant only

if the evidence satisfies [the jury] beyond a reasonable doubt of (his, her) guilt."[36]

However, Sellers' allegations were insufficient to establish a right to postconviction relief. The allegations in his postconviction motion were identical to the assertions we rejected in Sellers' direct appeal. We concluded that no improper presumption was created by instruction No. 22, because the instruction "provide[d] in plain English that Matheny was a 'claimed accomplice'—nothing more, nothing less."[37] And although the instruction deviated from the pattern jury instruction, the instructions as a whole charged the jury that the State was required to prove each and every element of the offense charged beyond a reasonable doubt.

Sellers' motion failed to establish any prejudice from his trial counsel's failure to object to instruction No. 22. As we observed on direct appeal, instruction No. 22 was a cautionary instruction in Sellers' favor regarding the weight to be given to Matheny's testimony. We find no error in the denial of postconviction relief on this claim.

(b) Instruction No. 24

Instruction No. 24 provided: "Evidence of marijuana and money located at [Jeremiah Brodie's residence in] Omaha, Nebraska, was received only for the limited purpose of the credibility of DaWayne Kearney and for no other purpose. You may consider this evidence only for the limited purpose and for no other."

DaWayne Kearney was one of Sellers' victims—he was robbed, but escaped before he could be killed. After numerous unsuccessful attempts were made to serve Kearney with a subpoena to testify, Kearney was arrested at the home of Jeremiah Brodie. During the arrest and a subsequent search of Brodie's residence, police officers found handguns, ammunition, marijuana, and cash. Kearney was not charged with any offense, because police did not believe there was any evidence against

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[36] See NJI2d Crim. 5.6.

[37] *Sellers, supra* note 1, 279 Neb. at 230, 777 N.W.2d at 788.

him. Another individual admitted that the handguns belonged to her, and there was no evidence that Kearney was in possession of the guns or the marijuana.

On direct appeal, Sellers alleged that instruction No. 24 negated the inference that Kearney was a drug dealer. And this inference was consistent with Sellers' testimony that he met with Kearney to buy marijuana, not to rob and kill him. But we concluded that the instruction did not foreclose Sellers' ability to argue that Kearney was a drug dealer. Sellers was permitted to question Kearney about the drugs and money found at Brodie's residence and any agreement Kearney had made with the State. The instruction did not prevent the jury from considering Sellers' version of the confrontation with Kearney.

Sellers' postconviction motion again made the same allegations that he made on direct appeal. And these allegations failed to establish any prejudice resulting from his trial counsel's failure to object to the instruction. Instruction No. 24 did not inhibit Sellers from asserting a claim of self-defense, and the jury was given two instructions on that theory. We agree that Sellers failed to establish a right to postconviction relief on this claim.

4. Premeditated Murder Theory Instruction

[12] Sellers assigns that his appellate counsel was ineffective in failing to raise, on direct appeal, the failure of his trial counsel to request an instruction on the premeditated murder theory of first degree murder and its lesser-included offenses. However, this claim was not presented to the district court. In his supplemental motion, Sellers alleged that the trial court erred in instructing the jury. He did not assert a claim of ineffective assistance of counsel. We therefore decline to review this assignment of error. In a postconviction motion, an appellate court will not consider as an assignment of error a claim that was not presented to the district court.[38]

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[38] *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013).

VI. CONCLUSION

We find no merit to Sellers' assigned errors. His assertions of ineffective assistance of trial and appellate counsel failed to establish any prejudice resulting from the alleged deficiencies of his counsel. And his claim of instructional error regarding the premeditated murder theory of first degree murder was not presented as a claim of ineffective assistance of counsel before the district court. We affirm the denial of postconviction relief without an evidentiary hearing.

AFFIRMED.

WRIGHT, J., participating on briefs.

ABIGAIL K. DESPAIN, APPELLEE, V.
WILLIAM E. DESPAIN, APPELLANT.
858 N.W.2d 566

Filed February 6, 2015. No. S-13-1133.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **New Trial: Appeal and Error.** Regarding motions for new trial, an appellate court will uphold a trial court's ruling on such a motion absent an abuse of discretion.
3. **Divorce: Property Division: Appeal and Error.** In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, whose decision will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
4. **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.
5. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
6. **Jurisdiction: Time: Notice: Appeal and Error.** To vest an appellate court with jurisdiction, a party must timely file a notice of appeal.
7. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and interpretation will not be used to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
8. **Divorce: Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital

property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

9. ____: ____. The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed as modified.

Mark A. Steele, of Steele Law Office, for appellant.

John H. Sohl for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Abigail K. Despain, the appellee, and William E. Despain, the appellant, were married in June 2012, and Abigail filed her complaint for the dissolution of marriage in the district court for Saunders County in August 2012. After trial, the district court filed its decree of dissolution of marriage including orders regarding property division. William appeals.

The issues in this appeal are whether William's appeal was timely and whether the district court correctly calculated the division of property. We determine that although William's motion for new trial was filed before the entry of judgment, it was filed after announcement of the decision. Under Neb. Rev. Stat. § 25-1144.01 (Reissue 2008), it is treated as filed after the entry of judgment. And, thus, the motion was effective and the appeal is timely. We further determine that the district court erred in that portion of the decree which divided the property, and we modify the decree as indicated below. We affirm as modified.

STATEMENT OF FACTS

Abigail and William were married on June 23, 2012. On August 27, Abigail filed her complaint for the dissolution

of the marriage. No children were born to the parties during the marriage.

Prior to their marriage, Abigail and William purchased a house together. The parties sold the house after Abigail had filed for divorce but prior to trial. The net sale proceeds were $12,453.34, and the parties divided the proceeds equally prior to trial, each receiving $6,226.67.

A trial was held on June 10, 2013. Abigail and William each testified and presented evidence at trial. As noted, at the time of trial, Abigail and William had already divided the proceeds from the sale of the house. According to the evidence, they had no joint indebtedness.

Abigail presented evidence that in purchasing the house with William, she had used her premarital funds to pay the earnest deposit of $1,000, the closing costs of $4,422, and the water deposit of $150. Abigail stated that in total, she had used $5,572 of her premarital funds to help purchase the house. Abigail also presented evidence that without her knowledge at the time, the parties had received a refund in the amount of $70 for the overpayment of closing costs, and that William had kept the $70.

William stated at trial that he had made repairs and improvements to the house using his premarital funds in the amount of $3,509.92. The district court did not credit this claim, and William does not assign error to this finding on appeal.

The record shows that after trial, on August 14, 2013, the district court sent the parties an unsigned document captioned "Journal Entry" (unsigned journal entry) containing the substance of its decision and ordered counsel for Abigail to prepare a dissolution decree. This unsigned journal entry specifically states that unsigned copies were sent to counsel for each party on August 14.

In the unsigned journal entry, regarding "property division," the court found that Abigail is entitled to the return of premarital funds used to purchase the house, in the amount of $5,422; the return of the water deposit, in the amount of $150, which was paid from her premarital funds; and one-half of the overpayment of closing costs, in the amount of $35. The unsigned

journal entry states that William shall make an equalization payment which flows from those findings. The unsigned journal entry states:

> [Abigail's attorney] shall prepare the decree herein. It shall be reviewed by [William's attorney] and presented to the court for signature not later than September 16, 2013. The decree shall append the appropriate calculation of the division of the estate in accordance with paragraph 2. In order to avoid confusion as to appeal time, [t]his order shall be forwarded to counsel both unsigned and unfiled. A signed copy will be filed contemporaneously with the entry of the decree.

Following the distribution of the unsigned journal entry on August 14, 2013, but before the decree was filed on October 21, William filed a motion for new trial on October 16 in which he claimed that the district court's decision regarding division of property failed to recognize the division of proceeds from the sale of the home which had occurred and that an equalization payment based on this failure is erroneous.

On October 21, 2013, the district court filed its "Decree of Dissolution of Marriage," which included orders reflecting its provisions. In the dissolution decree, the court stated that Abigail and William's marriage was irretrievably broken and should be dissolved. Abigail's birth name was restored to her. Regarding the division of property, the decree stated:

> [Abigail] should be entitled to the return of premarital funds used to purchase the marital home in the amount of $5,422.00. [Abigail] should be entitled to the return of the water deposit in the amount of $150.00 which was paid from premarital funds, less any amounts deducted for water usage during the marriage. [Abigail] should be entitled to one half of the overpayment of closing costs in the amount of $35.00.

In the decree, the court ordered William to pay Abigail $5,607 in order to equalize the division of property. The court did not award alimony to either party and stated that each party shall be responsible for his or her own attorney fees and court costs.

The court signed a copy (signed journal entry) of the unsigned journal entry first distributed on August 14, 2013, on October 18 and filed it on October 21 along with the decree.

On November 27, 2013, the court filed its order overruling William's motion for new trial. The order states in its entirety: "NOW ON this 27th day of November, 2013, this matter comes before the Court on [William's] Motion for New Trial. The Court finds that the Decree has been signed. The Motion for New Trial is overruled."

On December 26, 2013, William filed his notice of appeal from the November 27 order overruling his motion for new trial.

ASSIGNMENT OF ERROR

William claims, restated, that the district court erred when it overruled his motion for new trial in which he claimed that the court erred in its method of calculating the equalization payment that William owes Abigail.

STANDARDS OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law. *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014).

[2] Regarding motions for new trial, we will uphold a trial court's ruling on such a motion absent an abuse of discretion. *First Express Servs. Group v. Easter*, 286 Neb. 912, 840 N.W.2d 465 (2013).

[3,4] In actions for the dissolution of marriage, the division of property is a matter entrusted to the discretion of the trial judge, whose decision will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Plog v. Plog*, 20 Neb. App. 383, 824 N.W.2d 749 (2012). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

ANALYSIS

Abigail contends that William's motion for new trial, filed before entry of the decree, was a nullity and that as a result, the notice of appeal was untimely and the appeal should be dismissed. William claims that the district court erred in overruling his motion for new trial because the district court's method of calculating the equalization payment was incorrect. We conclude that William's motion for new trial was an effective filing pursuant to § 25-1144.01 and that the appeal is timely. We further determine that the district court erred in its method of calculating the equalization payment owed by William to Abigail.

William's Motion for New Trial.

[5,6] 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. See *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014). To vest an appellate court with jurisdiction, a party must timely file a notice of appeal. *Meister v. Meister*, 274 Neb. 705, 742 N.W.2d 746 (2007). A party must file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing. See Neb. Rev. Stat. § 25-1912(1) (Reissue 2008). A motion for a new trial, however, terminates the time in which a notice of appeal must be filed. See § 25-1912(3). If the court denies the motion for new trial, and assuming that the motion for new trial is an effective filing and not a nullity, the party has 30 days from the entry of the order denying the motion to file a notice of appeal. *Meister v. Meister, supra*.

Section 25-1912, upon which the foregoing discussion is based provides:

> (1) The proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final

> order was rendered, within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and, except as otherwise provided in sections 25-2301 to 25-2310, 29-2306, and 48-641, by depositing with the clerk of the district court the docket fee required by section 33-103.
>
> . . . .
>
> (3) The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a timely motion for a new trial under section 25-1144.01, (b) by a timely motion to alter or amend a judgment under section 25-1329, or (c) by a timely motion to set aside the verdict or judgment under section 25-1315.02, and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a), (b), or (c) of this subsection.

Section 25-1144.01, mentioned in § 25-1912, provides:

> A motion for a new trial shall be filed no later than ten days after the entry of the judgment. A motion for a new trial filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof.

William filed his motion for new trial before the court filed the dissolution decree, and the decree is the judgment in this dissolution case. See *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (2014). Abigail contends that William's motion for new trial filed before entry of the judgment was a nullity and that therefore, the running time for filing a notice of appeal from the decree did not terminate awaiting disposition of a new trial motion. According to Abigail, the notice of appeal was filed more than 30 days after entry of judgment and was untimely. Applying § 25-1144.01, we conclude the appeal was timely, and we reject Abigail's contention that we lack jurisdiction.

The relevant dates for our analysis are as follows:

- June 10, 2013: trial conducted.
- August 14, 2013: unsigned journal entry sent to parties' attorneys.
- October 16, 2013: William's motion for new trial filed.
- October 21, 2013: dissolution decree filed.
- October 21, 2013: signed journal entry filed.
- October 21, 2013: William's motion for new trial treated as filed under § 25-1144.01.
- November 27, 2013: order overruling William's motion for new trial filed.
- December 26, 2013: William's notice of appeal filed.

[7] The plain terms of § 25-1144.01 are dispositive of the jurisdictional issue. Section 25-1144.01 as quoted above had been amended in 2004 by 2004 Neb. Laws, L.B. 1207, to add the second sentence. As noted above, the second sentence of § 25-1144.01 provides: "A motion for a new trial filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof." Statutory language is to be given its plain and ordinary meaning, and interpretation will not be used to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Weber v. North Loup River Pub. Power*, 288 Neb. 959, 854 N.W.2d 263 (2014).

The 2004 amendment to § 25-1144.01 was apparently adopted in reaction to this court's decision in *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002). In *Macke*, we determined that under the version of § 25-1144.01 in effect prior to the 2004 amendment, a motion for new trial was effective and timely only if it was filed within 10 days after the entry of a judgment. Thus, under *Macke*, a motion for new trial filed before the entry of a judgment was a nullity, as was the trial court's ruling on such a motion for new trial. Under *Macke*, such a motion for new trial did not terminate the time for taking an appeal. However, under the 2004 amendment, a motion for new trial filed after the announcement of the decision but before the entry of the judgment is no longer a nullity.

As we have noted, the court distributed the unsigned journal entry on August 14, 2013, containing its substantive decision, and it further provided:

> [Abigail's attorney] shall prepare the decree herein. It shall be reviewed by [William's attorney] and presented to the court for signature not later than September 16, 2013. The decree shall append the appropriate calculation of the division of the estate in accordance with paragraph 2. *In order to avoid confusion as to appeal time,* [*t*]*his order shall be forwarded to counsel both unsigned and unfiled. A signed copy will be filed contemporaneously with the entry of the decree.*

(Emphasis supplied.)

We view the copies of the August 14, 2013, unsigned journal entry that were sent to the parties as the court's "announcement of a . . . decision" as that expression is used in § 25-1144.01. Hence, William's motion for new trial filed after the announcement of the decision "but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof." See § 25-1144.01. William's motion for new trial was effective. In sum, William's motion for new trial was treated as having been filed after judgment on October 21, the same date the decree was filed, and was properly before the district court. Time to appeal from the decree was terminated until the district court ruled on the motion for new trial. The notice of appeal filed within 30 days after the ruling on the motion for new trial was timely.

For completeness, we note that William suggests on appeal that the district court failed to properly consider his motion for new trial, perhaps because the court's order of denial was brief. The district court's November 27, 2013, order overruling the motion for new trial stated in its entirety: "NOW ON this 27th day of November, 2013, this matter comes before the Court on [William's] Motion for New Trial. The Court finds that the Decree has been signed. The Motion for New Trial is overruled." As we view the order, the court considered the motion for new trial and found it to be without merit. The language in the order signaled the court's recognition that the motion for new trial had been filed before entry of the decree

but, by implicit application of § 25-1144.01, that the decree had been signed and that the court could therefore properly proceed to the merits of the motion for new trial. We find no error in this procedure.

Equalization Payment Ordered by the District Court.

William claims that the district court erred in the method it employed to calculate the equalization payment owed by William to Abigail and that the court erred when it overruled his motion for new trial on this basis. We agree with William.

Regarding motions for new trial, we will uphold a trial court's ruling on such a motion absent an abuse of discretion. *First Express Servs. Group v. Easter*, 286 Neb. 912, 840 N.W.2d 465 (2013). As explained in more detail below, we determine that the district court erred in the method of calculating the equalization payment, and accordingly, we determine that the district court abused its discretion when it overruled William's motion for new trial challenging the equalization calculation. In particular, in this case, the court ordered William to pay Abigail an equalization payment of $5,607, whereas we determine it should have ordered him to pay $2,856.

[8,9] Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. See, *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008); *Plog v. Plog*, 20 Neb. App. 383, 824 N.W.2d 749 (2012). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Plog v. Plog, supra*.

In calculating the amount of the equalization payment, the district court first determined the parties' total property and

then divided the total property equally between the two parties. In an attempt to equalize the distribution, the court then ordered William to pay Abigail $5,607, which represented Abigail's premarital funds used to purchase the house, Abigail's premarital funds used to pay the water deposit, and half of the overpayment of closing costs returned by the bank. Because Abigail's evidence showed that the closing costs were paid by Abigail's premarital funds, the district court erred and should have ordered that the entire $70 refund be set off to Abigail as premarital property, and our calculations in the remainder of this opinion treat the $70 accordingly. See *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006) (stating that burden of proof to show property is premarital remains with person making claim in dissolution proceeding).

The district court erred in two fundamental ways in calculating the equalization payment. First, the district court failed to account for the fact that the parties had already divided and distributed the proceeds from the sale of the house during the pendency of the dissolution proceedings. The sale proceeds amounted to $12,453.34, and after dividing the proceeds equally, Abigail and William had each received $6,226.67 before trial. The district court erred by not recognizing this division and distribution when it calculated the equalization payment.

Second, the court failed to properly follow the initial step of the three-step process set forth above. After determining the parties' total property, which amounted to $12,523.34, the court should have identified and separated the marital assets and nonmarital assets. Then, the court should have subtracted and set aside to Abigail her premarital funds used for the downpayment on the house, the closing costs, and the water deposit, and the $70 refund, all of which totaled $5,642, from the total property of $12,523.34, leaving $6,881.34 as the marital assets to be divided between the parties, with each receiving $3,440.67. By failing to properly follow this process, and failing to recognize the prior distribution of the house sale proceeds, the court erred in calculating the amount owed by William to Abigail in order to equalize division of the estate.

After equalization, Abigail should have received $9,082.67 (consisting of premarital property equaling $5,642 plus one-half of the marital estate equaling $3,440.67), and William, with no premarital property, should have received one-half of the marital estate (equaling $3,440.67). Because the house sale proceeds were equally split before trial, Abigail and William had each already received $6,226.67 attributable to the sale of the house. And because William had already received the $70 closing cost refund, his receipts before trial totaled $6,296.67. To award Abigail the $9,082.62 she was due, and to award William the $3,440.67 to which he was entitled, the court should have ordered William to pay Abigail $2,856 instead of $5,607 as ordered.

CONCLUSION

We conclude that under § 25-1144.01, William's motion for new trial filed after the district court's announcement of the decision but before its entry of the decree was an effective filing and that the appeal is timely. With respect to property division, we determine that the district court erred in the method it employed when it calculated the equalization payment owed by William to Abigail. We therefore affirm the district court's dissolution decree but modify the portion of the decree that ordered William to pay Abigail $5,607 and instead order that William pay Abigail $2,856.

AFFIRMED AS MODIFIED.

CASSEL, J., concurring.

INTRODUCTION

I join the court's opinion, but write separately to emphasize three points. First, the word "announcement," as it is used in the current statutes governing appeals and motions for new trial, is not synonymous with the word "pronouncement" as it was used in the former statute defining rendition of judgment. Second, a premature motion for new trial is still possible despite the enactment of the savings clause. Finally, because "announcement" can take many forms, counsel relying upon the statutory savings clause for a motion for new trial should be sure that the "announcement" appears in the record.

"ANNOUNCEMENT" VERSUS "PRONOUNCEMENT"

Before 1999, "rendition" of a judgment was defined as a court's or judge's two-part act of "*pronouncing* judgment, accompanied by the making of a notation on the trial docket."[1] And although "entry" of judgment required the court clerk to spread the relief upon the court's journal,[2] the time for appeal began to run with "rendition,"[3] and not from "entry" unless there was no "rendition." And the first part of "rendition"—the "pronouncement"—was well settled in our case law. Pronouncement occurred when the court or judge made an oral pronouncement of judgment in open court.[4]

But the 1999 Legislature refined "rendition" as the court's or judge's act of "making and signing a written notation."[5] Thus, an oral pronouncement in open court was no longer part of the definition of "rendition" of judgment. At the same time, the Legislature amended the appeals statute so that the time for appeal would run from the "entry" of judgment rather than its "rendition."[6] And it redefined "entry" as the court clerk's act of "plac[ing] the file stamp and date" upon the judgment.[7]

The 1999 Legislature also introduced the first savings clause into our general appeal statute.[8] This savings clause treated a notice of appeal filed after the "*announcement*" of a decision, but before the entry of the judgment, as having been filed after the entry of judgment and on the date of entry.[9]

Although the 1999 Legislature failed to add an equivalent savings clause regarding motions for new trial, the 2004

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[1] See Neb. Rev. Stat. § 25-1301(2) (Reissue 1989) (emphasis supplied).

[2] See § 25-1301(3).

[3] See Neb. Rev. Stat. § 25-1912(1) (Reissue 1989).

[4] See, e.g., *Tri-County Landfill v. Board of Cty. Comrs.*, 247 Neb. 350, 526 N.W.2d 668 (1995).

[5] § 25-1301(2) (Reissue 2008). See 1999 Neb. Laws, L.B. 43, § 3.

[6] See 1999 Neb. Laws, L.B. 43, § 8.

[7] § 25-1301(3). See 1999 Neb. Laws, L.B. 43, § 3.

[8] See 1999 Neb. Laws, L.B. 43, § 8.

[9] See Neb. Rev. Stat. § 25-1912(2) (Supp. 1999) (emphasis supplied).

Legislature remedied that omission.[10] Thereafter, and currently, the savings clause states that "[a] motion for a new trial filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof."[11]

The change from "pronouncement" to "announcement" was not accidental or meaningless. The Nebraska Court of Appeals has recognized that "announcement" can come orally from the bench, from trial docket notes, from file-stamped but unsigned journal entries, or from signed journal entries which are not file stamped.[12] And the Court of Appeals acknowledged that its list was not all inclusive.[13] At oral argument in the case before us, counsel relied upon decisions discussing "pronouncement" under the former statutes to argue that an unsigned journal entry setting forth the general terms of the court's decision, although served on the parties' attorneys, did not qualify as an "announcement." This court's decision today rejects that argument.

Thus, my first point is that the old term "pronouncement" and the new term "announcement" are not synonymous. "Pronouncement" occurred when the court or judge orally pronounced judgment in open court. "Announcement" can occur in or out of court. It includes pronouncements, but also contemplates other means of communication.

PREMATURE MOTION FOR NEW TRIAL

As the court's opinion correctly observes, our decision in *Macke v. Pierce*[14] appears to have prompted the Legislature to provide a savings clause for some motions for new trial filed before the entry of judgment. The Legislature evidently recognized that a potential trap existed where a decision was clearly made but for some reason the entry of a judgment was

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[10] See 2004 Neb. Laws, L.B. 1207, § 3.

[11] Neb. Rev. Stat. § 25-1144.01 (Reissue 2008).

[12] See *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

[13] *Id.*

[14] *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002).

delayed. The Legislature had already enacted a savings clause for notices of appeal filed after announcement of a decision but before the entry of judgment. And it clearly wanted to provide a similar savings clause for a motion for new trial.

But a premature motion for new trial is still possible. If the motion is filed before the "announcement" of the verdict or decision, the savings clause does not apply.[15] And our decision in *Macke v. Pierce* would still dictate that such a motion is a nullity.[16]

CAUTION TO PRACTITIONERS

As I have explained, "announcement" of a decision can occur in many ways. Some of these ways may not be apparent on the trial court's record.

Appellate courts cannot ignore a question of whether the savings clause applies. 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.[17] Thus, where a motion for new trial is filed before the "entry" of judgment, an appellate court will examine the record to determine whether an "announcement" of a decision occurred before the filing of the motion.

If the motion was filed before any announcement, the motion will be deemed void. Thus, in many instances, the time for taking an appeal will not be tolled by the motion for new trial. And this unfortunate circumstance may not be discovered until it is too late. It is well settled that an untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal.[18] Consequently, a premature motion for new trial can easily result in the irrevocable loss of the right to appeal.

It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate

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[15] See § 25-1144.01.

[16] See *Macke v. Pierce, supra* note 14.

[17] *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012).

[18] *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013).

court will affirm the lower court's decision regarding those errors.[19] Because the appellant has the duty to present a record supporting the assigned errors, he or she necessarily bears the burden of presenting a record demonstrating that the appellate court has jurisdiction.

If the party appealing from a judgment after the denial of a motion for new trial is relying upon the savings clause of § 25-1144.01, the party must ensure that the "announcement" of decision appears in the record. If the trial court's record does not include it, the party seeking to appeal must make sure that it properly becomes part of the record. And the party must then make sure that it is included in the record presented to the appellate court.

CONCLUSION

The savings clause of § 25-1144.01 is a useful tool to avoid losing the right to appeal. But it has no effect when a motion is filed before announcement or where the record does not show an announcement before entry of judgment. I remind the practicing bar that failing to ensure that such an announcement is included in the record might result in an irrevocable loss of an appeal, which in turn is likely to lead to unpleasant consequences.

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[19] *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013).

JOHN HUGHES, APPELLANT, V. SCHOOL DISTRICT OF AURORA, NEBRASKA, A NEBRASKA POLITICAL SUBDIVISION, APPELLEE.

858 N.W.2d 590

Filed February 6, 2015. No. S-13-1144.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was

granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.

3. **Summary Judgment: Proof.** The party moving for summary judgment must make a prima facie case by producing enough evidence to show that the movant is entitled to judgment if the evidence were uncontroverted at trial.
4. ____: ____. If the party moving for summary judgment makes a prima facie case, the burden shifts to the nonmovant to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
5. **Proximate Cause: Words and Phrases.** A proximate cause is one that produces a result in a natural and continuous sequence and without which the result would not have occurred.
6. **Negligence: Proximate Cause: Proof.** To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.
7. **Trial: Negligence: Proximate Cause.** Causation is ordinarily a matter for the trier of fact.
8. **Summary Judgment.** Key factual propositions may be present for summary judgment purposes by reasonable inference.
9. ____. When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.
10. ____. A choice between two equally likely possibilities does not create a material issue of fact.
11. **Trial: Negligence: Proof.** A plaintiff is not bound to exclude the possibility that the event might have happened in some other way.

Appeal from the District Court for Hamilton County: MICHAEL J. OWENS, Judge. Reversed and remanded for further proceedings.

Tina M. Marroquin, of Pollack & Ball, L.L.C., for appellant.

Andrea D. Snowden and Robert B. Seybert, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

CONNOLLY, J.

SUMMARY

John Hughes tripped and fell while exiting a building owned by the School District of Aurora, Nebraska (District). Hughes sued the District, alleging that the District failed to maintain sufficient lighting, failed to construct a handrail along an exit

ramp, allowed a section of concrete to "heave," and allowed a concrete bench to obstruct the path of egress. The court sustained the District's motion for summary judgment because Hughes did not "know" what caused him to fall. Because reasonable minds could draw contrary conclusions from the evidence, we reverse.

BACKGROUND

Factual Background

The District operates a middle school in Aurora. The north side of the building has an "entrance-exit" consisting of a pair of exterior doors, a "vestibule area," and a pair of interior doors. The exterior doors open to a landing that transitions into a concrete ramp running north and south. "Sloping sides (ramp like) flank the ramp on the east and west." The ramp terminates at a driveway, running east and west, that separates the middle and high schools. A concrete bench is anchored outside the doors. The bench sits to the west of the ramp and about 4 feet from the ramp's edge.

On October 15, 2009, Hughes went to the middle school in Aurora to watch his daughter compete in a varsity volleyball match. The varsity match started about 7 p.m., but Hughes arrived at 5 or 5:30 p.m. to watch the junior varsity match. Hughes' wife drove their vehicle to the game and parked it along the driveway between the middle and high schools, at a point west of the terminus of the ramp. Hughes testified that "[i]t was daylight still" when he arrived. Hughes entered the middle school through the north doors.

Hughes estimated that the varsity match ended "a little bit after nine o'clock." After the match ended, Hughes lingered to congratulate the players and talk to other spectators. Hughes testified that it was 9:15 or 9:30 p.m. when he exited the building.

Walking alone, Hughes exited the middle school through the north doors. His wife and father-in-law, who had accompanied him to the match, had already made it back to the vehicle. Hughes testified that "[i]t was dark, very dark" when he left the building, too dark for him to see the bench. Hughes testified that there were some lights inside the vestibule and

just outside the doors. An ambulance parked along the driveway also emitted some light.

Hughes testified that after he passed through the north doors, his progress was stopped by a crowd of 8 to 15 people standing on the ramp and preventing him from continuing down the ramp to the driveway. The bench was southwest of where Hughes testified the crowd was located. Hughes explained that to avoid the crowd, he "turned around," "walked back," and "made the right-hand turn." That is, Hughes testified that he walked to the south and west. Hughes stated that as he did so, "I was looking ahead of me to make sure I wasn't going to run into anything . . . ."

Hughes testified that after he turned, "[a]ll of a sudden I went flying through the air, and I remember putting my hand down, because I could see the bench and put one hand down. I pushed myself off from the bench. That's when I came down and hit the concrete." Hughes' elbow bore the brunt of the impact, and he underwent surgery to repair a broken bone in his arm.

Asked what "caused [him] to fall," Hughes initially testified that "[t]here was a piece of concrete by the bench that's sticking up . . . that tripped me." But Hughes later testified that he was not sure what caused him to fall:

> I was walking along, and all of a sudden I was flying in the air. If I knew exactly how I fell or what caused the fall, whether it was the slope or the incline or the edge that was protruding, I'd tell you, but I don't really know. I was walking. Next thing I knew I was flying through the air.

Hughes testified that he did not believe that he tripped over the bench. The bench is about 18 inches tall, and Hughes did not have any "serious injuries" on his legs consistent with walking into the bench.

Hughes returned about a week after his fall to view the layout of the north exit and take photographs. Hughes testified that one of the concrete slabs near the bench had heaved, creating a raised "lip" 1½ to 1¾ inches high. The heaved section of concrete was to the immediate east of the north edge of the bench, so that a person approaching the bench in a

southwesterly direction would encounter the lip immediately before the bench.

Jim Harper, a licensed engineer, testified about the conditions at the north exit. Harper stated that he formed his opinions from site inspections, Hughes' account of the incident, photographs taken by Hughes, and a review of relevant building codes. Harper testified that he visited the site twice. On his first visit, Harper arrived "about dusk" and "just kind of watched the site . . . as it got dark." On his second visit, Hughes accompanied Harper and Hughes explained the various issues that he believed contributed to his fall.

Harper testified that school buildings in Nebraska must comply with the National Fire Protection Association's "Life Safety Code." Based on conversations with Hughes, the photographs taken by Hughes, and his independent observations, Harper testified that the lighting as it existed on October 15, 2009, violated the code. Harper also testified that the absence of handrails along the ramp violated the code. Based on the "rise of the ramp," the code required handrails that extended the entire length of the ramp. Harper testified that the "flare" or "side slope" on either side of the ramp was itself noncompliant in the absence of handrails. Harper opined that the presence of the bench itself did not violate the code but that, because the District did not establish a clear path of egress, the bench could become an obstruction. Generally, Harper testified that there was not a "defined means of egress" from the north exit: "You left the exit, and you were somewhat on your own."

As to causation, Harper opined the lighting condition "contributed to" Hughes' fall because Hughes "couldn't tell how to proceed out those doors." Harper also testified that code-compliant handrails "would have prevented" Hughes from leaving the ramp, "[s]hort of him climbing over [the handrail] or going under it or going all the way to the street and then coming up around it . . . ."

Procedural Background

In his operative complaint, Hughes alleged that he "was caused to trip and fall on the public sidewalk of the [District]."

Hughes identified four conditions that contributed to his fall: (1) The District's failure to "install and maintain lighting at the exit of the gymnasium building"; (2) "the slope of the sidewalk . . . unprotected by a proper guardrail"; (3) an "adjoining sidewalk section [that] had heaved leaving dangerous vertical differences between adjoining sections of the sidewalk"; and (4) the obstruction created by the concrete bench.

The District moved for summary judgment, and the court sustained its motion. The court stated that the "one primary issue" was whether the allegedly negligent conditions on the District's property proximately caused Hughes' injuries. More specifically, the court framed the issue as whether our opinion in *Swoboda v. Mercer Mgmt. Co.*[1] was "controlling in the case at bar." The court concluded that "the holding of *Swoboda* is controlling," emphasizing that Hughes testified that he did not "know" what caused him to fall.

ASSIGNMENT OF ERROR

Hughes assigns that the district court erred by sustaining the District's motion for summary judgment.

STANDARD OF REVIEW

[1,2] We affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and give that party the benefit of all reasonable inferences deducible from the evidence.[3]

ANALYSIS

Hughes argues that the record supports an inference that the District's negligence proximately caused his injuries. His

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[1] *Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997).

[2] *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014).

[3] *Id.*

theory on appeal is that a fact finder could infer that he tripped over the concrete lip, which he could not see because of poor lighting. Hughes contends that he "has a complete recollection of the events," including the manner of his exit from the building and the mechanics of his fall.[4] The District argues that Hughes was "unable to recall how he went from walking to flying in the air" and has offered "four possibilities" of what caused his injury.[5] According to the District, "Nebraska law does not permit a fact finder to be presented with more than one possibility of the cause of a plaintiff's fall . . . ."[6]

[3,4] The primary purpose of the summary judgment procedure is to pierce the allegations in the pleadings and show conclusively that the controlling facts are other than as pled.[7] The party moving for summary judgment must make a prima facie case by producing enough evidence to show that the movant is entitled to judgment if the evidence were uncontroverted at trial.[8] If the moving party makes a prima facie case, the burden shifts to the nonmovant to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.[9] Summary judgment proceedings do not resolve factual issues. Instead, they determine whether there are factual issues to be decided.[10]

[5-7] Here, the court entered summary judgment for the District because Hughes failed to produce evidence that his injury was proximately caused by the District's negligence. A proximate cause is one that produces a result in a natural and continuous sequence and without which the result would not have occurred.[11] To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent

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[4] Brief for appellant at 9.

[5] Brief for appellee at 10, 13-14.

[6] *Id.* at 10.

[7] *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

[8] *Id.*

[9] *Id.*

[10] See *Brock v. Dunning*, 288 Neb. 909, 854 N.W.2d 275 (2014).

[11] *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014).

action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.[12] Causation is ordinarily a matter for the trier of fact.[13]

In reaching its conclusion, the district court reasoned that our decision in *Swoboda v. Mercer Mgmt. Co.*[14] was "controlling." In *Swoboda*, the plaintiff fell as she reached the top of a flight of stairs in a building owned and managed by the defendants. The landing at the top of the stairs was made of brick before giving way to an elevated wood floor. A brick ramp extended from the wood floor to the landing at an angle perpendicular to the stairway. The plaintiff, who was 95 years old, ascended the stairs using the left handrail while her granddaughter held onto her right arm. As the plaintiff approached the last step, her granddaughter left her side to open a door. When the granddaughter looked back, she saw the plaintiff sitting on the wood floor with her legs extended down the ramp. The plaintiff alleged that she tripped over the side of the ramp, and the affidavit of an engineer stated that the ramp violated the building code. The trial court sustained the defendants' motion for summary judgment.

We affirmed, stating that an issue of fact cannot be created by "guess, speculation, conjecture, or choice of possibilities."[15] The "practical difficulty" with the plaintiff's claim was that no one saw her fall and the plaintiff herself "d[id] not remember the circumstances surrounding the fall."[16] The evidence revealed two possible causes of the plaintiff's injury but did not yield an inference that one was more likely than the other:

> [A] jury presented with the question of why [the plaintiff] fell would be faced with at least two possibilities:

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[12] *Id.*

[13] *Id.*

[14] *Swoboda v. Mercer Mgmt. Co., supra* note 1.

[15] *Id.* at 352, 557 N.W.2d at 632.

[16] *Id.* at 349, 351, 557 N.W.2d at 631, 632.

> (1) [The plaintiff] tripped over the top step or (2) [the plaintiff] tripped over the ramp. . . . [T]he evidence in this case leaves the jury with the prospect of guesswork as to which of these possibilities actually caused [the plaintiff's] injuries.[17]

Because the evidence did not "lead a reasonable mind to one conclusion rather than another,"[18] the defendants were entitled to summary judgment. The plaintiff could not remember if she was on the landing or ascending the stairs when she began to fall, and the position of her body when her granddaughter turned around did not support an inference that her fall began at one point rather than the other.

Below and on appeal, Hughes has analogized the facts to those in *Kotlarz v. Olson Bros., Inc.*[19] In *Kotlarz*, the plaintiff attended a physical therapy session at a clinic. The property was under construction, but no work was being done on the day of the plaintiff's injury because of strong winds. After her session ended, the plaintiff walked to her car and placed equipment inside the trunk. As she closed the trunk door, the plaintiff felt a gust of wind followed by a sharp blow to her neck. The plaintiff looked up and saw a foam sheet flying through the air in front of her. She also noticed several other foam sheets in the parking area. The plaintiff brought a negligence action against several construction firms. Relying on *Swoboda*, the trial court sustained the defendants' motions for summary judgment because "'a fact finder would have to guess at the possible cause of the accident.' . . ."[20]

The Nebraska Court of Appeals reversed, concluding that the evidence supported a reasonable inference that one of the defendants' foam sheets caused the plaintiff's injury. Admittedly, the plaintiff "did not know where the object came from, she did not see what hit her, and there were no

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[17] *Id.* at 352-53, 557 N.W.2d at 633.

[18] *Id.* at 352, 557 N.W.2d at 632.

[19] *Kotlarz v. Olson Bros., Inc.*, 16 Neb. App. 1, 740 N.W.2d 807 (2007).

[20] *Id.* at 5, 740 N.W.2d at 812.

eyewitnesses."[21] The trial court based its judgment "largely on the fact that no one saw an object hit [the plaintiff], and [the plaintiff] herself does not 'know' what hit her."[22] But the Court of Appeals stated that the plaintiff did not have to "'know'" what hit her, and could not have known without "rearview vision."[23] As the court noted, "if complete personal knowledge or an eyewitness were the legal standard, circumstantial evidence would be of little or no value."[24] The court concluded that the circumstantial evidence—particularly evidence of the location of the defendants' foam sheets, wind direction, and foam sheets in the parking area—provided a basis to infer that a foam sheet from the defendants' pile struck the plaintiff. Whereas the plaintiff in *Swoboda* could not remember whether she was on the landing or still traversing the steps when she fell, the plaintiff in *Kotlarz* was able to "recall[] all of the circumstances of the incident."[25]

Recently, the Eighth Circuit distinguished *Swoboda*, emphasizing that *Swoboda* involved evidence of two equally likely causes of the plaintiff's injury. In *Pohl v. County of Furnas*,[26] the plaintiff was driving to a farm on a snowy evening, when he turned onto a gravel road. After some distance, the road made a 90-degree turn, and the county had posted a warning sign about 110 feet from the curve. The plaintiff's vehicle left the road at the curve and collided with an embankment. The plaintiff brought a negligence action against the county, alleging that the county's placement of and failure to maintain the sign proximately caused his injuries. Because of trauma from the crash, the plaintiff "had no memory of that night from shortly after turning onto [the road] until he regained consciousness after the accident."[27] As a result, "he did not

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[21] *Id.* at 3, 740 N.W.2d at 810.

[22] *Id.* at 8, 740 N.W.2d at 813.

[23] *Id.* at 9, 740 N.W.2d at 814.

[24] *Id.*

[25] *Id.*

[26] *Pohl v. County of Furnas*, 682 F.3d 745 (8th Cir. 2012).

[27] *Id.* at 749.

remember seeing the sign or braking prior to leaving the roadway."[28] A traffic engineer testified that the placement and lack of "retroreflectivity" of the sign violated the U.S. Department of Transportation's Manual on Uniform Traffic Control Devices.[29] Based on data from the vehicle's "black box," an accident reconstructionist testified that the plaintiff was speeding as he approached the curve and started to brake when the vehicle was "closely aligned with the sign."[30] The court allocated 60 percent of the negligence to the county after a bench trial and awarded the plaintiff damages.

Citing *Swoboda*, the county argued on appeal that the trial court erred in determining that its negligence proximately caused the crash:

> The county contends that there were several equally likely causes of the accident, including that [the plaintiff] was not maintaining a proper lookout and thus failed to see the sign, that he saw it and failed to heed it, or that the falling snow prevented him from seeing it. It urges that because [the plaintiff] cannot remember whether or not he saw the sign before leaving the road, the district court's proximate cause determination was based on speculation rather than evidence.[31]

The Eighth Circuit concluded that the facts supported an inference that the illegibility and placement of the sign caused the plaintiff's injury. Although the plaintiff "could not remember whether or not he saw the sign prior to the accident," there was circumstantial evidence that he braked near the sign.[32] This evidence supported a reasonable inference that the plaintiff braked because he saw the sign and, therefore, might have braked sooner if the sign was farther up the road or visible from a greater distance. Furthermore, the record did not support the county's alternative theories of causation. For example, there

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[28] *Id.*

[29] *Id.* at 750.

[30] *Id.*

[31] *Id.* at 752-53.

[32] *Id.* at 753.

was no evidence that the plaintiff was not paying attention to the road or that the snow impeded visibility.

[8,9] We conclude that whether the allegedly negligent conditions outside the middle school proximately caused Hughes' injuries is a disputed material issue of fact. Hughes produced evidence that, below the ramp unguarded by a handrail, there was an elevated concrete lip adjacent to a concrete bench and that he could not see these conditions because of weak lighting. Importantly, Hughes testified about the path he took and where he was when he fell. Viewed in a light most favorable to Hughes, his testimony supports an inference that his path of egress intersected the concrete lip. If a person approaching from the angle Hughes described tripped on the lip, he would have fallen onto the concrete bench. Key factual propositions may be present for summary judgment purposes by reasonable inference.[33] And when reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.[34] Here, the evidence permits a reasonable inference that Hughes tripped on a concrete lip that he could not see because of a lack of lighting.

[10] In contrast, the plaintiff in *Swoboda* was not only unable to produce direct evidence of the cause of her injury, she was unable to testify about the circumstances. She could not recall, for example, whether she was on the stairs or on the landing when she began to fall. Nor could an inference be drawn based on where her granddaughter found her sitting. A choice between two equally likely possibilities does not create a material issue of fact.[35] But like the plaintiff in *Kotlarz*, Hughes was able to recall the circumstances of his fall, and these circumstances support a reasonable inference as to the cause.

[11] Furthermore, as the Eighth Circuit noted, *Swoboda* involved evidence of two equally likely causes of the plaintiff's

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[33] *Kotlarz v. Olson Bros., Inc.*, *supra* note 19.

[34] *McKinney v. Okoye*, 287 Neb. 261, 842 N.W.2d 581 (2014); *Schade v. County of Cheyenne*, 254 Neb. 228, 575 N.W.2d 622 (1998).

[35] See *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

fall. Here, the District, the movant, did not produce evidence of an alternative cause. It is always possible, of course, that Hughes' feet simply became tangled, even if there is direct evidence to the contrary. But a plaintiff is not bound to exclude the possibility that the event might have happened in some other way.[36] Contrary to the District's argument, Hughes' case is not doomed because there is more than one possible cause. It is enough for summary judgment purposes that the evidence permits a reasonable inference that negligent conditions on the District's property caused Hughes' injury.

CONCLUSION

Because reasonable minds could draw contrary conclusions from the evidence presented, the District did not show that it was entitled to judgment as a matter of law. We therefore reverse the court's summary judgment order and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

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[36] *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996).

STATE OF NEBRASKA, APPELLEE, V. WA'IL M. MUHANNAD, APPELLANT.

858 N.W.2d 598

Filed February 6, 2015. No. S-14-129.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Motions for Mistrial: Pleadings: Prosecuting Attorneys: Intent: Appeal and Error.** While the denial of a plea in bar generally involves a question of law, an appellate court reviews under a clearly erroneous standard a finding concerning the presence or absence of prosecutorial intent to provoke the defendant into moving for a mistrial.

4. **Double Jeopardy: Motions for Mistrial.** It is the general rule that where a court grants a mistrial upon a defendant's motion, the Double Jeopardy Clause does not bar a retrial.
5. **Motions for Mistrial.** A defendant's motion for a mistrial constitutes a deliberate election on his or her part to forgo the right to the trial completed before the first trier of fact. This is true even if the defendant's motion is necessitated by prosecutorial or judicial error.
6. ____. When a mistrial is declared at the defendant's behest, the defendant's right to have his or her trial completed by a particular tribunal is, as a general matter, subordinated to the public's interest in fair trials designed to end in just judgments.
7. **Double Jeopardy: Motions for Mistrial: Prosecuting Attorneys: Intent: Proof.** Where a defendant moves for and is granted a mistrial based on prosecutorial misconduct, double jeopardy bars retrial when the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial. It is the defendant's burden to prove this intent.
8. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution.
9. **Double Jeopardy: Motions for Mistrial: Prosecuting Attorneys: Intent.** In the absence of an intent to goad the defendant into moving for mistrial, double jeopardy would not bar retrial where the prosecutor simply made an error in judgment or was grossly negligent.
10. ____: ____: ____: ____. The rule established in *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982), does not cease to apply where a defendant moves for and is granted successive mistrials due to actions of the prosecutor or evidence adduced by the prosecutor. Under such circumstances, the relevant factor for determining whether double jeopardy bars retrial is prosecutorial intent to provoke the defendant to move for mistrial.
11. **Double Jeopardy: Motions for Mistrial: Prosecuting Attorneys.** The prosecutor's knowledge of the potential for mistrial does not change the standard used to determine whether double jeopardy bars retrial after a mistrial entered on the defendant's motion.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Alan G. Stoler, P.C., L.L.O., for appellant.

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

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

PER CURIAM.

NATURE OF CASE

Wa'il M. Muhannad appeals the order of the district court which denied his plea in bar following a mistrial. This is the second time that this case has been appealed under such circumstances. We addressed the denial of Muhannad's plea in bar after the first mistrial in *State v. Muhannad* (*Muhannad I*).[1] The present appeal arises from a plea in bar filed after a second mistrial, which, like the first, resulted from impermissible testimony by a particular witness.

In denying the plea in bar filed after the second mistrial, the district court determined that double jeopardy did not bar retrial, because the prosecutor did not intend to goad Muhannad into moving for the mistrial. We affirm the denial of Muhannad's plea in bar.

FACTS

Muhannad is charged with first degree sexual assault of his stepdaughter, M.H. He has been brought to trial on this charge two separate times. Each time, the trial ended in mistrial and he filed a plea in bar which alleged that double jeopardy barred retrial.

FIRST MISTRIAL

In the first jury trial, the State's last witness was Carrie Gobel, a licensed mental health practitioner and M.H.'s therapist. Gobel testified, without objection, to the fact that M.H. had been diagnosed with posttraumatic stress disorder (PTSD) and to the symptoms M.H. exhibited.[2] But when the prosecutor asked Gobel to describe the "'traumatic event that ha[d] caused this diagnosis,'" Muhannad objected.[3] His objection was overruled, and the prosecutor again asked, "'According to your assessment of [M.H.], what was the traumatic event that initiated the diagnosis of PTSD?' Gobel

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[1] *State v. Muhannad*, 286 Neb. 567, 837 N.W.2d 792 (2013).

[2] See *id.*

[3] See *id.* at 572, 837 N.W.2d at 797.

answered, '[M.H.] was sexually abused by her stepfather, [Muhannad], for an extensive period of time.'"[4]

At the close of the case but before closing arguments, Muhannad moved for a mistrial based on Gobel's testimony. The district court granted the motion, because "while Gobel might have been able to opine that 'sexual abuse' was the cause of M.H.'s PTSD, Gobel's testimony was 'over the edge' when she stated her belief that Muhannad was the perpetrator of the sexual abuse."[5]

Muhannad filed a plea in bar to his retrial, which the district court overruled. The court applied the rule from *Oregon v. Kennedy*[6] that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." The court found that the prosecutor "may have made an error in judgment" but that the prosecutor did not "demonstrate an intent to goad [Muhannad] into moving for a mistrial." Accordingly, the court concluded that there was no double jeopardy bar to retrial arising from prosecutorial misconduct.

In *Muhannad I*, we affirmed the judgment of the district court which denied Muhannad's plea in bar. Muhannad had argued that the bar to retrial recognized in *Oregon v. Kennedy* was "not limited to circumstances where the State intended to provoke a mistrial."[7] But we specifically rejected this argument and "declined to extend the *Oregon v. Kennedy* exception beyond situations where the prosecutor intended that the misconduct would provoke a mistrial."[8] We determined that the evidence supported the district court's finding that the prosecutor "made 'an error in judgment'" but did not intend to

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[4] See *id.* at 572, 837 N.W.2d at 798 (alteration in original).

[5] See *id.* at 573-74, 837 N.W.2d at 798.

[6] *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982).

[7] See *Muhannad I, supra* note 1, 286 Neb. at 574, 837 N.W.2d at 799.

[8] See *id.* at 578, 837 N.W.2d at 801.

provoke a mistrial.[9] We thus affirmed the denial of Muhannad's plea in bar.

Second Mistrial

Before Muhannad's second jury trial began, he filed a motion in limine seeking to exclude any testimony by Gobel concerning M.H.'s PTSD. The district court overruled the motion. However, because the court concluded that Gobel could not directly or indirectly testify as to M.H.'s credibility, it placed limits on the testimony Gobel could provide. On December 16, 2013, the court ordered that Gobel's testimony should be "limited to the symptoms, behavior, and feelings generally exhibited by the alleged victim as it relates to show [how] the alleged victim's behavior is similar to other child sexual abuse victims who exhibit signs of [PTSD]. . . . Further, the testimony cannot go beyond the child's behavior." On December 23, the court further explained that "Gobel can only testify that sexual abuse is one of many factors that can cause PTSD. Gobel can also testify how PTSD affects the alleged victim's behavior. Gobel cannot state that recent abuse or . . . abuse by [Muhannad] was the cause of the alleged victim's PTSD."

On January 9, 2014, the fourth day of the second jury trial, the State called Gobel to testify. She testified, without objection, that M.H. "appeared very nervous and anxious, particularly when discussing the sexual abuse," and that M.H.'s treatment plan included "learning effective [coping] mechanisms to deal with symptoms caused by the sexual abuse." Gobel also testified, without objection, to the symptoms generally exhibited by children in cases of sexual abuse. The prosecutor then asked, "Will you describe for me, going through each one of the criteria, the symptoms that you took note of with respect to [M.H.]?" Gobel responded, "Certainly. In regard to intrusive thoughts, [M.H.] was constantly thinking of the abuse and of her stepfather when she came into treatment." Muhannad immediately objected and asked that Gobel's answer be stricken. The district court sustained the objection,

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[9] See *id*. at 580, 837 N.W.2d at 803.

and the answer was stricken. Gobel attempted to continue answering the question, but Muhannad asked to approach the bench. After a sidebar, he moved for a mistrial and the district court granted the motion.

Muhannad subsequently filed a plea in bar in which he argued that double jeopardy barred retrial. The district court denied the plea in bar. It found that the prosecutor "did not specifically intend to provoke a second mistrial through [the] question," that the prosecutor did not make any error, that Gobel "failed to abide by the Court's Order in Limine regarding the scope of [her] testimony," and that Gobel "crossed the line [by] providing testimony that granted credibility to the testimony of the victim."

Muhannad timely appealed, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

Muhannad assigns, restated, that the district court erred in determining that double jeopardy principles did not bar retrial where a mistrial had been granted based on Gobel's testimony that the alleged victim was sexually assaulted by Muhannad.

STANDARD OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law.[10] On a question of law, an appellate court reaches a conclusion independent of the court below.[11]

[3] While the denial of a plea in bar generally involves a question of law, we review under a clearly erroneous standard a finding concerning the presence or absence of prosecutorial intent to provoke the defendant into moving for a mistrial.[12]

ANALYSIS

The question presented by the instant appeal is whether double jeopardy bars retrial of Muhannad following the second

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[10] *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009).

[11] *Id.*

[12] *Muhannad I, supra* note 1.

mistrial. Our focus is on the second mistrial only, because it has already been decided that the first mistrial did not bar retrial.[13] We similarly conclude that the second mistrial, which was granted upon Muhannad's motion, does not create a double jeopardy bar to retrial.

[4-6] "[I]t is the general rule that where a court grants a mistrial upon a defendant's motion, the Double Jeopardy Clause does not bar a retrial."[14] A defendant's motion for a mistrial constitutes a deliberate election on his or her part to forgo the right to the trial completed before the first trier of fact.[15] This is true even if the defendant's motion is necessitated by prosecutorial or judicial error.[16] When the mistrial is declared at the defendant's behest, the defendant's right to have his or her trial completed by a particular tribunal is, as a general matter, subordinated to the public's interest in fair trials designed to end in just judgments.[17]

[7] There is a "'narrow exception'" to this general rule.[18] In *Oregon v. Kennedy*, the U.S. Supreme Court held that where a defendant moves for and is granted a mistrial based on prosecutorial misconduct, double jeopardy bars retrial when the "conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."[19] The Court rejected a "more generalized standard of bad faith conduct, harassment, or overreaching as an exception to the defendant's waiver of his or her right to a determination by the first tribunal."[20] Consequently, "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on [the] defendant's motion, . . . does not bar retrial absent intent on

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[13] See *id*.

[14] *Id*. at 576, 837 N.W.2d at 800.

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] See *id*.

[19] See *Oregon v. Kennedy, supra* note 6, 456 U.S. at 679.

[20] See *Muhannad I, supra* note 1, 286 Neb. at 577, 837 N.W.2d at 800.

the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause."[21] It is the defendant's burden to prove this intent.[22]

[8,9] We have consistently held that the Double Jeopardy Clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution.[23] We have accordingly declined to extend the *Oregon v. Kennedy* exception beyond situations where the prosecutor intended that the misconduct would provoke a mistrial.[24] Indeed, in the appeal following the denial of Muhannad's first plea in bar, we rejected his arguments that the bar to retrial recognized in *Oregon v. Kennedy* was "not limited to circumstances where the State intended to provoke a mistrial."[25] We stated that in the absence of an intent to goad the defendant into moving for mistrial, double jeopardy would not bar retrial where the prosecutor "simply made 'an error in judgment'" or was grossly negligent.[26]

In the instant appeal, Muhannad does not argue that the prosecutor goaded him to move for mistrial such that *Oregon v. Kennedy* would apply to bar retrial. Rather, he claims that the standard established in *Oregon v. Kennedy* should not control his case. He argues that because his case involves successive mistrials entered for identical reasons, double jeopardy should bar retrial regardless of whether the prosecutor intended to provoke the second mistrial.

[10] We reject this argument that *Oregon v. Kennedy* should not control Muhannad's case. The rule established in *Oregon v. Kennedy* does not cease to apply where a defendant moves for and is granted successive mistrials due to actions of the prosecutor or evidence adduced by the prosecutor. Under such circumstances, the relevant factor for determining whether

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[21] *Oregon v. Kennedy, supra* note 6, 456 U.S. at 675-76.

[22] *Muhannad I, supra* note 1.

[23] *Id.*

[24] *Id.*

[25] See *id.* at 574, 837 N.W.2d at 799.

[26] See *id.* at 580, 837 N.W.2d at 803.

double jeopardy bars retrial is prosecutorial intent to provoke the defendant to move for mistrial,[27] as discussed in *Oregon v. Kennedy*.

The Eighth Circuit has applied *Oregon v. Kennedy* in cases where successive mistrials were caused by similar acts of the prosecutor. In *U.S. v. Standefer*,[28] the defendants moved for and were granted two mistrials due to the prosecutor's failure to disclose relevant facts during discovery. A third mistrial resulted from a hung jury. To determine whether retrial was barred by these mistrials, the court looked for evidence of prosecutorial intent to goad the defendants into moving for mistrial. It found that "successive mistrials caused by prosecutorial blunders might in some cases evidence an intent to prejudice rights secured by the Double Jeopardy Clause" but that there was "no such evidence in this case."[29]

Other courts have applied *Oregon v. Kennedy* in cases where impermissible testimony on a certain subject caused multiple mistrials to be granted upon the defendant's motion. In *State v. Fuller*,[30] successive mistrials were triggered by the testimony of the alleged victim that the defendant's driver's license had been suspended. To determine whether a third trial was barred by these mistrials granted at the defendant's request, the Minnesota Supreme Court applied *Oregon v. Kennedy*. It concluded that in the absence of intent to provoke the mistrials, double jeopardy did not bar a third trial. In *State v. Koelemay*,[31] the defendant moved for and was granted a mistrial in two successive trials due to testimony by prosecution witnesses about the defendant's prior drug record. A Louisiana appellate court concluded that the mistrials did not bar a third

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[27] See, *U.S. v. Amaya*, 750 F.3d 721 (8th Cir. 2014); *U.S. v. Standefer*, 948 F.2d 426 (8th Cir. 1991); *U.S. v. Alvin*, No. 10-65, 2014 WL 2957439 (E.D. Pa. 2014); *State v. Dillard*, 55 So. 3d 56 (La. App. 2010); *State v. Koelemay*, 497 So. 2d 321 (La. App. 1986); *State v. Fuller*, 374 N.W.2d 722 (Minn. 1985).

[28] *U.S. v. Standefer, supra* note 27.

[29] See *id.* at 432.

[30] *State v. Fuller, supra* note 27.

[31] *State v. Koelemay, supra* note 27.

trial, because "there [was] no showing of any intent on the part of the prosecutor to cause the defendant to move for a mistrial at any time in either trial."[32]

[11] Muhannad argues that his case is different from *U.S. v. Standefer*,[33] and other cases that apply *Oregon v. Kennedy*, because in his case, the prosecutor was aware, by virtue of the first mistrial, that Gobel's testimony could cause a mistrial. But the prosecutor's knowledge of the potential for mistrial does not change the standard used to determine whether double jeopardy bars retrial after a mistrial entered on the defendant's motion.[34]

In *U.S. v. Amaya*,[35] the Eighth Circuit considered whether the conviction of the defendant after two mistrials, both entered on the defendant's motion, violated double jeopardy. One mistrial was caused by the prosecutor's failure to disclose certain facts in discovery. The other mistrial was triggered by the testimony of a witness for the prosecution that the defendant was a "'drug dealer.'"[36] Such testimony was in direct violation of the trial court's pretrial ruling that that "'*witnesses* will not be allowed to opine that [the defendant] is a "drug dealer."'"[37] Due to this ruling, the prosecutor arguably was aware of the potential for mistrial. Nonetheless, the Eighth Circuit determined whether the mistrials barred retrial by looking for evidence that the "government intended to provoke a mistrial."[38] It followed *Oregon v. Kennedy*, as have other courts in similar situations.[39]

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[32] See *id.* at 325.

[33] *U.S. v. Standefer, supra* note 27.

[34] See, *U.S. v. Amaya, supra* note 27; *U.S. v. Alvin, supra* note 27; *State v. Koelemay, supra* note 27; *State v. Fuller, supra* note 27.

[35] *U.S. v. Amaya, supra* note 27.

[36] See *id.* at 723.

[37] See *id.* (emphasis in original).

[38] See *id.* at 726.

[39] See, *U.S. v. Alvin, supra* note 27; *State v. Koelemay, supra* note 27; *State v. Fuller, supra* note 27.

Muhannad's arguments that *Oregon v. Kennedy* should not apply to his case lack merit. Therefore, we proceed according to the standard established in that case when determining whether the second mistrial creates a double jeopardy bar to retrial.

The record supports the district court's conclusion that the prosecutor did not intend to goad Muhannad into moving for the second mistrial. The prosecutor's comments at pretrial hearings demonstrated that she understood what testimony she could and could not elicit from Gobel. At one hearing, the prosecutor stated, "With respect to the expert testimony, the one part I don't disagree with is that I can't ask about the opinions . . . as to whether or not [M.H.] had been sexually abused or that the diagnosis is a result of her being sexually abused." Given these limitations, in the second trial, the prosecutor made changes to the manner in which she questioned Gobel and tailored the questions to touch upon permissible topics only. Even the question which provoked the inadmissible testimony was appropriate: "Will you describe for me, going through each one of the criteria, the symptoms that you took note of with respect to [M.H.]?" At the hearing on Muhannad's plea in bar, the prosecutor denied that she asked this question to provoke a mistrial. She stated that any suggestion to the contrary was "absolutely absurd [under] the circumstance[s]."

Muhannad argues that "the misconduct of an expert witness for the State," such as Gobel, "should be imputed to the prosecution."[40] He alleges that Gobel may have "deliberately chose[n] to ignore" the district court's order limiting the scope of her testimony.[41] We need not consider whether, as a general matter, a witness' intent can be imputed to the prosecutor, because doing so would not change the result in this case. Under *Oregon v. Kennedy*, a mistrial entered on the defendant's

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[40] See brief for appellant at 11.

[41] See *id.* at 8.

motion is a bar to retrial only when there is an intent to "'goad' the defendant into moving for a mistrial."[42]

It was not clearly erroneous for the district court to conclude that the prosecutor did not intend to goad Muhannad into moving for the second mistrial. Therefore, double jeopardy does not bar a third trial of Muhannad and the district court did not err in overruling his plea in bar.

CONCLUSION

For the foregoing reasons, we affirm the order of the district court which overruled Muhannad's plea in bar following the second mistrial.

AFFIRMED.

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

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[42] See *Oregon v. Kennedy, supra* note 6, 456 U.S. at 676.

STATE OF NEBRASKA, APPELLEE, V.
TERRANCE J. HALE, APPELLANT.
858 N.W.2d 543

Filed February 6, 2015. No. S-14-183.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: 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.
3. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
4. ____: ____. 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.

5. **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.
6. **Rules of Evidence: Hearsay.** For a statement to be an excited utterance, the following criteria must be met: (1) There must be a startling event; (2) the statement must relate to the event; and (3) the declarant must make the statement while under the stress of the event.
7. ____: ____. The true test for an excited utterance is not when the exclamation was made but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.
8. ____: ____. Facts relevant to whether a statement is an excited utterance include the declarant's manifestation of stress, the declarant's physical condition, and whether the declarant spoke in response to questioning.
9. **Rules of Evidence: Hearsay: Police Officers and Sheriffs.** Statements made in response to questions from law enforcement in particular do not generally have inherent guarantees of reliability and trustworthiness. But the declarant's answer to a question may still be an excited utterance if the context shows that the statement was made without conscious reflection.

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

Thomas C. Riley, Douglas County Public Defender, Scott C. Sladek, and Douglas A. Johnson for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

CONNOLLY, J.

SUMMARY

Raymond Vasholz died from inhaling smoke from a fire set in his home. His wife, Elizabeth Vasholz, testified that Terrance J. Hale broke into the house, demanded money, assaulted her and Raymond, and set several objects on fire. A jury convicted Hale of first degree murder, and the court sentenced him to life imprisonment. Hale argues that the court erred in allowing two witnesses to testify about out-of-court statements made by Elizabeth. The court overruled Hale's hearsay objections on the ground that the statements were excited utterances. Hale also contends that the evidence is not sufficient to support his conviction. We affirm.

BACKGROUND

Fire and Immediate Response

Elizabeth, 76 years old at the time of the assault, testified that she was living with her husband, Raymond, in Omaha, Nebraska, on February 7, 2013. In the time "leading up to 9 o'clock a.m.," Elizabeth testified that she was sitting in the living room with Raymond when she heard "[b]reaking glass" that "sounded like it was coming from the basement." Elizabeth testified that a man wearing a coat, whom Elizabeth identified in court as Hale, came up the basement stairs. Elizabeth testified that she recognized Hale because he had done yardwork for her, but she did not know him by name.

Elizabeth testified that Hale demanded money. After she replied that she had no money, Elizabeth said that Hale assaulted her and Raymond. As Hale hit Raymond, Elizabeth recalled striking Hale's back with a lamp. Elizabeth testified that Hale grabbed "a paper" and lit it using the gas stove. Elizabeth said that Hale threw the lit paper at her and then set a couch cushion on fire and "came at" her, pushing the burning cushion against her arms.

Elizabeth testified that she escaped the house, grabbing a recycling bin to cover herself because Hale had torn off the pajama top she had been wearing. She recalled knocking on her neighbor's door, but no one answered, so she sat on her neighbor's porch and began "screaming my head off." Elizabeth stated that Hale then came outside and "threw his coat down." Then another man arrived, and Elizabeth asked him for help. After police arrived, Elizabeth recalled that they arrested Hale because she yelled, "That's him, that's him," while pointing at Hale. Elizabeth stated that she suffered burns on her back and both arms and cracked vertebrae.

About 9 a.m., Gary Burns was driving in his car when he saw an elderly woman sitting outside. Burns said that the woman—who was "real dingy and dirty" and looked like "she had been beat up, basically,"—had no shirt on, and was covering herself with a recycling bin. The woman was yelling, "'Help, help, help.'" Burns also saw a man, whom he identified in court as Hale, about 15 feet from the woman.

Burns got out of his car and called the 911 emergency dispatch service to report an assault. As he approached the woman, Burns testified that she pointed at Hale and said, "'You did this, you did it.'" According to Burns, Hale threw up his arms and said, "'I didn't do this.'"

Firefighters responded to an alarm for a house fire at 9:12 a.m. Smoke was escaping from the house when they arrived. Inside they found "pockets of fire" that they quickly extinguished.

The firefighters searched the house for victims and found a man, later identified as Raymond, lying across a bed in a bedroom. The firefighters carried Raymond out of the house and to the front yard, where paramedics immediately attended to him. A paramedic testified that Raymond was not breathing and did not have a pulse. Electronic monitors placed on Raymond while an ambulance transported him to a hospital showed no signs of cardiac activity.

Police officer Roger Oseka was patrolling with a training officer, Patrick Andersen, when they heard a request for assistance over the radio at 9:12 a.m. Oseka estimated that it took him and Andersen less than 5 minutes to reach the scene. When Oseka arrived, he saw an elderly white woman sitting on the "front porch" of a neighbor's house. Oseka also saw a black man, whom he identified in court as Hale, "walking in circles" and saying, "'I was trying to save them.'"

Oseka exited his cruiser and approached the woman, whom he said was bleeding from her nose and mouth and had "burn sores" on both arms. Oseka observed the woman "throwing up or spitting into" a green recycling bin. He made contact with the woman and described her "tone" as "[s]urprisingly, for the chaotic scene . . . was calm, but yet concise." Oseka talked with the woman and—after the court overruled Hale's hearsay objection—he testified that the woman "looked past me, raised her arm and pointed it and said, 'He did it.'" Oseka turned and saw Hale standing where the woman was pointing. Oseka then directed Andersen to arrest Hale.

Andersen said that the woman appeared to be in "a state of shock" and was "screaming" at them and fire personnel. When

the State asked, "[W]hat does she scream to you?" Andersen testified that the woman said, "'That's him. He did this.'" As she screamed, Andersen said that the woman pointed at a black man, whom Andersen identified in court as Hale. Andersen stated that Hale thereafter screamed, "'I tried to help them. I saved her, but I couldn't save him.'"

William Guidebeck, a paramedic, arrived at about 9:19 a.m. and saw a woman sitting on a "neighbors' stoop," cradling a green recycling bin against her chest. Guidebeck observed that she was not wearing a shirt but had a green coat with blood on it draped over her back. Guidebeck described the condition of the woman: "She was in pain. She was kind of hanging her arms over the recycle bin as to not touch anything. She had burns—severe burns on her arms, on her face. Her hair was singed. She just kind of had a blank look on her face." Guidebeck also noted that she had a "significant amount of soot around her mouth and nose."

Nevertheless, Guidebeck testified that the woman was "alert and oriented," based on her answers to the "times three" questions of "[p]erson, place, and time." That is, she "knew where she was at, she knew what day it was, and she was very aware of her surroundings." Guidebeck removed the coat, and he testified that the woman "reacted in pain."

At this point in Guidebeck's testimony, the State asked whether he had "receive[d] any response of any kind from this female patient." Hale objected on hearsay grounds. The court overruled Hale's objection on the ground that Elizabeth's answer was an excited utterance. Guidebeck testified:

> We removed the coat from her. We threw it down. Asked her if there was anybody else inside. She said her husband. We asked her if that was her husband's coat, because it was kind of odd that she didn't have a shirt on, but she had a coat draped around her. When I asked if that was her husband's coat, she said, "No." We asked her whose coat it was, and she said, "It's his."

After the court overruled another hearsay objection from Hale, Guidebeck testified, "And we said, 'Whose?' And she pointed in the direction of one of the [police] cars." Guidebeck knew that someone was in the cruiser, but he could not see who.

Investigation

Raymond was pronounced dead during the afternoon of February 7, 2013. A coroner's physician performed an autopsy on February 8. He testified that 10 to 18 percent of the body was covered by second-degree burns. Additionally, the autopsy showed numerous abrasions, lacerations, and bruises. The physician stated that "soot" in the trachea and lungs showed that Raymond had been alive during the fire. Blood sample tests showed a fatal amount of carbon monoxide. The physician testified that Raymond's death was caused by "the complication of breathing smoke, soot, carbon monoxide, and the other hot gasses in the fire, [and] being burned by the fire."

Fire investigator Michael Shane McClanahan examined the house on February 7, 2013. McClanahan identified six different points of origin, each independent of the other. McClanahan also found a couch cushion with "thermal damage." McClanahan opined that the fire was "intentionally-set," based on the multiple points of origin and no indication that they would have naturally spread from one to another. McClanahan testified that his conclusions were consistent with Elizabeth's description of events.

Inside, the house showed signs of a violent struggle. Firefighters saw what appeared to be "blood streaks" on a refrigerator in the kitchen. Photographs of the house showed "apparent blood" on the leg of an upturned table, a windowsill in the room where Raymond was found, an exterior door, and the wall leading to the basement. "[A]pparent blood" was also documented on the sleeve and lining of the green coat and on the recycling bin. Additionally, a pane in a basement window was broken and the latch used to open the window was bent. A handprint was pressed into the dirt outside the window.

Regarding Hale's condition, Oseka testified that he offered Hale medical attention because Hale was "complaining that he was in the house and he was breathing in the smoke and he was coughing." Andersen said that Hale "started coughing up or spitting up black soot" after he drank some water. Photographs of Hale after his arrest show a small cut on his nose, a scratch on his right arm, a small cut on his right leg, and "scrapes or lacerations" on his back.

The University of Nebraska Medical Center performed a forensic DNA analysis of several items retrieved from the scene. Blood on the "left chest area" and left sleeve of the green coat generated a genetic profile matching Elizabeth's. Hale's DNA profile was consistent with blood on the right sleeve of the coat. The probability of an unrelated African American individual matching the profile is 1 in 6.35 quintillion.

Hale did not testify, but the State played for the jury several recordings of his statements. In a statement to police, Hale said that he "tried to save this lady." Hale said that he was walking near the Vasholzes' home when he saw smoke. Because the doors were locked, Hale said that he kicked in a basement window and pulled Elizabeth from the house.

Four days after Raymond's death, Hale sat for an interview with local media. During the interview, Hale said that he was walking to a bus stop when he saw smoke rising from the Vasholzes' house. Hale said that he opened a door and saw an older woman that he recognized as a neighbor. Hale pulled her out of the house and went back for her husband when "somebody attacked me from behind." Hale said that he went to the basement, broke a window, climbed out, called 911, and waited for police to arrive. Hale said that he covered the woman with his coat, but she told him to get away. Hale claimed that the police caused the laceration to his nose when they took him into custody.

At trial, Hale's attorneys emphasized the differences in Elizabeth's accounts of the event. Police officer Scott Warner interviewed Elizabeth on February 8 and 19, 2013. The first interview occurred when Elizabeth was still at the hospital, and Warner testified that she was "medicated that time with morphine," "spoke very quietly," and "spent most of the time with her eyes closed." During the first interview, Elizabeth told Warner that it was "getting darker" at the time of the attack and that her assailant wore a colorful hat. Warner asked Elizabeth whether she had seen her assailant before February 7, and she said, "'I really don't know.'"

At the second interview, Warner testified that Elizabeth said she recognized the man because he had previously done

yardwork for her. Elizabeth again told Warner that her assailant wore a hat.

At trial, Elizabeth testified that she could not recall whether Hale wore a hat, and there is no evidence that he did. Elizabeth also testified that the green coat was never over her shoulders.

In the operative information, the State charged Hale with one count of first degree murder under Neb. Rev. Stat. § 28-303(2) (Reissue 2008). The information alleged that Hale killed Raymond while committing, or attempting to commit, a robbery, burglary, or arson.

A jury convicted Hale, and the court sentenced him to life imprisonment.

ASSIGNMENTS OF ERROR

Hale assigns, restated, that (1) the court erred in overruling his hearsay objections to Oseka's and Guidebeck's testimony about Elizabeth's out-of-court statements and (2) the evidence is not sufficient to support his conviction.

STANDARD OF REVIEW

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

[2] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.[2]

[3,4] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the

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[1] *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014).

[2] See *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014).

finder of fact.[3] The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[4]

ANALYSIS

Oseka's and Guidebeck's Testimony

Hale argues that the court erred in overruling his hearsay objections to testimony by Oseka and Guidebeck about out-of-court statements made by Elizabeth. Regarding Oseka's testimony, Hale argues that the statement to which Oseka testified was not an excited utterance because Oseka described Elizabeth as "'calm and concise.'"[5] Regarding Guidebeck's testimony, Hale contends that the statement to which Guidebeck testified was not an excited utterance because Elizabeth spoke after conscious reflection and in response to "investigative questioning."[6]

[5] 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.[7] Hearsay is not admissible unless otherwise provided for under the Nebraska Evidence Rules or elsewhere.[8]

To recap, Oseka testified that Elizabeth pointed at Hale and said, "'He did it.'" Guidebeck testified that he asked Elizabeth whose coat was draped over her shoulders and that she said, "'It's his,'" while pointing at an individual in a police cruiser. Elizabeth made her statement to Oseka before her statement to Guidebeck. Both statements are hearsay.

[6] Excited utterances are one of the exceptions to the prohibition of hearsay.[9] For a statement to be an excited utterance,

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[3] *State v. Lavalleur*, 289 Neb. 102, 853 N.W.2d 203 (2014).

[4] See *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014).

[5] Brief for appellant at 10.

[6] *Id.* at 9.

[7] *State v. Castillo-Zamora, supra* note 2.

[8] *Id.*

[9] See *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

the following criteria must be met: (1) There must be a startling event; (2) the statement must relate to the event; and (3) the declarant must make the statement while under the stress of the event.[10] The justification for the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity for reflection and produces utterances free of conscious fabrication.[11]

Hale does not dispute that the attack Elizabeth suffered and witnessed was a startling event. And when the startling event is the commission of a crime, a statement identifying the perpetrator relates to the event.[12] So, the issue is whether Elizabeth made her statements to Oseka and Guidebeck while still under the stress from the assault and fire.

[7] An excited utterance does not have to be contemporaneous with the exciting event.[13] It may be subsequent to the event if there was not time for the exciting influence to lose its sway.[14] The true test is not when the exclamation was made but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.[15] Therefore, the lapse of time is not dispositive,[16] and the proponent does not have to produce definitive evidence of the time of the startling event.[17] The period in which the exception applies depends on the facts of the case.[18]

[8,9] Relevant facts include the declarant's manifestation of stress,[19] such as "yelling,"[20] and the declarant's physical

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[10] See *State v. Castillo-Zamora, supra* note 2.

[11] *Id.*

[12] See *State v. Smith, supra* note 9.

[13] *State v. Castillo-Zamora, supra* note 2.

[14] *Id.*

[15] See *id.*

[16] See *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

[17] *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[18] *State v. Castillo-Zamora, supra* note 2.

[19] See, e.g., *id.*

[20] See *State v. Canbaz*, 259 Neb. 583, 591, 611 N.W.2d 395, 402 (2000).

condition.[21] Also relevant is whether the declarant spoke in response to questioning.[22] Statements made in response to questions from law enforcement in particular do not generally have inherent guarantees of reliability and trustworthiness.[23] But the declarant's answer to a question may still be an excited utterance if the context shows that the statement was made without conscious reflection.[24]

Here, Elizabeth testified that the attack occurred in the period "leading up to 9 o'clock a.m." on February 7, 2013. Burns testified that he saw Elizabeth "yelling" for help on her neighbor's stoop at "approximately 9 a.m." An alarm for a house fire was sounded at 9:12 a.m., and Oseka and Andersen testified that they arrived in less than 5 minutes. Guidebeck estimated that he arrived at "about 9:19 a.m."

So, we can infer that Oseka and Guidebeck arrived minutes after Elizabeth left her burning home. And they both found Elizabeth sitting on a neighbor's stoop in pajama bottoms, with untreated "severe burns," cradling a plastic recycling bin against her bare chest in the "chilly" February air.

Whether Elizabeth was still stressed when she spoke to Oseka is a difficult question. Oseka testified that when he and Andersen approached Elizabeth, she "had open burn sores on both her left and right arms" and was bleeding from these sores and her mouth. Additionally, Oseka stated that Elizabeth was "throwing up or spitting into" the recycling bin. Nevertheless, Oseka testified that Elizabeth, "[s]urprisingly, for the chaotic scene . . . was calm, but yet concise." If this was the only description of Elizabeth's demeanor, her statement to Oseka would not be an excited utterance.

But Andersen witnessed—and testified about—the same statement, and he described Elizabeth differently. According

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[21] *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

[22] *Id.*

[23] See *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993). See, also, *State v. Sullivan*, 236 Neb. 344, 461 N.W.2d 84 (1990).

[24] *Werner v. County of Platte, supra* note 21. See *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005); *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990).

to Andersen, Elizabeth was in a "state of shock" and was "screaming" at the responders. In fact, Andersen described Elizabeth's identification of Hale not as a "statement," but as a "scream."

So, Oseka's and Andersen's accounts of Elizabeth's apparent stress level differ. But considering the totality of the circumstances—including the nearness of the event and Elizabeth's manifestations of physical stress—we conclude that Elizabeth was still under the stress from the assault and fire when she identified Hale as the perpetrator. The court did not err by overruling Hale's hearsay objection to Oseka's testimony.

We similarly conclude that Elizabeth's statement to Guidebeck was an excited utterance. Guidebeck testified that Elizabeth was visibly "in pain" when he approached. Her hair was singed, and she had burns on her arms and face. Guidebeck testified that Elizabeth "had a blank look on her face." From these facts, we can infer that Elizabeth was under the stress of the assault and fire when she spoke to Guidebeck. Hale emphasizes that Guidebeck also described Elizabeth as "alert and oriented" because she knew who she was, where she was, and the day. But alertness is not inconsistent with a stimulation of the sympathetic nervous system from the adrenal gland's release of hormones, a possible response to stress.[25] Hale also notes that Elizabeth told Guidebeck that the green coat belonged to the person in the back of a police cruiser only after Guidebeck asked whose coat it was. But the record does not indicate that Elizabeth labored over the question, and we conclude that her answer—"'[i]t's his'"—did not involve conscious reflection.

Sufficiency of the Evidence

Hale argues that the evidence is not sufficient to support his conviction. He contends that Elizabeth's testimony was

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[25] See, Attorney's Illustrated Medical Dictionary E31 (West 1997); Emily Campbell, Comment, *The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?* 69 Neb. L. Rev. 190 (1990).

critical to the State's case and that her credibility is questionable due to her "admitted confusion" and the differences between her trial testimony and her statements to Warner.[26] Hale also claims that the State produced little physical evidence and failed to more aggressively investigate another man who was spotted near the Vasholzes' home.

The State prosecuted Hale under the species of first degree murder known as felony murder. Section 28-303 provides: "A person commits murder in the first degree if he or she kills another person . . . (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . ." The critical difference between felony murder and premeditated first degree murder is that the intent to commit the underlying felony is substituted for an intent to kill.[27] Here, the underlying felonies alleged in the operative information and put to the jury were robbery, burglary, or arson.

We conclude that the evidence is sufficient to support Hale's conviction. Elizabeth and McClanahan testified that someone intentionally damaged the Vasholzes' home and contents by starting a fire. The coroner's physician testified that Raymond died from breathing in smoke and carbon monoxide from the fire. Elizabeth testified that Hale was the person who intentionally set the fire, and her account is supported by circumstantial evidence such as Hale's blood on the green coat and the marks on his body. Viewing the evidence in the light most favorable to the State, a rational fact finder could have found beyond a reasonable doubt that Hale killed Raymond in the perpetration of an arson.[28] We need not address whether the same conclusion can be reached under the two alternate underlying felonies of robbery and burglary.[29]

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[26] Brief for appellant at 12.

[27] See *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014).

[28] See, Neb. Rev. Stat. § 28-503(1) (Cum. Supp. 2014); *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990).

[29] *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014).

Elizabeth's recounting of the events at trial differed somewhat from her statements to Warner, and her statements to Warner themselves were not identical. This was a matter that the jury could consider when weighing Elizabeth's testimony and credibility, but it is not a matter for us. Our question is only whether a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt.[30] The credibility and weight of witness testimony is the province of the jury, and we will not reassess credibility on appellate review.[31]

CONCLUSION

We conclude that the out-of-court statements Oseka and Guidebeck testified about were excited utterances, and therefore admissible despite their hearsay status. And we conclude that the evidence is sufficient to support Hale's conviction for murder in the first degree.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

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[30] See *State v. Matit, supra* note 4.

[31] See, *State v. Tolbert*, 288 Neb. 732, 851 N.W.2d 74 (2014); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

STATE OF NEBRASKA, APPELLEE, V.
RAMEZ MERHEB, APPELLANT.
858 N.W.2d 226

Filed February 6, 2015. No. S-14-315.

1. **Appeal and Error.** To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
2. **Constitutional Law: Postconviction.** A manifest injustice common-law claim must be founded on a constitutional right that cannot and never could have been vindicated under the Nebraska Postconviction Act or by any other means.
3. **Constitutional Law: Effectiveness of Counsel: Convictions.** As a general proposition, counsel's advice about collateral matters—those not involving the direct consequences of a criminal conviction—is irrelevant under the Sixth Amendment.

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

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

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

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

HEAVICAN, C.J.

INTRODUCTION

Ramez Merheb filed a verified motion to set aside his plea. The district court denied the motion. Merheb appeals. We affirm.

FACTUAL BACKGROUND

On October 6, 2008, Merheb pled guilty to attempted possession of marijuana with intent to deliver. On December 2, he was sentenced to 1 to 2 years' imprisonment. No direct appeal was filed.

On May 22, 2009, Merheb filed a motion for postconviction relief. In the motion, Merheb alleged that he received ineffective assistance of counsel when his immigration counsel provided erroneous advice regarding the consequences of his conviction. Merheb further alleged that he would not have pled guilty and would have pursed an appeal on the denial of a motion to suppress in his case had his counsel acted effectively.

The district court denied Merheb's motion on June 26, 2009. Merheb appealed to the Nebraska Court of Appeals on July 7. On December 17, the State filed a suggestion of mootness, because Merheb had been released from prison on May 23 and his parole had expired on November 17. The State argued that because he was no longer under a term of imprisonment or parole, Merheb had no right to postconviction relief. The Court of Appeals dismissed Merheb's appeal as moot on January 20, 2010. We denied Merheb's petition for

further review on March 10, and the mandate was spread by the district court on March 26.

On March 31, 2010, the U.S. Supreme Court decided *Padilla v. Kentucky*.[1] In *Padilla*, the Court held that in order to comply with Sixth Amendment standards regarding competent representation, counsel must inform a client whether a plea carries a risk of deportation. On February 20, 2013, the Court held in *Chaidez v. U.S.*[2] that its decision in *Padilla* was a new rule and not retroactive, and that defendants whose convictions became final before *Padilla* could not benefit from its holding.

On August 16, 2012, Merheb filed a motion to set aside his plea. He alleged that his immigration counsel was ineffective in providing "clearly erroneous and unreasonable information as the immigration consequences of the plea agreement and resulting conviction." Merheb further alleged that if not for the erroneous immigration advice, he would have proceeded to trial or otherwise preserved his right to appeal the order denying his motion to suppress, and that the relief was necessary to correct a manifest injustice.

The district court denied Merheb's motion, reasoning that his conviction was final prior to the Court's decision in *Padilla* and that thus, *Padilla* was inapplicable to Merheb. The district court further noted that under this court's decision in *State v. Gonzalez*,[3] the common-law right to withdraw a plea after final judgment was narrow. The district court reasoned that because Merheb's motion to set aside his plea was filed more than 2 years after *Padilla*, it was not timely for *Gonzalez* purposes.

Merheb appeals.

ASSIGNMENT OF ERROR

Merheb assigns, restated and consolidated, that the district court erred in denying his motion to set aside his plea.

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[1] *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

[2] *Chaidez v. U.S.*, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

[3] *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013).

STANDARD OF REVIEW

[1] To the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.[4]

ANALYSIS

On appeal, Merheb assigns a number of errors which can be consolidated as one: that the district court erred in denying his motion to set aside his plea.

In his motion, Merheb attempts to set aside his plea on just one ground—that his immigration counsel was ineffective. He had previously filed a motion for postconviction relief which was denied as moot; he makes no argument in this motion that postconviction relief is currently available to him. Nor does he argue that he could withdraw his plea due to the failure of the trial court to inform him of the necessary advisements under Neb. Rev. Stat. § 29-1819.02 (Reissue 2008). In fact, a review of the trial record reveals that Merheb was given the necessary advisements under § 29-1819.02.

[2] Thus, the only avenue Merheb seeks to use here is that of the "manifest injustice" procedure which this court recognized in *State v. Gonzalez*.[5] A manifest injustice common-law claim must be founded on a constitutional right that cannot and never could have been vindicated under the Nebraska Postconviction Act or by any other means.[6] Merheb seeks to vindicate the constitutional right set forth in *Padilla*, where the U.S. Supreme Court held that Sixth Amendment standards of competent representation require counsel to inform his or her client whether a plea carries a risk of deportation.[7]

We assume for the purposes of this appeal that Merheb could not have vindicated this claimed constitutional right in a postconviction action, because he was released from prison and parole before his postconviction claim could be decided

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[4] *State v. Chiroy Osorio*, 286 Neb. 384, 837 N.W.2d 66 (2013).

[5] *State v. Gonzalez, supra* note 3.

[6] See *id.*

[7] *Padilla v. Kentucky, supra* note 1.

on appeal. But we conclude that the district court did not err in dismissing Merheb's motion, because Merheb is not entitled to relief.

[3] As a general proposition, counsel's advice about collateral matters—those not involving the direct consequences of a criminal conviction—is irrelevant under the Sixth Amendment.[8] Such an analysis is excluded from a *Strickland v. Washington*[9] analysis on the ineffectiveness of counsel.[10] But in *Padilla*, the Court concluded that no such distinction should apply in the case of deportation, because deportation was "unique"[11] in that it was "particularly severe,"[12] was "intimately related to the criminal process,"[13] and was "nearly an automatic result"[14] of some convictions. Later, in *Chaidez*, the Court noted that the rule from *Padilla* counted as "'break[ing] new ground' or 'impos[ing] a new obligation'"[15] for purposes of a retroactivity analysis under *Teague v. Lane*,[16] and thus was not retroactive in its application.

There is no distinction in the application of these principles based upon whether counsel failed to give any advice regarding immigration consequences or whether counsel instead gave erroneous advice. As noted by the Seventh Circuit in *Chavarria v. U.S.*,[17] the Court in neither *Padilla* nor *Chaidez* found any relevant distinction between the two: "There is no question that the [*Chaidez*] majority understood that *Padilla* announced a new rule for all advice, or lack thereof, with

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[8] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). See, generally, *Chaidez v. U.S., supra* note 2.

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

[10] See, *State v. Yos-Chiguil, supra* note 8; *Chaidez v. U.S., supra* note 2.

[11] *Padilla v. Kentucky, supra* note 1, 559 U.S. at 365.

[12] *Id.*

[13] *Id.*

[14] *Id.*, 559 U.S. at 366.

[15] *Chaidez v. U.S., supra* note 2, 133 S. Ct. at 1110.

[16] *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

[17] *Chavarria v. U.S.*, 739 F.3d 360, 363 (7th Cir. 2014).

respect to the consequences of a criminal conviction for immigration status."

Thus, prior to the decision in *Padilla*, whether counsel informed a defendant of the potential immigration consequences of a conviction was excluded from analysis under *Strickland*. And under *Chaidez*, the right granted in *Padilla* is not retroactive. Thus, if a conviction was final as of the date of the Court's decision in *Padilla*, a criminal defendant cannot benefit from the *Padilla* holding.

Because Merheb did not appeal from his conviction and sentence, Merheb's conviction became final in early January 2009—30 days after his sentence was imposed by the trial court. *Padilla* was not decided until March 31, 2010. Thus, the constitutional right under which Merheb seeks relief is inapplicable as a matter of law and the procedure set forth under *Gonzalez* is unavailable. Merheb's argument that the district court erred in denying his motion to set aside his plea is without merit.

CONCLUSION

The district court's denial of Merheb's motion to set aside his plea is affirmed.

AFFIRMED.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TRENT R. ESCH, APPELLANT.
858 N.W.2d 219

Filed February 6, 2015. No. S-14-471.

1. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

2. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
3. **Sentences: Restitution.** In imposing a sentence, the court must state the precise terms of the sentence. Such requirement of certainty and precision applies to criminal sentences containing restitution orders, and a court's restitution order must inform the defendant whether the restitution must be made immediately, in specified installments, or within a specified period of time, not to exceed 5 years, as required under Neb. Rev. Stat. § 29-2281 (Reissue 2008).

Appeal from the District Court for Custer County: KARIN L. NOAKES, Judge. Affirmed in part, and in part reversed and remanded with directions.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Jon Bruning, Attorney General, and Austin N. Relph for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This appeal was brought by Trent R. Esch in connection with his convictions and sentences in the district court for Custer County for felony criminal mischief and use of a weapon to commit a felony. In a previous appeal, Esch obtained certain relief which lead to a new trial from which this appeal is taken. See *State v. Esch*, No. A-13-241, 2013 WL 6623142 (Neb. App. Dec. 17, 2013) (selected for posting to court Web site). He claims that there was insufficient evidence to support his conviction for use of a weapon to commit a felony and to support an order to pay $7,500 as restitution for criminal mischief. Esch stands convicted of criminal mischief, but we reverse Esch's conviction for use of a weapon to commit a felony and order the charge to be dismissed. Regarding the sentence for felony criminal mischief, we affirm the term of imprisonment and the amount of restitution ordered, but we remand the

cause for resentencing with respect to the manner of payment of restitution.

STATEMENT OF FACTS

Esch was originally tried before a jury on charges of criminal mischief and use of a weapon to commit a felony. Evidence at the jury trial indicated that on March 18, 2012, Esch went to the home of the chief deputy of the Custer County Sheriff's Department and repeatedly fired his rifle at the chief deputy's patrol car which was parked outside the home. Damage to the patrol car included several bullet holes to the side of it, a punctured gas tank, and a flat tire. The company which insured the patrol car determined that it was a total loss. The jury found Esch guilty of both counts and determined that the value of pecuniary loss sustained as a result of the criminal mischief was $7,500. The court sentenced Esch to imprisonment for 20 to 36 months for felony criminal mischief and to a consecutive sentence of imprisonment for 5 to 7 years for use of a weapon. The court also ordered Esch to pay restitution in the amount of $7,500.

Esch appealed his convictions and sentences to the Nebraska Court of Appeals. He claimed, inter alia, that the district court erred when it refused his proposed jury instruction which stated that the jury must determine beyond a reasonable doubt the pecuniary loss sustained as a result of Esch's criminal mischief. The court had refused Esch's proposed separate instruction and instead had combined the pecuniary loss instruction with the instruction setting forth the elements of criminal mischief. The instruction given by the court stated in part, "If you find the State has proven the elements of Criminal Mischief beyond a reasonable doubt, you must also determine what, if any, pecuniary loss was suffered."

The Court of Appeals rejected most of Esch's assignments of error, which related to evidentiary rulings and sufficiency of the evidence. However, the Court of Appeals concluded that the district court erred when it failed to instruct the jury more particularly that it must determine pecuniary loss beyond a reasonable doubt. The Court of Appeals noted that pecuniary loss is not an element of criminal mischief, which

is described in Neb. Rev. Stat. § 28-519 (Reissue 2008), but the amount of pecuniary loss determines whether the offense is a felony or a misdemeanor. Under § 28-519, if pecuniary loss is $1,500 or more, then the offense is a Class IV felony; if pecuniary loss is less than $1,500, the offense is a misdemeanor. The Court of Appeals concluded that the court's failure to instruct the jury more particularly that the State must prove the amount of pecuniary loss beyond a reasonable doubt was erroneous and prejudicial to Esch.

Because pecuniary loss is not an element of criminal mischief, and because it rejected Esch's other assignments of error, the Court of Appeals affirmed Esch's conviction for criminal mischief. However, as a result of its conclusion that the court erred when it failed to properly instruct the jury that the amount of pecuniary loss due to the criminal mischief must be proved beyond a reasonable doubt, the Court of Appeals stated:

> [W]e vacate Esch's sentence for criminal mischief and remand the cause for a new trial on the issue of the amount of pecuniary loss caused by Esch's criminal mischief on March 18, 2012. Once that determination is made, the trial court can properly determine the grade of the offense and then resentence Esch accordingly. In addition, because the offense of use of a weapon to commit a felony is contingent upon the underlying crime being a felony, we must also vacate the use of a weapon conviction.

State v. Esch, No. A-13-241, 2013 WL 6623142 at *5 (Neb. App. Dec. 17, 2013) (selected for posting to court Web site). The Court of Appeals then determined that the Double Jeopardy Clause did not prohibit a retrial for the charge of use of a weapon to commit a felony because the evidence admitted in the jury trial was sufficient to sustain a conviction for that charge. The Court of Appeals concluded its opinion as follows: "[W]e affirm Esch's conviction for criminal mischief but vacate his sentence and remand the cause for a new trial on the issue of pecuniary loss. We also vacate his conviction and sentence for use of a weapon to commit a felony." *Id*. The holding of the Court of Appeals' opinion stated, "Affirmed in

part, and in part vacated and remanded for further proceedings." *Id.*

On remand, Esch waived his right to a jury trial and consented to a bench trial. At the bench trial, the State offered two exhibits into evidence—a "Written Stipulation" signed by Esch and the State and a "Waiver of Jury Trial, Waiver of Pre-Sentence Investigation and Acknowledgment of the Written Stipulation" signed by Esch. Esch did not object to these two exhibits, and the court received both exhibits. Neither the State nor Esch offered any other evidence.

The written stipulation stated, inter alia, that

> the criminal mischief occurring on March 18, 2012, for which [Esch] was convicted and which conviction was affirmed by the Nebraska Court of Appeals, resulted in damage to a 2007 Dodge Durango automobile and . . . the pecuniary loss sustained as a result of the damage to the 2007 Dodge Durango automobile exceeded $1500.

The written stipulation also stated that the parties "jointly recommend that the Court sentence [Esch] to the sentence previously entered herein on March 21, 2013."

In the waiver, Esch stated, inter alia, that he understood that

> by executing the written stipulation . . . the District Court will find him guilty beyond a reasonable doubt of the charge of felony criminal mischief, a class IV felony and that the District Court may also find him guilty beyond a reasonable doubt on the charge of the use of a weapon to commit a felony, a class IC felony.

The district court found Esch guilty beyond a reasonable doubt of both criminal mischief, a Class IV felony, and use of a weapon to commit a felony. The court further found beyond a reasonable doubt that the pecuniary loss caused by the criminal mischief was equal to or greater than $1,500. The court sentenced Esch by imposing the same sentences that had been pronounced after the jury trial, including the order to pay restitution in the amount of $7,500.

Esch appeals his conviction for use of a weapon to commit a felony and the restitution portion of his sentence for felony criminal mischief.

ASSIGNMENTS OF ERROR

Esch claims that there was insufficient evidence to support (1) his conviction for use of a weapon to commit a felony and (2) the order to pay restitution of $7,500 for criminal mischief.

STANDARD OF REVIEW

[1] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014).

ANALYSIS

We note initially that Esch does not challenge his conviction for criminal mischief and that because he stipulated the damage was greater than $1,500, he conceded that it was a felony. Therefore, Esch stands convicted of felony criminal mischief.

There Was Not Sufficient Evidence in the New Trial to Support a Conviction for Use of a Weapon to Commit a Felony.

In this appeal, Esch first claims that at the new trial, the State failed to present sufficient evidence to support a conviction of use of a weapon to commit a felony. We agree with Esch's contentions that the Court of Appeals' mandate required a new trial on use of a weapon to commit a felony and that at the new trial, the State did not offer sufficient evidence to prove this charge. We therefore reverse the conviction for use of a weapon to commit a felony, and we further conclude that the Double Jeopardy Clause forbids a new trial on this charge.

In its opinion in Esch's first appeal, the Court of Appeals affirmed his criminal mischief conviction but vacated Esch's

conviction and sentence for use of a weapon to commit a felony. The Court of Appeals also concluded that the Double Jeopardy Clause did not forbid a retrial on the use of a weapon charge. Therefore, to obtain a conviction for use of a weapon, the Court of Appeals' opinion anticipates that there could be a new trial on the charge, at which trial, the State would be required to prove all elements of the charge of use of a weapon beyond a reasonable doubt.

At the new trial, the State offered no evidence other than the written stipulation and the waiver. Although Esch stipulated to certain facts, including the fact that the damage caused by his criminal mischief was in excess of $1,500, Esch did not stipulate to other facts that were necessary to establish the elements of use of a weapon to commit a felony. The stipulation was sufficient to establish that Esch's conviction for criminal mischief was properly classified as a felony and that therefore, Esch had committed a felony, but the State presented no evidence at the new trial to show that Esch used a weapon to commit the felony criminal mischief of which he was convicted.

The State contends that the remand was limited to a trial to determine the amount of pecuniary loss to determine the grade of the criminal mischief conviction and that only evidence relevant to that issue could be considered on remand. The State misperceives the opinion of the Court of Appeals. The Court of Appeals' opinion did not impose the limitation urged by the State on the scope of the proceeding on remand. As noted, with regard to the criminal mischief charge, the Court of Appeals affirmed the conviction but vacated the sentence and remanded the cause for a new trial on the issue of pecuniary loss, which issue was relevant to sentencing for the criminal mischief conviction. The Court of Appeals did not similarly limit the scope of proceedings on remand with respect to the use of a weapon to commit a felony charge. To the contrary, the Court of Appeals vacated the conviction and noted that the Double Jeopardy Clause did not prohibit a new trial on the charge of use of a weapon. A new trial was at the discretion of the prosecutor, and a new trial required evidence to establish all elements of use of a weapon as charged.

The State also argues that there was evidence at the first trial that Esch had used a gun to commit criminal mischief and that use of a weapon should be treated as an established fact. However, the State did not offer evidence from the first trial into evidence at the new trial and it therefore did not establish by presentation of evidence the elements of use of a weapon at the new trial. Although it was established at the new trial that Esch had committed felony criminal mischief, the use of a weapon is not an element of felony criminal mischief; establishing commission of the crime of felony criminal mischief does not automatically prove the use of a weapon in the commission of the crime of felony criminal mischief.

The State additionally directs our attention to the written stipulation, in which Esch agreed to recommend that the district court impose the same sentence that it had imposed previously. The State argues that Esch in effect stipulated to his guilt on the use of a weapon charge. We do not read the sentencing feature of the stipulation as a stipulation by Esch that he agreed to be found guilty of use of a weapon to commit a felony; it was only an agreement that if he were again convicted, he would join a recommendation for the same sentence that had previously been imposed. By its terms, such agreement with regard to sentencing would necessarily take effect only if Esch were properly convicted of the crime for which he was being sentenced.

Finally, the State argues that Esch invited any error related to the sufficiency of evidence regarding the use of a weapon charge when he failed to object to the State's interpretation of the Court of Appeals' opinion as providing that the use of a weapon conviction would be automatically reinstated once the criminal mischief conviction was shown to be a felony. The State's suggestion is without merit. Esch's alleged failure to object did not relieve the State of its duty to introduce sufficient evidence to prove the elements of the crime beyond a reasonable doubt at the new trial.

[2] We reject the State's arguments and conclude that there was not sufficient evidence presented at the new trial to support Esch's conviction of use of a weapon to commit a felony. The Double Jeopardy Clause does not forbid a retrial

so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013). However, the evidence admitted at the new trial was not sufficient to sustain a guilty verdict of use of a weapon to commit a felony and, therefore, the Double Jeopardy Clause prohibits a retrial. The use of a weapon conviction is reversed, and the cause is remanded with directions to dismiss the charge.

Esch Stipulated to a Restitution Order in the Amount of $7,500, but the District Court Committed Plain Error When It Failed to Specify the Manner of Payment of Restitution.

Esch claims that there was insufficient evidence to support a restitution order in the amount of $7,500 in connection with his conviction for felony criminal mischief. Because we conclude that Esch stipulated to a restitution order in the amount of $7,500, we affirm the portion of the sentence which ordered restitution in the amount of $7,500. However, the district court failed to specify the manner of payment as required by statute, and we therefore remand the cause for resentencing to specify the manner of payment.

Esch contends that there was not sufficient evidence to support a restitution order in the amount of $7,500 because the written stipulation states only that the loss was in excess of $1,500 and the State presented no evidence to prove damage of $7,500. However, in the written stipulation, Esch stipulated that he would join the State in recommending that he be sentenced to the same sentence previously entered. The previous sentence included a restitution order in the amount of $7,500, the amount found by the jury at the first trial. We apply the terms of the written stipulation, which we read as Esch's agreement that restitution of $7,500 as previously ordered was an appropriate amount to compensate for damage caused by his criminal mischief. Esch also waived his right to a jury trial at the new trial, and therefore, as a result of the stipulation and the waiver, the court had a sufficient basis from which it

could enter a restitution order in the amount of $7,500, as it had done after the first trial. We, therefore, affirm the portion of the sentencing order in which the court ordered restitution in the amount of $7,500.

[3] However, the State calls our attention to Neb. Rev. Stat. § 29-2281 (Reissue 2008), which is titled "Restitution; determination of amount; manner of payment." Relevant to the manner of payment, § 29-2281 provides in part that "[t]he court may order that restitution be made immediately, in specified installments, or within a specified period of time not to exceed five years after the date of judgment or defendant's final release date from imprisonment, whichever is later." The State also draws our attention to *State v. Mettenbrink*, 3 Neb. App. 7, 12, 520 N.W.2d 780, 783-84 (1994), in which the Court of Appeals stated that "in imposing a sentence, the court must state the precise terms of the sentence" and that such "requirement of certainty and precision applies to criminal sentences containing restitution orders." In *Mettenbrink*, plain error was committed when a court's restitution order failed to inform the defendant whether the restitution must be made immediately, in specified installments, or within a specified period of time, not to exceed 5 years, as required under § 29-2281. Thus, although § 29-2281 offers options, one option must be ordered.

In the present case, the district court failed to specify the manner of payment of restitution as required under § 29-2281. We apply the rationale in *Mettenbrink, supra*, and determine that it was plain error for the court to fail to specify the manner of restitution payment. We therefore remand the cause to the district court for resentencing with regard to the manner of payment of restitution; we otherwise affirm the sentence for criminal mischief, including the amount of restitution ordered.

CONCLUSION

Esch was convicted of felony criminal mischief, and the conviction and sentence of imprisonment therefor stand and are unaffected by this opinion.

With respect to the present appeal, we conclude that there was not sufficient evidence at the new trial to support Esch's

conviction for use of a weapon to commit a felony. We therefore reverse the conviction and, for reasons based on Double Jeopardy explained above, remand the cause with directions to vacate the conviction and dismiss the charge of use of a weapon to commit a felony. We further conclude that there was sufficient evidence to support the $7,500 amount of restitution ordered with respect to the felony criminal mischief conviction. We therefore affirm the $7,500 amount of restitution in the sentence for felony criminal mischief but we remand the cause for resentencing with respect to the manner of payment of restitution.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

EMBER M. SCHRAG, APPELLANT, V.
ANDREW S. SPEAR, APPELLEE.
858 N.W.2d 865

Filed February 13, 2015. No. S-13-258.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. ____: ____. A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
4. **Child Custody: Appeal and Error.** In child custody cases, where the 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. **Child Custody.** Before a custodial parent can remove a child from the state, permission of the court is required, whether or not there is a travel restriction placed on the custodial parent.
6. ____. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent

must also demonstrate that it is in the child's best interests to continue living with him or her in the new location. The paramount consideration is whether the proposed move is in the best interests of the child.

7. ____. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
8. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
9. **Modification of Decree: Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a change in circumstances.
10. **Modification of Decree: Child Custody: Evidence: Time.** In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time.
11. **Modification of Decree: Child Custody.** Removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody. Nevertheless, when considered in conjunction with other evidence, such a move may well be a change of circumstances that would warrant a modification of the decree.
12. **Modification of Decree: Child Custody: Proof.** Before custody may be modified based upon a material change in circumstances, it must be shown that the modification is in the best interests of the child.
13. **Child Custody.** In addition to the "best interests" factors listed in Neb. Rev. Stat. § 43-2923 (Cum. Supp. 2014), a court making a child custody determination may consider matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the parental capacity to provide physical care and satisfy the educational needs of the child.
14. **Child Custody: Appeal and Error.** In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and BISHOP, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Stephanie R. Hupp and Zachary L. Blackman, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellant.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellee.

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

STEPHAN, J.

The Nebraska Court of Appeals reversed an order of the district court for Lancaster County which denied Ember M. Schrag's application to move her minor daughter to New York and modified a prior custody determination by awarding custody of the child to her father, Andrew S. Spear.[1] On further review, we conclude the district court did not abuse its discretion and therefore reverse the judgment of the Court of Appeals.

I. BACKGROUND

1. FACTS

The underlying facts are set forth in greater detail in the published opinion of the Court of Appeals. We summarize them here.

Lillian Schrag was born in November 2007 and resided with Ember in Lincoln, Nebraska. Ember initiated a paternity action in the district court for Lancaster County in which she alleged that Andrew was Lillian's biological father. Ember and Andrew were never married and never lived together after Lillian's birth. In a decree entered January 21, 2009, the court determined Andrew was Lillian's father. The court awarded custody of Lillian to Ember, subject to Andrew's rights of visitation as set forth in a parenting plan. Andrew was ordered to pay child support for Lillian and one-half of the childcare expenses incurred by Ember. At the time of the decree and at all subsequent times, Andrew has resided near Kansas City, Missouri.

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[1] See *Schrag v. Spear*, 22 Neb. App. 139, 849 N.W.2d 551 (2014).

Cindy Chesley is Ember's mother and Lillian's grandmother. She and her husband reside in North Platte, Nebraska. From late 2008 through 2010, Chesley and her husband cared for Lillian for extended periods of time while Ember worked as a touring folk singer. Chesley and Ember had a falling out in early 2011 when Chesley told Ember she would be unable to care for Lillian for another extended period due to other family obligations. Ember testified she had no ongoing relationship with Chesley and that they had been "estranged for two years."

In early 2011, Ember moved with Lillian to Decorah, Iowa, where they resided with Ember's boyfriend and his parents. Ember married this man in April 2011. She did not obtain approval of the court before relocating Lillian from Nebraska to Iowa. Andrew, believing the move was temporary, did not oppose it until Ember presented him with documents indicating the move was permanent. Andrew obtained emergency custody of Lillian for a brief time before she was returned to Ember's custody. Andrew thereafter sought modification of custody, and Ember sought court approval to move Lillian to Iowa, which had already occurred. The parties eventually resolved this dispute by entering into a stipulation and parenting plan which were approved by the court in an order entered on February 22, 2012. This order left Lillian in Ember's physical custody and granted Ember permission to move to Iowa with the child.

The parenting plan provided that the parties would have joint legal custody of Lillian and specified Andrew's rights of visitation. The plan also provided that the parties would "reside in the states of Nebraska, Missouri (including the Kansas City metro), and Iowa unless otherwise agreed to by the parties." Further, the parenting plan provided that Lillian was to have no unsupervised contact with Chesley. The final paragraph of the parenting plan provides: "The parties intend for Nebraska to maintain jurisdiction of this matter as the home state for the child."

While Ember and Lillian resided in Iowa, Ember worked two part-time jobs, which she did not consider to be related to her music career. In June 2012, while Lillian was with Andrew

for her summer visitation, Ember separated from her husband. A September 6 decree dissolving the marriage was entered by an Iowa court.

On the same day that she separated from her husband, Ember traveled to the home of Robert Bannister in Brooklyn, New York. She had met Bannister in March 2011, and became romantically involved with him when she arrived at his home in June 2012. Bannister, who is approximately 24 years older than Ember, is employed in the software industry. He is separated but not divorced from his second wife.

Ember spent most of the summer of 2012 on the East Coast, primarily in New York and Philadelphia, Pennsylvania, where she had a housesitting job. She testified that while there, she was "looking for a living arrangement that would be in the best interest" and eventually decided to move to New York.

On approximately August 27, 2012, Andrew returned Lillian to Ember at their agreed-upon meeting place in Des Moines, Iowa. They exchanged pleasantries, but Ember made no mention of any change in her living arrangements. Ember then almost immediately took Lillian to New York and moved into Bannister's apartment, where they have subsequently resided.

On August 30, 2012, after she had relocated to New York, Ember sent an e-mail message to Andrew informing him that she had separated from her husband and had spent the summer "working on the east coast and developing a new support system in Philadelphia and New York City." She informed him for the first time of Lillian's relocation, stating: "Although this is the first you're hearing of it, this is not sudden, and it will be the best for Lillian." Andrew responded, "I do not agree moving Lillian to New York is what's best for her." Ember did not seek or obtain approval of the district court prior to relocating Lillian to New York.

Ember and Lillian have continued to reside with Bannister in his two-bedroom apartment in Brooklyn. Other than occasional musical performances, Ember is not employed, and she takes care of Lillian when Lillian is not in school. When Ember is performing outside New York, Bannister cares for Lillian. Ember and Lillian are entirely dependent on Bannister for housing. Ember's income was approximately $8,000 in 2012,

and her only regular income during 2013 was from Andrew's monthly child support payments.

Andrew was married in 2010 and resides with his wife and children in Liberty, Missouri, near Kansas City. He is employed as a restaurant manager, and his wife is also employed outside the home. They have a good relationship with Lillian and believe she is comfortable in their home. Andrew has extended family in the Kansas City area and enjoys a good relationship with Chesley, whom he invites for a visit whenever Lillian is visiting his home.

2. Procedural Background

(a) District Court

Upon learning that Ember had relocated with Lillian to New York, Andrew filed a complaint in the district court for Lancaster County seeking an award of legal and physical custody of Lillian. Ember filed an answer and a counterclaim in which she sought permission of the court to move Lillian from Iowa to New York.

After a trial at which Ember, Andrew, Chesley, Bannister, and other witnesses testified, the district court entered an order denying Ember's request to move Lillian to New York. The court examined Ember's motives for the relocation, its potential for enhancement of Lillian's quality of life, and its impact on Andrew's parenting time.[2] Based on this analysis, it concluded Ember had not carried her burden of establishing that the move to New York was in Lillian's best interests. And it made a further finding that under the circumstances of the case, the move was not in Lillian's best interests.

The court concluded Andrew had met his burden of proving a material change in circumstances which warranted modification of custody. The court awarded primary physical custody of Lillian to Andrew, subject to Ember's reasonable rights of visitation. The court also calculated Ember's child support obligation and vacated that portion of its prior order which placed restrictions on Chesley's contact with Lillian.

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[2] See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

(b) Court of Appeals

Ember perfected a timely appeal, asserting that the district court erred in modifying custody, denying her application to remove Lillian to New York, removing the restrictions on Chesley's visitation with Lillian, and calculating her support obligation. A divided panel of the Court of Appeals affirmed in part, and in part reversed, and remanded with directions.[3] The majority concluded that the district court abused its discretion when it denied Ember permission to move Lillian to New York and when it awarded physical custody of Lillian to Andrew. But the majority concluded that the district court did not err when it removed the restrictions on Chesley's visitation with Lillian and calculated Ember's child support obligation. The dissent concluded that the district court had not abused its discretion with respect to any of its rulings.

We granted Andrew's petition for further review.

II. ASSIGNMENTS OF ERROR

Andrew assigns, restated, that the Court of Appeals erred in concluding that the district court abused its discretion in (1) denying Ember permission to relocate Lillian to New York and (2) modifying its orders to award physical custody of Lillian to Andrew. Neither party sought further review of the Court of Appeals' decision with respect to visitation by Chesley or the calculation of Ember's child support obligation.

III. STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.[4]

[2,3] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason,

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[3] *Schrag, supra* note 1.

[4] *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013); *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

and evidence.[5] A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.[6]

[4] In child custody cases, where the 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.[7]

IV. ANALYSIS

1. Relocation

We have previously observed that parental relocation cases are "among the most complicated and troubling" cases that courts must resolve.[8] This is so because of the competing and often legitimate interests of the parents in proposing or resisting the move, and because courts ultimately have the difficult task of weighing the best interests of the child at issue "which may or may not be consistent with the personal interests of either or both parents."[9] In these cases, courts are required to balance the noncustodial parent's desire to maintain their current involvement in the child's life with the custodial parent's chance to embark on a new or better life.[10] It is for this reason that such determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given deference.[11]

This case also has two other areas of potential complexity. First, the record shows that neither parent nor the child resided in Nebraska at the time the district court was asked to approve the relocation to New York. The parenting plan

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[5] *Watkins, supra* note 4.

[6] *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

[7] *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

[8] *Farnsworth, supra* note 2, 257 Neb. at 248, 597 N.W.2d at 597.

[9] *Id.* at 249, 597 N.W.2d at 597.

[10] *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014).

[11] *Id.*

approved in the 2012 order specifically provided that "[t]he parties intend for Nebraska to maintain jurisdiction of this matter as the home state for the child." We note there has been no determination by a court of this state or any other state that we lack jurisdiction.[12] Second, the record shows that the child in question was born out of wedlock. In *Coleman v. Kahler*,[13] the Court of Appeals held that Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time. But in this case, there were two prior custody determinations—the initial paternity decree in 2009 and the 2012 order which permitted Ember to relocate with Lillian to Iowa. Accordingly, we conclude that the district court had jurisdiction to decide Ember's request to relocate Lillian from Iowa to New York. We conclude that legal principles governing requests by custodial parents to relocate children from Nebraska to another state are applicable in this action.

[5,6] Before a custodial parent can remove a child from the state, permission of the court is required, whether or not there is a travel restriction placed on the custodial parent.[14] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state.[15] After clearing that threshold, the custodial parent must also demonstrate that it is in the child's best interests to continue living with him or her in the new location.[16] The paramount consideration is whether the proposed move is in the best interests of the child.[17] We have discouraged trial courts from

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[12] See Neb. Rev. Stat. § 43-1239 (Reissue 2008).

[13] *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009).

[14] *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999); *Coleman, supra* note 13.

[15] See, *Daniels v. Maldonado-Morin*, 288 Neb. 240, 847 N.W.2d 79 (2014); *Steffy, supra* note 10.

[16] See *id.*

[17] *Id.*

granting temporary permission to remove children to another jurisdiction prior to a ruling on permanent removal, because such temporary permission "complicates matters and makes more problematic the subsequent ruling on permanent removal and encumbers appellate evaluation of the ultimate decision on permanent removal."[18] In this case, Ember's removal of Lillian from Iowa to New York without seeking *any* prior approval of the district court has created a similar problematic scenario.

As noted, the threshold issue with respect to removal is whether the custodial parent had a legitimate reason for the proposed relocation.[19] Although the district court did not make a specific finding as to whether Ember had a legitimate "reason" to move to New York, it examined the legitimacy of her motives for relocating. As we noted in *Farnsworth v. Farnsworth*,[20] the legitimacy of the custodial parent's motive for a proposed relocation is part of the "threshold question" of whether the parent has a legitimate reason for moving, and also plays a "further role in ascertaining a child's best interests" if the threshold showing is made. Thus, we consider the district court's findings with respect to the legitimacy of Ember's motives as pertinent to whether she established a legitimate reason for the move.

The district court found no merit to Ember's contention that the relocation was necessary in order to establish a new living arrangement and support system, because both of those factors were entirely dependent upon the continuation of her relationship with Bannister, a married man whom she had known for approximately 1 year and whom Lillian had never met prior to the relocation. The district court also made a specific finding that Ember "has not carried the burden of establishing that career enrichment was a legitimate motive for the move," noting that there was "no evidence to support that moving to New York would or has advanced [her] music career or the income associated with her music career."

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[18] *Jack v. Clinton*, 259 Neb. 198, 210, 609 N.W.2d 328, 337 (2000).

[19] *Daniels, supra* note 15; *Steffy, supra* note 10.

[20] *Farnsworth, supra* note 2, 257 Neb. at 250, 597 N.W.2d at 598.

These findings are fully supported by the record. We cannot agree with the Court of Appeals' conclusion that "Ember's reasonable expectation of improvement in her music career" in New York was a legitimate reason for the move.[21] It is true that absent some aggravating circumstance, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, significant career enrichment is a legitimate reason for relocation.[22] For example, job-related changes are legitimate reasons for moving where there is a reasonable expectation of improvement in the career or occupation of the custodial parent and the custodial parent's new job included increased potential for salary advancement.[23] We have held that a firm offer of employment in another state with a flexible schedule in close proximity to the custodial parent's extended family constitutes a legitimate reason for relocation.[24] Likewise, we have held that a career enhancement for a custodial parent's spouse is a legitimate reason for removal when the career change occurred after a marriage.[25]

But unlike the other cases in which we have applied these principles, Ember did not relocate in order to accept a firm offer of employment or any other definite income-generating activity, in the music industry or otherwise. She had only a vague notion that her music career would somehow be enhanced by living in New York. But she has been unemployed since the relocation, and her musical performances have not generated any appreciable income or demonstrable career enhancement. At the time of the relocation and since, she and Lillian have been almost entirely dependent for their housing upon Bannister, who has no legal obligation to shelter or otherwise support either of them.

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[21] *Schrag, supra* note 1, 22 Neb. App. at 163, 849 N.W.2d at 570.

[22] *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Farnsworth, supra* note 2.

[23] *Jack, supra* note 18; *Farnsworth, supra* note 2.

[24] See, *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Jack, supra* note 18.

[25] See *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

And we agree with the conclusion of the district court that Ember had an ulterior motive for the relocation. The record fully supports the district court's determination that

> one of Ember's unstated motives was to avoid Andrew's and this Court's involvement in the decision to move . . . . This is not the first time Ember has moved Lillian from one state to another without seeking Lillian's father's input on the decision. It is not the first time Ember has moved without seeking court permission. It is not the first time she has move[d] surreptitiously. Ember cannot claim ignorance of the requirement of court approval. Nor can she claim ignorance of the importance of involving Andrew in such decisions.

The record reflects quite clearly that Ember moved to New York with no firm or even likely prospects for employment or career enhancement, that she did so with the intent of entering into a living arrangement which offered no assurance of stability or permanency for herself or her child, and that she orchestrated the move in a manner designed to impair Andrew's parental rights and evade the jurisdiction of the district court. Based upon our de novo review, and the deference which we give to the factual determinations of the district court, we conclude that Ember did not have a legitimate reason for the relocation. Because she did not meet this threshold burden, we need not engage in a best interests analysis on this issue.

2. Modification of Custody

[7,8] The legal principles governing modification of child custody are well settled. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.[26] A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at

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[26] *Watkins, supra* note 4; *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004); *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002).

the time of the initial decree, would have persuaded the court to decree differently.[27]

(a) Material Change in Circumstances

Here, the district court found that Andrew had met his burden of establishing a material change in circumstances. The Court of Appeals acknowledged that "Ember's decision to move to New York to live with Bannister after her divorce . . . might constitute a change in circumstances," but it concluded that there was no evidence that the move had any adverse effect on Lillian.[28]

[9,10] The party seeking modification of child custody bears the burden of showing a change in circumstances.[29] In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time.[30]

[11] Removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody.[31] Nevertheless, when considered in conjunction with other evidence, such a move may well be a change of circumstances that would warrant a modification of the decree.[32] Here, Ember moved Lillian from Iowa to New York without Andrew's knowledge just months after she signed and asked a court to approve a parenting plan in which she agreed to notify Andrew of any plan to change her residence, and further agreed to reside in Nebraska, Iowa, or Missouri unless otherwise agreed to by Andrew. Further, Ember conducted the move without prior approval of the court just months after resolving a dispute involving her move from Nebraska to Iowa without court approval.

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[27] *Tremain, supra* note 26.

[28] *Schrag, supra* note 1, 22 Neb. App. at 156, 849 N.W.2d at 566.

[29] *Tremain, supra* note 26.

[30] *Heistand, supra* note 26.

[31] *Brown, supra* note 24.

[32] *Id.*

In *State ex rel. Reitz v. Ringer*,[33] we held that a trial court did not err in finding a material change in circumstances warranting modification of custody where a custodial parent removed a child from Nebraska without obtaining permission of the court which had adjudicated paternity and granted custody and visitation rights. We reasoned that such action denied the noncustodial parent his court-ordered visitation rights. Here, Ember's intentional and unilateral conduct had the effect of negating provisions of the existing parenting plan regarding the parties' place of residence, and thus affected the manner in which Andrew was able to exercise his visitation rights. As the district court correctly determined, the relocation to New York "has a substantial adverse impact on the relationship between Lillian and Andrew."

We agree with the dissenting member of the Court of Appeals that such conduct on Ember's part "clearly constitutes a material change in circumstances."[34] And we therefore conclude that the district court did not abuse its discretion in reaching the same conclusion.

(b) Best Interests

[12] Before custody may be modified based upon a material change in circumstances, it must be shown that the modification is in the best interests of the child.[35] Neb. Rev. Stat. § 43-2923 (Cum. Supp. 2014), requires a court, in determining custody and parenting arrangements, to consider certain factors relevant to the best interests of the minor child, including:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological

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[33] *State ex rel. Reitz, supra* note 14.

[34] *Schrag, supra* note 1, 22 Neb. App. at 177, 849 N.W.2d at 578 (Moore, Judge, concurring in part, and in part dissenting).

[35] See, *Brown, supra* note 24; *Parker v. Parker*, 234 Neb. 167, 449 N.W.2d 553 (1989).

> age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child;
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> (d) Credible evidence of abuse inflicted on any family or household member. For purposes of this subdivision, abuse and family or household member shall have the meanings prescribed in section 42-903; and
>
> (e) Credible evidence of child abuse or neglect or domestic intimate partner abuse.

[13] In addition to these statutory "best interests" factors, a court making a child custody determination may consider matters such as the moral fitness of the child's parents, including the parents' sexual conduct; respective environments offered by each parent; the emotional relationship between child and parents; the age, sex, and health of the child and parents; the effect on the child as the result of continuing or disrupting an existing relationship; the attitude and stability of each parent's character; and the parental capacity to provide physical care and satisfy the educational needs of the child.[36]

In concluding that the change of custody was in Lillian's best interests, the district court reasoned that Ember's conduct had brought about abrupt endings of very important relationships for Lillian and that such conduct "has made it abundantly clear that she does not care what Andrew thinks about raising Lillian." The court determined that Ember's abrupt and unilateral decision to move to New York with Lillian "demonstrates an inability to abide [by] agreements she makes with Andrew and does not bode well for any expectation by Andrew or this Court that continuing custody with Ember would have any likelihood of her involving Andrew in Lillian's life in any meaningful way." The court further found that "Andrew has impressed the Court with his willingness to involve Ember." It found that the parenting plan submitted by Andrew was reasonable and in Lillian's best interests.

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[36] See *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996).

The Court of Appeals reasoned modification of custody was not shown to be in Lillian's best interests, because the evidence showed that she was "'calm and secure and happy'" in her new surroundings and Andrew had not presented "any specific evidence that the changes in Ember's life have had a negative impact on Lillian."[37] It further reasoned that stability "should not be based solely upon a parent's relocation" and that it would be "particularly unfair in this case to remove Lillian from Ember's primary care when Ember has now found a way to be at home with Lillian more while still having opportunities to advance her music career."[38]

We agree with the dissent that Ember's evidence that Lillian is "'flourishing'" in New York should be discounted, because such evidence was "only developed as a result of Ember's unilateral decision to move Lillian there before obtaining either Andrew's consent or prior court approval."[39] The dissent further reasoned that a showing of actual harm to a child as a result of a material change in circumstances is not required and that "by evaluating the relevant best interests factors and choosing to modify custody, a trial court can essentially find by implication that the change in circumstances has an adverse impact upon the child."[40] The dissent reasoned that Ember's conduct with respect to her relocation to New York "speaks to [her] judgment, which, albeit indirectly, speaks to her suitability as a custodial parent."[41] As examples of Ember's judgmental deficiencies detrimental to Lillian's best interests, the dissent noted that she moved into Bannister's home with Lillian only within 2 or 3 months after beginning a romantic relationship with him and without Lillian's previously having met him. The dissent further noted that Ember is entirely

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[37] *Schrag, supra* note 1, 22 Neb. App. at 158, 849 N.W.2d at 567.

[38] *Id.* at 159, 849 N.W.2d at 567.

[39] *Id.* at 178, 849 N.W.2d at 578-79 (Moore, Judge, concurring in part, and in part dissenting).

[40] *Id.* at 179-80, 849 N.W.2d at 579.

[41] *Id.* at 182, 849 N.W.2d at 581.

dependent upon Bannister for housing and support and that she and Lillian would have no place to go if that relationship ended. The dissent viewed the evidence as tending to show that "Ember is making decisions, changes in relationships, and far-reaching moves that serve *her* desires and musical interests rather than a consideration of how these changes affect Lillian."[42]

We agree with the dissent that a noncustodial parent need not show that actual harm has befallen a child in order to establish that a modification of custody due to a material change in circumstances would be in the child's best interests. And we also agree that the record reflects significant flaws in Ember's judgment which could adversely impact Lillian's life and well-being. Ember precipitously decided to move Lillian to a city where Ember has no job or other apparent means of support and into the home of a man with whom she had only recently begun a romantic relationship and whom Lillian had not previously met. Ember admitted that she has no family in New York, and as noted by the dissent, she readily acknowledged that she would have "nowhere to live" if the relationship with Bannister ended.[43] In contrast, the evidence reflects that Andrew can provide Lillian with a stable home and financial security with a nearby network of extended family. The district court rejected Ember's criticism of Andrew's parenting skills, finding such criticism to be "disingenuous" and without significance.

This case differs from *Tremain v. Tremain*,[44] in which we affirmed a trial court's determination that a custodial father had not established grounds to remove his children to another state, but reversed the trial court's modification of the decree to award permanent custody to the mother. The father had removed the children from Nebraska to Oregon, where he had obtained new employment, without first obtaining approval of the court. In response to a contempt order, the children

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[42] *Id.* at 183, 849 N.W.2d at 582.

[43] *Id.* at 183, 849 N.W.2d at 581.

[44] *Tremain*, *supra* note 26.

were returned to the temporary custody of their mother in Nebraska pending resolution of the removal issue, while the father remained in Oregon. There was no evidence beyond the move to Oregon to support a finding of a material change in circumstances. In reversing the modification order, we determined that because both parents were fit to have custody, the trial court should have ascertained whether the father would relocate back to Nebraska in order to retain custody of the children.

In this case, as in *Tremain*, both parents are fit to have custody. But when Ember was asked where she would live if the court granted custody of Lillian to Andrew, she replied: "Well, New York City is the place that I currently have a workable solution." Although given an opportunity to do so, she gave no indication that she would relocate in order to retain custody. Further, this is not the first time Ember has uprooted Lillian without permission. Here, the relocation is not the only evidence that supports a finding of a material change in circumstances.

We conclude that the district court did not err in determining that there had been a material change in circumstances which warranted a modification of custody.

V. CONCLUSION

[14] In contested custody cases, where material issues of fact are in great dispute, the standard of review and the amount of deference granted to the trial judge, who heard and observed the witnesses testify, are often dispositive of whether the trial court's determination is affirmed or reversed on appeal.[45] The resolution of key issues in this case were dependent on the trial judge's assessment of Ember's credibility and her motives in moving Lillian to New York without prior approval of the court, and of Andrew's motives and credibility in resisting the move and seeking modification of custody.

Based on our de novo review of the record, we agree with the dissenting member of the Court of Appeals that the trial

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

court did not abuse its discretion in its resolution of these issues in favor of Andrew. We reverse the judgment of the Court of Appeals with respect to the issues of removal and modification of custody. Because further review was not requested, we do not disturb that portion of the Court of Appeals' judgment pertaining to visitation by Chesley and Ember's child support obligation. We remand the cause to the Court of Appeals with directions to affirm the judgment of the district court in all respects.

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., participating on briefs.

DWIGHT E. WHITESIDES, APPELLEE, V.
LINDA M. WHITESIDES, APPELLANT.
858 N.W.2d 858

Filed February 13, 2015. No. S-13-493.

1. **Pleadings: Judgments.** A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion.
2. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
5. **Courts: Jurisdiction: Divorce.** Pursuant to Neb. Rev. Stat. § 42-351 (Reissue 2008), full and complete general jurisdiction over the entire marital relationship and all related matters is vested in the district court in which a petition for dissolution of marriage is properly filed.
6. **Courts: Jurisdiction: Divorce: Property Settlement Agreements.** A district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all terms of approved property settlement agreements.
7. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.

8. **Pleadings.** A pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases.
9. ____. Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet.
10. **Pleadings: Due Process.** A court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process.
11. **Divorce: Modification of Decree: Property Settlement Agreements.** Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions will not thereafter be vacated or modified in the absence of fraud or gross inequity.
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed as modified.

Susan A. Anderson, of Anderson, Bressman & Hoffman Law Firm, P.C., L.L.O., for appellant.

Philip B. Katz, of Koenig & Dunne Divorce Law, P.C., L.L.O., for appellee.

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

Cassel, J.

INTRODUCTION

After a stipulated dissolution decree divided a partnership interest, the husband sought modification, contending that division of the interest could not be accomplished. The district court denied modification, but made findings regarding the interest's assignability and the husband's compliance with the decree. The wife appeals. Because these surplus findings deprived her of due process, we modify the order to strike them. As so modified, we affirm.

BACKGROUND

Dwight E. Whitesides and Linda M. Whitesides' marriage was dissolved via a dissolution decree entered in December 2012. At the time of the decree, Dwight possessed a 6-percent

interest in a partnership known as the 20/20 Partnership. The partnership owned a commercial building with spaces leased to various tenants. Dwight testified that although the partnership had been using its income to pay off a mortgage, he expected his interest to produce a net income of approximately $500 to $600 every month.

At the time of trial, Dwight had offered his partnership interest for sale to the other partners for $60,000. The other partners had 30 days to accept the offer, and the time period for acceptance had not yet expired. Dwight testified that if the offer was accepted, the net proceeds would be split equally with Linda. However, if the other partners rejected the offer, he would transfer half of his interest to Linda. And he confirmed that half of the income produced from the interest would belong to Linda.

The parties entered into a stipulation reflecting Dwight's testimony as to the disposition of the partnership interest. Based upon the stipulation, the trial court entered its decree. Regarding the partnership interest, the decree stated:

> [Dwight] recently offered to sell his 6[-percent] interest in 20/20 partnership to the other 6 existing partners. Should any of the partners purchase said stock, the net proceeds shall be divided equally. Should none of the partners choose to accept [Dwight's] sale offer, [Dwight] shall take whatever administrative actions are required to transfer [half] of his interest to [Linda] pursuant to the 20/20 [operating agreement].

In February 2013, Dwight filed a "Motion to Alter or Amend Decree of Dissolution" pursuant to Neb. Rev. Stat. § 25-2001 (Reissue 2008). In the motion, he alleged that none of the other partners had accepted his offer to sell the partnership interest. And he further alleged that he had attempted to transfer half of his interest to Linda, but that the partnership had refused to comply with his instructions. Finally, he contended that Linda was unwilling to permit him to make an additional offer to sell the interest. Thus, he requested that the district court amend the decree to permit him to make additional offers to sell the interest.

Linda, however, opposed Dwight's request to make an additional offer to sell the partnership interest. Linda asserted that under the dissolution decree, she had a vested interest in half of the partnership interest. And if Dwight was permitted to make an additional offer, he would be given the exclusive authority to dispose of her share of the interest. Linda further contended that she was not seeking to be a member of the partnership. She sought only to be recognized as an assignee of half of Dwight's interest. And she argued that a complaint could be filed against the partnership to enforce the assignment or that Dwight could remit to her half of the net income from the partnership interest every year. She therefore requested that the district court enforce the dissolution decree and overrule the motion to alter or amend.

The district court entered an order on May 15, 2013, overruling the motion. But in doing so, the court made several findings as to the effect of various provisions in the partnership's operating agreement. These findings included:

> The [operating agreement] does not require the existing members to accept [Linda] as a member. [Linda's] suggestion that [Dwight] assign [half] of his interest to [her] would be equally untenable. [Linda] would be entitled to a distribution of profits, but may not have the corresponding obligation in the event [the partnership] elected to make capital improvements to its office building, and [Dwight] would be responsible for any taxable gains, and benefit from any taxable losses. Further, the [o]perating [a]greement does not provide for an assignment or transfer of less than 100 [percent] of a member's interest.

The district court further concluded that Dwight had fully performed his obligations under the dissolution decree. He had offered the partnership interest for sale, and when the offer was rejected, he had attempted to transfer half of the interest to Linda. The court acknowledged that the result achieved was not one that the parties had contemplated at the time of the decree. Although the interest was a marital asset, the court had no value for the interest which it could divide between

the parties. It therefore overruled the motion to alter or amend the decree.

Linda filed a timely notice of appeal. We moved the case to our docket pursuant to statutory authority.[1]

ASSIGNMENTS OF ERROR

Linda assigns, restated, that the district court erred in its findings contained in the May 15, 2013, order, because (1) the court had no authority to interpret the dissolution decree or to address Dwight's compliance with the decree, (2) the findings were irrelevant to the relief requested by Dwight and denied Linda due process, (3) the findings unfairly prejudiced Linda's ability to enforce the decree in a future proceeding, (4) the findings constituted an abuse of discretion, and (5) the findings controverted the parties' stipulation which formed the basis for the decree.

STANDARD OF REVIEW

Dwight captioned his motion as seeking to alter or amend the dissolution decree, but he did not file his motion pursuant to Neb. Rev. Stat. § 25-1329 (Reissue 2008). That section permits a party to seek to alter or amend a judgment only within 10 days after the entry of the judgment.[2] And the motion was filed long after the 10-day period had expired. Thus, it could not function as a motion under § 25-1329.[3]

[1] Rather, Dwight expressly brought his motion pursuant to § 25-2001, which governs the vacation or modification of prior judgments or orders. We therefore consider Dwight's motion as a motion to modify the dissolution decree pursuant to § 25-2001. A postjudgment motion must be reviewed based on the relief sought by the motion, not based on the title of the motion.[4]

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

[2] See, § 25-1329; *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004).

[3] See *id.*

[4] *Central Neb. Pub. Power, supra* note 2.

[2,3] An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.[5] A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[6]

ANALYSIS

Linda does not contend that the district court erred in its ultimate action on Dwight's motion—which the court overruled. Rather, she attacks the court's findings. First, the court concluded that the partnership's operating agreement prohibited a partial assignment of a member's interest. Second, it determined that Dwight had fully complied with his obligations under the decree, even though he had failed to transfer half of the partnership interest to Linda.

We first address Linda's assertion that the district court lacked the authority to make findings regarding the assignability of the partnership interest and Dwight's compliance with the dissolution decree. We then turn to the alleged deprivation of due process. Finding this issue to be dispositive, we do not consider Linda's remaining assignments of error.

JURISDICTION

In her first assignment of error, Linda asserts that the district court lacked the authority to address any issues extraneous to Dwight's request for modification. And she specifically alleges that the court had no authority to determine Dwight's compliance with his obligations under the dissolution decree, because she did not request that he be held in contempt. Linda's arguments as to the court's authority go to its jurisdiction.

[4-7] We have defined subject matter jurisdiction as the power of a tribunal to hear and determine a case in the general

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[5] *Eihusen v. Eihusen*, 272 Neb. 462, 723 N.W.2d 60 (2006).

[6] *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008).

class or category to which the proceedings in question belong and to deal with the general subject matter involved.[7] Pursuant to Neb. Rev. Stat. § 42-351 (Reissue 2008), full and complete general jurisdiction over the entire marital relationship and all related matters is vested in the district court in which a petition for dissolution of marriage is properly filed.[8] And a district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all terms of approved property settlement agreements.[9] A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.[10]

The contested findings addressed the partnership interest divided in the decree. And it is clear that the district court possessed jurisdiction to enforce its disposition of the interest. Thus, we are not persuaded that the court lacked subject matter jurisdiction to consider the assignability of the partnership interest or Dwight's compliance with his obligations under the decree.

Due Process

Linda also asserts that the district court's findings in the May 15, 2013, order deprived her of due process. On this point, we agree. The sole issue presented by Dwight's motion was his request to modify the dissolution decree.

[8-10] We have explained that a pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases.[11] Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet.[12] And we have expressed that a

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[7] See *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013).

[8] See *Rozsnyai v. Svacek*, 272 Neb. 567, 723 N.W.2d 329 (2006).

[9] *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[10] *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003).

[11] See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[12] *Id.*

court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process.[13]

The pleadings did not present the assignability of the partnership interest and Dwight's compliance with the dissolution decree as issues for determination. Rather, in his motion, Dwight alleged that the partnership had refused his instructions to transfer half of his interest and he requested that the decree be modified to permit him to make additional offers for sale. Thus, the district court should have limited its determination to whether a basis existed to permit modification of the decree.

[11] And in this case, modification was appropriate only on the basis of fraud or gross inequity. The disposition of the partnership interest in the dissolution decree was the result of the parties' stipulation. We have explained that where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions will not thereafter be vacated or modified in the absence of fraud or gross inequity.[14]

The district court's consideration of matters irrelevant to the existence of fraud or gross inequity deprived Linda of procedural due process. Among other protections, procedural due process generally requires parties whose rights are to be affected by a proceeding to be given timely notice, which is reasonably calculated to inform the person concerning the subject and issues involved in the proceeding.[15]

[12] Linda was given no notice that the assignability of the partnership interest and Dwight's compliance with the dissolution decree were before the district court for determination. And these issues were extraneous to Dwight's request for modification. The court's findings should have been limited to the appropriateness of modification due to fraud or gross inequity.

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[13] See *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[14] See *Strunk, supra* note 9.

[15] See *Zahl, supra* note 13.

But the court made no findings on that issue. Consequently, we modify the court's May 15, 2013, order to strike the findings as surplusage. And we therefore have no need to consider Linda'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.[16]

CONCLUSION

Because the sole issue presented by Dwight's motion was modification of the dissolution decree, the district court should have limited its determination to the existence of fraud or gross inequity. Its consideration of matters extraneous to that issue deprived Linda of due process. We strike the extraneous findings in the court's May 15, 2013, order as surplusage. As so modified, we affirm the order overruling the motion to modify the decree.

AFFIRMED AS MODIFIED.

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[16] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

ALISON RICHARDS ON BEHALF OF MAKAYLA C., APPELLEE, V. DUSTIN MCCLURE, APPELLANT.

858 N.W.2d 841

Filed February 13, 2015. No. S-14-092.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **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. **Judgments: Injunction: Appeal and Error.** A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is reviewed de novo on the record.
4. **Criminal Law: Statutes.** Nebraska's stalking and harassment statutes are given an objective construction, and the victim's experience resulting from the perpetrator's conduct should be assessed on an objective basis.

5. **Criminal Law: Judgments.** Under Nebraska's stalking and harassment statutes, the inquiry is whether a reasonable victim would be seriously terrified, threatened, or intimidated by the perpetrator's conduct.
6. **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.

Appeal from the District Court for Scotts Bluff County: Leo Dobrovolny, Judge. Reversed and remanded with directions.

Lindsay R. Snyder, of Smith, Snyder & Petitt, a general partnership, for appellant.

No appearance for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

In December 2013, Alison Richards, the appellee, on behalf of her minor child Makayla C., filed a petition and affidavit for a harassment protection order against Makayla's boyfriend, Dustin McClure, the appellant, in the district court for Scotts Bluff County. An ex parte harassment protection order was filed by the district court on December 31, 2013, and McClure requested a show cause hearing. After the hearing, the district court filed its order on January 21, 2014, in which it ruled that the harassment protection order shall remain in effect for 1 year. McClure appeals. Because we determine that exhibits 1 and 6 were improperly received into evidence and that there was insufficient evidence to support the issuance of the harassment protection order, we reverse, and remand with directions to vacate the harassment protection order.

STATEMENT OF FACTS

On December 30, 2013, Richards, on behalf of her minor child Makayla, filed a petition and affidavit (hereinafter the pleading) to obtain a harassment protection order against McClure. The pleading alleged that Makayla was 17 years old. Cell phone records listing dates and times of text messages between McClure and Makayla from December 24 through

28 were attached to the pleading. Richards alleged that the cell phone records list shows "the obsessiveness of contacts" between McClure and Makayla. Also attached to the pleading are printed screenshots of text messages between McClure and Makayla, which the pleading alleged show "the content of each text" in the cell phone records list.

On December 31, 2013, the court filed an ex parte harassment protection order against McClure. On January 2, 2014, McClure requested a hearing.

An evidentiary hearing was held on January 15, 2014. At the hearing, Richards, on behalf of Makayla, was present but without counsel. Richards made numerous arguments as to why the harassment protection order should be entered, but she was not called as a witness, nor were her assertions made under oath. Makayla was also present at the hearing, but she did not testify.

The court asked Richards if she had evidence to present, and Richards stated that she wanted to present evidence of the cell phone records list and screenshots of the text messages that were attached to the pleading. The court asked if she had copies of the documents with her to offer at the hearing, and Richards responded that she did not.

Richards stated that she obtained the cell phone records list through her online account with the telephone company and that she pays for Makayla's cell phone. To get the pictures of the actual text messages, Richards stated that she took "screenshot[s] on [Makayla's] phone," which "shows the actual screen of the text messages," and she then e-mailed those pictures to herself and printed them out.

McClure's counsel objected to the offer of the cell phone records list and the screenshots of the text messages on the bases that they were not properly marked and presented as evidence at the hearing and lack of foundation.

The court made a ruling conditionally receiving the list and messages and stated to Richards:

> I will make a few concessions for you because you are not an attorney, but not many. But, I will consider the attachments to the petition . . . .
>
> . . . .

> . . . I will consider that as Exhibit No. 1. After the hearing, ma'am, you will have to make arrangements to get these documents copied —
>
> . . . .
>
> . . . so we have a proper record. And, you can't bring your other copies because what we are using is these ones in the court file. So you will have to make arrangements with the Clerk of [the] Court to actually copy these ones that are in here.

McClure contends that Richards did not follow through on the court's direction regarding exhibit 1. Exhibit 1 is not included in the bill of exceptions.

Following discussion regarding exhibit 1, Richards stated that she did not have any witnesses to call to testify. McClure moved for a directed verdict, which the district court denied.

McClure called his grandmother as a witness. She testified that Makayla had stated to her that Makayla did not want the protection order in place "[b]ecause [Makayla] wants a relationship with [McClure] and nothing in the petition or harassment protection order is there to harm her."

McClure also testified in his own behalf. McClure testified that at the time of the hearing, he was 20 years old and Makayla was 17 years old. He testified that Makayla was his girlfriend and that they had been in a relationship "[o]ff and on" for 3 years. McClure testified that he never intentionally tried to threaten, intimidate, or scare Makayla by the text messages. He generally testified that he wanted the court to set aside the protection order and that it was his understanding Makayla did not want the protection order. In response to the court's questioning, McClure further testified that the name "Brian Bell" shown at the top of the screenshots of the text messages was a "fake name" that Makayla had programmed into her cell phone in lieu of McClure's name.

On rebuttal, Richards offered five exhibits, numbered 2 through 6, and McClure objected to all five exhibits. The court refused to receive four of the exhibits, numbered 2 through 5, but it received exhibit 6.

Richards described exhibit 6 as a letter from an anonymous source which she had received regarding McClure and

Makayla's relationship when Makayla was 15 years old. The undated letter stated:

> Dear Ms. Mitchell:
>
> Disregard this letter if your daughter is not Makayla . . . .
>
> I am a concerned adult and I am choosing to remain anonymous. I am a parent though.
>
> I am concerned about the relationship your daughter is in with . . . McClure.
>
> He speaks of her in derogatory ways around his peers, mostly about the sexual activity that he and your daughter share regularly. . . .
>
> You can count all of this as hearsay or you can take this information and protect your daughter. . . .
>
> Concerned.

McClure's counsel objected to exhibit 6 and stated:

> And, Exhibit 6, this is an anonymous letter to Ms. Mitchell. I don't know who Ms. Mitchell is. I'm aware that the parties are . . . Richards and Makayla . . . . Nobody has signed this. I object on authentication, I object on foundation. Nobody is here to say where it came from and, additionally, it's hearsay. It has no date on it. So I'm, also, going to object on relevancy.

In receiving exhibit 6, the court stated:

> Exhibit No. 6 is some sort of communication, an anonymous communication. I'm going to receive it. It's not hearsay because I don't think anything in here to be an assertion. It's just simply something that . . . Richards indicated that she received which prompted her to do apparently what she is doing now. So I don't think it is an assertion, just simply something that she received.

Following the evidentiary hearing, the district court filed its order on January 21, 2014, in which it continued the harassment protection order and put it in place for 1 year. In its order, the court determined that a parent can bring an action on behalf of his or her minor child pursuant to Neb. Rev. Stat. § 25-307 (Reissue 2008). The court stated that "[t]he issue here is whether a parent of a minor can secure a harassment protection order against someone when the parent

considers the conduct harassment, but clearly the minor does not." The court determined that the "evidence shows willing two-way conversation via text messaging between" McClure and Makayla and further stated:

> There is no evidence that Makayla is seriously terrified, threatened, or intimidated. She is a willing and equal participant in the communications which make up the evidence in the case. Nothing in [McClure's] testimony, or his grandmother's, indicates Makayla is participating in the communications due to threat, intimidation, or some form of coercion.

Without citing to any authority, the court then determined that "a parent may bring a harassment protection order action against another when the parent is acting in the best interests of their [sic] child, regardless of whether the child may consider themselves [sic] harassed." The court found that McClure's conduct was "seriously threatening." The court stated that there is a 3-year age difference between McClure and Makayla, that the relationship began when Makayla was 14 years old, that McClure and Makayla's relationship has been forbidden by Richards, that McClure encourages Makayla to use marijuana with him, and that the nature of their relationship appears to be sexual. The court stated that Richards "has good reason to be concerned for her daughter's well-being, and a reasonable parent would consider [McClure] to be a threat to Makayla's safety and proper upbringing." The district court ordered that the harassment protection order remain in effect for a period of 1 year.

McClure appeals.

ASSIGNMENTS OF ERROR

McClure claims that the district court erred when it (1) received exhibit 1—cell phone records list and screenshots of text messages—into evidence because, inter alia, the exhibit was never made part of the record; (2) received exhibit 6—anonymous letter—into evidence based on various objections; (3) continued the harassment protection order against McClure for a period of 1 year because there was insufficient evidence; and (4) entered the harassment protection order against

McClure on the basis of Richards' concern for Makayla rather than the impact on the alleged victim, Makayla.

STANDARDS OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014). 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. *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

[3] A protection order is analogous to an injunction. *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). Accordingly, the grant or denial of a protection order is reviewed de novo on the record. *Id.*

ANALYSIS

McClure claims that due to a lack of evidence, the district court erred when it continued the harassment protection order against him. He claims in particular that the court erred when it admitted exhibits 1 and 6 into evidence. We agree that the court erred when it admitted exhibits 1 and 6 into evidence, and upon our de novo review of the record, we determine that there was insufficient evidence to support the issuance of the harassment protection order.

The harassment protection order in this case was entered on the basis of Neb. Rev. Stat. § 28-311.09 (Cum. Supp. 2014), the purpose and terms of which are contained in Neb. Rev. Stat. § 28-311.02 (Reissue 2008). Section 28-311.02 provides in relevant part:

> (1) It is the intent of the Legislature to enact laws dealing with stalking offenses which will protect victims from being willfully harassed, intentionally terrified, threatened, or intimidated by individuals who intentionally follow, detain, stalk, or harass them or impose any

restraint on their personal liberty and which will not prohibit constitutionally protected activities.

(2) For purposes of sections 28-311.02 to 28-311.05, 28-311.09, and 28-311.10:

(a) Harass means to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose;

(b) Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including a series of acts following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person.

Regarding issuance of a harassment protection order, § 28-311.09 provides in relevant part:

(1) Any victim who has been harassed as defined by section 28-311.02 may file a petition and affidavit for a harassment protection order . . . . Upon the filing of such a petition and affidavit in support thereof, the court may issue a harassment protection order without bond enjoining the respondent from (a) imposing any restraint upon the person or liberty of the petitioner, (b) harassing, threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of the petitioner, or (c) telephoning, contacting, or otherwise communicating with the petitioner.

(2) The petition for a harassment protection order shall state the events and dates of acts constituting the alleged harassment.

. . . .

(4) A petition for a harassment protection order filed pursuant to subsection (1) of this section may not be withdrawn except upon order of the court. An order issued pursuant to subsection (1) of this section shall specify that it is effective for a period of one year unless otherwise dismissed or modified by the court. Any person who knowingly violates an order issued pursuant to

> subsection (1) of this section after service or notice as described in subdivision (8)(b) of this section shall be guilty of a Class II misdemeanor.
>
> . . . .
>
> (7) Any order issued under subsection (1) of this section may be issued ex parte without notice to the respondent if it reasonably appears from the specific facts shown by affidavit of the petitioner that irreparable harm, loss, or damage will result before the matter can be heard on notice. . . . If the respondent wishes to appear and show cause why the order should not remain in effect for a period of one year, he or she shall affix his or her current address, telephone number, and signature to the form and return it to the clerk of the district court within five days after service upon him or her. Upon receipt of the request for a show-cause hearing, the court shall immediately schedule a show-cause hearing to be held within thirty days after the receipt of the request for a show-cause hearing and shall notify the petitioner and respondent of the hearing date.

[4,5] Application of the law governing harassment protection orders has been summarized as follows:

> Nebraska's stalking and harassment statutes are given an objective construction and . . . the victim's experience resulting from the perpetrator's conduct should be assessed on an objective basis. *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007). Thus, the inquiry is whether a reasonable [victim] would be seriously terrified, threatened, or intimidated by the perpetrator's conduct. *Id.*

Glantz v. Daniel, 21 Neb. App. 89, 101, 837 N.W.2d 563, 572-73 (2013).

We have recognized that the procedures at a show cause hearing might be less elaborate than those commonly used at civil trials, but we have concluded that "at a minimum, testimony must be under oath and documents must be admitted into evidence before being considered." *Mahmood v. Mahmud*, 279 Neb. 390, 398, 778 N.W.2d 426, 433 (2010). Where the evidence is insufficient, the appellate courts have

reversed and vacated harassment protection orders issued by lower courts. See, e.g., *Mahmood v. Mahmud, supra*; *Glantz v. Daniel, supra*; *Sherman v. Sherman*, 18 Neb. App. 342, 781 N.W.2d 615 (2010).

In this case, McClure contends that exhibits 1 and 6 were improperly admitted into evidence and that in the absence of these documents, the evidence is insufficient. We agree.

Exhibit 1 was described as consisting of cell phone records listing the dates and times of text messages between McClure and Makayla from December 24 through 28, 2013, and printed-out screenshots of the contents of those text messages. The records list and screenshots had initially been attached to the pleading filed in this case.

At the show cause hearing, in response to the district court's questioning, Richards stated that she wished to present the records list and screenshots as evidence but that she did not have those documents to offer as exhibits at the hearing. The court conditionally received the records list and screenshots, denominated this group as "exhibit 1," and directed Richards as follows: "After the hearing, ma'am, you will have to make arrangements to get these documents copied . . . so we have a proper record."

Exhibit 1 is not included in the bill of exceptions; McClure asserts that Richards failed to copy and submit the documents. The pleading was not received as evidence at the hearing. And, in any event, "the allegations of a petition require proof by evidence incorporated in the bill of exceptions." *Mahmood v. Mahmud*, 279 Neb. at 398, 778 N.W.2d at 432. We have stated in particular that documents must be properly admitted into evidence at contested factual hearings in protection order proceedings to be considered by the trial court. See, *id.*; *Sherman v. Sherman, supra*.

[6] Upon appeal, 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. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). Based on the facts that the court's receipt of exhibit 1 was conditioned on Richards' copying the documents and submitting them for inclusion in the record and

that the exhibit was not made part of the bill of exceptions, it is not available for consideration on appeal.

Regarding exhibit 6, after McClure had rested, Richards stated that she wished to offer exhibit 6. In her offer of exhibit 6, Richards described the exhibit as an undated letter from an anonymous source which she had received regarding McClure and Makayla's relationship when Makayla was 15 years old. McClure objected to exhibit 6 on the bases of authentication, foundation, inadmissible hearsay, and relevance. McClure's objection to the receipt of exhibit 6, based on lack of authentication, should have been sustained, and the court erred when it overruled the objection and received exhibit 6.

With respect to authentication, Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901(1) (Reissue 2008), provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The letter was not self-authenticating. See Neb. Evid. R. 902, Neb. Rev. Stat. § 27-902 (Reissue 2008). But we have recognized that authentication of letters may be provided by testimony. See *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992). See, also, *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007). See, also, § 27-901(2)(a). To properly authenticate a letter, the witness must provide personal knowledge regarding the important facts surrounding the letter. See *State v. Timmerman, supra*. And "[a]lthough a document must generally be authenticated to be admissible in evidence, its mere authentication does not invariably mean that it is admissible." 29A Am. Jur. 2d Evidence § 1048 at 389 (2008). That is, the document, once authenticated, remains subject to meeting the rules of evidence regarding admissibility. See *id*.

Exhibit 6 was an undated letter addressed to a "Ms. Mitchell" from an anonymous source. The important facts missing from the face of the letter which needed to be supplied by testimony included the date the letter was written, the author of the letter, and an explanation of the recipient "Ms. Mitchell." Richards did not testify under oath regarding exhibit 6, and even a generous reading of her unsworn

offer does not satisfactorily answer these questions surrounding the letter. Without such authentication presented under oath, exhibit 6 was not properly authenticated, and therefore, exhibit 6 was not admissible.

Viewing the evidence as a whole, we note that neither Richards nor the alleged victim, Makayla, testified at the hearing in support of the issuance of the harassment protection order. Compare *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014) (involving case where victim testified at show cause hearing on protection order). McClure presented evidence against the issuance of the harassment protection order. As explained above, exhibits 1 and 6 were not properly in evidence, and there were no other exhibits received into evidence on Makayla's behalf. Upon our de novo review of the record, we determine there was insufficient evidence properly considered upon which the issuance of a harassment protection order could be based. The state of the record is similar to the situation in *Mahmood v. Mahmud*, 279 Neb. 390, 398, 778 N.W.2d 426, 433 (2010), wherein we stated: "In light of the fact that the court had no evidence upon which it could base its findings [supporting issuance of the order], we find in our de novo review that the evidence is insufficient to support the protection order."

CONCLUSION

Because there was insufficient evidence, we reverse, and remand with directions to vacate the harassment protection order.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

JAMES L. JOHNSON, APPELLANT, V. BRIAN GAGE, WARDEN, TECUMSEH STATE CORRECTIONAL INSTITUTION, AND ROBERT HOUSTON, DIRECTOR, DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEES.

858 N.W.2d 837

Filed February 13, 2015. No. S-14-166.

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. **Habeas Corpus.** A writ of habeas corpus is a statutory remedy in Nebraska that is available to those persons falling within the criteria established by Neb. Rev. Stat. § 29-2801 (Reissue 2008), namely, those who are detained without having been convicted of a crime and committed for the same, those who are unlawfully deprived of their liberty, or those who are detained without any legal authority.
3. ____. Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.
4. ____. A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
5. ____. A writ of habeas corpus is available only when the release of the petitioner from the deprivation of liberty being attacked will follow as a result of a decision in the petitioner's favor.
6. **Habeas Corpus: Proof.** Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.

Appeal from the District Court for Johnson County: DANIEL E. BRYAN, JR., Judge. Affirmed.

James L. Johnson, pro se.

Jon Bruning, Attorney General, and Blake E. Johnson for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

James L. Johnson appeals the order of the district court for Johnson County which denied and dismissed his petition for a writ of habeas corpus filed pursuant to Neb. Rev. Stat. § 29-2801 (Reissue 2008). In this action, Johnson asked

the district court to rule on whether, in the future, he would be entitled to a credit against his Nebraska sentences when he resumed serving those sentences after completion of a California sentence. Because a ruling in Johnson's favor would not result in his release from detention, we conclude the writ is not available to Johnson in this action. We affirm the district court's denial and dismissal of Johnson's petition for a writ of habeas corpus.

STATEMENT OF FACTS

In 1979, Johnson was convicted in the district court for Douglas County of uttering a forged instrument and, in a separate case, was convicted of second degree forgery and was found to be a habitual criminal. For the two convictions, the district court sentenced Johnson to imprisonment for a total of 18 to 25 years. Johnson began serving his sentences in a Nebraska prison, but he escaped from the prison in 1987.

Several years later, Johnson was arrested in California on murder charges. He was convicted of first degree murder in a California court, and in 1997, the California court sentenced Johnson to life in prison without the possibility of parole. Johnson was imprisoned in California until 2006, when he requested and was granted a voluntary transfer to the Nebraska prison system pursuant to the Interstate Corrections Compact, codified at Neb. Rev. Stat. § 29-3401 (Reissue 2008). The reason for the transfer was that he had family living in Nebraska. He was received into the Nebraska prison system on February 16, 2006.

Johnson is imprisoned at the Tecumseh State Correctional Institution. In April 2013, he filed a pro se petition for a writ of habeas corpus in the district court for Johnson County against certain officials of the Nebraska Department of Correctional Services. In the allegations in the petition, Johnson expressed his belief that when he was transferred to Nebraska in 2006, he resumed serving his sentences for the 1979 Nebraska convictions, and he claimed that, given the passage of time, the maximum term for those sentences had been completed on January 16, 2011. He requested a determination that he was entitled to a "credit" against the Nebraska sentences.

A hearing was held, and the district court denied and dismissed Johnson's petition on February 5, 2014. The court concluded that under the Interstate Corrections Compact, the receiving state acts solely as a holding agent for the sending state. The court cited *Falkner v. Neb. Board of Parole*, 213 Neb. 474, 330 N.W.2d 141 (1983), as controlling. In *Falkner*, this court held that a Nebraska parole violator who was serving a sentence in Iowa for an offense subsequent to the Nebraska conviction did not recommence serving his Nebraska sentence until he had been released from custody in Iowa and arrested for the Nebraska parole violation. Johnson contended that *Falkner* did not control this case, because he was not a parole violator and instead was a prison escapee. The court rejected Johnson's argument.

The court concluded that Nebraska was holding Johnson as an agent for California; that he had been serving only his California sentence, albeit in Nebraska; and that he would not begin serving his Nebraska sentences again until after he had been released from his California sentence and arrested for custody by Nebraska. In its order denying the writ, the court noted that at the hearing, Johnson agreed that the court did not have "jurisdiction to rule on the California sentence," which under the court's analysis was the only sentence Johnson was currently serving.

Johnson appeals.

ASSIGNMENT OF ERROR

Johnson claims that the district court erred when it denied and dismissed his petition for a writ of habeas corpus.

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. *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009).

ANALYSIS

Johnson petitioned for a writ of habeas corpus pursuant to § 29-2801, which provides as follows:

> If any person, except persons convicted of some crime or offense for which they stand committed, or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment, now is or shall be confined in any jail of this state, or shall be unlawfully deprived of his or her liberty, and shall make application, either by him or herself or by any person on his or her behalf, to any one of the judges of the district court, or to any county judge, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person allowing such writ is a judge, directed to the proper officer, person or persons who detains such prisoner.

[2] In *Glantz v. Hopkins*, 261 Neb. 495, 624 N.W.2d 9 (2001), *disapproved on other grounds, State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009), we described a writ of habeas corpus as a statutory remedy in Nebraska that is available to those persons falling within the criteria established by § 29-2801, namely, those who are detained without having been convicted of a crime and committed for the same, those who are unlawfully deprived of their liberty, or those who are detained without any legal authority.

[3-6] Elsewhere, we have explained the availability of habeas corpus as follows:

> Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained. A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty. A writ is available only when the release of the petitioner from the deprivation of liberty

> being attacked will follow as a result of a decision in the petitioner's favor. Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.

Tyler v. Houston, 273 Neb. 100, 104, 728 N.W.2d 549, 553 (2007).

The record in this case shows that in his petition, Johnson claimed he was entitled to a credit against his Nebraska sentences for the time that he had spent in the Nebraska prison since 2006, and he sought a ruling stating that he would be entitled to a credit in a future calculation of his Nebraska sentences. At the hearing, Johnson acknowledged, "I still have to do my California sentence. . . . I know they're not going to release me." Johnson did not dispute that he was legally detained on his California life sentence and that a favorable result in this case would not result in his release.

In *Glantz, supra*, we described the limited availability of a writ of habeas corpus in Nebraska as follows:

> Section 29-2801 speaks in terms of present detention. We do not read into this section the possibility of future illegal detention as the basis for a writ of habeas corpus. Such a reading would be inconsistent with the nature of a writ of habeas corpus. "The writ is generally available only when the release of the prisoner from the detention he attacks will follow as a result of a decision in his favor." 39 Am. Jur. 2d *Habeas Corpus* § 13 at 221-22 (1999). It is not within the province of this court to expand the availability of this statutory remedy, and we leave that to the Legislature.

261 Neb. at 499-500, 624 N.W.2d at 12. We concluded in *Glantz* that because the relief sought by the petitioner would not result in his release, a writ of habeas corpus was not available.

Similarly, in the present case, even if the court agreed with Johnson's claim that he had completed his Nebraska sentences, Johnson would not be entitled to immediate release, because, as he acknowledged, he would still be legally detained pursuant to his California life sentence. The relief Johnson sought was more in the way of a declaration that at some point in

the future, after he was no longer legally detained on the California sentence, it would be illegal to detain him on the Nebraska sentences. Such a "possibility of future illegal detention" is not the basis for a writ of habeas corpus. See *id*. Because a writ of habeas corpus was not available to Johnson based on the claims he made in his petition and his position at the hearing, we agree with the district court that he was not entitled to habeas corpus relief.

CONCLUSION

We conclude that the district court did not err when it concluded that Johnson was not entitled to a writ of habeas corpus. We therefore affirm the district court's denial and dismissal of Johnson's petition for a writ of habeas corpus.

AFFIRMED.

WRIGHT, J., participating on briefs.

STACY M., APPELLEE, V.
JASON M., APPELLANT.
858 N.W.2d 852

Filed February 13, 2015. No. S-14-214.

1. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
2. **Parent and Child: Paternity.** A finding that an individual is not a biological father is not the equivalent of a finding that an individual is not the legal father.
3. **Parent and Child: Paternity: Presumptions: Evidence.** Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born during wedlock is presumed. This presumption may be rebutted only by clear, satisfactory, and convincing evidence.
4. **Jurisdiction: Divorce: Paternity.** The district court in a dissolution proceeding has jurisdiction to resolve a disputed issue of paternity.
5. **Divorce: Paternity: Child Support.** Even if paternity is not directly placed in issue or litigated by the parties to a dissolution proceeding, any dissolution decree which orders child support implicitly makes a final determination of paternity.
6. **Divorce: Paternity: Presumptions: Evidence.** When the parties fail to submit evidence at the dissolution proceeding rebutting the presumption of paternity, the dissolution court can find paternity based on the presumption alone.

7. **Divorce: Paternity: Child Support.** A dissolution decree which orders child support is a legal determination of paternity.
8. **Divorce: Paternity: Child Support: Res Judicata.** A dissolution decree that orders child support is res judicata on the issue of paternity.
9. **Paternity: Evidence: Res Judicata.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father.
10. **Parent and Child: Paternity.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) gives the court discretion to determine whether disestablishment of paternity is appropriate in light of both the adjudicated father's interests and the best interests of the child.
11. **Parent and Child: Due Process.** Both parents and their children have cognizable substantive due process rights to the parent-child relationship. These rights protect the parent's right to the companionship, care, custody, and management of his or her child, and they also protect the child's reciprocal right to be raised and nurtured by a biological or adoptive parent.
12. **Parent and Child: Child Support.** Support of one's children is a fundamental obligation which takes precedence over almost everything else.
13. **Divorce: Child Support: Public Policy.** The public policy of this state provides that parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce.
14. **Parent and Child: Child Support.** The obligation of support is a duty of a legally determined parent.

Appeal from the District Court for Adams County: TERRI S. HARDER, Judge. Affirmed.

John B. McDermott, of Shamberg, Wolf, McDermott & Depue, for appellant.

No appearance for appellee.

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

STEPHAN, J.

After the dissolution of his marriage became final, Jason M. discovered through genetic testing that he was not the biological father of a child born during the marriage. He sought equitable relief in the form of an order suspending his child support obligation without terminating the parental relationship. He now appeals from an order denying his requested relief. We affirm.

FACTS

Jason and Stacy M.'s marriage was dissolved by a decree entered by the district court for Adams County in March 2011. Although the decree itself is not included in the record, other evidence establishes that it required Jason to pay child support for three minor children. The oldest child is now of age, so Jason is currently paying approximately $600 per month in child support for the two younger children born during the marriage.

Jason suspected during the marriage that he was not the biological father of the youngest child, but he did not raise the issue of paternity in the dissolution proceedings. In 2013, Jason obtained genetic testing which established he was not the father of the child. Through counsel, he subsequently filed a pleading entitled "Action in Equity to Suspend Child Support." He alleged Stacy knew the identity of the youngest child's biological father but refused to obtain child support from him. He asserted the appropriate "equitable remedy" was to suspend his obligation to pay child support for the youngest child.

Stacy filed a pro se responsive pleading in which she alleged she did not know the identity of the child's biological father, because she was "taken advantage of and [had] no knowledge of by whom." She further alleged that she always assumed Jason was the child's father and that Jason "is the only father [the child] knows and will ever know."

After conducting an initial evidentiary hearing, the district court appointed a guardian ad litem for the child pursuant to Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) and then conducted a second hearing at which the guardian ad litem participated. At the second hearing, Jason's counsel objected to the appointment of the guardian ad litem, "because we're not proceeding under 43-1412.01. And our action was an action in equity just to suspend the child support."

Jason and Stacy testified at both hearings. Jason acknowledged that since the dissolution of the marriage, he has always exercised his visitation rights with the child and enjoys an "[e]xcellent" relationship with him. They celebrate holidays together, attend church together, go hunting and fishing, and

enjoy other sporting activities. He wants the relationship to continue. His position in this case is aptly summarized by the following excerpt from his testimony:

> [J]ust for the record, I would like you, the judge, to know and Stacy to know that I would continue and will always love [the child] as my son until I die. He is considered my son. I just feel that it's not my responsibility to pay child support for [a child] that is not biologically mine.

Jason testified that his employment and income have not changed substantially since the decree was entered.

Stacy testified she did not know that Jason was not the biological father of the child until learning of the genetic testing results. She testified that at the relevant time, she was drinking at a bar with friends and thought she had been "drugged" and then "taken advantage of sexually" by a man whose identity she did not know. She did not report this incident because she was ashamed. She has never attempted to determine the identity of the child's biological father. She agreed that Jason had a very good relationship with the child which she wants to continue. She stated that the child "thinks the world" of Jason and that she has not told the child that Jason is not his biological father, because "it would crush him." Stacy testified that she used the child support paid by Jason to support the child and that termination of the child support obligation or the paternal relationship would not be in the child's best interests.

The district court denied the relief sought by Jason. It reasoned that a child born during wedlock is presumed to be the legitimate offspring of the parties and that while § 43-1412.01 afforded Jason a remedy to disestablish his paternity, he had not sought relief under that statute. The court found that Jason "wants the rights of a parent, but does not want the majority of the financial responsibility (child support) of a parent." Finding no Nebraska case that would support the requested relief, the court declined to exercise its equitable power to grant relief.

Jason timely appealed, and we moved this case to our docket pursuant to our statutory authority to regulate the caseloads

of the appellate courts of this state.[1] We note that Stacy did not file a brief or otherwise appear in this appeal.

ASSIGNMENT OF ERROR

Jason assigns the district court abused its discretion by failing to suspend his child support obligation.

STANDARD OF REVIEW

[1] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[2]

ANALYSIS

[2,3] There is compelling evidence that Jason is not the biological father of the child in question. But as we have recently noted, a finding that an individual is not a biological father is not the equivalent of a finding that an individual is not the legal father.[3] Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born during wedlock is presumed.[4] This presumption may be rebutted only by clear, satisfactory, and convincing evidence.[5] The testimony or declaration of a husband or wife is not competent to challenge the paternity of a child.[6]

[4-8] The parentage of a child born during a marriage is traditionally contested, if at all, in dissolution proceedings.[7] The

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

[2] *Floral Lawns Memorial Gardens Assn. v. Becker*, 284 Neb. 532, 822 N.W.2d 692 (2012); *Newman v. Liebig*, 282 Neb. 609, 810 N.W.2d 408 (2011); *County of Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456 (2009).

[3] *State on behalf of B.M. v. Brian F.*, 288 Neb. 106, 846 N.W.2d 257 (2014).

[4] *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012). See *Helter v. Williamson*, 239 Neb. 741, 478 N.W.2d 6 (1991).

[5] *Id.*

[6] *Id.*

[7] *Alisha C., supra* note 4. See *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974).

marital presumption of paternity can be rebutted at that time.[8] The district court in a dissolution proceeding has jurisdiction to resolve a disputed issue of paternity.[9] Even if paternity is not directly placed in issue or litigated by the parties to a dissolution proceeding, any dissolution decree which orders child support implicitly makes a final determination of paternity.[10] When the parties fail to submit evidence at the dissolution proceeding rebutting the presumption of paternity, the dissolution court can find paternity based on the presumption alone.[11] The trial court necessarily makes such a finding when it orders child support, because the trial court could not order child support without finding that the presumed father was the father of the child.[12] Thus, a dissolution decree which orders child support is a legal determination of paternity.[13] As a result, any dissolution decree that orders child support is res judicata on the issue of paternity.[14] Under common law, the issue cannot be relitigated except under very limited circumstances through a motion to vacate or modify the decree.[15]

[9,10] However, in 2008, the Legislature enacted § 43-1412.01, which overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father.[16] Section 43-1412.01 gives the court discretion to determine whether disestablishment of paternity is appropriate

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[8] *Id.*

[9] *Alisha C., supra* note 4; *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

[10] *Alisha C., supra* note 4. See *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994) (superseded by statute on other grounds as stated in *Alisha C., supra* note 4).

[11] *Id.*

[12] *Alisha C., supra* note 4; *DeVaux, supra* note 10.

[13] *Alisha C., supra* note 4. See *Snodgrass v. Snodgrass*, 241 Neb. 43, 486 N.W.2d 215 (1992).

[14] *Alisha C., supra* note 4. See *DeVaux, supra* note 10.

[15] *Id.*

[16] *Alisha C., supra* note 4.

in light of both the adjudicated father's interests and the best interests of the child.[17]

During both the proceedings below and in this appeal, Jason unequivocally stated he is *not* seeking disestablishment of paternity pursuant to § 43-1412.01. Despite this, he argues that the language of the statute supports the equitable remedy he pursues by providing "a court with the authority to suspend a child support order without necessarily disestablishing paternity."[18] The first sentence of § 43.1412.01 authorizes an individual to ask a court to "set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity" based on the results of genetic testing. Jason argues that the use of the word "or" distinguishes an "obligation to pay child support" from a "legal determination of paternity," thus authorizing a court to suspend the former without affecting the latter.

But this argument ignores the use of the word "other" in the same sentence. As we have noted, a decree of dissolution which orders a man to pay child support is an implicit determination of paternity, even if the issue of paternity was not contested. Clearly, this sentence of the statute lists an "obligation to pay child support" as one of several forms of a "legal determination of paternity" which may be challenged through genetic test results. This plain meaning is underscored by the fourth sentence of the statute, which provides: "A court that sets aside a determination of paternity in accordance with this section shall order completion of a new birth record and may order any other appropriate relief, including setting aside an obligation to pay child support."[19] In short, the language of the statute does not provide any support for the equitable relief which Jason seeks. Rather, it permits but does not require a court to set aside a child support obligation when paternity has been disestablished. It does not authorize any change in child support without such disestablishment.

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[17] *Id.*

[18] Brief for appellant at 8.

[19] § 43-1412.01.

[11-14] Section 43-1412.01 provides Jason with a remedy at law to seek disestablishment of paternity and elimination of his child support obligation. But he has elected not to utilize that remedy, because he does not wish to disestablish paternity and thereby terminate the parental relationship. It is commendable that Jason has maintained a loving relationship with the child after learning that he is not the biological father. However, the parental relationship is not one which can be bifurcated in the manner Jason urges. Both parents and their children have cognizable substantive due process rights to the parent-child relationship.[20] These rights protect the parent's right to the companionship, care, custody, and management of his or her child, and they also protect the child's reciprocal right to be raised and nurtured by a biological or adoptive parent.[21] Support of one's children is a fundamental obligation which takes precedence over almost everything else.[22] One aspect of support includes the regular monthly payment of child support established by the guidelines.[23] The public policy of this state provides that parents have a duty to support their minor children until they reach majority or are emancipated, and a parent is not relieved of this duty by virtue of divorce.[24] The obligation of support is a duty of a legally determined parent.

Jason is the legally determined parent of this child, and he has not sought to set aside that determination despite the existence of a statutory remedy and apparent factual grounds to do so. We are not persuaded by his argument that suspension of his child support obligation is equitable or necessary to compel Stacy to seek support from the child's biological father. The district court did not err in denying the requested relief.

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[20] *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

[21] *Id.*

[22] *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

[23] *Id.*

[24] *Henderson v. Henderson*, 264 Neb. 916, 653 N.W.2d 226 (2002).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
TERRELL T. THORPE, APPELLANT.
858 N.W.2d 880

Filed February 13, 2015. No. S-14-495.

1. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
5. ____: ____. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
6. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
7. **Postconviction: Collateral Attack: Appeal and Error.** A defendant cannot use a motion for postconviction relief to collaterally attack issues that were decided against him or her on direct appeal.
8. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.
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.

11. ____: ____: ____. 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 petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.
12. **Proof: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
13. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
14. **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.
15. **Criminal Law: Aiding and Abetting.** Aiding and abetting is simply another basis for holding an individual liable for the underlying crime.
16. ____: ____. By its terms, Neb. Rev. Stat. § 28-206 (Reissue 2008) provides that a person who aids or abets may be prosecuted and punished as if he or she were the principal offender.
17. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Terrell T. Thorpe, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

Terrell T. Thorpe appeals the order of the district court which overruled his amended motion for postconviction relief without an evidentiary hearing. We affirm the judgment of the district court.

II. SCOPE OF REVIEW

[1,2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Phelps*, 286

Neb. 89, 834 N.W.2d 786 (2013). When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion. *Id*.

[3-5] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id*. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *Robinson, supra*.

III. FACTS

1. Trial Proceedings and Direct Appeal

After a jury trial, Thorpe was convicted of two counts of first degree murder and two counts of use of a weapon to commit a felony for his involvement with the shooting deaths of Kevin Pierce and Victor Ford. Thorpe was sentenced to life imprisonment without parole on each count of first degree murder and 30 to 40 years' imprisonment and 40 to 50 years' imprisonment on the counts of use of a weapon to commit a felony. All four of his sentences were ordered to be served consecutively.

On direct appeal, we affirmed Thorpe's convictions and sentences on the weapons charges and his convictions on the murder charges. See *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). But we vacated Thorpe's sentences of life imprisonment without parole for the murder charges, because life imprisonment without parole was not a valid sentence for first degree murder in Nebraska. See *id*. We remanded the cause with directions to "sentence Thorpe to life imprisonment on both murder charges." See *id*. at 27, 783 N.W.2d at 763.

Thorpe was represented by the same attorney at trial and on direct appeal.

2. Postconviction Proceedings

In December 2011, Thorpe filed an amended pro se motion for postconviction relief. He claimed ineffective assistance of trial counsel, prosecutorial misconduct, convictions based on insufficient evidence, abuse of discretion by the trial court, and ineffective assistance of appellate counsel.

Thorpe alleged his trial counsel was ineffective for (1) not obtaining an independent forensic pathologist expert to rebut the testimony of the State's forensic pathologist expert, (2) not requesting a scientific evaluation of all latent fingerprints, (3) not requesting independent forensic testing of the physical evidence, (4) not requesting independent DNA testing of three pieces of physical evidence, (5) not interviewing and investigating certain named individuals who might have been called as witnesses, (6) not investigating the possibility that someone other than Thorpe committed the murders, (7) not objecting to or moving to quash counts I and III of the second amended information, and (8) not objecting to jury instructions Nos. 4, 6, and 14.

Thorpe alleged that certain comments made by the State during opening and closing arguments amounted to prosecutorial misconduct. He claimed that his convictions were based on insufficient evidence, because the State "failed to prove that the Manner of Deaths were Certified as Homicides." And he claimed that the trial court abused its discretion in instructing the jury and in not rendering a "judgment of guilt." Finally, Thorpe alleged that his appellate counsel was ineffective for failing to raise on direct appeal the aforementioned claims of ineffective assistance of trial counsel, prosecutorial misconduct, insufficient evidence, and abuse of discretion by the trial court.

On May 15, 2013, the State moved to dismiss Thorpe's amended motion without an evidentiary hearing. The State was given 30 days to submit a brief, and Thorpe had 45 days from his receipt of the State's brief to submit his own brief. The State did not submit a brief.

In February 2014, Thorpe filed a "Motion in Opposition to Plaintiff[']s Motion to Dismiss Amended Motion for

Postconviction Relief and Request for Default Judgment." He asked the district court to consider two additional ineffective assistance of trial counsel claims that were not included in his amended motion for postconviction relief. These new claims related to trial counsel's alleged failure to request the appointment of a special prosecutor and to "challenge the statements and testimony of [Taiana] Matheny." (Taiana Matheny participated in the murders and was one of the State's witnesses at Thorpe's trial.) Thorpe also requested that the court "enter a judgment of default against the plaintiff, for failure to respond as instructed by the Court." Although Thorpe claims that he requested a hearing on his motion, the record does not show that he did. The court did not explicitly rule on Thorpe's motion.

3. Denial of Postconviction Relief

On May 15, 2014, the district court denied Thorpe's amended motion for postconviction relief without an evidentiary hearing. It concluded that Thorpe's ineffective assistance of trial counsel claims failed to allege prejudice.

> [Thorpe's] claims of ineffective assistance of counsel do not include a single fact or allegation with regard to prejudice actually occurring. Rather than provide specific facts as to how the outcome of the trial would have been different, [Thorpe] makes conclusory statements that if trial counsel would have done the things as set forth above, the jury would have found him not guilty.
>
> [Thorpe] fails to provide any information as to how these alleged deficiencies would have change[d] the outcome of the jury verdicts of guilty. [Thorpe] just lists a number of things that he felt his trial counsel should have done.

The district court concluded that the State had not engaged in prosecutorial misconduct and that the trial court had not abused its discretion in the ways alleged by Thorpe. It found no merit to Thorpe's claim that in the absence of proof that the deaths were certified as homicides, the evidence was insufficient to convict him. And the court determined that Thorpe's appellate

counsel was not ineffective, because there was no merit to the allegations of ineffective assistance of trial counsel. Thorpe timely appeals.

IV. ASSIGNMENTS OF ERROR

Thorpe assigns, restated, that (1) the trial court erred by failing to allow certain hearsay testimony by an Omaha police officer; (2) trial counsel was ineffective for failing to move the trial court to allow certain hearsay testimony by that same officer; (3) the trial court erred by giving jury instruction No. 14, despite *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011); (4) trial counsel was ineffective for failing to object to jury instruction No. 14; (5) the trial court erred by failing to instruct the jury on felony murder; (6) the district court erred by failing to determine that his trial counsel was ineffective for failing to interview and call several witnesses to testify; (7) the trial court erred by allowing the State to vouch for the credibility of its witnesses; (8) the prosecution engaged in misconduct by making false and misleading statements about one of the State's witnesses during closing arguments; (9) the trial court erred by failing to instruct the jury about jailhouse informants; (10) trial counsel was ineffective for failing to propose a jury instruction on jailhouse informants; (11) the trial court erred by convicting Thorpe on insufficient evidence; and (12) the district court erred in failing to consider Thorpe's motion in opposition to the State's motion to dismiss when rendering its decision to deny postconviction relief.

V. ANALYSIS

Thorpe's amended motion for postconviction relief contains numerous claims which he does not raise on appeal. The claims to which Thorpe does not assign error include the claims of ineffective assistance of trial counsel for not obtaining an independent forensic pathologist expert; not requesting the independent scientific evaluation, forensic testing, or DNA testing of latent fingerprints and physical evidence; not investigating the possibility that someone other than Thorpe committed the murders; not interviewing and investigating certain

individuals; and not moving to quash counts I and III of the second amended information. Thorpe does not assign error to his claims of ineffective assistance of appellate counsel or to his claim that the trial court erred in not rendering a "judgment of guilt."

To be considered by an appellate court, an appellant must both assign and specifically argue any alleged error. *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007). Accordingly, our consideration of Thorpe's amended motion for postconviction relief is limited to those claims for relief which Thorpe assigns as error and argues on appeal. We address these claims in the order in which they are raised by Thorpe in his brief.

1. First and Second Assignments of Error

[6] Thorpe assigns that the trial court erred in failing to allow certain hearsay testimony by an Omaha police officer and that his trial counsel was ineffective for failing to move the trial court to allow this testimony. But Thorpe did not raise either of these claims in his amended motion for postconviction relief. An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010). Therefore, we do not consider these allegations.

2. Third Assignment of Error

[7] Thorpe alleges that the trial court erred by giving jury instruction No. 14. He raised this identical claim on direct appeal, and we explicitly found that the trial court "did not err in giving instruction No. 14." See *State v. Thorpe*, 280 Neb. 11, 25, 783 N.W.2d 749, 762 (2010). A defendant "cannot use a motion for postconviction relief to collaterally attack issues that were decided against him on direct appeal." See *State v. Dunster*, 278 Neb. 268, 278, 769 N.W.2d 401, 410 (2009). Therefore, Thorpe's third assignment of error is without merit.

3. Fourth Assignment of Error

Thorpe alleges that his trial counsel was ineffective for failing to object to jury instruction No. 14. Although as raised, this claim is not procedurally barred, Thorpe is not entitled to relief. The record affirmatively shows that during the jury instruction conference, Thorpe's trial counsel objected to jury instruction No. 14. Furthermore, on direct appeal, we found that there was sufficient evidence to support the giving of jury instruction No. 14. See *Thorpe, supra*. We find no merit to this assignment of error.

4. Fifth Assignment of Error

[8] Thorpe alleges that the trial court erred by failing to instruct the jury on felony murder. Because this claim is based on actions or inactions that occurred in open court, Thorpe would have known of such claim at the time the jury instructions were given and could have raised the claim on direct appeal. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010). Therefore, this assignment of error lacks merit.

5. Sixth Assignment of Error

Thorpe assigns that the district court erred by failing to determine that his trial counsel was ineffective for not interviewing and calling 10 witnesses to testify: James Pierce, Brandi Ford, Tiffany Ross, Orlando Cortez Burries, Aries Rosario, Teara Holman, Joshua Smithhistler, Maurice Gresham, Robert Laney, and Jamme Alexander.

There are allegations in Thorpe's amended motion for postconviction relief which correspond to nine of these witnesses. However, Thorpe's amended motion did not allege that his trial counsel was ineffective for failing to call Gresham. As noted previously, we will not consider "a question not presented to

the district court for disposition through a defendant's motion for postconviction relief." See *Haas*, 279 Neb. at 817-18, 782 N.W.2d at 589. Therefore, under this assignment of error, we consider Thorpe's allegations with respect to only those nine witnesses which were included both in his amended motion and in his brief on appeal.

[9-12] In considering Thorpe's claims as to these nine witnesses, we apply well-known legal principles. A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013). 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. *Baker, supra*. To show prejudice under the prejudice component of the *Strickland* test, the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. See *id*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*.

[13,14] 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. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013). 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*. Thus, in a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief. See *id*.

(a) Thorpe's Allegations

In Thorpe's amended motion for postconviction relief, he alleged how James Pierce, Brandi Ford, Ross, Burries, Rosario, Holman, Smithhistler, Laney, and Alexander would have testified if they had been called as witnesses. With regard to each witness, Thorpe alleged that his or her testimony "likely would have resulted in [Thorpe's] acquittal."

(i) James Pierce

Thorpe alleged that James Pierce "had information that there was a possibility that Pacedeon Birge 'Pacey,' rather than [Thorpe] committed the murder of Kevin Pierce." James Pierce would have testified that "'Pacey' was the type of person that would do something like this . . . in order to exact revenge on [James Pierce] for shooting [Pacey's] brother."

(ii) Brandi Ford

Thorpe alleged that Brandi Ford "had information that there was a possibility that 'Pacey' rather than [Thorpe], committed the murder of Kevin Pierce." Specifically, Ford would have testified that she "had heard on the streets that 'Pacey' was telling people that it was going to be a 'Brother for Brother' eversince [sic] 'Pacey's[']' brother had been killed by James Pierce." Ford also had heard from her friend "Travis" that another individual once threatened "to have Pacey shoot [Travis] in the head, like [Pacey] did Kevin Pierce."

(iii) Tiffany Ross

Thorpe alleged that Ross "had information that there was a possibility that 'Pacey' rather than [Thorpe], committed the murder of Kevin Pierce." Ross would have testified that Kevin Pierce told her about two separate instances in which Pacey told Kevin Pierce that "he was going to kill him." Ross also would have testified that Kevin Pierce told her that "'Pacey' was out to get him and would kill him" and that "the animosity between 'Pacey' and [Kevin] Pierce, was that [Kevin] Pierce's brother James [Pierce], had killed Pacey's younger brother."

(iv) Orlando Cortez Burries

Thorpe alleged that Burries "had information that there was a possibility that 'Pacey,' rather than [Thorpe], committed the murder of Kevin Pierce." Burries would have testified that "a party named 'Pacey' had called [Kevin Pierce's] cellphone approximately three years ago and told him 'just like James [Pierce] killed my little brother, I'm gonna kill the youngest[']" and that "Pacey also told James [Pierce] that he was going to do that."

(v) Aries Rosario

Thorpe alleged that Rosario "had information that there was a possibility that 'Pacey,' rather than [Thorpe], committed the murder of Kevin Pierce." Rosario would have testified that "Pacey told her, 'I want James [Pierce] because I'am [sic] going to do James [Pierce] like he did me" and that "Pacey then started talking about killing [James Pierce's] little brother." Rosario also would have testified that she "remembered a statement Pacey made to her as 'somebody is going, going to die. I'm going to kill somebody.'"

(vi) Teara Holman

Thorpe alleged that Holman "had information that there was a possibility that 'Duall' (Charles Brooks) rather than [Thorpe], committed the murder of Victor Ford." Holman would have testified that Ford "had been fighting with 'Duall'" and that she "believed that 'Duall' may have had something to do with Ford's death."

(vii) Joshua Smithhistler

Thorpe alleged that Smithhistler "had information that there was a possibility that [Kevin Pierce's girlfriend's] mother's boyfriend, rather than [Thorpe] committed the murder." Smithhistler would have testified that at various times, Kevin Pierce stated that he got a "bite mark on his neck" from "his girlfriend" and that "his girlfriend was holding a knife on him." Smithhistler also would have testified that on separate occasions, he observed Pierce arguing with "his girlfriend"

and with an individual that Pierce "said was his girlfriend's mother's boyfriend."

(viii) Robert Laney

Thorpe alleged that Laney "made phone contact with a party who had information that there was a possibility that Charles Brooks 'Doall', rather than [Thorpe], committed the murder of Victor Ford." Thorpe claimed that Laney had spoken with James Pierce, Brandi Ford, Ross, Burries, Rosario, Holman, and Smithhistler, and that they told Laney the information which we described above when discussing each of these witnesses.

(ix) Jamme Alexander

Thorpe alleged that Alexander "would have negated Matheny's testimony."

(b) Analysis

Of these nine witnesses, Thorpe alleged that all of them except Alexander would have testified to the "possibility" that someone other than Thorpe committed the murders for which he was convicted. Even if we were to assume, without deciding, that Thorpe's trial counsel was deficient for failing to present the testimony of these eight witnesses, Thorpe cannot establish that he was prejudiced by that failure. To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

Thorpe was convicted on the theory that he aided and abetted Terry Sellers and Matheny. The State's evidence established that Matheny shot Kevin Pierce and that Sellers shot Victor Ford. The evidence showed that in both cases, the victim was shot and killed during an armed robbery.

[15-17] Aiding and abetting is simply another basis for holding an individual liable for the underlying crime. *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013). "By its terms, [Neb. Rev. Stat.] § 28-206 [(Reissue 2008)] provides that a

person who aids or abets may be prosecuted and punished as if he or she were the principal offender." *State v. McGuire*, 286 Neb. 494, 520, 837 N.W.2d 767, 790 (2013). We have stated that aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. *Id*. Mere encouragement or assistance is sufficient. *Id*.

At trial, Matheny testified that Thorpe participated in the robberies and murders of Kevin Pierce and Victor Ford. Matheny stated that Thorpe helped to develop the plan to rob Pierce, that Thorpe supplied a rifle and revolver to use in the robbery, and that he loaded the gun which Matheny used to shoot Pierce. When Pierce arrived to meet up with Matheny, Thorpe approached Pierce with a firearm and led Pierce to the location where he was shot. After Matheny shot Pierce, Thorpe drove Pierce's vehicle away from the scene and later removed the wheel rims from the vehicle.

Matheny testified that the following night, she, Sellers, and Thorpe engaged in a similar scheme to rob Victor Ford. She stated that Thorpe talked to Ford on a cell phone and that Thorpe drove Sellers and Matheny to the location where they were supposed to meet Ford. As was the case with Kevin Pierce, Thorpe provided the gun which was used to shoot Ford and was present when Sellers shot Ford. After they took Ford's vehicle, Thorpe instructed Matheny to wipe it clean of fingerprints. And once they abandoned Ford's vehicle, Thorpe drove Sellers and Matheny back to their hotel.

Given this powerful direct evidence against Thorpe, there is not a reasonable probability that the result of his trial would have been different if his trial counsel had called James Pierce, Brandi Ford, Ross, Burries, Rosario, Holman, Smithhistler, and Laney to testify. These eight witnesses allegedly would have testified to the "possibility" that someone other than Thorpe committed the murders of Kevin Pierce and Victor Ford. In other words, their testimony would have been speculative as to any connection between another individual and the murders. As set forth, much of the testimony would have been hearsay or hearsay within hearsay. None of these witnesses would

have given direct evidence that someone other than Thorpe committed the murders. Such testimony would not be able to overcome the direct evidence and eyewitness testimony that Thorpe was involved in the robberies and murders of Kevin Pierce and Victor Ford.

Thorpe cannot show that he was prejudiced by his trial counsel's failure to call James Pierce, Brandi Ford, Ross, Burries, Rosario, Holman, Smithhistler, and Laney. Therefore, Thorpe's claims as to these eight witnesses did not contain factual allegations which, if proved, would entitle Thorpe to postconviction relief for ineffective assistance of counsel. The district court did not err in denying relief on these claims without an evidentiary hearing.

As to the ninth witness, Thorpe alleged that Alexander "would have negated Matheny's testimony." Thorpe did not allege what testimony Alexander would have given if called or what part of Matheny's testimony would have been negated. In assessing postconviction claims that trial counsel was ineffective for failing to call a particular witness, we have upheld the dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called. *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013). Therefore, Thorpe was not entitled to an evidentiary hearing or postconviction relief on this claim.

The district court did not err in denying relief, without an evidentiary hearing, on Thorpe's claims of ineffective assistance of counsel for failure to call certain witnesses. Thorpe's sixth assignment of error lacks merit.

6. Seventh Assignment of Error

Thorpe assigns that the trial court erred by allowing the State to vouch for the credibility of its witnesses. This claim is procedurally barred, because Thorpe could have raised it on direct appeal. See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

7. Eighth Assignment of Error

Thorpe argues that the prosecution engaged in misconduct by making false and misleading statements about one of the State's witnesses during closing arguments. Thorpe could have raised this issue on direct appeal. Therefore, this claim is procedurally barred. See *id*.

8. Ninth and Tenth Assignments of Error

At Thorpe's trial, the jury was not instructed about jailhouse informants. In the instant appeal, Thorpe claims that the trial court erred by failing to do so and that his trial counsel was ineffective for failing to propose such an instruction. Neither of these claims were raised in Thorpe's amended motion for postconviction relief. An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010). Accordingly, we do not consider these allegations.

9. Eleventh Assignment of Error

Thorpe alleges that the trial court erred by convicting him on insufficient evidence. Thorpe could have raised sufficiency of the evidence on direct appeal, but he did not. This claim is procedurally barred. See *Boppre, supra*.

10. Twelfth Assignment of Error

Thorpe assigns that the district court erred in failing to consider his motion in opposition to the State's motion to dismiss when rendering its decision to deny postconviction relief. The claims raised in Thorpe's motion in opposition were not pleaded in his amended motion for postconviction relief, which was the operative pleading before the

court. Therefore, the court did not err in denying postconviction relief without considering the claims raised in Thorpe's motion in opposition.

VI. CONCLUSION

For the foregoing reasons, we affirm the order of the district court which denied Thorpe's amended motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

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

858 N.W.2d 850

Filed February 13, 2015. No. S-14-692.

Original action. Judgment of public reprimand.

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 David C. Holcomb, respondent, on November 13, 2014. 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 October 14, 2008. At all relevant times, he was engaged in the practice of law in Omaha, Nebraska.

On July 31, 2014, 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 state that on or about November 6, 2013, respondent posted on a Web site

which he owned and controlled that his uncle and his cousin had committed various crimes and suggested that they should be prosecuted by the International Criminal Court. The Web site posting called for readers to report respondent's uncle and cousin to the International Criminal Court, and the posting included respondent's uncle and cousin's publicly recorded address and telephone number. The formal charges state that "[t]he allegations of criminal conduct by [respondent's uncle] and [respondent's cousin] stated by respondent in his Internet posting are false and respondent knew they were false when he posted them, or he posted them in reckless disregard for the truth." 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. § 3-508.4(a) and (c) (misconduct).

On November 13, 2014, 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 conduct rule § 3-508.4(a) and (c). In the conditional admission, respondent knowingly chose not to challenge or contest the truth of the matters conditionally admitted and waived all proceedings against him in connection therewith 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 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 rule § 3-508.4(a) and (c) 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.

Debra Aldrich et al., on behalf of Bethel Lutheran Church, appellants, v. Clarke Nelson et al., on behalf of Bethel Lutheran Church and Bethel Evangelical Lutheran Church Foundation of Holdrege, Nebraska, Inc., appellees.

859 N.W.2d 537

Filed February 20, 2015. No. S-14-143.

1. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** A motion to dismiss for lack of jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) which is limited to a facial attack on the pleadings is subject to a de novo standard of review.
2. **Constitutional Law: Civil Rights.** The First Amendment to the U.S. Constitution prohibits governmental interference with religion. This limitation applies to all three branches of government, including the judiciary.
3. **Courts: Civil Rights: Words and Phrases.** One of two approaches taken by courts handling issues of religious autonomy is the deference to polity approach.
4. ____: ____: ____. The deference to polity approach to issues of religious autonomy is a rule of deference to the internal structure of decisionmaking adopted by a church. If the church is congregational in polity, the rule of the majority of the local congregation prevails. But if the church is hierarchical, a civil court must defer to the decision of properly constituted hierarchal authorities within the church.
5. ____: ____: ____. One of two approaches taken by courts handling issues of religious autonomy is the neutral principles approach.
6. **Civil Rights: Words and Phrases.** Neutral principles have been defined as secular legal rules whose application to religious parties or disputes does not entail theological or religious evaluations.
7. **Civil Rights.** The neutral principles approach to issues of religious autonomy involves making a secular analysis of all relevant documents such as church charters, constitutions, bylaws, articles of incorporation, canons of the church, relevant deeds and trusts, and significant state statutes from a secular, not religious, perspective.
8. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Phelps County: Terri S. Harder, Judge. Reversed and remanded for further proceedings.

Robert A. Mooney, Frederick D. Stehlik, William L. Biggs, and Abbie M. Schurman, of Gross & Welch, P.C., L.L.O., for appellants.

Scott E. Daniel, of Gettman & Mills, L.L.P., and Kurth A. Brashear, of Brashear, L.L.P., for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

Debra Aldrich and some of her fellow parishioners (Minority Members) at Bethel Lutheran Church (Bethel) brought this action on behalf of Bethel against other members (Majority Members) of Bethel. The district court dismissed for lack of subject matter jurisdiction. The Minority Members appeal. We reverse, and remand for further proceedings.

FACTUAL BACKGROUND

This case involves an intrachurch dispute between the members of Bethel, a nonprofit corporation organized under Nebraska law. Prior to January 17, 2011, Bethel, which is located in Holdrege, Nebraska, was affiliated with the Evangelical Lutheran Church of America (ELCA). It appears that on May 23 and August 22, 2010, the Bethel congregation voted by at least a two-thirds majority vote to disaffiliate from the ELCA and instead sought to affiliate with the Lutheran Congregation in Mission for Christ (LCMC), although information regarding the vote is not explicitly included in the record. The Majority Members appeared before the ELCA's synod council and sought the termination of their ELCA affiliation, but that termination was not granted.

Subsequently, and despite the decision by the synod council, the Majority Members affiliated with the LCMC and employed a non-ELCA pastor. In addition, Bethel's governing documents were amended, including Bethel's constitution.

Following a demand on the Majority Members, the Minority Members filed suit seeking declaratory judgment, an accounting, and an injunction against the dissipation of assets. In its amended complaint, the Minority Members sought declarations that (1) Bethel was a member of the ELCA; (2) Bethel continued to be governed by its own constitution and bylaws and by the constitution, bylaws, and continuing resolutions

of the ELCA; (3) the Majority Members violated the Bethel constitution and bylaws when it created a membership relationship with the LCMC; (4) as an ELCA church, Bethel may not be dually affiliated with the LCMC; (5) as an ELCA church, Bethel may not be ministered by a non-ELCA pastor; (6) the Majority Members have no authority over the property and assets of Bethel; and (7) Bethel's foundation and its assets are subject to the control of Bethel as an ELCA affiliate and not Bethel as an LCMC affiliate.

The Majority Members filed a motion to dismiss. The district court granted the motion, concluding:

> [The Minority Members sought] a determination by the court that [the Majority Members'] efforts in changing affiliation, and revising / adopting new corporate governance documents [were] prohibited and void because [the Majority Members] were not given permission to do so by the Nebraska Synod Council of the ELCA. Such determinations cannot be made without delving into the doctrinal dispute that precipitated a majority of the members to pursue disaffiliation from the ELCA and how, whether, and which ELCA documents govern [the Majority Members'] corporate actions.

The Minority Members appeal.

ASSIGNMENT OF ERROR

On appeal, the Minority Members assign, restated and consolidated, that the district court erred in dismissing for lack of subject matter jurisdiction without allowing leave to amend.

STANDARD OF REVIEW

[1] A motion to dismiss for lack of jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) which is limited to a facial attack on the pleadings is subject to a de novo standard of review.[1]

ANALYSIS

The Minority Members assign that the district court erred in concluding that it did not have jurisdiction over this litigation.

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[1] See *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 599, 694 N.W.2d 625, 629 (2005).

[2] The First Amendment to the U.S. Constitution prohibits governmental interference with religion.[2] This limitation applies to all three branches of government, including the judiciary.[3] There are generally two approaches courts take in handling issues of religious autonomy.

[3,4] The first is the "deference to polity" approach, adopted by the U.S. Supreme Court in *Watson v. Jones*.[4] This is a rule of deference to the internal structure of decisionmaking adopted by the church itself.[5] If the church is congregational in polity, the rule of the majority of the local congregation prevails.[6] But if the church is hierarchical, a civil court must defer to the decision of properly constituted hierarchal authorities within the church.[7]

[5-7] The second approach is known as the neutral principles approach.[8] Neutral principles have been defined as "secular legal rules whose application to religious parties or disputes do[es] not entail theological or religious evaluations."[9] This approach involves making a "secular analysis of all relevant documents, such as church charters, constitutions, bylaws, articles of incorporation, canons of the church, relevant deeds and trusts, and significant state statutes"[10] from a secular, not religious, perspective.[11] This approach is more

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[2] U.S. Const. amends. I and XIV.

[3] See *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 80 S. Ct. 1037, 4 L. Ed. 2d 1140 (1960). See, also, *Parizek v. Roncalli Catholic High School*, 11 Neb. App. 482, 655 N.W.2d 404 (2002).

[4] *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871). See *Wehmer v. Fokenga*, 57 Neb. 510, 78 N.W. 28 (1899).

[5] 1 William W. Bassett et al., Religious Organizations and the Law § 3:7 (2013).

[6] *Id.*

[7] *Id.*

[8] See *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979). See, also, *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002); *Parizek v. Roncalli Catholic High School*, *supra* note 3.

[9] 77 C.J.S. *Religious Societies* § 123 at 107 (2006).

[10] *Id.*

[11] *Id.*

commonly used when dealing with contracts for goods or services, or in cases involving property disputes.[12]

On appeal, the Minority Members urge this court to conclude that the synod council's decision not to permit Bethel to leave the ELCA was entitled to deference under *Watson*. The Minority Members alternatively argue that this case does not involve a doctrinal dispute, but, rather, is simply one involving the interpretation and application of church governance documents and thus can be decided using neutral principles of law.

We agree with the Minority Members' contention that the district court erred in concluding that it lacked jurisdiction. Bethel is a nonprofit corporation organized under Nebraska law, and relevant statutes are applicable. And the issue presented by this litigation can be decided by examining state statutes and church governance and other relevant documents and using neutral principles of law. The district court erred in granting the Majority Members' motion to dismiss for lack of subject matter jurisdiction under § 6-1112(b)(1).

[8] We reverse the decision of the district court concluding that it lacked jurisdiction and remand this cause for further proceedings including, though not limited to, the disposition of the Majority Members' still-pending motion to dismiss. We need not address this motion on appeal, however, as it was not passed upon by the district court.[13]

CONCLUSION

Having concluded that the district court erred in finding that it lacked jurisdiction over this action, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

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[12] 2 William W. Bassett et al., Religious Organizations and the Law § 10:50 (2013).

[13] See *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008).

STATE OF NEBRASKA, APPELLEE, V. RODRIGO ALBERTO ORTEGA, ALSO KNOWN AS RODRIGO ALBERTO GARCIA, APPELLANT.

859 N.W.2d 305

Filed February 20, 2015. No. S-14-185.

1. **Attorney Fees: Appeal and Error.** When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion.
2. **Pleas: Appeal and Error.** Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
3. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
4. **Affidavits: Attorney Fees.** By obtaining permission to proceed in forma pauperis under Neb. Rev. Stat. § 25-2301.01 (Reissue 2008), a party is not granted the payment of his or her attorney fees. Attorney fees are not the type of fees and costs contemplated by the in forma pauperis statutes.
5. **Right to Counsel: Attorney Fees.** When counsel is appointed to represent an indigent misdemeanor defendant pursuant to Neb. Rev. Stat. § 29-3906 (Reissue 2008), an application for attorney fees must be made to the appointing court.
6. **Appeal and Error.** Appellate courts do not generally consider arguments and theories raised for the first time on appeal.
7. **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.
8. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.
9. **Pleas.** After the entry of a plea of guilty or no contest, but before sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.
10. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
11. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
12. **Pleas.** To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel,

(3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.

Appeal from the District Court for Dakota County, PAUL J. VAUGHAN, Judge, on appeal thereto from the County Court for Dakota County, KURT RAGER, Judge. Judgment of District Court affirmed in part, and in part vacated.

Randy S. Hisey and Zachary S. Hindman, of Bikakis, Mayne, Arneson, Hindman & Hisey, for appellant.

Jon Bruning, Attorney General, and Austin N. Relph for appellee.

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

CASSEL, J.

INTRODUCTION

After Rodrigo Alberto Ortega, also known as Rodrigo Alberto Garcia, pled guilty to three misdemeanor charges in the county court and was sentenced, he first appealed to the district court. After the district court affirmed, he filed a second appeal to the Nebraska Court of Appeals. In an order authorizing Ortega to proceed in forma pauperis on the second appeal, the district court intended to deny payment of attorney fees beyond the first appeal. Before this court, Ortega primarily attacks this purported denial of attorney fees. But we conclude that payment of attorney fees was not denied, because the district court was not the proper court to address the issue and no application for payment was made pursuant to the statutory procedure. Thus, to the extent that the order may be construed as addressing attorney fees, we vacate it. Finding no merit to Ortega's other claims regarding denial of permission to withdraw his guilty pleas and allegedly excessive sentences, we otherwise affirm.

BACKGROUND

After Ortega's vehicle was stopped by police and he was arrested, Ortega was charged in the county court with five

counts. At the time of the stop, the police officers were responding to a complaint of a suspicious vehicle. Upon arrival, an officer observed Ortega's vehicle stopped in the center of the roadway. During the stop, Ortega repeatedly disregarded the officer's commands. Ultimately, a physical altercation ensued, and multiple officers were required to take Ortega into custody.

At arraignment, the county court informed Ortega of the charges and asked him whether he wished to request counsel at public expense. Ortega replied that he "would like to proceed without [counsel]." The court immediately asked Ortega, "Do you understand the Court would appoint an attorney for you at public expense if you could not afford one?" Ortega responded, "Yes, I do." In response to further inquiries, Ortega confirmed that he understood that counsel could be of assistance to him and that no one had made any threats or promises to persuade him to proceed without counsel. And he further confirmed that he was not under the influence of alcohol or drugs. The court pronounced its conclusion that Ortega had knowingly, intelligently, and voluntarily waived the right to counsel, and it cautioned Ortega to "let the Court know right away" if he changed his mind.

The county court next inquired whether a plea agreement had been made. The State responded that there was no plea agreement. The court questioned Ortega as to his knowledge of the possible pleas and their effect upon his rights, and Ortega confirmed his understanding. The court further informed Ortega of the potential sentences and the possibility that future convictions could be enhanced. And Ortega again confirmed that he was not under the influence of alcohol or drugs. Ortega pled guilty to count 1, resisting arrest; count 3, driving during revocation or impoundment; and count 4, no operator's license, nonresident. The State dismissed count 2, obstructing a peace officer, and count 5, driving left of center. The court determined that Ortega had entered his pleas knowingly, voluntarily, and intelligently, and it found him guilty.

The county court continued the matter for sentencing and ordered the preparation of a presentence investigation report. Several days later, Ortega filed an "Inmate Request Form"

seeking to withdraw his guilty pleas and to stop the preparation of the presentence investigation report. As grounds for withdrawal, Ortega alleged that he was under the influence of drugs when he entered his pleas, because he was arraigned only 3 days after his arrest.

Upon its own motion, the county court appointed Ortega counsel from the public defender's office. Despite the appointment of counsel, Ortega personally filed a second inmate request form seeking to withdraw his guilty pleas. He again claimed that he was under the influence of drugs when he entered his pleas, and he further alleged that he was suffering from depression and stress and that the proceeding was "to[o] fast." Ortega claimed that he had requested his appointed counsel withdraw his pleas but that counsel could not help him.

Ortega's appointed counsel moved to withdraw and alleged that Ortega no longer desired his representation. Counsel attached a letter from Ortega, stating: "I'm gonna ask you to stop doing anything you [are] doing for me. You are not the lawyer I want to defend me. You are polluted and I have request[ed] and sen[t] a letter to the judge to court appoint me a different lawyer."

A hearing was held on the motion to withdraw, and Ortega confirmed that he no longer wanted to be represented by his appointed counsel. He explained that he did not agree with counsel "on a lot of things" and that whenever he asked counsel to do something, counsel would "always go a different way." However, Ortega requested that the county court appoint another attorney to represent him. The court overruled the motion, concluding that no grounds had been established to permit the withdrawal.

Ortega's appointed counsel subsequently filed a second motion to withdraw, alleging that Ortega was refusing to speak with him and that there had been a breakdown of communication and trust. One day later, Ortega filed a letter detailing "all the legal reasons" to permit the withdrawal. He stated that he desired an "appropri[a]te" or "ade[q]uate" defense, and he claimed that his relationship with counsel was broken and could not be fixed.

A second hearing was conducted, and appointed counsel explained that the relationship between himself and Ortega had reached such a "caustic" level that there was no "real ability" for him to represent Ortega. Ortega again confirmed that he wanted counsel to withdraw. However, the county court overruled the motion, again finding that good cause to permit the withdrawal had not been shown.

After denying the withdrawal, the county court proceeded to sentencing. Rather than presenting an argument, appointed counsel stated that Ortega had asked him to refrain from making any comments. The court asked Ortega if there was anything he wanted to say, and Ortega replied that he wanted counsel to withdraw. The court responded that at that point, Ortega was effectively proceeding pro se. Ortega asserted that when he pled guilty, he was depressed, under a "lot of stress," and without the benefit of counsel. And he claimed that he had made multiple attempts to withdraw his pleas, but counsel refused to file an appropriate motion.

The county court sentenced Ortega to 250 days' imprisonment on the resisting arrest conviction, 60 days' imprisonment on the driving during revocation or impoundment conviction, and 30 days' imprisonment on the no operator's license, nonresident, conviction. Each sentence was ordered to run consecutively, and Ortega was given credit for 65 days served.

Ortega, represented by new counsel, filed a timely notice of appeal to the district court. On appeal, Ortega alleged that his guilty pleas were not entered knowingly, voluntarily, and intelligently and that his sentences were unreasonable. But the district court observed that at the time Ortega entered his pleas, he had been informed of the charges, his rights, and the consequences of a guilty plea. And it determined that his sentences were within the statutory guidelines. It therefore affirmed his convictions and sentences.

Ortega filed a timely notice of appeal to the Court of Appeals, along with a poverty affidavit and a motion to proceed in forma pauperis. The district court granted the motion to proceed in forma pauperis, but in its order doing so, it struck out the provision stating that Ortega's "fees" would be paid

by Dakota County, Nebraska. Thus, the relevant portion of the order read, "IT IS ORDERED: that the defendant is allowed to proceed with his appeal in forma pauperis and that the ~~fees and~~ costs of said appeal shall be paid by Dakota County."

Based upon the denial of Ortega's "fees," his appellate counsel filed a motion to withdraw in the Court of Appeals. Appellate counsel alleged that they had been appointed to represent Ortega in his appeal and that, pursuant to his direction, they had been required to file a notice of appeal to the Court of Appeals. However, they claimed that the district court had denied them payment by striking out the term "fees" from the order in forma pauperis. The Court of Appeals overruled the motion, and we moved the case to our docket pursuant to statutory authority.[1]

Ortega's appellate counsel filed a second motion to withdraw in this court. They explained that after the denial of the prior motion, they filed a second motion to proceed in forma pauperis in the district court. They also stated that the district court indicated in an e-mail that it did not intend to rule on the motion, because it believed that it did not have jurisdiction. According to Ortega's appellate counsel, the court further explained that it did not believe Ortega had the right to appointed counsel after his first appeal to the district court. However, the above actions do not appear in the record received from the district court, and we do not have any transcript including either the second motion or any ruling on the motion. We overruled the second motion to withdraw without prejudice and permitted appellate counsel to brief the issue of attorney fees.

After briefing was completed, we heard oral arguments. At oral argument, appellate counsel reported that the district court had later ruled on the second motion, confirming its intention to deny attorney fees, and counsel sought leave to file a supplemental transcript. We now overrule this request as moot. As discussed in greater detail below, the granting of counsel's request would not affect the result of our analysis.

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

ASSIGNMENTS OF ERROR

Ortega assigns, consolidated and reordered, that the district court erred in (1) ordering that his attorney fees would not be paid at public expense; (2) rejecting his claim that his guilty pleas were not entered knowingly, voluntarily, and intelligently; and (3) rejecting his claim that his sentences were unreasonable.

STANDARD OF REVIEW

[1] When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion.[2]

[2] Prior to sentencing, the withdrawal of a plea forming the basis of a conviction is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.[3]

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[4]

ANALYSIS

We begin our analysis with the primary issue of appellate counsel's attorney fees. We then turn to Ortega's remaining claims.

Attorney Fees

Ortega argues that pursuant to Neb. Ct. R. App. P. § 2-103, his appellate counsel were required to represent him before the Court of Appeals, unless permitted to withdraw. And he claims that by striking out the term "fees" from the order in forma pauperis, the district court denied his appellate counsel payment for their representation.

We acknowledge, as did the State in its brief, that the district court, in striking out the term "fees" from the order in forma

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[2] *In re Guardianship of Brydon P.*, 286 Neb. 661, 838 N.W.2d 262 (2013).

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

[4] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

pauperis, intended to deny the payment of attorney fees. But the district court's belief that it could deny Ortega's attorney fees through the order in forma pauperis was flawed. Thus, this assigned error evidences several misconceptions.

The first, and most fundamental, misconception is the notion that the striking of the words "fees and" from the order granting leave to proceed in forma pauperis affected the right to or amount of any attorney fees for Ortega's court-appointed counsel.

The district court's attempt to deny attorney fees by means of an interlineation within the order in forma pauperis failed for two reasons. First, the court conflated the "fees" regarding permission to proceed in forma pauperis with fees for a court-appointed attorney. Second, the determination of fees is regulated by a separate statutory procedure, which directs the question in the first instance to the appointing court. In this instance, that means the county court. We explain each reason in more detail.

Both civil and criminal proceedings in forma pauperis are governed by Neb. Rev. Stat. § 25-2301 et seq. (Reissue 2008).[5] Section 25-2301(2) sets forth that "[i]n forma pauperis means the permission given by the court for a party to proceed without prepayment of fees and costs or security." However, the "fees" specified in § 25-2301(2) do not include a party's attorney fees.

In considering § 25-2301.02, we have observed that the fees, costs, or security referred to are those customarily required to docket an appeal.[6] And the statutes delineate various specific fees, costs, or security that a party is excused from paying by proceeding in forma pauperis, including the service of all necessary writs, process, and proceedings[7]; the subpoena of any witnesses that have material and necessary evidence[8]; the

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[5] See *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

[6] See *id.*

[7] § 25-2302.

[8] § 25-2304.

preparation of the record on appeal[9]; and the printing of appellate briefs.[10]

[4] But the statutes governing proceedings in forma pauperis make no mention of a party's attorney fees. By obtaining permission to proceed in forma pauperis under § 25-2301.01, a party is not granted the payment of his or her attorney fees. Attorney fees are not the type of "fees and costs" contemplated by the in forma pauperis statutes.

[5] Rather, for appointed counsel to obtain payment for his or her representation of an indigent criminal defendant, a separate application must be made to the appropriate court.[11] When counsel is appointed to represent an indigent misdemeanor defendant pursuant to § 29-3906, an application for attorney fees must be made to the "appointing court." Although no order appointing appellate counsel appears within the record, Ortega's notice of appeal from the county court to the district court was filed by appellate counsel. Thus, it is apparent that they were appointed by the county court.

Because the county court was the appointing court in this case and the district court functioned purely as an intermediate appellate court,[12] the county court was and remains the appropriate court for an application for attorney fees. But the record does not disclose any application by appellate counsel for the payment of their attorney fees pursuant to the statutory procedure. Thus, the propriety of appellate counsel's fees was not an issue properly before the district court.

The payment of appellate counsel's fees was an issue to be determined, in the first instance, by the county court. And an application for court-appointed attorney fees would be appropriately addressed to the county court, after the district court acts upon our mandate and issues its mandate to the county court. "The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall

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[9] §§ 25-2305 and 25-2306.

[10] § 25-2307.

[11] See Neb. Rev. Stat. §§ 29-3905 and 29-3906 (Reissue 2008).

[12] See *State v. Boham*, 233 Neb. 679, 447 N.W.2d 485 (1989).

allow payment to counsel in the full amount determined by the court."[13] To the extent that the district court purported to deny attorney fees for Ortega's court-appointed counsel, we vacate its order. At this point, there is no order effectively granting or denying attorney fees for Ortega's appellate counsel.

However, in order to assist the lower courts, we briefly address Ortega's argument regarding § 2-103 of our appellate rules of procedure. That rule states:

> (A) Representation on Appeal. Counsel appointed in district court to represent a defendant in a criminal case other than a postconviction action shall, upon request by the defendant after judgment, file a notice of appeal and continue to represent the defendant unless permitted to withdraw by this court.
>
> (B) Motion to Withdraw. A motion of court-appointed counsel for permission to withdraw shall state the reason for the request, and shall be served upon opposing counsel by regular mail and on the defendant by certified mail to the defendant's last-known address. An original and one copy of the motion and proof of service shall be filed with the Supreme Court Clerk.

Ortega claims that pursuant to § 2-103, appellate counsel were obligated to continue the representation beyond his first appeal to the district court. But Ortega's reliance upon § 2-103 is unfounded.

As Ortega's counsel forthrightly conceded at oral argument, § 2-103 does not create any substantive right to counsel at public expense. Those rights flow from our federal and state Constitutions.[14] In some instances, a statute may also provide for appointment of counsel at public expense.[15]

Rather, § 2-103 ensures orderly proceedings by mandating that after an appeal is perfected, counsel in the court below is deemed as counsel in the appellate court until a withdrawal

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[13] § 29-3905.

[14] See, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *State v. Hughan*, 13 Neb. App. 862, 703 N.W.2d 263 (2005).

[15] See §§ 29-3905 and 29-3906. See, also, Neb. Rev. Stat. § 29-3004 (Reissue 2008).

of appearance has been filed. And counsel in any criminal case pending in an appellate court may withdraw only after obtaining permission of the appellate court.[16] A recent decision of the Court of Appeals illustrates the disruption to orderly procedure that may flow from counsel's failure to make the appropriate motion to withdraw.[17]

In the case before us, counsel complied with § 2-103 and filed an appropriate motion to withdraw. Indeed, counsel did so twice. But because of the district court's irregular order purporting to deny attorney fees, both motions were overruled. Instead, we directed counsel to address the matter in briefing, and counsel did so. These circumstances should be considered when the county court addresses a proper application for attorney fees. Having disposed of the primary matter before us, we now turn to the issues pertaining to Ortega's convictions and sentences.

Withdrawal of Pleas

Ortega assigns that the district court erred in rejecting his claim that his guilty pleas were not entered knowingly, voluntarily, and intelligently. He argues that at the time of his pleas, he was under the influence of drugs and was suffering from stress and depression. And he claims that any failure to preserve this issue for appeal was the result of ineffective assistance of counsel.

[6] This assignment of error raises a needlessly complex procedural question as to how the issue should be addressed in this appeal. In the county court, Ortega's appointed counsel never filed a motion to withdraw Ortega's guilty pleas. And we have stated that appellate courts do not generally consider arguments and theories raised for the first time on appeal.[18] In apparent recognition of this principle, Ortega asserts that any failure to raise this issue before the county court was ineffective assistance of counsel.

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[16] See § 2-103(1). See, also, Neb. Ct. R. App. P. § 2-101(F)(1) (rev. 2015).

[17] See *State v. Agok*, 22 Neb. App. 536, 857 N.W.2d 72 (2014).

[18] See *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

But Ortega himself made numerous requests to the county court to withdraw his pleas. He filed two inmate request forms in the county court seeking to withdraw his pleas. And at sentencing, he asserted that he had been under the influence of stress and depression when he pleaded guilty and he referred to his prior efforts to withdraw his pleas. However, these requests were never explicitly ruled upon, and the court ultimately sentenced Ortega.

Thus, we are presented with Ortega's claim that his counsel was ineffective for failing to make a motion which Ortega himself made on multiple occasions, along with the additional complication that the county court never explicitly addressed Ortega's requests. To resolve this quandary, we consider the sentencing of Ortega as a denial of his requests. In his argument at the sentencing hearing, Ortega renewed his assertions that he did not make his pleas knowingly and intelligently; yet, the court proceeded to impose its sentences. We therefore consider the issue as properly preserved for appellate review.

[7,8] However, we decline to address any claim of ineffective assistance of counsel predicated on this issue in this subsequent appeal. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[19] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[20] Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.[21]

[9] The record is insufficient to address Ortega's claim of ineffective assistance of counsel. The record is silent as to counsel's motivations in failing to bring a motion to withdraw Ortega's pleas. Our case law provides that after the entry of a plea of guilty or no contest, but before sentencing, a court, in

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

[20] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[21] *Id.*

its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution has not been or would not be substantially prejudiced by its reliance on the plea entered.[22] It is possible that counsel believed that no fair and just reason existed for the withdrawal of Ortega's pleas and that the refusal to bring the motion was a strategic decision. Without a more complete record, we decline to address the issue.

[10,11] We now turn to the county court's denial of Ortega's requests to withdraw his pleas on the grounds espoused by Ortega. We have held that the right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion on the part of the trial court, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.[23] The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.[24]

[12] We find no merit to Ortega's assertion that his pleas were not entered knowingly, voluntarily, and intelligently on the basis that he was under the influence of drugs, stress, or depression. The record affirmatively establishes that Ortega understood the nature of the plea hearing and the effect of his guilty pleas. To support a finding that a plea of guilty has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.[25]

The county court complied with all of these requirements. Ortega confirmed his understanding of the charges, the right

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[22] See *Williams, supra* note 3.

[23] See *id.*

[24] *Id.*

[25] See *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

to assistance of counsel, the effect of a guilty plea upon his constitutional rights, and the possible penalties. And on two occasions, he confirmed that he was not under the influence of drugs. Thus, Ortega's assertion that his pleas were not entered knowingly, voluntarily, and intelligently is affirmatively refuted by the record.

Ortega attempts to compare this case to *State v. Schurman*,[26] in which the Court of Appeals concluded that the defendant should have been permitted to withdraw his pleas on the bases that the defendant exhibited confusion during the plea hearing and was suffering from bipolar disorder and hearing loss. However, in contrast to *Schurman*, Ortega did not exhibit any confusion during the plea hearing. Ortega responded appropriately to each of the county court's questions, and he confirmed his understanding of the proceeding on multiple occasions. Thus, we disagree that *Schurman* supports Ortega's assigned error.

We find no abuse of discretion in the county court's refusal to permit the withdrawal of Ortega's pleas. The record established that Ortega's bare assertions of impairment were unfounded. This assignment of error is without merit.

Excessive Sentences

Ortega asserts that his sentences were unreasonable, because they were near the maximum permitted by the statutory guidelines. He further asserts that the circumstances of the crimes did not warrant the sentences imposed.

Ortega's sentences were within the statutory guidelines. The principles of law governing review of sentences imposed in criminal cases are so familiar that we need not repeat them here.[27] Based upon the relevant sentencing factors, we do not find Ortega's sentences to be an abuse of discretion. Ortega had an extensive prior criminal history, including several convictions similar to those in the present case. He had previous convictions for no valid operator's license; driving under

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[26] *State v. Schurman*, 17 Neb. App. 431, 762 N.W.2d 337 (2009).

[27] See *State v. Tolbert*, 288 Neb. 732, 851 N.W.2d 74 (2014).

suspension; driving during revocation; refusing to comply with the orders of police; and hindering, delaying, or interrupting an arrest. Ortega's criminal history demonstrates a continued disregard for the lawful authority of police and the laws governing the operation of motor vehicles in the State of Nebraska. This assignment clearly lacks merit.

CONCLUSION

We find no merit to Ortega's assertion that the district court's order in forma pauperis had the legal effect of denying his appellate counsel payment for their representation. Further, the district court was not the proper court to address the issue of attorney fees. To the extent that the district court's order granting leave to proceed in forma pauperis may be understood as addressing attorney fees, we vacate the order. As to Ortega's other claims, the record establishes that his guilty pleas were entered knowingly, voluntarily, and intelligently and that his sentences were not excessive. We affirm the judgment of the district court, which affirmed Ortega's convictions and sentences.

AFFIRMED IN PART, AND IN PART VACATED.

HEAVICAN, C.J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
ARON D. WELLS, SR., APPELLANT.
859 N.W.2d 316

Filed February 20, 2015. No. S-14-331.

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. **Convictions: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and

a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

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 search and seizure.
4. **Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.
5. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Appeal and Error.** To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), which describes the three levels, or tiers, of police-citizen encounters.
6. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of the liberty of the citizen.
7. **Police Officers and Sheriffs: Search and Seizure**. A tier-two police-citizen encounter constitutes an investigatory stop as defined by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Such an encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning.
8. **Police Officers and Sheriffs: Search and Seizure: Arrests.** A tier-three police-citizen encounter constitutes an arrest. An arrest involves a highly intrusive or lengthy search or detention.
9. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure**. Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.
10. **Investigative Stops: Police Officers and Sheriffs.** When conducting an investigatory stop, an officer must employ the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.
11. ____: ____. An investigatory stop requires only that an officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that criminal activity is afoot.
12. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.
13. **Police Officers and Sheriffs: Probable Cause.** In determining whether a police officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience.
14. **Investigative Stops: Probable Cause: Appeal and Error.** An appellate court reviews the district court's finding of reasonable suspicion de novo.

15. **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.
16. **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.
17. **Search and Seizure: Arrests.** A search made without a warrant is valid if made incidental to a lawful arrest.
18. **Police Officers and Sheriffs: Search and Seizure: Arrests.** After an arrest is made, the arresting officer may search the person to remove any weapons that the latter might seek to use in order to resist arrest or effect his or her escape and also to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.
19. **Arrests.** Neb. Rev. Stat. § 28-1409(2) (Reissue 2008) diminishes the common-law right to resist unlawful arrest and provides that regardless of whether the arrest is legal, one may not forcibly resist an arrest.
20. **Criminal Law: Evidence: Appeal and Error.** 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.
21. **Evidence: Appeal and Error.** As with any sufficiency claim, regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
22. **Police Officers and Sheriffs: Assault.** Neb. Rev. Stat. § 28-931 (Cum. Supp. 2010) provides that a person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer and the offense is committed while such officer is engaged in the performance of his or her official duties.
23. **Criminal Law: Words and Phrases.** Neb. Rev. Stat. § 28-109(4) (Reissue 2008) defines physical pain as a bodily injury.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Affirmed.

Mark E. Rappl for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

HEAVICAN, C.J.

NATURE OF CASE

Aron D. Wells, Sr., was convicted in the district court for Lancaster County, Nebraska, of one count of third degree assault of an officer and one count of possession of a controlled substance. Wells alleges that the court erred in overruling his motion to suppress evidence and that there was insufficient evidence to sustain a conviction of assault on an officer. We conclude that the district court did not err in denying Wells' motion to suppress and that there was sufficient evidence to support a conviction.

BACKGROUND

On January 13, 2012, investigators Timothy Cronin and Scott Parker, police officers serving on the Lincoln/Lancaster County drug task force, were conducting surveillance in Lincoln, Nebraska. The investigators were wearing plain clothes and were in an unmarked car in the parking lot of a local fast-food restaurant located on the corner of 13th and E Streets. Cronin described the area immediately surrounding 13th and E Streets as the "epicenter of narcotics" in Lincoln. Cronin testified that his opinion was based on numerous narcotics arrests made in that area, interviews from confidential informants, "proffer interview reports," police intelligence reports, and results of the police department's undercover controlled substances purchase operations.

The investigators were positioned in the parking lot so that they could observe activity occurring at a gas station and convenience store located across the street from the fast-food restaurant. At approximately 5 p.m., the investigators observed a black 1976 Buick pull into the convenience store parking lot. Cronin believed the driver to be an individual whom Cronin had previously arrested for narcotics possession. Cronin was also familiar with reports that the driver of the Buick had previously purchased drugs from an undercover officer. Cronin testified that he had also received "more recent" police intelligence regarding the driver's involvement with narcotics, but did not elaborate.

Over the course of 10 minutes, Cronin and Parker observed "five to six" people approach the driver's side front window of the Buick, stay for "[j]ust a matter of seconds," and then leave. Cronin could not tell whether the window was down, but he assumed it was down based on how the individuals interacted with the driver. Cronin did not observe anyone carrying anything to the car or carrying anything after leaving the car. Based on what he observed, Cronin did not get the impression that the individuals approaching the car were there to shop at the convenience store. Cronin suspected the driver of selling narcotics and explained that based on his experience and training, it was common for drugs to be sold from vehicles either by the potential buyer or seller contacting the driver at a car window or by the driver's having the buyer or seller enter the car, driving the car around the block, and then dropping off the buyer or seller.

Cronin recognized one of the individuals that approached the Buick as Wells. Cronin had had numerous contacts with Wells and had previously arrested Wells on a drug offense. After Wells walked away from the Buick, the investigators observed Wells flag down a Ford Contour driving eastbound on E Street. The Ford stopped, and Wells had a 10- to 15-second conversation with the two occupants of the car. Wells pointed to a nearby parking lot. The Ford drove to the parking lot, and Wells began to walk toward the parking lot. The investigators drove their unmarked car to that parking lot and parked 10 to 20 feet away from the Ford.

The investigators approached the Ford with their badges out and service weapons visible. Cronin observed that Wells was in the back seat on the passenger side of the Ford. Cronin made eye contact with Wells as Cronin neared the rear passenger door. Cronin recognized the driver of the Ford as a known drug trafficker/user, because the driver was easily recognizable by his facial tattoos. As the investigators approached the car, Cronin testified that he saw Wells digging into Wells' right pocket and that Wells' arm appeared to be under his jacket. Cronin testified that he "was very concerned [Wells] was either retrieving or hiding a weapon, or hiding narcotics on his person." When Cronin arrived at the car,

Wells' arm was still underneath his jacket. Cronin opened the door, grabbed control of Wells' arm, and pulled Wells out of the car.

After Wells was removed from the car, Cronin placed him in handcuffs. Cronin testified that he asked Wells "if he had anything on him" and that Wells replied he did not. Cronin initially testified that he "asked him if [he] could search him" and that Wells replied that he could. Cronin later testified that he asked Wells if he "could pat him down." Cronin then "began doing a pat search and search of his pockets where [Wells] was digging at." Cronin put his fingers into a coin pocket on the right side of Wells' pants and felt a plastic baggie. Cronin could not tell if there was anything in the baggie, but suspected it might contain a controlled substance.

Cronin testified that after he put his fingers in Wells' pocket, Wells tried to spin around. Wells began kicking backward toward Cronin and struck Cronin in the knee and thigh area four or five times. Cronin stated that the kicking hurt for about a minute but did not leave any lasting injuries. After Wells began struggling, Cronin and Parker "took [Wells] to the ground." The investigators observed a large pool of blood coming from Wells' face while he was lying on the ground. Cronin testified that after Wells was lying on the ground, Wells told the investigators that they could not search him.

After Wells was subdued, Cronin searched Wells' coin pocket and discovered baggies of crack cocaine and marijuana. Wells was not charged in connection with the marijuana. At trial, Wells stipulated that the other baggie did indeed contain crack cocaine. According to a police officer who arrived after the altercation occurred, Wells told that officer that Cronin had punched him and that Cronin did not have probable cause to search Wells.

Wells was taken to the hospital to receive treatment for his injuries. After the altercation with Wells, Cronin had a small cut on his hand and went to the hospital to receive treatment as well. Cronin testified that while they were both at the hospital, Wells apologized for kicking Cronin. Cronin stated that he did not prompt Wells to speak to him and that he did not ask Wells any questions.

Wells' testimony at trial presented a different version of the events. Wells testified that he flagged down the Ford in the street to ask the driver for a ride. According to Wells, the driver said that he would give Wells a ride, but he needed to clean out the back seat of his car, and that that was the reason why the Ford had pulled into the parking lot. Wells testified that while he was in the back seat, Cronin came up to the car and pulled Wells out. After being placed in handcuffs, Cronin asked Wells if he could search him and Wells stated that he said no. Wells also explained in his testimony that based on how he was positioned against the car, it would have been impossible for him to kick Cronin the way Cronin alleged. Wells admitted that he did pull away from Cronin while he was being searched, but that he never tried to fight Cronin. Instead, according to Wells, Cronin punched him in the face, put him in a choke hold, and threw him to the ground. Wells also denied that while at the hospital, he apologized to Cronin for kicking him. On cross-examination, Wells admitted to having crack cocaine in his pocket and admitted to using crack cocaine before the incident. Wells estimated that he probably smoked the crack cocaine 30 minutes before his contact with the investigators.

At trial, Wells filed a motion to suppress, seeking an order to suppress all evidence seized from him on January 13, 2012. Making essentially the same argument Wells now makes on appeal, he argued that Cronin's initial detention or arrest of Wells was an illegal seizure under the Fourth Amendment and that Cronin's warrantless search of Wells constituted an illegal search under the Fourth Amendment. On November 19, 2013, the district court overruled Wells' motion to suppress. The district court noted that it "found Cronin's testimony to be credible, both as it respected the area of 13th and 'E' Streets generally, and as it respected the events of January 13, 201[2]."

As to the initial detention, the district court found Cronin's detention of Wells to be a valid *Terry* stop, determining that the investigators had reasonable suspicion to believe Wells was engaged in suspicious activity. Further, the court found that "[u]nder the circumstances, Cronin was justified in removing

Wells from the Contour and placing him in handcuffs to protect the investigators and to prevent the destruction of evidence while he conducted his investigation."

Regarding the search, the district court stated that it did not find Wells' testimony that he did not give consent to Cronin to be credible. The court concluded that Wells did initially give consent for Cronin to search Wells. The district court further concluded that Cronin's discovery of the plastic baggie, combined with Wells' resistance in response, gave Cronin probable cause to search further after Wells withdrew his consent. Therefore, the subsequent search of Wells, after he withdrew consent, was supported by probable cause and did not violate the Fourth Amendment.

Wells was charged with one count of third degree assault of an officer and one count of possession of a controlled substance. At a bench trial on January 24, 2014, the district court found Wells guilty of both charges. On March 26, Wells was sentenced to 12 to 30 months' imprisonment for the first count and 12 to 18 months' imprisonment for the second count, with the sentences to be served consecutively. Wells timely filed a notice of appeal on April 14.

ASSIGNMENTS OF ERROR

Wells assigns as error that (1) the court erred in overruling his motion to suppress and (2) the court erred in finding him guilty of the offense of third degree assault on an officer because insufficient evidence existed to support said conviction.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review.[1] Regarding historical facts, we review the trial court's findings for clear error.[2] But whether those facts trigger or violate Fourth Amendment

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[1] *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[2] *Id.*

protections is a question of law that we review independently of the trial court's determination.[3]

[2] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.[4]

ANALYSIS

Motion to Suppress.

[3,4] Wells assigns that the trial court erred in overruling his motion to suppress. At trial, Wells sought to exclude evidence gathered by Cronin on January 13, 2012, on the ground that it was obtained in violation of the Fourth Amendment. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure. Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.[5]

Classifying Initial Detention.

[5-9] To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment to the U.S. Constitution, an appellate court employs the analysis set forth in *State v. Van Ackeren*,[6] which describes the three levels, or tiers, of police-citizen encounters.[7] A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of the liberty

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[3] *Id.*

[4] *State v. Keuhn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[5] See *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

[6] *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[7] *State v. Hedgcock, supra* note 1.

of the citizen.[8] A tier-two police-citizen encounter constitutes an investigatory stop as defined by *Terry v. Ohio*.[9] Such an encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning.[10] A tier-three police-citizen encounter constitutes an arrest.[11] An arrest involves a highly intrusive or lengthy search or detention.[12] Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[13]

[10] Wells argues that Cronin's use of handcuffs transformed an investigatory detention into a de facto arrest. When conducting an investigatory stop, an officer must employ "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[14] If unreasonable force is used or if it lasts for an unreasonably long period of time, then a detention may turn into a de facto arrest.[15] An examination of the case law leads to the conclusion that there is often a gray area between investigatory detentions and arrests, and "'we must not adhere to "rigid time limitations" or "bright line rules," . . . but must use "common sense and ordinary human experience."'"[16]

This court has not discussed under what circumstances the use of handcuffs would transform an investigatory detention

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[8] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[9] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). See *State v. Hedgcock, supra* note 1.

[10] *State v. Hedgcock, supra* note 1.

[11] *Id.* (citing *State v. Van Ackeren, supra* note 6).

[12] *Id.*

[13] *State v. Hedgcock, supra* note 1.

[14] *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983).

[15] *U.S. v. Maltais*, 403 F.3d 550 (8th Cir. 2005).

[16] *State v. Van Ackeren, supra* note 6, 242 Neb. at 490, 495 N.W.2d at 638 (quoting *United States v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985)).

into a custodial arrest. The use of handcuffs has been approved when it was reasonably necessary to protect officer safety during an investigative stop.[17] For example, in *United States v. Thompson*,[18] the defendant attempted to reach inside his coat pocket several times while an officer was performing a *Terry* frisk. The officer warned the defendant to stop or else he would place him in handcuffs.[19] After the defendant again tried to reach in his pocket, the officer put the defendant in handcuffs.[20] The Ninth Circuit held that the use of handcuffs was a reasonable precaution for officer safety and did not transform the stop into a custodial arrest.[21] And in *United States v. Purry*,[22] an officer detained a suspected bank robber. The officer placed the suspect in handcuffs after the suspect "'turned and pulled away'" when the officer put his arm on the suspect.[23] The District of Columbia Circuit determined that given the circumstances, the use of handcuffs constituted reasonable force and did not transform the stop into a custodial arrest.[24]

But the use of handcuffs may not be justified when the facts do not justify a belief that the suspect may be dangerous. In *State v. Williams*,[25] an officer was dispatched to investigate a burglar alarm sounding inside a nearby home. The officer noticed a car parked outside the front of the house, and as the officer approached, the car's headlights turned on and the car began to move.[26] The officer pulled his patrol car in front of

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[17] See, e.g., *U.S. v. Miller*, 974 F.2d 953 (8th Cir. 1992); *U.S. v. Crittendon*, 883 F.2d 326 (4th Cir. 1989); *U.S. v. Hastamorir*, 881 F.2d 1551 (11th Cir. 1989); *U.S. v. Glenna*, 878 F.2d 967 (7th Cir. 1989).

[18] *United States v. Thompson*, 597 F.2d 187 (9th Cir. 1979).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *United States v. Purry*, 545 F.2d 217 (D.C. Cir. 1976).

[23] *Id.* at 219.

[24] *United States v. Purry, supra* note 22.

[25] *State v. Williams*, 102 Wash. 2d 733, 689 P.2d 1065 (1984).

[26] *Id.*

the vehicle and instructed the defendant to get out of the car.[27] The officer then handcuffed the suspect and put him in the back of his patrol car.[28] The Washington Supreme Court determined that the use of handcuffs could be appropriate under certain circumstances, but was not a reasonable precaution in this situation, because "[h]e did not threaten the police nor did the facts of the alleged crime justify assuming that the suspect was armed or likely to harm the police."[29] The use of force in that situation exceeded the scope of the *Terry* stop.

Whether the detention was reasonable under the circumstances in this case depends on a multitude of factors. We find useful those factors listed in *United States v. Jones*,[30] an Eighth Circuit case examining the reasonable use of force during a *Terry* stop, including

> the number of officers and police cars involved, the nature of the crime and whether there is reason to believe the suspect might be armed, the strength of the officers' articulable, objective suspicions, the erratic behavior of or suspicious movements by the persons under observation, and the need for immediate action by the officers and lack of opportunity for them to have made the stop in less threatening circumstances.

In *Jones*, two officers suspected the defendant of participating in a burglary. The defendant fled when the officers attempted to talk to him. The officers blocked the defendant's car from moving and unholstered their weapons while the defendant was out of their sight. The defendant argued that blocking the car and the use of weapons constituted a custodial arrest. The Eighth Circuit determined that the officers' use of force was reasonable and did not transform the investigatory stop into a full-blown arrest.

In this case, we find that the district court did not err in its determination that the detention constituted an investigatory

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 740, 689 P.2d at 1069.

[30] *United States v. Jones*, 759 F.2d 633, 639-40 (8th Cir. 1985).

stop. The record indicates that Cronin detained Wells in a reasonable manner under the circumstances, which stopped short of a full custodial arrest. Cronin had a strong suspicion Wells was in possession of a controlled substance. As Cronin approached the car, he witnessed Wells appear to be digging into his pocket, and when Cronin arrived at the car, Wells' right arm was concealed underneath his jacket. The nature of Wells' suspected crime, trafficking narcotics, further justified Cronin's action. In Cronin's past experience as a member of the Lincoln/Lancaster County drug task force, he knew that narcotics users and traffickers often carry weapons.[31] Also, the suspects outnumbered the investigators at the scene and Parker was on the other side of the car at the time of detention. Based on Wells' furtive movements and his apparent attempt to conceal something, Cronin had an immediate need for action. It does not appear that Cronin could have made the stop and, at the same time, ensured his safety in a less threatening manner. Finally, we note that Wells was detained only for a brief period of time before he allegedly assaulted Cronin and was placed under arrest.[32] Considering these circumstances, we conclude that Cronin's decision to gain control of Wells' arm and handcuff him while Cronin conducted his investigation was a "reasonable precaution . . . to protect [officer] safety and maintain the status quo."[33]

Reasonable Suspicion.

[11-14] Having classified the detention, we must next determine whether it was supported by sufficient reasonable suspicion that Wells was, or was about to be, engaged in criminal activity. An investigatory stop requires only that an officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that criminal activity is afoot.[34] Whether a police officer has a reasonable suspicion based on

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[31] See, also, *U.S. v. Miller, supra* note 17.

[32] See *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005).

[33] *U.S. v. Martinez*, 462 F.3d 903, 907 (8th Cir. 2006).

[34] See *State v. Hedgcock, supra* note 1.

sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.[35] In determining whether a police officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience.[36] We review the district court's finding of reasonable suspicion de novo.[37]

We have previously analyzed what could create reasonable suspicion in the context of suspected pedestrian-vehicle drug transactions in *State v. Ellington*.[38] In *Ellington*, we held that the officer did not have reasonable suspicion to stop a defendant when the officer observed, in an area known for narcotics, the defendant lean into a vehicle with his arms extended into the vehicle, appear to converse with the occupants, and then walk away upon seeing the police cruiser.[39] Citing to cases from several jurisdictions, we listed several factors, absent in that case, which could give rise to reasonable suspicion that a pedestrian-vehicle drug transaction took place:

> These jurisdictions have collectively concluded that when an officer does not recognize or know an individual; is not acting on particularized information from a third party; does not observe an exchange of items or money between the individual and another person; does not observe any movement, gestures, or attempts by the individual to conceal or hide objects; does not observe the individual repeatedly approach vehicles in a similar pattern of activity; and does not suspect the individual of any other crime, the officer's mere observation of a pedestrian leaning into a window of a stopped vehicle in a high-crime area and then walking away upon seeing the officer

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[35] *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008).

[36] *State v. Kelley, supra* note 5.

[37] See *State v. Allen*, 269 Neb. 69, 690 N.W.2d 582 (2005), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[38] *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993).

[39] *Id.*

> does not amount to a reasonable suspicion of drug-related activity warranting an investigatory stop.[40]

In *Ellington*, the officer did not know either the defendant or the occupants of the car, had not observed any similar encounters between the defendant and other motorists, did not see any objects or money exchange hands, and did not see the defendant attempt to conceal anything after leaving the car.[41]

The facts of the case at bar distinguish it from *Ellington*. Cronin recognized both Wells and the driver of the Buick as individuals with a history of narcotics trafficking and use. Before Wells arrived, the investigators also observed a pattern, over a 10-minute period, of several individuals walking up to the Buick in a manner consistent with the sale of narcotics. After interacting with the driver of the Buick, Wells was picked up by the Ford in another manner, according to Cronin, typical of pedestrian-vehicle drug transactions. To further support his suspicion, when the investigators arrived at the parking lot, Cronin recognized the driver of the Ford as another known drug trafficker/user. Cronin then observed Wells possibly hiding or concealing something in his pocket after Wells saw the investigators. This is all in addition to the fact that the entire sequence of events occurred in an area Cronin referred to as the "epicenter of narcotics" in Lincoln.

Based on the totality of the circumstances, the officers had reasonable suspicion, based upon sufficient, articulable facts, that Wells had been involved in a drug transaction, despite the fact that neither investigator actually observed the controlled substance or money changing hands. The district court did not err in determining that the officers had reasonable suspicion.

Reasonableness of Search.

[15,16] Wells argues that even if the initial detention was supported by reasonable suspicion, Cronin's search of Wells' pocket was an unreasonable search under the Fourth

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[40] *Id.* at 559-60, 495 N.W.2d at 919.

[41] *Id.*

Amendment. 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.[42] 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.[43]

The district court determined that after Wells was taken out of the car and handcuffed, he voluntarily gave consent for Cronin to search him. Cronin then proceeded to put his fingers into Wells' pocket, which is when Cronin felt the baggies. A struggle between the two subsequently ensued. Wells withdrew his consent after Cronin and Parker "took [Wells] to the ground," but Cronin continued to search Wells and recovered the baggie of crack cocaine from Wells' pocket. The district court found that Cronin's feeling the baggie with his fingers, combined with Wells' reaction to Cronin's discovery, gave Cronin probable cause to search Wells' person.

[17,18] Wells argues that the consent was not given voluntarily. Further, Wells maintains that if he did give consent, he consented only to a "pat down," and that Cronin exceeded the scope of the consent given by reaching into Wells' pocket. Even if we assume without deciding that Wells' consent was not voluntarily given and that Cronin exceeded the scope of any consent given, we nevertheless conclude that the retrieval of the crack cocaine from Wells' pocket constituted a valid search incident to arrest. "A search made without a warrant is valid if made incidental to a lawful arrest."[44] After an arrest is made, the arresting officer may search the person to "remove any weapons that the latter might seek to use in order to resist

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[42] *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996).

[43] See *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011). See, also, *City of Beatrice v. Meints*, 289 Neb. 558, 856 N.W.2d 410 (2014).

[44] *State v. Buckman*, 259 Neb. 924, 936, 613 N.W.2d 463, 475 (2000).

arrest or effect his escape" and also "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."[45]

[19] We have yet to determine whether the search incident to a lawful arrest exception applies even if the suspect was arrested for resisting an unlawful search or seizure. However, Neb. Rev. Stat. § 28-1409(2) (Reissue 2008) diminishes the common-law right to resist unlawful arrest and provides that regardless of whether the arrest is legal, one may not forcibly resist an arrest. This statute on its face does not extend to illegal searches and seizures. The policy behind the abolition of the common-law right to resist unlawful arrest, however, applies equally to unlawful searches:

> Society has an interest in securing for its members the right to be free from unreasonable searches and seizures. Society also has an interest, however, in the orderly settlement of disputes between citizens and their government; it has an especially strong interest in minimizing the use of violent self-help in the resolution of those disputes. We think a proper accommodation of those interests requires that a person claiming to be aggrieved by a search conducted by a peace officer pursuant to an allegedly invalid warrant test that claim in a court of law and not forcibly resist the execution of the warrant at the place of search.[46]

This is the view the Nebraska Court of Appeals has taken in *State v. Coleman*.[47] In *Coleman*, the defendant bit an officer during a *Terry* frisk and was charged with assault on an officer.[48] The Court of Appeals determined that the officer did not have reasonable suspicion to initially detain the defendant and that therefore, the subsequent frisk was unconstitutional.[49]

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[45] *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), *abrogated on other grounds, Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

[46] *United States v. Ferrone*, 438 F.2d 381, 390 (3d Cir. 1971).

[47] *State v. Coleman*, 10 Neb. App. 337, 630 N.W.2d 686 (2001).

[48] *Id.*

[49] *Id.*

Nevertheless, the Court of Appeals held that the assault conviction could stand, despite the fact that the defendant was resisting an unconstitutional search.[50] The Court of Appeals believed that "the rationale and policy behind the ban on resistance to arrests in § 28-1409(2) is applicable to the use of force to resist pat downs, even though the search may be later found to fail constitutional muster."[51] Several other jurisdictions have also extended the rule to prohibit resistance against illegal pat-down searches as well.[52] Accordingly, we agree with the Court of Appeals' reasoning in *Coleman* and hold that an illegal search would not justify the use of force in resisting an officer.

In the case at bar, after Wells allegedly kicked Cronin, Cronin had probable cause to arrest Wells for assault of an officer in the third degree. When Wells was subdued and held to the ground by Cronin's putting his knee into Wells' back, the initial detention was transformed into a custodial arrest. This arrest was valid regardless of whether Cronin's prior search was constitutional. Any search of Wells' person that occurred after that time, including Cronin's search of Wells' pockets from which Cronin ultimately retrieved the baggie, would fall under the search incident to a lawful arrest exception to the warrant requirement. Therefore, even if Cronin's initial search was unlawful, the evidence need not be suppressed under the exclusionary rule, because it can be justified under another exception to the warrant requirement. Wells' argument that the district court erred in denying his motion to suppress is without merit.

Sufficiency of Evidence.

[20,21] Wells further assigns that there was insufficient evidence to support Wells' conviction for third degree assault

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[50] *Id.*

[51] *Id.* at 349, 630 N.W.2d at 697.

[52] See, e.g., *Elson v. State*, 659 P.2d 1195 (Alaska 1983); *State v. Ritter*, 472 N.W.2d 444 (N.D. 1991); *Com. v. Hill*, 264 Va. 541, 570 S.E.2d 805 (2002); *U.S. v. Mouscardy*, No. Crim. 10-10100-PBS, 2011 WL 2600550 (D. Mass. June 28, 2011) (unpublished memorandum and order), *affirmed* 722 F.3d 68 (1st Cir. 2013).

of an officer. 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.[53] As with any sufficiency claim, regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[54]

[22,23] "A person commits the offense of assault on an officer in the third degree if . . . [h]e or she intentionally, knowingly, or recklessly causes bodily injury . . . [t]o a peace officer [and t]he offense is committed while such officer . . . is engaged in the performance of his or her official duties."[55] And Neb. Rev. Stat. § 28-109(4) (Reissue 2008) defines physical pain as a bodily injury. We have previously held that a conviction for assault on a peace officer in the third degree was supported by sufficient evidence showing that the defendant struck an officer and that the officer experienced physical pain as a result.[56]

At trial, Cronin testified that when he reached into Wells' pocket, Wells "attempted to try to spin around and began kicking backwards towards" Cronin. Cronin testified that Wells raised his left leg at the knee, cocked it back, and struck Cronin in the thigh and knee four or five times. Cronin stated that he felt pain in his knee and thigh area "for a few seconds or a minute afterwards," but that there were "no long-lasting effects" and that the kicks did not leave any lasting injuries. Wells denied kicking Cronin and testified that based on his position after being handcuffed, it would have been impossible for him to raise his leg the way Cronin described. Parker testified that he was on the other side of the car and

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[53] See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[54] *State v. Norman*, 285 Neb. 72, 824 N.W.2d 739 (2013).

[55] Neb. Rev. Stat. § 28-931 (Cum. Supp. 2010).

[56] See *State v. Melton*, 239 Neb. 576, 477 N.W.2d 154 (1991).

did not witness the incident. Neither the State nor the defense presented additional evidence on this issue.

Without any other evidence to rely on, the district court found Cronin's testimony to be more credible than Wells' testimony. We are not in a position to reweigh the credibility of the witnesses.

Viewing the evidence in a light most favorable to the prosecution, which in this case would mean assuming Cronin's account of the incident is correct, there was sufficient evidence to find all essential elements of the crime beyond a reasonable doubt. The evidence establishes that Wells knew Cronin was a police officer performing his official duties and that Wells caused a bodily injury by kicking Cronin in the knee and thigh several times, which resulted in pain to Cronin. Wells' assignment of error is without merit.

CONCLUSION

The judgment and sentences of the district court are affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

TERRY J. ARMSTRONG, APPELLANT, V.
STATE OF NEBRASKA, APPELLEE.
859 N.W.2d 541

Filed February 20, 2015. No. S-14-438.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. 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: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2010), is not synonymous with wages. It includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.
5. ____: ____. 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.
6. **Workers' Compensation.** A worker is not, as a matter of law, totally disabled solely because the worker's disability prevents him or her from working full time.
7. ____. Under the "odd-lot" doctrine, 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.
8. ____. A worker may be totally disabled for all practical purposes, despite being able to find trivial, occasional employment under rare conditions at small remuneration.
9. ____. Whether a claimant has suffered a loss of earning power or is totally disabled are questions of fact.
10. **Appeal and Error.** For an appellate court to consider an alleged error, a party must specifically assign and argue it.
11. **Workers' Compensation: Penalties and Forfeitures: Time.** Under Neb. Rev. Stat. § 48-125(1)(b) (Cum. Supp. 2014), an employer must pay a 50-percent waiting-time penalty if (1) the employer fails to pay compensation within 30 days of the employee's notice of disability and (2) no reasonable controversy existed regarding the employee's claim for benefits.
12. **Workers' Compensation: Appeal and Error.** For the purpose of Neb. Rev. Stat. § 48-125 (Cum. Supp. 2014), a reasonable controversy exists if (1) there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court about an aspect of an employee's claim, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.
13. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Words and Phrases.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2014) is a question of fact.
14. **Workers' Compensation: Evidence: Time.** Evidence showing a reasonable controversy does not have to be known to the employer at the time it refuses benefits.
15. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Ordinarily, when an appellate court judicially construes a statute and that construction does

not evoke an amendment, the court presumes that the Legislature acquiesced in the court's determination of the Legislature's intent.

16. **Workers' Compensation.** Because an employer is liable under Neb. Rev. Stat. § 48-120 (Reissue 2010) for reasonable medical and hospital services, the employer must also pay the cost of travel incident to and reasonably necessary for obtaining these services.

Appeal from the Workers' Compensation Court: DANIEL R. FRIDRICH, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michelle D. Epstein and Jason G. Ausman, of Ausman Law Firm, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Elizabeth A. Gregory for appellee.

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

CONNOLLY, J.

SUMMARY

Terry J. Armstrong was injured while working as a nurse in the employ of the State of Nebraska. The Workers' Compensation Court found that Armstrong was permanently partially disabled and suffered a 75-percent loss of earning power. On appeal, Armstrong argues that a worker who is permanently restricted to part-time work is, as a matter of law, totally disabled. Armstrong also argues that evidence produced by an employer at trial—but unknown at the time benefits are denied—cannot create a reasonable controversy for purposes of the employee's entitlement to a waiting-time penalty. We disagree on both points, but remand the cause so that the court may decide if the State is liable for certain mileage expenses.

BACKGROUND

FACTUAL BACKGROUND

On May 22, 2010, Armstrong injured her left shoulder while working as a staff nurse at the Eastern Nebraska Veterans' Home. Armstrong and her employer stipulated that Armstrong

suffered a rotator cuff tear in her left shoulder for which she was "entitled to compensation." The State paid Armstrong temporary total disability (TTD) benefits from May 22, 2010, until April 23, 2012, when it concluded that Armstrong had reached maximum medical improvement.

As one physician noted, Armstrong's "medical history is indeed complicated." Armstrong underwent surgery to repair the rotator cuff tear in August 2010. Her surgeon stated in September 2011 that Armstrong had reached maximum medical improvement as to her rotator cuff injury.

But multiple physicians opined that Armstrong developed complex regional pain syndrome (CRPS) after the surgery. CRPS is a chronic pain condition that usually affects a limb after an injury to that limb.

At the request of Armstrong's attorney, Dr. D.M. Gammel reviewed the "countless medical records" and examined Armstrong on October 8, 2013. Gammel concluded that Armstrong's rotator cuff injury caused her CRPS and that her CRPS had reached maximum medical improvement. Gammel opined that Armstrong was permanently limited to working 4-hour days.

Two physicians who examined Armstrong and the medical records at the State's request reached different conclusions. One found "minimal objective evidence" of CRPS and opined that Armstrong was malingering. The other stated that Armstrong's "bilateral upper extremity hypersensitivity" was not caused by the May 2010 accident.

Procedural Background

In January 2013, Armstrong filed a petition in Workers' Compensation Court alleging that she suffered from CRPS and had sustained injuries to both her left and right upper limbs because of the May 2010 accident. Armstrong also alleged that she suffered from bipolar, anxiety, and adjustment disorders because of the accident. Armstrong requested TTD benefits from May 22, 2010, to October 8, 2013—the date Gammel opined that she reached maximum medical improvement as to her CRPS—and permanent total disability benefits starting on October 8, 2013.

The court appointed a vocational rehabilitation counselor to provide a loss of earning capacity analysis. Karen Stricklett, the appointed counselor, authored a report that gave different estimates based on the opinions of various physicians. Because of Gammel's opinion that Armstrong could work only 4 hours per day, Stricklett estimated that Armstrong would have a 75-percent loss of earning capacity.

The compensation court entered an award finding that Armstrong was entitled to TTD and permanent partial disability benefits. In addition to the rotator cuff tear, the court found that Armstrong suffered from CRPS because of the accident. The court also found that Armstrong's preexisting anxiety had worsened because of the May 2010 accident. But it concluded that any changes in Armstrong's depression or cognition were unrelated to the workplace injury.

The court awarded Armstrong TTD benefits from April 24, 2012, to October 8, 2013. After that date, the court awarded her permanent partial disability benefits measured by her lost earning power. The court stated that Armstrong met her burden of proving a permanent impairment "through the medical report of Dr. Gammel, who opined that [Armstrong] could work four hours per day in the light demand category."

For Armstrong's lost earning power, the court found that she "suffered a 75 percent loss of earning capacity as opined by . . . Stricklett." The court said that it "simply believes that [Armstrong] is capable of doing more than she led her doctors to believe." In particular, the court noted reports from emergency room doctors who said that Armstrong showed no signs of stress while using her cell phone but "'cries out in pain with any motion that we do.'" The court also said that it observed Armstrong during trial and noticed that she manipulated papers and moved her limbs without apparent difficulty.

Finally, the court denied Armstrong a waiting-time penalty, attorney fees, and interest under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2014), because a reasonable controversy existed. Armstrong argued that the State did not have evidence of a reasonable controversy when it stopped making TTD payments in April 2012. The court agreed, but found that the State had presented such evidence at trial.

ASSIGNMENTS OF ERROR

Armstrong assigns that the compensation court erred by (1) finding that Armstrong suffered a 75-percent loss of earning capacity, because "a 20-hour workweek is not suitable gainful employment as a matter of law"; (2) finding that Armstrong was not entitled to a waiting-time penalty, attorney fees, and interest; and (3) failing to award mileage expenses for all of Armstrong's travel to injury-related medical appointments.

STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.[1]

[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.[2] In workers' compensation cases, we determine questions of law.[3]

ANALYSIS

Partial Disability

Armstrong argues that an injured worker with a permanent disability that prevents her from working "full-time" is, as a matter of law, totally disabled.[4] According to Armstrong, only "full-time, 40-hour per week employment positions" may be considered when determining a permanently disabled worker's lost earning power.[5] She frames the issue as follows: "[C]an a worker who is permanently restricted to working 4-hour

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[1] Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014).

[2] *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[3] See *id.*

[4] Brief for appellant at 24.

[5] *Id.*

days, resulting in a 20-hour workweek, be less than permanently and totally disabled pursuant to Nebraska Workers' Compensation law?"[6]

The State contends that Armstrong "confuses wages with earning power."[7] Additionally, the State argues that Armstrong's interpretation would lead to "absurd results," such as an injured worker with a 39-hour workweek restriction being deemed totally disabled solely on that ground.[8] In response, Armstrong says that she "does not suggest that the Court adopt a bright-line rule with respect to how many hours worked per week constitutes full-time or part-time employment."[9] Instead, she appears to argue that she is totally disabled unless she can earn "wages similar" to those she would earn in a 40-hour workweek.[10]

Neb. Rev. Stat. § 48-121 (Reissue 2010) provides compensation for three categories of job-related disabilities.[11] Subsection (1) sets the amount of compensation for total disability; subsection (2) sets the amount of compensation for partial disability, except in cases covered by subsection (3); and subsection (3) sets out "schedule" injuries to specified parts of the body with compensation established therefor.[12]

[4] The compensation court awarded Armstrong permanent partial disability benefits under § 48-121(2), which are measured by 66⅔ percent of the difference between weekly wages at the time of the injury and earning power thereafter. As used in § 48-121(2), earning power is not synonymous with wages.[13] It includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform

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[6] *Id.* at 13.

[7] Brief for appellee at 14.

[8] *Id.* at 15.

[9] Reply brief for appellant at 7.

[10] *Id.*

[11] *Rodgers v. Nebraska State Fair*, 288 Neb. 92, 846 N.W.2d 195 (2014).

[12] *Id.*

[13] *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005).

the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.[14]

[5] Armstrong claims that she is permanently totally disabled. Total disability does not mean a state of absolute helplessness.[15] 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.[16]

The thrust of Armstrong's argument is that because her weekly wage for permanent disability benefits must be calculated on a 40-hour workweek, her earning power is necessarily zero if her disability prevents her from working full time. Generally, Neb. Rev. Stat. § 48-126 (Reissue 2010) provides that a worker's weekly wage is determined by averaging the earnings from the 26 weeks preceding the injury. But in cases of permanent disability, § 48-121(4) provides that if the worker's wages were paid by the hour, weekly wages must be computed on a minimum 40-hour workweek. Armstrong urges us to read "earning power" under § 48-121(2) "in conjunction with" the method of calculating weekly wage under § 48-121(4).[17]

We have acknowledged that the plain text of § 48-121(4) sometimes requires "distortion" in the calculation of a permanently disabled worker's weekly wage.[18] For example, we noted in *Mueller v. Lincoln Public Schools*[19] that § 48-121(4) required the claimant's "workweek be extended to 40 hours," even though she only worked 37½ hours per week before

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[14] *Id.*

[15] *Money v. Tyrrell Flowers, supra* note 2.

[16] *Id.*

[17] Brief for appellant at 23.

[18] *Mueller v. Lincoln Public Schools*, 282 Neb. 25, 30, 803 N.W.2d 408, 411 (2011).

[19] *Id.*

her injury. Similarly, we held in *Becerra v. United Parcel Service*[20] that the compensation court did not err by calculating the permanently disabled claimant's weekly wage on a 40-hour workweek, even though the claimant worked 17 hours per week before his injury. At issue in *Becerra* was the claimant's vocational rehabilitation priority under Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010), which a vocational counselor testified depended on the claimant's weekly wage.

[6] We conclude that a worker is not, as a matter of law, totally disabled solely because the worker's disability prevents him or her from working full time. While § 48-121(4) requires a permanently disabled hourly worker's weekly wage to be calculated on a 40-hour workweek, "wages and earning capacity are not the same thing."[21] Compensation for partial disability under § 48-121(2) is a function of the worker's "wages" and "earning power." For a permanently disabled hourly worker, § 48-121(4) requires that wages be calculated based on a 40-hour workweek. But it does not mandate that earning power be deemed zero solely because the worker is unable to work full time.

Of course, a worker's inability to work full time is relevant to the worker's earning power. For example, we held in *Giboo v. Certified Transmission Rebuilders*[22] that the compensation court erred by relying on an earning power report that failed to consider the impact of a 6-hour workday restriction. We noted the numerical truism that, all else being equal, a person who works only 6 hours per day will earn less than a person who works 8 hours per day. But we also explained that such a restriction "reduce[s] a person's earning capacity by virtue of the fact that it reduces the number of jobs available to that individual."[23]

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[20] *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012).

[21] *Kam v. IBP, inc.*, 12 Neb. App. 855, 867, 686 N.W.2d 631, 641 (2004). See, also, *Straub v. City of Scottsbluff*, 280 Neb. 163, 784 N.W.2d 886 (2010); *Davis v. Goodyear Tire & Rubber Co., supra* note 13.

[22] *Giboo v. Certified Transmission Rebuilders*, 275 Neb. 369, 746 N.W.2d 362 (2008).

[23] *Id.* at 388, 746 N.W.2d at 377.

[7,8] Furthermore, a worker may be totally disabled even though she is able to work in some limited capacity. Under the "odd-lot" doctrine, 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.[24] A worker may be totally disabled for all practical purposes, despite being able to find trivial, occasional employment under rare conditions at small remuneration.[25] For example, we have affirmed a finding of total disability where the claimant had a "low tolerance for prolonged sitting, standing, or walking"[26]; where the claimant could engage in activity for only 30 minutes before needing to rest[27]; and where the claimant worked 16 to 18 hours per week only "at the sufferance of an employer willing to provide the extra supervision and who would tolerate his aberrational behavior."[28] But we have noted that "not all part-time work . . . is trivial."[29]

[9,10] Whether a claimant has suffered a loss of earning power or is totally disabled are questions of fact.[30] Here, Armstrong assigns that the compensation court erred

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[24] *Lovelace v. City of Lincoln*, 283 Neb. 12, 14, 809 N.W.2d 505, 507 (2012). Cf., *Money v. Tyrrell Flowers, supra* note 2; *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003); *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002); *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992).

[25] See, *McDonald v. Lincoln U-Cart Concrete Co.*, 232 Neb. 960, 442 N.W.2d 892 (1989); *Heironymous v. Jacobsen Transfer*, 215 Neb. 209, 337 N.W.2d 769 (1983); *Craig v. American Community Stores Corp.*, 205 Neb. 286, 287 N.W.2d 426 (1980); *Brockhaus v. L. E. Ball Constr. Co.*, 180 Neb. 737, 145 N.W.2d 341 (1966); *Wheeler v. Northwestern Metal Co.*, 175 Neb. 841, 124 N.W.2d 377 (1963).

[26] *Frauendorfer v. Lindsay Mfg. Co., supra* note 24, 263 Neb. at 252, 639 N.W.2d at 139.

[27] *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

[28] *McDonald v. Lincoln U-Cart Concrete Co., supra* note 25, 232 Neb. at 969, 442 N.W.2d at 899.

[29] *Id.*

[30] See, *Kim v. Gen-X Clothing*, 287 Neb. 927, 845 N.W.2d 265 (2014); *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

by finding that she had a 75-percent loss of earning power because "a 20-hour workweek is not suitable gainful employment as a matter of law." Having rejected this assignment, we do not consider any alleged deficiencies in Stricklett's report or the sufficiency of the evidence to support the court's factual finding that Armstrong suffered a 75-percent loss of earning power. For an appellate court to consider an alleged error, a party must specifically assign and argue it.[31]

Waiting-Time Penalty, Attorney Fees, and Interest

Armstrong argues that she is entitled to a waiting-time penalty, attorney fees, and interest because of the State's failure to pay TTD benefits within 30 days of notice of her disability. The compensation court found that the State "did not have a basis for the discontinuation of [Armstrong's] TTD benefits at the time it did so." But the court denied Armstrong a waiting-time penalty because the State "present[ed] evidence at trial that justified its discontinuation of benefits." Armstrong contends that a reasonable controversy must exist at the time the employer denies benefits.

[11] Under § 48-125(1)(b), an employer must pay a 50-percent waiting-time penalty if (1) the employer fails to pay compensation within 30 days of the employee's notice of disability and (2) no reasonable controversy existed regarding the employee's claim for benefits.[32] When compensation is so delayed and the employee receives an award from the compensation court, the employee is also entitled to attorney fees and interest.[33] Although "reasonable controversy" appears nowhere in the text of § 48-125, the phrase has been part of our waiting-time penalty jurisprudence for more than 90 years.[34]

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[31] *deNouri & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014).

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

[33] § 48-125(2)(a) and (3). See *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

[34] *Behrens v. American Stores Packing Co.*, 234 Neb. 25, 449 N.W.2d 197 (1989) (citing *Updike Grain Co. v. Swanson*, 104 Neb. 661, 178 N.W. 618 (1920)).

[12,13] Under the test we announced in *Mendoza v. Omaha Meat Processors*,[35] for the purpose of § 48-125, a reasonable controversy exists if (1) there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court about an aspect of an employee's claim, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.[36] Whether a reasonable controversy exists under § 48-125 is a question of fact.[37]

[14] We have explained that "[u]nder the *Mendoza* test, when there is some conflict in the medical testimony adduced at trial, reasonable but opposite conclusions could be reached by the compensation court."[38] And we have held that a reasonable controversy existed even though the evidence showing the controversy was unknown at the time the employer refused benefits. In *Dawes v. Wittrock Sandblasting & Painting*,[39] the claimant argued that the compensation court erred by not awarding him a waiting-time penalty. We disagreed:

> Here, [the employer] presented expert medical testimony that would have supported a finding that [the claimant's]

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[35] *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

[36] Cf., *Manchester v. Drivers Mgmt., supra* note 32; *Stacy v. Great Lakes Agri Mktg., supra* note 30; *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004); *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000); *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999).

[37] *Manchester v. Drivers Mgmt., supra* note 32.

[38] *McBee v. Goodyear Tire & Rubber Co., supra* note 36, 255 Neb. at 908-09, 587 N.W.2d at 692. See, *U S West Communications v. Taborski*, 253 Neb. 770, 572 N.W.2d 81 (1998); *Kerkman v. Weidner Williams Roofing Co.*, 250 Neb. 70, 547 N.W.2d 152 (1996). See, also, *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001).

[39] *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved in part on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

> condition was not the result of an accident arising out of and in the course of employment. . . . While this opinion was not adduced until after the denial of benefits, it is evidence that [the employer] had an actual basis in law or fact for denying [the claimant's] claim.[40]

So, we concluded that a reasonable controversy existed based on testimony unknown at the time the employer denied benefits.

[15] Ordinarily, when an appellate court judicially construes a statute and that construction does not evoke an amendment, we presume that the Legislature acquiesced in the court's determination of the Legislature's intent.[41] The Legislature has amended § 48-125 four times since we decided *Dawes*.[42] But none of the amendments are relevant to our reasoning. Because the Legislature did not materially change the language of § 48-125, our holding in *Dawes*—that a reasonable controversy can be shown by evidence adduced at trial but unknown at the time benefits were denied—continues to apply.

Armstrong contends that *Dawes* discourages the prompt payment of benefits by giving the employer an incentive to delay. As we noted in *Dawes*, the purpose of the waiting-time penalties in § 48-125 is to "require[] that employe[r]s and insurers promptly handle and decide claims."[43] We do not believe that *Dawes* is inconsistent with this purpose. If an employer chooses to ignore the employee's notice of disability, it does so at its own peril. Should the employee's claim

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[40] *Dawes v. Wittrock Sandblasting & Painting, supra* note 39, 266 Neb. at 554, 667 N.W.2d at 191 (citing *Mendoza v. Omaha Meat Processors, supra* note 35).

[41] See *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009).

[42] See, 2011 Neb. Laws, L.B. 151, § 1; 2009 Neb. Laws, L.B. 630, § 3; 2005 Neb. Laws, L.B. 238, § 4, and L.B. 13, § 5.

[43] *Dawes v. Wittrock Sandblasting & Painting, supra* note 40, 266 Neb. at 553, 667 N.W.2d at 191. See, also, *Gaston v. Appleton Elec. Co.*, 253 Neb. 897, 573 N.W.2d 131 (1998); *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998).

be noncontroversial, the employer is subject to the significant waiting-time penalties in § 48-125. So, employers and insurers have an incentive to investigate all claims and pay noncontroversial claims promptly to avoid a penalty.

Armstrong concedes that the evidence produced at trial showed the existence of a reasonable controversy. We therefore affirm the court's denial of a waiting-time penalty, attorney fees, and interest based on the State's failure to pay benefits within 30 days of notice of Armstrong's disability.

Mileage Expenses

Armstrong argues that the court "overlooked" some of her mileage expenses.[44] The court received two documents—exhibits 22 and 53—in which Armstrong computed the mileage of trips to various medical providers. Exhibit 22 records mileage for trips made between July 28, 2012, and November 8, 2013. Exhibit 53 records trips made from November 8, 2013, to February 7, 2014. The court awarded all of the mileage expenses in exhibit 53, but did not mention exhibit 22. Armstrong requests that we remand the cause so that the court may consider the mileage in exhibit 22. The State "does not dispute that the trial [c]ourt overlooked Exhibit 22."[45]

[16] Under Neb. Rev. Stat. § 48-120 (Reissue 2010), an employer is liable for all reasonable medical, surgical, and hospital expenses required by the nature of the injury which will help restore the employee to health and employment. Because § 48-120 makes the employer liable for reasonable medical and hospital services, we have held that the employer must also pay the cost of travel incident to and reasonably necessary for obtaining these services.[46] This rule is firmly established.[47]

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[44] Brief for appellant at 40.

[45] Brief for appellee at 21.

[46] *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959); *Newberry v. Youngs*, 163 Neb. 397, 80 N.W.2d 165 (1956). See, also, *Hoffart v. Fleming Cos.*, 10 Neb. App. 524, 634 N.W.2d 37 (2001).

[47] *Hoffart v. Fleming Cos., supra* note 46.

We agree that the court overlooked exhibit 22. Exhibits 22 and 53 contain mileage for trips to the same providers for the same services, such as mileage to and from occupational therapy. It is not apparent why the court would award mileage expenses for Armstrong's occupational therapy on November 13, 2013, documented in exhibit 53, but not her trip to occupational therapy on November 8, 2013, documented in exhibit 22. We therefore direct the court to consider on remand which of the trips described in exhibit 22, if any, the State should pay.

CONCLUSION

We affirm the compensation court's finding that Armstrong is permanently partially disabled and has suffered a 75-percent loss of earning capacity. A worker is not, as a matter of law, totally disabled solely because she is unable to work full time. We also conclude that the court did not err by denying Armstrong a waiting-time penalty, attorney fees, and interest under § 48-125. But we conclude that the court failed to consider the mileage expenses detailed in exhibit 22. We therefore remand the cause and direct the court to consider exhibit 22 and determine the mileage of the trips, if any, the State should pay.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., participating on briefs.

JLEE RAFERT ET AL., APPELLANTS, V.
ROBERT J. MEYER, APPELLEE.
859 N.W.2d 332

Filed February 27, 2015. No. S-14-003.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face.

3. **Trusts.** As a general rule, the authority of a trustee is governed not only by the trust instrument but also by statutes and common-law rules pertaining to trusts and trustees.
4. ____. A trustee has a duty to fully inform the beneficiary of all material facts so that the beneficiary can protect his or her own interests where necessary.
5. ____. Every violation by a trustee of a duty required of him by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.
6. **Dismissal and Nonsuit: Pleadings: Appeal and Error.** When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff.
7. **Trusts.** A trustee has the duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code.
8. **Trusts: Liability: Damages.** A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach.
9. **Trusts.** A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.

Appeal from the District Court for Richardson County: DANIEL E. BRYAN, JR., Judge. Reversed and remanded for further proceedings.

Gary J. Nedved and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellants.

Mark C. Laughlin and Jacqueline M. DeLuca, of Fraser Stryker, 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 action for breach of trust. The settlor, Jlee Rafert, directed her attorney, Robert J. Meyer, to prepare an irrevocable trust that named Meyer as the trustee. The corpus of the trust was three insurance policies on the life of Rafert, issued in the total amount of $8.5 million. The policies were payable

on Rafert's death to the trustee for the benefit of Rafert's four daughters. The trust instrument provided that the trustee had no duty to pay the insurance premiums, had no duty to notify the beneficiaries of nonpayment of such premiums, and had no liability for any nonpayment.

Meyer executed all three insurance policy applications, each identifying the trust as owner of the policy. On each policy application executed by Meyer, he provided the insurer with a false address for the trust. The initial premiums were paid in 2009, but in 2010, the policies lapsed for nonpayment of the premiums due. Rafert, Meyer, and the beneficiaries did not receive notice until August 2012 from the insurers that the policies had lapsed. Rafert paid $252,841.03 to an insurance agent who did not forward the payment to the insurers.

Rafert and her daughters (collectively Appellants) sued Meyer for breach of his duties as the trustee and damages that occurred as a result of the breach. The trial court sustained Meyer's motion to dismiss for failure to state a claim against Meyer.

For the reasons stated herein, we reverse the judgment of the district court and remand the cause for further proceedings.

SCOPE OF REVIEW

[1,2] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *State v. Mamer*, 289 Neb. 92, 853 N.W.2d 517 (2014).

FACTS

Background

On March 17, 2009, Rafert executed an irrevocable trust for the benefit of her four adult daughters. Meyer prepared the trust instrument and named himself as the trustee. Meyer did not meet with Rafert to explain the provisions of the trust or

who would be responsible for monitoring the insurance policies owned by the trust.

As trustee, Meyer signed three applications for life insurance that named Rafert as the insured and the trust as the owner of the policies. On each application, Meyer gave the insurer a false address in South Dakota for Meyer as trustee. Since the creation of the trust, Meyer was a resident of Falls City, Nebraska, and never received mail at the South Dakota address. The insurers were TransAmerica Life Insurance Company (TransAmerica), Lincoln Benefit Life Company (Lincoln Benefit), and Lincoln National Life Insurance Company (Lincoln National) (collectively insurers). In 2009, Rafert paid initial premiums on each of the policies in the amounts of $97,860, $63,916, and $100,230, respectively.

TransAmerica sent a notice to Meyer at the false address that premiums of $97,860 were due and a subsequent notice that the policy was in danger of lapsing. In November 2010, a final notice and letter were sent to Meyer stating that the policy had lapsed effective August 11, 2010, but that the policy allowed for reinstatement.

Lincoln Benefit sent a notice to Meyer at the false address that a premium of $60,150 was due on May 26, 2010, and a subsequent letter to inform Meyer that the policy was in its grace period and was in danger of lapsing. On February 23, 2011, a final notice was sent to Meyer stating that the grace period had expired but that the policy could be reinstated.

Appellants asserted that Lincoln National would have sent similar notices in 2010 to the false address given to Lincoln National by Meyer.

Appellants alleged that Meyer breached his fiduciary duties as trustee and that as a direct and that as a proximate result of the breach of Meyer's duties, the policies lapsed, resulting in the loss of the initial premiums. And after the policies had lapsed, Rafert paid additional premiums in the amount of $252,841.03. These premiums were paid directly to an insurance agent by issuing checks to a corporation owned by the agent. However, the premiums were never forwarded to the insurers by the agent or his company, and Appellants do not know what happened to the premiums.

Appellants alleged that Rafert's daughters, as qualified beneficiaries, had an immediate interest in the premiums paid by Rafert. As a result of Meyer's providing the insurers with a false address, Appellants did not receive notices of the lapses of the three policies until August 2012.

Procedural Background

Meyer moved to dismiss Appellants' second amended complaint, asserting that he did not cause the nonpayment of the premiums, that he had no notice from the insurers of nonpayment, and that his failure to submit annual reports to the beneficiaries had no causal connection to the damages claimed, because the lapses had occurred after his report would have been submitted.

The district court dismissed the second amended complaint with prejudice, finding that pursuant to the terms of the trust, Meyer did not have a duty to pay the premiums or to notify anyone of the nonpayment of the premiums. Nor, it observed, did he have any responsibility for the failure to pay the premiums. It concluded the pleadings failed to allege how Meyer's actions had caused the lapses of the policies.

Appellants timely appealed.

ASSIGNMENTS OF ERROR

Appellants assign that the district court erred in granting Meyer's motion to dismiss their second amended complaint. They claim the court erred in concluding that they had not stated a plausible claim that Meyer had breached his mandatory duties under the Nebraska Uniform Trust Code (Code) to act in good faith and in the interest of the beneficiaries. They assert that the court erred in finding that Appellants did not state a plausible claim that Meyer breached his mandatory duty to keep qualified beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.

ANALYSIS

This case is presented as a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6). We therefore consider whether Appellants' factual allegations set forth a plausible claim for

which relief may be granted. The issue is whether Appellants stated a plausible claim that Meyer breached his fiduciary duties to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries and whether Appellants were damaged as a result.

Our decision is controlled by certain common-law rules pertaining to trusts and trustees and by the provisions of the Code.

[3,4] As a general rule, the authority of a trustee is governed not only by the trust instrument but also by statutes and common-law rules pertaining to trusts and trustees. *Wahrman v. Wahrman*, 243 Neb. 673, 502 N.W.2d 95 (1993). A trustee has a duty to fully inform the beneficiary of all material facts so that the beneficiary can protect his or her own interests where necessary. *Karpf v. Karpf*, 240 Neb. 302, 481 N.W.2d 891 (1992). "'[A] trustee owes beneficiaries of a trust his undivided loyalty and good faith, and all his acts as such trustee must be in the interest of the [beneficiary] and no one else.'" *Id.* at 311, 481 N.W.2d at 897.

[5] Every violation by a trustee of a duty required of him by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952). It is generally held that an exculpatory clause will not excuse the trustee from liability for acts performed in bad faith or gross negligence. George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 542 (2d rev. ed. 1993).

The relevant provisions of the Code provide:

> (a) Except as otherwise provided in the terms of the trust, the . . . Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.
>
> (b) The terms of a trust prevail over any provision of the [C]ode except:
>
> . . . .
>
> (2) the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

> . . . .
>
> (8) the duty under subsection (a) of section 30-3878 to keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests, and to respond to the request of a qualified beneficiary of an irrevocable trust for . . . information reasonably related to the administration of a trust; [and]
>
> (9) the effect of an exculpatory term under section 30-3897.

Neb. Rev. Stat. § 30-3805 (Reissue 2008).

A trustee must "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the . . . Code." Neb. Rev. Stat. § 30-3866 (Reissue 2008). Regarding a trustee's duty to keep the beneficiaries of the trust reasonably informed of the trust assets, "[a] trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests." Neb. Rev. Stat. § 30-3878(a) (Reissue 2008). The Code provides that a term limiting a trustee's liability for breach of trust is unenforceable to the extent it "relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries." Neb. Rev. Stat. § 30-3897(a)(1) (Reissue 2008). Furthermore, an exculpatory clause in a trust is invalid "unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor." § 30-3897(b).

[6] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *State v. Mamer*, 289 Neb. 92, 853 N.W.2d 517 (2014). When analyzing a lower court's dismissal of a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff. *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb.

79, 727 N.W.2d 447 (2007). Consequently, we look to the factual pleadings in the second amended complaint, accepting all allegations as true and drawing all reasonable inferences therefrom in favor of Appellants to determine whether Appellants have stated a plausible claim.

Appellants allege that Meyer breached his duties as trustee by providing a false address to the insurers, failing to keep Appellants informed of the facts necessary to protect their interests, failing to furnish annual statements, failing to communicate the terms of the trust to Rafert, and failing to act in good faith and in accordance with the terms and purposes of the trust and in the interests of the beneficiaries.

Meyer contends that his duties were limited by articles II and IV of the trust and that providing a false address to the insurers and failing to furnish annual reports did not cause the premiums not to be paid. Articles II and IV of the trust provide:

> ARTICLE II
>
> The Trustee shall be under no obligation to pay the premiums which may become due and payable under the provisions of such policy of insurance, or to make certain that such premiums are paid by the Grantor or others, or to notify any persons of the noon-payment [sic] of such premiums, and the Trustee shall be under no responsibility or liability of any kind in the event such premiums are not paid as required.
>
> . . . .
>
> ARTICLE IV
>
> . . . The Trustee shall not be required to make or file an inventory or accounting to any Court, or to give bond, but the Trustee shall, at least annually, furnish to each beneficiary a statement showing property then held by the Trustee and the receipts and disbursements made.

Meyer claims that he had no obligation as trustee to monitor or notify any person of the nonpayment of premiums and that the district court correctly relied upon the language of article II in dismissing Appellants' action. We disagree. The Code provides deference to the terms of the trust, but this deference does not extend to all the trustee's duties. Those

duties to which the Code does not defer are described above in § 30-3805.

[7,8] A trustee has the duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the Code. § 30-3866. A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach. *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

In drafting the trust, Meyer could not abrogate his duty under § 30-3805 to keep Appellants reasonably informed of the material facts necessary for them to protect their interests. Notice of nonpayment of the premiums would have profoundly affected Appellants' actions to protect the policies from lapsing. Notice that the policies had lapsed would have affected the subsequent payment by Rafert as settlor to the insurance agent.

Meyer admittedly provided a false address on each of the insurance applications. This had the obvious result that the insurers' notices regarding premiums due would not reach any of the parties. Despite this, Meyer argues that article II limits his liability for any claims related to nonpayment of the premiums. Meyer goes so far as to suggest that he did not have the duty to inform Appellants even if he had received notices of the nonpayment of the premiums.

Such a position is clearly untenable and challenges the most basic understanding of a trustee's duty to act for the benefit of the beneficiaries under the trust. Perhaps the most fundamental aspect of acting for the benefit of the beneficiaries is protecting the trust property. Article II cannot be relied upon to abrogate Meyer's duty to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

[9] Our conclusion remains the same whether we treat article II as an exculpatory clause or as a term limiting Meyer's duties or liability.

> A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

> (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries[.]

§ 30-3897(a). Appellants have alleged sufficient facts for a court to find that Meyer acted in bad faith or reckless indifference to the purposes of the trust or the interests of the beneficiaries by providing a false address to the insurers. This is not a situation where a gratuitous trustee, who had no involvement in the drafting of the trust or the administration of the insurance policy, undertook only to distribute insurance proceeds after the insured's death. The trustee's duties must be viewed in the light of the trustee's alleged involvement in these matters. If there was none, the result might well be different.

If article II is an exculpatory clause, it is invalid because Meyer failed to adequately communicate its nature and effect to Rafert. "An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship *unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor*." § 30-3897(b) (emphasis supplied). Appellants alleged that Meyer drafted the trust agreement but never met with Rafert or explained the terms of the trust and the respective duties of each party.

We next consider Meyer's duty to furnish annual reports to the beneficiaries. Meyer contends that the lapses of the policies occurred prior to the time such reports were due. But annual reporting was a minimum requirement in the ordinary administration of the trust. A reasonable person acting in good faith and in the interests of the beneficiaries would not wait until such annual report was due before informing the beneficiaries that the trust assets were in danger of being lost. Meyer's duty to report the danger to the trust property became immediate *when the insurers issued notices of nonpayment of the premiums*. As trustee, Meyer had a statutory duty "to keep the qualified beneficiaries of the trust reasonably informed . . . of the material facts necessary for them to protect their

interests." § 30-3805(b)(8). Here, again, according to the allegations, Meyer was not an otherwise uninvolved and gratuitous trustee.

The pleadings alleged that Meyer's breach of his fiduciary duties as trustee was a direct and proximate cause of the damages sustained by Appellants. Meyer contends the damages claimed by Appellants cannot be traced to Meyer's conduct. And the district court concluded that Meyer's actions did not cause the premiums not to be paid by the insurance agent. But Meyer's actions prevented Appellants from knowing the premiums had not been paid, and it is reasonable to infer that Meyer's actions prevented Appellants from acting to protect their interests.

Appellants claimed that the subsequent payment of premiums to the agent occurred after the policies had lapsed. It can reasonably be inferred that a false address given to the insurers caused the notices of the defaults in payment not to reach Appellants and that as a result, Appellants paid premiums amounting to $252,841.03 to the insurance agent after the policies had lapsed. It is reasonable to infer that had they known of the lapses, they would have taken the necessary action to protect their interests.

Meyer had a statutory duty to inform Appellants of the material facts necessary for them to protect their interests. This duty arose when the insurers issued the notices of nonpayment of the premiums. The second amended complaint alleged sufficient facts to state a plausible claim against Meyer for breach of fiduciary duty.

CONCLUSION

For the reasons stated herein, we reverse the judgment of the district court dismissing Appellants' second amended complaint and we remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SIOUXLAND ETHANOL, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE, V. SEBADE BROTHERS, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, AND RICK SEBADE, AN INDIVIDUAL, APPELLANTS.

859 N.W.2d 586

Filed February 27, 2015. No. S-14-126.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Breach of Contract.** A material breach will excuse the nonbreaching party from its performance of the contract.
4. **Breach of Contract: Words and Phrases.** A material breach is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract.
5. **Breach of Contract.** Whether or not a breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case.
6. **Breach of Contract: Judgments.** Although whether a material breach has occurred is commonly a fact question, in some circumstances, a court may determine the question as a matter of law.
7. ____: ____. If the materiality question in a breach of contract case admits of only one reasonable answer, then the court must intervene and address what is ordinarily a factual question as a question of law.
8. **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.
9. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. If the movant meets this burden, then the nonmovant must show the existence of a material issue of fact that prevents judgment as a matter of law.
10. **Summary Judgment: Evidence.** When the parties' evidence would support reasonable, contrary inferences on the issue for which a movant seeks summary judgment, it is an inappropriate remedy.

Appeal from the District Court for Dakota County: PAUL J. VAUGHAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David Geier and Stuart B. Mills for appellants.

Brian C. Buescher and Garth Glissman, of Kutak Rock, L.L.P., for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

CASSEL, J.

INTRODUCTION

In this breach of contract action, the buyer failed repeatedly to meet its monthly purchase requirement and the seller sold its unpurchased product to others. The district court determined that the seller was entitled to summary judgment and awarded damages and prejudgment interest.

Upon the buyer's appeal, we conclude that the buyer's breach during the first three quarters of the contract was material and that it excused the seller of its obligation to adjust the buyer's shipments in the fourth quarter. However, the evidence concerning damages presents a genuine issue of material fact as to the market price of the product during each quarter.

We therefore affirm the district court's summary judgment in favor of the seller on the issue of liability, but we reverse the court's judgment for damages and prejudgment interest, and remand the cause for further proceedings.

BACKGROUND

CONTRACT

On September 12, 2008, Rick Sebade and Sebade Brothers, LLC (collectively Sebade Brothers), entered into a "Priced Sale Contract" with Siouxland Ethanol, LLC (Siouxland). Sebade Brothers agreed to purchase modified wet distillers grains with solubles (product), which Siouxland manufactured as a byproduct of ethanol production. The contract ran from October 1, 2008, to September 30, 2009. During that time, Sebade Brothers was obligated to order and take delivery of

2,500 tons of product per month, for a total of 30,000 tons. It agreed to pay $80 per ton.

The contract provided Sebade Brothers with a limited authority to vary the amounts purchased. Specifically, it stated, "Buyer may, at its option, adjust the amount of Product delivered during any month by a maximum of 30 Tons either over or under the Monthly Quantity, subject to a maximum adjustment of 30 Tons per quarter for each of the first three quarters during the Delivery Period." Thus, from October 1 to December 31, 2008, it required Sebade Brothers to purchase not less than 7,470 tons nor more than 7,530. The same amounts applied to the first 3 months of 2009 and then to the next 3-month period. Thus, by the end of the third quarter of the contract term, Sebade Brothers could vary the total quantity by no more than 90 tons, plus or minus.

The contract also provided that Siouxland was to adjust Sebade Brothers' fourth-quarter shipments so that by the end of the contract, the total shipments to Sebade Brothers equaled 30,000 tons. The contractual language stated:

> Adjustments to the Monthly Quantity in one quarter shall not affect Buyer[']s option to make adjustments to the Monthly Quantity in subsequent quarters, provided, however, that during the fourth quarter of the Delivery Period, Seller shall adjust Buyer's fourth quarter shipments in such amounts as Seller determines, so that total shipments of Product to Buyer equal to the Total Contract Quantity set forth above by the end of the Delivery Period. In no event shall the total amount of Product shipped exceed the total Contract Quantity.

The contract also contained a provision stating the measure of damages if Sebade Brothers failed to purchase the required amount of product. This provision stated:

> If the total volume of Product order[ed] by Buyer in any quarter is less than [the] contracted volume for that quarter minus 30 Tons, Buyer will be responsible for the difference between the contracted price per ton set forth above and [the] current market price of Product (if less than the contracted price) on the shortfall of Product delivered to Buyer during such quarter.

Performance and Breach

Sebade Brothers rarely purchased the contractual amount of 2,500 tons of product per month. The following table shows the amounts of product that Sebade Brothers purchased for each month of the contract.

Month	Tons of Product Bought by Sebade Brothers
October 2008	1,720.90
November 2008	2,530.23
December 2008	2,653.46
January 2009	2,515.64
February 2009	1,694.60
March 2009	1,449.67
April 2009	2,030.90
May 2009	2,166.67
June 2009	1,392.06
July 2009	1,525.32
August 2009	1,079.82
September 2009	0.00
TOTAL	20,759.27

There is no dispute that Sebade Brothers purchased only 20,759.27 tons of product, which was 9,240.73 fewer than it was contractually obligated to buy. Without taking into account the contractual provision allowing for a 30-ton deviation each month subject to a maximum adjustment of 30 tons per quarter, Sebade Brothers was 595.41 tons short of its quota the first quarter, 1,840.09 tons short the second quarter, and 1,910.37 tons short the third quarter, for a cumulative shortage prior to the fourth quarter of 4,345.87.

Pleadings

Siouxland filed an amended complaint against Sebade Brothers, setting forth a claim for breach of contract. Siouxland alleged that Sebade Brothers' failure to comply with the contract forced Siouxland to sell over 9,000 tons of product at market prices in effect at the time, which prices fell significantly below the price Siouxland was guaranteed by the contract. Siouxland alleged that it suffered over $290,000 in damages.

Sebade Brothers set forth three defenses in its answer. First, it alleged that Siouxland did not give notice of its intention to resell the product. Second, Sebade Brothers alleged that Siouxland did not adjust quantities in the fourth quarter as required and that thus, Siouxland breached its obligation under the Uniform Commercial Code to act in good faith and waived any further claims against Sebade Brothers. Third, Sebade Brothers alleged that Siouxland did not tender delivery in the amount of shortfalls Siouxland alleged and that thus, Sebade Brothers "had no duty to accept or pay."

Summary Judgment Hearing

Siouxland moved for summary judgment, and the district court held a hearing on the motion. Evidence established that Sebade Brothers typically would call Siouxland 1 to 2 days in advance to ensure sufficient product was available and then would send a truck to pick up the product. Sebade testified that he would not expect Siouxland to arrive with a load of product at Sebade Brothers' feedlots without any prior arrangement.

There is no dispute that Siouxland did not adjust Sebade Brothers' shipments of product in the fourth quarter. But the parties disputed whether Siouxland informed Sebade Brothers that it needed to pick up more product in the last quarter and whether Sebade stated that Sebade Brothers would not accept or pay for unordered product from Siouxland.

District Court's Judgment

The district court entered summary judgment in favor of Siouxland. The court determined, as a matter of law, that Sebade Brothers materially breached the contract. The court reasoned that after the first three quarters, Sebade Brothers had a shortfall of 4,499.56 tons, which meant that it failed to order and take delivery of $359,964.80 worth of product. This, the court found, was a material breach of the contract. The court also concluded, as a matter of law, that Sebade Brothers' material breach excused Siouxland from performing its obligation to adjust shipments in the fourth quarter. Thus, the court

granted summary judgment in favor of Siouxland on the issue of liability.

The court also granted summary judgment on the issue of damages and prejudgment interest. The court found Siouxland's damages to be $290,201.83. The court determined that Siouxland was entitled to prejudgment interest "'as a matter of right'" and that the interest began running from the dates that Sebade Brothers was obligated to make a payment. After determining the amount for prejudgment interest to be $27,465.74, the court entered judgment of $317,667.57 in favor of Siouxland.

Sebade Brothers timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

Sebade Brothers assigns that the district court erred in granting summary judgment in favor of Siouxland.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

ANALYSIS

Liability

Sebade Brothers argues that a genuine issue of fact existed on its "waiver" defense. It asserts that under the contract,

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

[2] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

[3] *Id.*

Siouxland had the right to deliver additional product during the fourth quarter to make up for earlier deficiencies. According to Sebade Brothers, Siouxland failed to do so, thereby waiving the deficiencies. "Whether a waiver is to be implied from acts or conduct of a party is a question of fact."[4] Here, the contract provided that Siouxland "shall" adjust Sebade Brothers' shipments so that the total shipments equal the total contract amount.

[3] But Siouxland counters that it was excused from adjusting shipments based upon Sebade Brothers' material breach of the contract prior to the fourth quarter. A material breach will excuse the nonbreaching party from its performance of the contract.[5] Thus, a material breach by Sebade Brothers during the first three quarters of the contract would relieve Siouxland of its obligation to adjust Sebade Brothers' shipments of product during the fourth quarter. And if that is the situation, Sebade Brothers' arguments concerning waiver and tender of delivery have no merit. We therefore begin by considering whether we can determine, as a matter of law, that Sebade Brothers materially breached the contract prior to the fourth quarter.

[4,5] "[A] 'material breach' is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract."[6] Whether or not a breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case.[7] On the other hand, substantial

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[4] 17B C.J.S. *Contracts* § 1041 at 486 (2011).

[5] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

[6] 23 Samuel Williston, A Treatise on the Law of Contracts § 63:3 at 438 (Richard A. Lord ed., 4th ed. 2002).

[7] *Domjan v. Faith Regional Health Servs.*, 273 Neb. 877, 735 N.W.2d 355 (2007).

performance may be established as long as any deviations from the contract are relatively minor and unimportant.[8]

[6,7] Although whether a material breach has occurred is commonly a fact question, in some circumstances, a court may determine the question as a matter of law.

> The determination whether a material breach has occurred is generally a question of fact. Nevertheless, the materiality of a breach of contract is not always a question of fact, even if the issue is disputed; thus, if there is only one reasonable conclusion, a court must address what is ordinarily a factual question as a question of law.[9]

Thus, as a federal circuit court has stated, "[I]f the materiality question in a given case admits of only one reasonable answer . . . , then the court must intervene and address what is ordinarily a factual question as a question of law."[10]

The breaches in this case went to the heart of the agreement. Sebade Brothers failed to order and take delivery of the required monthly allotment of 2,500 tons of product. And Sebade Brothers' failure to meet the 2,500-ton requirement was not a one-time issue; it met the requirement in only 3 of the first 9 months of the contract. Further, the shortfalls were significant. Of those 6 months in which it did not meet the requirement (even considering the permissible 30-ton shortfall), the closest it came was 303.33 tons short, with the largest shortfall being 1,077.94 tons. These are not minor deviations. While the breach did not completely frustrate the entire purpose of the contract, it was so important that it made continued performance by Siouxland virtually pointless.[11]

[8] Sebade Brothers' apparent interpretation of the contract is not reasonable. It seems to contend that even if it ordered nothing during the first three quarters, Siouxland would remain obligated to make all 30,000 tons of product available for

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[8] *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000).

[9] 23 Williston, *supra* note 6, § 63:3 at 440-41.

[10] *Gibson v. City of Cranston*, 37 F.3d 731, 736 (1st Cir. 1994).

[11] See *Gibson, supra* note 10.

Sebade Brothers in the fourth quarter without its approval. 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.[12] Evidence established that it would not have been possible for Siouxland to ship 9,000 tons of product in 1 day or 30,000 tons in 2 weeks. The contract specifically allowed for a shortfall of up to 30 tons of product in each of the first three quarters; thus, 90 tons is the maximum amount that Siouxland could have needed to adjust Sebade Brothers' total shipments during the fourth quarter. With that understanding in mind, it is not reasonable to expect Siouxland to generate an additional 4,400 tons of product during the final quarter.

We conclude that Sebade Brothers materially breached the contract and that this material breach excused Siouxland's obligation to make adjustments to shipments during the fourth quarter. We affirm the district court's sustaining of Siouxland's motion for summary judgment as to Sebade Brothers' liability for its breach of the contract.

Damages

Sebade Brothers next argues that summary judgment was not proper due to the existence of questions of fact relevant to Siouxland's losses. We agree.

The contract provided the measure of damages for a failure to purchase the contractually required volume of product. The measure of damages was the difference between the contracted price per ton of $80 and the "current market price of Product (if less than the contracted price) on the shortfall of Product delivered to Buyer during such quarter."

Sebade Brothers claims that Siouxland failed to prove that there was no dispute of material fact regarding the "current market price." To establish its damages under the contract, Siouxland presented the district court with a calculation based on the prices at which Siouxland resold the product on the "spot market" during the months in which Sebade Brothers

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[12] *Hearst-Argyle Prop. v. Entrex Comm. Servs.*, 279 Neb. 468, 778 N.W.2d 465 (2010).

failed to order and take delivery of 2,500 tons of product. Sebade Brothers challenges Siouxland's evidence of market price, claiming that Siouxland merely "presented evidence of a variety of private sales transactions to many other customers, spread over the period of the contract, and broken down month-by-month."[13]

Siouxland cites other jurisdictions in support of its position that market value may be proved by a resale of the goods at a reasonable time and place. The Supreme Judicial Court of Maine, for example, stated that it found "no difficulty in sustaining the presiding Justice in his use of the resale price as evidence of market values of the property resold."[14] Similarly, the Supreme Court of Washington stated that "the resale price of goods may be considered as appropriate evidence of the market value at the time of tender in determining damages."[15] And in a case where the only evidence as to market value of the goods at the time of the breach was that it was about the same as what the goods ultimately sold for, a U.S. district court in Kansas stated that the market price of the goods was the same as the resale price and noted evidence that the seller obtained the highest possible price for the goods.[16] Although we recognize that there is authority supporting the use of resale price as evidence of market value, as we discuss below, deficiencies in Siouxland's proof prevent us from determining as a matter of law that resale price equaled market price in this case.

[9,10] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. If the movant meets this burden, then the nonmovant must show the existence of a material issue of fact that prevents

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[13] Brief for appellant at 15.

[14] *Dehahn v. Innes*, 356 A.2d 711, 722 (Me. 1976).

[15] *Sprague v. Sumitomo Forestry*, 104 Wash. 2d 751, 759, 709 P.2d 1200, 1205 (1985).

[16] *Sharp Electronics Corp. v. Lodgistix, Inc.*, 802 F. Supp. 370 (D. Kan. 1992).

judgment as a matter of law.[17] But when the parties' evidence would support reasonable, contrary inferences on the issue for which a movant seeks summary judgment, it is an inappropriate remedy.[18]

The evidence before us demonstrates a genuine issue of material fact as to the market price for the product, which is a necessary component of the contractual formula for determining damages. The evidence shows many instances of Siouxland's selling product at different prices on the same day, with prices differing as much as $10 a ton. Further, in June 2009, there were numerous days in which Sebade Brothers purchased product on the spot market at a higher price than Siouxland sold product on the same day. On one of those days, Sebade Brothers paid $13 more per ton than Siouxland charged. This evidence presents a genuine issue as to whether the prices at which Siouxland sold product on the spot market were indeed the market price. This evidence might well have been sufficient to enable a fact finder at trial to determine the market prices and, thus, calculate damages with reasonable certainty. But on Siouxland's motion for summary judgment, the district court was not permitted to decide disputed issues of fact. And in determining the amount of damages and prejudgment interest, that is essentially what the court did. Accordingly, the district court erred in awarding damages and prejudgment interest at the summary judgment stage. We therefore reverse in part the court's order and remand the cause for further proceedings.

CONCLUSION

We conclude that Sebade Brothers' breach of its contract with Siouxland was material and that it relieved Siouxland of any obligation to adjust Sebade Brothers' shipments during the fourth quarter of the contract. However, we conclude that there is a genuine issue of material fact concerning Siouxland's damages under the contract. We therefore affirm the judgment

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[17] *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

[18] *Id.*

of the district court regarding Sebade Brothers' liability for its material breach of the contract, but we reverse the court's award of damages and prejudgment interest, and remand the cause for further proceedings.

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

HEAVICAN, C.J., and MILLER-LERMAN, J., not participating.

SYNERGY4 ENTERPRISES, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. PINNACLE BANK, APPELLEE.

859 N.W.2d 552

Filed February 27, 2015. No. S-14-176.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Statutes: Judgments: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes: Legislature: Intent.** In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Affirmed.

James S. Mitchell, of Law Offices of James S. Mitchell, P.C., and, on brief, Clifford T. Lee for appellants.

Steven D. Davidson, of Baird Holm, L.L.P., for appellee.

Robert J. Hallstrom, of Brandt, Horan, Hallstrom & Stilmock, for amicus curiae Nebraska Bankers Association, Inc.

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

PER CURIAM.

NATURE OF CASE

Synergy4 Enterprises, Inc.; Michele K. Quinn; and Darold A. Bauer (collectively Synergy4) brought an action against Pinnacle Bank (Pinnacle) alleging three causes of action in tort: promissory estoppel, negligent misrepresentation, and fraud. Pinnacle asserted Synergy4's claims were barred by the credit agreement statutes of frauds[1] because they constituted an action based on an oral promise to loan money. The district court granted Pinnacle summary judgment on all three claims, determining that the claims were barred by § 45-1,113. We affirm.

FACTS

Synergy4 is a Nebraska corporation. Quinn and Bauer are the sole shareholders and officers of Synergy4. Pinnacle is a banking corporation that operates in Nebraska and whose business includes providing loans to individuals and businesses. Scott Bradley was president of a Pinnacle branch with whom Quinn had developed a longstanding banking relationship of approximately 20 years. Synergy4 alleged that Quinn and Bradley had a long-established course of dealing and that Quinn and Bradley entered into lending agreements that were often conducted on the basis of an oral lending commitment considered binding by both parties.

In November 2008, Quinn was given the opportunity to purchase a company at which she was the chief financial officer. On November 12, Quinn and Bauer met with Bradley to discuss a loan and line of credit with which Quinn and Bauer would be able to operate the business. Synergy4 alleges that at that meeting, Bradley orally approved Quinn and Bauer's proposal for a line of credit of at least $1 million. The parties also discussed Quinn's upcoming trip to China in the spring of 2009 to purchase inventory and the need for substantial credit advances to make the anticipated purchases.

After the meeting, Pinnacle provided Quinn and Bauer with a commitment letter for a loan of $400,000. Notwithstanding

[1] Neb. Rev. Stat. §§ 45-1,112 to 45-1,115 (Reissue 2010).

the commitment letter, it was alleged that Bradley orally assured Quinn and Bauer that Pinnacle would still provide a loan for $1 million. On March 6, 2009, before Quinn went on the purchasing trip to China, Bradley again assured Quinn that she could proceed with the trip and that the $1 million credit line was in place.

After receiving Bradley's oral assurances, Quinn and Bauer incorporated Synergy4 and entered into a 5-year lease on a location and Quinn went to China on a 5-week purchasing trip. During this trip, Quinn committed Synergy4 to approximately $1.6 million in inventory purchases. On May 8, 2009, Bradley advised Synergy4 that Pinnacle would not be lending more than the $400,000 provided for in the commitment letter.

Throughout the summer of 2009, Quinn and Bauer attempted to meet Synergy4's financial commitments in operating their business. In July or August 2009, Pinnacle provided Quinn and Bauer an unsecured personal loan of $50,000 to pay Synergy4's payroll while Quinn and Bauer again attempted to secure additional loans from Pinnacle. On August 13, Bradley informed Synergy4 that Pinnacle would not make any further advances on Synergy4's credit line.

Synergy4 filed this lawsuit against Pinnacle in May 2013 alleging three causes of action: promissory estoppel, negligent misrepresentation, and fraud. Pinnacle moved for summary judgment, alleging that Synergy4's claims were barred by § 45-1,113 of Nebraska's credit agreement statute of frauds because the purported $1 million credit agreement was not in writing. The district court sustained the motion, concluding that the plain language of § 45-1,113 barred Synergy4's claim for promissory estoppel. The court also dismissed Synergy4's claims for negligent misrepresentation and fraud.

ASSIGNMENTS OF ERROR

Synergy4 asserts that the district court erred in determining that the Nebraska credit agreement statute of frauds bars its claims. It asserts that the credit agreement statute of frauds is coextensive with the general statute of frauds and, therefore, allows claims based on all the common-law exceptions to the statute of frauds.

STANDARD OF REVIEW

[1,2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[2] The meaning and interpretation of a statute are questions of law.[3] An appellate court independently reviews questions of law decided by a lower court.[4]

ANALYSIS

The issue presented is whether §§ 45-1,112 and 45-1,113 bar Synergy4's action based on oral promises and assurances made by Pinnacle or its agents.

[3] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[5]

Section 45-1,113(1) provides:

> A debtor or a creditor may not maintain an action or assert a defense in an action based on a credit agreement unless the credit agreement is in writing, expresses consideration, sets forth the relevant terms and conditions of the credit agreement, and is signed by the creditor and by the debtor.

For purposes of § 45-1,113, "credit agreement" means: "A contract, promise, undertaking, offer, or commitment to loan money or to grant or extend credit."[6]

[4] Synergy4 argues that the statute was not intended to bar common-law exceptions to the general statute of frauds and cites to the statute's legislative history. In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is

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[2] *Harris v. O'Connor*, 287 Neb. 182, 842 N.W.2d 50 (2014).

[3] *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013).

[4] *Id.*

[5] *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

[6] § 45-1,112(1)(a)(i).

open to construction when its terms require interpretation or may reasonably be considered ambiguous.[7] The language of §§ 45-1,112 and 45-1,113 is not ambiguous or unclear. Therefore, we decline to consider any statements made during the committee hearings or floor debates. Instead, we look to the plain language of the statutes to reach our conclusion.

Synergy4 contends that the Nebraska credit agreement statute of frauds is coextensive with Nebraska's general statute of frauds. It argues that because promissory estoppel applies to the state's general statute of frauds, it also applies to unwritten credit agreements. We have stated that a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[8] Promissory estoppel, therefore, is based on a party's detrimental reliance on another party's promise that would otherwise be an unenforceable contract.[9] In this case, Synergy4 alleges it incurred damages as a result of relying on Bradley's oral promises and assurances that a $1 million line of credit was in place.

However, § 45-1,113 supersedes the common-law theory of promissory estoppel insofar as it applies to unwritten credit agreements or oral promises to loan money or extend credit. The plain language of § 45-1,113 prohibits an action based on a credit agreement unless the credit agreement is in writing. Our review finds no exception or limitation in the statute's language.

This conclusion is supported by the broad language in the definition of credit agreements, which includes any "contract, *promise*, undertaking, offer, or *commitment* to loan money or to grant or extend credit."[10] This precludes recovery for a

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[7] *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006).

[8] *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990).

[9] See *id.* (stating that promissory estoppel claim has traditionally been used where to refuse promise unsupported by consideration would work injustice to party who relied to his detriment on promise).

[10] § 45-1,112(1)(a)(i) (emphasis supplied).

credit agreement based on the promissory estoppel doctrine, which is wholly dependent on reliance on a promise or assurance. As a result, Synergy4 cannot maintain an action based on the oral promises or commitments of Bradley that Pinnacle would lend or extend credit of $1 million. Synergy4's causes of action are all based upon the unwritten credit agreement.

Our conclusion is supported by *Fortress Systems, L.L.C. v. Bank of West*.[11] In that case, the Eighth Circuit found that a loan officer's oral promise to lend money if the borrower settled its lawsuit with investors did not satisfy § 45-1,113, because the alleged promise was neither in writing nor signed by both parties. The court held, "Nebraska's statute of frauds for credit agreements is broadly written to include any 'contract, *promise*, undertaking, offer, or commitment to loan money or to grant or extend credit.'"[12]

Our own jurisprudence reflects a reluctance to allow promissory estoppel to sustain an action for unwritten contracts. In *Farmland Service Coop, Inc. v. Klein*,[13] a buyer sought to enforce an oral agreement to sell 90,000 bushels of corn at a set price. We determined that the buyer could not sue under the theory of promissory estoppel to enforce the oral agreement barred by the statute of frauds. We held:

> The mere pleading of reliance on the contract to his detriment should not be sufficient to permit a party to assert rights and defenses based on a contract barred by the statute of frauds. If he were permitted to do so, the statute of frauds would be rendered meaningless and nugatory.[14]

In *Rosnick v. Dinsmore*,[15] we reiterated that promissory estoppel could not be used to circumvent the protection provided by the statute of frauds.

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[11] *Fortress Systems, L.L.C. v. Bank of West*, 559 F.3d 848 (8th Cir. 2009).

[12] *Id.* at 853 (emphasis in original).

[13] *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976).

[14] *Id.* at 543, 244 N.W.2d at 90.

[15] *Rosnick v. Dinsmore*, *supra* note 8.

We disagree with Synergy4's assertion that the Legislature, in failing to use the "'complete bar'" language in § 45-1,113, intended it to be coextensive with the general statute of frauds[16] with all the common-law exceptions. However, even assuming arguendo that the language did not explicitly bar such exceptions, it would be illogical for the Legislature to enact a separate statute of frauds for credit agreements if the Legislature had intended that it be coextensive with the general statute of frauds.

We similarly conclude that § 45-1,113 bars Synergy4's claims for negligent misrepresentation. "Regardless of whether the present cause of action is labeled as a breach of contract, misrepresentation, fraud, deceit [or] promissory estoppel, its substance is that of an action upon an agreement by a bank to loan money. Therefore, [the credit agreement statute of frauds] applies."[17]

We find that because Synergy4's claims are based on a credit agreement that was not in writing, they are barred by § 45-1,113.

CONCLUSION

For the above reasons, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

STEPHAN and MILLER-LERMAN, JJ., not participating.

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[16] Brief for appellants at 10. See Neb. Rev. Stat. § 36-202 (Reissue 2008).

[17] *Ohio Valley Plastics v. Nat. City Bank*, 687 N.E.2d 260, 263-64 (Ind. App. 1997).

FABIOLA A. FLORES, APPELLANT, V.
MANUEL FLORES-GUERRERO, APPELLEE.
859 N.W.2d 578

Filed February 27, 2015. No. S-14-224.

1. **Child Custody: Appeal and Error.** An appellate court reviews child custody determinations de novo on the record, but the trial court's decision will normally be upheld absent an abuse of discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
4. **Words and Phrases.** As a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion.
5. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.
6. **Child Custody.** A child custody determination that does not comport with statutory requisites is an abuse of discretion.
7. **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 Sarpy County: WILLIAM B. ZASTERA, Judge. Judgment vacated, and cause remanded for further proceedings.

James Walter Crampton for appellant.

Jamie E. Kinkaid and Nancy R. Shannon, of Cordell & Cordell, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Fabiola A. Flores (Fabiola) appeals from the order of the district court that awarded her and Manuel Flores-Guerrero (Manuel) joint physical custody of their minor children and placed legal custody with the court. She argues that the district court's order, which made no special written findings regarding

Manuel's conviction for third degree domestic assault, violated Neb. Rev. Stat. § 43-2932 (Reissue 2008). Given the evidence presented to the district court, we agree that it was an abuse of discretion for the district court to make a custody determination without complying with § 43-2932. Therefore, we vacate the order of modification and remand the cause for further proceedings consistent with this opinion.

SCOPE OF REVIEW

[1,2] An appellate court reviews child custody determinations de novo on the record, but the trial court's decision will normally be upheld absent an abuse of discretion. See *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009). An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

[3] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *Id.*

FACTS

The marriage of Fabiola and Manuel was dissolved by a decree entered on January 24, 2011. Fabiola was awarded sole legal and physical custody of the parties' two minor children subject to Manuel's reasonable rights of visitation. Manuel was ordered to pay child support. On May 5, per agreement of the parties, the divorce decree was modified to temporarily reduce Manuel's child support obligation.

On July 12, 2012, Manuel filed a complaint for modification of custody. He prayed for modification of the decree to award him sole custody of the children, subject to Fabiola's reasonable rights of visitation or, in the alternative, to award the parties joint legal and physical custody of the children.

Fabiola filed an amended answer and cross-complaint in which she asked the district court to leave custody with her but modify various provisions of the parenting plan related to visitation, extracurricular activities, the parties' obligations to notify each other when the children suffered from "significant

illnesses," and proof of health insurance. She also asked for permission to remove the children to California.

In December 2013 and January 2014, a trial was held on Manuel's complaint and Fabiola's amended cross-complaint. The evidence adduced by Fabiola included certified copies of an order sentencing Manuel to probation for his convictions of terroristic threats and third degree domestic assault and the mandate of the Nebraska Court of Appeals which affirmed his convictions in a memorandum opinion in case No. A-10-964. Fabiola testified that she was the victim of these crimes.

At the end of the hearing, Fabiola brought § 43-2932 to the district court's attention. The court stated that it was "very familiar with that statute." Immediately thereafter, the court orally entered its decision. On the issue of custody, it stated: "The Court's going to take legal custody of the children in the Court. I'm going to grant joint physical custody to the parties, one week on, one week off."

On February 11, 2014, the district court entered a corresponding written order. It found that both parties were "fit and proper persons to be awarded the physical custody of the minor children," and it awarded them joint physical custody. The court also found that it was "in the best interest of the minor children that legal custody be placed with the Court." On related matters, the court denied Fabiola's application for removal, recalculated Manuel's child support obligation, and ordered the parties to communicate only through e-mail or text messaging. The court also made other modifications related to expenses, extracurricular activities, and proof of health insurance.

Fabiola 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).

ASSIGNMENTS OF ERROR

Fabiola assigns, restated, that the district court abused its discretion in placing legal custody with the court, modifying the decree to provide for joint physical custody where there

was little evidence of cooperation between the parties, and granting the parties joint physical custody without making the written findings required by § 43-2932.

ANALYSIS

In the order from which Fabiola appeals, the district court modified the parties' divorce decree in numerous ways. The most significant modification made by the court was to child custody, both legal and physical. It is this modification of custody to which Fabiola assigns error.

The district court made substantial modifications to the parties' custody arrangement. Prior to the order of modification, Fabiola had legal and physical custody of the children. The children were in Manuel's care at only the following times: (1) during his parenting time, which occurred on Wednesdays and alternating weekends; (2) for several weeks over the summer; (3) during holiday visitation; and (4) when Fabiola would occasionally ask him to watch the children for her. In the order of modification, the district court changed this arrangement by taking legal custody of the children and awarding the parties joint physical custody, with each parent to "have possession of the minor children for alternating periods of seven consecutive days." Thus, as a result of the district court's modification, Manuel gained joint physical custody where he had none before and Fabiola lost the sole legal and physical custody which she had been awarded in the divorce decree.

Fabiola argues that it was a violation of § 43-2932 for the district court to adopt this new custody arrangement without making special written findings regarding Manuel's conviction for third degree domestic assault. We agree.

§ 43-2932

Section 43-2932, found within Nebraska's Parenting Act, establishes certain requirements for the development of a parenting plan in cases where a parent is found to have committed child abuse or neglect, child abandonment, or domestic intimate partner abuse or to have interfered with the other parent's access to the child. This statute has potential applicability to

the instant case, because modification proceedings involving child custody require development of a parenting plan and are governed by the Parenting Act. See Neb. Rev. Stat. § 42-364(1) and (6) (Cum. Supp. 2014) and Neb. Rev. Stat. § 43-2924(1) (Reissue 2008).

Section 43-2932 states:

> (1) When the court is required to develop a parenting plan:
>
> (a) If a preponderance of the evidence demonstrates, the court shall determine whether a parent who would otherwise be allocated custody, parenting time, visitation, or other access to the child under a parenting plan:
>
> (i) Has committed child abuse or neglect;
>
> (ii) Has committed child abandonment under section 28-705;
>
> (iii) Has committed domestic intimate partner abuse; or
>
> (iv) Has interfered persistently with the other parent's access to the child; . . . and
>
> (b) If a parent is found to have engaged in any activity specified by subdivision (1)(a) of this section, limits shall be imposed that are reasonably calculated to protect the child or child's parent from harm. . . .
>
> . . . .
>
> (3) If a parent is found to have engaged in any activity specified in subsection (1) of this section, the court shall not order legal or physical custody to be given to that parent without making special written findings that the child and other parent can be adequately protected from harm by such limits as it may impose under such subsection. The parent found to have engaged in the behavior specified in subsection (1) of this section has the burden of proving that legal or physical custody, parenting time, visitation, or other access to that parent will not endanger the child or the other parent.

Section 43-2932 imposes several obligations upon a court where a parent's commission of one of the listed actions is established by a preponderance of the evidence. Where "a preponderance of the evidence demonstrates" that a parent has committed one of the listed actions, a court must make

a determination to that effect. See § 43-2932(1)(a). Such a finding, in turn, obligates the court to impose any necessary limitations on custody, parenting time, and visitation and to make specific written findings prior to awarding legal or physical custody to the parent who committed the listed action. See § 43-2932(1)(b) and (3). A preponderance of the evidence is the equivalent of "the 'greater weight'" of the evidence. See *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 864, 809 N.W.2d 725, 742 (2011). The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true. NJI2d Civ. 2.12A.

[4] Throughout § 43-2932, the Legislature used the word "shall." As a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion. *Wayne G. v. Jacqueline W.*, 288 Neb. 262, 847 N.W.2d 85 (2014). Therefore, where a preponderance, or the greater weight, of the evidence demonstrates that a parent has committed one of the listed actions, the obligations of § 43-2932 are mandatory.

Domestic intimate partner abuse is one of the actions listed in § 43-2932(1)(a). This type of abuse includes "an act of abuse as defined in section 42-903." See Neb. Rev. Stat. § 43-2922(8) (Cum. Supp. 2014). The acts of abuse defined in the Protection from Domestic Abuse Act are those committed against "household members" and include "[a]ttempting to cause or intentionally and knowingly causing bodily injury" and "[p]lacing, by means of credible threat, another person in fear of bodily injury." See Neb. Rev. Stat. § 42-903(1)(a) and (b) (Cum. Supp. 2014). Spouses and former spouses are considered household members. See § 42-903(3). Thus, threatening to cause or actually causing bodily injury to a spouse or former spouse qualifies as domestic intimate partner abuse.

Application

In the instant case, the greater weight of the evidence before the district court demonstrated that Manuel had committed domestic intimate partner abuse. Given such evidence, § 43-2932 applied to the modification proceedings.

The district court received into evidence certified copies of an order sentencing Manuel to probation for his conviction of third degree domestic assault and the mandate of the Court of Appeals which affirmed his conviction. Together, these certified copies clearly established that Manuel had been convicted of third degree domestic assault. Fabiola testified without objection that she was the victim of this assault.

Neb. Rev. Stat. § 28-323(1) (Cum. Supp. 2014) provides that

> [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 threaten someone in a menacing manner is to show "an intention to do harm." See *State v. Smith*, 267 Neb. 917, 921, 678 N.W.2d 733, 737 (2004). Thus, broadly speaking, in committing third degree domestic assault of Fabiola, Manuel either threatened her with bodily injury or actually caused her bodily injury. The fact that Manuel was convicted means that the State proved such conduct toward Fabiola beyond a reasonable doubt. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

Manuel's conviction established beyond a reasonable doubt that he threatened to cause or did cause bodily injury to Fabiola, his spouse or former spouse. Threatening to cause or actually causing injury to a spouse or former spouse constitutes domestic intimate partner abuse. See §§ 42-903(1) and 43-2922(8). Therefore, the greater weight of the evidence received by the district court demonstrated that Manuel had committed domestic intimate partner abuse.

[5] We reject Manuel's argument that the provisions of § 43-2932 were not applicable because his conviction for third degree domestic assault occurred prior to entry of the parties' divorce decree. The statute does not include any language that indicates the listed actions must be committed within a certain period of time. And "an appellate court will not read into a

statute a meaning that is not there." *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 659, 844 N.W.2d 276, 281 (2014). Additionally, it would not serve the purposes of the Parenting Act to require courts to consider only recent assault or abuse. In Neb. Rev. Stat. § 43-2921 (Reissue 2008), the Legislature explained the underlying premise of the Parenting Act, stating:

> Given the potential profound effects on children from witnessing child abuse or neglect or domestic intimate partner abuse, as well as being directly abused, the courts shall recognize the duty and responsibility to keep the child or children safe when presented with a preponderance of the evidence of child abuse or neglect or domestic intimate partner abuse . . . .

Section 43-2932 would work against this duty and responsibility to keep children safe if it required courts to consider only those acts of assault or abuse which occurred subsequent to a decree of divorce. Accordingly, we conclude that regardless of when Manuel was convicted of third degree domestic assault, the evidence of his conviction made it necessary for the district court to comply with § 43-2932 before making a custody determination.

In entering the order of modification, the district court did not comply with § 43-2932. Despite the fact that Manuel committed domestic intimate partner abuse, the district court did not make a determination to that effect, as required by § 43-2932(1)(a). More important, the district court failed to make the written findings required by § 43-2932(3) before awarding joint physical custody. Section 43-2932(3) explicitly provides that where a parent has committed one of the listed activities, "the court *shall not* order legal or physical custody to be given to that parent *without making special written findings* that the child and other parent can be adequately protected from harm by such limits as it may impose" on custody, parenting time, and visitation. (Emphasis supplied.) The district court did not make such findings before ordering joint physical custody. Under § 43-2932(3), this failure by the district court precluded it from making the custody determination it did.

[6] A child custody determination that does not comport with statutory requisites is an abuse of discretion. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007). Accordingly, to the extent the district court made a custody determination in the instant case without complying with § 43-2932, it abused its discretion. Under these circumstances, the district court's custody determination must be vacated.

In the order of modification, the district court made other modifications to the parties' divorce decree besides modifying custody. However, all of the modifications were based upon the modification of custody. Therefore, we vacate the order of modification in its entirety, and we remand the cause for further proceedings on the complaint for modification and amended cross-complaint.

Any order of modification of custody that the district court enters must include the findings required by § 43-2932(1)(a). Additionally, if Manuel is awarded any type of custody, the district court's order of modification must include special written findings that the children and Fabiola can be adequately protected by any limitations on custody, parenting time, and visitation that the court finds necessary. See § 43-2932(3).

[7] Our decision to reverse the district court's order of modification because it was not in compliance with § 43-2932 obviates the need to consider Fabiola'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. *Millennium Laboratories v. Ward*, 289 Neb. 718, 857 N.W.2d 304 (2014).

CONCLUSION

For the foregoing reasons, we vacate the district court's order of modification and remand the cause for further proceedings consistent with this opinion.

JUDGMENT VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. JAMES R. COVEY, APPELLANT.

859 N.W.2d 558

Filed February 27, 2015. No. S-14-241.

1. **Evidence: Appeal and Error.** When reviewing the sufficiency of the evidence to support a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
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. **Statutes: Legislature: Presumptions: Intent: Appeal and Error.** An appellate court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.
4. **Statutes.** Where an amendment leaves certain portions of the original act unchanged, such portions are continued in force with the same meaning and effect they had before the amendment.
5. **Words and Phrases: Presumptions.** The same words used in the same sentence are presumed to have the same meaning.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded with directions to vacate.

D. Brandon Brinegar, Deputy Buffalo County Public Defender, for appellant.

Jon Bruning, Attorney General, and Austin N. Relph for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This case presents the issue of whether a person can be guilty of felony criminal impersonation under Neb. Rev. Stat. § 28-638(1)(c) (Cum. Supp. 2014) by uttering a false name that does not correspond to any real individual.

BACKGROUND

James R. Covey was charged with criminal impersonation in violation of § 28-638(1)(c). He was also charged with being a habitual criminal.[1]

Section 28-638(1)(c) states that a person commits the crime of "criminal impersonation" if he or she "[k]nowingly provides false personal identifying information or a false personal identification document to a court or a law enforcement officer[.]" Neb. Rev. Stat. § 28-636(2) (Cum. Supp. 2014), in turn, defines "[p]ersonal identifying information" as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific person including a person's: (a) Name; (b) date of birth; [et cetera]." "Person" or "specific person" are not defined.

At trial, Officer Brandon Brueggemann testified that on the afternoon of April 18, 2013, he was investigating a citizen report of a man possibly selling stolen goods out of the trunk of his vehicle. Brueggemann approached Covey at a convenience store, where he was standing near the trunk of a vehicle that matched the citizen's description. Brueggemann exited the cruiser and asked Covey some general questions.

In his police report, Brueggemann stated that from prior contacts, he recognized Covey as "James Covey." However, at trial, Brueggemann explained that he did not recognize Covey when he initially made contact.

Brueggemann testified that Covey falsely told Brueggemann that Covey's name was "Daniel Jones." Covey concurrently told Brueggemann Covey's correct birth date.

Brueggemann returned to his cruiser to run the name and birth date through his computer terminal. As he was doing so, Covey ran away. After a pursuit, Covey was apprehended and arrested. When booked, Covey identified himself truthfully as "James Covey."

There was no evidence at trial that the name "Daniel Jones" corresponded to an actual person, and the State did not argue that, as a matter of common sense, it must correspond to an actual person.

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[1] See Neb. Rev. Stat. § 29-2221 (Reissue 2008).

Covey challenged the charge of criminal impersonation on the ground that it did not apply to the utterance of a name of a fictitious individual. Covey argued that the State could have instead charged him with false reporting under Neb. Rev. Stat. § 28-907 (Reissue 2008), because he had provided the false name in an attempt to avoid an arrest warrant. False reporting is a Class I misdemeanor.

The State argued that the existence of an actual person who was being impersonated was irrelevant to the charge of criminal impersonation. It asserted prosecutorial discretion in choosing to charge Covey with felony impersonation rather than misdemeanor false reporting.

The trial court agreed with the State and overruled Covey's plea in abatement and motion to dismiss the charge of criminal impersonation. The trial court also granted the State's motion in limine to prevent Covey from presenting any argument that he must have known he was using the name of an actual person in order to be guilty of criminal impersonation. After the trial, the jury found Covey guilty of criminal impersonation.

At the sentencing hearing, Covey objected to the admission of exhibits 2 through 7 on the ground that they had just been received by defense counsel. The court offered to continue the sentencing hearing, but Covey declined. The court overruled Covey's objections to the exhibits.

The court found that Covey was a habitual criminal and sentenced him to 10 to 14 years of incarceration. The court explained that it was sentencing Covey in such a way that he would have a period of supervised release on parole after his incarceration.

ASSIGNMENTS OF ERROR

Covey assigns as error the overruling of his plea in abatement and the overruling of his motion to dismiss. Both of these assignments can be consolidated into his third assignment of error that there was insufficient evidence to support his conviction.

Covey also assigns as error the trial court's grant of the State's motion in limine and the overruling of Covey's

objection to exhibits 2 through 7 for purposes of enhancement. Finally, Covey asserts that the court imposed an excessive sentence.

STANDARD OF REVIEW

[1] When reviewing the sufficiency of the evidence to support a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2]

[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.[3]

ANALYSIS

Covey argues that the evidence was insufficient to convict him of criminal impersonation under § 28-638(1)(c), because there was no evidence that the false name he provided to the law enforcement officer corresponded to any actual person.

Section 28-638(1)(c) is one of several subsections pertaining to the "crime of criminal impersonation." Section 28-638(1) states that "[a] person commits the crime of criminal impersonation if he or she" (a) pretends to be a representative of some person or organization with the intent to gain pecuniary benefit and to deceive or harm another; (b) carries on any profession, business, or other occupation without a license, certificate, or other legally required authorization; (c) knowingly provides false personal identifying information or a false personal identification document to a court or a law enforcement officer; or (d) knowingly provides false personal identifying information or a false personal identification document to an employer for the purpose of obtaining employment.

Impersonation under § 28-638(1)(a) and (b) is a felony or a misdemeanor, depending upon the value gained or attempted to

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[2] *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

[3] *Hess v. State*, 287 Neb. 559, 843 N.W.2d 648 (2014).

be gained by the impersonator.[4] Impersonation under subsection (1)(d) is always a misdemeanor.[5] But impersonation under subsection (1)(c), the statute Covey was charged with violating, is always a felony.[6]

Section 28-636(1) defines a "[p]ersonal identification document" as

> a birth certificate, motor vehicle operator's license, state identification card, . . . or passport or any document made or altered in a manner that it purports to have been made on behalf of or issued to *another person* or by the authority of *a person* who did not give that authority.

(Emphasis supplied.)

Section 28-636(2), which is most directly at issue in this case, defines "[p]ersonal identifying information" as

> *any name or number* that *may be used*, alone or in conjunction with any other information, *to identify a specific person* including *a person's: (a) Name*; (b) date of birth; (c) address; (d) motor vehicle operator's license number or state identification card number as assigned by the State of Nebraska or another state; (e) social security number or visa work permit number; [et cetera].

(Emphasis supplied.)

We must determine whether, under § 28-636(2), the "person's" name or number can be a fictitious "person's" name or number, which "may be used . . . to identify a specific [fictitious] person," or, instead, whether the State must show that the defendant provided the name or number of a real person, which name or number "may be used, alone or in conjunction with any other information, to identify a specific [real] person." We conclude that under the plain language of these statutes, a person commits felony impersonation only by giving law enforcement the personal identifying information of a specific and real individual. To the extent that there could be any reasonable disagreement about the plain meaning of the

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[4] See § 28-636(2)(a) through (d).

[5] See § 28-638(2)(f).

[6] See § 28-638(2)(e).

relevant impersonation statutes, they are ambiguous. As such, we must follow our rules of construction and the rule of lenity, which will lead us to the same result.

"Person" is not defined in the definitions section of chapter 28, article 6, of the Nebraska Revised Statutes, which sets forth the "offenses involving fraud" and which contains the impersonation statutes. However, Neb. Rev. Stat. § 28-109 (Reissue 2008), found in article 1 of the criminal code, states: "For purposes of the Nebraska Criminal Code, unless the context otherwise requires: . . . (16) Person shall mean any natural person and where relevant a corporation or an unincorporated association." The impersonation statutes, of course, are part of the criminal code.

The definition of "person" found in § 28-109(16) makes clear that the "person"/"specific person" in § 28-636(2) cannot be a fictitious person. Black's Law Dictionary states that a "natural person" is "[a] human being, as distinguished from an artificial person created by law."[7] We believe that a "natural person" excludes imaginary, artificial, or fictitious persons. If it did not, then all kinds of crimes could be committed against fictitious "persons." We find no reason why the context of the impersonation statutes would "require" that we understand "person" any differently.

To the extent it might be argued that the definition of "person" as a "natural person" is not decisive, we note the dictionary definition of a "person" as "a human being regarded as an individual."[8] "Specific," in turn, is "clearly defined or identified."[9] While the dictionary definition of "person" does not explicitly state that the "human being" is real rather than fictitious, things capable of being real are not normally understood by default as encompassing the fictitious, unless the context so indicates. Rather, the default understanding of a word used in the context of a real-world application is that the word refers to real things in that real world. We believe

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[7] Black's Law Dictionary 1162 (7th ed. 1999).

[8] Concise Oxford American Dictionary 660 (2006).

[9] *Id.* at 869.

that in the context of § 28-636(2), "person" plainly means a real person.

Cases from other jurisdictions considering similar impersonation statutes support this conclusion that "person" is plainly limited to real and specifically identifiable human beings. For example, 18 U.S.C. § 1028(a)(7) (2012) provides that under specified circumstances, it is a crime to knowingly transfer, possess, or use, without lawful authority, a means of identification "of another person." Section 1028(d)(7), in turn, defines "means of identification" in language practically identical to § 28-636(2)'s definition of "[p]ersonal identifying information." It defines "means of identification" as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual." It then lists several of the same examples as § 28-636(2): name, date of birth, address, driver's license or identification number, Social Security or work permit number, et cetera.

Federal courts have consistently held that the "means of identification" described in 18 U.S.C. § 1028(d)(7) must identify an actual person who is not the defendant.[10] In fact, the U.S. Supreme Court, in *Flores-Figueroa v. United States*,[11] held that the language of 18 U.S.C. § 1028A(a)(1) (2012), which is identical in relevant part to 18 U.S.C. § 1028(a)(7), requires that the government prove the defendant knew that the means of identification at issue corresponded to an actual person.

Further, federal courts hold that a non-unique identifier, such as a name, will not alone qualify as a "means of identification," when that identifier points to numerous equally plausible, actual persons, as opposed to one specific, real individual.[12] For example, in *U.S. v. Mitchell*,[13] the court held that the definition of "'means of identification of another person'" as "'any name or number that may be used, alone

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[10] See *Flores-Figueroa v. United States*, 556 U.S. 646, 129 S. Ct. 1886, 173 L. Ed. 2d 853 (2009).

[11] *Id.*

[12] See, e.g., *U.S. v. Foster*, 740 F.3d 1202 (8th Cir. 2014); *U.S. v. Mitchell*, 518 F.3d 230 (4th Cir. 2008).

[13] *U.S. v. Mitchell, supra* note 12, 518 F.3d at 234 (emphasis in original).

or in conjunction with any other information, to identify a *specific individual*'" was plain and clarified that 18 U.S.C. § 1028(d)(7) requires that the "means of identification" entail a sufficient amount of correct, distinguishing information to identify a specific, real person. The court then explained that, in most circumstances, a non-unique identifier, such as a name or date of birth, will not be sufficient to identify a specific person.[14]

State courts likewise conclude in the context of various impersonation statutes that the "person" impersonated must be a real person. Several state courts have accordingly held that giving a police officer the wrong name, without proof the name corresponded to a real individual, is insufficient to support a charge of impersonation.[15]

Many state impersonation statutes are worded in terms of impersonating "another," which is understood as "another person," similar to the federal statutes. "Another" in this context has been held to mean holding oneself out as a specific, actual individual who is someone other than oneself.[16]

State v. Woodfall[17] illustrates the strength of courts' plain reading of terms like "another," "other person," and "person," as excluding fictitious entities. In *Woodfall*, the court was presented with the definition of "'personal information'" as "'information associated with *an actual person or a fictitious person*.'"[18] Yet, the court still found the statutory scheme ambiguous. The court interpreted the definition of "personal

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[14] *Id*.

[15] See, *Lee v. Superior Court*, 22 Cal. 4th 41, 989 P.2d 1277, 91 Cal. Rptr. 2d 509 (2000); *State v. Jackson*, 32 Conn. App. 724, 630 A.2d 164 (1993); *Brown v. State*, 225 Ga. App. 750, 484 S.E.2d 795 (1997); *City of Liberal v. Vargas*, 28 Kan. App. 2d 867, 24 P.3d 155 (2001); *People v. Gaissert*, 75 Misc. 2d 478, 348 N.Y.S.2d 82 (1973); *State v. Berry*, 129 Wash. App. 59, 117 P.3d 1162 (2005).

[16] *People v. Danisi*, 113 Misc. 2d 753, 449 N.Y.S.2d 874 (1982); *People v. Gaissert, supra* note 15. See, also, *People v. Sherman*, 116 Misc. 2d 109, 455 N.Y.S.2d 528 (1982).

[17] *State v. Woodfall*, 120 Haw. 387, 206 P.3d 841 (2009).

[18] *Id*. at 393, 206 P.3d at 847 (emphasis supplied).

information" in favor of the defendant and concluded it was limited to impersonation of real persons. The court explained that the inclusion of "fictitious persons" in the definition of "personal information" conflicted with other provisions. The definition of "personal information" operated in conjunction with the underlying statute setting forth the offense of "'transmission of any personal information of another.'"[19] And the term "'another,'" the court noted, was defined by a different statute as "'any other person.'"[20] The court also noted that "'person'" was defined by a general statute applicable to the criminal code as "'any natural person.'"[21]

[3] We do not see any meaningful distinction between the terms "another" and "person" under the statutes from other jurisdictions addressed above and the use of "person"/"specific person" in § 28-636(2). Furthermore, we note that § 28-638 expressly uses the term "impersonation" as part of the body of the statute. This is not merely a label placed by the Nebraska Revisor of Statutes. As such, the word "impersonation" should be given credence like any other. We will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.[22] And one dictionary definition of "impersonation" is to pretend to be "another person."[23] The cases discussed above support our view of the plain meaning of §§ 28-638(1)(c) and 28-636(2).

At a minimum, we would be hard pressed to conclude that "person" in the context of §§ 28-638(1)(c) and 28-636(2) is not ambiguous as to whether it includes or excludes fictitious persons. Ambiguity is defined as being capable of more than one reasonable interpretation,[24] and we certainly view these other courts' decisions as reasonable.

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[19] *Id.* at 391, 206 P.3d at 845.

[20] *Id.* at 392, 206 P.3d at 846.

[21] *Id.*

[22] See *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985).

[23] Black's Law Dictionary, *supra* note 7 at 757.

[24] See *In re Interest of Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012).

In the face of ambiguity, we must examine legislative history and abide by the rule of lenity. Doing so, we are led to the same conclusion: that to commit the felony crime of impersonation by presenting "false personal identifying information" to a law enforcement officer, there must be an actual individual being "impersonated" by such "personal identifying information."

We first observe the history of the impersonation legislation. The definition of "personal identifying information" remained unchanged during the most recent amendment to the impersonation statutes, which was 2009 Neb. Laws, L.B. 155. The same definition of "personal identifying information" was previously found in Neb. Rev. Stat. § 28-608(4)(b) (Reissue 2008), and that definition tied into § 28-608(1)(d)(i). Section 28-608(1)(d)(i) stated that a person "commits the crime of criminal impersonation" if he or she, "[w]ithout the authorization or permission of another and with the intent to deceive or harm another," "[o]btains or records personal identification documents or personal identifying information[.]"

Thus, in the context of the impersonation statutes before the passage of L.B. 155, the "person" identified by the "personal identifying information" was very clearly a real person, as distinguished from a fictitious person. The "personal identifying information" was of "another," who was capable of giving authorization or permission, and who was capable of being harmed by the unauthorized use of the personal identifying information. Moreover, using the "personal identifying information" of another, in violation of § 28-608(1)(d)(i), was distinguishable from impersonation through "[a]ssum[ing] a false identity" or acting in an "assumed character," in violation of § 28-608(1)(a). Before L.B. 155, all the kinds of impersonation were a misdemeanor or a felony, depending on the harm caused.

[4] Where an amendment leaves certain portions of the original act unchanged, such portions are continued in

force with the same meaning and effect they had before the amendment.[25] Thus, the unchanged definition of "personal identifying information" is presumed to continue to be understood as the name or number of a real, not a fictitious, specific person.

We find no evidence from the legislative history that the Legislature intended to change the meaning of "personal identifying information" when it passed L.B. 155. The legislative history indicates only that L.B. 155 added the category of presenting "false identifying information" to a police officer, and made every such instance a felony regardless of the harm caused, because "persons who commit these crimes are not always looking for a financial gain."[26] The Judiciary Committee explained that it was attempting to close the "gaps that *victims* fall through currently. Criminals use *personal information* for many reasons other than financial gain, including to commit crimes, evading arrest, or undocumented workers use this information to be employed in this country."[27]

Also, we interpret criminal statutes together so as to maintain a consistent and sensible scheme.[28] In this regard, we observe that criminal impersonation via false personal identifying information, both before and after L.B. 155, has always been distinguishable from the separate misdemeanor offense of "false reporting" found in our criminal code. Section 28-907(1)(a) states that a person commits "false reporting" if he or she "[f]urnishes material information he or she knows to be false to any peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter." We have held that

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[25] *Branz v. Hutchinson*, 128 Neb. 698, 260 N.W. 198 (1935).

[26] Floor Debate, L.B. 155, Judiciary Committee, 101st Leg., 1st Sess. 84 (May 7, 2009).

[27] Judiciary Committee Hearing, L.B. 155, 101st Leg., 1st Sess. 50 (Jan. 28, 2009) (emphasis supplied).

[28] See *Sack v. State*, 259 Neb. 463, 610 N.W.2d 385 (2000).

the crime of "false reporting" includes giving a false name to avoid an arrest warrant.[29]

It would be an odd criminal scheme if giving a false name to a police officer, without any additional intent, could be a felony under § 28-638(1)(c), while the same act with the additional element of intending to impede an investigation is only a misdemeanor.

Finally, we must abide by the rule of lenity. Under the rule of lenity, ambiguities in a penal statute are resolved in the defendant's favor.[30] The rule of lenity serves important interests. It promotes fair notice to those subject to the criminal laws, minimizes the risk of selective or arbitrary enforcement, and maintains the proper balance between Congress, prosecutors, and the courts.[31] The rule of lenity requires that we interpret "person," as used in §§ 28-638(1)(c) and 28-636(2), to encompass only real, specifically identifiable, human beings.

The State and the dissent argue §§ 28-638(1)(c) and 28-636(2) unambiguously give fair notice to those subject to our criminal laws that it is felony "criminal impersonation" to provide a false name or number to a police officer—whether or not such false name or number constitutes identifying information for any real individual. The State argues that the "specific person" referred to in § 28-636(2) is the defendant and not some other, specific, real person. The State accordingly reads "to identify a specific person" as meaning "to identify oneself." We disagree.

[5] The "personal identifying information" will not be "false" if the "specific person" identified by the name or number is the same "person's" name or number given to the law enforcement officer. Therefore, the State's argument runs afoul

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[29] See *State v. Nissen*, 224 Neb. 60, 395 N.W.2d 560 (1986).

[30] See, *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014); *State v. Thacker*, 286 Neb. 16, 834 N.W.2d 597 (2013).

[31] See, e.g., *United States v. Kozminski*, 487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988).

of the rule of construction that the same words used in the same sentence are presumed to have the same meaning.[32]

Furthermore, if the Legislature had intended the meaning the State champions, there are certainly clearer ways it could have conveyed that meaning. "[A] specific person" in § 28-636(2) is an oddly oblique way for the Legislature to have chosen to simply say "oneself."

And, finally, the State's argument as to whom "specific person" refers does not address the meaning of the second instance of "person" in § 28-636(2): "including a person's: (1) Name; (b) date of birth; (c) address; [et cetera]."

The dissent, for its part, focuses on the use of the term "may" in the same phrase from § 28-636(2) that the State focuses on: "Personal identifying information means any name or number that may be used, alone or in conjunction with any other information, to identify a specific person . . . ." The dissent argues that § 28-636(2) plainly states that the "[p]ersonal identifying information" may or may not identify a real human being. In making this argument, the dissent relies on cases holding that "may" connotes permissive or discretionary action.

The dissent's argument, like the State's, does not address the second instance of "person" in the statute. In any event, the cases the dissent relies upon are inapplicable. The statutes analyzed in those cases use "may" to describe an action by an actor. For example, we have held that "may" connotes discretionary action when used in statutes specifying that "'the court may set aside a final judgment'"[33] or "may allow the

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[32] See, *Brown v. Gardner*, 513 U.S. 115, 115 S. Ct. 552, 130 L. Ed. 2d 462 (1994); *Philippides v. Bernard*, 151 Wash. 2d 376, 88 P.3d 939 (2004). See, also, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); *Lewis v. Philip Morris Inc.*, 355 F.3d 515 (6th Cir. 2004); *C.R. Klewin Northeast v. City of Bridgeport*, 282 Conn. 54, 919 A.2d 1002 (2007); *Jasper Contractors, Inc. v. E-Claim.com*, 94 So. 3d 123 (La. App. 2012). See, also, 2A Norman J. Singer, Statutes and Statutory Construction § 46:06 (5th ed. 1992).

[33] *Alisha C. v Jeremy C.*, 283 Neb. 340, 349, 808 N.W.2d 875, 883 (2012).

prevailing party . . . a reasonable attorney's fee."[34] In contrast, "may" as found in § 28-636(2) is in a passive phrase utilized for an abstract definition. "May" modifies the "name or number" "that may be used." A name or number cannot act or have "discretion."

We read "may" in § 28-636(2) as "being capable of." One dictionary definition describes "may" as "have the ability . . . to."[35] Thus, to be "personal identifying information," that information must have the ability to identify a "specific person." We believe that to be the most sensible reading of the statute.

In sum, the State and the dissent assert that the relevant language pertaining to felony impersonation by presenting "false personal identifying information" to a court or law enforcement officer is just a complicated way of describing giving a false name or number—of a kind that could, but not necessarily does, identify a specific real person.

But we do not think it makes sense to refer to a fictitious "specific person" or a name, address, state identification card number, et cetera, of a fictitious person. To the extent it could be a sensible reading, we certainly do not think it the only one. There is a difference between a fictitious name or number and a fictitious person[36]; thus, we cannot agree with the State and the dissent's view that one essentially collapses into the other.

For the foregoing reasons, Covey is correct that the evidence was insufficient to support the crime charged. There was no evidence the name "Daniel Jones" belonged to a real Daniel Jones, much less to any "specific" Daniel Jones. Such a showing would not have been necessary had the State charged Covey with the misdemeanor offense of false reporting under

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[34] *Manning v. Dakota Cty. Sch. Dist.*, 279 Neb. 740, 746, 782 N.W.2d 1, 7 (2010).

[35] See Webster's Third New International Dictionary of the English Language, Unabridged 1396 (1993).

[36] *Santiago v. E.W. Bliss Co.*, 2012 IL 111792, 973 N.E.2d 858, 362 Ill. Dec. 462 (2012) (Karmeier, J., specially concurring).

§ 28-907(1)(a). If the Legislature wishes to criminalize as a felony giving a police officer a false name, address, date of birth, et cetera—whether or not that name or number is capable of identifying any specific individual in the real world—then it may amend § 28-636(2) to clearly express that intent. Until then, we must read § 28-636(2) as limiting "personal identifying information" to those names or numbers capable of identifying specific and real human beings.

CONCLUSION

We reverse, and remand the cause with directions to vacate Covey's conviction. We need not address Covey's remaining assignments of error.

REVERSED AND REMANDED WITH DIRECTIONS TO VACATE.

CASSEL, J., dissenting.

The majority acknowledges that a clear and unambiguous statute requires no interpretation,[1] but it undertakes a tortured analysis to discover ambiguity. Here, the meaning of the statute[2] is clear.

The elements of the crime do not require identification of a real person. A person commits the crime of criminal impersonation if he or she "[k]nowingly provides false personal identifying information . . . to . . . a law enforcement officer[.]"[3] Thus, other than date of commission and venue, there are only two elements: (1) that the accused provided false personal identifying information to a law enforcement officer and (2) that he or she did so knowingly. There is no requirement that the false personal identifying information relate to a real person.

Likewise, the definition of "personal identifying information" contains no such requirement. "Personal identifying information" is defined as "any name or number that may be used, alone or in conjunction with any other information, to identify

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[1] See *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980).

[2] Neb. Rev. Stat. § 28-638(1)(c) (Cum. Supp. 2014).

[3] *Id.*

a specific person."[4] The majority defines "person" as "a human being regarded as an individual"[5] and "specific" as "clearly defined or identified."[6] And the majority acknowledges that none of these terms are explicitly limited to real, as opposed to imaginary, "human beings." However, rather than stopping there, it then reads the term "real" into the statute.

I would refrain from this unnecessary interpretation of an unambiguous statute. Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, a court may not manufacture ambiguity in order to defeat that intent.[7] The statute provides a clear definition: Personal identifying information is a name or number that may be used, alone or in conjunction with additional information, to identify a definite or identifiable individual.[8] And when the word "may" is used in a statute, permissive or discretionary action is presumed.[9] Here, the word "may" means the personal identifying information provided is *capable* of identifying a definite or identifiable individual, not that the information provided *must* identify a definite or identifiable individual.

And Covey knowingly gave such false information to law enforcement. He identified himself as "Daniel Jones," a name that may be used to identify a particular individual, which he knew to be false. There was no proof that Daniel Jones was a real person. But the ability of a name to identify a definite or particular individual is not premised upon the existence of an actual person with that name.

The majority conflates the name of the crime with the crime's statutory elements. "Criminal impersonation" is merely

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[4] Neb. Rev. Stat. § 28-636(2) (Cum. Supp. 2014).

[5] Concise Oxford American Dictionary 660 (2006).

[6] *Id.* at 869.

[7] *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

[8] See § 28-636(2).

[9] *JCB Enters. v. Nebraska Liq. Cont. Comm.*, 275 Neb. 797, 749 N.W.2d 873 (2008); *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

the name of the offense, as designated by the Legislature.[10] The name of the crime does not change or affect its elements. And those elements control our review. When reviewing the sufficiency of the evidence to support a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[11] Here, both elements of the crime were clearly established. And that should be the end of our inquiry.

I would affirm Covey's conviction. Therefore, I respectfully dissent.

HEAVICAN, C.J., and STEPHAN, J., join in this dissent.

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[10] See § 28-638(1)(c).

[11] *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

FIRST TENNESSEE BANK NATIONAL ASSOCIATION, SUCCESSOR BY MERGER TO FIRST HORIZON HOME LOAN CORPORATION, APPELLANT, V. JASON NEWHAM, APPELLEE.

859 N.W.2d 569

Filed February 27, 2015. No. S-14-326.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Appeal from the District Court for Cass County: JEFFREY J. FUNKE, Judge. Affirmed.

Brian J. Muench for appellant.

Edward F. Noethe and Michael G. Monday, of McGinn, McGinn, Springer & Noethe, for appellee.

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

CASSEL, J.

INTRODUCTION

A lender sued upon a promissory note. The district court determined that the action was barred by a California statute of limitations and entered summary judgment in the borrower's favor. On appeal, the lender contends that the limitations period was tolled by either a California statute or a provision of the Servicemembers Civil Relief Act (SCRA).[1] We affirm. The California tolling statute could not be applied against the borrower, a nonresident of California, without violating the Commerce Clause.[2] And the borrower's membership in the National Guard provided no basis to toll the limitations period.

BACKGROUND

Jason Newham executed a promissory note dated September 8, 2005, in favor of First Horizon Home Loan Corporation in the amount of $182,000. Newham used the funds to refinance a prior mortgage on real property located in Dixon, California. At that time, Newham was a resident of California and "in active duty, Air Force," stationed at Travis Air Force Base. Payments on the note were due on the first of every month, and the note was secured by a deed of trust for the property.

Sometime after execution of the note, First Horizon Home Loan Corporation merged with First Tennessee Bank National

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[1] 50 U.S.C. app. § 501 et seq. (2012).

[2] U.S. Const. art. I, § 8, cl. 3.

Association (First Tennessee). As a result, First Tennessee became the holder of the note.

Newham left California and vacated the property in May 2007. He made his last payment on the note on August 6. He resided in Papillion, Nebraska, until September, when he moved to Kansas to work for an aircraft company as a demonstration pilot. Although Newham had joined the North Dakota National Guard in July 2007, he did not move to North Dakota until June 2009. With the North Dakota National Guard, he was "part-time for the first [2] years, and then . . . full-time, at the state level, for the last . . . almost [3] years." Newham later moved to Minnesota, but he returned to Nebraska in June 2013.

On August 5, 2013, First Tennessee filed a complaint against Newham, alleging that he was in default on the note and seeking damages in the amount of $274,467.13, plus interest. In response, Newham moved for summary judgment and alleged that First Tennessee's suit was barred by the statute of limitations. First Tennessee filed an amended complaint and alleged that Newham was an "absconding debtor."

At the summary judgment hearing, Newham's counsel argued that First Tennessee's action was governed by California law and that First Tennessee had failed to bring the action within 4 years as required by Cal. Civ. Proc. Code § 337 (West 2006). First Tennessee, however, asserted that the statute of limitations had been tolled by either Cal. Civ. Proc. Code § 351 (West 2006) or 50 U.S.C. app. § 526(a). As discussed in greater detail below, § 351 tolls the statute of limitations during the period of time that a defendant is outside of California and § 526(a) tolls the statute of limitations during the "period of a servicemember's military service," as defined by relevant federal law.

The district court also received various discovery into evidence, including Newham's answers to interrogatories and his deposition testimony. As to his current employment status, Newham stated that he is a "part-time member" of the Nebraska Air National Guard. His position does not entail active duty status. When asked to provide the dates and duty stations of his periods of active duty, Newham indicated that

his most recent period of active duty was from March 2005 to July 2007 at Travis Air Force Base.

As to his repayment of the note, Newham confirmed that he made his last payment on August 6, 2007, and that he "was in breach of the contract" as of September 2. Additionally, he testified that he never returned to California after he vacated the property.

On February 3, 2014, the district court entered summary judgment in Newham's favor. In its order, the court determined that First Tennessee's claim was governed by the California statute of limitations and that First Tennessee had failed to file suit within the 4-year limitations period. As to the tolling provision of Cal. Civ. Proc. Code § 351, the court concluded that, if applied against Newham, § 351 would violate the Commerce Clause of the U.S. Constitution. However, the court did not address the tolling provision of 50 U.S.C. app. § 526(a).

First Tennessee moved for new trial and alleged that the district court erred in failing to apply § 526(a). Additionally, First Tennessee asserted that Newham had the burden to show that the application of § 351 would violate the Commerce Clause. And it alleged that applying § 351 would not result in any constitutional violation.

At the hearing on First Tennessee's motion, the district court acknowledged that it had failed to consider § 526(a) in its summary judgment order. However, it clarified that in considering the statute of limitations, it had reviewed § 526(a) and concluded that it did not apply because Newham was not on active duty. The court explained that it did not set forth its analysis in the order, because it "did not believe it was relevant and necessary, based on the information."

The district court overruled the motion for new trial, and First Tennessee filed a notice of appeal. We moved the case to our docket pursuant to statutory authority.[3]

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

ASSIGNMENTS OF ERROR

First Tennessee assigns, consolidated and restated, that the district court erred in finding that the statute of limitations was not tolled by either (1) Cal. Civ. Proc. Code § 351 or (2) 50 U.S.C. app. § 526(a).

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.[4]

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[5]

ANALYSIS

JURISDICTION

[3] We first dispose of a preliminary matter. Although neither party has alleged a jurisdictional defect, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[6]

After the district court entered summary judgment, First Tennessee timely filed a motion for new trial, which, despite its title, we treat as a motion to alter or amend the judgment.[7] The motion terminated the time for taking an appeal.[8]

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[4] *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010).

[5] *Id.*

[6] See *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011).

[7] See *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005), *abrogated in part, Kennedy v. Plan Administrator for DuPont Sav. and Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009).

[8] See *id.*

First Tennessee's notice of appeal was timely filed after the terminating motion was overruled. Thus, we have jurisdiction of the appeal.

California Law Applies

Having established our jurisdiction over the appeal, we turn to First Tennessee's assignments of error. The parties agree that California law applies.

Neither party contests the conclusion that First Tennessee's claim was governed by the 4-year limitations period of Cal. Civ. Proc. Code § 337. And it is clear that First Tennessee did not file suit within the limitations period. Newham acknowledged that he was in default on the note on September 2, 2007. While First Tennessee contended at oral argument that Newham was in default as of September 3, the specific date of default makes no difference to our analysis. First Tennessee did not file the present action until August 5, 2013, nearly 6 years later.

First Tennessee asserts only two statutory bases for tolling the statute of limitations. We therefore limit our analysis to whether the limitations period was tolled by either Cal. Civ. Proc. Code § 351 or 50 U.S.C. app. § 526(a).

Cal. Civ. Proc. Code § 351

Because Cal. Civ. Proc. Code § 351 is a California statute, we set forth its full text.

> Exception, where defendant is out of the State. If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action.

As discussed above, the district court determined that § 351 could not be applied to toll the limitations period, because its application against Newham, a nonresident of California, would violate the Commerce Clause of the U.S. Constitution. We agree.

State tolling statutes, such as § 351, raise constitutional concerns due to their potential effect on interstate commerce. As the U.S. Supreme Court expressed in *Bendix Autolite Corp. v. Midwesco Enterprises*,[9] "Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce."[10] In that case, the Court determined that an Ohio tolling statute violated the Commerce Clause when applied to a foreign corporation, because it imposed a greater burden on foreign corporations than it imposed on Ohio corporations. The statute "force[d] a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity."[11]

In considering § 351, California courts have similarly found that it violates the Commerce Clause by forcing nonresident defendants to be present in California for the duration of the limitations period or to forfeit the limitations defense.[12] In *Heritage Marketing Services v. Chrustawka*,[13] the defendants were former California residents who had moved out of the state to reside in Texas. The California Court of Appeal concluded that § 351 could not be applied against them without violating the Commerce Clause. Applying § 351 would impose an impermissible burden on interstate commerce, because it would "creat[e] disincentives to travel across state lines and impos[e] costs on those who wish to do

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[9] *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 108 S. Ct. 2218, 100 L. Ed. 2d 896 (1988).

[10] *Id.*, 486 U.S. at 893.

[11] *Id.*

[12] See, *Dan Clark Family Ltd. v. Miramontes*, 193 Cal. App. 4th 219, 122 Cal. Rptr. 3d 517 (2011); *Heritage Marketing Services v. Chrustawka*, 160 Cal. App. 4th 754, 73 Cal. Rptr. 3d 126 (2008).

[13] *Heritage Marketing Services, supra* note 12.

so."[14] Further, in *Dan Clark Family Ltd. v. Miramontes*,[15] the California Court of Appeal concluded that § 351 could not be applied against defendants who were residents of Mexico. In that case, § 351 would force the defendants to "either *become* residents of California or to be subject to suit in California in perpetuity."[16]

We find the above cases to be instructive and conclude that the application of § 351 against Newham would violate the Commerce Clause. Like the defendants in the above cases, Newham was a nonresident of California during the limitations period. Further, his status was identical to that of the defendants in *Heritage Marketing Services*, as a former resident of California who had permanently left the state. Applying § 351 against Newham would impose an impermissible burden on interstate commerce. Denying him the limitations defense would force similar defendants either to remain in California for the duration of the limitations period or to forfeit the limitations defense, remaining subject to suit in California in perpetuity. "Section 351 penalizes people who move out of state by imposing a longer statute of limitations on them than on those who remain in the state. The [C]ommerce [C]lause protects persons from such restraints on their movements across state lines."[17]

First Tennessee attempts to compare this case to *Filet Menu, Inc. v. Cheng*,[18] in which the California Court of Appeal concluded that the Commerce Clause was not violated by the application of § 351 against residents of California who traveled outside of the state for reasons unrelated to interstate commerce. And it claims that Newham had the burden of proving that his absence from California affected interstate commerce by being for the purpose of employment.

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[14] *Id.* at 764, 73 Cal. Rptr. 3d at 132.

[15] *Dan Clark Family Ltd., supra* note 12.

[16] *Id.* at 233, 122 Cal. Rptr. 3d at 528.

[17] *Heritage Marketing Services, supra* note 12, 160 Cal. App. 4th at 763, 73 Cal. Rptr. 3d at 132.

[18] *Filet Menu, Inc. v. Cheng*, 71 Cal. App. 4th 1276, 84 Cal. Rptr. 2d 384 (1999).

But both of these arguments were rejected in the above cases. In *Dan Clark Family Ltd.*, the California Court of Appeal dismissed the plaintiff's reliance upon *Filet Menu, Inc.*, because *Filet Menu, Inc.* involved a resident defendant. "A resident defendant does not face the same unpalatable choice that a nonresident faces with respect to the tolling of the statute of limitations under [§] 351—i.e., to remain in California, or be subject to suit in perpetuity."[19] And in *Heritage Marketing Services*, the California Court of Appeal rejected the plaintiffs' argument that the defendants could have relocated to Texas for purposes other than employment, observing: "[P]laintiffs have not cited, nor have we found, any cases holding that interstate commerce is *not* affected when persons simply move out of state, as opposed to doing so for the purpose of taking or seeking new employment."[20] And in this case, the district court received ample evidence that Newham held numerous positions of employment in multiple states after his relocation from California. Thus, we are not persuaded that Newham's relocation from California did not affect interstate commerce.

We find no error in the district court's conclusion that § 351 could not be applied against Newham to toll the 4-year limitations period. Under the Commerce Clause, § 351 could not deprive Newham of an ordinary legal defense available to persons remaining within California. This assignment of error is without merit.

50 U.S.C. APP. § 526

First Tennessee further asserts that the district court erred in failing to apply 50 U.S.C. app. § 526(a) to toll the limitations period. Section 526 is part of the SCRA and provides, in relevant part:

> **(a) Tolling of statutes of limitation during military service**

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[19] *Dan Clark Family Ltd., supra* note 12, 193 Cal. App. 4th at 234, 122 Cal. Rptr. 3d at 528.

[20] *Heritage Marketing Services, supra* note 12, 160 Cal. App. 4th at 762, 73 Cal. Rptr. 3d at 131.

> The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

First Tennessee asserts that the district court incorrectly identified Newham as a "'reservist,'" rather than a "'full-time National Guard'" member.[21] And because Newham was a full-time National Guard member, First Tennessee claims that § 526(a) acted to toll the limitations period.

We acknowledge that the district court incorrectly identified Newham as a reservist at the hearing on First Tennessee's motion for new trial. All of the evidence received by the court identified Newham as a National Guard member. And Newham testified that he was a full-time member of the North Dakota National Guard for approximately 3 years. Further, Newham's membership in the North Dakota National Guard coincided with the limitations period. However, there was no basis to conclude that his National Guard membership activated the tolling effect of § 526(a).

The SCRA provides specific definitions for the terms used within § 526(a).[22] As stated above, § 526(a) tolls the limitations period during the "period of a servicemember's military service." And the "[p]eriod of military service" is defined as the "period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service."[23] Thus, it is apparent that the critical term in applying § 526(a) is "military service."

The question becomes whether Newham's National Guard membership qualified as "military service" under the SCRA.

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[21] See brief for appellant at 8.

[22] See 50 U.S.C. app. § 511.

[23] 50 U.S.C. app. § 511(3).

Under the SCRA, "military service" has multiple definitions. But only the definitions under § 511(2)(A) were potentially applicable to Newham. That subsection defines "military service" as:

> [I]n the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard—
>
> (i) active duty, as defined in section 101(d)(1) of title 10, United States Code, and
>
> (ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds.

This definition provides only two means by which the SCRA could have tolled the California statute of limitations. If Newham was on "active duty" or if he was called to active service under the conditions specified in § 511(2)(A)(ii), tolling would result. But the evidence does not establish that either circumstance occurred.

It is clear that Newham was not on "active duty" as defined in 10 U.S.C. § 101(d)(1) (2012) during the limitations period. That provision defines "active duty" as

> full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. *Such term does not include full-time National Guard duty*.

(Emphasis supplied.)

"[F]ull-time National Guard duty" is expressly excluded from the definition of "active duty."[24] And multiple federal courts have recognized that full-time National Guard duty at

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[24] See, 10 U.S.C. § 101(d)(1); *In re Ladd*, 516 B.R. 66 (D.S.C. 2014); *Freeman v. U.S.*, 98 Fed. Cl. 360 (2011).

the state level does not constitute federal active military service.[25] Newham indicated that his most recent period of active duty was from March 2005 to July 2007, when he was stationed at Travis Air Force Base. And he testified that his membership in the North Dakota National Guard was "full-time, at the state level." Thus, the evidence received at the summary judgment hearing established that Newham was not on "active duty" at any point during the limitations period.

First Tennessee points to the definition of "active service" under § 101(d)(3) and argues that there are two methods of being on "active duty." "[A]ctive Service" is defined as "service on active duty or full-time National Guard duty."[26] However, this argument ignores the definitions of the terms used within the SCRA.[27] As previously discussed, "military service" is limited to "active duty" as defined by § 101(d)(1). And that provision expressly excludes full-time National Guard duty.

As to the second possible definition of "military service," the district court received no evidence on that issue. There was no evidence that during his membership with the North Dakota National Guard, Newham was called to active service—authorized by the President or the Secretary of Defense—for a period of more than 30 consecutive days under 32 U.S.C. § 502(f) (2012), for purposes of responding to a national emergency.[28]

[4] And on that issue, First Tennessee bore the burden of proof. Newham established a prima face case for the application of the statute of limitations. 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

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[25] See, *Freeman, supra* note 24; *Bowen v. U.S.*, 49 Fed. Cl. 673 (2001), *affirmed* 292 F.3d 1383 (Fed. Cir. 2002) (construing predecessor act, Soldiers' and Sailors' Civil Relief Act of 1940).

[26] 10 U.S.C. § 101(d)(3).

[27] See 50 U.S.C. app. § 511.

[28] See 50 U.S.C. app. § 511(2)(A)(ii).

of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[29] Thus, the burden shifted to First Tennessee to establish a genuine issue of material fact as to the tolling of the limitations period. But First Tennessee neither alleged nor presented any evidence that Newham had ever been called to active service to respond to a national emergency. No genuine issue was established as to whether Newham's National Guard membership met the second definition of "military service."[30]

In short, First Tennessee failed to establish any basis for concluding that the limitations period was tolled by § 526(a). Newham was not on "active duty" during his membership in the North Dakota National Guard, and no evidence was presented that he had ever been called to active service within the meaning of § 511(2)(A)(ii). This assignment of error is without merit.

CONCLUSION

Both parties agree that First Tennessee was required to file suit within 4 years of Newham's breach of the promissory note. But no evidence was presented to the district court creating a genuine issue of fact as to the tolling of the limitations period. Because the present action was not filed until nearly 6 years after the breach, we affirm the entry of summary judgment in Newham's favor.

AFFIRMED.

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[29] *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013). See *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005).

[30] See 50 U.S.C. app. § 511(2)(A)(ii).

DMK Biodiesel, LLC, a Nebraska limited liability company, and Lanoha RVBF, LLC, a Nebraska limited liability company, appellants, v. John McCoy et al., appellees.

859 N.W.2d 867

Filed March 6, 2015. No. S-14-150.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from 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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
4. **Securities Regulation.** The Securities Act of Nebraska should be liberally construed to afford the greatest possible protection to the public.
5. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
6. ____: ____. An appellate court will not read into a statute a meaning that is not there.
7. **Securities Regulation.** Reliance is not an element of an investor's claim against the seller of a security under Neb. Rev. Stat. § 8-1118(1) (Reissue 2012).
8. ____. A buyer's sophistication is irrelevant to a claim under Neb. Rev. Stat. § 8-1118(1) (Reissue 2012).

Appeal from the District Court for Buffalo County: John P. Icenogle, Judge. Reversed and remanded for further proceedings.

David A. Domina and Megan N. Mikolajczyk, of Domina Law Group, P.C., L.L.O., for appellants.

Daniel L. Lindstrom and Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellees John McCoy et al.

L. Steven Grasz, Mark D. Hill, and Michael Schmidt, of Husch Blackwell, L.L.P., for appellee Renewable Fuels Technology, LLC.

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

STEPHAN, J.

DMK Biodiesel, LLC (DMK), and Lanoha RVBF, LLC (Lanoha), filed suit against John McCoy; John Hanson; Phil High; Jason Anderson (collectively the individual defendants); and Renewable Fuels Technology, LLC (Renewable), alleging the fraudulent sale of securities, in violation of Neb. Rev. Stat. § 8-1118(1) (Reissue 2012). This is the second appeal. In the first appeal, we reversed the district court's order granting a motion to dismiss because the court considered matters outside the pleadings without conducting an evidentiary hearing.[1] On remand, Renewable and the individual defendants filed motions for summary judgment, which the district court sustained after conducting an evidentiary hearing. DMK and Lanoha now appeal. We reverse, and remand for further proceedings.

I. BACKGROUND

Republican Valley Biofuels, LLC (RVBF), issued a confidential private placement memorandum (PPM) with an effective date of May 7, 2007, seeking investors in a biodiesel production facility. RVBF was promoted by the individual defendants, and Renewable was the manager of RVBF. The PPM provided that the securities being offered were "speculative and involve a high degree of risk." It included a summary of the offering describing RVBF and the biodiesel facility RVBF proposed to build, as well as a description of "[r]isk factors" involved in the investment. The PPM provided that "[n]o person has been authorized to make any representation or warranty, or give any information, with respect to RVBF or the units offered hereby except for the information contained herein." The PPM also stated that

> [a]lthough we believe that our plans and objectives reflected in or suggested by such forward-looking statements are reasonable, we may not achieve such plans

[1] *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013).

> or objectives. Actual results may differ from projected results. We will not update forward-looking statements even though we may undergo changes in the future.

In August 2007, DMK and Lanoha entered into separate subscription agreements and became minority investors in RVBF. In the agreements, each acknowledged the investments involved a high degree of risk. They further acknowledged they had sufficient knowledge and experience in financial and business matters to be able to evaluate "the merits and risks involved" in the investments. Each agreement states: "Subscriber has relied solely upon the information furnished in the [PPM] and Subscriber has not relied on any oral or written representation or statement, except as contained in the [PPM], in making this investment."

In 2009, DMK and Lanoha brought an action against Renewable and the individual defendants in the district court for Buffalo County. In their operative complaint, they alleged that Renewable and the individual defendants, acting in concert as members and the manager of RVBF, made false oral representations and omissions in connection with RVBF and the proposed biodiesel facility which induced their investment. DMK and Lanoha asserted these actions violated the Securities Act of Nebraska (the Act)[2] and violated fiduciary duties owed by the members and manager of RVBF. DMK and Lanoha further sought an accounting at law.

Renewable and the individual defendants filed motions to dismiss, which the district court sustained. DMK and Lanoha appealed, and we reversed.[3]

After the district court entered a judgment on the appeal mandate, Renewable and the individual defendants filed motions for summary judgment asserting they were not liable to DMK and Lanoha as a matter of law. The district court held an evidentiary hearing, after which it sustained the motions and dismissed the action. The court assumed for purposes of

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[2] See Neb. Rev. Stat. § 8-1101 et seq. (Reissue 2012 & Cum. Supp. 2014).

[3] See *DMK Biodiesel, supra* note 1.

its ruling that Renewable and the individual defendants "made the oral representations alleged by [DMK and Lanoha] during the period of time that [DMK and Lanoha] were contemplating their investment." The court framed the issue as whether the "cause of action for security fraud [based on] misrepresentations made to investors is viable given the contents of the [PPM] and subscription agreements in which [DMK and Lanoha] acknowledge[d] that their investments were made without consideration of any representation not contained in the [PPM] or Subscription Agreements." The court reasoned that DMK and Lanoha were sophisticated investors and that given the contents of the PPM and subscription agreements, they could not have relied upon any oral representations as a matter of law. The court concluded:

> [W]hen the sophisticated investor executes a subscription document stating that the "Subscriber has relied solely upon the information furnished in the [PPM] and Subscriber has not relied on any oral or written representation or statement, except as contained in the [PPM], in making this investment" the investor should be held to that statement.

DMK and Lanoha filed a timely appeal.

II. ASSIGNMENTS OF ERROR

DMK and Lanoha assign, restated and consolidated, that the district court erred when it (1) concluded that there were no genuine issues of material fact; (2) concluded that Renewable and the individual defendants were entitled to summary judgment as a matter of law; (3) failed to find that § 8-1118(5) invalidates provisions of the subscription agreements; and (4) failed to recognize that § 8-1118 is applicable to all situations in which a false or misleading statement is made, regardless of the level of sophistication of the investors.

III. 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 those facts and that the moving party is entitled to judgment as a matter of law.[4]

[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.[5]

[3] Statutory interpretation presents a question of law.[6] When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.[7]

IV. ANALYSIS

1. § 8-1118(1) Claim

[4] DMK and Lanoha claim Renewable and the individual defendants violated § 8-1118(1) by selling a security by means of any untrue statement of material fact. Section 8-1118(1) is part of the Act which is modeled after the 1956 Uniform Securities Act.[8] The Act should be liberally construed to afford the greatest possible protection to the public.[9] The purpose of the Act is to protect the public from fraud and to benefit purchasers as opposed to sellers.[10] According to § 8-1118:

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[4] *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013); *Selma Development v. Great Western Bank*, 285 Neb. 37, 825 N.W.2d 215 (2013).

[5] *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011); *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010).

[6] *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012); *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011).

[7] *Village of Hallam, supra* note 6; *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011).

[8] See *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010). See, also, *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986) (Grant, J., dissenting; Boslaugh and Hastings, JJ., join).

[9] *Hooper, supra* note 8; *Labenz v. Labenz*, 198 Neb. 548, 253 N.W.2d 855 (1977).

[10] *Loewenstein v. Midwestern Inv. Co.*, 181 Neb. 547, 149 N.W.2d 512 (1967).

> (1) Any person who offers or sells a security in violation of section 8-1104 or offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they are made not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he or she did not know and in the exercise of reasonable care could not have known of the untruth or omission, shall be liable to the person buying the security from him or her, who may sue either at law or in equity . . . .

We have few cases construing or applying this statute. In the most recent of these, *Hooper v. Freedom Fin. Group*,[11] we affirmed a judgment determining that directors and a holding company of a broker-dealer which sold securities by means of untrue statements of material fact were liable to investors. In our opinion, we noted that the evidence established the stock in question was sold by means of untrue statements and that the purchasers "were unsophisticated investors who relied upon" the seller's assurances that the stock was as described in a sales pamphlet, notwithstanding the pamphlet's inconsistencies with the offering memorandum.[12] However, we were not called upon in that case to determine whether reliance upon the alleged misrepresentation was an element of an investor's claim under § 8-1118(1) or whether the investor's degree of sophistication was relevant to the claim. Nor have we considered whether exculpatory statements contained in a PPM or a subscription agreement operate as a bar to a claim under § 8-1118(1). Those issues are before us here.

(a) Reliance

[5,6] To determine whether reliance is an element of a claim under § 8-1118(1), we begin by examining the language of the statute, utilizing familiar principles of statutory construction. Absent a statutory indication to the contrary, an

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[11] *Hooper, supra* note 8.

[12] *Id.* at 122, 784 N.W.2d at 446.

appellate court gives words in a statute their ordinary meaning.[13] An appellate court will not read into a statute a meaning that is not there.[14] The Legislature has provided an additional tool to determine the meaning of the Act by directing that it "shall be construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of the [A]ct with the related federal regulation."[15]

As noted, the Act is modeled after the 1956 Uniform Securities Act.[16] Section 8-1118(1) is patterned after § 410(a) of the 1956 Uniform Securities Act,[17] which in turn "is almost identical with § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*[(a)](2)."[18]

The Act imposes liability upon one who (1) "offers or sells a security," (2) "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they are made not misleading," and where the buyer is (3) "not knowing of the untruth or omission."[19] It permits the seller to avoid liability by sustaining "the burden of proof that he or she did not know and in the exercise of reasonable care could not have known of the untruth or omission."[20]

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[13] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013); *Mutual of Omaha Bank v. Murante*, 285 Neb. 747, 829 N.W.2d 676 (2013).

[14] *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 844 N.W.2d 276 (2014); *SourceGas Distrib. v. City of Hastings*, 287 Neb. 595, 844 N.W.2d 256 (2014).

[15] § 8-1122.

[16] See *Hooper, supra* note 8. See, also, Seth E. Lipner et al., Securities Arbitration Desk Reference, 2014-2015 ed. § 16.1 (Securities Law Handbook Series 2014).

[17] Unif. Securities Act § 410(a) (1956), 7C U.L.A. app. I (2006).

[18] *Id.*, comment, cl. (2), 7C U.L.A. at 889. See, also, 12A Joseph C. Long & Philip B. Feigin, Blue Sky Law § 9:2 (2014).

[19] § 8-1118(1).

[20] *Id.*

Thus, the statute contains no explicit requirement that an investor must prove reliance upon an alleged misrepresentation or omission by the seller in order to recover. The question is whether the phrase "by means of" implicitly requires a showing that the investor relied upon the seller's misrepresentation or omission of material fact.

Various courts have held that similar language in § 12(2) of the Securities Act of 1933 does not implicitly require an element of reliance. In *Sanders v. John Nuveen & Co., Inc.*,[21] the Seventh Circuit stated that "[a]lthough the 'by means of' language . . . requires some causal connection between the misleading representation or omission and plaintiff's purchase . . . [i]t is well settled that § 12(2) imposes liability without regard to whether the buyer relied on the misrepresentation or omission." Other federal courts have likewise held that reliance upon misrepresentations or omissions is not an element of a claim under § 12(2) of the Securities Act of 1933.[22] In this regard, a claim under this section of the Securities Act of 1933 differs from a claim under rule 10b-5 of the Securities and Exchange Commission's regulations,[23] derived from § 78j of the Securities Exchange Act of 1934,[24] which rule also addresses securities fraud but has been held to include an element of reliance by the investor upon the alleged fraudulent statement.[25]

Most courts construing state laws derived from § 410(a) of the 1956 Uniform Securities Act have similarly concluded that an investor does not need to prove reliance upon an untrue

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[21] *Sanders v. John Nuveen & Co., Inc.*, 619 F.2d 1222, 1225 (7th Cir. 1980).

[22] See, e.g., *MidAmerica Federal S & L v. Shearson/American Exp.*, 886 F.2d 1249 (10th Cir. 1989); *Gilbert v. Nixon*, 429 F.2d 348 (10th Cir. 1970); *Johns Hopkins University v. Hutton*, 422 F.2d 1124 (4th Cir. 1970); *In re Phar-Mor, Inc. Litigation*, 848 F. Supp. 46 (W.D. Pa. 1993).

[23] 17 C.F.R. § 240.10b-5 (2014).

[24] See 15 U.S.C. § 78a et seq. (2012).

[25] See, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008); *Ross v. Bank South, N.A.*, 885 F.2d 723 (11th Cir. 1989).

statement or omission of material fact in order to recover.[26] In reaching this conclusion, the Utah Supreme Court noted that its holding was "in accord with a significant majority of other courts' interpretations of statutes which, like [the Utah Uniform Securities Act], were modeled after section 410(a)(2) of the Uniform Securities Act or section 605(a) of the Uniform Revised Securities Act."[27] The draftsmen's commentary to § 410(a) of the 1956 Uniform Securities Act is consistent with these cases. According to the commentary, "[t]he 'by means of' clause . . . is not intended as a requirement that the buyer prove *reliance* on the untrue statement or the omission."[28]

A few courts have reached contrary conclusions, holding that reliance is an element of an investor's claim under state blue sky laws. For example, a Washington appellate court has construed Washington's antifraud statute to require reliance as an element of an investor's claim.[29] But unlike the Nebraska statute, the Washington statute was patterned after

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[26] See, *Dunn v. Borta*, 369 F.3d 421 (4th Cir. 2004) (construing Virginia Securities Act); *Carothers v. Rice*, 633 F.2d 7 (6th Cir. 1980) (construing Kentucky's Blue Sky Law); *Alton Box Bd. Co. v. Goldman, Sachs Co.*, 560 F.2d 916 (8th Cir. 1977) (construing Missouri Securities Law); *Forrestal Village, Inc. v. Graham*, 551 F.2d 411 (D.C. Cir. 1977) (construing District of Columbia Securities Act), *abrogated on other grounds, Lampf v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991); *Adams v. Hyannis Harborview, Inc.*, 838 F. Supp. 676 (D. Mass. 1993) (construing Massachusetts Blue Sky Law); *Comeau v. Rupp*, 810 F. Supp. 1127 (D. Kan. 1992) (construing Kansas Securities Act); *Green v. Green*, 293 S.W.3d 493 (Tenn. 2009); *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 809 N.E.2d 1017 (2004); *Connecticut Nat. Bank v. Giacomi* et al., 242 Conn. 17, 699 A.2d 101 (1997); *Gohler v. Wood*, 919 P.2d 561 (Utah 1996); *Esser Distributing Co. v. Steidl*, 149 Wis. 2d 64, 437 N.W.2d 884 (1989); *Everts v. Holtmann*, 64 Or. App. 145, 667 P.2d 1028 (1983); *Arnold v. Dirrim*, 398 N.E.2d 426 (Ind. App. 1979); *Bradley v. Hullander*, 272 S.C. 6, 249 S.E.2d 486 (1978). See, also, David O. Blood, *There Should Be No Reliance in the "Blue Sky,"* 1998 BYU L. Rev. 177 (1998); 12A Long & Feigin, *supra* note 18, § 9:117.13.

[27] *Gohler, supra* note 26, 919 P.2d at 566.

[28] Louis Loss, Commentary on the Uniform Securities Act 148 (1976) (emphasis in original).

[29] *Guarino v. Interactive Objects, Inc.*, 122 Wash. App. 95, 86 P.3d 1175 (2004).

the Securities Exchange Act of 1934, and the court applied reliance principles drawn from that act and the related regulation commonly known as rule 10b-5. A Georgia appellate court reached the same result in interpreting a state statute patterned after the Securities Exchange Act of 1934.[30]

[7] Based upon the plain language of § 8-1118(1), its relationship to § 410(a)(2) of the 1956 Uniform Securities Act, and § 12(2) of the Securities Act of 1933, and the weight of case law interpreting similar state statutes, we hold that reliance is not an element of an investor's claim against the seller of a security under § 8-1118(1).

(b) Sophistication of Investor

It is undisputed that DMK and Lanoha were sophisticated investors at the time of their investment in RVBF. DMK and Lanoha contend that for purposes of establishing liability under § 8-1118(1), their level of sophistication does not matter. However, the district court found this fact to be of significance, reasoning that while there may be a rationale for allowing redress to an unsophisticated investor who relies upon oral representations which are contrary to a written prospectus, "in a situation in which a sophisticated investor has been fully advised of the risks of the potential investment and then hears 'contrary' statements about the issue of the risk one would [expect] he would fully investigate and require documentation as to the inconsistencies." While there is logic to this reasoning, the plain language of § 8-1118(1) does not differentiate between sophisticated and unsophisticated investors or impose a duty of investigation or inquiry upon any potential investor confronted with inconsistencies between written and oral representations by the seller of the security.

The only phrase in the statute dealing with the investor's knowledge at the time of the alleged misrepresentation is "the buyer not knowing of the untruth or omission."[31] Courts construing similar language in § 12(2) of the Securities Act of 1933 and state statutes derived from § 410(a)(2) of the 1956

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[30] *Keogler v. Krasnoff*, 268 Ga. App. 250, 601 S.E.2d 788 (2004).

[31] § 8-1118(1).

Uniform Securities Act have held that it bars recovery only when an investor has "actual knowledge that a representation is false or knows that existing information has been withheld."[32] Courts have held that constructive knowledge is not a bar to a claim under § 12(2) and similar state laws[33] and that the statutory language does not impose a duty on any investor to investigate or verify statements made by the seller of a security.[34] Rejecting an argument that investors had an affirmative duty to discover the truth of misrepresentations and omissions with regard to an investment, an Indiana appellate court construing a statute similar to § 8-1118(1) reasoned:

> [I]f the legislature had intended to impose a duty of investigation upon the buyer, it would have expressly included such in the working of the statute. The proscriptions of [the Indiana statute], however, embrace a fundamental purpose of substituting a policy of full disclosure for that of caveat emptor. That policy would not be served by imposing a duty of investigation upon the buyer.[35]

[8] We agree with this reasoning and with the conclusion of other courts and commentators that a buyer's sophistication is irrelevant to a claim under § 12(2) of the Securities Act of 1933 and similar state statutes.[36] As one court put it, "Section 12(2) [of the Securities Act of 1933] does not establish a graduated scale of duty depending upon the sophistication and

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[32] *Wright v. National Warranty Co.*, 953 F.2d 256, 262 (6th Cir. 1992). See, also, *MidAmerica Federal S & L, supra* note 22; *Sanders, supra* note 21; *In re Olympia Brewing Co. Securities Litigation*, 612 F. Supp. 1367 (N.D. Ill. 1985); *Marram, supra* note 26; 12A Long & Feigin, *supra* note 18, § 9:31.

[33] *Dunn, supra* note 26; *MidAmerica Federal S & L, supra* note 22; *Marram, supra* note 26; 12A Long & Feigin, *supra* note 18, § 9:130.

[34] *Dunn, supra* note 26; *MidAmerica Federal S & L, supra* note 22; *In re Olympia Brewing Co. Securities Litigation, supra* note 32; *Marram, supra* note 26. See, also, *Bradley, supra* note 26; 12A Long & Feigin, *supra* note 18, § 9:32.

[35] *Kelsey v. Nagy*, 410 N.E.2d 1333, 1336 (Ind. App. 1980).

[36] See, *Wright, supra* note 32; *Marram, supra* note 26; 12A Long & Feigin, *supra* note 18, § 9:31.

access to information of the customer."[37] The same is true of § 8-1118(1).

(c) Exculpatory Provisions

The district court also concluded that DMK and Lanoha should be held to the affirmation in their subscription agreements that they had not relied on any oral or written representation or statement except those contained in the PPM. DMK and Lanoha argue that this was error, because § 8-1118(5) provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security or receiving any investment advice to waive compliance with any provision of the act or any rule or order under the act shall be void." But Renewable and the individual defendants contend the district court's ruling was correct, relying on a federal case holding that "in the law of securities a written disclosure trumps an inconsistent oral statement."[38]

The provision of the PPM upon which Renewable and the individual defendants, as well as the district court, relied is sometimes referred to as an "integration clause." The Supreme Judicial Court of Massachusetts considered whether an integration clause in a subscription agreement barred an action under a Massachusetts statute similar to § 8-1118(1) based upon alleged oral misrepresentations and omissions by the seller of a security. Reasoning that reliance and sophistication of the buyer are not elements of the statutory claim, the court concluded that "the existence of contradictory written statements, in an integration clause or otherwise, does not provide a defense to the charge of preinvestment materially misleading oral statements."[39] The court determined that a section of the Massachusetts statute which prohibited any party from waiving compliance with its provisions further supported its conclusion that the integration clause did not bar the statutory claim.

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[37] *Sanders, supra* note 21, 619 F.2d at 1229.

[38] *Acme Propane, Inc. v. Tenexco, Inc.*, 844 F.2d 1317, 1322 (7th Cir. 1988).

[39] *Marram, supra* note 26, 442 Mass. at 55, 809 N.E. at 1028.

In *MidAmerica Federal S & L v. Shearson/American Exp.*,[40] the 10th Circuit Court of Appeals held that a securities dealer could be held liable to an investor under an Oklahoma statute similar to § 8-1118(1) for oral misrepresentations by one of its brokers, even though correct information was furnished in prospectuses later sent to the investor. The court distinguished the holding in *Acme Propane, Inc. v. Tenexco, Inc.*,[41] that a written disclosure trumps an inconsistent oral statement, upon which Renewable and the individual defendants rely, noting that the court in that case was dealing with a liability claim under rule 10b-5, whereas §12(2) of the Securities Act of 1933, upon which the Oklahoma statute was based, "dictates a different outcome."[42] The court in *MidAmerica Federal S & L* reasoned that unlike liability claims under rule 10b-5, § 12(2) "has no requirement of justifiable reliance on the part of a purchaser" and that the "purchaser's investment sophistication is immaterial."[43] The court cited with approval a commentator's observation that "'it is a firmly entrenched principle of § 12(2) that the "[a]vailability elsewhere of truthful information cannot excuse untruths or misleading omissions" by the seller.'"[44]

Because we have concluded that reliance is not an element of a claim under § 8-1118(1) and the sophistication of the investor is irrelevant to such claim, we conclude that the district court erred in determining that the integration clauses in the subscription agreements executed by DMK and Lanoha bar their claims under § 8-1118(1).

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[40] *MidAmerica Federal S & L, supra* note 22.

[41] *Acme Propane, Inc., supra* note 38.

[42] *MidAmerica Federal S & L, supra* note 22, 886 F.2d at 1256.

[43] *Id.*

[44] *Id.* at 1256-57, quoting Martin I. Kaminsky, *An Analysis of Securities Litigation Under Section 12(2) and How It Compares With Rule 10b-5*, 13 Hous. L. Rev. 231 (1976) (quoting *Dale v. Rosenfeld*, 229 F.2d 855 (2d Cir. 1956)).

(d) Summary

We conclude that the district court erred in entering summary judgment with respect to the § 8-1118(1) claim of DMK and Lanoha. There remain genuine issues of material fact concerning whether the alleged misrepresentations and omissions of material fact were made, the nature of such misrepresentations and omissions, and whether DMK and Lanoha had actual knowledge of the true facts which they allege to have been misrepresented or omitted.

2. Other Issues

(a) Exhibits 12 Through 20

Renewable and the individual defendants argue that exhibits 12 through 20 were not received in evidence at the summary judgment hearing and should not be considered on appeal. The exhibits in question were offered by DMK and Lanoha over objections which were not ruled on at the hearing or, as far as we can tell, subsequent thereto. We have not considered these exhibits in our analysis of this appeal.

(b) Motion to Strike

Following oral argument of this appeal, Renewable and the individual defendants filed a motion to strike statements made by DMK and Lanoha's counsel during oral argument as not supported by the record. Because we have not relied upon such statements, we do not consider whether or not they are supported by the record and overrule the motion as moot.

(c) Motion for Attorney Fees

At the same time DMK and Lanoha filed their opening brief on appeal, they also filed a motion for attorney fees pursuant to that portion of § 8-1118(1) which permits a party seeking to impose liability on a seller of securities to "sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent per annum from the date of payment, costs, and reasonable attorney's fees." We read the statute to permit an award of attorney fees as a part of a judgment on the merits of the liability claim.

That has not occurred in this case. Although DMK and Lanoha have prevailed on this appeal, they have yet to prove and obtain a judgment on their liability claim under § 8-1118(1). Accordingly, we overrule their motion for attorney fees without prejudice.

V. CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

PROFESSIONAL FIREFIGHTERS ASSOCIATION OF OMAHA, LOCAL 385, AFL-CIO CLC, ET AL., APPELLANTS, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

860 N.W.2d 137

Filed March 6, 2015. Nos. S-14-230, S-14-375, S-14-627.

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. **Statutes: Judgments: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
3. **Commission of Industrial Relations: Final Orders: Contracts.** When Nebraska's Commission of Industrial Relations enters a final order setting wages, hours, and terms and conditions of employment which are binding on the employer, the order is, in every sense, a contract between the parties.
4. **Municipal Corporations: Public Officers and Employees: Ordinances.** City ordinances related to how city employees should be paid are agreements by the city to follow the ordinances and pay employees at the relevant rates.
5. **Actions: Employer and Employee: Wages: Attorney Fees: Case Disapproved: Appeal and Error.** To the extent *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992), authorizes two attorney fee awards under the Nebraska Wage Payment and Collection Act to an employee who is unsuccessful at the trial court level but successful on appeal, it is disapproved.

6. **Employer and Employee: Employment Contracts: Wages: Words and Phrases.** Wages under the Nebraska Wage Payment and Collection Act include the compensation and benefits that an employer actually pays for labor or services, including amounts which are not paid directly to employees.

Appeals from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded with directions.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., for appellants.

Bernard J. in den Bosch, Deputy Omaha City Attorney, for appellee.

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

STEPHAN, J.

The Nebraska Wage Payment and Collection Act (the Act)[1] defines "[w]ages" 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."[2] In these consolidated cases, firefighters employed by the City of Omaha (the City) and represented by a union filed suit under the Act for wages they claimed were due under an order entered by Nebraska's Commission of Industrial Relations (CIR). The principal issue in these appeals is whether the claimed wages were "agreed to" as of the date of the CIR order or, rather, as of the later date when the parties' conflicting interpretations of that order were resolved by the district court. We conclude the wages were agreed to on the date of the final CIR order and reverse, and remand with directions.

I. BACKGROUND

Appellants are (1) the Professional Firefighters Association of Omaha, Local 385, AFL-CIO CLC, the recognized exclusive

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[1] See Neb. Rev. Stat. §§ 48-1228 to 48-1234 (Reissue 2010 & Cum. Supp. 2014).

[2] § 48-1229(6).

collective bargaining representative for a unit of Omaha fire department employees; (2) Steve LeClair, the president of the association; and (3) individual employees covered by the bargaining unit represented by Local 385. They will be collectively referred to herein as "the firefighters."

On or about December 29, 2007, a collective bargaining agreement between the firefighters and the City expired. The parties were unable to reach a new agreement and therefore litigated a wage case before the CIR. The CIR issued its findings and order on December 23, 2008, and then, after the parties sought clarification, issued a final order in the case on February 18, 2009. This order set the minimum and maximum pay rate for the period January 1 through December 31, 2008. Neither party appealed from the CIR orders.

The CIR's final order gave the City 90 days to pay in one lump sum all adjustments and compensation resulting from the order. On May 6, 2009, the firefighters notified the City that they disagreed with how the City was implementing the CIR orders in various respects, including that the City was not complying with Omaha Mun. Code, ch. 23, art. III, div. 3, § 23-148 (2001). That section provides:

> When a uniformed member of the fire or police department is paid at a rate which exceeds that at which such member's senior in rank, grade or class is being paid, such senior officer or officers shall be increased to the next higher step within the assigned pay range irrespective of the date of last increase. The effective date of such increase shall become the anniversary date for pay purposes each year thereafter until promoted or demoted. This provision shall not apply when a member has been reduced in pay, grade or class for disciplinary reasons or when he has not been granted a pay increase due to unsatisfactory performance; neither shall it apply when such condition is the result of [the] use of the two-step salary increase provision.

After the CIR orders, the City paid certain firefighters who were more senior in rank, grade, or class less money than lower ranking firefighters. The City did so based on its understanding that because the CIR orders allowed for overlap

between the ranks in terms of pay, the orders preempted § 23-148. In addition, the City interpreted the CIR orders as not requiring either "hazmat" certification pay for certain firefighters or specialty shift pay premiums for paramedics.

On June 3, 2009, the firefighters filed two declaratory judgment actions in the district court for Douglas County, seeking declarations that the City was misinterpreting the terms of the CIR orders. The actions included an allegation that the City was not properly paying wages due. On June 23, while the declaratory judgments were pending, the firefighters also filed a wage claim with the City's comptroller.[3] This claim alleged the City owed additional wages to certain firefighters based on the 2008 and 2009 CIR orders and § 23-148. It asserted that if the claim was disallowed, the firefighters would file suit against the City under the Act.

On January 13, 2012, the district court resolved the declaratory judgment actions and determined the City owed additional wages because it had failed to comply with the CIR orders and § 23-148. On March 13, the City denied the wage claim the firefighters had previously filed. On April 10, the firefighters brought this suit in district court under the Act. They allege the total wages in dispute amount to $1,515,718.20.

The parties agreed there were no genuine issues of material fact and filed cross-motions for summary judgment. The district court granted summary judgment in favor of the City. It reasoned that until it made its decisions in the declaratory judgment actions, "there was uncertainty as to what the rights and responsibilities of the parties were" with respect to wages due and that thus, until that time, no wages were "previously agreed to" under the Act, so the firefighter's 2009 claim was not ripe. In a subsequent order in response to a motion for reconsideration filed by the firefighters, the district court transcribed the judgments it had entered in the declaratory judgment actions, but again held that the firefighters had no valid claim under the Act. The firefighters filed three separately docketed notices of appeal, which were consolidated. We granted the firefighters' petition to bypass the Nebraska Court of Appeals.

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[3] See Neb. Rev. Stat. § 14-804 (Reissue 2012).

II. ASSIGNMENTS OF ERROR

The firefighters assign that the district court erred when it (1) found their claim was not covered by the Act and (2) denied them attorney fees authorized by § 48-1231.

III. 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.[4]

[2] The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.[5]

IV. ANALYSIS

In these appeals, the only issues before us are whether the firefighters had a valid claim under the Act and, if so, whether they should receive attorney fees under the Act. We are aware that the Act has been amended since the expiration of the collective bargaining agreement and the issuance of the CIR and district court orders. However, there are no substantive revisions and, thus, we will refer to the current version.

1. Agreement on Wages

The firefighters sought recovery from the City under a provision of the Act which states:

> An employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court. If an employee establishes a claim and secures judgment on the claim, such employee shall be entitled to recover (a) the full amount of the judgment

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[4] *Potter v. Board of Regents*, 287 Neb. 732, 844 N.W.2d 741 (2014); *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

[5] *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013).

> and all costs of such suit and (b) if such employee has employed an attorney in the case, an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages. If the cause is taken to an appellate court and the plaintiff recovers a judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court, which fees shall not be less than twenty-five percent of the unpaid wages.[6]

The term "wages" is defined by the Act 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."[7]

This case differs from the typical case brought to recover wages under the Act in two respects. First, there were 654 named plaintiffs asserting wage claims. Of these, 394 persons obtained judgments in varying amounts. Second, the actual wage entitlement issue was litigated in separate declaratory judgment actions while the wage claim was pending before the City and before the action from which these appeals arise was filed in district court. This procedural course was dictated by Nebraska law governing claims against a city of the metropolitan class. Section 14-804 specifies the procedure for filing such claims. We have held that the filing of a claim pursuant to § 14-804 is a procedural prerequisite to the prosecution of a wage claim against a city in the district court pursuant to the Act.[8] Section 14-804 provides that when a claim of any person against the city "is disallowed, in whole or in part, by the city council, such person may appeal from the decision of said city council to the district court of the same county, as provided in section 14-813." Thus, the firefighters could not

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[6] § 48-1231(1).

[7] § 48-1229(6).

[8] See, *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001); *Thompson v. City of Omaha*, 235 Neb. 346, 455 N.W.2d 538 (1990).

seek relief in district court under the Act until the City denied their wage claim, which did not occur until after the declaratory judgment actions were resolved.

But the firefighters were not prevented from seeking declaratory relief while their wage claim remained pending before the City. An action for a declaratory judgment which involves unpaid wages allegedly owed by a city is distinct from an action for unpaid wages under the Act.[9] Although the result of such a declaratory judgment may be that a city will eventually have to pay money to the plaintiffs, the action is not a claim for money damages, but, rather, an action for declaration of rights.[10] Here, when the declaratory judgment actions were resolved and the City disallowed their pending wage claim, the firefighters timely filed this action in district court pursuant to Neb. Rev. Stat. § 14-813 (Reissue 2012), asserting their claim under the Act.

This procedural history is important to our resolution of the primary issue in this appeal, which is the point in time when wages payable to the firefighters for their work in 2008 were "agreed to" by the parties within the meaning of the Act. Specifically, were the wages "agreed to" at the time of the final CIR order in 2009, as the firefighters contend, or were they not "agreed to" until the declaratory judgment actions were resolved in 2012, as the district court determined and the City argues on appeal? The date of the agreement determines whether the firefighters had a valid claim on June 23, 2009.

The district court reasoned that the claim filed by the firefighters in 2009 was not ripe, because until it resolved the declaratory judgment actions in 2012, "there was uncertainty as to what the rights and responsibilities of the parties [under the CIR orders] were." The court concluded that there thus was no agreement as to the firefighters' 2008 compensation until the parties accepted the court's 2012 decision in the declaratory judgment actions "by either not appealing or following the Court's decision."

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[9] *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

[10] *Id.*

This reasoning is incorrect. In virtually every case brought under the Act, the employee and the employer dispute whether wages are owed based on an existing contract or agreement of some sort. The court then determines which party's interpretation of that agreement is correct.[11] The fact that there is a reasonable disagreement between the parties as to how the agreement regarding compensation should be interpreted does not mean that no agreement as to wages due exists until the dispute is resolved by a court.

For example, in *Fisher v. PayFlex Systems USA*,[12] two employees alleged they were entitled to be paid upon separation from employment for their earned but unused "'paid time off'" hours per the employee handbook. The employer argued they were not so entitled, because those hours were not vacation hours. In a 4-to-3 decision, we held the employees were correct. But even the fact that three members of this court agreed with the employer's interpretation of the handbook at issue did not defeat the employees' claims under the Act. The employer was held liable despite the existence of a reasonable disagreement as to whether the wages were owed pursuant to the parties' agreement, which was ultimately decided by this court.

The only mention of "reasonable dispute" in the Act is the final sentence of § 48-1231(1), which addresses the circumstance in which an employee fails to recover a judgment on a wage claim. That sentence provides: "If the court finds that no reasonable dispute existed as to the fact that wages were owed or as to the amount of such wages, the court may order the employee to pay the employer's attorney's fees and costs

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[11] See, e.g., *Roseland v. Strategic Staff Mgmt.*, 272 Neb. 434, 722 N.W.2d 499 (2006) (superseded by statute as stated in *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014)); *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005); *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997) (superseded by statute as stated in *Coffey, supra* note 11); *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

[12] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 810, 829 N.W.2d 703, 707 (2013).

of the action as assessed by the court." There is no provision in the Act stating that the existence of a reasonable dispute between the parties affects the employer's liability. To the contrary, the reasonableness of the dispute is not even an issue with respect to the employer's obligation to pay the employee's attorney fees if the employee prevails. The plain language of § 48-1231 simply provides that if the employee establishes a claim and secures a judgment on it, he or she is entitled to recover the full amount of the judgment and attorney fees of not less than 25 percent of the unpaid wages. We will not read into a statute a meaning that is not there.[13]

[3,4] In this case, the "agreement" of the parties with respect to 2008 compensation consisted of the CIR orders entered in 2008 and 2009 and the language of § 23-148. When the CIR enters a final order setting wages, hours, and terms and conditions of employment which are binding on the employer, the order is, in every sense, a contract between the parties.[14] Moreover, we have held that Omaha city ordinances related to how city employees should be paid are agreements by the City to follow the ordinances and pay employees at the relevant rates.[15] In a typical case, a disagreement of the parties regarding compensation due would be resolved by a court in an action brought by an employee under the Act. The fact that the disagreement here was resolved in separate declaratory judgment actions which were decided before the firefighters could file suit pursuant to § 14-813 does not affect the City's liability under the Act.

We are not persuaded by the City's argument that the Court of Appeals' decision in *Freeman v. Central States Health & Life Co*.[16] supports its position that the wages were not

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[13] See, *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 844 N.W.2d 276 (2014); *SourceGas Distrib. v. City of Hastings*, 287 Neb. 595, 844 N.W.2d 256 (2014).

[14] *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. 455, 344 N.W.2d 459 (1984).

[15] See *Hawkins, supra* note 8.

[16] *Freeman v. Central States Health & Life Co.*, 2 Neb. App. 803, 515 N.W.2d 131 (1994).

"previously agreed to" under the Act until the declaratory judgments were entered. In that case, two employees brought an action under the Act claiming they were entitled to wages for overtime. One employee had agreed to a salary of $1,545 per month, and the other had agreed to a salary of $1,436 per month. Both apparently expected to work 38.75 hours per week for their salaries and claimed they were entitled to compensation for overtime under the federal Fair Labor Standards Act (FLSA)[17] for hours worked over and above that amount. The Court of Appeals reversed a judgment for the employees, concluding there was no agreement between the parties to pay overtime, because the FLSA is the exclusive remedy for enforcement of rights created under it and thus the employees could not use the Act to enforce rights they possessed under the FLSA. This determination that the FLSA could not be the statutory source of a previous agreement regarding compensation under the Act is factually distinguishable from the instant case. Here, there clearly was a previous agreement, consisting of the CIR orders and § 23-148, upon which the firefighters' claims were based. And unlike the FLSA, we have previously held that Omaha city ordinances related to pay scale can be the basis of a "previous agreement" under the Act.[18]

The City contends that a finding that an agreement existed for purposes of the Act prior to the resolution of the declaratory judgment actions would produce an unduly harsh result. It argues that once a dispute arose between the City and the firefighters about what wages were due under the CIR orders and § 23-148, it found itself in the unenviable position of either disputing the firefighters' interpretation of the CIR orders and § 23-148 and putting itself at risk of paying at least 25 percent of the disputed wages as attorney fees under the Act, or paying the wages the firefighters demanded under protest and trying to recover them later if the City prevailed in the declaratory judgment actions. Clearly, the City's exposure in this case is greatly magnified by the fact

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[17] See 29 U.S.C. § 201 et seq. (2012 & Supp. I 2013).

[18] See *Hawkins, supra* note 8.

that the disputed agreement arose in the context of collective bargaining. But the Act expressly defines "[e]mployer" to include "the state or any . . . political subdivision."[19] And the Act does not distinguish an employer's liability for attorney fees resulting from nonpayment of wages owing to multiple employees under a collective bargaining agreement from the more typical circumstance of a wage claim asserted by an individual employee.

For these reasons, we conclude that the district court erred in determining that the firefighters did not have a valid claim under the Act.

2. Attorney Fees

As noted, § 48-1231(1) provides that if an employee establishes a claim and secures a judgment on it, he or she shall receive the full amount of the judgment and "an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages." Section 48-1231(1) further provides:

> If the cause is taken to an appellate court and the plaintiff recovers a judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court, which fees shall not be less than twenty-five percent of the unpaid wages.

The firefighters argue that the total amount of unpaid wages was $1,515,718.20, which includes $259,118 in pension contributions made by the City to the board of trustees of the City's Police and Fire Retirement System's pension fund (pension fund) based upon the additional wages which the court determined the City owed. The firefighters contend that they were entitled to an attorney fee award of at least 25 percent of that amount, or $378,929.55, by the district court and that they are entitled to an additional award of the same amount by this court. The City disputes that the firefighters are entitled to two attorney fee awards if they prevail in this appeal. The City

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[19] § 48-1229(2).

also argues that the computation of any attorney fees should not include the contribution the City made to the pension fund, because that amount does not constitute "wages" within the meaning of the Act.

(a) One Award or Two?

The second sentence of § 48-1231(1) requires a trial court to award attorney fees to an employee who "establishes a claim and secures judgment on the claim." The third sentence requires an appellate court to award attorney fees where a "plaintiff recovers a judgment" on appeal. Because the "plaintiff" in an action under the Act will always be an "employee" claiming unpaid wages, we regard these terms as used in the statute to be synonymous. We construe these two sentences to require a trial or appellate court which finds merit in an employee's wage claim to award attorney fees of at least 25 percent of the unpaid wages found due.

This could result in an employee's receiving two attorney fee awards. If a trial court finds merit in an employee's claim for unpaid wages, it is required to enter judgment for the amount of wages due plus attorney fees of at least 25 percent of the unpaid wages. If the employer then appeals, but the employee prevails on appeal, the employee would be entitled to an additional attorney fee award of at least 25 percent of the unpaid wages by the appellate court.

But it does not result in the firefighters' receiving two attorney fee awards here. The district court found the firefighters had no valid claim under the Act. Therefore, they did not "establish[] a claim and secure[] judgment on the claim" in the trial court, and under the plain language of § 48-1231(1), they are not entitled to an attorney fee award for the trial proceedings. Because, however, we determine that the firefighters do have a valid claim under the Act, they have "recover[ed] a judgment" on appeal and are entitled to an award of attorney fees by this court. This construction of § 48-1231(1) achieves the statute's purpose in that it prevents an employer from being punished for winning at trial, yet ensures that employees will be fully compensated for reasonable attorney fees incurred in

the litigation, because the appellate court may award attorney fees in excess of the statutory minimum where an appropriate showing is made.[20]

[5] Although we have not specifically addressed this issue in the past, our interpretation today is in accord with our case law. We have consistently approved two attorney fee awards, one for trial and one for the appeal, in cases where the employee was successful at both levels.[21] But in *Brockley v. Lozier Corp.*,[22] we reversed a trial court judgment in favor of an employer and directed that the employee be awarded a 25-percent attorney fee by the trial court and an additional 25-percent attorney fee for the appeal. In reaching this result, we did not examine or analyze the specific language of § 48-1231(1), as we have done here. We conclude that to the extent *Brockley* authorizes two attorney fee awards under the Act to an employee who is unsuccessful at the trial court level but successful on appeal, it is disapproved. Because the firefighters did not establish their claim and secure a judgment on it in the district court, they are not entitled to attorney fees for the trial. But because they were successful in recovering a judgment on appeal, they are entitled to an attorney fee award from this court under the Act.

(b) Pension Contributions

The remaining issue is whether the City's contributions to the pension fund as the result of the additional wages found due should be included in the amount on which the attorney fee award is based. The record reflects that the City's mandatory contributions to the pension fund are calculated as a percentage of wages due and are used to fund benefits paid to firefighters upon retirement. The retirement benefits are calculated based on a percentage of an employee's pay from the highest consecutive 26 biweekly payroll periods within the

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[20] See, *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010); *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

[21] See cases cited *supra* note 11.

[22] *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992).

employee's final 5 years of service. The percentage used to calculate the benefit ranges from 45 to 69 percent, depending upon the employee's years of service.

As noted, "[w]ages" under the Act include "fringe benefits," which the Act defines as including "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."[23] The firefighters argue that the City's contributions to the pension fund on behalf of an employee are a "fringe benefit" within this definition. But the City contends that they are not, because the benefits are paid to a third party and an individual employee "has no entitlement to them."[24]

[6] We have held that "wages" under the Act include a bonus received by an employee,[25] the cash value of a life insurance policy,[26] an employee's share of profits,[27] and unused vacation time.[28] It is true that in each of these cases, the benefit was paid to the employee. But the Act itself contains no language specifically requiring that a fringe benefit be received by an employee in order to be includable in the statutory definition of "wages." To the contrary, § 48-1229(4) includes various "retirement, pension, or profit-sharing plans" and "any other employee benefit plans or benefit programs" in the definition of fringe benefits, "regardless of whether the employee participates in such plans or programs." Reading §§ 48-1229(4) and (6) together, we conclude that "wages" under the Act include the compensation and benefits that an employer actually pays for labor or services, including amounts which are

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[23] § 48-1229(4) and (6) (emphasis supplied).

[24] Brief for appellee at 26.

[25] *Law Offices of Ronald J. Palagi v. Howard*, 275 Neb. 334, 747 N.W.2d 1 (2008).

[26] *Sindelar, supra* note 11.

[27] *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988) (superseded by statute as stated in *Kinney, supra* note 11).

[28] *Fisher v. PayFlex USA, supra* note 12; *Roseland, supra* note 11.

not paid directly to employees. Thus, the City's contribution to the pension fund based upon the additional compensation which it was required to pay to the firefighters for 2008 should be included in the amount utilized to calculate the attorney fee award.

(c) Computation of Award

The City was required to pay a total of $1,515,718.20 in additional wages and benefits due under the 2008 and 2009 CIR orders. This amount includes the $259,118 in pension contributions made by the City to the pension fund. Because the firefighters have recovered a judgment on appeal, they are entitled to an attorney fee award of at least $378,929.55, representing 25 percent of the wages due. We decline to award additional attorney fees in this case.

V. CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the cause to the district court with directions to enter judgment for the firefighters and against the City in the amount of $378,929.55, representing the statutory attorney fee award for recovery of judgment on appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

Wright, J., participating on briefs.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF DONALD D. BARNHART, A PERSON IN NEED OF PROTECTION. ALICE F. BARNHART AND SHERRY HEADY, APPELLEES, V. VALLEY LODGE 232 A.F. & A.M. ET AL., APPELLANTS.

859 N.W.2d 856

Filed March 6, 2015. No. S-14-420.

1. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
2. **Jurisdiction.** The question of jurisdiction is a question of law.
3. **Statutes.** Statutory interpretation presents a question of law.

4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
5. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
6. **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.
7. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of a controversy.
8. **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.
9. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
10. **Judgments: Appeal and Error.** An appellate court can determine whether or not there is standing independent of the lower court's determination.
11. **Actions: Guardians and Conservators.** In contesting a guardianship, an objector must show a true interest or attentiveness to the well-being and protection of the ward.
12. **Guardians and Conservators: Standing.** In a guardianship or conservatorship proceeding, where an objector has no concerns for the ward's welfare but only concerns of its own potential financial expectancy, such concerns do not give the objector standing to challenge a guardianship or conservatorship as "any person interested in [the ward's] welfare" under Neb. Rev. Stat. § 30-2619 or § 30-2645 (Reissue 2008).
13. **Actions: Guardians and Conservators.** A conservatorship proceeding is not an adversarial proceeding. Rather, it is a proceeding to promote the best interests of the person for whom the conservatorship is sought.
14. **Wills.** Wills, by their nature, are ambulatory.
15. **Decedents' Estates: Wills.** A beneficial interest in a will does not vest until the testator's death.
16. **Appeal and Error.** New theories cannot be presented on appeal.
17. **Guardians and Conservators: Wills: Standing.** Beneficiaries under a will do not have standing to contest a guardianship or conservatorship by virtue of their interests as beneficiaries of the will alone.
18. **Due Process: Evidence: Words and Phrases.** A formal "evidentiary hearing" is not necessary before the court makes a finding in a case. The required procedures may vary according to the interests at stake in a particular context, but the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. It is enough that the parties have an opportunity to present evidence.
19. **Courts: Pretrial Procedure.** It is not the duty of the court to inform litigants of the evidence they need to submit in order to support their motions.

Appeal from the County Court for Douglas County: MARCELA A. KEIM, Judge. Affirmed.

Michael C. Cox, Heather Voegele-Andersen, Brenda K. Smith, and John V. Matson, of Koley Jessen, P.C., L.L.O., for appellants.

Daniel J. Guinan and David C. Mullin, of Fraser Stryker, P.C., L.L.O., for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Donald D. Barnhart (Barnhart) is deemed incapacitated and in need of protection. His wife, Alice F. Barnhart, and his stepdaughter, Sherry Heady, petitioned to become his coguardians and coconservators. The guardianship and conservatorship is contested by alleged beneficiaries of Barnhart's prior will. These parties contend that they are interested parties to Barnhart's welfare and, thus, have standing to contest the will. The prior beneficiaries are Valley Lodge 232 A.F. & A.M.; Chrysolite Lodge No. 420 A.F. & A.M.; Alegent Health Community Memorial Hospital of Missouri Valley, Iowa; and Senior Citizens of Western Harrison County, Iowa, Inc. (collectively the objectors). The issue in this case is whether or not the objectors are "any person interested in [Barnhart's] welfare" under Neb. Rev. Stat. § 30-2619 (Reissue 2008) when their only claimed interest in the case is a beneficial interest in a will.

BACKGROUND

BARNHART'S ASSETS AND ESTATE PLAN

Barnhart's assets include farmland that has not yet been appraised, but is "in excess of 400 acres" located in Harrison County, Iowa; an investment account valued at $91,000; a checking account valued at $89,000; and a 2007 Honda Accord valued at $7,000.

In 2000, Barnhart executed a will (the 2000 will). At that time, he was not married and did not have any children. The 2000 will left 40 percent of Barnhart's residual and remainder estate to Valley Lodge No. 232 A.F. & A.M., 20 percent of his residual and remainder estate to Chrysolite Lodge No. 420 A.F. & A.M., 20 percent of his residual and remainder estate to Alegent Health Community Memorial Hospital of Missouri Valley, and 20 percent of his residual and remainder estate to the Senior Citizens of Western Harrison County.

In 2003, Barnhart married Alice. As Barnhart's wife, Alice is his closest living relative. Heady is Alice's daughter and is Barnhart's attorney in fact under a durable power of attorney document executed on November 8, 2009.

Barnhart's brother died in 2012. Barnhart's brother left all of his residue to the same organizations named in Barnhart's 2000 will—the objectors in this case. Alice and Heady allege that Barnhart decided he did not want his estate to go the same way as his brother's and decided that instead, he wanted his property to go to Alice.

In November 2012, Barnhart executed a new estate plan, including a will and a trust agreement creating the Donald Barnhart Revocable Trust (2012 estate plan). Alice and Heady are the beneficiaries of the 2012 estate plan. The objectors, beneficiaries of the 2000 will, are not designated as beneficiaries of the 2012 estate plan.

Original Petitions for Guardianship and Conservatorship

The exact date of Barnhart's incapacity is uncertain, but in affidavits to the court, Heady states that Barnhart was admitted to the hospital in the spring of 2013 with the sudden onset of severe psychological symptoms. At that time, Barnhart was declared a "'danger to himself and others.'" Subsequently, Barnhart was placed in the Douglas County Health Center and remains there to this date. Heady states in her affidavit to the court that Barnhart's condition renders him unable to make "responsible decisions concerning his medical care or his finances."

Heady states that she attends meetings with the professionals at Douglas County Health Center once every 3 months to discuss Barnhart's treatment. Heady also states that she visits Barnhart on a weekly basis.

On November 27, 2013, Alice and Heady petitioned for appointment of emergency temporary and permanent coguardians and coconservators in the county court for Douglas County, Nebraska. On the same date, the petition for temporary coguardianship and coconservatorship was granted by the county court, and Alice and Heady became temporary coguardians and coconservators.

On January 21, 2014, the objectors filed in the county court a joint "Objection to Amended and Corrected Petition for Appointment of Emergency Temporary and Permanent Co-Guardians and Co-Conservators of an Incapacitated Person." The objectors claim that the guardianship and conservatorship contest is in the best interests of Barnhart because his "step-daughters" were depleting and/or wasting his estate.

Proceedings in County Court

On March 4, 2014, the county court held a hearing on the issue of standing. All parties were asked to brief standing prior to the March 4 hearing. All parties were aware that the purpose of the hearing was to consider the issue of standing. At the hearing, the county court asked for a copy of the current estate documents before making its rulings on standing. The documents were reviewed in camera, and the objectors did not object to the viewing, nor did they proffer any further evidence or ask for a continuance or further hearing to do so.

At the hearing on March 4, 2014, the county court asked the objectors what kind of relationship Barnhart had with the objecting charities. The attorney for the objectors responded that "to be a hundred percent honest with you, I don't know what — how deep the relationship went, but [Barnhart] certainly felt strong enough to make gifts to them." Further, in the objection to the amended petition for appointment of guardianship and conservatorship, it states that the objectors "are without sufficient information and belief regarding the need

for a guardian." Instead, the objection states that the reason for the guardianship and conservatorship contest is "[b]ased upon interest and belief [that Barnhart's] estate is being depleted and/or wasted . . . ." At the hearing, the objectors' attorney stated that "we felt we had evidence on the financial side because of land transfers, those kinds of things."

At the conclusion of the March 4, 2014, hearing, the county court stated that if it found the "interested parties" have standing, then it would hold a formal evidentiary hearing, including a pretrial process. All parties at the hearing left the hearing with notice that the court was making its ruling on standing prior to a formal evidentiary hearing, on the basis of the arguments at the hearing and after viewing the 2012 estate plan documents.

After the hearing, on March 12, 2014, the court issued an order finding that the objectors did not have standing to contest the guardianship and conservatorship. The court found that *In re Guardianship of Gilmore*[1] was distinguishable from the present case, because in Barnhart's case, the objectors' interest in Barnhart is "not altruistic, it's financial." In its order, the county court said the objectors "are not genuinely interested in the overall well being of . . . Barnhart during his lifetime. Their concerns stem directly from a financial interest in the outcome of the distribution of his estate after death."

Soon after the order was released, the objectors filed a motion to alter or amend judgment on the basis that evidentiary findings were made without an evidentiary hearing. Later, at a hearing on April 2, 2014, the objectors argued that they were entitled to have an evidentiary hearing on the issue of standing. The objectors argued that an evidentiary hearing must be held if the court made its standing ruling on the basis of evidentiary findings.

The objectors explained to the court their concern about evidentiary findings. The attorney for the objectors stated that they were concerned that comments in the order may be taken as court findings on factual and evidentiary issues. If so, this would create a preclusion issue for the objectors when and if

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[1] *In re Guardianship of Gilmore*, 11 Neb. App. 876, 662 N.W.2d 221 (2003).

they later wish to challenge Barnhart's capacity at the time of the 2012 estate plan.

At the April 2, 2014, hearing, the court stated:

> Basically, it was a situation where everybody kind of agreed for me to take a look at the will in-camera so . . . I went ahead and did that. . . . I wasn't trying to make a determination whether you are, in fact, takers under the will. I wasn't looking at anything like that.

The court further explained:

> I acknowledge we did not have an evidentiary hearing. We didn't have one. And, in my opinion . . . you didn't have standing. And I wasn't trying to make any sort of evidentiary rulings because I acknowledge 100 percent it was not an evidentiary hearing. So, I suppose, if you're requesting that I . . . clarify that by saying it was not an evidentiary hearing, by saying that *my order is limited to standing* . . . I don't necessarily have a problem doing that, that wasn't my intention to expand the scope of the proceedings at all, I was just trying to basically explain my findings without . . . doing what some people do, which is say, "You don't have standing, end of story."

(Emphasis supplied.)

After the April 2, 2014, hearing, the county court issued an order stating that its March 12 order was a ruling only on standing and did not "expand the nature of the proceeding."

ASSIGNMENTS OF ERROR

The objectors assign as error, restated, as follows: (1) the county court's determination that the objectors did not have standing to challenge the guardianship and conservatorship proceedings, and thus finding that Alice and Heady are proper guardians, and (2) the county court's making of evidentiary findings without an evidentiary hearing.

STANDARD OF REVIEW

[1-4] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the

jurisdiction of a court.[2] The question of jurisdiction is a question of law.[3] Statutory interpretation also presents a question of law.[4] When reviewing questions of law, we resolve the questions independently of the conclusion reached by the lower court.[5]

[5,6] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record in the county court.[6] 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.[7]

ANALYSIS

Standing to Contest Guardianship or Conservatorship as "any person interested in his or her welfare"

The issue in this case is whether or not the objectors are "any person[s] interested in [Barnhart's] welfare" under § 30-2619, when their only claimed interest in the case is a potential beneficial interest in a will. We conclude that the objectors are not.

[7,8] Standing is the legal or equitable right, title, or interest in the subject matter of a controversy.[8] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.[9] Before reaching the legal issues presented for review, it is the

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[2] *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002).

[3] *Nebraska Dept. of Health & Human Servs. v. Struss*, 261 Neb. 435, 623 N.W.2d 308 (2001).

[4] *Governor's Policy Research Office v. KN Energy, supra* note 2.

[5] See *id.*

[6] *In re Guardianship & Conservatorship of Cordel*, 274 Neb. 545, 741 N.W.2d 675 (2007).

[7] *Id.*

[8] *Ferer v. Aaron Ferer & Sons*, 278 Neb. 282, 770 N.W.2d 608 (2009).

[9] *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

duty of an appellate court to determine whether it has jurisdiction over the matter before it.[10]

[9,10] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[11] Therefore, an appellate court can determine whether or not there is standing independent of the lower court's determination.[12]

The Nebraska guardianship and conservatorship statutes repeatedly use the language "interested in his or her *welfare*."[13] Section 30-2619 states "any person interested in his or her welfare may petition for . . . appointment of a guardian" when describing who has standing in such proceedings. And § 30-2645 that dictates the circumstances in which a petition for order subsequent to appointment of a conservator states, "[*a*]*ny person interested in the welfare* of a person for whom a conservator has been appointed may file a petition in the appointing court . . . ." (Emphasis supplied.)

It should be noted that this language differs from the other statutes in chapter 30, article 26, of the Nebraska Revised Statutes and that only the statutes dealing with protected persons use some form of the phrase "person interested in the welfare."[14] A different definition of "interested person" applies to the remainder of the probate statutes in chapter 30.[15]

Therefore, we must determine who may be a "person interested in the welfare," and thus, has standing to challenge guardianships and conservatorships. In *In re Guardianship of Gilmore*, the Nebraska Court of Appeals examined this language.[16] *In re Guardianship of Gilmore* suggested adopting a

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[10] *Id*.

[11] *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

[12] See *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 642 N.W.2d 816 (2002).

[13] § 30-2619 (emphasis supplied). See Neb. Rev. Stat. §§ 30-2633 and 30-2645 (Reissue 2008).

[14] See, e.g., *id*. See, also, *In re Guardianship of Gilmore, supra* note 1.

[15] See Neb. Rev. Stat. § 30-2209(21) (Cum. Supp. 2014).

[16] See *In re Guardianship of Gilmore, supra* note 1.

broad definition of "person interested in his or her welfare."[17] The opinion states:

> Sometimes, persons in need of a guardian or conservator have no relatives or at least none that care. Sometimes, the relatives of such people are prevented from serving the best interests of the protected person by avarice, greed, self-interest, laziness, or simple stupidity. Frequently, a neighbor, an old friend, the child of an old friend, a member of the clergy, a banker, a lawyer, a doctor, or someone else who has been professionally acquainted with the person needing such help will come forward out of simple charity and bring the matter to the attention of the local probate court. Sometimes, unscrupulous relatives need supervision.[18]

Put more simply, the Court of Appeals said the "statutes are worded to allow people without a legal interest to bring the matter to the local court's attention."[19] The Court of Appeals also reasoned that discretion should go to the county judge who determines the proper guardianship: "Of course, the county judge, under the applicable standard of review, can make the determination of whether the petitioner is really interested in the welfare of the person subject to the proceedings."[20]

In *In re Guardianship of Gilmore*, the Nebraska Department of Health and Human Services (DHHS) brought an action seeking to remove the ward's mother as guardian. At the hearing, DHHS presented evidence that the ward's welfare was in danger, including evidence from the ward's doctor and psychologist, the service coordinator for DHHS, and a social worker employed at the ward's school, among other evidence. The mother argued that DHHS did not have standing to bring the action, because DHHS did not qualify as an "interested person" under the guardianship statutes.

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[17] *Id.*

[18] *Id.* at 882, 662 N.W.2d at 226.

[19] *Id.*

[20] *Id.*

[11] We agree with the reasoning in *In re Guardianship of Gilmore* that, generally, no legal interest in the ward is necessary to contest a guardianship. In contesting a guardianship, an objector must show a true interest or attentiveness to the well-being and protection of the ward. We agree with *In re Guardianship of Gilmore* that guardianships can be challenged by

> a neighbor, an old friend, the child of an old friend, a member of the clergy, a banker, a lawyer, a doctor, or someone else who has been professionally acquainted with the person needing such help . . . com[ing] forward out of simple charity and bring[ing] the matter to the attention of the local probate court.[21]

There, it was determined that DHHS was a proper person to come forward on a guardianship matter. We approve of the Court of Appeals' decision in *In re Guardianship of Gilmore* that DHHS had standing in that case. Particularly convincing in that case is that it is DHHS' primary function to care for those whose health and welfare needs protection. Furthermore, DHHS was able to bring forth testimony of people in personal relationships with the ward and those who were concerned for the welfare of the ward. Such personal attentiveness for the ward's welfare must be shown and can be shown by observations by someone with a relationship with the ward or by proffering any evidence to the court that the ward's protection is in danger.

[12] But the objectors here only argued a financial interest in Barnhart's welfare. We hold that in a guardianship or conservatorship proceeding, where an objector has no concerns for the ward's welfare but only concerns of its own potential financial expectancy, such concerns do not give the objector standing to challenge a guardianship or conservatorship as "any person interested in [the ward's] welfare" under § 30-2619 or § 30-2645.

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[21] *Id.*

Standing to Challenge Conservatorship by Financial Interest in Ward

There are limited situations specified by the conservatorship statutes in which a person or entity may have standing to contest a conservatorship on the basis of the objector's own financial interest. Under § 30-2633, "any person who would be adversely affected by lack of effective management of his or her property and property affairs may petition for the appointment of a conservator or for other appropriate protective order." For example, in *In re Guardianship of Gilmore*, a factor in the finding that DHHS had standing to challenge the guardianship and conservatorship was the fact that if the ward depleted his funds, DHHS itself would have to support the ward. The Court of Appeals stated that DHHS had standing to challenge, "particularly when [DHHS] is quite likely to be supplying financial assistance for the ward."[22] Therefore, where the objector has an interest in the welfare of the ward because the objector would have an obligation to support the ward during his or her lifetime if the ward's funds are mismanaged, then that objector would have standing to contest the conservatorship.

[13] Outside of the situation specified in § 30-2633, we have repeatedly explained that a conservatorship proceeding is not an adversarial proceeding. Rather, it is a proceeding to promote the best interests of the person for whom the conservatorship is sought.[23] If we were to allow standing to challenge a conservatorship to any member of the public who is "concerned" about the oversight of an estate, it would lead to absurd results. Permitting will disputes to play out through conservatorship proceedings during the life of a testator is not in the best interests of a ward needing protection.

[14,15] We do not hold that potential beneficiaries of a surviving testator under a will never have standing to contest

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[22] *Id*.

[23] See *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001).

a conservatorship, but merely that the potential beneficiary designation alone is not enough interest to establish standing to contest a conservatorship. Wills, by their nature, are ambulatory.[24] A beneficial interest in a will does not vest until the testator's death.[25]

In *In re Guardianship & Conservatorship of Borowiak*,[26] the Court of Appeals recognized that the objectors had standing to object to a conservatorship, because the ward had already died, and thus, their beneficial interest under the ward's will had vested. However, the opposite is true where the ward has not yet died, because a beneficial interest in a will has not yet vested. So, even if an objector to a conservatorship has a potential beneficial interest in a ward's will, this is not a vested interest and, therefore, the objector has no legal standing to challenge the will until after the testator's death.

Standing to Contest Guardianship

We find that attentiveness for the ward's personal welfare has not been shown or argued in this case on the bases of the pleadings and arguments at the court's hearings and where the arguments were based on the ward's financial situation.

Unlike *In re Guardianship of Gilmore*, the objecting parties in this case have failed to show that they are altruistically concerned with the best interests of Barnhart. It was abundantly clear from the allegations in the petition and through the transcript of the hearings in the county court that the objectors' primary concern was the financial assets of Barnhart, and not concern for Barnhart's personal well-being.

The objectors' argument from the beginning was that they are interested in the welfare of Barnhart because they are beneficiaries of his will. In their initial objection, they cited that Barnhart's estate "is being depleted and/or wasted" as the

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[24] See *Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994).

[25] See 28 Am. Jur. 2d *Estates* § 275 (2011).

[26] *In re Guardianship & Conservatorship of Borowiak*, 10 Neb. App. 22, 624 N.W.2d 72 (2001).

primary reason for their contest. In the initial objection, the objectors stated they were "without sufficient information and belief regarding the need for a guardian."

The county court then held a hearing on standing and made it abundantly clear that it would make its standing decision on the basis of the hearing. Again, at the hearing on standing, the attorney for the objectors stated that "to be a hundred percent honest with you, I don't know what — how deep the relationship went, but [Barnhart] certainly felt strong enough to make gifts to them."

At oral arguments on appeal, the objectors stated, for the first time, that there was a personal relationship between Barnhart and the objectors, because Barnhart had been a mason throughout his life and a member of the masonic lodges that make up two of the four objectors.

[16] New theories cannot be presented on appeal.[27] At the March 4, 2014, hearing, the objectors had their opportunity to argue that they have personal and altruistic concerns about Barnhart's welfare. But after a thorough reading of the bill of exceptions, the county court did not—and we do not—see any such arguments. It is clear that the objectors' primary concern was for the estate assets of Barnhart. Therefore, we find the objectors have failed to establish that they have standing to challenge a *guardianship* of Barnhart.

Standing to Contest Conservatorship

[17] Even assuming the objectors are beneficiaries of the will, they still essentially have the same financial interest as any other member in the community until the death of Barnhart. As stated in our holding today, beneficiaries under a will do not have standing to contest a guardianship or conservatorship by virtue of their interests as beneficiaries of the will alone.

Therefore, we affirm the county court's finding that the objectors do not have standing to challenge the conservatorship of Barnhart. In so finding, we also find it was not error

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[27] See, e.g., *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003).

for the court to accept Alice and Heady as coguardians and coconservators of Barnhart.

Necessity of Formal Evidentiary Hearing

[18,19] A formal "evidentiary hearing" is not necessary before the court makes a finding in a case. The required procedures may vary according to the interests at stake in a particular context, but the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.[28] It is enough that the parties have an opportunity to present evidence.[29] It is not the duty of the court to inform litigants of the evidence they need to submit in order to support their motions.

The parties were given the chance to brief the issue of standing prior to the March 4, 2014, hearing. The parties were notified that the county court intended to make its standing ruling on the basis of the arguments presented at the March 4 hearing. If the parties felt they needed to present evidence prior to a ruling on standing, this was the time to make that need known to the court. We assume that because the court agreed to look at the will in camera, it would have agreed to look at other evidence or factual matters in making its standing ruling. The objectors cannot now argue that there was something more they wanted to assert at the hearing. The fact that they had the opportunity to do so at a hearing is enough.

Further, we make this standing finding independently of the lower court and as a matter of law. We rely on no factual findings pertaining to the objectors' interest under Barnhart's will because even assuming they are beneficiaries under the will, that is not enough to give them standing.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the county court.

Affirmed.

Wright, J., participating on briefs.

Miller-Lerman, J., not participating.

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[28] See *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

[29] *Id.*

Twin Towers Condominium Association, Inc., a Nebraska nonprofit corporation, appellee and cross-appellant, v. Bel Fury Investments Group, L.L.C., a Nebraska limited liability company, appellant and cross-appellee, and Credit Bureau Services, Inc., a Nebraska corporation, and Domina Law Group PC, LLO, a Nebraska professional corporation, appellees.

860 N.W.2d 147

Filed March 13, 2015. No. S-13-1047.

1. **Actions: Foreclosure: Equity.** A real estate foreclosure action is an action in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.
3. ____: ____. 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.
4. **Statutes.** Statutory interpretation presents a question of law.
5. **Damages: Evidence.** Whether the evidence provides a basis for determining damages with reasonable certainty is a question of law.
6. **Appeal and Error.** An appellate court reviews questions of law independently of the trial court's decision.
7. **Foreclosure: Liens.** The purpose of a foreclosure proceeding is not to create a lien, but to enforce one already in existence.
8. **Statutes: Liens.** A lien created by statute is limited in operation and extent by the terms of the statute.
9. **Liens: Proof.** The party seeking to enforce a lien has the burden of proving every fact essential to the establishment of the lien.
10. **Courts: Assessments.** Courts enforce condominium assessments only if they are calculated in the manner required by the association's governing documents.
11. **Liens: Assessments.** A condominium association's temporary miscalculation of assessments does not invalidate its lien for unpaid assessments.
12. **Foreclosure: Liens: Judgments.** In general, the holder of a lien may pursue foreclosure without first obtaining a personal judgment on the underlying debt.
13. **Foreclosure: Final Orders.** A foreclosure decree is a final judgment even though it creates a period for redemption.
14. **Damages: Proof.** A plaintiff does not have to prove his or her damages beyond all reasonable doubt, but must prove them to a reasonable certainty.
15. **Attorney Fees: Costs.** Customarily, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits.

16. **Parties: Words and Phrases.** A party is a prevailing party if it receives a judgment in its favor.
17. **Acceleration Clauses: Equity.** An equity court may deny enforcement of an acceleration clause in a condominium association's governing documents when application of the clause would be inequitable.
18. **Foreclosure.** The necessary issues to be determined by a foreclosure decree are the execution of the agreement, the breach thereof, the identity of the real estate, and the amount remaining due.
19. **Judicial Sales: Foreclosure: Property.** A foreclosure decree governs which property is to be sold at an execution sale, regardless of the description in subsequent documents and notices.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Brian J. Muench for appellant.

Thomas J. Young for appellee Twin Towers Condominium Association, Inc.

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

CONNOLLY, J.

I. SUMMARY

Bel Fury Investments Group, L.L.C. (Bel Fury), owns property located in the Twin Towers Condominium in Omaha, Nebraska. After Bel Fury failed to pay assessments for this property (Unit SCB), the Twin Towers Condominium Association, Inc. (the Association), recorded two notices of lien and filed a foreclosure action. When the Association filed the notices of lien and the complaint, it was levying assessments against Unit SCB in a manner prohibited by the Association's governing documents. The Association discovered the error while the foreclosure action was pending and recalculated the assessments. The district court found that the Association had a lien against Unit SCB for delinquent assessments and stated that the Association could foreclose its lien if Bel Fury did not pay the back assessments within 90 days.

On appeal, Bel Fury argues that the Association does not have a lien because it failed to levy assessments in the manner

required by its governing documents. On cross-appeal, the Association argues that the court did not award all the relief the Association is entitled to and failed to make all the findings necessary for a foreclosure decree.

We conclude that the Association's initial miscalculation of assessments did not invalidate its lien. We further conclude that the court erred by not awarding the Association attorney fees, not including several installments as part of the debt secured by the lien, and failing to include a legal description of Unit SCB in its decree.

II. BACKGROUND

1. Factual Background

The Twin Towers Condominium was created by a master deed recorded on December 30, 1983. The "condominium regime" consisted of two 10-story towers: the "South Tower" and "North Tower." The master deed provides that the Association serves as "a vehicle for the management of the condominium." Each unit owner is automatically a member of the Association.

The master deed authorizes the Association to levy assessments against the units under terms set forth in the bylaws. Paragraph 12 of the bylaws provides:

> Assessments against each apartment owner for such common expenses shall be made annually on or before the fiscal year end preceding the year for which assessments are made. The annual assessments shall be due in 12 equal, monthly payments on the first day of each month. The assessments to be levied against each apartment shall be such apartment's pro rata share of the total annual budget based upon the percentage share of the such apartment's basic value as set forth in the Master Deed . . . . Assessments delinquent more than 10 days after the due date shall bear interest at the highest legal contract rate from the due date until paid. The delinquency of one installment of an assessment shall cause all remaining installments to immediately become due, payable and delinquent.

The master deed states that Unit SCB represents 1.42 percent of the condominium's basic value.

Bel Fury is a business engaged in real estate sales and rentals. Bel Fury bought Unit SCB—windowless commercial space in the basement of the "South Tower"—in July 2004.

In February 2010, the Association hired a property management company to help manage the condominium regime. The company's owner, David Davis, testified that his company's responsibilities included collecting assessments for the Association and keeping records of payments made by unit owners.

Davis testified that when his company "came on board" in February 2010, the Association was levying assessments "based on a square footage amount." In October or November 2012, Davis discovered that the master deed required assessments to be calculated according to each unit's proportional share of the regime's basic value. Davis informed the Association, which "decided to go back to 2009 and make everything . . . pursuant to the Master Deed." Davis completed the corrections in January 2013.

Another concern for Bel Fury was the lack of heating and cooling in Unit SCB. Scott Bloemer, one of Bel Fury's owners, testified that Unit SCB did not have "heating and air conditioning" when Bel Fury bought the property. He stated that the Association did not fix the problem until July 2010. Davis testified that he became aware that Unit SCB lacked "heating and air conditioning" in March 2010. He said that the Association remedied the problem "sometime in 2010."

Bloemer testified that Bel Fury was unable to find a tenant for Unit SCB because of the lack of heating and cooling, the high assessments levied by the Association, and the stigma from the foreclosure litigation. Bloemer estimated that the annual rental income for Unit SCB "as it sat" "would be" $28,120 and stated that this amount was the lost rental income Bel Fury suffered each year from 2005 to 2012. Bloemer testified that Bel Fury could rent Unit SCB as storage space for $400 to $750 per month, then testified that it would rent for "like 50 cents to like a buck a square foot," and later testified that it would rent for $300 per month. Unit SCB has

7,030 square feet. Asked whether Bel Fury "actively marketed the property to sell," Bloemer testified, "I think we probably did at some point," but he could not recall when. Regarding Bel Fury's efforts to rent the property, Bloemer said, "I think the property was put out on the internet," but he could not recall when. Bloemer stated that Bel Fury did "not ma[k]e a lot of effort" to let Unit SCB after the foreclosure litigation began.

Bloemer testified that Bel Fury started paying only half its assessment for Unit SCB in February 2010 because he thought that "maybe somebody will do something [about the heating and cooling] if we cut our payments in half." Bloemer said that the Association stopped accepting the partial payments in October 2010.

The Association recorded two notices of lien against Unit SCB in October 2010. The most recent "Tenant Ledger" for Bel Fury is "current through the month of March, 2013." According to the ledger, Bel Fury owed $27,868.15 of unpaid annual and special assessments and $7,800.76 of late fees and interest.

2. Procedural Background

In December 2010, the Association filed a complaint to foreclose its lien against Unit SCB. The complaint alleged that Bel Fury owed assessments of $7,507 as of October 19, 2010, "together with accruing dues, special assessments and interest thereon from and after said date."

In addition to Bel Fury, the Association named Gateway Community Bank; Credit Bureau Services, Inc.; and Domina Law Group PC, LLO, as defendants. The Association alleged that these three defendants were actual or potential lienholders with interests junior to the Association's lien.

The complaint requested an accounting, a finding that the Association has a lien on Unit SCB, and an order that Bel Fury "be required to pay said indebtedness." The Association asked the court to issue an order of sale if Bel Fury did not pay the back assessments within 20 days of entry of the decree.

In Bel Fury's operative answer, it denied that it owed any assessments to the Association. Bel Fury also asserted a

counterclaim, alleging that the Association "failed to provide heating and air conditioning services" to Unit SCB "over the past five years." Bel Fury claimed that this failure made Unit SCB "unrentable and unusable" and "interfered with" its efforts to sell the unit. The counterclaim asserted damages of about $190,000 for lost rent and $9,000 for "[o]verpaid utilities." In the Association's reply, it generally denied the allegations in the counterclaim and alleged that Bel Fury had not suffered any damages.

As to the remaining defendants, Gateway Community Bank filed an answer stating that it was the beneficiary of a 2006 deed of trust and that its interest was a "first and superior lien." Domina Law Group answered, stating that it sought more than $130,000 from Bel Fury for professional services in pending litigation. Credit Bureau Services did not file a responsive pleading. In February 2012, the court sustained the Association's motion to dismiss Gateway Community Bank without prejudice.

In September 2013, the court entered a "Finding and Order." The court found that the Association had a lien against Unit SCB and that "judgment should be entered" for $26,467.44 against Bel Fury. The court stated that the Association could foreclose its lien if Bel Fury did not pay this amount within 90 days. Because the Association miscalculated assessments, the court concluded that the Association could not charge Bel Fury late fees or interest. The court "dismissed" Bel Fury's counterclaim because it "failed to prove damages." The court ordered the parties to bear their own attorney fees and costs associated with the action.

The Association moved for an order finding that Credit Bureau Services had defaulted and that Domina Law Group had no interest in Unit SCB. In November 2013, the court found that neither Credit Bureau Services nor Domina Law Group had a "lien interest" in Unit SCB.

III. ASSIGNMENTS OF ERROR

Bel Fury assigns, consolidated and renumbered, that the court erred by finding that the Association may foreclose its lien if unpaid after 90 days because (1) the assessments

were levied on a square-foot basis and nonuniformly, (2) the Association did not provide Bel Fury with any notice regarding the lien foreclosure, (3) the Association had an adequate remedy at law, and (4) the provision that Bel Fury had 90 days to pay the debt made the order "not presently effective and . . . therefore void." Bel Fury also assigns that the court erred by (5) finding that Bel Fury failed to prove damages for its counterclaim and (6) not awarding Bel Fury attorney fees.

On cross-appeal, the Association assigns, consolidated and renumbered, that the court erred by (1) not awarding the Association attorney fees and costs, (2) not awarding interest on the past-due assessments, and (3) not awarding "assessments due from and after February 2013." The Association also assigns that (4) the court's decree was deficient because it did not state the legal description of Unit SCB, the priority of the liens, or that it would issue an order of sale if Bel Fury did not pay the debt within 90 days.

IV. STANDARD OF REVIEW

[1-3] A real estate foreclosure action is an action in equity.[1] On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.[2] But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[3]

[4-6] Statutory interpretation presents a question of law.[4] Whether the evidence provides a basis for determining damages with reasonable certainty is a question of law.[5] An appellate court reviews questions of law independently of the trial court's decision.[6]

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[1] *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 352 N.W.2d 921 (1984).

[2] *Robertson v. Jacobs Cattle Co.*, 288 Neb. 846, 852 N.W.2d 325 (2014).

[3] See *id.*

[4] *Id.*

[5] See *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003).

[6] *Robertson v. Jacobs Cattle Co., supra* note 2.

V. ANALYSIS

1. Statutory Background

Before analyzing the issues raised in Bel Fury's appeal, it is necessary to discuss the statutory background. Nebraska has two condominium acts: The Condominium Property Act (CPA), Neb. Rev. Stat. §§ 76-801 to 76-823 (Reissue 2009), and the Nebraska Condominium Act (NCA), Neb. Rev. Stat. §§ 76-825 to 76-894 (Reissue 2009). Generally, the CPA governs condominium regimes created before 1984.[7] The NCA applies to condominiums created on or after January 1, 1984.[8] A condominium regime is created under either the CPA or the NCA when the master deed or declaration, respectively, is recorded.[9]

Both acts provide that a condominium association has a lien for unpaid assessments. As to the CPA, § 76-817 states:

> The co-owners of the apartments are bound to pay pro rata . . . toward the expenses of administration and of maintenance and repair of the general common elements and, in the proper case, of the limited common elements, of the building, and toward any other expense lawfully agreed upon.
>
> If any co-owner fails or refuses to make any payment of such common expenses when due, the amount thereof shall constitute a lien on the interest of the co-owner in the property and, upon the recording thereof, shall be a lien in preference over all other liens and encumbrances except assessments, liens, and charges for taxes past due and unpaid on the apartment and duly recorded mortgage and lien instruments.
>
> No co-owner may exempt himself or herself from paying toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him or her.

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[7] See *Oak Hills Highlands Assn. v. LeVasseur*, 21 Neb. App. 889, 845 N.W.2d 590 (2014).

[8] See *id.*

[9] See §§ 76-803 and 76-838(a).

Section 76-874 describes the lien process under the NCA during the period relevant to this case:

> (a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due and a notice containing the dollar amount of such lien is recorded in the office where mortgages are recorded. The association's lien may be foreclosed in like manner as a mortgage on real estate but the association shall give reasonable notice of its action to all lienholders of the unit whose interest would be affected. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest . . . are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment may be a lien from the time the first installment thereof becomes due.
>
> (b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration, (ii) a first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit. . . .
>
> . . . .
>
> (e) This section does not prohibit actions to recover sums for which subsection (a) of this section creates a lien . . . .
>
> (f) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

The Association recorded its master deed on December 30, 1983. But § 76-826(a) states that certain sections of the NCA, including § 76-874, apply to condominiums created before 1984 if the events in question occurred after January 1, 1984:

> The [NCA] shall apply to all condominiums created within this state after January 1, 1984. Sections 76-827, 76-829 to 76-831, 76-840, 76-841, 76-869, 76-874, 76-876,

> 76-884, and 76-891.01, and subdivisions (a)(1) to (a)(6) and (a)(11) to (a)(16) of section 76-860, to the extent necessary in construing any of those sections, apply to all condominiums created in this state before January 1, 1984; but those sections apply only with respect to events and circumstances occurring after January 1, 1984, and do not invalidate existing provisions of the master deed, bylaws, or plans of those condominiums.

The effect of § 76-826 is acknowledged in multiple sections of the CPA, including § 76-817.[10]

The Association's master deed adds another wrinkle. Paragraph 7(b) provides:

> If any co-owner shall fail or refuse to make any payment of such assessments when due, the amount thereof plus interest shall constitute a lien upon the co-owner's interest in his apartment and in the property and, upon the recording of such lien by the Association . . . such amount shall constitute a lien prior and preferred over all other liens and encumbrances, except previous[ly] filed Association assessments, liens and charges for taxes past due and unpaid on the apartment except as otherwise provided for by law.

While § 76-826(a) requires that some sections of the NCA be applied to CPA-era condominium regimes, it cautions that the NCA does not invalidate the provisions of existing master deeds.

Neither the Association nor Bel Fury have labored over whether the validity of the Association's lien depends on § 76-817, § 76-874, or the master deed. Depending on the context, the Association cites both §§ 76-817 and 76-874, while also asserting that it "has a lien pursuant to the Master Deed."[11] Bel Fury has focused on the NCA under the assumption that the condominium regime was created in 2005—presumably because of the Association's references in its notices

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[10] See §§ 76-802, 76-804, 76-807, 76-809, 76-811, 76-816, 76-817, 76-819, 76-820, and 76-823. See, also, Neb. Rev. Stat. § 76-824.01 (Reissue 2009).

[11] Brief for appellee Twin Towers at 12.

of lien and complaint to a phantom 2005 master deed. In its September 2013 order, the court found that the Association had a lien "pursuant to Neb. Rev. Stat. [§]§ 76-817 and 76-874."

We conclude that § 76-874 determines the validity of the Association's lien for unpaid assessments. Although the Twin Towers condominium regime was created before January 1, 1984, the events relevant to the Association's lien occurred after that date. Therefore, § 76-826(a) requires that we apply § 76-874 instead of § 76-817. This result does not "invalidate" paragraph 7(b) of the master deed.[12] Language in the master deed concerning the creation and enforcement of a lien was always gratuitous, because the "existence of a valid statutory lien rests entirely on whether the terms of the statute creating the lien have been met."[13]

2. Appeal

(a) The Association Has a Valid Lien

Bel Fury argues that the Association's lien was "invalid and void ab initio" because the Association made assessments on a square-foot basis and because it nonuniformly assessed commercial and residential properties.[14] The Association "readily admits that assessments had been miscalculated for a period of time," but asserts that "this had been corrected months before trial."[15] The Association argues that at least by the time of

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[12] See *Carroll v. Oak Hall Associates, L.P.*, 898 S.W.2d 603 (Mo. App. 1995).

[13] 51 Am. Jur. 2d *Liens* § 56 at 133-34 (2011). See, *BA Mortg. v. Quail Creek Condominium Ass'n*, 192 P.3d 447 (Colo. App. 2008); *Dime Sav. Bank of N.Y. v. Muranelli*, 39 Conn. App. 736, 667 A.2d 803 (1995); *Hudson House Condo. Ass'n v. Brooks*, 223 Conn. 610, 611 A.2d 862 (1992); *Brask v. Bank of St. Louis*, 533 S.W.2d 223 (Mo. App. 1975). See, also, *Spanish Court Two Condominium Ass'n v. Carlson*, 2014 IL 115342, 12 N.E.3d 1, 382 Ill. Dec. 1 (2014); *Elbadramany v. Oceans Seven Condominium Ass'n*, 461 So. 2d 1001 (Fla. App. 1984). But see, *In re Eno*, 269 B.R. 319 (M.D. Pa. 2001); *Harbours Condominium Ass'n, Inc. v. Hudson*, 852 N.E.2d 985 (Ind. App. 2006).

[14] Brief for appellant at 6.

[15] Brief for appellee Twin Towers at 9.

trial, it sought only to enforce a lien for assessments made in conformance with its governing documents.

[7-9] The purpose of a foreclosure proceeding is not to create a lien, but to enforce one already in existence.[16] A lien created by statute is limited in operation and extent by the terms of the statute.[17] It can arise and be enforced only under the conditions provided in the statute.[18] The party seeking to enforce a lien has the burden of proving every fact essential to the establishment of the lien.[19]

[10] It is true that courts enforce condominium assessments only if they are calculated in the manner required by the association's governing documents.[20] But Bel Fury does not cite any authority stating that a lien for correctly calculated assessments cannot be enforced merely because the assessments were initially miscalculated. To the contrary, at least one court has held that an initial miscalculation is not fatal to a condominium association's foreclosure action. In *Oronoque Shores Condo. Ass'n v. Smulley*,[21] a condominium association admittedly levied a special assessment for snow removal to each owner equally, even though its bylaws required it to make assessments according to each unit's share of the common elements. After the association started foreclosure proceedings, it corrected the error and reapportioned the assessment.

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[16] See, *West Town Homeowners Assn. v. Schneider*, 231 Neb. 100, 435 N.W.2d 645 (1989); *Federal Land Bank of Omaha v. Blankemeyer*, 228 Neb. 249, 422 N.W.2d 81 (1988).

[17] See, *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991); *County Board of Platte County v. Breese*, 171 Neb. 37, 105 N.W.2d 478 (1960); *In re Conservatorship of Marshall*, 10 Neb. App. 589, 634 N.W.2d 300 (2001).

[18] See *id.*

[19] 51 Am. Jur. 2d, *supra* note 13, § 89. See, also, *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986).

[20] See, *In re Johnson*, 366 N.C. 252, 741 S.E.2d 308 (2012); *Zack v. 3000 East Avenue Condominium Ass'n*, 306 A.D.2d 846, 762 N.Y.S.2d 459 (2003).

[21] *Oronoque v. Shores Condo. Ass'n v. Smulley*, 114 Conn. App. 233, 968 A.2d 996 (2009).

On appeal, the unit owner argued that the assessment was void because it did not conform to the bylaws. She asserted that the subsequent correction did not make the assessment valid because such "new assessment" was not approved by the association's board.[22] The court concluded that the assessment was not void "merely because of the incorrect apportionment" because it was "forewarned, properly imposed and voted on by the board and within the association's authority to impose."[23] The court distinguished the "validity" of the assessment from its "apportionment":

> We must note that there is a difference between the validity of the snow assessment, that is, the power of the association to impose the assessment, and the manner in which it was apportioned. The apportioning of the snow assessment to each unit owner is a ministerial task, which does not affect the validity of the snow assessment itself.[24]

The court also noted that the defendant "acknowledged that the snow assessment was due and owing."[25]

[11] We conclude that the Association's temporary miscalculation of assessments does not invalidate its lien against Unit SCB. Because the bylaws require the Association to levy assessments according to each unit's share of the regime's basic value, the Association cannot enforce assessments made on the Unit SCB's square footage.[26] But here, the decree enforced assessments calculated according to Unit SCB's share of the regime's basic value. Bloemer testified that he did not think that Bel Fury had to pay assessments until the Association repaired Unit SCB's heating and cooling unit, but he otherwise did not dispute the amount of assessments as recalculated on a basic value basis. Withholding assessments is not a remedy

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[22] *Id.* at 238, 968 A.2d at 999.

[23] *Id.* at 238-39, 968 A.2d at 999.

[24] *Id.* at 239, 968 A.2d at 1000.

[25] *Id.* at 240, 968 A.2d at 1000.

[26] See, *In re Johnson, supra* note 20; *Zack v. 3000 East Avenue Condominium Ass'n, supra* note 20.

to cure unauthorized acts by the officers or directors of a condominium association.[27] Accordingly, the court did not err by enforcing a lien for assessments calculated in a manner consistent with the Association's bylaws.

(b) Notice

Bel Fury argues that the Association's lien is void because it did not give Bel Fury a "notice of default"[28] or "Notice to Cure."[29] In support, Bel Fury cites sections of the Nebraska Trust Deeds Act and the Farm Homestead Protection Act.[30] We determine that these sections have no bearing on the Association's action to foreclose a lien for unpaid condominium assessments. Section 76-874(a) requires notice to other lienholders, but is silent as to the unit owner. The Association's foreclosure action has entered its fifth year, and Bel Fury does not point to any notice deficiencies related to the litigation process. To the extent that Bel Fury argues that it did not receive notice of the sale of Unit SCB, we note that the sale has not yet occurred.

(c) Adequate Remedy at Law

[12] Bel Fury argues that the Association could not foreclose its lien because it had an adequate remedy at law (i.e., money damages). We disagree. In general, the holder of a lien may pursue foreclosure without first obtaining a personal judgment on the underlying debt.[31] Section 76-874(a) provides that an assessment lien "may be foreclosed in like manner as a mortgage." We have held that a mortgagee may foreclose its lien without being forced to resort to other remedies.[32]

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[27] *Coral Way Condo. v. 21/22 Condo. Assn.*, 66 So. 3d 1038 (Fla. App. 2011).

[28] Brief for appellant at 8.

[29] Reply brief for appellant at 6.

[30] See Neb. Rev. Stat. §§ 76-1008 and 76-1903 (Reissue 2009).

[31] 53 C.J.S. *Liens* § 56 (2005).

[32] *Federal Farm Mortgage Corporation v. Ganser*, 146 Neb. 635, 20 N.W.2d 689 (1945). See, also, *Federal Farm Mtg. Corporation v. Cramb*, 137 Neb. 553, 290 N.W.2d 440 (1940); 55 Am. Jur. 2d *Mortgages* § 452 (2009).

(d) "Invalid" Judgment

[13] Bel Fury argues that the provision in the decree that Bel Fury had 90 days to pay the outstanding assessments before the Association could foreclose made the judgment "invalid because it is an order which is not presently effective." Again, we disagree. A foreclosure decree is a final judgment even though it creates a period for redemption.[33]

(e) Proof of Damages

Bel Fury argues that the court erred by finding that Bel Fury "failed to prove damages" on its counterclaim. Bel Fury asserts that "unreasonably high dues" and the lack of heating and cooling "negatively affected both the re-sale value of the units and the rentability."[34] The Association emphasizes that Bel Fury could not find a tenant for Unit SCB either before or after the heating and cooling unit was repaired. The Association posits that Unit SCB's status as a windowless basement space "in all probability accounts for the lack of any tenants or prospective tenants."[35]

[14] A plaintiff does not have to prove his or her damages beyond all reasonable doubt, but must prove them to a reasonable certainty.[36] After reviewing the record, we conclude that the court did not err by finding that Bel Fury failed to prove damages to a reasonable certainty.

(f) Attorney Fees

Bel Fury argues that the court abused its discretion by not awarding it attorney fees under § 76-891.01, which provides:

> If a declarant or any other person subject to the [NCA] fails to comply with any provision of the act or any provision of the declaration or bylaws, any person

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[33] *Mortgage Lenders Network, USA v. Sensenich*, 177 Vt. 592, 873 A.2d 892 (2004); 55 Am. Jur. 2d, *supra* note 32, § 634. See, also, *West Town Homeowners Assn. v. Schneider, supra* note 16.

[34] Brief for appellant at 10.

[35] Brief for appellee Twin Towers at 16.

[36] See, *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010); *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

> 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.

Section 76-891.01 is part of the NCA, but it is among the sections that § 76-826 makes applicable to CPA-era condominiums.

[15] We determine that Bel Fury is not entitled to attorney fees. Customarily, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits.[37] Bel Fury did not prevail, and the Association's suit was not frivolous.

3. Cross-Appeal

(a) Attorney Fees and Costs

[16] The Association argues that it is entitled to attorney fees and costs. We agree. Section 76-874(f) provides: "A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party." The Association was a prevailing party because it received a judgment in its favor.[38] The court had discretion as to the amount,[39] but the award of attorney fees and costs is mandatory.[40]

(b) Interest

The Association argues that it is entitled to interest on past-due assessments. On our de novo review, we conclude that the court did not err by declining to award interest, because the Association miscalculated assessments for a substantial period.

(c) Assessments Due After January 2013

The Association argues that the court erred by not including in the debt secured by its lien the assessments that became

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[37] *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999); *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 523 N.W.2d 24 (1994).

[38] 20 C.J.S. *Costs* § 139 (2007).

[39] See, e.g., *Brodersen v. Traders Ins. Co., supra* note 37.

[40] See *Stage Neck Owners Ass'n v. Poboisk*, 726 A.2d 1261 (Me. 1999).

delinquent after January 2013. In its decree, the court found that the debt secured by the Association's lien is $26,467.44, which is the amount of unpaid assessments in Davis' tenant ledger through January 1, 2013. Under an acceleration clause in the bylaws, the Association argues that all the monthly assessments became due upon the delinquency of one installment. "At the very least," the Association contends, "the trial court should have awarded ongoing and unpaid assessments up to the point of any payment by Bel Fury or sale of the property pursuant to an order of sale."[41]

The amount of the debt is an essential part of a foreclosure decree.[42] The court may include an installment of the debt that was not due when the complaint was filed but became due during the pendency of litigation.[43] But the court cannot include an installment that has yet to become due, because doing so would prevent a redemption.[44]

[17] We have said that an acceleration clause in a mortgage is enforceable,[45] although an equity court may deny enforcement when application of the clause would be inequitable.[46] Paragraph 12 of the bylaws provides: "The delinquency of one installment of an assessment shall cause all remaining installments to immediately become due, payable and delinquent."

On our de novo review, we conclude that enforcement of the acceleration clause in paragraph 12 of the bylaws would be inequitable. The Association miscalculated—substantially—the amount of assessments, starting well before it filed the notices of lien and continuing for 2 years after it started foreclosure proceedings. But we conclude that the debt secured by the Association's lien includes the assessments for the months of

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[41] Brief for appellee Twin Towers on cross-appeal at 29-30.

[42] See, e.g., *Glissman v. Orchard*, 152 Neb. 500, 41 N.W.2d 756 (1950).

[43] See 5 Herbert Thorndike Tiffany, The Law of Real Property § 1523 (3d ed. 1939).

[44] *Id.*

[45] See *Jones v. Burr*, 223 Neb. 291, 389 N.W.2d 289 (1986).

[46] *Walker Land & Cattle Co. v. Daub, supra* note 19.

February and March 2013. On March 26, 2013, Davis testified that Bel Fury had not paid assessments for Unit SCB since September 2010. Paragraph 12 of the bylaws states that assessments are due on the first of each month and delinquent if not paid within 10 days. Accordingly, the record shows that the February and March 2013 assessments against Unit SCB were delinquent and part of the debt secured by the Association's lien.

(d) Necessary Findings in Foreclosure Decree

The Association argues that the court's decree was deficient because it did not state the legal description of Unit SCB, did not determine the "lien interests of the various parties," and did not "provide for the issuance of an order of sale and of the sale of the property."[47] The Association also contends that the court should not have "identified the amount due as a judgment."

[18] The purposes of a foreclosure action are to determine the existence of a lien and the amount and priority of the lien, and to obtain a decree directing the sale of the premises in satisfaction thereof if no redemption is made.[48] In a foreclosure action, the "judgment" is the order stating the amount due and directing a sale to satisfy the lien.[49] The necessary issues to be determined by the foreclosure decree are the execution of the agreement, the breach thereof, the identity of the real estate, and the amount remaining due.[50]

[19] We conclude that the court erred by not stating the legal description of Unit SCB in its decree. A foreclosure decree governs which property is to be sold at an execution sale, regardless of the description in subsequent documents

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[47] Brief for appellee Twin Towers on cross-appeal at 27.

[48] *Wittwer v. Dorland*, 198 Neb. 361, 253 N.W.2d 26 (1977).

[49] *Federal Deposit Ins. Corp. v. Tidwell*, 820 P.2d 1338 (Okla. 1991); 55 Am. Jur. 2d, *supra* note 32, § 634.

[50] See, *Glissman v. Orchard, supra* note 42; *Columbus Land, Loan & Bldg. Assn. v. Wolken*, 146 Neb. 684, 21 N.W.2d 418 (1946); *Stuart v. Bliss*, 116 Neb. 305, 216 N.W. 944 (1927); *Union Central Life Ins. Co. v. Saathoff*, 115 Neb. 385, 213 N.W. 342 (1927).

and notices.[51] Thus, the legal description in the decree is extremely important.[52] We note that § 76-841—which is listed in § 76-826(a)—states the particulars of a sufficient legal description for a condominium unit.

We determine that the court did not err by failing to prioritize the "lien interests of the various parties."[53] The court found in a November 2013 order that neither Domina Law Group nor Credit Bureau Services had a lien interest in Unit SCB. In February 2012, the court sustained the Association's motion to dismiss Gateway Community Bank as a party to the action.

Finally, we conclude that the entry of a "judgment"—rather than a "decree"—and the statement that the Association could "foreclose"—rather than a "provi[sion] for the issuance of an order of sale"—do not rise to the level of prejudicial error.[54] Generally, an equity court's decision is termed a "decree" and the decision of a court of law is termed a "judgment."[55] But it is clear enough that the court ordered Bel Fury to pay its debt within 90 days and that if it failed to do so, the Association could have Unit SCB sold to satisfy the debt.

VI. CONCLUSION

We conclude that the Association's initial miscalculation of assessments does not invalidate its lien against Unit SCB. Nor do we find merit in Bel Fury's remaining assignments. But on the Association's cross-appeal, we remand the cause with directions to award the Association attorney fees and costs, to include assessments for February and March 2013 as part of the debt secured by the lien, and to determine the legal description of the property subject to the lien.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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[51] *Bates v. Schuelke*, 191 Neb. 498, 215 N.W.2d 874 (1974).

[52] See *id*. See, also, 55 Am. Jur. 2d, *supra* note 32, § 636.

[53] Brief for appellee Twin Towers on cross-appeal at 27.

[54] *Id*.

[55] See Black's Law Dictionary 497 (10th ed. 2014).

COLE HODSON, APPELLANT, V. BRADLEY TAYLOR ET AL., APPELLEES.

860 N.W.2d 162

Filed March 13, 2015. No. S-13-1131.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing demonstrate that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the summary judgment 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.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the lower court's conclusions.
4. **Negligence: Liability: Proximate Cause.** In premises liability cases, an owner or occupier is subject to liability for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves (1) that the owner or occupier either created the condition, knew of the condition, or by exercise of reasonable care would have discovered the condition; (2) that the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) that the owner or occupier should have expected that the visitor either would not discover or realize the danger or would fail to protect himself or herself against the danger; (4) that the owner or occupier failed to use reasonable care to protect the visitor against the danger; and (5) that the condition was a proximate cause of damage to the visitor.
5. **Recreation Liability Act.** Nebraska's Recreation Liability Act applies only to premises liability actions.
6. **Negligence.** Premises liability causes of action cannot be taken against one who is not an owner or occupant of the property.
7. ____. Not every negligence action involving an injury suffered on someone's land is properly considered a premises liability case.
8. ____. Under a premises liability theory, a court is generally concerned with either a condition on the land or the use of the land by a possessor.
9. ____. In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
10. **Negligence: Proof.** Foreseeability is analyzed in the context of breach and is used as a factor in determining whether there was a breach of the duty of reasonable care.
11. **Negligence.** A person acts negligently if the person does not exercise reasonable care under all the circumstances.

12. ____. Primary factors to consider in ascertaining whether a person's conduct lacks reasonable care include the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.
13. ____. Foreseeability is analyzed as a fact-specific inquiry into the circumstances that might have placed the defendant on notice of the possibility of injury.
14. ____. Small changes in the facts may make dramatic change in how much risk is foreseeable.
15. ____. The law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen.
16. ____. Though questions of foreseeable risk are ordinarily proper for a trier of fact, courts may reserve the right to determine that the defendant did not breach its duty of reasonable care if reasonable people could not disagree about the unforeseeability of the injury.
17. **Negligence: Invitor-Invitee: Liability.** Owners or occupiers have breached their duty if they know, or by exercise of reasonable care should have realized, that a condition on their land would create a risk from which visitors would fail to protect themselves.
18. ____: ____: ____. A land possessor is not liable to a lawful entrant on the land unless the land possessor had or should have had superior knowledge of the dangerous condition on the land.
19. ____: ____: ____. Land possessors have a duty to attend to the foreseeable risks in light of the then-extant environment, including foreseeable precautions by others.
20. **Negligence: Waters.** A duty to provide for a water's passage through the landowner's property is owed to adjoining landowners, and not to guests of adjoining landowners.
21. **Negligence.** All people owe a basic duty to conform to the legal standard of reasonable conduct in light of the apparent risk.
22. **Negligence: Waters: Invitor-Invitee.** A lake association owes to the lawful guest or visitor a duty to protect the visitor against those parts of the land which it has reason to know of, with reasonable care would have discovered, or should have realized involved an unreasonable risk of harm to the visitor.
23. **Negligence.** Generally, when a dangerous condition is open and obvious, the owner or occupier is not liable in negligence for harm caused by the condition.
24. ____. Under the open and obvious doctrine, a possessor of land is not liable to his or her invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
25. ____. A condition is considered obvious when the risk is apparent to and of the type that would be recognized by a reasonable person in the position of the invitee.
26. **Negligence: Waters.** A body of water is not a concealed, dangerous condition, because the public recognizes that bodies of water vary in depth and that sharp changes in the bottom may be expected.

27. **Negligence.** If an owner or occupier should have anticipated that persons using the premises would fail to protect themselves, despite the open and obvious risk, then the open and obvious doctrine does not apply.

Appeal from the District Court for Washington County: JAMES G. KUBE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

E. Terry Sibbernsen and Andrew D. Sibbernsen, of Sibbernsen, Strigenz & Sibbernsen, P.C., and Jeffrey B. Farnham and Andrew W. Simpson, of Farnham & Simpson, P.C., L.L.O., for appellant.

David M. Woodke and Earl G. Green III, of Woodke & Gibbons, P.C., L.L.O., for appellees Bradley Taylor, Laura Taylor, and Whitney Taylor.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellee Willers Cove Owners Association.

Stephen L. Ahl and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees Ronald D. Willers and Marilyn M. Willers.

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

MCCORMACK, J.

I. NATURE OF CASE

Cole Hodson suffered a catastrophic injury when he dove into the Willers Cove lake near Pilger, Nebraska. Cole brings a tort action against Bradley Taylor and Laura Taylor (collectively the Taylors) and their daughter, Whitney Taylor, as his hosts at the lake; the Willers Cove Owners Association (the WCOA), claiming the lake association should have known of dangerous conditions in the lake; and Ronald D. Willers and Marilyn M. Willers (collectively the Willers), for negligently constructing a culvert which led to the dangerous condition that caused Cole's injury. The district court dismissed all of Cole's claims in summary judgment. Cole now appeals.

II. BACKGROUND

1. Accident

On the date of the accident, the Taylors were residents of and owned a home located at the Willers Cove lake community in Stanton County, Nebraska.

On June 26, 2010, Cole and three other friends—Adam Hodson, Caitlin Hoer (Caitlin), and Johnny Forsen (Johnny)—were invited by Whitney to the residence of the Taylors for the purpose of swimming and boating. Adam was Whitney's boyfriend, Cole was Adam's cousin, Johnny was Cole's childhood friend, and Caitlin was a friend of Whitney. Each member of the group was around 18 years old at the time. Shortly after arrival, the group boarded the Taylors' pontoon boat and proceeded on the Willers Cove lake. Deposition testimony among the people on the boat differs, but either Whitney or Adam operated the boat. The pontoon boat stopped twice at different locations. While stopped, Cole and Johnny jumped off the pontoon boat and swam in the lake.

Cole recalls that he had at least two beers since arriving at Willers Cove and before his final dive into the water. Johnny recalls that each member of the group had three beers before Cole was injured.

The last stop was made on the west side of the lake, somewhere between 50 and 200 feet from the north shoreline. Whitney stated that she chose this place for jumping and swimming because she had stopped there in the past.

Cole stated he could not see below the surface of the lake and jumped into the lake without testing the depth. Johnny also stated that the water was "pretty muddy." Further, in Cole's deposition, counsel asked:

> Q[:] Okay. Now, did you know when you first dove into the lake that if you couldn't see below the surface on a lake that there was a possibility that there could be an object or shallow depth?
>
> . . . .
>
> A[:] Possibly.
>
> Q[:] Okay. And how is it that you knew that could be the case?

A[:] That's the case in any situation like that.

Cole also admitted that the depth of lake bottoms can be different at different places in a lake or pond.

After stopping at other locations in the lake, the boat came to a stop in its final place before Cole's injury. Cole is unsure how far this was from the shoreline. Both Cole and Johnny dove, jumped, or flipped "several" or "five or more" times into the water at this location, and they swam around in the water. Cole says that during each of those dives, and during his time swimming at this location, he did not touch the bottom of the lake. Deposition testimony of all the people on the boat indicates that no one formally tested the depth of the lake at this location.

After "several" successful dives at the last location, Cole dove and abruptly came into contact with something in the water, which he assumes to be the bottom of the Willers Cove lake. Cole stated in his deposition that he does not know for certain that he hit the bottom of the lake, because he does not remember anything after his final dive into the lake. As a result of the dive, Cole suffered a "C5 complete spinal cord injury." The C5 spinal cord injury has left Cole paralyzed and without feeling from the chest down. He has function in his shoulders, but only limited flexion in his hands and wrists.

Johnny left the boat to retrieve Cole after the accident. Johnny testified that when he jumped off the boat this final time, he could walk for a few feet because the water in that location was only about "knee high." But, before he could get to Cole, the depth dropped off again and he had to swim. This conflicts with Johnny's original statement in which he said that he had to swim to Cole after exiting the boat. Adam also testified that Johnny had to swim to get to Cole.

2. Willers Cove

The Willers once owned and operated a sand and gravel company. The Willers Cove lake was created where they dug sand and gravel from the earth that was later filled in with ground water. The Willers were the initial owners of Willers Cove before deeding the lake to the WCOA.

On July 20, 2005, the Willers executed a quitclaim deed conveying ownership of the lake to the WCOA. When the lake was transferred to the WCOA in 2005, it was a completed project. The Willers did nothing more to the lake itself after the transfer. The WCOA now owns, operates, maintains, and manages the Willers Cove lake.

The WCOA passes rules and regulations for the Willers Cove lake. Prior to 2007, the WCOA had a rule that there would be no swimming more than 50 feet from the shore of the Willers Cove lake. However, such rule was not readopted in 2007. One of the directors of the WCOA stated that this regulation was either unintentionally omitted or purposefully left out. He stated that the rule seemed meaningless and would be difficult to enforce, though he does not recall exactly why the rule was omitted from adoption in 2007.

Willers Cove is a private lake. All people with residences abutting the lake must be a member of the WCOA. One must be a member or guest of a member of the WCOA to be able to use the lake.

3. Potentially Dangerous Conditions at Willers Cove

Cole argues that the sand along the north shoreline was known to sometimes cause potentially dangerous conditions in the lake, because the sand was unstable. The evidence shows that members of the WCOA and the Willers discussed this unstable sand condition at a meeting in 2004.

Members of the lake community were not positive as to the depth of the lake, but Bradley testified that he had knowledge of the depth of the lake based on the depth finder installed on his boat. He stated that the deepest part of the lake is 50 feet and that it tapers off in depth closer to the shore. He estimated that right next to the shore, the depth was about 4 feet deep. Bradley stated that he never noticed especially varying depths of the lake, or a sandbar in the lake. After the accident, the WCOA was compelled to have a survey done of the depth of the entire lake.

Cole retained an expert witness, Charles R. Dutill II, to opine as to potentially dangerous conditions in the Willers Cove lake. Dutill stated that the water levels rose in the year of the accident due to rainfall and some flooding. The rising water levels actually caused conditions in the lake to become shallower, because the water level caused the shoreline of the lake to move outward about 2 feet. Thus, the depth of the water at the shoreline would be significantly less than when lake elevation is lower overall. Specifically, Dutill stated that, typically, 100 feet from shore would have a depth of 18.75 feet, but that on the day of the accident, due to more water being in the lake, the conditions would be "significantly" shallower at 100 feet.

Dutill opined that the WCOA members should have known that the lake levels were rising. However, he specifically stated that he did *not* have the opinion that the WCOA members should have known that the rising lake levels would cause a dangerous, hazardous, or shallow condition in the lake.

4. The Willers' Property

The Willers own property at Willers Cove on the east end of the lake. On the Willers' property, there is a creek. This creek did not flow into Willers Cove prior to 2010. Sometime in 2009, Ronald replaced a small culvert on his own land with a larger culvert so that he could drive through the area on his property containing the creek. Later, Ronald removed the culvert altogether after heavy rains and flooding occurred in 2010.

However, in 2010, due to flooding in the area, the creek that ran on the Willers' property breached its banks and allegedly caused the shores of the Willers Cove lake to erode, causing additional material and water to flow into the lake. Dutill opined as to the culvert. His opinion was that the culvert was substantially undersized and insufficient to handle the appropriate flow of water in the stream. Dutill further stated the opinion that Ronald was negligent in failing to consult with or hire an engineer or other similar professional in regard to installing the culvert. However, nowhere in his opinion did Dutill state that this culvert caused the levels in the lake to rise.

He stated only that it was apparent the waterflow of the creek had changed over time. Dutill also could not connect that to the installation of the culvert.

Dutill stated in his deposition:

> There are two aspects to the breakout that are significant. One is that again, with it being my opinion that a substantial amount of sediment moved into the lake, some of that sediment would have reached the location of the accident. And so that would make the depth more shallow there than would otherwise be the case. A much more significant factor is that the breakout allowed a substantial amount of water that would not normally flow into the lake to flow into the lake.

Dutill commented, "[T]here are several factors that result in more water in the lake. . . . [T]he net effect of those factors would be that . . . the edge of the lake moved more than two feet" from where it usually meets. Dutill could point to no one factor that caused the water levels in the Willers Cove lake to rise.

5. Allegations Against Defendants

(a) Allegations Against the Taylors

Cole alleges that his injuries were the direct and proximate result of negligence by the Taylors. Cole asserts that the Taylors were negligent in failing to warn users of Willers Cove, such as Cole, of the dangerous and shallow condition of the lake; in allowing Whitney, their daughter, and her guests to use the pontoon boat without supervision; and in permitting Whitney or one of her guests to drive the pontoon boat when the Taylors knew, or in the exercise of reasonable care should have known, that she was inexperienced and incompetent to operate this pontoon boat on the Willers Cove lake on the date of the accident, given the condition of the lake and the depth.

(b) Allegations Against the Willers

Cole alleges that his injuries were the direct and proximate result of negligence by the Willers. Cole asserts that the Willers failed to ascertain and maintain sufficient and safe

water depth in the lake, failed to warn users of the dangerous and shallow condition of the lake, failed to enforce safety rules and regulations relating to the use of the lake, failed to publish rules and regulations concerning jumping off pontoon boats into the lake, failed to warn users of the dangers of recent lake flooding, and failed to design and construct the lake and surrounding area in a manner that would prevent surface and/or floor waters from cutting through and breaching the land adjacent to the lake, thereby enabling such waters to enter the lake and deposit sand or silt on the lake bottom.

In particular, Cole argued that Ronald negligently installed a culvert on his land, which had the effect of creating a dangerous condition in the lake, and that Ronald should have known such dangerous condition was created.

(c) Allegations Against the WCOA

Cole alleges that his injuries were the direct and proximate result of negligence by the WCOA. Cole asserts that the WCOA failed to ascertain and maintain sufficient and safe water depth in the lake; failed to warn users, such as Cole, of the dangerous and shallow condition of the lake; failed to enforce reasonably safe rules and regulations relating to the use of the lake; failed to publish rules and regulations concerning jumping off a pontoon boat or a boat; failed to warn users of the lake of the shallow depth of the lake due to the recent flooding; and failed to post signs and warnings prohibiting individuals from using and swimming in the lake due to the recent flooding and resulting unsafe condition of the lake.

6. District Court Ruling

All of the defendants moved for summary judgment. As to the Taylors, the district court found that, as a matter of law, Nebraska's Recreation Liability Act (the Act)[1] barred liability in this case. In so finding, the district court found

[1] Neb. Rev. Stat. §§ 37-729 through 37-736 (Reissue 2008).

that the Taylors were "owners" of the lake, as defined in the Act. The district court also followed our holding in *Holden v. Schwer*,[2] which states that in order for the Act to apply, the landowner does not need to fully dedicate his or her property to the public in order to be covered by the Act, but instead, a landowner need only allow some members of the public, on a casual basis, to enter and use the land for recreational purposes in order to be protected from liability under the Act. Because the court determined that the Act applied, the court did not need to decide whether Cole's negligence claims had any merit.

As to the Willers, the court noted that the Willers had not owned or been responsible for maintaining the lake for more than 4 years prior to the date of the accident and that thus, most negligence claims were time barred by Neb. Rev. Stat. § 25-207 (Reissue 2008). As to the culvert installed by Ronald, the court noted the duty to provide for passage of water is only to adjoining landowners, and not to guests on adjoining property, like Cole. Further, although foreseeability is normally a matter for a trier of fact to determine, the court found that in this case, as a matter of law,

> [no] reasonable person could determine that it was foreseeable that inserting a culvert in a waterway would, under extreme precipitation, cause excess water and silt to enter into Willers Cove and in turn cause an area in the lake to become excessively shallow such that someone would dive into the lake and suffer the type of injury experienced by [Cole].

As to the WCOA, the court found that the lake was an open and obvious condition that Cole should have realized presented a risk of death or serious harm. In order to apply the open and obvious doctrine, a court must also find that the WCOA could not have anticipated that such harm would come to someone like Cole.[3] The court stated that this proposition

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[2] *Holden v. Schwer*, 242 Neb. 389, 495 N.W.2d 269 (1993).

[3] See *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

"is directly related to" the issue of foreseeability and that the WCOA could not have foreseen that such harm would come to someone in the position of Cole. Finding that the WCOA could not have foreseen this condition in the lake, the court found that the open and obvious doctrine barred the WCOA's liability.

III. ASSIGNMENTS OF ERROR

Cole assigns, consolidated and restated, that the district court erred in granting summary judgment (1) for the Taylors on the basis that the Taylors were protected from liability by the Act; (2) for the Willers on the basis that there was no duty or breach of such duty to Cole to adequately provide for passage of water from their property, because the events causing injury were unforeseeable; and (3) for the WCOA, because it was not negligent in failing to enforce regulations restricting swimming to within 50 feet from the shore and because the dangerous condition in the lake was unforeseeable.

IV. STANDARD OF REVIEW

[1,2] We will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing demonstrate 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] In reviewing a summary judgment, an appellate court views the summary judgment 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]

[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the lower court's conclusions.[6]

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[4] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013).

[5] *Id.*

[6] *Id.*

V. ANALYSIS

1. Recreational Liability Act and the Taylors

In reviewing the complaint in this case, we find that the Taylors did not own or occupy the property on which the injury occurred. Therefore, we do not view this as a premises liability action. The Act applies only to premises liability actions, and therefore, the Act does not apply to this case. We reverse, and remand the cause to the district court for a determination on the remaining questions of the Taylors' alleged negligence.

An owner is someone "who has the right to possess, use, and convey something; a person in whom one or more interests are vested."[7] An occupant is "[o]ne who has possessory rights in, or control over, certain property or premises" or "[o]ne who acquires title by occupancy."[8]

[4] In premises liability cases, an owner or occupier is subject to liability for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves (1) that the owner or occupier either created the condition, knew of the condition, or by exercise of reasonable care would have discovered the condition; (2) that the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) that the owner or occupier should have expected that the visitor either would not discover or realize the danger or would fail to protect himself or herself against the danger; (4) that the owner or occupier failed to use reasonable care to protect the visitor against the danger; and (5) that the condition was a proximate cause of damage to the visitor.[9]

[5] The Act applies only to premises liability actions. Under the Act, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational

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[7] Black's Law Dictionary 1214 (9th ed. 2009).

[8] *Id.* at 1184.

[9] *Aguallo v. City of Scottsbluff*, *supra* note 3.

purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes."[10] Therefore, when the Act applies, we read the Act only to bar liability for premises liability actions.

In this case, Cole has alleged premises liability actions against the Taylors for his injury, which occurred on the Willers Cove lake. Cole's complaint alleges that the Taylors were negligent:

> (a) In failing to warn users of Willers Cove, such as [Cole], of the dangerous and shallow condition of the lake;
>
> . . . .
>
> (d) In failing to warn or prohibit swimming in the area of the sandpit lake known as Willers Cove when the defendants knew, or in the exercise of reasonable care should have known, of the shallow and unstable condition of the lake at the area where the accident occurred;
>
> (e) In failing to warn users of the lake, such as the plaintiff, Cole . . . , of the unreasonably dangerous and unsafe condition of the lake on June 26, 2010.

[6] However, premises liability causes of action cannot be taken against one who is not an owner or occupant of the property. The Taylors were not owners or occupants of the Willers Cove lake. The record is undisputed that the Taylors are not legal owners of the lake. The WCOA is the legal owner of the lake.

Neither do the Taylors qualify as occupants of the Willers Cove lake. Under the legal definition of occupant, one may be an occupant by having control over the land in question. Though the lower court found that the Taylors were "in control" of the lake by virtue of their membership in the WCOA, we disagree. Membership in the WCOA does not give those members control of the lake that the WCOA owns. The people truly in control of the WCOA's property are those in positions of control of the WCOA itself—for example, the WCOA officers. Just because the Taylors are adjoining landowners, can

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[10] § 37-731. See, also, *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

invite guests to use the lake, and can otherwise use the lake as they wish does not make them in control of the property, nor does premises liability attach to the Taylors for what happens on that lake.

[7,8] Not every negligence action involving an injury suffered on someone's land is properly considered a premises liability case.[11] Under a premises liability theory, a court is generally concerned with either a condition on the land or the use of the land by a possessor.[12] The complaint against the Taylors does include causes of action not associated with premises liability.

We reverse the district court's determination that the Act applies, because the Act applies only to premises liability actions, and the Taylors do not have premises liability for injuries that occur due to dangerous conditions in the lake. We remand the cause for a determination of the remaining negligence allegations against the Taylors.

2. Alleged Negligence of the Willers and the WCOA

We agree with the district court and affirm its finding that, even with all reasonable inferences in favor of Cole, the Willers were not negligent, because the Willers owed no special duty to Cole and because the injury of Cole was not reasonably foreseeable to the ordinary person. However, we do find material issues of fact remaining as to the WCOA's ability to foresee the dangerous condition in the lake. We reverse, and remand the district court's summary judgment ruling as to the WCOA.

[9-12] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[13] Our case law has placed foreseeability in the context of breach and as a factor in determining whether there was a breach

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[11] *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011); *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004).

[12] *Id.*

[13] *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014).

of the duty of reasonable care.[14] A person acts negligently if the person does not exercise reasonable care under all the circumstances. "'Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care [include] the *foreseeable likelihood that the person's conduct will result in harm*, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.'"[15]

[13-15] Under the Restatement (Third) of Torts, which Nebraska has adopted, foreseeability is analyzed as a fact-specific inquiry into the circumstances that might have placed the defendant on notice of the possibility of injury.[16] Stated another way, the foreseeability analysis requires us to ask what the defendants knew, "when they knew it, and whether a reasonable person would infer from those facts that there was a danger."[17] Small changes in the facts may make a dramatic change in how much risk is foreseeable.[18] The law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen.[19]

[16] Though questions of foreseeable risk are ordinarily proper for a trier of fact, courts may reserve the right to determine that the defendant did not breach its duty of reasonable care, as a matter of law, if reasonable people could not disagree about the unforeseeability of the injury.[20] Therefore, although foreseeability is a question of fact, there remain cases where

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[14] See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[15] *Id.* at 218, 784 N.W.2d at 918 (emphasis supplied). See, also, 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 (2010).

[16] See, *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 14; 1 Restatement (Third) of Torts, *supra* note 15, § 7.

[17] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 14, 280 Neb. at 217, 784 N.W.2d at 917.

[18] *Deviney v. Union Pacific RR. Co.*, 280 Neb. 450, 786 N.W.2d 902 (2010).

[19] *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003).

[20] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 14. See *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009).

foreseeability can be determined as a matter of law, such as by summary judgment.[21]

[17] More specifically, in premises liability cases, an owner or occupier is subject to liability for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves (1) that the owner or occupier either created the condition, knew of the condition, or by exercise of reasonable care would have discovered the condition; (2) that the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) that the owner or occupier should have expected that the visitor either would not discover or realize the danger or would fail to protect himself or herself against the danger; (4) that the owner or occupier failed to use reasonable care to protect the visitor against the danger; and (5) that the condition was a proximate cause of damage to the visitor.[22] It follows that owners or occupiers have breached their duty if they know, or by exercise of reasonable care should have realized, that a condition on their land would create a risk from which visitors would fail to protect themselves.

[18,19] Though Nebraska has abolished the distinction between invitee and licensee, "it remains true that a land possessor is not liable to a lawful entrant on the land unless the land possessor had or should have had superior knowledge of the dangerous condition on the land."[23] Land possessors have a duty to attend "to the foreseeable risks in light of the then-extant environment, *including foreseeable precautions by others*."[24] This is true regarding all dangerous conditions on the land, but "'[k]nown or obvious dangers pose less of a risk than comparable latent dangers because those exposed can take precautions to protect themselves.'"[25]

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[21] *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014).

[22] *Aguallo v. City of Scottsbluff, supra* note 3.

[23] *Warner v. Simmons*, 288 Neb. 472, 478, 849 N.W.2d 475, 480 (2014).

[24] 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 51, comment *a*. at 243 (2012) (emphasis supplied).

[25] *Warner v. Simmons, supra* note 23, 288 Neb. at 479, 849 N.W.2d at 480. See, also, 2 Restatement (Third) of Torts, *supra* note 24, § 51, comment *k*.

(a) The Willers

We find that, even giving all reasonable inferences in favor of Cole, the Willers owed no duty to protect Cole from the type of injury that occurred. Without any duty, there is no breach that could have occurred. This finding is based on our conclusion that no reasonable person could find that the injury suffered by Cold was foreseeable from the installation of a culvert on adjoining property.

[20] Cole asserts that the Willers owe adjoining landowners a duty to provide for the passage of water from their land, and that the Willers breached that duty.[26] If a landowner builds a structure in a natural watercourse to provide for the water's passage through the landowner's property, that landowner does owe a duty to adjoining landowners to maintain the construction so that water will not be collected or damage another's property.[27] However, our law states that this duty is owed only to other landowners, and is used only to refer to damages caused to another's property.[28] Cole is not an adjoining landowner, and therefore, the duty articulated in *Bristol v. Rasmussen*[29] does not apply to Cole. We have not recognized, and do not now recognize, a duty to guests of an adjoining landowner to properly dispose of water from one's own land.

[21] Although the Willers owed no special duty to Cole, they still owed the most basic duty to conform to the legal standard of reasonable conduct in light of the apparent risk.[30] The expert witness could not state that the culvert was the cause of the rising levels in the Willers Cove lake, or of the overflow of the creek. Even assuming that Ronald could see that the installation of the culvert was causing some water to overflow from the creek, Ronald, in the position of an ordinary

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[26] See *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996).

[27] See *id.*

[28] See *id.* See, also, *LaPuzza v. Sedlacek*, 218 Neb. 285, 353 N.W.2d 17 (1984); *Leaders v. Sarpy County*, 134 Neb. 817, 279 N.W. 809 (1938).

[29] *Bristol v. Rasmussen, supra* note 26.

[30] *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000).

person, would not foresee that an overflow from the creek would cause a dangerous condition in a separate body of water that would then cause a guest of that property to receive serious bodily injury.

We find that, giving all factual inferences in favor of Cole, the Willers could not have reasonably foreseen that by installing a culvert on their property, such culvert would cause flooding that would then cause sand in the bottom of the Willers Cove lake to move, which a visiting guest of another landowner would then proceed to dive into and receive life-altering injuries. Therefore, we affirm the district court's granting of summary judgment.

(b) The WCOA

In contrast, we do find material issues of fact as to whether the WCOA knew of the condition, by exercise of reasonable care should have discovered the condition, or should have realized that a condition involved an unreasonable risk of harm to the lawful visitor.

[22] The WCOA owes to the lawful guest or visitor a duty to protect the visitor against those parts of the land which it has reason to know of, with reasonable care would have discovered, or should have realized involved an unreasonable risk of harm to the visitor.[31] In particular, since the WCOA would have, and should have, superior knowledge of lake conditions, there is some duty to use that knowledge to protect lawful visitors.[32]

The factual question then becomes whether or not this condition should have been foreseeable to the WCOA. Many material issues of fact are left undetermined when viewed in the light most favorable to Cole, and weigh into the foreseeability of Cole's injury. First, Cole claims the WCOA knew that the west side of the lake was unstable and that sand fell into the water. There is some evidence that this was discussed at meetings of the WCOA; however, we do not know if the WCOA recognized it as a dangerous condition for guests

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[31] See *Aguallo v. City of Scottsbluff, supra* note 3.

[32] See *Warner v. Simmons, supra* note 23.

using the lake for swimming. This presents a material issue of fact, because if the WCOA knew the sand could create a dangerously shallow and unexpected condition in the lake, then it had a responsibility to implement safety precautions for its members and guests.

Cole also claims that the WCOA had a regulation keeping swimming to within 50 feet of the shore. However, the WCOA claims that this rule was abrogated by the time of the accident. Even if the rule were in effect, it is not clear whether its enforcement would have prevented Cole's accident. This presents a material issue of fact that is proper for the trier of fact, because if there was a rule in effect, but being improperly enforced by the WCOA, and that improper enforcement caused the injury to Cole, then the WCOA may be liable for negligence.

Finally, no witness can definitively state where the boat was in the lake when the accident occurred. Most witnesses think it was on the west part of the lake, but no witnesses know how far the boat was from shore. These are issues of material fact, because the distance of the boat from the shore would impact the foreseeability of the dangerously shallow condition in the lake.

3. Open and Obvious Doctrine

The district court found that the open and obvious doctrine applied to bar recovery from the WCOA, because the lake constituted an open and obvious condition and the WCOA could not have foreseen that such harm would come to someone in the position of Cole. We reverse this application of the open and obvious doctrine and remand the cause for a determination of the WCOA's negligence.

[23] Generally, when a dangerous condition is open and obvious, the owner or occupier is not liable in negligence for harm caused by the condition.[33] The rationale behind this rule is that the open and obvious nature of the condition gives caution and that therefore, the risk of harm is considered

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[33] *Aguallo v. City of Scottsbluff, supra* note 3.

slight since reasonable people will avoid open and obvious risks.[34]

[24] Under the open and obvious doctrine, a possessor of land is not liable to his or her invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless* the possessor should anticipate the harm despite such knowledge or obviousness.[35]

[25,26] A condition is considered obvious when the risk is apparent to and of the type that would be recognized by a reasonable person in the position of the invitee.[36] In Nebraska, we have repeatedly held that a body of water is not a concealed, dangerous condition.[37] We have said: "It can be stated as a matter of fact that the public recognizes that bodies of water vary in depth and that sharp changes in the bottom may be expected."[38]

Here, Cole did not protect himself from the open and obvious condition—a lake of unknown depth. He admits in his deposition that he has knowledge of natural bodies of water and that their depth can vary greatly. Invitees must take available precautions to protect themselves from open and obvious dangers. Further, it is accepted as a fact by this court that members of the public know that natural bodies of water can vary in depth and that sharp changes in the bottom should be expected.[39] This hazard of a lake associated with risk of death and serious injury has been held to be appreciated even by children.[40] We agree with the lower court in its finding that the

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[34] Restatement (Second) of Torts § 343A (1965).

[35] *Id.*

[36] 4 J.D. Lee & Barry A. Lindahl, Modern Tort Law: Liability and Litigation § 39:7 (2d ed. 2014).

[37] See, *Haden v. Hockenberger & Chambers Co.*, 193 Neb. 713, 228 N.W.2d 883 (1975); *Cortes v. State*, 191 Neb. 795, 218 N.W.2d 214 (1974); *Lindelow v. Peter Kiewit Sons', Inc.*, 174 Neb. 1, 115 N.W.2d 776 (1962).

[38] *Cortes v. State, supra* note 37, 191 Neb. at 799, 218 N.W.2d at 216-17.

[39] *Cortes v. State, supra* note 37.

[40] *Id.*

lake, as a body of water, "natural or artificial, . . . poses a well-known and clear risk of being dangerous."

[27] However, a determination that a danger is "open and obvious" does not end the analysis; a court must also determine whether the owner/occupier should have anticipated that persons using the premises would fail to protect themselves, despite the open and obvious risk.[41] As we have stated:

> Reason to anticipate harm from an open and obvious danger "may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk."[42]

In *Connelly v. City of Omaha*,[43] we found that the open and obvious doctrine did not apply to bar the City of Omaha's liability to the plaintiff. In *Connelly*, a young girl was paralyzed when she sledded down a hill in a city park into a tree on the right side of the hill. The City of Omaha argued that the tree was open and obvious and did not present an unreasonable risk of harm to sledders, who they assumed would have discovered the tree, realized the danger, and gone elsewhere to sled. However, we found that as an "entity operating a park that was open to the public and commonly used for sledding, the City should have expected the public to encounter some dangers which were not unduly extreme, rather than forgo the right to use the park for sledding."[44]

Similarly, in this case, the lake presented a danger which was not "unduly extreme," and since the lake was open for

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[41] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

[42] *Id.* at 142, 816 N.W.2d at 754. See, also, *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982).

[43] *Connelly v. City of Omaha, supra* note 41.

[44] *Id.* at 143-44, 816 N.W.2d at 755.

guests and members to swim, the WCOA should have expected the public to encounter some of the dangers associated with the open body of water. The lake is an inviting scene for people to use for swimming in the summer months. Swimming in itself is not a highly dangerous activity. And in order to swim, one must first get into the body of water. A common method of getting into bodies of water is jumping or diving. Especially where a person has already jumped and dove into the lake and assumes to know its depth, that person would not be expected to realize that there was an undue danger associated with diving into the water another time. Viewing these inferences in the light most favorable to Cole, we conclude that the district court erred in finding that the open and obvious doctrine applied, because the WCOA should have anticipated its guests to come into contact with the lake.

We reverse the lower court's finding that the open and obvious doctrine applied to bar the WCOA's liability and remand the cause to determine the negligence of the WCOA consistent with the instructions in this opinion.

VI. CONCLUSION

We affirm the lower court's ruling as to the Willers, and reverse, and remand for further proceedings as to the Taylors and the WCOA.

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

STEPHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TIUANA L. JOHNSON, APPELLANT.
859 N.W.2d 877

Filed March 13, 2015. No. S-14-245.

1. **Indictments and Informations.** A ruling on whether to allow a criminal information to be amended is made by the trial court in its discretion.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.

3. **Sentences: Judgments: Words and Phrases.** An appellate court reviews criminal sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Judges: Words and Phrases.** A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.
5. **Habitual Criminals: Sentences: Convictions: Proof.** There are no factual findings that the trial court must make, in order to enhance a defendant's sentence under the habitual criminal statutes, that are not a part of proving the fact of a prior conviction.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Paul E. Cooney, and Mark Carraher, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, George R. Love, and Mary C. Byrd, Senior Certified Law Student, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Tiuana L. Johnson was convicted of escape in violation of Neb. Rev. Stat. § 28-912(5)(a) (Reissue 2008) and sentenced as a habitual criminal. On appeal, Johnson does not challenge the underlying conviction for escape. Rather, he challenges the habitual criminal statute on its face and as applied. Johnson also asserts that the State's motion to amend the information was untimely and that his sentence was excessive.

BACKGROUND

On June 21, 2013, Johnson was charged with Class III felony escape, under § 28-912(5)(a). In an amended information filed on August 15, 2013, Johnson was also charged with being a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 2008).

Johnson objected to the State's motion to amend the information to add the habitual criminal charge. The hearing on the State's motion to amend was held on August 15, 2013. Johnson argued that the county attorney had had ample time and that Johnson was ready to plead no contest to the charge in the original information. The State explained that it had been waiting to receive the record of two prior convictions that it wished to use in support of the habitual criminal charge. The State also observed that there was still plenty of time remaining for the State's statutory obligation to bring Johnson to trial. The court allowed the amendment. The amended information was filed on that same date.

Johnson thereafter filed a motion to quash the amended information insofar as it charged Johnson with being a habitual criminal. In the motion to quash, Johnson asserted that the habitual criminal statutory scheme was unconstitutional because it fails to provide for a jury determination of certain facts pertaining to the prior convictions. Johnson also asserted that application of the habitual criminal statutes violated double jeopardy because the same conviction that made the escape charge a Class III felony rather than a Class IV felony formed the basis of the habitual criminal enhancement. Johnson further asserted that the application of the habitual criminal statutes would violate a state constitutional provision, Neb. Const. art. I, § 15, requiring that penalties be proportionate to the offense. Finally, Johnson asserted that application of the habitual criminal enhancement would be cruel and unusual punishment. Johnson did not assert in the motion to quash that the untimeliness of the amendment to the information prejudiced his substantial rights.

The court overruled the motion to quash. Johnson waived his right to a jury trial and his right to a speedy trial. The underlying charge of escape was tried on November 25, 2013, on three stipulated exhibits, subject to Johnson's renewed motion to quash and the court's guarantee that it would not consider any other crimes, wrongs, or acts for purposes of determining whether Johnson committed the crime of escape. Additionally, Johnson stipulated that he was the person named in the exhibits.

These exhibits generally show that on September 20, 2012, Johnson was incarcerated following a conviction for the commission of an offense. He was out on an approved "Job Seeking pass" in Lincoln, Nebraska, and failed to return. Johnson committed a robbery in Omaha, Nebraska, that same day. Johnson was apprehended on September 28 and confessed to the escape and robbery.

The court found Johnson guilty of escape, in violation of § 28-912(5)(a). Upon the court's inquiry, Johnson's counsel indicated that she was "fine with" taking up the issue of enhancement.

In support of the habitual criminal charge, the court accepted into evidence five exhibits proffered by the State. Johnson did not make any objection to the exhibits other than those based on his prior motion to quash. The exhibits demonstrated that before his escape on September 20, 2012, Johnson had committed nine crimes for each of which he had been sentenced to a term of imprisonment for not less than 1 year.

The exhibits show that Johnson was convicted on October 24, 1997, of receipt of stolen property, in relation to events on June 19. He was not sentenced until May 11, 1998, at which time he was sentenced to 2 to 4 years' imprisonment.

On October 2, 1998, Johnson was convicted of robbery and a related use of a weapon charge in relation to events on March 22 and was sentenced to imprisonment for 2 to 4 years on the robbery conviction and 1 to 3 years on the use of a weapon conviction. Those sentences were ordered to be served consecutively with each other, but concurrently with the May 11 sentence for receipt of stolen property.

On July 31, 2003, Johnson was convicted of four counts of robbery under one docket and one count of burglary under a different docket. The robberies and burglary occurred on different dates between December 15, 2002, and January 6, 2003, and involved different victims. On September 17, 2003, Johnson was sentenced to 2½ to 5 years' imprisonment for each robbery, each sentence to be served consecutively. On

that same date, he was sentenced to 2 to 3 years' imprisonment for the burglary, to be served concurrently to the sentences for the robberies.

Finally, on February 8, 2010, Johnson was convicted under § 28-912(1)(5) of escape in relation to events on September 15, 2009. On April 28, 2010, Johnson was sentenced to 2 to 2 years' imprisonment for that crime.

The court also accepted into evidence, without any objection, printouts offered by Johnson of Nebraska inmate details from the Nebraska Department of Correctional Services. The printouts indicate that October 21, 2002, was the mandatory release date for the conviction of receipt of stolen property and the convictions of robbery and the related use of a weapon. Thus, Johnson was no longer serving those sentences at the time of the escape underlying this appeal.

At the close of the evidence, Johnson renewed his motion to quash. With regard to the double jeopardy challenge, Johnson argued that the State had failed to show two prior convictions for purposes of the habitual criminal charge that were both convictions under which Johnson was no longer detained at the time of his escape on September 20, 2012. Johnson explained that he believed the October 24, 1997, conviction for receipt of stolen property and the October 2, 1998, convictions for robbery and use of a weapon counted as only one conviction under the habitual criminal statutes, because the sentences for the robbery and use of a weapon convictions were to be served concurrently with the sentence for the receipt conviction.

ASSIGNMENTS OF ERROR

Johnson assigns that the trial court (1) abused its discretion by improperly permitting the State to amend the information over Johnson's objection; (2) erred by improperly overruling Johnson's motion to quash, in violation of the 6th, 8th, and 14th Amendments to the U.S. Constitution and article I, §§ 6, 9, 11, and 15, of the Nebraska Constitution; and (3) abused its discretion by imposing an excessive sentence.

STANDARD OF REVIEW

[1] A ruling on whether to allow a criminal information to be amended is made by the trial court in its discretion.[1]

[2] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[2]

[3] An appellate court reviews criminal sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3]

ANALYSIS

Timeliness of Amendment to Information

Johnson first argues that the trial court abused its discretion in allowing the State to amend its information to add the habitual criminal charge. He asserts that prior to the hearing on August 15, 2013, he was unaware of the State's intention to amend the information. Without providing any further detail, he generally asserts that "[t]he unexpected change of the allegations forced [Johnson] to quickly adjust his defense strategy in a manner that prejudiced [Johnson's] ability to exercise his constitutional right to effectively defend himself."[4]

[4] A ruling on whether to allow a criminal information to be amended is made by the trial court in its discretion.[5] A judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.[6]

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[1] *State v. Clark*, 8 Neb. App. 936, 605 N.W.2d 145 (2000).

[2] *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014).

[3] *State v. Rieger*, 286 Neb. 788, 839 N.W.2d 282 (2013).

[4] Brief for appellant at 15.

[5] *State v. Clark, supra* note 1.

[6] *State v. Carlson*, 260 Neb. 815, 619 N.W.2d 832 (2000).

In *State v. Collins*[7] and *State v. Walker*,[8] we said that the defendant waived his objection with regard to the alleged untimeliness of the State's amendment of the information when the defendant failed to file a motion to quash. We explained that objections to the form or content of an information should be raised by a motion to quash.[9]

Johnson filed a motion to quash, but the alleged untimeliness of the amendment to the information was not one of the stated bases for the motion. Because Johnson did not raise in his motion to quash the alleged untimeliness of the State's amendment to the information, he waived that objection.

Furthermore, Johnson's bald assertion of prejudice fails to demonstrate that the trial court abused its discretion in allowing the amendment. In *State v. Cole*,[10] we held that the trial court did not abuse its discretion in allowing amendment of an information to add a habitual criminal charge on the day of trial. We explained that the habitual criminal charge was not heard until a week after the trial on the underlying charge had commenced. We said this was a reasonable time for the defendant to prepare his defense to the habitual criminal charge.[11]

Here, both the underlying trial and the hearing on the habitual criminal charge occurred more than 3 months after the State filed its amended information. And Johnson's counsel stated she was "fine with" continuing with the habitual criminal hearing on that date. Johnson, in fact, never moved for a continuance on the basis that he needed more time to prepare a defense to the habitual criminal charge. We will not conclude that Johnson was prejudiced by the timing of the amendment when he did not ask for a continuance, but, to the contrary,

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

[8] *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

[9] *State v. Collins, supra* note 7; *State v. Walker, supra* note 8.

[10] *State v. Cole*, 192 Neb. 466, 222 N.W.2d 560 (1974).

[11] *Id.*

indicated he was prepared to address the habitual criminal charge at the hearing on August 15, 2013.[12]

Right to Jury Trial

Next, Johnson argues that the habitual criminal statutes violate the right to a jury trial under the 6th Amendment and the Due Process Clause contained in the 14th Amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution. It is not entirely unclear whether this is an as-applied or facial challenge to the statutory scheme. Regardless, we find it has no merit.

In *State v. Hurbenca*,[13] we held that under the U.S. Supreme Court's holding in *Apprendi v. New Jersey*,[14] the determination of whether a defendant has prior convictions that may increase the penalty for a crime beyond the prescribed statutory maximum is not a determination that must be made by a jury. We noted that, as stated in *Apprendi*, the fact of a prior conviction is not a fact that relates to "'"the commission of the offense" itself . . . .'"[15] Therefore, such fact is a "narrow exception to the general rule that it is unconstitutional for a legislature to remove from a jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[16] We noted that the Court in *Apprendi* had said, "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . .'"[17]

Johnson asks us to reconsider our decision in *Hurbenca* in light of the subsequent decision by the U.S. Supreme

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[12] See, e.g., *State v. Collins, supra* note 7; *State v. Mills*, 199 Neb. 295, 258 N.W.2d 628 (1977).

[13] *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

[14] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[15] *State v. Hurbenca, supra* note 13, 266 Neb. at 858, 669 N.W.2d at 672.

[16] *Id.*

[17] *Id.* at 857-58, 669 N.W.2d at 672.

Court in *Blakely v. Washington*.[18] Johnson fails to explain how the *Blakely* decision changed the U.S. Supreme Court precedent that we relied upon in *Hurbenca*. Instead, in his brief, Johnson points only to the *Apprendi* proposition we applied in *Hurbenca*.

Regardless, Johnson's argument is based on a false dichotomy. Johnson attempts to parse the mere fact of a prior conviction from facts Johnson claims are necessary to prove that prior conviction for purposes of enhancement. Citing *State v. Johnson*,[19] Johnson characterizes such independent facts as (1) the nature of the prior convictions, (2) whether the prior convictions were based upon charges separately brought and tried, (3) whether the prior convictions arose out of separate and distinct criminal episodes, and (4) whether the defendant was the person named in each prior conviction.

[5] We have repeatedly held that under our habitual criminal statutes, there is no required showing by the State beyond "the question of determining whether a [valid] conviction [for purposes of § 29-2221] has or has not been had."[20] In other words, there are no factual findings that the trial court must make, in order to enhance a defendant's sentence under the habitual criminal statutes, that are not a part of proving the fact of a prior conviction.

The four facts listed by Johnson have never been set forth in our case law as a list of separate and necessary findings in a habitual criminal proceeding. But to the extent that Johnson correctly identifies factual elements of the State's burden in establishing two valid prior convictions for purposes of § 29-2221, those factual elements are not separate and apart from the fact of a prior conviction. Those facts are the means by which the State proves the fact of the prior convictions.[21]

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[18] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[19] *State v. Johnson*, 7 Neb. App. 723, 585 N.W.2d 486 (1998).

[20] *Danielson v. State*, 155 Neb. 890, 894, 54 N.W.2d 56, 58 (1952).

[21] See, *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983); *State v. Roan Eagle*, 182 Neb. 535, 156 N.W.2d 131 (1968); *Danielson v. State, supra* note 20. See, also, *State v. Johnson, supra* note 19.

We find no merit to Johnson's argument that such aspects of proving a valid prior conviction under the habitual criminal statutes must be determined by a jury.

Double Jeopardy

Johnson alternatively argues that the habitual criminal statutes as applied violated constitutional principles prohibiting double jeopardy.

Section 28-912(5)(a) provides that escape while detained following a conviction is a Class III felony, while § 28-912(4) provides that escape from detention under other circumstances specified in § 28-912(1) is a Class IV felony. Section 29-2221(1) states that "[w]hoever has been twice convicted of a crime, sentenced, and committed to prison, . . . for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal" and have his felony sentence enhanced accordingly. Johnson asserts that the "dual use"[22] of the same conviction to support escape under § 28-912(5)(a) and enhancement of his sentence under § 29-2221 is unconstitutional.

In support of his argument, Johnson relies on cases in which we have rejected habitual criminal enhancement of sentences imposed for third-offense driving while intoxicated or third-offense driving with a suspended license, where at least one of the two prior convictions supporting the habitual criminal charge was also the basis for the third-offense conviction and its accompanying enhanced sentence for that recidivist conduct.[23] He argues that these cases stand for the proposition that such dual use of the same prior conviction for purposes of enhancing a sentence is unconstitutional.

But the double jeopardy question Johnson raises is not before us on the facts presented. Without needing to decide, in accordance with *State v. Ellis*[24] and its progeny, the exact number of prior convictions proved by the State under

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[22] Brief for appellant at 21.

[23] See, *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999); *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980).

[24] *State v. Ellis, supra* note 21.

§ 29-2221, we reject Johnson's general assumption that all convictions under which the inmate is serving a sentence at the time of his or her escape must be considered as bases for enhancement under § 28-912(5) for purposes of a double jeopardy analysis. Johnson does not otherwise deny that there are at least three separate prior convictions proved by the State under § 29-2221, and we see no legal basis for him to have done so. Accordingly, we conclude that the same conviction did not constitute the basis for both the Class III felony escape enhancement and enhancement under the habitual criminal statutes.

We do not decide whether, under different facts, it would be unconstitutional or otherwise erroneous to utilize the same prior conviction both under a statutory enhancement that is not based on recidivism and under the habitual criminal statutes. In this case, because the State proved at least two prior convictions that were not necessary to support the conviction of escape under § 28-912(5), there is no "dual use" of the same prior conviction.

Excessive and Disproportionate Sentencing and Cruel and Unusual Punishment

Finally, Johnson argues that application of the habitual criminal charges resulted in a penalty disproportionate to the nature of the offense, in violation of article I, § 15, of the Nebraska Constitution; that his sentence was excessive; and that his punishment was cruel and unusual in violation of the Eighth Amendment to the U.S. Constitution.

In *Ewing v. California*,[25] the U.S. Supreme Court rejected the argument that a habitual criminal statute resulted in cruel and unusual punishment. The Court explained:

> [T]he State's interest is not merely punishing the offense of conviction, or the "triggering" offense: "[I]t is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that

[25] *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003).

> they are simply incapable of conforming to the norms of society as established by its criminal law."[26]

The enhanced sentence, the Court reasoned, "is justified by the State's public-safety interest in incapacitating and deterring recidivist felons."[27] In *State v. Chapman*,[28] we similarly rejected the general contention that the habitual criminal statutes impose penalties in disproportion to the nature of the offense.

The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all of the facts and circumstances surrounding a defendant's life.[29] An appellate court reviews criminal sentences for abuse of discretion, which 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.[30]

Johnson points out that his escape did not involve the use or threat of force, nor any "dangerous instrumentality to effectuate the escape."[31] He also claims, without explanation, that the court abused its discretion in considering violations other than the relevant escape conviction for which Johnson was being sentenced. Finally, he argues that the current sentence ignores certain unspecified "rehabilitative needs."[32]

Although Johnson's escape was not violent, we find the application of the habitual criminal enhancement and the resulting sentence of 10 to 20 years' imprisonment to be neither excessive, disproportionate, nor cruel and unusual. The punishment was appropriate given Johnson's extensive criminal record. We note that in addition to the felonies evidenced in support of the

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[26] *Id.* at 29 (quoting *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)).

[27] *Id.*

[28] *State v. Chapman, supra* note 23.

[29] *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009).

[30] *State v. Rieger, supra* note 3.

[31] Brief for appellant at 27.

[32] *Id.* at 30.

habitual criminal charge, the presentence investigation report reveals more than two dozen misdemeanors. We also find it pertinent that this is not his first conviction for escape.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
RICHARD K. COOK, APPELLANT.
860 N.W.2d 408

Filed March 20, 2015. No. S-13-271.

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. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
3. **Postconviction: Constitutional Law: Judgments: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a court denies relief without an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.
5. **Trial: Due Process: Police Officers and Sheriffs: Witnesses.** A due process violation occurs when a law enforcement officer who participated in the investigation or preparation of the prosecution's case fabricates evidence or gives false testimony against the defendant at trial on an issue material to guilt or innocence.
6. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
7. **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.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Jerry L. Soucie for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

HEAVICAN, C.J.

NATURE OF CASE

Richard K. Cook was convicted of first degree murder and use of a firearm to commit a felony. Cook's conviction was affirmed. Cook now seeks postconviction relief. He appeals the district court's rejection of 28 of his 35 claims for postconviction relief. We conclude that the district court did not err when it denied an evidentiary hearing on the grounds that investigators fabricated evidence used at Cook's trial and that he received ineffective assistance of counsel from his appellate counsel's failure to raise certain issues related to his trial counsel's performance on direct appeal.

BACKGROUND

This case is an interlocutory appeal from the district court's order denying some of Cook's claims for postconviction relief of his convictions for first degree murder and use of a weapon to commit a felony. A full recitation of the facts can be found in *State v. Cook*.[1] Below is a summary of the relevant facts related to this appeal.

Amy Stahlecker's Death.

On April 29, 2000, Amy Stahlecker's body was found on the banks of the Elkhorn River near the intersection of Highway 275 and West Maple Road in Douglas County, Nebraska. Witnesses last saw Stahlecker alive around 1 a.m. on April 29, when she left Omaha to drive back to Fremont, Nebraska. The

[1] *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

white Ford Explorer Stahlecker was driving was found with a blown tire on the side of Highway 275.

Stahlecker's body was found underneath a bridge that was a part of West Maple Road. Stahlecker had been shot multiple times, including once to the back of the head and twice to the face. An autopsy revealed multiple contusions and abrasions on Stahlecker's body. The autopsy also found semen in the vaginal area, but no specific evidence of sexual assault. DNA testing of the semen revealed that it was consistent with Cook's DNA.

On May 2, 2000, Michael Hornbacher, a friend of Cook, contacted a Washington County deputy sheriff and told him that Cook had confessed to Hornbacher that Cook killed Stahlecker. Hornbacher also later gave statements to Nebraska State Patrol investigators. Hornbacher and Cook gave conflicting accounts as to what happened the night Stahlecker was killed and what happened the following day.

Hornbacher's Version.

Hornbacher testified at trial that Cook and Hornbacher were at a bar the night of Stahlecker's death. Hornbacher saw Cook leave in Cook's truck, and Hornbacher later got a ride home from three people he had met at the bar. Hornbacher's girlfriend, with whom he shared an apartment, testified that she waited up for Hornbacher and that he arrived home at 12:50 a.m. After Hornbacher arrived back at his apartment, he passed out in his bed and did not wake up until 11 or 11:30 a.m.

Believing he left personal items in Cook's truck, Hornbacher called Cook about picking up the items. Cook did not want Hornbacher to come to Cook's residence, so they arranged for Cook to pick up Hornbacher in front of Hornbacher's residence. After Hornbacher got in the truck, Cook said that he was concerned about something that might affect his family.

Cook then drove to a park and confessed to killing a woman the night before. Hornbacher testified that Cook told him that after Cook left the bar, Cook drove west on Highway 275 toward Fremont, where he saw a woman on the side of the road with a flat tire on her vehicle. Cook stated that he

picked the woman up and that they had sexual intercourse in the front seat of the truck. After the intercourse, Cook said the woman had "'weirded out'" and Cook feared the woman may claim that he raped her.[2] According to Hornbacher, Cook said he "ordered the woman to get out of the truck, and then he 'lost it' and grabbed his 9-mm handgun from the truck's console and 'unloaded' it on the woman."[3] Cook told Hornbacher that that he dumped the body in a ravine.

Cook's Version.

Cook testified at his own trial and presented a different version of events the night of Stahlecker's death. According to Cook, shortly after leaving the bar, Cook and Hornbacher decided to drive to a bar in Fremont that featured female strippers. While driving along Highway 275, Cook testified that they encountered Stahlecker and her vehicle on the side of the highway. Cook decided he would stop to help change the tire. Cook attempted to change the tire, but was unable to do so. Cook testified that he could not call for help because his cell phone was not working and they could not find Hornbacher's cell phone. Cook decided that they should find an open service station to get help. After finding no open service station, Stahlecker suggested they return to the Explorer. They were unable to find the vehicle and decided to pull over into an off-road area on West Maple Road and "'chill out.'"[4]

Cook testified that Hornbacher was either passed out or sleeping in the back seat of Cook's truck at this time. According to Cook, he and Stahlecker then had consensual sexual intercourse in the front passenger seat. After Cook and Stahlecker finished and began dressing, Hornbacher spoke up from the back seat. Cook stated that neither he nor Stahlecker were aware Hornbacher was awake in the back seat. Cook testified that Hornbacher forcefully demanded that Stahlecker perform oral sex on him and that she refused. An argument ensued, and Hornbacher reached to grab Stahlecker's shoulder. According

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[2] *Id.* at 471, 667 N.W.2d at 209.

[3] *Id.*

[4] *Id.* at 472, 667 N.W.2d at 209.

to Cook, it was at this time that Stahlecker exited the truck and began to walk away. Cook then got out of the truck to give Stahlecker her keys or offer her a ride.

Cook testified that he heard two gunshots and then saw Hornbacher leaning out of the driver's-side window with Cook's gun in his hand. Hornbacher exited the vehicle and approached Stahlecker, and then Cook saw Hornbacher shoot Stahlecker in the back of the head. After Stahlecker collapsed, Hornbacher then shot Stahlecker in the face two times. Cook testified that he ran to Stahlecker's body to check for a pulse. Cook stated that he was forced at gunpoint by Hornbacher to help drag the body across the road and dump it off the bridge. Cook also testified that Hornbacher threatened to kill him if Cook said anything about the murder.

Investigation and Forensic Evidence.

At the scene of the crime, investigators found a blood smear on the bridge, with a trail of blood drops leading from the bridge, across the median, and to the eastbound lane of West Maple Road. DNA tests determined that the blood was consistent with Stahlecker's DNA. Investigators also made castings of a shoeprint located on the bridge and another shoeprint left in a pool of blood.

After Hornbacher's statements to law enforcement, investigators from the Nebraska State Patrol went to Cook's place of employment in Council Bluffs, Iowa, and told Cook that they needed to speak with him at their Omaha office. The Nebraska State Patrol transported Cook's truck to the Omaha office, then returned it to Council Bluffs and, after obtaining a search warrant, brought the truck back to the Nebraska State Patrol headquarters in Omaha. Investigators discovered traces of blood and fibers from Stahlecker's clothes on the inside of Cook's truck. DNA tests revealed that Stahlecker could not be excluded as the contributor of the blood. Investigators also determined that a bloody shoeprint found on the exterior door panel of Cook's truck matched the shoeprints found at the scene of the crime.

David Kofoed, the chief crime scene investigator for Douglas County at the time, assisted with the collection of

evidence in this case. In 2009, it was discovered that Kofoed had fabricated and planted evidence in at least two different murder investigations. In both cases, it was determined that Kofoed planted evidence to corroborate confessions made to police.[5]

In this case, Kofoed specifically assisted the Nebraska State Patrol by taking castings of the shoeprints found at the scene of Stahlecker's death. In addition, Kofoed, along with three other Douglas County crime scene investigators, initially processed the evidence from Cook's truck; Kofoed and another investigator were responsible for physically collecting evidence from the truck, while the other investigators were responsible for note-taking and documenting and photographing the evidence.

Trial and Direct Appeal.

On April 26, 2001, the jury found Cook guilty of first degree murder and use of a firearm to commit a felony. On July 20, the court sentenced Cook to life imprisonment on the first degree murder conviction and 49½ to 50 years' imprisonment on the weapons conviction.

Cook appealed his convictions. Cook alleged seven claims of trial court error and seven different claims of ineffective assistance of counsel by Cook's trial attorney. In case No. S-12-681, this court rejected all of Cook's claims of trial court error, determining that there was an insufficient record to decide each of Cook's ineffective assistance of counsel claims, and dismissed the appeal on September 13, 2012.

Cook filed his initial pro se motion to vacate his convictions on July 2, 2004. On April 11, 2005, Cook filed an amended pro se motion for postconviction relief. On September 4, 2009, Cook filed a second, and final, amended motion for postconviction relief. The majority of the second amended motion was drafted by Cook, despite Cook's having been appointed a lawyer. Cook raised four of the same claims of ineffective

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[5] *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012). See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

assistance of counsel as he did on direct appeal, and 31 new claims for postconviction relief.

On June 27, 2012, the district court entered an order addressing all of Cook's claims. The district court granted a hearing on Cook's four claims of ineffective assistance of counsel that were raised on direct appeal, along with three new claims. The remaining claims were rejected by the district court on the grounds that the claims either clearly had no merit or did not allege facts with sufficient specificity regarding prejudice. Two of the rejected claims involve allegations that Kofoed fabricated evidence, and the rest of the claims allege that Cook received ineffective assistance of counsel due to his appellate counsel's failure to make certain arguments on appeal.

ASSIGNMENTS OF ERROR

Cook assigns that the district court erred in (1) denying an evidentiary hearing and dismissing the motion for postconviction relief on the ground that Kofoed or other investigators planted evidence used at Cook's trial, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution, and (2) denying an evidentiary hearing and dismissing the motion for postconviction relief on the grounds relating to the "layered" allegation of ineffectiveness of appellate counsel for failure to raise and argue issues on direct appeal involving conflict of interest, specific instances of ineffective assistance of trial counsel, and incorrect jury instructions, in violation of the 5th, 6th, and 14th Amendments to the U.S. Constitution.

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.[6]

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[6] *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013).

ANALYSIS

[2,3] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.[7] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.[8]

[4] Cook assigns that the district court erred in denying an evidentiary hearing and dismissing his motion for postconviction relief on the grounds that an investigator fabricated evidence and that his counsel on direct appeal was ineffective for failing to raise certain issues on direct appeal. When a court denies relief without an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.[9]

Fabricated Evidence Claims.

[5] Cook seeks an evidentiary hearing to prove that Kofoed fabricated DNA evidence found in Cook's truck. If Kofoed did indeed fabricate evidence, that would constitute a violation of Cook's right to due process. A due process violation occurs when a law enforcement officer who participated in the investigation or preparation of the prosecution's case fabricates evidence or gives false testimony against the defendant at trial on an issue material to guilt or innocence.[10]

In his motion for postconviction relief, Cook makes allegations that Kofoed or unnamed Nebraska State Patrol investigators either cross-contaminated evidence from the crime

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[7] *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

[8] *State v. Branch*, 286 Neb. 83, 834 N.W.2d 604 (2013).

[9] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[10] *Edwards, supra* note 5.

scene into the truck or actually planted evidence in the truck. Cook alleges that blood traces, later determined to match Stahlecker's DNA, and a fiber from Stahlecker's underwear were somehow placed in Cook's truck by the investigators. He also alleges in his motion, without any factual support, that Kofoed purchased a pair of shoes to create a bloody footprint in the truck that matched a footprint found at the scene of the crime.

[6] An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.[11] We agree with the district court that the claim of fabricated evidence is "only an allegation involving a conclusion without any supporting facts." As the district court also noted, all of the evidence found inside Cook's truck is easily explainable by Cook's own version of the events. Cook admitted that Stahlecker was inside his truck shortly before her death and that he had sexual intercourse with Stahlecker. This would explain the fiber from Stahlecker's underwear that was found in the truck. Cook also testified that he checked Stahlecker's pulse after she was shot and that he was forced to help move Stahlecker's body across the road and dump it over the bridge. This places Cook near the body and would explain the bloody footprint found on the outside of the truck, along with the traces of blood in the truck's interior.

In *State v. Edwards*,[12] a case involving a Kofoed investigation, we stated that the allegations "would be too conclusory if [the defendant] had simply alleged in a vacuum that a law enforcement officer fabricated evidence to be used against him at trial without any factual allegations upon which to base such a claim." But we determined in that case that the defendant's claims warranted an evidentiary hearing when the allegations made by the defendant were similar to Kofoed's unlawful conduct in two prior investigations:

> [The defendant] alleged that as in the 2006 investigation of the . . . murders, Kofoed found blood in an obscure part of [the defendant's] car after other [crime scene]

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[11] *Branch, supra* note 8.

[12] *Edwards, supra* note 5, 284 Neb. at 404, 821 N.W.2d at 700.

> investigators had examined the car and failed to find this evidence. The facts alleged in [the defendant's] petition also appear similar to the 2003 investigation in that Kofoed allegedly submitted swabs of evidence for DNA testing instead of submitting the evidence itself. And the allegations suggest that Kofoed may have held physical evidence for several days before having another investigator test it, a pattern that is similar to his conduct during the 2006 investigation in which he fabricated evidence.[13]

In this case, Kofoed and his team discovered all of the evidence during the initial search of the truck. The blood was found on the floormat of Cook's truck and also on the inside and outside door panels of the driver's-side door, all areas of the truck which could not be classified as "obscure." Additionally, Kofoed had no involvement with the investigation after he and his team completed the initial search of the vehicle. Simply alleging Kofoed's involvement in the investigation and his history of fabricating evidence is not sufficient on its own to support a claim for postconviction relief. Without more, there is no basis to conclude, based on the record in this case, that Kofoed or any other investigator placed this evidence in Cook's truck, through either cross-contamination or fabrication. The district court did not err in dismissing these claims. Cook's assignment of error is without merit.

Layered Ineffective Assistance of Counsel Claims.

Cook assigns that the district court erred in failing to grant an evidentiary hearing for several of Cook's layered ineffective assistance of counsel claims. This appeal is limited solely to the question of whether Cook failed to allege sufficient facts to demonstrate a violation of his constitutional rights or whether the record affirmatively shows that he is entitled to no relief.[14]

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[13] *Id*.

[14] See *Baker, supra* note 6.

[7] Although Cook makes several conclusory arguments in his statement of facts regarding the sufficiency of his allegations, he gives no explanation in the argument section of his brief for how the district court actually erred in rejecting his layered claims or how the claims were factually sufficient. Instead, Cook argues that this court should overturn the rule that precludes review of issues which were raised on direct appeal or were known to the defendant and could have been litigated on direct appeal.[15] 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.[16] Because Cook failed to argue how the district court erred in rejecting his layered ineffective assistance of counsel claims for postconviction relief, we will not consider his assignment of error. Conversely, the argument Cook actually makes in his brief was not specifically assigned as an error on appeal, nor was it raised before the district court. We therefore decline to address it.

CONCLUSION

We conclude that the district court did not err in denying Cook's request for a hearing for 28 of his 35 grounds for postconviction relief. We affirm the district court's order.

AFFIRMED.

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[15] See, e.g., *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

[16] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

In re Estate of Edward J. Stuchlik, Jr., deceased, and In re Trust Created by Edward J. Stuchlik, Jr., deceased. John E. Stuchlik, appellant, v. Margaret Stuchlik, Personal Representative and Cotrustee, and Kenneth Stuchlik, Cotrustee, appellees.

861 N.W.2d 682

Filed March 20, 2015. No. S-13-1118.

SUPPLEMENTAL OPINION

Appeal from the County Court for Saunders County: Patrick R. McDermott, Judge. Supplemental opinion: Former opinion modified. Motions for rehearing overruled.

Paul R. Elofson, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellant.

Richard L. Rice and Andrew C. Pease, of Crosby Guenzel, L.L.P., for appellees.

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

Per Curiam.

Case No. S-13-1118 is before this court on the motions for rehearing filed by the appellant and the appellees regarding our opinion in *In re Estate of Stuchlik*.[1] We overrule the motions, but we modify the opinion as follows:

In the section of the opinion titled "II. BACKGROUND," under the subheading "4. Activities of Cotrustees," we withdraw the first and second paragraphs[2] and substitute the following:

> After Stuchlik's death, Margaret, as the surviving joint tenant, conveyed her interest in the residence she shared with Stuchlik—which was property different from the "home place"—to Edward, Voboril, and Kenneth as tenants in common, subject to a life estate granted to

[1] *In re Estate of Stuchlik*, 289 Neb. 673, 857 N.W.2d 57 (2014).

[2] *Id.* at 678-79, 857 N.W.2d at 64.

> Margaret. As the warranty deed states, "[Margaret], a single person, Grantor, in consideration of One Dollar ($1.00) and other good and valuable consideration, conveys to Grantees, [Edward, Voboril, and Kenneth], as tenants-in-common, an undivided one-half interest in and to the following described real estate . . . ." The warranty deed then purports to convey the residence from Margaret to Edward, Voboril, and Kenneth.
>
> In January 2013, Margaret, Kenneth, and Edward entered the home place premises without the consent of John. They were accompanied by a county sheriff's deputy who testified that he did so "through a civil standby that [he] was requested to do sometime at the beginning of this year." The county sheriff's deputy testified that he was directed by the sheriff to accompany Margaret and her two children "to make sure that there's no sort of altercation between the two parties." Margaret, Kenneth, and Edward entered the residence and changed the locks. Since the retaking of the home place, Margaret, Kenneth, and Edward have indicated to John that they intend to demolish the residence. John alleges that Margaret's and Kenneth's treatment of his personal property in the residence constituted a conversion.

In the section of the opinion designated "V. ANALYSIS," under the subheadings "2. REMOVAL AS COTRUSTEES," "(a) Contract for Wills or Oral Trust," and "*(i) Contract for Wills*," we withdraw the first paragraph[3] and substitute the following:

> The county court did not err in finding that even if there was enough evidence to support a contract for wills, such a contract was not relevant to this action. John argues that Margaret had entered into a contract for wills with Stuchlik before his death and that the two had contracted to equally divide the trust between their three sons. However, as the county court recognized, the proper case for a breach of a contract for wills is not a probate action against the decedent's estate, but, rather, is

[3] *Id.* at 684, 857 N.W.2d at 67.

> an action for breach of contract or an action against the breaching party's estate. Therefore, a contract for wills is wholly irrelevant to this action to remove cotrustees.

Under those same subheadings, we withdraw the third paragraph[4] and substitute the following:

> The county court found that the evidence of a letter from Margaret and Stuchlik directing Bromm on the division of the estate was merely the evidence of an intent to have mutual wills, and not an agreement to will. The court found that the language in the will did not raise a presumption of a contract for wills. However, the court did not need to make either determination.

In the section of the opinion designated "V. ANALYSIS," under the subheadings "2. REMOVAL AS COTRUSTEES," "(a) Contract for Wills or Oral Trust," and "*(ii) Oral Trust*," we withdraw the second and third paragraphs[5] and substitute the following:

> The county court found that there was no evidence of such oral trust. Given our standard of review in these proceedings, we must give weight to the court's evidentiary findings. We do not reweigh evidence, but consider evidence in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party.[13]
>
> Because we find that the county court did not err in finding that an existence of a contract for wills or an oral trust would be irrelevant to the removal of a trustee, we find no merit to John's arguments that the court erred in not allowing discovery on the matter, erred in granting attorney-client privilege, or erred in failing to review Bromm's testimony in camera for relevancy.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTIONS FOR REHEARING OVERRULED.

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[4] *Id.*

[5] *Id.* at 685-86, 857 N.W.2d at 68.

JAN J. GOLNICK, APPELLANT, V. JACK W. CALLENDER, APPELLEE.

860 N.W.2d 180

Filed March 20, 2015. No. S-14-032.

1. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
2. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
3. **Pleadings.** A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
4. **Negligence: Evidence.** A defendant's tortious conduct is a question of fact that a defendant can judicially admit.
5. **Negligence: Motor Vehicles: Evidence: Proximate Cause.** When a defendant in a vehicle accident case admits to negligently causing the accident but denies the nature and extent of the plaintiff's injuries, evidence of the collision itself is admissible. In that circumstance, proximate causation is at issue and the evidence is relevant to show the nature of the contact and its force.
6. **Pleadings: Evidence.** A court's discretion to admit or exclude cumulative evidence on an admitted fact also applies to a court's decision to allow a pleading amendment that results in the production of that evidence.
7. **Rules of the Supreme Court: Pleadings.** In exercising its discretion to permit or deny an amendment regarding an admitted fact, a court should consider the prevailing factors under Neb. Ct. R. Pldg. § 6-1115(a). It should also consider whether the new allegations are relevant to a component of a party's claim or defense that the nonmoving party has not admitted.
8. **Negligence: Damages.** Nebraska law does not permit a plaintiff to obtain punitive damages over and above full compensation for the plaintiff's injuries.
9. **Negligence: Evidence.** In a negligence case, evidence intended to punish a defendant's conduct or deter similar conduct is not at issue.
10. **Trial: Evidence: Juries: Final Orders.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury, but the court's ruling on the motion is not a final order.
11. **Trial: Evidence: Appeal and Error.** To preserve error regarding a court's order in limine, a party resisting the order must make an appropriate objection or offer of proof at trial.
12. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.

13. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
14. **Negligence: Jury Instructions: Damages.** In a negligence case, a court should instruct a jury on damages for the aggravation of a preexisting condition if the evidence would support that finding.
15. **Juries: Verdicts: Presumptions.** When the jury returns a general verdict for one party, an appellate court presumes that the jury found for the successful party on all issues raised by that party and presented to the jury.
16. **Damages: Words and Phrases.** In Nebraska, hedonic damages—which are damages to compensate a plaintiff for the loss of enjoyment of life resulting from his or her physical injuries—are subsumed within a plaintiff's damages for pain and suffering. They are not a separate category of damages.
17. **Jury Instructions: Appeal and Error.** A court does not err in failing to give an instruction if the substance of the proposed instruction is contained in those instructions actually given.
18. **Jurors.** There is no public right of access to the jurors' deliberations themselves.
19. **Constitutional Law: Jurors: Rules of Evidence.** Because there is no constitutional right to obtain information about a jury's deliberations, a court's discretion under Neb. Rev. Stat. § 25-1635 (Reissue 2008) to disclose juror information for good cause shown after a verdict should be tempered by the restrictions imposed under Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2008).
20. **Rules of Evidence: Judgments: Jury Misconduct.** Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2008), promotes the public interests of protecting jurors' freedom of deliberation and the finality of judgments, absent a plausible allegation of juror misconduct.
21. **Jury Misconduct: Evidence.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred.
22. **Rules of Evidence: Verdicts: Jurors: Affidavits.** Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2008), prohibits admission of a juror's affidavit to impeach a verdict on the basis of the jury's motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.
23. **Jurors: Verdicts.** Absent a reasonable ground for investigating, posttrial interviews with jurors cannot be used as a fishing expedition to find some reason to attack a verdict.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Matthew A. Lathrop, of Law Office of Matthew A. Lathrop, P.C., L.L.O., for appellant.

Joseph E. Jones and Alexander D. Boyd, of Fraser Stryker, P.C., L.L.O., for appellee.

James E. Harris, of Harris Kuhn Law Firm, L.L.P., for amicus curiae Nebraska Association of Trial Attorneys.

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

CONNOLLY, J.

I. SUMMARY

Jan J. Golnick appeals from the district court's judgment in his negligence action against Jack W. Callender. Callender amended his answer to admit that he was negligent in causing the vehicle accident that injured Golnick. Thereafter, the court sustained Callender's motion to preclude evidence of his negligence at trial. The court also denied Golnick's request to amend his complaint to allege specific acts of tortious conduct and rejected three of his proposed jury instructions. The jury returned a verdict for Callender. Finding no reversible error, we affirm.

II. BACKGROUND

In October 2009, Golnick filed a complaint alleging that in October 2005, he and Callender were driving on the same street in opposite directions when Callender's vehicle crossed the centerline and crashed head on into Golnick's vehicle. He alleged that he sustained injuries as a "direct and proximate result of the crash."

In Callender's original answer, he denied that the accident occurred as Golnick alleged. In 2013, Callender sought leave to file an amended answer. He still denied that the accident occurred as Golnick alleged, but he admitted that "he was negligent and that his negligence was the proximate cause of the accident." He denied the nature and extent of Golnick's injuries and all other allegations.

Golnick objected to the amendment and moved to file an amended complaint, which would have alleged that when Callender crossed the centerline, he was distracted by his cell phone. At the hearing on the parties' proposed amendments,

Golnick offered a police report to show that (1) an issue of fact existed regarding Callender's denial that the accident happened as Golnick alleged and (2) Callender had not admitted to the relevant facts regarding the alleged negligence. The court received the police report for deciding whether to allow the pleading amendments.

At the hearing, the court stated that Golnick wanted to "put in evidence to make [Callender] more liable than just the admitting of negligence. You want to make him derelict." The court concluded that the issue was whether Callender had "proper control of his car, not whether he was on his cell phone." The court overruled Golnick's objections to Callender's amended answer and overruled Golnick's request to amend his complaint.

Callender then moved for an order in limine to prohibit Golnick from presenting any evidence about Callender's negligence. As relevant here, Callender sought to exclude (1) evidence that he was distracted by his cell phone and (2) evidence that he was cited, charged, or convicted of a traffic violation because of the accident. Callender also sought to admit evidence of Golnick's pleadings in a pending negligence case about a 2007 vehicle accident involving Golnick. In both cases, Callender alleged that the accident caused Golnick to have permanent injuries to his neck, head, shoulder, and back. The court's rulings on these motions are not part of the record.

At the start of the trial, the court briefly explained to the jurors that while Golnick and Callender were traveling on the same street, Callender's vehicle crossed the centerline and struck Golnick's vehicle. The court also explained that because Callender admitted that his negligence caused the collision, they would not have to decide the cause of the collision.

In Golnick's opening statement, his attorney told the jurors that Callender had veered into oncoming traffic and hit Golnick's vehicle head on when Callender saw that the traffic in front of him had stopped. His attorney said that Golnick's preexisting eye problems and preexisting back problems did not account for the eye problems and back problems that Golnick began to experience within a month

after the accident. He also stated that Golnick's problems were not caused by a severe 2007 accident in which Golnick was struck from behind. He admitted that Golnick's problems were permanently worsened by the 2007 accident. But he stated that Golnick had already sustained permanent injuries before 2007 and that his pain had never gone away. In Callender's opening statement, his attorney listed evidence that would show the 2005 accident did not cause Golnick's physical problems.

At trial, the evidence showed that Golnick was age 71 and had some preexisting health problems before the 2005 accident. The court admitted a photograph of his vehicle that showed minor damage to the front bumper and grill. Golnick did not attempt to submit evidence on Callender's distraction by his cell phone or make an offer of proof on that fact. The court admitted the pleadings in the 2007 action.

At the jury instruction conference, the court rejected Golnick's proposed jury instructions Nos. 2, 3, and 4. The jury returned a unanimous verdict for Callender. After entering judgment for Callender, the court denied Golnick's request to obtain the name, address, and telephone number for each juror.

III. ASSIGNMENTS OF ERROR

Golnick assigns that the court erred as follows:

(1) not allowing Golnick to amend his complaint to allege specific acts of negligence;

(2) overruling Golnick's objection to Callender's motion to amend his answer;

(3) permitting Callender to deny that the collision occurred in the manner Golnick alleged while admitting that his negligence caused the collision;

(4) sustaining Callender's motion in limine to prohibit Golnick from telling jurors that Callender had admitted to specific acts of negligence, including using a cell phone;

(5) rejecting Golnick's requested jury instruction No. 4 on the "Statement of the Case";

(6) rejecting Golnick's requested jury instruction No. 3 on aggravation of a preexisting condition;

(7) rejecting Golnick's requested jury instruction No. 2 on damages; and

(8) denying Golnick's posttrial request for juror information.

IV. STANDARD OF REVIEW

[1,2] Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.[1] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[2]

V. ANALYSIS

1. Court Did Not Abuse Its Discretion in Granting Callender Leave to Amend His Answer

Golnick contends that the court erred in permitting Callender to amend his answer to admit that he was negligent while he was still denying that the accident occurred as Golnick alleged. He argues that parties can only admit facts within their knowledge, not legal conclusions. Callender counters that negligence and proximate cause are questions of fact and that we have previously allowed defendants to admit negligence and causing an accident without admitting to causing the plaintiff's injuries.

[3] Under Neb. Ct. R. Pldg. § 6-1115(a), leave to amend "shall be freely given when justice so requires." A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[3] Golnick argues that the court's ruling precluded him from producing relevant evidence on Callender's

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[1] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

[2] *Credit Bureau Servs. v. Experian Info. Solutions*, 285 Neb. 526, 828 N.W.2d 147 (2013).

[3] *InterCall, Inc., supra* note 1.

negligence. We disagree that Callender's amendment prejudiced Golnick.

[4,5] Callender correctly argues that a defendant's tortious conduct is a question of fact[4] that a defendant can judicially admit.[5] A defendant can admit to negligently causing an accident without admitting to causing the plaintiff's injuries.[6] But when a defendant in a vehicle accident case admits to negligently causing the accident but denies the nature and extent of the plaintiff's injuries, evidence of the collision itself is admissible. In *Springer v. Smith*,[7] we explained that proximate causation is at issue in that circumstance and that the evidence is "relevant to show the nature of the contact and its force." As the Restatement (Third) of Torts[8] explains, determining whether an act is a factual cause of an outcome requires the fact finder to make an inference based on personal experience and some understanding of the causal mechanism. And we have previously recognized that proving tortious conduct is crucial to a causal inquiry.[9] So, to the extent that a defendant's tortious conduct is relevant to proving *how* the conduct caused the plaintiff's injuries, the production of such evidence is unaffected by an admission, standing alone, that the defendant negligently caused a vehicle accident.

Accordingly, Callender's admission did not preclude Golnick from producing evidence relevant to proving the nature and force of the accident (the causal mechanism) resulting in Golnick's injuries. Nor did the court's order in

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[4] See *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012).

[5] See, e.g., *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

[6] See *Cooper v. Hastert*, 175 Neb. 836, 124 N.W.2d 387 (1963).

[7] See *Springer v. Smith*, 182 Neb. 107, 110, 153 N.W.2d 300, 302 (1967).

[8] See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 28, comment *b*. (2010).

[9] See *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014), citing Restatement, *supra* note 8, § 26, comment *h*.

limine preclude this evidence. Because Golnick was free to present this evidence, Callender's admission that he negligently caused the accident was a conclusive fact that Golnick could use to his advantage.[10] We conclude that the court's granting Callender leave to amend his answer did not unfairly prejudice Golnick. We recognize that Golnick's argument on this issue is intertwined with his contention that the court should have permitted him to amend his complaint. But that argument does not change our conclusion.

2. Court Did Not Abuse Its Discretion in Denying Golnick's Request to Amend His Complaint

Before trial, Golnick also moved to amend his complaint to include specific acts of Callender's negligence—most significantly, Callender's distraction by his cell phone—that caused the accident. Golnick contends that the court erred in denying his request to amend. He argues that Callender would not have been unfairly prejudiced by requiring him to admit to more specific negligent conduct. The amicus curiae, the Nebraska Association of Trial Attorneys, argues that the court's ruling deprived the jury of hearing the full factual basis for determining that Callender's negligence caused Golnick's injuries. The association also contends that courts should not permit parties to stipulate or admit their way out of the presentation of unfavorable evidence. Callender argues that because he admitted to negligently causing the accident, the only remaining issue for trial was the nature and extent of Golnick's injuries, and that additional allegations of negligence were irrelevant to damages.

As explained, Callender did not admit to causing Golnick's injuries, so Callender incorrectly argues that the only issue for trial was damages. But here, allowing the amendment would have permitted Golnick to prove Callender's specific acts of negligence. And because Callender admitted to

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[10] See, e.g., *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

negligently causing the accident, the decision whether to admit or exclude Golnick's evidence would have been a matter of judicial discretion:

> A fact that is judicially admitted *needs* no evidence from the party benefiting by the admission. But his evidence, if he chooses to offer it, *may* even be *excluded*; first, because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy . . . ; next, because it may be superfluous and merely cumber the trial . . . ; and furthermore, because the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate) is not a thing which the party can be said to be always entitled to.
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> Nevertheless, a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate *moral force of his evidence*; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases), so as to be technically but not practically a waiver of proof. Hence, there should be no absolute rule on the subject; and the trial court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances.[11]

[6,7] We conclude that the same discretion to admit or exclude cumulative evidence on an admitted fact also applies to a court's decision to allow a pleading amendment that results in the production of that evidence. As stated, the considerations under our pleading rules are undue delay, bad faith, unfair prejudice, and futility of the amendment.[12] So if the court determines that it will not permit the party to produce a piece of evidence, then the party's amendment of the

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[11] 9 John Henry Wigmore, Evidence in Trials at Common Law § 2591 at 824 (James H. Chadbourn rev. ed. 1981) (emphasis in original).

[12] See § 6-1115(a).

pleading to allege this fact would be futile.[13] In exercising its discretion to permit or deny an amendment regarding an admitted fact, a court should consider the prevailing factors under § 6-1115(a). It should also consider whether the new allegations are relevant to a component of a party's claim or defense that the nonmoving party has not admitted.

Here, because Callender had admitted to negligently causing the collision, Golnick's proposed allegations regarding Callender's distraction by his cell phone and other negligent acts were needless proof on the issue of tortious conduct. No other tort-feasor contributed to the accident, and Callender did not allege contributory negligence. So allocation of fault was not at issue. Nor did the court's order denying the amendment preclude Golnick from presenting evidence to show how Callender's conduct caused Golnick's injuries.

[8,9] Moreover, Nebraska law does not permit a plaintiff to obtain punitive damages over and above full compensation for the plaintiff's injuries.[14] This means that in a negligence case, evidence intended to punish a defendant's conduct or deter similar conduct is not at issue. We have previously upheld a district court's mistrial order because the plaintiff suggested that the defendant's intoxication was the reason that he negligently caused a vehicle accident when the defendant had admitted to negligently causing the accident and the court had precluded the intoxication evidence.[15]

Finally, we reject the Nebraska Association of Trial Attorneys' argument that the U.S. Supreme Court's decision in *Old Chief v. United States*[16] applies to this civil case. There,

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[13] See, *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420 (7th Cir. 1993); *Harris v. Equilon Enterprises, LLC*, 107 F. Supp. 2d 921 (S.D. Ohio 2000); *Hartnett v. Globe Firefighter Suits, Inc.*, No. 97-2156, 1998 WL 390741 (4th Cir. June 29, 1998) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 155 F.3d 559 (4th Cir. 1998)).

[14] See, e.g., *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d 566 (1989); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960).

[15] See *Huber, supra* note 5.

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

the Court held that a district court abuses its discretion under Fed. R. Evid. 403 if it spurns a defendant's offer to concede a prior judgment and instead admits the full judgment over the defendant's objection. The Court reasoned that the evidence was unnecessary to prove a defendant's felon status at the time he illegally possessed a gun. There, the jury's knowledge of the name or nature of the prior offense raised the risk that a guilty verdict would be tainted by improper considerations and the evidentiary alternative did not interfere with the government's presentation of its case. But the Court extensively discussed the importance of normally allowing prosecutors to present coherent narrative evidence in criminal cases. It explained that interruptions for abstract admissions could make jurors think the government is withholding material evidence and possibly be less willing to vindicate the public's interest in punishing the crime.

In a negligence case, however, the plaintiff is not vindicating the public's interest in punishing the defendant's wrongful conduct and is not concerned with a juror's possible reluctance to do so. A plaintiff's interest in a negligence case is limited to compensation for the harm caused by the defendant's tortious conduct. So the reasoning in *Old Chief* does not apply. We conclude that the court did not abuse its discretion in denying Golnick's request to amend his complaint.

3. Golnick Failed to Preserve Error Assigned to Court's Order in Limine

Golnick contends the court erred in sustaining Callender's motion in limine to prohibit Golnick from producing evidence of Callender's distraction by his cell phone. But Golnick did not obtain a final order on this exclusion by offering proof at trial of the evidence that he believed was admissible.

[10,11] A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury, but the court's ruling on the motion is not a final order.[17] To preserve error regarding a court's order in limine, a party resisting the

[17] See, e.g., *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008).

order must make an appropriate objection or offer of proof at trial.[18] Because Golnick failed to preserve his assigned error, we do not consider the court's order in limine beyond what was necessary to dispose of Golnick's assignments regarding the court's rulings on the parties' motions to amend their pleadings.

4. Court's Jury Instructions Were Correct or Not Prejudicial

Golnick contends that the court erred in failing to give three of his proposed jury instructions.

[12,13] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[19] Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.[20]

(a) Court Properly Rejected Golnick's Proposed Jury Instruction No. 4

Golnick contends that the court erred in failing to give his proposed jury instruction No. 4. That instruction would have informed the jury of the specific ways in which Golnick believed that Callender was negligent while driving. Golnick does not argue this assignment except to state that there was evidence to sustain the allegations. We conclude that this argument is subsumed by our analysis of the court's ruling on the parties' motions to amend their pleadings. As noted, the court did not abuse its discretion in allowing Callender to admit his negligence and denying Golnick leave to amend his complaint. So it correctly determined that Callender's specific acts of negligence were not factual questions for the jury to decide.

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[18] See *id.*

[19] *InterCall, Inc., supra* note 1.

[20] *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

(b) Court's Failure to Specifically Instruct Jury on Golnick's Aggravation Damages Was Not Prejudicial Error

At trial, the court instructed the jury as follows on the effect of Golnick's preexisting back problems:

> There is evidence that [Golnick] had spinal stenosis prior to the collision of October 5, 2005. [Callender] is liable only for any damages that you find to be proximately caused by the collision.
>
> If you cannot separate damages caused by the preexisting condition from those caused by the collision, then [Callender] is liable for all of those damages.

Golnick's proposed instruction No. 3 would have added a third paragraph: "This is true even if the person's condition made him more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury."

The first paragraph of the court's instruction is the standard jury instruction No. 4.09 for determining damages when the plaintiff has a preexisting condition.[21] The second paragraph is frequently called the "apportionment" instruction.[22] It is appropriately used when the jury may be unable to precisely determine which of the plaintiff's damages were not preexisting.[23]

Golnick contends that the court erred in failing to give his proposed third paragraph. He argues that the court's instruction did not explain that the jury could find Callender liable for aggravating Golnick's preexisting condition even if the preexisting condition made him more susceptible to a greater injury than what might normally occur. Golnick argues that in *Ketteler v. Daniel*,[24] we required an instruction like the one he proposed for a plaintiff with a preexisting condition. And he

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[21] See NJI2d Civ. 4.09.

[22] *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997).

[23] See *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996).

[24] *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996).

argues that the jury may have denied him a recovery because it concluded his back injury would not have occurred absent his preexisting condition.

Callender argues that the court did not err in using the pattern jury instruction and the additional instruction for cases in which the jury may not be able to separate damages caused solely by the tortious act. He argues that Golnick has pointed to no evidence that his preexisting condition made him more susceptible to his claimed injuries. Additionally, Callender argues that Golnick's proposed instruction is not the same as the instruction in *Ketteler*. He argues that the Nebraska Court of Appeals has approved of the instruction that the court gave. Finally, because the jury returned a unanimous general verdict form for him, Callender argues that they presumptively decided all the issues in his favor. Because of the general verdict, he contends that whether Golnick was more susceptible to injury is irrelevant.

In *Ketteler*, an issue at trial was whether the plaintiff's fibromyalgia was a preexisting condition or the accident caused it. The court instructed the jury that there was evidence the plaintiff had neck, back, and hip problems before the accident and that the defendant was liable only for damages that the jury found to be proximately caused by the accident. The plaintiff proposed submitting two additional components to this instruction, which the court rejected. The first proposed component was the same as the apportionment instruction given here: "'If you cannot separate damages caused by the pre-existing condition from those caused by the accident, then the Defendant is liable for all of those damages.'"[25] The second proposed component was directed at the aggravation of preexisting condition: "'The Defendant may be liable for bodily harm to [the plaintiff] even though the injury is greater than usual due to the physical condition which predisposed [her] to the injury. In short, the Defendant takes the Plaintiff as he finds her.'"[26] The jury returned a verdict for

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[25] *Id*. at 296, 556 N.W.2d at 629.

[26] *Id*.

the plaintiff, but she appealed the court's rejection of her proposed instruction.

We held that the court should have submitted the plaintiff's entire proposed instruction. We explained that because we had adopted the "eggshell-skull" theory of liability, a plaintiff is entitled to recover damages for the aggravation of a preexisting condition. We concluded that there was evidence to support such damages and that the court's refusal to submit the entire instruction prejudiced the plaintiff.

We reached the same conclusion in *Castillo v. Young*,[27] another case in which there was evidence to support a finding that the defendant's negligence had aggravated a preexisting condition. The court gave the first two components of the instruction for determining damages when the jury may be unable to precisely determine which of the plaintiff's damages were not preexisting. The only difference in the plaintiff's instruction that the court rejected was the third component—the aggravation instruction—that we had approved in *Ketteler*. We reversed the trial court's refusal to give this instruction because the instruction given did not cover the plaintiff's theory of damages for aggravation of a preexisting disease. Because there was evidence to support such damages, the court's failure to give the aggravation instruction prejudiced the plaintiff.

[14] In a negligence case, these cases clearly required a court to instruct a jury on damages for the aggravation of a preexisting condition if the evidence would support that finding. In the Court of Appeals' case on which Callender relies, the court reversed the trial court's refusal to give the apportionment instruction. But the absence of an instruction on the aggravation of a preexisting condition was not at issue.[28] So the case is not authority for Callender's position.

It is true that Golnick's proposed instruction is not the same as the instruction that was required in *Ketteler* and *Castillo*. His alternative language was part of a jury instruction

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[27] *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

[28] See *Higginbotham v. Sukup*, 15 Neb. App. 821, 737 N.W.2d 910 (2007).

discussed in *Gustafson v. Burlington Northern RR. Co.*,[29] but that particular language was not at issue. Under our previous case law, however, Golnick's proposed instruction was sufficient to put the court on notice that it must instruct the jury on his theory of damages if his evidence supported a finding of aggravation damages. And there was sufficient evidence to support that finding.

However, we conclude that under these circumstances, Golnick was not prejudiced by the court's failure to specifically instruct the jury that it could award damages for Golnick's injuries, even if his preexisting condition made him more susceptible to injury. The jury's authority to award damages for the aggravation of a preexisting condition was at least implied in the apportionment instruction: "If you cannot separate damages caused by the preexisting condition from those caused by the collision, then [Callender] is liable for all of those damages." And the record shows that in closing argument, Golnick specifically asked the jury to award damages caused by the aggravation of his spinal and eye conditions. So when Golnick's closing argument is considered with the apportionment instruction, the jury likely understood that it could award damages for the aggravation of a preexisting condition.

[15] Additionally, this case is distinguishable from *Ketteler* and *Castillo* because in those cases, the jury awarded damages to the plaintiff even if the plaintiff was unsatisfied with the amount. Here, the jury returned a general verdict for Callender. When the jury returns a general verdict for one party, we presume that the jury found for the successful party on all issues raised by that party and presented to the jury.[30] So we presume that the jury's verdict for Callender indicates it agreed with his argument that the 2005 accident had not caused Golnick's physical injuries. This is particularly true when Golnick did not

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[29] *Gustafson, supra* note 22.

[30] See *Heckman v. Burlington Northern Santa Fe Ry. Co.*, 286 Neb. 453, 837 N.W.2d 532 (2013).

ask the court to give the jury a special verdict form or require the jury to make special findings.[31]

(c) Court Properly Rejected Golnick's Proposed Jury Instruction No. 2

At the jury instruction conference, Golnick's attorney objected to the court's instruction No. 7 on damages. He asked that the court include the additional damage components included in his proposed instruction No. 2. The court refused his request. The court's instruction No. 7 follows NJI2d Civ. 4.01, the pattern instruction for damages in cases where joint and several liability and contributory negligence are not at issue.[32]

NJI2d Civ. 4.01 informs the jury that if it returns a verdict for the plaintiff (Golnick), it must decide how much money would fairly compensate him for his damages. The pattern instruction states that the jury must consider only those things proximately caused by the defendant's (Callender's) negligence. And it lists several nonexclusive damage components that a jury may consider depending on the issues raised and the evidence.[33] The court's instruction included two of the listed damage components: (1) "[t]he nature and extent of the injury, including whether the injury is temporary or permanent (and whether any resulting disability is partial or total)," and (2) "[t]he physical and mental suffering [Golnick] has experienced (and is reasonably certain to experience in the future)." Golnick's proposed instruction No. 2 would have added several damage components to the court's list. On appeal, however, Golnick argues only that the court erred in failing to include damage components for anxiety and inconvenience.

Golnick contends that anxiety and inconvenience are specific examples of mental distress that the Legislature has recognized as noneconomic damages under Neb. Rev. Stat.

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[31] See Neb. Rev. Stat. § 25-1121 (Reissue 2008).

[32] See NJI2d Civ. 4.01 and Special Note.

[33] See *id.*, comment.

§ 25-21,185.08 (Reissue 2008). Section 25-21,185.08 lists examples of economic and noneconomic damages that a fact finder can consider in civil actions where joint and several liability is at issue. Golnick argues that because the Legislature has specifically authorized damages for anxiety and inconvenience in some cases, these damage components should be available whenever the evidence supports them. He contends that the evidence supported the instruction and that the court erred in failing to give the instruction. We conclude that the court's instruction adequately covered the issues.

[16] The comment to NJI2d Civ. 4.00 states that the meaning of the term "inconvenience" is unclear and that it is included in that instruction only because it is listed in § 25-21,185.08 as a noneconomic damage component. We note that serious inconvenience is a consideration in some nuisance cases.[34] Golnick, however, is using the term as a specific type of mental distress. And Golnick's closing argument shows that he is referring to hedonic damages for his loss of enjoyment of life resulting from his physical injuries. But in Nebraska, hedonic damages are subsumed within a plaintiff's damages for pain and suffering. They are not a separate category of damages.[35]

[17] Similarly, in many cases, a plaintiff's anxiety is inseparable from his or her general mental suffering caused by a physical injury.[36] In a couple of cases, we have addressed anxiety associated with parasitic damages for the plaintiff's "reasonable fear of a future harm attributable to a physical injury caused by the defendant's negligence."[37] But Golnick

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[34] See, *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976); 66 C.J.S. *Nuisances* § 37 (2009).

[35] See *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995).

[36] See, e.g., *Southwell v. DeBoer*, 163 Neb. 646, 80 N.W.2d 877 (1957) (citing cases).

[37] *Hartwig v. Oregon Trail Eye Clinic*, 254 Neb. 777, 784, 580 N.W.2d 86, 91 (1998). Accord *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964), *disapproved on other grounds, Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994).

did not argue that he has anxiety associated with parasitic damages. And a court does not err in failing to give an instruction if the substance of the proposed instruction is contained in those instructions actually given.[38] In Golnick's closing argument, his attorney explained the things that the jury could consider in determining damages:

> The damages instruction gives you what you can consider. And those things are what you heard from the witness stand about . . . Golnick's physical pain, his anxiety, the inconvenience, the worry, the fear that he had, those things are all physical or emotional and mental experiences that resulted directly from the wreck of October 5, 2005.

We conclude that the court sufficiently informed the jury that Golnick's anxiety and inconvenience were a part of his damages for pain and suffering.

5. Court Did Not Abuse Its Discretion in Denying Golnick's Request for Juror Information

Golnick contends that under Neb. Rev. Stat. § 25-1635 (Reissue 2008), the court erred in denying his motion for juror contact information after the court had entered judgment for Callender. He explains that during the jurors' deliberations, they asked the court if they could use a calculator. He argues that this question suggests they were planning to determine the amount of his damages, yet a half hour later, they returned a verdict for Callender. He contends that this apparent change in the jury's direction warranted investigation.

Section 25-1635 prohibits the disclosure of juror information without a court order for good cause shown, but it gives a court discretion to disclose the names of persons drawn for actual service as a juror. Golnick argues that because the names of the jurors were announced during voir dire, obtaining their contact information after the trial did not raise privacy concerns. He argues that the public has a First Amendment right of access to juror information after a trial.

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[38] *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

It is true that the U.S. Supreme Court has held that a First Amendment right of public access applies to criminal trials, including voir dire proceedings.[39] Where this right applies, the "presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[40]

Federal courts of appeals have "widely agreed" that the First Amendment right of public access "extends to civil proceedings and associated records and documents."[41] And we have held that a trial court abuses its discretion when it denies a party's request before voir dire to review juror questionnaires and withholds the nonconfidential portion of those forms.[42]

But providing the jurors' personal information to the parties before voir dire is different than disclosing it after a verdict. A court's disclosure of the information before voir dire allows parties to make intelligent inquiries and decisions about peremptory strikes of prospective jurors. For this reason, we have held in criminal cases that a court's impaneling an anonymous jury—meaning that the jurors' personal information is withheld from the public and the parties—is a drastic measure that should only be undertaken in limited circumstances.[43]

[18] These concerns are not present here. Golnick had access to the relevant part of the jurors' questionnaires for conducting voir dire, and his appeal does not raise the benefits of open trial proceedings. There is "clearly no public right

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[39] *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

[40] *Id.*, 464 U.S. at 510. See, also, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).

[41] *Courthouse News Service v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (citing cases).

[42] See *Huber, supra* note 5.

[43] See *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012).

of access to the jurors' deliberations themselves."[44] Different considerations are at play when a party seeks to interview jurors about their deliberations after the jury has returned its verdict.

[19] "[A] special historical and essential value applies to the secrecy of jury deliberations which is not applicable to other trial and pre-trial proceedings."[45] As federal appellate courts have stated, a jury's "'[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.'"[46] We conclude that because there is no constitutional right to obtain information about a jury's deliberations, a court's discretion under § 25-1635 to disclose juror information for good cause shown after a verdict should be tempered by the restrictions imposed under Neb. Evid. R. 606(2).[47]

Rule 606(2) prohibits a juror from testifying about the validity of a verdict based on the jury's deliberations or the juror's mental processes:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith . . . .

Rule 606(2) also prohibits a court from receiving a juror's "affidavit or evidence of any statement by him indicating an effect of this kind." Its exceptions are limited to permitting a

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[44] *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990). Accord, *U.S. v. Cleveland*, 128 F.3d 267 (5th Cir. 1997); *U.S. v. Calbas*, 821 F.2d 887 (2d Cir. 1987).

[45] *In re Globe Newspaper Co., supra* note 44, 920 F.2d at 94.

[46] *Cleveland, supra* note 44, 128 F.3d at 270, quoting *Clark v. United States*, 289 U.S. 1, 53 S. Ct. 465, 77 L. Ed. 993 (1933).

[47] See Neb. Rev. Stat. § 27-606(2) (Reissue 2008).

juror to "testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." We have previously looked to federal case law in applying rule 606(2) because it is adopted from Fed. R. Evid. 606(b).[48]

[20] The federal rule "is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences."[49] The common-law rule that shields jury deliberations, in turn, rested on substantial policy considerations to protect the integrity and finality of jury trials. Permitting jurors to impeach the verdict would result in defeated parties harassing jurors "'in the hope of discovering something which might invalidate the finding [and] make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.'"[50] So Nebraska's rule 606(2) promotes the public interests of protecting jurors' freedom of deliberation and the finality of judgments, absent a plausible allegation of juror misconduct.

[21,22] We have held that when an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred.[51] But rule 606(2) "prohibits admission of a juror's affidavit to impeach a verdict on the basis of the jury's motives, methods, misunderstanding,

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[48] See, *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991); R. Collin Mangrum, Mangrum on Nebraska Evidence 471 (2014).

[49] *Tanner v. United States*, 483 U.S. 107, 121, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987).

[50] *Id.*, 483 U.S. at 119-20, quoting *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915).

[51] *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001) (abrogated in part on other grounds as stated in *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013)).

thought processes, or discussions during deliberations, which enter into the verdict."[52]

[23] Under these principles, federal courts routinely hold that absent a reasonable ground for investigating, a party cannot use posttrial interviews with jurors as a "fishing expedition" to find some reason to attack a verdict.[53] We agree with this reasoning and conclude that it is applicable to a court's exercise of discretion under § 25-1635.

Here, Golnick did not allege juror misconduct or the presence of an external influence on the jury. Instead, he explicitly states that he wished to question the jurors about their deliberations to determine whether they were improperly influenced. His request to investigate rests solely on the jury's request to use a calculator, from which question he surmises that the jurors were planning to award him damages but changed their minds. The jury's request, however, was not a reasonable ground for suspecting misconduct or juror corruption. So Golnick essentially requested a "fishing expedition" to inquire into the jurors' reasoning and mental processes to find some reason to impeach the verdict. Because rule 606(2) prohibits this type of evidence, the court did not err in denying his request.

VI. CONCLUSION

We conclude that the court did not abuse its discretion in granting Callender leave to amend his answer to admit that he negligently caused the parties' vehicle accident. Under these circumstances, the court also did not abuse its discretion in denying Golnick's request to amend his complaint to allege that Callender's negligent driving occurred because he was distracted by his cell phone. The cell phone evidence was unnecessary to prove that Callender was negligent, because he admitted his negligence. And the court's orders did not

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[52] *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 863, 510 N.W.2d 41, 53 (1994).

[53] See, 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 606.06[2][a] (Joseph M. McLaughlin ed., 2d ed. 2014) (citing federal cases); 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6076 (2d ed. 2007).

preclude Golnick from presenting evidence relevant to how Callender's negligence caused Golnick's injuries.

We further conclude that the court's jury instructions either were correct or did not prejudice Golnick. Finally, we conclude that the court did not abuse its discretion in denying Golnick's request for juror contact information after the jurors completed their service. Because rule 606(2) prohibits evidence of the jurors' deliberations, the court did not err in denying Golnick's request to investigate the jurors' reasoning and thought processes.

AFFIRMED.

DAVID FIALA, LTD., A NEBRASKA CORPORATION, DOING BUSINESS AS FUTURESONE, APPELLEE, V. IAN HARRISON ET AL., APPELLEES, AND WILLIAM GROSS, APPELLANT.

860 N.W.2d 391

Filed March 20, 2015. No. S-14-178.

1. **Arbitration and Award.** Arbitrability presents a question 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. **Arbitration and Award: Federal Acts: Contracts.** If a contract containing an arbitration clause involves interstate commerce, the Federal Arbitration Act governs the contract.
5. **Contracts: States.** Contracts involving interstate commerce include contracts for services between parties of different states.
6. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
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.** When a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder.
9. **Contracts: Evidence.** If a contract is ambiguous, the meaning of the contract is a question of fact and a court may consider extrinsic evidence to determine the meaning of the contract.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded for further proceedings.

Kevin R. McManaman and Charles E. Wilbrand, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellant.

Robert B. Seybert and Stephen J. Schutz, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee David Fiala, Ltd.

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

MILLER-LERMAN, J.

NATURE OF CASE

William Gross appeals the order of the district court for Lancaster County which denied his motion to compel arbitration. The court concluded that the claims in this action were not subject to arbitration under the arbitration provision in the parties' employment agreement. We conclude that the district court erred as a matter of law when it failed to determine that the arbitration provision was ambiguous and to thereafter resolve the ambiguity with extrinsic evidence. We therefore reverse the order denying Gross' motion, and we remand the cause to the district court for further proceedings to resolve the ambiguity and determine the meaning and scope of the arbitration provision.

STATEMENT OF FACTS

In September 2006, Gross executed an "Associated Person/Individual Agreement/Procedures and Rules" (agreement) with David Fiala, Ltd., doing business as FuturesOne (FuturesOne), which set forth the terms of Gross' employment with FuturesOne. Section 6.B. of the agreement contained the following arbitration provision:

> [Gross] and [FuturesOne] agree to arbitrate any dispute, claim, or controversy that may arise between themselves or a customer or any other person that is subject to arbitration under the rules, constitution or by-laws of the

> CFTC or NFA or any other self-regulatory organization with which [Gross] registers, from time to time.

In November 2012, FuturesOne filed a complaint in the district court for Lancaster County against Gross and three other individuals who had signed the same or a similar agreement with FuturesOne. FuturesOne alleged that each of the defendants had resigned from FuturesOne in late 2007 or early 2008; that in the year after resigning, two of the defendants had set up a firm to compete with FuturesOne; and that Gross and the fourth defendant were employed by the competing firm. FuturesOne also alleged that three of the defendants, including Gross, owed money to FuturesOne for amounts that had been paid but not earned at the time they resigned. FuturesOne alleged that Gross owed $7,000. FuturesOne asserted two causes of action for breach of contract. It alleged that Gross and others had breached the agreement (1) by failing to pay amounts owed to FuturesOne and (2) by competing with FuturesOne in violation of the agreement. FuturesOne sought damages against each of the defendants.

Gross filed a motion to dismiss or, in the alternative, to stay proceedings and compel arbitration. Gross asserted that the arbitration provision in his agreement with FuturesOne required that any and all disputes or claims that arose between the parties themselves be subject to arbitration. At a hearing on Gross' motion, the court received affidavits offered by Gross and by FuturesOne into evidence.

The court thereafter filed an order on January 29, 2014, denying Gross' motion. In its order, the court quoted a portion of section 6.B. and indicated that "CFTC" and "NFA" as used in that section referred to the "U.S. Commodity Futures Trade Commission" and the "National Futures Association," respectively. The court stated in its order that in section 6.B., the parties had "agreed to 'arbitrate any dispute, claim or controversy that may arise between themselves . . . that is subject to arbitration under the rules, constitution or by-laws of the CFTC or NFA or any other self-regulatory organization with which [the defendant Gross] registers, from time to time.'" We note that the ellipsis and brackets are in the court's original order.

In its analysis of the scope of the arbitration provision, the court referred to the Web sites of both the CFTC and the NFA. The court quoted a statement from the CFTC's Web site to the effect that the CFTC's mission was "'to protect market participants and the public from fraud, manipulation, abusive practices and systemic risk related to derivatives — both futures and swaps — and to foster transparent, open, competitive and financially sound markets.'" The court quoted a statement from the NFA's Web site that the NFA was "'formed in 1976 to become a futures industry's self-regulatory organization'" and that its regulatory activities included, inter alia, "'providing an arbitration forum for futures and forex-related [sic] disputes.'"

After referring to these sources, the court stated that it did not believe that the parties intended that disputes between themselves regarding money owed by Gross to FuturesOne and regarding alleged violations of a covenant not to compete were to be subject to arbitration pursuant to section 6.B. The court apparently reasoned that these were not the types of disputes that were subject to arbitration under the rules, constitution, or bylaws of the CFTC and the NFA. The court therefore denied Gross' motion.

Gross appeals.

ASSIGNMENTS OF ERROR

Gross claims, restated, that the district court erred when it (1) denied his motion to compel arbitration, (2) referred to matters outside of the record in rendering its order, and (3) determined that the claims were not within the scope of the agreement.

STANDARDS OF REVIEW

[1-3] Arbitrability presents a question of law. *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010). The meaning of a contract and whether a contract is ambiguous are questions of law. See *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010). When reviewing questions of law, an appellate court has an obligation to resolve the questions

independently of the conclusion reached by the trial court. *Village of Memphis v. Frahm*, 287 Neb. 427, 843 N.W.2d 608 (2014).

ANALYSIS

The Agreement in This Case Is Governed by the Federal Arbitration Act, and Therefore, the Failure to Meet a Requirement of Nebraska's Uniform Arbitration Act Does Not Make the Arbitration Provision Unenforceable.

We note first that FuturesOne contends, as an alternative to the basis upon which the district court denied Gross' motion, that the court should have denied the motion on the basis that the parties' agreement did not meet one of the requirements of Nebraska's Uniform Arbitration Act (UAA), Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2008 & Cum. Supp. 2014). FuturesOne does not contend or specify that either the arbitration provision or the agreement elsewhere delegates to the arbitrator the issue of the UAA's impact on the validity of the arbitration provision. Compare *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). If the UAA applied as urged by FuturesOne, its argument could determine this appeal, and we therefore consider this argument first. However, we conclude that the agreement is governed by the Federal Arbitration Act (FAA) rather than the UAA and that therefore, a purported failure to meet a requirement of the UAA does not render the arbitration provision unenforceable.

The UAA requires that any standardized agreement in which binding arbitration is the sole remedy for dispute resolution include a specific statement adjoining the signature block which states that the contract contains an arbitration provision. § 25-2602.02. The Nebraska statute provides the exact wording for this notice requirement and requires that this statement be capitalized and underlined. The agreement between FuturesOne and Gross does not contain the statement, and if the agreement were governed by the UAA, the failure to strictly comply with § 25-2602.02 would make the arbitration clause void and unenforceable. See *Kramer v.*

Eagle Eye Home Inspections, 14 Neb. App. 691, 716 N.W.2d 749 (2006), *overruled on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010). However, we have stated that if an agreement is governed by the FAA, then the FAA preempts the Nebraska notice requirement and the lack of the statutorily required statement does not render the arbitration agreement unenforceable. *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 757 N.W.2d 205 (2008).

[4,5] We noted in *Aramark* that the U.S. Supreme Court held in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996), that if a contract containing an arbitration clause involves interstate commerce, the FAA governs the contract. Under 9 U.S.C. § 2 (2012), the FAA applies to "a contract evidencing a transaction involving commerce." In *Aramark*, 276 Neb. at 705, 757 N.W.2d at 209, we observed that the U.S. Supreme Court gave this phrase in 9 U.S.C. § 2 "a broad interpretation to give expansive scope to the FAA." See, also, *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). We further noted in *Aramark* that this court had determined that contracts involving interstate commerce included "contracts for services between parties of different states." 276 Neb. at 706, 757 N.W.2d at 210 (citing cases).

The agreement in this case involves a contract for services between FuturesOne, a Nebraska corporation, and Gross, a South Dakota resident. The agreement also involves services related to futures trading on national markets. There is no serious claim contradicting the fact that the agreement between FuturesOne and Gross involves interstate commerce, and, giving expansive scope to the FAA, the agreement is therefore governed by the FAA. Because the agreement is governed by the FAA, the notice requirement of the UAA, § 25-2602.02, does not apply and the failure to include this statement does not render the arbitration provision unenforceable. We therefore reject FuturesOne's argument based on § 25-2602.02 of the UAA, and we consider Gross' challenge to the district court's ruling on the scope of the arbitration provision.

The District Court Erred When It Failed to Determine That the Arbitration Provision Is Ambiguous and to Thereafter Consider Appropriate Extrinsic Evidence to Resolve the Ambiguity.

Gross claims generally that the district court erred when it failed to compel arbitration of the parties' disputes under the agreement. The question whether the disputes in this case required arbitration hinged on interpretation of the scope of the arbitration provision in section 6.B. of the agreement.

[6] The U.S. Supreme Court has noted that 9 U.S.C. § 2 has the effect of placing arbitration agreements on an equal footing with other contracts and to require that they be enforced according to their terms. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). We determine that the district court failed to recognize an ambiguity in the arbitration provision, and we conclude that the cause must be remanded to the district court for further proceedings to resolve the ambiguity.

The arbitration provision in the parties' agreement, section 6.B., provided as follows:

> [Gross] and [FuturesOne] agree to arbitrate any dispute, claim, or controversy that may arise between themselves or a customer or any other person *that is subject to arbitration under the rules, constitution or by-laws of the CFTC or NFA or any other self-regulatory organization with which* [*Gross*] *registers, from time to time*.

(Emphasis supplied.) In their arguments on appeal, the parties offer differing readings of this arbitration provision. The difference centers on the phrase that is italicized in the above quote and that begins "that is subject to arbitration." In the remainder of our opinion, we sometimes refer to the italicized portion of section 6.B. as "the phrase." The parties differ with respect to what noun or nouns the phrase modifies. FuturesOne contends certain matters are subject to

arbitration, whereas Gross contends certain persons are subject to arbitration.

Under FuturesOne's reading, the phrase modifies "any dispute, claim, or controversy" and therefore the only disputes, claims, and controversies that are subject to arbitration are those that are subject to arbitration under the rules, constitution, or bylaws of the named organizations. Under this interpretation, the phrase describes all disputes (regardless of the parties involved), and therefore, the present disputes between FuturesOne and Gross would be subject to arbitration only if they are the types of disputes that are subject to arbitration under the rules, constitution, or bylaws of the named organizations.

Under Gross' reading, the phrase modifies "any other person" and therefore defines the persons, other than the parties to the agreement and their customers, who may be involved in a dispute that would be subject to arbitration. Under this reading, the arbitration provision applies to all disputes between persons identified in the provision, namely (1) the parties "themselves," (2) "a customer," and (3) "any other person that is subject to arbitration under the rules, constitution or by-laws" of the named organizations. Under Gross' reading, any dispute that involves only the parties themselves, such as the instant case, is subject to arbitration; it is simply not necessary to consider the rules of the named organizations to determine whether a dispute between the parties "themselves" is subject to arbitration. Under Gross' interpretation, the rules, constitution, or bylaws of the named organizations are relevant only to determine what "other person" involved in a dispute is subject to arbitration under the agreement.

The district court in this case read the arbitration provision in the manner urged by FuturesOne; that is, the phrase modified "dispute, claim, or controversy." As a result, the court found it necessary to determine whether the disputes between FuturesOne and Gross were the types of disputes that were subject to arbitration under the rules, constitution, or bylaws of the CFTC and the NFA. The court concluded that the disputes in this case were not the types of disputes subject to

arbitration under the organizations' rules and that therefore, the parties' agreement did not require arbitration of the disputes in this case.

In its analysis of the arbitration provision, the district court stated that the parties had "agreed to 'arbitrate any dispute, claim or controversy that may arise between themselves . . . that is subject to arbitration under the rules, constitution or by-laws of the CFTC or NFA or any other self-regulatory organization with which [the defendant Gross] registers, from time to time.'" The ellipsis within the quote of section 6.B. was inserted by the district court in the portion of its order quoted above, and certain language found in section 6.B. was removed. By including the ellipsis and eliminating a portion of the text of the arbitration provision, the district court obscured the ambiguity that exists in the arbitration provision. The district court's editing of the provision made it appear clear that the phrase in section 6.B. which begins "that is subject to arbitration" modifies "any dispute, claim or controversy" and therefore applies to all disputes, including disputes between the parties themselves, and limits the arbitration requirement to disputes that are subject to arbitration under the named organizations' rules.

Whether a contract is ambiguous is a question of law. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010). As an appellate court, we have an obligation to resolve questions of law independently of the conclusion reached by the trial court. See *Village of Memphis v. Frahm*, 287 Neb. 427, 843 N.W.2d 608 (2014). Therefore, we must independently determine whether the arbitration provision in the agreement between FuturesOne and Gross is ambiguous. We conclude that it is.

[7] 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. *American Fam. Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 842 N.W.2d 100 (2014). Because the phrase "that is subject to arbitration" immediately follows "any other person," it is grammatically reasonable to read the arbitration provision as Gross

urges; that is, that the phrase refers to persons. However, it is also reasonable, although perhaps not as grammatical, to read the sentence in the manner urged by FuturesOne, in which the phrase beginning "that is subject to arbitration" modifies "any dispute, claim, or controversy." Such reading may be reasonable despite the lack of proximity between the two phrases. We find both interpretations to be reasonable, but the interpretations conflict. FuturesOne's interpretation would require an examination of the rules, constitution, and bylaws of the CFTC and the NFA to determine whether the disputes between FuturesOne and Gross are subject to arbitration, whereas Gross' interpretation would not require such an examination, because all disputes between FuturesOne and Gross would be subject to arbitration.

[8,9] When a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P., supra*. If a contract is ambiguous, the meaning of the contract is a question of fact and a court may consider extrinsic evidence to determine the meaning of the contract. *Id*. Therefore, in the present case, the district court should have considered extrinsic evidence to determine the meaning of the arbitration provision in the agreement.

Without remarking on whether the court's consideration of the Web sites regarding the types of disputes that are subject to arbitration under the rules, constitution, and bylaws of the CFTC and the NFA was proper, such consideration did not address or resolve the ambiguity in the arbitration provision. Because the district court did not note the ambiguity discussed above, it failed to look to appropriate extrinsic evidence to resolve the ambiguity as to what word or words the phrase that begins "that is subject to arbitration" modifies. We therefore reverse the order of the district court and remand the cause for further proceedings in which the district court shall resolve this ambiguity in the arbitration provision, section 6.B., and thereafter determine whether the agreement requires arbitration of the disputes between FuturesOne and Gross.

CONCLUSION

We conclude that the district court erred when it failed to determine that the arbitration provision, section 6.B., was ambiguous and to thereafter resolve the ambiguity by considering appropriate extrinsic evidence. We therefore reverse the order of the district court which denied Gross' motion to compel arbitration, and we remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KYLE KERCHER, APPELLEE AND CROSS-APPELLANT, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLANTS AND CROSS-APPELLEES.

860 N.W.2d 398

Filed March 20, 2015. No. S-14-211.

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. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives the party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
4. **Attorney Fees: Appeal and Error.** An appellate court reviews a court's award of attorney fees under Neb. Rev. Stat. § 48-1231 (Reissue 2010) for abuse of discretion.
5. **Employment Contracts: Breach of Contract: Proof.** In an action for breach of an employment contract, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract.
6. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.

7. ____. A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.
8. **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.
9. **Attorney Fees.** To determine proper and reasonable attorney fees, a court must consider several factors: the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed and remanded for further proceedings.

John C. Wiltse, of University of Nebraska, and Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

James C. Zalewski, of DeMars, Gordon, Olson, Zalewski & Wynner, and Maynard H. Weinberg, of Weinberg & Weinberg, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Kyle Kercher filed a complaint alleging that the Board of Regents of the University of Nebraska and the University of Nebraska at Omaha (collectively the University) breached his employment contract when it removed him from his appointed professorship that he alleges was a part of his tenured appointment. The district court granted Kercher's motion for partial summary judgment on the issue of liability, and damages were stipulated by the parties. The University appeals the judgment against it. Kercher cross-appeals the district court's order awarding him attorney fees, because the court awarded only a portion of the fees requested for work done by a second attorney working on Kercher's behalf. We

affirm the judgment and the district court's order awarding Kercher attorney fees.

BACKGROUND

In 2001, a fund was created by Terry Haney for the purpose of providing a stipend for a professorship within the Department of Gerontology (the Department) within the College of Public Affairs and Community Service (CPACS) at the University of Nebraska at Omaha. The professorship was designated as the "Terry Haney Chair of Gerontology." The fund agreement between Haney and the University of Nebraska Foundation (the Foundation) required that the individual selected for the appointment meet certain requirements, including possessing the "[a]bility and proven experience to conduct community outreach to include speeches, seminars, conferences and other training activities in order to advance knowledge pertinent to Gerontology." The fund agreement also states that the appointment lasts for 5 years, at which point the recipient is eligible for renewal for another 5-year period.

In 2005, Kercher applied for a faculty position within the Department. The position was titled "Distinguished Professor of Gerontology." The job posting stated that the "position involves teaching and research, especially the mentoring of graduate students." On July 15, 2005, B.J. Reed, the dean of CPACS, sent Kercher a letter which offered him an appointment at the University beginning August 15, 2005. The "Type" of appointment was described as "Continuous (tenured)." The "Rank" of the position was "The Terry Haney Distinguished Professor of Gerontology and Graduate Faculty." The offer provided that the salary was "$100,000 AY ($76,000 base plus $24,000 endowment from the . . . Foundation) paid in twelve equal monthly installments (September 2005 to August 2006)." The offer incorporated an attached statement from James Thorson, the chair of the Department at that time, which "outlines [Kercher's] initial assignment." The attached statement from Thorson made no reference to the terms of the fund agreement, nor did it make any specific reference to community outreach duties as a part of his appointment. The attached statement to the offer stated that Kercher's duties

would also include "Committee and/or other assignments as requested by the chair of the Department of Gerontology and/or the dean." The offer also incorporated the University's bylaws (the Bylaws) into the agreement. The fund agreement itself was not incorporated into the offer. Kercher accepted the offer on July 20, 2005.

Section 4.3(1) of the Bylaws lists the four types of appointments for faculty: (1) special appointment, (2) appointment for a specific term, (3) continuous appointment, and (4) health professions faculty appointment. Section 4.4.1 defines special appointments as any appointment that does not fall under one of the three other categories. Section 4.4.1(9) goes on to provide that "appointments supported by funds over which the University does not have control or which the University cannot reasonably expect to continue indefinitely" can only be filled by special appointment. Additionally, faculty members "may hold a 'Special Appointment' coincident with . . . a 'Continuous Appointment,' and the terms of the Special Appointment may be independent of the terms of the other appointment status as a faculty member." While the Bylaws state that special appointments are terminable with 90 days' notice, section 4.4.3 provides that a continuous appointment is "terminable only for adequate cause, bona fide discontinuance of a program or department, retirement for age or disability, or extraordinary circumstances because of financial exigencies."

The Bylaws also provide a clear procedure for the creation of faculty appointments. Section 4.3(a) provides that "[e]very appointment by the University . . . shall be in writing and signed by the Board [of Regents] or its authorized agent." Section 4.3(b) provides that "every faculty member appointed to a position . . . shall, when initially appointed, be given a written statement specifically stating and apportioning the faculty member's initial teaching, extension, service, research, and administrative responsibilities."

In 2006, Haney met with Kercher, Thorson, and another faculty member. Haney informed Kercher of the criteria for the fund agreement and indicated that Kercher should engage in more community outreach. Kercher testified at deposition

that he did not believe Haney's request to be a contractual duty and considered the meeting to be "ceremonial." Kercher stated that he did not feel like he needed to meet Haney's expectations.

Throughout the rest of Kercher's initial 5-year term, Haney expressed concern to the new head of the Department, Julie Masters, and to Reed, the dean of CPACS, that Kercher was not fulfilling the community outreach requirements of the fund. On May 15, 2010, Haney sent the general counsel of the Foundation a letter indicating that "[p]er the recommendation of the college," Kercher's appointment should be extended for another year. Haney instructed that Kercher would be eligible for an additional 5-year extension if "Kercher meets the requirements of the outlined fund agreement."

On June 4, 2010, Reed sent an e-mail to Kercher informing him that the chair appointment was for 5 years and renewable "subject to the conditions of the fund agreement." This appears to be the first time Kercher was informed by someone employed by the University that the professorship was renewable and not permanent.

Shortly after that e-mail, Masters met with Kercher and provided him with a copy of the fund agreement, which outlined the criteria for the professorship. This was the first time that Kercher had been presented with a copy of the fund agreement. Masters also provided Kercher with a copy of the May 15, 2010, letter Haney had sent to the Foundation.

On July 28, 2010, which marked the end of the initial 5-year appointment, a senior vice chancellor at the University of Nebraska at Omaha informed Kercher that his appointment would be extended for another year "and may be extended for an additional period based on a review of your performance during this period."

On June 6, 2011, Masters sent Kercher an e-mail indicating that "Haney continues to express concern that the expectations of the fund, specifically community outreach, is [sic] not being met." Masters requested that Kercher provide information on how he was meeting the stated criteria of the professorship. Kercher never provided any information. On July 5, the senior vice chancellor informed Kercher that his

appointment would be renewed for another year but would not be extended again.

The University does not dispute that Kercher's base salary of $76,000 constitutes a continuous appointment, and Kercher still remains a tenured faculty member within the Department. Kercher has received no more than his base salary since September 2012.

On October 9, 2012, Kercher submitted to the risk manager's office at the University a claim for injury or damages against the University. Kercher filed his complaint in district court on October 30. On February 19, 2013, the University filed a motion for summary judgment, and on April 1, Kercher filed a motion for partial summary judgment on the issue of liability.

On October 18, 2013, the district court granted Kercher's motion for partial summary judgment and denied the University's motion for summary judgment. The court found that the offer made "no reference to any non-academic-related responsibilities," that there was "no evidence that anyone involved in the extending of the July 15 offer to . . . Kercher or . . . Kercher himself thought the money being contributed by the Foundation had any strings attached to it," and that it was

> clear and undisputed that . . . Kercher never agreed to assume or perform as part of his appointment any duties or responsibilities other than those referred to in the attachment to the July 15, 2005, letter or agreed to the contribution from the Foundation as part of his salary package being for a limited period of time or containing additional employment conditions.

Therefore, the district court concluded that "the offer to and acceptance by . . . Kercher was for a single Continuous (tenured) Appointment for an initial salary of $100,000 and did not include an additional Special Appointment." The court also found that Kercher did not agree to modify the contract.

After the district court entered its order granting Kercher's partial motion for summary judgment, the issue of damages was settled by stipulation of the parties, save for the issue of attorney fees. The district court determined that pursuant to

Neb. Rev. Stat. § 48-1231(1) (Reissue 2010), Kercher was entitled to attorney fees of not less than 25 percent of the award. The district court also determined that based on the complexity of the case, Kercher was entitled to an award in excess of the statutory minimum 25 percent.

James Zalewski, Kercher's primary attorney, submitted an affidavit that his normal billing rate is $225 per hour. Zalewski stated that he took three depositions, represented Kercher at his deposition, researched case law, and prepared the brief in opposition to the University's motion for summary judgment and the brief in support of Kercher's motion for partial summary judgment. Zalewski stated that he voluntarily reduced his fee and billed Kercher $28,694.26 for 171.8 hours of billable time. Based on his experience and qualifications, the district court found Zalewski's fee to be reasonable and awarded attorney fees to Kercher "in the amount of $28,694.[2]6."

M.H. Weinberg, the attorney Kercher initially retained, also submitted an affidavit. He stated that he was the attorney that initially developed the case and that he agreed to assist Zalewski in the case for $100 per hour. Weinberg, according to his affidavit, assisted Zalewski by "primarily gathering evidence, researching key legal issues, reviewing depositions, reviewing briefs, and making an argument to Judge Paul D. Merritt, Jr. of the Lancaster County District Court." Weinberg stated that he normally charges $150 to $175 per hour for this type of service. Based on his $100-per-hour fee, Weinberg had a total fee of $13,025 and an additional $141.70 in costs. Weinberg requested an award calculated at his ordinary rate of $175 per hour for a total award of $22,935.45.

John Wiltse, the attorney representing the University, submitted an affidavit in which he stated that he had not had any contact with Weinberg from September 12, 2012, a month before Kercher filed his complaint in district court, to May 20, 2013, when Weinberg attended a hearing. Wiltse also stated that "Zalewski attended all case proceedings by himself before that and signed all papers in the case in his or his firm's name only."

The district court noted that the calculation of Weinberg's attorney fees was "more difficult to ascertain." The district court found that "[n]othing in . . . Zalewski's affidavit implies that, but for the assistance of . . . Weinberg, he would not have been able to adequately represent . . . Kercher." As such, the district court awarded attorney fees for the work Weinberg did before Kercher retained Zalewski and for the time Weinberg spent attending the hearing for the motion for summary judgment, for a total amount of $3,943.74.

The University appeals the judgment against it for breach of contract. Kercher cross-appeals the district court's award of Weinberg's attorney fees.

ASSIGNMENTS OF ERROR

The University's Assignment of Error

The University assigns, on appeal, restated and consolidated, that the district court erred in concluding that the $24,000 stipend was a continuous appointment and not a special appointment.

Kercher's Assignments of Error

Kercher assigns on cross-appeal, consolidated and restated, that the district court erred in failing to (1) recognize the contribution of Weinberg and concluding that Kercher was not entitled to all attorney fees expended in representation by Weinberg and (2) consider evidence presented by Weinberg in support of his motion for an award of attorney fees.

STANDARD OF REVIEW

[1,2] 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.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment

[1] *Roos v. KFS BD, Inc.*, 280 Neb. 930, 799 N.W.2d 43 (2010).

was granted, and gives the party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[3]

[4] An appellate court reviews a court's award of attorney fees under § 48-1231 for abuse of discretion.[4]

ANALYSIS

Breach of Contract Claim

[5] The University assigns that the district court erred in determining that Kercher's stipend amount did not constitute a special appointment. In an action for breach of an employment contract, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract.[5] Thus, Kercher bears the burden of proving the terms of the contract and that the University breached those terms.

[6,7] When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.[6] A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.[7] Therefore, our analysis is constrained to an interpretation of the terms of the agreement between the University and Kercher, which includes the offer given to Kercher along with the Bylaws incorporated into the agreement.

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[2] *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

[3] *Braunger Foods v. Sears*, 286 Neb. 29, 834 N.W.2d 779 (2013).

[4] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[5] *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[6] *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

[7] *E & E Prop. Holdings v. Universal Cos.*, 18 Neb. App. 532, 788 N.W.2d 571 (2010).

Ultimately, the issue in this case is whether the endowed portion of Kercher's salary was a continuous or special appointment under the Bylaws. If it was a special appointment, then the University was within its rights under the Bylaws to terminate it with 90 days' notice. However, if it was a continuous appointment, then, under the Bylaws, it can be terminated only for cause and the University breached its agreement with Kercher.

The Bylaws provide the framework for construing the agreement between the parties. Of particular importance is section 4.3(a) and (b). Section 4.3(a) requires that "[*e*]*very* appointment . . . shall be in writing." (Emphasis supplied.) Taking into account the entirety of the Bylaws, this would mean that in the case of concurrent appointments, like what the University claims existed in this case, both appointments would need to be made in writing. Nowhere in the written offer to Kercher does it make any reference to the term "special appointment" or clearly indicate that any part of his salary was not subject to a continuous appointment.

Even if we were to somehow read into the agreement that it provided for a special appointment, the offer also failed to satisfy section 4.3(b), which requires the University to provide a written statement of the faculty member's duties. In the agreement, there was no mention of any specific duties, beyond Thorson's statement attached to the offer. It was certainly not made clear in the written offer that Kercher's endowed stipend was contingent upon his performing certain community outreach duties.

Moreover, there is no evidence that the terms of any special appointment were even communicated to Kercher orally before he accepted the position. Masters acknowledged in an e-mail that "[a]s we all know, the terms [of the agreement] were not revealed to [Kercher] when he first came to [the University]." All members of the hiring committee also indicated in interrogatories that they never informed Kercher before he was hired that he must meet the requirements of any specific endowment or that any portion of his salary would be subject to review or renewal.

The University argues that including the information that a portion of the salary was to be paid by an unnamed endowment from the Foundation was sufficient to create a special appointment, because pursuant to section 4.4.1(9) of the Bylaws, "appointments supported by funds over which the University does not have control" can be filled only as special appointments. This argument by the University, however, overlooks the fact that the Bylaws still require that all appointments be made in writing and that the faculty member, when initially assigned to an appointment, be provided with a statement outlining the responsibilities for the appointment. Kercher was never provided that information. Taking into account the Bylaws, a reasonable person would conclude that the offer presented to Kercher by the University was for a tenured position with a salary of $100,000. The district court did not err in granting Kercher's motion for partial summary judgment.

Attorney Fees

Kercher assigns on cross-appeal that the district court abused its discretion in not awarding him all of the fees requested by Weinberg. Section 48-1231(1) provides, in part, "If an employee establishes a claim and secures judgment on the claim, such employee shall be entitled to recover . . . an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages."

[8,9] An appellate court reviews a court's award of attorney fees under § 48-1231 for abuse of discretion.[8] 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.[9] To determine proper and reasonable attorney fees, a court must consider several factors: the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly

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[8] *Fisher v. PayFlex Systems USA*, *supra* note 4.

[9] *Id.*

conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.[10]

The record indicates that Zalewski was the lead attorney throughout the duration of the litigation, and there is little evidence in the record reflecting what Weinberg contributed to the case. Zalewski is an experienced, skillful attorney and returned a favorable result for his client. The district court recognized that and awarded fees consistent with what Zalewski had billed Kercher. The only evidence the district court had of Weinberg's contribution to the case was his affidavit and his appearance at one hearing during the course of litigation. Weinberg did not sign any briefs or other documents submitted to the court or attend any depositions, and he did not communicate with opposing counsel from September 12, 2012, to May 20, 2013. It was on this basis that the district court reduced the award of Weinberg's attorney fees.

The parties in this case stipulated that the statutory minimum amount to be awarded for attorney fees would be $7,938 (25 percent of $31,752). The district court awarded a total of $32,638 ($28,694.26 plus $3,943.74) for fees between the two attorneys. That is over four times the statutory minimum and more than what Kercher received in lost wages. The district court did not abuse its discretion in its award of attorney fees for Weinberg's limited work on the case.

Although not raised by the parties, Kercher is also entitled to an award of attorney fees for this action. Section 48-1231(1) provides in relevant part:

> If the cause is taken to an appellate court and the plaintiff recovers a judgment, the appellate court shall tax as costs in the action, to be paid to the plaintiff, an additional amount for attorney's fees in such appellate court, which fees shall not be less than twenty-five percent of the unpaid wages.

When an employer appeals a judgment in favor of the employee and the employee then also prevails on appeal, the

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[10] *Id.*

statute requires that the appellate court award attorney fees of at least 25 percent of the unpaid wages in addition to the fees awarded by the trial court.[11] In several past cases, we have awarded attorney fees at both the trial and appellate levels.[12] Accordingly, Kercher's attorney fees in the appellate court in the sum of $7,938, which is the statutory minimum 25 percent of the unpaid wages as previously stipulated by the parties, are assessed against the University. We remand the cause back to the district court to determine how the fees for their work on appeal should be split between Zalewski and Weinberg.

CONCLUSION

Accordingly, we find that the district court properly granted Kercher's motion for partial summary judgment and that the district court did not abuse its discretion in its award of attorney fees for Kercher. We further award, pursuant to § 48-1231(1), an additional $7,938 to Kercher in attorney fees in this appeal.

AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

HEAVICAN, C.J., and WRIGHT, J., not participating.

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[11] See, *Professional Firefighters Assn. v. City of Omaha, ante* p. 300, 860 N.W.2d 137 (2015); *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

[12] See, e.g., *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997) (superseded by statute as stated in *Coffey v. Planet Group, supra* note 6); *Sindelar v. Canada Transport, Inc., supra* note 11.

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Michael B. Kratville, respondent.

861 N.W.2d 104

Filed March 20, 2015. No. S-15-040.

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, Michael B. Kratville, on January 15, 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 9, 1986. On April 16, 2013, respondent was indicted by a grand jury in the U.S. District Court for the District of Nebraska for mail and wire fraud and conspiracy to commit mail and wire fraud. On December 4, 2014, respondent entered a guilty plea to one count of wire fraud pursuant to a plea agreement with the U.S. Attorney. The court accepted his plea, and sentencing was set for February 27, 2015.

On January 15, 2015, respondent filed a voluntary surrender of license, in which he stated that he is aware that the Counsel for Discipline is currently investigating the events surrounding his federal indictment. Respondent further stated that he does not contest the truth of the suggested allegations being made against him. Respondent further stated that he freely, knowingly, and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the 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.

JUDGMENT OF DISBARMENT.

WALTER MACLOVI-SIERRA, APPELLANT, V. CITY OF OMAHA, NEBRASKA, APPELLEE.

860 N.W.2d 763

Filed March 27, 2015. No. S-13-1139.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
2. **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.
3. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Strict Liability.** Neb. Rev. Stat. § 13-911 (Reissue 2007) creates strict liability on the part of a political subdivision when (1) a claimant suffers death, injury, or property damage; (2) such death, injury, or property damage is proximately caused by the actions of a law enforcement officer employed by the political subdivision during vehicular pursuit; and (3) the claimant is an innocent third party.
5. **Police Officers and Sheriffs: Motor Vehicles.** Whether law enforcement sought to apprehend a motorist is a mixed question of law and fact.
6. **Police Officers and Sheriffs: Motor Vehicles: Proximate Cause.** Whether an injury to an innocent third party is proximately caused by the action of a law enforcement officer during vehicular pursuit is a question of fact which must necessarily be determined on a case-by-case basis.
7. **Proximate Cause: Evidence.** The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong.

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

Robert M. Knowles and Christina M. Knowles, of Knowles Law Firm, for appellant.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellee.

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

STEPHAN, J.

Walter Maclovi-Sierra brought this action against the City of Omaha under the Political Subdivisions Tort Claims Act (the Act),[1] seeking damages for injuries he sustained when he was struck by a stolen vehicle allegedly being pursued by Omaha police officers. Following a bench trial, the district court for Douglas County dismissed the action after finding that any pursuit had terminated prior to the accident and that the actions of the officers did not proximately cause the accident and resulting injuries. Maclovi-Sierra perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state.[2] The issues presented on appeal are primarily factual. Because we conclude that the factual findings of the district court are not clearly erroneous, we affirm its judgment.

I. BACKGROUND

This action was brought pursuant to a section of the Act which provides in part: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer."[3] Maclovi-Sierra contends that at all relevant times, the stolen vehicle that struck him was being pursued by Omaha police officers.

1. EVIDENCE

On January 14, 2011, at approximately 11:05 a.m., Maclovi-Sierra was standing on the south side of Q Street near the southbound entrance ramp to Highway 75 in Omaha, Nebraska. He was struck by a stolen vehicle operated by Gino Main and sustained permanent injuries.

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[1] Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2007 & Cum. Supp. 2010).

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

[3] § 13-911(1).

Earlier that morning, Monica Anderson, an off-duty Sarpy County deputy sheriff, learned from her father that his blue Chevrolet Silverado pickup had been stolen from the driveway of his home near 28th and Washington Streets. At approximately 10 a.m., Anderson and her husband set out in their personal vehicle to try to find the stolen pickup.

They first drove around downtown Omaha and then went to South Omaha. At approximately 10:30 a.m., they spotted the pickup traveling southbound on 24th Street. Anderson called the 911 emergency dispatch service and told her husband, who was operating their vehicle, to follow the pickup. Anderson saw that the pickup was being driven by a man subsequently identified as Main. The pickup turned right on J Street and parked near a medical facility between 26th and 27th Streets. Anderson and her husband parked nearby, and she reported its location to the dispatcher. Over the next 5 to 10 minutes, Anderson observed Main sitting in the parked pickup while a passenger went in and out of the medical facility two or three times.

Anderson and her husband followed as the pickup left its parked location and proceeded west on J Street and then north on 27th Street. She testified that the pickup was traveling at a normal rate of speed at that time. As the northbound pickup approached the intersection of 27th and H Streets, Anderson saw an Omaha police cruiser driving south on 27th Street. The cruiser was operated by Omaha police officer Mark Cupak, who was alone in the cruiser.

While on patrol that morning, Cupak was dispatched to the area of 27th and J Streets where a stolen pickup had been spotted. Cupak proceeded south on 27th Street with his cruiser's flashing, rotating lights activated, but not his siren. Just before he reached the intersection of 27th and H Streets, Cupak saw the northbound pickup approaching his cruiser from approximately 1 to 1½ blocks away. At that location, 27th Street was a two-lane street in a primarily residential area with a speed limit of 25 miles per hour. When Cupak first observed the stolen pickup, it was being operated at a normal rate of speed, and if the pickup had not been reported stolen, it would not have drawn Cupak's attention.

Cupak attempted to stop the pickup at the intersection of 27th and H Streets by turning his southbound cruiser into the northbound lane of 27th Street and stopping with his cruiser's lights activated. Cupak remained inside his cruiser, and he drew his sidearm and pointed it at the approaching northbound pickup, hoping to block the pickup from proceeding north. But, in Cupak's words, the pickup "just went into the southbound lane, and . . . just nonchalantly just drove around my cruiser and kept going northbound" toward F Street. Cupak explained that the pickup "didn't accelerate, didn't go up over the curb to get around me. It was just — he just maintained his speed, and it was just like a Sunday drive, just drifted around me and continued north."

At that point, Cupak told his dispatcher what had occurred, put away his sidearm, and turned his cruiser around. This took several seconds. He then proceeded northbound on 27th Street with his cruiser's lights flashing but did not activate his siren. At that point, he could not see the pickup. Cupak testified that he accelerated to between 35 and 40 miles per hour in an effort to catch up to the pickup, but never did. He explained that to "catch up" to a vehicle is different than to chase or pursue it in that there is no intent to stop the vehicle. He did not advise his dispatcher that he was in pursuit of the pickup.

As Cupak approached the intersection of 27th and F Streets, he saw another police cruiser westbound on F Street with its lights activated, so he assumed the stolen pickup had turned onto F Street. When he heard a radio report that the pickup had struck another vehicle at the Highway 75 ramp on F Street and left the scene, Cupak proceeded to that location and completed an accident report. In his report, Cupak described the stolen pickup as "fleeing an attempted traffic stop."

Anderson gave a somewhat different account of Cupak's encounter with the stolen pickup. She testified that when the northbound pickup approached Cupak's southbound cruiser near the intersection of 27th and H Streets, the driver of the pickup "gunned it" and "accelerated to a high rate of speed," which she estimated to be at 45 miles per hour. She said that

Cupak turned his cruiser around and followed the pickup at the same speed with its lights flashing. Anderson saw the pickup proceed north on 27th Street and then turn west on F Street, with two other police cruisers following.

Anderson and her husband drove to a point on 28th Street where they could observe traffic on Highway 75. From there, Anderson saw the pickup enter the southbound lanes of Highway 75 at a speed which she estimated to be 70 miles per hour, followed by two police cruisers with their lights activated traveling at the same speed. She lost sight of the vehicles as they approached J Street. Anderson told the police dispatcher that the cruisers were "'in pursuit'" of the pickup. Anderson and her husband then proceeded to the Q Street overpass on Highway 75, where they saw that the pickup had crashed.

The two cruisers which Anderson saw following the pickup on F Street were operated by Omaha police officer Makayla Stiles and Omaha police sergeant Timothy Brown, with Brown in the lead cruiser. Both were at a police assembly area approximately one-half mile from 27th and F Streets when they heard a police dispatch concerning a stolen vehicle at that location. Each proceeded to that intersection, traveling east on F Street. Brown arrived first, and Stiles arrived a few seconds later. As she approached the intersection, Stiles saw Brown's cruiser stopped at the intersection, facing west on F Street. Stiles then saw the stolen pickup turn left from 27th Street onto F Street in front of Brown's cruiser. Brown followed the pickup, and Stiles followed Brown. Both officers had activated the flashing lights on their cruisers, and both activated their sirens after several blocks.

Stiles' cruiser was equipped with a system which made a video and audio recording of events beginning at 11:02:46 a.m. when the pickup turned left onto F Street and proceeded west in front of Brown's westbound cruiser. The recording, which was received in evidence, depicts the subsequent events from Stiles' perspective as she followed Brown's cruiser and eventually came upon the scene of the accident on Q Street at the top of the Highway 75 southbound exit ramp. The recording shows an elapsed time of 1 minute 45 seconds from the

time the stolen pickup turned west onto F Street until Stiles arrived at the accident scene and stopped her cruiser.

The recording shows the stolen pickup turning west onto F Street without stopping at the stop sign. Brown's lights were activated, and Stiles activated hers approximately 4 seconds after the pickup turned onto F Street. After the pickup turned, Brown accelerated, but was several car lengths behind the pickup, and Stiles followed several car lengths behind Brown. A siren is not heard on the recording until 9 seconds after the pickup turns. The cruisers followed the stolen pickup for several blocks to the Highway 75 entrance ramp.

The posted speed limit on F Street was 30 miles per hour. The two officers' opinions differed on whether they exceeded this speed as they followed the stolen pickup west on F Street. George Lynch, an accident reconstruction expert retained by Maclovi-Sierra, testified that in his opinion, Brown's cruiser was traveling approximately 40 miles per hour for at least part of the time on F Street. Brown testified that while following the pickup on F Street with his cruiser's lights and siren activated, he intended to close the distance so that the driver would understand his intent to make a traffic stop.

The stolen pickup proceeded west on F Street for approximately 14 to 15 seconds before sideswiping a stopped vehicle while turning onto the southbound Highway 75 entrance ramp. The pickup accelerated down the ramp and merged onto Highway 75 approximately 11 to 12 seconds after sideswiping the vehicle. Brown and Stiles followed, entering the ramp at a speed of 20 miles per hour. Stiles maintained a fairly consistent distance behind Brown. Both cruisers accelerated and reached a maximum speed of 70 miles per hour just as Brown merged onto Highway 75. The posted speed limit was 55 miles per hour. Upon entering Highway 75, both cruisers reduced their speed to between 60 and 68 miles per hour as they proceeded south.

The recording established that 12 seconds after entering the Highway 75 entrance ramp, Brown radioed: "I'm not going to be in pursuit." Seven seconds later, he radioed that the suspect was going "southbound in the fast lane . . . just going

under the L Street" overpass. One second later, Brown turned off his cruiser's flashing lights and siren.

Brown testified that while he was still on the Highway 75 entrance ramp, he realized the pickup would not stop and made the decision not to pursue but that he nevertheless accelerated down the ramp because he wanted to keep the pickup in sight long enough to alert other officers to the speed and direction of travel. Brown testified that he did not consider himself to be in pursuit at any point, but did not say so on his radio earlier because he thought it was more important to first transmit the location and direction of the pickup. Brown lost sight of the pickup when it passed under the L Street overpass. Stiles was still on the entrance ramp when she lost sight of the stolen pickup as it reached the L Street overpass.

The video recording shows Brown's cruiser passing beneath the L Street overpass 10 seconds after shutting down his cruiser's lights and sirens and 11 seconds after the stolen pickup passed that point. Still southbound on Highway 75, Brown passed beneath the Q Street exit 27 to 28 seconds after turning off his lights and siren.

Stiles exited Highway 75 at Q Street, intending to go back to the sideswiped vehicle on F Street. She came upon an accident at the top of the ramp. The video recording shows Main running from the scene as Stiles is approaching the top of the ramp. A few seconds later, she came to a stop approximately 1 minute 45 seconds after the stolen pickup initially turned onto F Street and 1 minute after Brown deactivated his cruiser's lights and siren. Upon exiting her cruiser, Stiles learned that Maclovi-Sierra had been struck by the pickup driven by Main, which remained at the scene of the accident. Main fled on foot, but was later captured a short distance away.

Main testified by deposition during his incarceration for offenses related to this incident. He was 19 years old at the time of the accident. He admitted to stealing the pickup. Main testified that when he encountered Cupak's cruiser on 27th Street, Cupak exited the cruiser, drew his weapon, and ordered him to stop. Main said he stopped for a few seconds before driving around the cruiser and proceeding north, accelerating

up to 45 miles per hour as he did so. He then observed Cupak following him with his cruiser's flashing lights activated, but said Cupak was never able to catch up with him. Main testified that as he approached F Street, he saw two police cruisers at the intersection with flashing lights activated and thought they were waiting to chase him.

Main testified that as he proceeded west on F Street at speeds exceeding the speed limit, he observed the cruisers behind him with lights and sirens activated and thought they were chasing him. He decided to "get on the interstate and try to outrun them and then head over to Iowa" because he believed the police would not pursue him across the state line. Main entered Highway 75 at F Street and exited at Q Street. He testified that while southbound on Highway 75, he changed lanes several times and reached speeds of up to 110 miles per hour. Just south of the L Street overpass, he lost sight of the two cruisers behind him, but he still believed he was being pursued. He exited Highway 75 at Q Street, intending to reenter Highway 75 northbound en route to Iowa, but lost control of the pickup and struck Maclovi-Sierra before hitting a utility pole. Main testified that he could hear sirens when he got out of the pickup after the accident and believed he was still being pursued. Main testified that from the time he reached 27th and H Streets until the moment of the accident, he was actively trying to resist apprehension by Omaha police.

Main acknowledged that he had previously stolen two or three vehicles and attempted to elude police on one of these occasions. He believed that if he reached a speed in excess of 85 miles per hour, police were required to stop the pursuit. On the day in question, he was attempting to drive in excess of that speed so he would not be pursued. He estimated that he was traveling at a speed of 100 miles per hour at the time he reached the L Street overpass. Main admitted that when he exited Highway 75 at Q Street, he could no longer see any police cruisers behind him and that he thought exiting the highway might be a smart idea, because police did not know where he was. But he did not believe he had completely eluded police, because "you can't outrun a radio." Main explained

that based on his prior experience attempting to elude police, he thought there were usually multiple cruisers in the area, and that he felt he needed to keep fleeing whether or not he could actually see police cruisers pursuing him. But he said he intended to slow down to a normal speed as soon as he could no longer hear police sirens so as not to attract suspicion.

Lynch testified that the distance between the L Street overpass and the scene of the accident is one-half mile. He testified it took Main between 20.42 and 24.4 seconds to travel that distance, assuming Main was going between 80 to 110 miles per hour. Lynch agreed, based upon his review of the video recording, that Main's speed exceeded that of Brown from the time that both vehicles entered Highway 75.

After the incident, all three officers completed a "Chief's Report," which required them to place the incident in one of four categories. Cupak characterized his contact with Main as a "Refuse to Stop/Vehicle Fled/Non-pursuit." Initially, Stiles and Brown used the same characterization in their reports. But, Lt. Gregg Barrios, who was Brown's immediate supervisor, directed Brown to revise his report to characterize the incident as "Vehicle Chase (Pursuit)." He indicated that Stiles would be required to do the same. Brown and Stiles subsequently filed revised reports as directed.

Barrios testified that after reviewing the incident with his superior, Capt. Katherine Gonzalez, he believed that Brown and Stiles were engaged in a vehicular pursuit "at some point." He believed that the pursuit ended when Brown announced over his radio that he would not be in pursuit. Barrios did not believe that Cupak had ever engaged in a vehicular pursuit. Gonzalez testified that after reviewing the incident with Barrios, she made the decision that Brown and Stiles should report the incident as a pursuit. She explained:

> [I]f there is any reason to believe that the fleeing person may have thought they were being chased, then it's better for us to write down that it's a pursuit, rather, because oftentimes the pursuit review will actually kick the report back and say it, in fact, was a pursuit.

She noted that "we always try to err on the side of caution, so there is no negative connotation by putting a pursuit down."

The Omaha Police Department's policy regarding vehicular pursuits was received in evidence. The policy utilizes the same definition of "pursuit" found in § 13-911. According to the policy, the use of emergency lights and sirens "merely to gain the attention of a driver to pull over" is not an active attempt to apprehend.

The parties stipulated that at all relevant times, Maclovi-Sierra was an "innocent third party" within the meaning of § 13-911(1) and that he complied with the provisions of the Act with respect to providing notice of his tort claim and withdrawing it from consideration prior to filing suit. The parties further stipulated that the medical expenses incurred by Maclovi-Sierra were necessitated by the accident and were fair and reasonable and that he will experience future pain and suffering as a result of his injuries.

2. Findings of District Court

The district court made detailed factual findings regarding the evidence summarized above. The court determined that where Anderson's testimony regarding the events on F Street and Highway 75 differed from the video recording, the recording was "the most accurate record of events." The court noted that Main's statements about the incident were frequently contradicted by other witnesses and evidence, and it specifically determined that Main's testimony that he could still hear sirens at the time of the accident was contradicted by the video recording and Lynch's testimony. The court found that "Main did not see or hear cruisers after he went under the 'L' Street overpass."

Based upon its factual findings, the court determined that Cupak attempted to make a traffic stop but did not initiate a vehicular pursuit of Main. The court found that Cupak "made no attempt to overtake or catch up to Main and did not engage in any further observation of Main after he proceeded onto 'F' Street."

The court also determined that "Brown and Stiles did not engage in a pursuit as defined by the statute. Their actions are more consistent with those described by the Omaha Police Department's policy on pulling over a driver for a traffic

stop." The court reasoned that the existence of a "pursuit" within the meaning of the statute required the coexistence of two elements: "(1) an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle, when (2) the driver of the fleeing vehicle is resisting apprehension." The court determined that although Main was resisting apprehension by Brown and Stiles, "there was no active attempt to apprehend him."

Finally, the court concluded that even if Brown and Stiles had been attempting to apprehend Main, "the officers' actions were not the proximate cause of the accident in which [Maclovi-Sierra] was injured."

II. ASSIGNMENTS OF ERROR

Maclovi-Sierra assigns, restated and renumbered, that the district court erred in (1) finding that the actions of the city's police officers did not constitute a vehicular pursuit as defined by § 13-911(5), (2) finding that any pursuit was terminated prior to the accident, (3) finding that the actions of the police officers were not the proximate cause of Maclovi-Sierra's damages, and (4) misapplying the applicable law with respect to proximate cause.

III. STANDARD OF REVIEW

[1] In actions brought under the Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.[4]

[2] In actions brought pursuant to the 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.[5]

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[4] *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013); *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

[5] See, *Werner v. County of Platte, supra* note 4; *Richter v. City of Omaha*, 273 Neb. 281, 729 N.W.2d 67 (2007).

[3] An appellate court reviews questions of law independently of the lower court's conclusion.[6]

IV. ANALYSIS

[4] Section 13-911 creates strict liability on the part of a political subdivision when (1) a claimant suffers death, injury, or property damage; (2) such death, injury, or property damage is proximately caused by the actions of a law enforcement officer employed by the political subdivision during vehicular pursuit; and (3) the claimant is an innocent third party.[7] In this case, there is no dispute regarding the first and third elements. The case turns on whether Maclovi-Sierra's injuries were proximately caused by a "vehicular pursuit" of the stolen pickup by Omaha police officers.

1. Vehicular Pursuit

(a) General Principles

[5] The Legislature defined the phrase "vehicular pursuit" as used in § 13-911 to mean

> 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.[8]

Whether law enforcement sought to apprehend a motorist is a mixed question of law and fact.[9] As the Nebraska Court of

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[6] *Mutual of Omaha Bank v. Kassebaum*, 283 Neb. 952, 814 N.W.2d 731 (2012); *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011).

[7] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006); *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), *disapproved on other grounds, Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002).

[8] § 13-911(5).

[9] See *Werner v. County of Platte, supra* note 4.

Appeals has noted, vehicular pursuit as defined by § 13-911(5) "involves multiple elements and, thus, is a much more nuanced matter than simply deciding whether one vehicle is trying to 'catch up' to, or maintain sight of, another."[10]

(b) Actions of Cupak

In concluding that Cupak was not in pursuit of the stolen pickup as it proceeded north on 27th Street from H Street to F Street, the district court obviously credited Cupak's version of the events over the testimony of Main and, to some extent, Anderson. As the trier of fact, it was entitled to do so. Cupak testified that when he turned his cruiser around after the pickup drove past him, he could no longer see the pickup and was not certain whether it stayed on 27th Street or turned onto an intersecting street. He did not advise the police dispatcher that he was in pursuit, which would have been required under department policy if he intended to initiate a pursuit. Cupak explained that he did not initiate a pursuit because he could no longer see the pickup and "had no idea where he was." Cupak testified that he was attempting to "catch up" to the pickup not with the intent of stopping it, but to be available in the event of a foot chase or other event.

These circumstances are similar in some respects to the first of two incidents which we reviewed in *Mid Century Ins. Co. v. City of Omaha*.[11] There, an officer followed a motorist who drove away after being questioned by an officer and hearing a dispatch that he was suspected of involvement in a hit-and-run accident. The officer returned to his vehicle and accelerated in the direction that the vehicle had gone but did not actually see the vehicle. The officer testified that he did not know whether the vehicle had proceeded in that direction or turned off. The officer never again saw the vehicle before it collided with another vehicle, causing personal injuries to the occupants of that vehicle. We concluded that the trial court

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[10] *Perez v. City of Omaha*, 15 Neb. App. 502, 515, 731 N.W.2d 604, 613 (2007).

[11] *Mid Century Ins. Co. v. City of Omaha*, 242 Neb. 126, 494 N.W.2d 320 (1992).

was not clearly wrong in determining that the officer was not engaged in a pursuit within the meaning of § 13-911.

We reach the same conclusion with respect to Cupak's actions. Viewing the evidence in a light most favorable to the city, as our standard of review requires, there is evidence from which a trier of fact could reasonably conclude that Cupak made no active attempt to apprehend Main after the unsuccessful attempt to stop him at 27th and H Streets. The district court did not err in concluding that Cupak was not engaged in a vehicular pursuit within the meaning of § 13-911.

(c) Actions of Brown and Stiles

The district court determined that Brown and Stiles "did not engage in a pursuit as defined by the statute" and that "[t]heir actions are more consistent with those described by the Omaha Police Department's policy on pulling over a driver for a traffic stop." But it also determined that even if the officers' actions could be regarded as an active attempt to apprehend Main, that attempt was terminated by the time Main passed under the L Street overpass on Highway 75.

Whether Brown and Stiles were engaged in a vehicular pursuit in their initial encounter with the pickup is a close question, as is evident from the testimony of Barrios and Gonzalez. For purposes of our analysis, we will assume without deciding that Brown and Stiles initiated a vehicular pursuit of Main when he turned left at 27th and F Streets and proceeded west. However, the record fully supports the district court's finding that any pursuit was terminated prior to the accident when Brown transmitted over his radio that he would not be in pursuit and turned off his cruiser's emergency lights and siren.

2. Proximate Cause

The district court found that the actions of Brown and Stiles "were not the proximate cause of the accident" in which Maclovi-Sierra was injured. Maclovi-Sierra argues that the court misapplied the law of proximate cause, because he was not required to prove that the conduct of the officers was *the* proximate cause, only that it was *a* proximate cause. His understanding of the applicable law is correct. In *Meyer*

v. State,[12] we held that a provision of the State Tort Claims Act which imposed strict liability for injuries to innocent third parties proximately caused by a law enforcement pursuit "require[d] that the actions of a law enforcement officer during a vehicular pursuit be merely a proximate cause of the damage, and not the sole proximate cause." We subsequently held in *Staley v. City of Omaha*[13] that the same principle applied to the similar language in § 13-911.

But we are not persuaded that the district court misapplied these principles. We understand the district court's findings to be that any causal connection between the actions of Brown and Stiles and the accident was broken when Brown announced that he was not in pursuit and deactivated his cruiser's emergency equipment, so that the subsequent actions of Main in driving the stolen pickup constituted the sole proximate cause of the accident. The court concluded that Main chose to "drive recklessly" at the Q Street exit ramp "not based upon any objective observations" of Brown and Stiles "but rather because of a prior experience in an unrelated high speed chase." The court further found that "Main's reckless driving in anticipation of the possibility that other officers may arrive was the proximate cause of [Maclovi-Sierra's] injuries."

In *Staley*, a trial court determined that a police pursuit was a proximate cause of a personal injury accident involving the pursued vehicle, notwithstanding the fact that the police had terminated the pursuit prior to the accident. We affirmed, reasoning:

> A law enforcement officer's decision and action to terminate a vehicular pursuit do not instantaneously eliminate the danger to innocent third parties contemplated in § 13-911. That danger continues until the motorist reasonably perceives that the pursuit has ended and has an opportunity to discontinue the hazardous, evasive driving behaviors contemplated in the statute.[14]

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[12] *Meyer v. State*, 264 Neb. 545, 550, 650 N.W.2d 459, 463 (2002).

[13] *Staley v. City of Omaha,* *supra* note 7.

[14] *Id.* at 551, 713 N.W.2d at 467.

Staley involved a pursuit in a residential neighborhood during hours of darkness. Because the police cruiser's siren was not functioning, the pursued motorist had no audible signal that the pursuit had been terminated. A passenger in the pursued vehicle testified that she saw the cruiser's flashing lights approximately 30 seconds before the accident. The fleeing motorist testified that he was attempting to evade police prior to and at the time of the accident. We concluded that under the totality of the circumstances, we could not say that the fleeing motorist's belief that he was being pursued was unreasonable, and we therefore affirmed the determination of the trial court that the pursuit was a proximate cause of the accident.

[6] But as we also said in *Staley*, "whether an injury to an innocent third party is 'proximately caused by the action of a law enforcement officer . . . during vehicular pursuit' is a question of fact which must necessarily be determined on a case-by-case basis."[15] In this case, the trial court made different findings of fact and reached a different conclusion than the trial court in *Staley*. Based upon the video and Lynch's testimony, the court discredited Main's testimony that he could hear sirens when he exited Highway 75, and it made a specific finding that "Main could not see or hear any trailing cruisers after he passed the 'L' Street overpass" and that Main's "subsequent decisions were based upon his assumption, from a previous high speed chase, that the trailing officers had radioed his location and other cruisers in the area may respond." The court further found:

> If Brown and Stiles were at any point in pursuit as defined by the statute, that pursuit had terminated. Main recognized the termination as he could no longer see or hear Brown and Stiles and continued to drive recklessly in anticipation of the arrival of other law enforcement that may search for him. Main's reckless driving in anticipation of the possibility that other officers may arrive was the proximate cause of [Maclovi-Sierra's] injuries.

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[15] *Id.*

The court found that after Main could no longer see or hear the cruisers that had been following him on Highway 75, he chose to exit the highway with the intent of crossing over and reentering the highway "heading the opposite direction at a normal pace to disguise his flight from potential additional responding officers."

The court found that "Main was aware, or should reasonably have realized, that he had outrun the original cruisers to the extent that they were no longer visible and that sirens were no longer audible." The court further found: "Assuming Main believed, for his first 14 seconds of travel on the ramp and onto Hwy 75, that the officers were or may pursue him; he certainly should have reasonably perceived that any pursuit from Brown and Stiles had ended."

[7] The question of proximate cause, in the face of conflicting evidence, is ordinarily one for the trier of fact, and the court's determination will not be set aside unless clearly wrong.[16] Here, the district court determined that Main's actions leading to the accident were not motivated by a police pursuit, but, rather, by an intent to evade other law enforcement personnel who might be looking for him but who were not then in actual pursuit. While we acknowledge that another trier of fact may have viewed the evidence differently, that is so of almost any factual determination made on the basis of conflicting evidence. Based upon our review of the record, we cannot say that the determination of the district court with respect to proximate cause was clearly wrong.

V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

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[16] *Staley v. City of Omaha, supra* note 7; *Meyer v. State, supra* note 12.

STATE OF NEBRASKA, APPELLEE, V. MALIQUE A. STEVENS, APPELLANT.

860 N.W.2d 717

Filed March 27, 2015. No. S-14-036.

1. **Courts: Juvenile Courts: Jurisdiction.** In determining whether a case should be transferred to juvenile court, a court should consider those factors set forth in Neb. Rev. Stat. § 43-276 (Cum. Supp. 2012). In order to retain the proceedings, the court need not resolve every factor against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.
2. **Courts: Juvenile Courts: Jurisdiction: Evidence.** When a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court.
3. **Trial: Joinder.** There is no constitutional right to a separate trial. Instead, the right is statutory and depends upon a showing that prejudice will result from a joint trial.
4. **Trial: Joinder: Proof: Appeal and Error.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
5. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
6. **Trial: Joinder: Indictments and Informations.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
7. **Trial: Joinder: Jurisdiction.** A court should grant a severance only if there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Prejudice serious enough to meet this standard may occur when evidence that the jury should not consider against a defendant and that would not be admissible against a defendant if a defendant were tried alone is admitted against a codefendant, when many defendants are tried together in a complex case and they have markedly different degrees of culpability, when essential exculpatory evidence that would be available to a defendant tried alone would be unavailable in a joint trial, or in other situations.
8. **Trial: Joinder: Proof.** To prevail on a severance argument, a defendant must show compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever.

9. **Pleadings: Parties: Judgments: Appeal and Error.** On appeal, a denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.
10. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
11. **Witnesses: Impeachment.** Generally, the credibility of a witness may be attacked by any party, including the party who called the witness.
12. ____: ____. One means of attacking the credibility of a witness is by showing inconsistency between his or her testimony at trial and what he or she said on previous occasions. The trial court has considerable discretion in determining whether testimony is inconsistent with prior statements.
13. ____: ____. As a general rule, a witness makes an inconsistent or contradictory statement if he or she refuses to either deny or affirm that he or she did, or if he or she answers that he or she does not remember whether or not he or she made it.
14. **Evidence: Hearsay.** It is elementary that out-of-court statements offered to prove the truth of the matter asserted are hearsay. Thus, prior extrajudicial statements of a witness may be received into evidence for the purpose of assisting the jury in ascertaining the credibility of the witness, but unless they are otherwise admissible, they may not be considered as substantive evidence of the facts declared in the statements.
15. **Witnesses: Impeachment.** A party cannot impeach his or her own witness without limitation.
16. **Witnesses: Impeachment: Prior Statements: Juries.** The rule permitting a party to impeach his or her own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made.
17. **Witnesses: Impeachment: Prior Statements: Case Disapproved.** A party's impeachment of its own witness under Neb. Rev. Stat. § 27-607 (Reissue 2008) with a prior inconsistent statement is not necessarily dependent upon a showing that the trial testimony sought to be impeached caused affirmative damage to the party's case. To the extent that *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982), and *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985), can be read to hold otherwise, they are disapproved.
18. **Sentences: Appeal and Error.** An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.
19. **Sentences.** When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. The sentencing court is not limited to any mathematically applied set of factors.

20. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Matthew K. Kosmicki for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

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

STEPHAN, J.

After a jury trial, Malique A. Stevens was convicted of robbery and sentenced to 6 to 10 years' imprisonment. A codefendant, Alfredo V. Dominguez, was tried with Stevens and convicted of the same crime. In this appeal, Stevens challenges various procedural and evidentiary rulings. We find no merit in any of his assignments of error and therefore affirm his conviction and sentence.

BACKGROUND

On the evening of December 3, 2012, Janelle Yaunk parked her car in the lot of an apartment complex in north Lincoln, Nebraska, where a friend resided. As she walked toward the entrance of the building, she was approached by a young man who displayed a gun. Two other young men soon joined him. All three wore hoods over their heads and foreheads, and the rest of their faces, except their eyes, were covered with bandannas.

The man with the gun ordered Yaunk to give him money. When she said she had none, he struck her in the face with the gun, and she sat on the ground. One of the other two men took her car keys and cell phone from her. The men then made her start the car for them before they ordered her out of the vehicle and drove away in it.

Yaunk's friend arrived soon after, and they called the police. Shortly after the robbery was reported, a Lincoln police officer

observed the stolen car and attempted to stop it. Three individuals in the car jumped out of it while it was still moving and ran away. The officer attempted to give chase but was unable to apprehend them. A cell phone that belonged to Orlando Neal was found in the abandoned vehicle. A pellet gun was found approximately 30 feet from the vehicle.

Neal eventually confessed to the robbery and was subsequently convicted and sentenced. In his initial statements to the police, he implicated Stevens and Dominguez as the other two participants in the robbery. In a subsequent deposition, however, Neal stated Stevens and Dominguez were not involved. Investigators found Stevens' fingerprints on the exterior of Yaunk's car, and this evidence was admitted at trial. Investigators also determined that DNA found on the pellet gun came from Dominguez, and this evidence was admitted at trial.

Both Stevens and Dominguez were 15 years old at the time the robbery was committed. They were each charged with one count of robbery in separate informations filed in the district court for Lancaster County. The cases were then consolidated for trial. Stevens filed a motion to transfer his case to juvenile court. After conducting an evidentiary hearing on the motion, the district court found good cause to deny the transfer. After the DNA evidence implicating Dominguez was discovered, Stevens filed a motion requesting his trial be severed, but the motion was denied.

Yaunk testified and described the robbery. She identified Stevens and Dominguez in court as two of the perpetrators. Timothy Robinett, a Lincoln cabdriver, testified that the night of the robbery, he had been at a Walgreens store near the scene of the robbery and three young men had attempted to hire his cab. Over Stevens' objection, Robinett testified that he was 50- to 75-percent sure that Stevens was one of the young men. Robinett was unable to identify the others.

The State also called Dakota Grant, Stevens' brother. Grant was arrested on December 4, 2012, for the robbery, along with Stevens and Dominguez. He testified that before they were arrested, he was with Stevens and Dominguez and heard them talking, but did not hear what they were saying. He also

testified that he did not remember talking to a police officer after he was arrested. After a court recess, Grant stated that on December 4, Stevens and Dominguez were looking at a newspaper Web site and reading and talking about an article describing the robbery and carjacking. The State asked Grant whether he had told the police that Stevens and Dominguez had been talking about the actual robbery, not the article, but Dominguez' objection to the question was sustained by the court.

Neal also testified at trial. He testified that he had come to Lincoln a few days before December 4, 2012, to meet up with Stevens and Dominguez. He testified that he was at the Walgreens store with Stevens and Dominguez the evening of December 3 and that they tried to get a cab, but that then they split up and went separate ways. Neal described how he committed the robbery of Yaunk and stated that the two persons with him at the time were not Stevens and Dominguez. He admitted that he was stealing the car in order to get to Dominguez' home, where he was staying, and he stated that he did not remember telling the police at the time of his arrest the names of the persons he was with during the robbery. Over objection, Neal was allowed to testify that he originally told the police that Dominguez was with him at the time of the robbery. Neal also testified that he used Stevens' name when talking to the police, but emphasized that he never said Stevens took part in the robbery.

After hearing all the evidence, the jury convicted both Stevens and Dominguez of robbery. Stevens was subsequently sentenced to 6 to 10 years' imprisonment, and he filed this timely appeal.

ASSIGNMENTS OF ERROR

Stevens assigns, restated, that the district court erred in (1) denying his motion to transfer to juvenile court, (2) denying his motion to sever his trial, (3) allowing Robinett to make an in-court identification of him, (4) allowing the State to impeach Grant and Neal with their prior inconsistent statements, and (5) imposing an excessive sentence.

ANALYSIS

Motion to Transfer to Juvenile Court

[1] When Stevens moved to transfer his case to juvenile court, the district court conducted a hearing pursuant to Neb. Rev. Stat. § 29-1816(2)(a) (Cum. Supp. 2012). That statute provides the "customary rules of evidence shall not be followed at such hearing," and requires consideration of the 15 factors set forth in Neb. Rev. Stat. § 43-276 (Cum. Supp. 2012). In order to retain the proceedings, the court need not resolve every factor against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor.[1] It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.[2] After the court considers the evidence in light of the § 43-276 factors, "the case shall be transferred unless a sound basis exists for retaining the case."[3] The court is required to "set forth findings for the reason for its decision" on the motion to transfer.[4]

The burden of proving a sound basis for retention lies with the State.[5] Elizabeth Buhr testified for the State at the hearing on Stevens' motion to transfer his case to juvenile court. Buhr is a children family services supervisor for the Department of Health and Human Services. In that role, she oversees the case management of seven family services specialists of children who are wards of the state. One such specialist is assigned to Stevens. That specialist was out of the country at the time of the hearing, but Buhr testified she had reviewed the file and had some personal knowledge of Stevens' history. In addition, the specialist had created a written summary of Stevens' case file.

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[1] See *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[2] *Id.*

[3] § 29-1816(2)(a).

[4] § 29-1816(2)(c).

[5] *State v. Goodwin, supra* note 1.

Relying primarily on this summary, Buhr testified about Stevens' history in juvenile court, including his placements, his law violations, and services that had been provided to him. Summarized, the evidence showed that between 2010 and 2012, Stevens had been charged with or cited for four felonies, including the robbery at issue in this case. He had been placed at various facilities, including group homes, residential treatment facilities, and rehabilitation and treatment centers. He had a history of running away from his placements, including from secure facilities. And from 2010 to 2012, he had been provided psychological evaluations, substance abuse evaluations and treatment, individual therapy, electronic monitoring, and drug screening. Stevens did not call any witnesses at the hearing.

In its order denying Stevens' motion to transfer, the district court considered each of the factors listed in § 43-276 that were applicable. It noted that Stevens had been in various out-of-home placements since September 2010, when he was 13 years old, as a result of juvenile court adjudications, and was "on runaway status from placement on parole through the Office of Juvenile Services" at the time of the charged offense. The court found that Stevens failed to take advantage of "many opportunities at a wide variety of treatment options" and that he had "a pattern of absconding from placements designed to provide needed treatment and engaging in conduct that places him and others at risk of harm." The court found that the charged offense "was committed in an aggressive and premeditated manner" and that Stevens "has threatened family members with a weapon," "claims gang involvement," and had a "history of violence" which led the court to conclude that "not only his best interests, but those of the public may require his custody or supervision [to] extend beyond his minority." The court noted that under Neb. Rev. Stat. § 29-2204(3) (Cum. Supp. 2012), it had the same dispositional alternatives as a juvenile court would have under the Nebraska Juvenile Code. After weighing the various factors, it concluded that it had a sound basis for retaining jurisdiction over the case.

[2] When a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court.[6] That is the case here. The record fully supports the reasoning of the district court in denying Stevens' motion to transfer the case to juvenile court. We find no abuse of discretion in the court's disposition of the motion.

Motion to Sever

After originally agreeing to a joint trial, Stevens filed a motion to sever. The district court denied the motion, and Stevens argues on appeal that it erred in doing so.

[3-5] There is no constitutional right to a separate trial.[7] Instead, the right is statutory and depends upon a showing that prejudice will result from a joint trial.[8] The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.[9] A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.[10]

[6] According to § 29-2002(2), the court may order two or more informations to be tried together "if the defendants . . . are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The court may order separate trials if "it appears that a defendant or the state would be prejudiced by a joinder of offenses . . . for trial together."[11] We have held:

> "[T]he propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or

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[6] *Id.*

[7] *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013).

[8] *Id.*; Neb. Rev. Stat. § 29-2002 (Reissue 2008).

[9] *State v. Foster, supra* note 7.

[10] *Id.*

[11] § 29-2002(3).

> information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial."[12]

[7] A court should grant a severance only if there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.[13] Prejudice serious enough to meet this standard may occur when evidence that the jury should not consider against a defendant and that would not be admissible against a defendant if a defendant were tried alone is admitted against a codefendant, when many defendants are tried together in a complex case and they have markedly different degrees of culpability, when essential exculpatory evidence that would be available to a defendant tried alone would be unavailable in a joint trial, or in other situations.[14]

[8,9] To prevail on a severance argument, a defendant must show compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever.[15] On appeal, a denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.[16]

Here, there is no question that the two cases arose out of the same act or transaction and were thus joinable for trial. Stevens was therefore required to show that joinder was prejudicial in order to prevail on his motion to sever. He contends that prejudice existed because the State had DNA evidence linking Dominguez to the pellet gun used in the robbery. He essentially concedes that this evidence would have been admissible against him even had he had a separate trial, but argues it was nevertheless prejudicial because of the possibility

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[12] *State v. Foster, supra* note 7, 286 Neb. at 836, 839 N.W.2d at 795, quoting *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

[13] See *State v. Foster, supra* note 7.

[14] *Id.*

[15] *Id.*

[16] *Id.*

that the jury would find the evidence against Dominguez so overwhelming that it would necessarily conclude Stevens must have participated in the robbery as well.

We reject this argument. This was not a complicated case. The jury was well aware that it was to decide whether one or both of the defendants, Dominguez and Stevens, participated in the robbery. The mere fact that DNA evidence linked Dominguez to the gun was not specific and actual prejudice to Stevens. The district court did not abuse its discretion in denying Stevens' motion to sever.

In-Court Identification of Stevens by Robinett

Robinett testified at trial that he was 50- to 75-percent certain that Stevens was one of the young men that attempted to hire his cab at a Walgreens store near the scene of the robbery on the night of the crime. Stevens objected to this testimony as not accurate and based on Neb. Rev. Stat. § 27-403 (Reissue 2008), but the district court overruled his objections. Stevens cross-examined Robinett about his identification testimony.

On appeal, Stevens does not contend the testimony was inadmissible pursuant to § 27-403. Instead, relying upon *Manson v. Brathwaite*,[17] he argues it was too unreliable to be admissible. *Manson* noted that "reliability is the linchpin in determining the admissibility of identification testimony."[18] *Manson* also set out factors that should be considered when determining the reliability of identification testimony, including the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his or her prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. In essence, Stevens argues that this reliability criterion was not met in this case, so Robinett's testimony should not have been received over Stevens' objection.

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[17] *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

[18] *Id.*, 432 U.S. at 114.

The *Manson* factors, however, are not directly applicable to this case. The U.S. Supreme Court clarified in *Perry v. New Hampshire*[19] that a preliminary finding of the reliability of an eyewitness identification is necessary only when the identification was procured under unnecessarily suggestive circumstances arranged by law enforcement. There was police involvement in the identification at issue in *Manson*. But here, the issue does not involve an allegedly suggestive pretrial identification arranged by law enforcement. Rather, all that is being challenged is Robinett's in-court identification of Stevens. According to *Perry*,[20] in such a situation,

> it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

We recognized and applied this distinction in *State v. Nolan*.[21]

Here, Stevens exercised his opportunity to challenge the reliability of Robinett's identification through the means articulated in *Perry*. And, notably, he does not argue anything on appeal other than the *Manson* reliability test. Because that test does not apply, the district court could not have erred in failing to apply it.

Impeachment of Grant and Neal

Stevens argues that the State was allowed to elicit improper impeachment evidence from witnesses Grant and Neal. As noted, both Grant and Neal were also arrested in connection with the robbery. The record is unclear as to whether Grant was ultimately charged. Neal, however, confessed and had been convicted prior to Stevens' trial.

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[19] *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

[20] *Id.*, 132 S. Ct. at 721.

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

The State called both Grant and Neal at trial. Grant testified that Stevens is his brother and that Grant was with Stevens and Dominguez on the morning after the robbery. Grant originally testified that during that time, he could hear Stevens and Dominguez talking, but was unable to hear what they were saying. He was then asked if he spoke to a police officer after he was arrested later that day, and he responded that he did not remember. The trial was then recessed for the day.

When Grant resumed his testimony on the following day, he stated that he heard Stevens and Dominguez talking and that they were looking at a newspaper Web site and discussing the carjacking/robbery. He recalled that they were talking about a news article reporting the crime, but not talking as if they committed the crime. Grant was then asked if, after his arrest, he told the police that Stevens and Dominguez had been talking about the actual crime. Dominguez' objection to that question was sustained.

Neal testified that he came to Lincoln from Omaha, Nebraska, on approximately December 2, 2012, to meet Stevens and Dominguez. The three had been close in the past, and he considered them as his brothers. He admitted that he was with Stevens and Dominguez at the Walgreens store near the scene of the crime and near the time of the crime and that they tried to get a cab there. He testified that Dominguez and Stevens left soon after and that he decided to "jack a car." He described the robbery in some detail and stated that two other persons whose names he did not know participated in the crime, but he denied that Stevens and Dominguez were there. He stated that he did not remember telling police that Stevens and Dominguez participated in the robbery. Over an objection of improper impeachment, Neal was then asked whether a police officer had asked him at the time of his arrest for the names of his accomplices, and Neal admitted that he had given the officer Dominguez' name. Neal also admitted that he had mentioned Stevens' name to police, although he stated that he had never said Stevens was involved in the robbery.

[10,11] Stevens argues on appeal that the district court erred in permitting the State to impeach Grant and Neal with prior

inconsistent statements over objection. When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[22] Generally, the credibility of a witness may be attacked by any party, including the party who called the witness.[23] This principle, first articulated by this court in *State v. Fronning*[24] and subsequently codified in the Nebraska rules of evidence,[25] is a departure from the common-law voucher rule, which "assumed that the party calling a witness vouched for his or her credibility and, therefore, prohibited the party calling a witness from attacking that person's credibility," subject to certain exceptions.[26]

[12-14] One means of attacking the credibility of a witness is by showing inconsistency between his or her testimony at trial and what he or she said on previous occasions.[27] The trial court has considerable discretion in determining whether testimony is inconsistent with prior statements.[28] As a general rule, a witness makes an inconsistent or contradictory statement if he or she refuses to either deny or affirm that he or she did, or if he or she answers that he or she does not remember whether or not he or she made it.[29] It is elementary that out-of-court statements offered to prove the truth of the matter asserted are hearsay.[30] Thus, prior extrajudicial

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[22] *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013); *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[23] Neb. Rev. Stat. § 27-607 (Reissue 2008); *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985).

[24] *State v. Fronning*, 186 Neb. 463, 183 N.W.2d 920 (1971).

[25] § 27-607.

[26] R. Collin Mangrum, Mangrum on Nebraska Evidence § 27-607 at 491 (2014). See, also, *State v. Fronning, supra* note 24; *Welton v. State*, 171 Neb. 643, 107 N.W.2d 394 (1961).

[27] *State v. Marco, supra* note 23.

[28] *Id.*

[29] *Id.*

[30] Neb. Rev. Stat. § 27-801(3) (Reissue 2008); *State v. Marco, supra* note 23.

statements of a witness may be received into evidence for the purpose of assisting the jury in ascertaining the credibility of the witness, but unless they are otherwise admissible, they may not be considered as substantive evidence of the facts declared in the statements.[31]

[15,16] A party cannot impeach his or her own witness without limitation.[32] In *State v. Brehmer*,[33] we stated that the rule permitting a party to impeach his or her own witness

> "may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made."

One commentator refers to this as a "'no artifice'" rule.[34] In *State v. Marco*,[35] we cited with approval a federal case holding that the prosecution should not be permitted

> "to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence—or if it didn't miss it, would ignore it."

More recently, we have said that "a party may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible."[36]

An exception to the common-law voucher rule prohibiting impeachment by a party of its own witness existed if the calling party could show surprise and affirmative damage to

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[31] *State v. Marco, supra* note 23.

[32] See *id.*

[33] *State v. Brehmer*, 211 Neb. 29, 44, 317 N.W.2d 885, 893 (1982). See *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960).

[34] Mangrum, *supra* note 26 at 492.

[35] *State v. Marco, supra* note 23, 220 Neb. at 100-01, 368 N.W.2d at 473, quoting *United States v. Webster*, 734 F.2d 1191 (7th Cir. 1984).

[36] *State v. Boppre*, 243 Neb. 908, 926, 503 N.W.2d 526, 537 (1993).

its case.[37] In *Brehmer*,[38] we noted that while it was no longer necessary to show surprise in order to impeach one's own witness with a prior inconsistent statement, the impeachment was nevertheless improper, in part because there was no "affirmative damage" to the prosecution's case by the witness' answers at trial. We employed similar reasoning in *Marco*.

[17] There is tension between our reference to the "affirmative damage" exception in the *Brehmer* and *Marco* cases and our statement in *State v. Price*,[39] decided before either *Brehmer* or *Marco*, that "surprise" and "affirmative damage" were exceptions to the voucher rule and that their reinstatement under the rule stated in § 27-607 "would likely engender unnecessary confusion." We conclude that a party's impeachment of its own witness under § 27-607 with a prior inconsistent statement is not necessarily dependent upon a showing that the trial testimony sought to be impeached caused affirmative damage to the party's case. To the extent that *Brehmer* and *Marco* can be read to hold otherwise, they are disapproved.

The language of § 27-607 is similar to and patterned after rule 607 of the Federal Rules of Evidence.[40] When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.[41] Summarizing federal court decisions on this point, one commentator articulates the limitation on the scope of rule 607:

> [I]mpeachment of a party's own witness by means of a prior statement may not be employed as a "mere subterfuge" or for the "*primary* purpose of placing before the

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[37] See, Mangrum, *supra* note 26; 4 Michael H. Graham, Handbook of Federal Evidence § 607:3 (7th ed. 2012); Annot., Propriety, Under Federal Rule of Evidence 607, of Impeachment of Party's Own Witness, 89 A.L.R. Fed. 13 (1988).

[38] *State v. Brehmer, supra* note 33, 211 Neb. at 42, 317 N.W.2d at 893.

[39] *State v. Price*, 202 Neb. 308, 322, 275 N.W.2d 82, 90 (1979).

[40] See Mangrum, *supra* note 26.

[41] *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012).

> jury substantive evidence which is not otherwise admissible" when the party is aware prior to calling the witness that the witness will not testify consistent with the witness' prior statement.[42]

This rule "focuses upon the content of the witness' testimony as a whole" so that "if the witness' testimony is important in establishing any fact of consequence significant in the context of the litigation, the witness may be impeached as to any other matter testified to by means of a prior inconsistent statement."[43] We conclude that these principles are consistent with the "no artifice" rule employed in our prior cases.[44]

Because the State was not permitted to impeach Grant with a prior inconsistent statement, we focus our attention on the State's direct examination of Neal. Without any reference to his prior statement, Neal's testimony established facts of consequence to the prosecution. Specifically, his testimony established that Stevens and Dominguez were with him in the area where the robbery was committed, shortly before it occurred, and that they shared his motive for finding free transportation to Dominguez' home. Neal's testimony also corroborated Robinett's in-court identification of Stevens as one of the three individuals who attempted to hire his cab. This testimony, when considered together with Stevens' fingerprints found on Yaunk's vehicle and Dominguez' DNA found on the gun, provided at least circumstantial evidence that Stevens and Dominguez participated with Neal in committing the robbery.

Neal's testimony that the other two perpetrators of the robbery were not Stevens and Dominguez, but, rather, two persons whose names he did not know, created an obvious issue of credibility in his account of the crime. Reference to his prior statement implicating Stevens and Dominguez was a legitimate and proper means of impeachment. Because Neal provided key evidence useful to the prosecution independent

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[42] 4 Graham, *supra* note 37, § 607:3 at 234-40.

[43] *Id*. at 240-41.

[44] See, Mangrum, *supra* note 26; *State v. Boppre, supra* note 36; *State v. Price, supra* note 39.

of his prior statement linking Stevens and Dominguez to the robbery, we cannot conclude that the State called him as a witness for the primary purpose of placing his prior statement before the jury. We conclude that the district court did not abuse its discretion in permitting the State to impeach Neal, over objection, with his prior inconsistent statement.

Excessive Sentence

Stevens was sentenced to 6 to 10 years' imprisonment for the robbery conviction. He argues the sentence imposed was excessive.

[18] An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.[45] The 6- to 10-year sentence was well within the statutory limits for robbery, which is a Class II felony with a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment.[46] We thus can find it excessive only if we conclude the district court abused its discretion in imposing it.

[19,20] When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense.[47] The sentencing court is not limited to any mathematically applied set of factors.[48] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[49]

Stevens does not argue that the district court failed to consider these factors. And a review of the record indicates the

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[45] *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[46] Neb. Rev. Stat. §§ 28-105 and 28-324 (Reissue 2008 & Cum. Supp. 2014).

[47] See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[48] *Id.*

[49] *Id.*

court did so. Instead, Stevens generally asserts that the sentence of imprisonment exceeds the minimum period consistent with the protection of the public, the gravity of the offense, and his rehabilitative needs.[50] He emphasizes his significantly troubled childhood and what he characterizes as a "minimal criminal history."[51]

The record reflects that Stevens has been involved in the juvenile system since he was 12 years old and that he has been in and out of foster homes and other care facilities. He has struggled with drugs and alcohol and has been sent to a youth rehabilitation and treatment center. At the same time, however, the record shows that he consistently refuses to follow rules, that he has escaped from the treatment center, and that he has been involved in at least three felonies since 2010. We conclude the district court did not abuse its discretion in sentencing Stevens to 6 to 10 years' imprisonment.

CONCLUSION

For the foregoing reasons, we affirm Stevens' conviction and sentence.

AFFIRMED.

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[50] See *State v. Haynie*, 239 Neb. 478, 476 N.W.2d 905 (1991).

[51] Brief for appellant at 26.

STATE OF NEBRASKA, APPELLEE, V.
ALFREDO V. DOMINGUEZ, APPELLANT.
860 N.W.2d 732

Filed March 27, 2015. No. S-14-047.

1. **Courts: Juvenile Courts: Jurisdiction.** In determining whether a case should be transferred to juvenile court, a court should consider those factors set forth in Neb. Rev. Stat. § 43-276 (Cum. Supp. 2012). In order to retain the proceedings, the court need not resolve every factor against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.

2. **Courts: Juvenile Courts: Jurisdiction: Evidence.** When a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court.
3. **Trial: Joinder.** There is no constitutional right to a separate trial. Instead, the right is statutory and depends upon a showing that prejudice will result from a joint trial.
4. **Trial: Joinder: Proof: Appeal and Error.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
5. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
6. **Trial: Joinder: Indictments and Informations.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
7. **Trial: Joinder: Jurisdiction.** A court should grant a severance only if there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Prejudice serious enough to meet this standard may occur when evidence that the jury should not consider against a defendant and that would not be admissible against a defendant if a defendant were tried alone is admitted against a codefendant, when many defendants are tried together in a complex case and they have markedly different degrees of culpability, when essential exculpatory evidence that would be available to a defendant tried alone would be unavailable in a joint trial, or in other situations.
8. **Trial: Joinder: Proof.** To prevail on a severance argument, a defendant must show compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever.
9. **Pleadings: Parties: Judgments: Appeal and Error.** On appeal, a denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.
10. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
11. **Witnesses: Impeachment.** Generally, the credibility of a witness may be attacked by any party, including the party who called the witness.
12. ____: ____. One means of attacking the credibility of a witness is by showing inconsistency between his or her testimony at trial and what he or she said on previous occasions. The trial court has considerable discretion in determining whether testimony is inconsistent with prior statements.
13. ____: ____. As a general rule, a witness makes an inconsistent or contradictory statement if he or she refuses to either deny or affirm that he or she did, or if he or she answers that he or she does not remember whether or not he or she made it.

14. **Evidence: Hearsay.** It is elementary that out-of-court statements offered to prove the truth of the matter asserted are hearsay. Thus, prior extrajudicial statements of a witness may be received into evidence for the purpose of assisting the jury in ascertaining the credibility of the witness, but unless they are otherwise admissible, they may not be considered as substantive evidence of the facts declared in the statements.
15. **Witnesses: Impeachment.** A party cannot impeach his or her own witness without limitation.
16. **Witnesses: Impeachment: Prior Statements: Juries.** The rule permitting a party to impeach his or her own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made.
17. **Witnesses: Impeachment: Prior Statements: Case Disapproved.** A party's impeachment of its own witness under Neb. Rev. Stat. § 27-607 (Reissue 2008) with a prior inconsistent statement is not necessarily dependent upon a showing that the trial testimony sought to be impeached caused affirmative damage to the party's case. To the extent that *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982), and *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985), can be read to hold otherwise, they are disapproved.
18. **Jury Instructions: Appeal and Error.** The determination of whether a jury instruction is correct is a question of law, and an appellate court resolves questions of law independently of the determination reached by the trial court.
19. **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.
20. **Criminal Law: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
21. **Sentences: Appeal and Error.** An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.
22. **Sentences.** When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. The sentencing court is not limited to any mathematically applied set of factors.

23. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Jennifer M. Houlden, and Keenan Gallagher, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Austin N. Relph for appellee.

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

STEPHAN, J.

After a jury trial, Alfredo V. Dominguez was convicted of robbery and sentenced to imprisonment for 6 to 10 years. A codefendant, Malique A. Stevens, was tried with Dominguez and convicted of the same crime. In this appeal, Dominguez challenges various procedural and evidentiary rulings. We find no merit in any of his assignments of error and therefore affirm his conviction and sentence.

BACKGROUND

On the evening of December 3, 2012, Janelle Yaunk parked her car in the lot of an apartment complex in north Lincoln, Nebraska, where a friend resided. As she walked toward the entrance of the building, she was approached by a young man who displayed a gun. Two other young men soon joined him. All three wore hoods over their heads and foreheads, and the rest of their faces, except their eyes, were covered with bandannas.

The man with the gun ordered Yaunk to give him money. When she said she had none, he struck her in the face with the gun, and she sat on the ground. One of the other two men took her car keys and cell phone from her. The men then made her start the car for them before they ordered her out of the vehicle and drove away in it.

Yaunk's friend arrived soon after, and they called the police. Shortly after the robbery was reported, a Lincoln police officer observed the stolen car and attempted to stop it. Three individuals in the car jumped out of it while it was still moving and ran away. The officer attempted to give chase but was unable to apprehend them. A cell phone that belonged to Orlando Neal was found in the abandoned vehicle. A pellet gun was found approximately 30 feet from the vehicle.

Neal eventually confessed to the robbery and was subsequently convicted and sentenced. In his initial statements to the police, he implicated Stevens and Dominguez as the other two participants in the robbery. In a subsequent deposition, however, Neal stated Stevens and Dominguez were not involved. Investigators found Stevens' fingerprints on the exterior of Yaunk's car, and this evidence was admitted at trial. Investigators also determined that DNA found on the pellet gun came from Dominguez, and this evidence was admitted at trial.

Both Stevens and Dominguez were 15 years old at the time the robbery was committed. They were each charged with one count of robbery in separate informations filed in the district court for Lancaster County. The cases were then consolidated for trial. Dominguez filed a motion to transfer his case to juvenile court. After conducting an evidentiary hearing on the motion, the district court found good cause to deny the transfer. After the fingerprint evidence implicating Stevens was discovered, Dominguez filed a motion requesting his trial be severed, but the motion was denied.

Yaunk testified and described the robbery. She identified Stevens and Dominguez in court as two of the perpetrators. Timothy Robinett, a Lincoln cabdriver, testified that the night of the robbery, he had been at a Walgreens store near the scene of the robbery and three young men had attempted to hire his cab. Over Stevens' objection, Robinett testified that he was 50- to 75-percent sure that Stevens was one of the young men. Robinett was unable to identify the others.

The State also called Dakota Grant, Stevens' brother. Grant was arrested on December 4, 2012, for the robbery, along with Stevens and Dominguez. He testified that before they

were arrested, he was with Stevens and Dominguez and heard them talking, but did not hear what they were saying. He also testified that he did not remember talking to a police officer after he was arrested. After a court recess, Grant stated that on December 4, Stevens and Dominguez were looking at a newspaper Web site and reading and talking about an article describing the robbery and carjacking. The State asked Grant whether he had told the police that Stevens and Dominguez had been talking about the actual robbery, not the article, but Dominguez' objection to the question was sustained.

Neal also testified at trial. He testified that he had come to Lincoln a few days before December 4, 2012, to meet up with Stevens and Dominguez. He testified that he was at the Walgreens store with Stevens and Dominguez the evening of December 3 and that they tried to get a cab, but that then they split up and went separate ways. Neal described how he committed the robbery of Yaunk and stated that the two persons with him at the time were not Stevens and Dominguez. He admitted that he was stealing the car in order to get to Dominguez' home, where he was staying, and he stated that he did not remember telling the police at the time of his arrest the names of the persons he was with during the robbery. Over objection, Neal was allowed to testify that he originally told the police that Dominguez was with him at the time of the robbery. Neal also testified that he used Stevens' name when talking to the police, but emphasized that he never said Stevens took part in the robbery.

After hearing all the evidence, the jury convicted both Stevens and Dominguez of robbery. Dominguez was subsequently sentenced to 6 to 10 years' imprisonment, and he filed this timely appeal.

ASSIGNMENTS OF ERROR

Dominguez assigns, restated, that the district court erred in (1) denying his motion to transfer to juvenile court, (2) denying his motion to sever his trial, (3) allowing the State to impeach witnesses Grant and Neal with their prior inconsistent statements, (4) giving an aiding and abetting instruction, and (5) imposing an excessive sentence. He also assigns

that the evidence adduced at trial was insufficient to sustain the robbery conviction.

ANALYSIS

Motion to Transfer to Juvenile Court

[1] When Dominguez moved to transfer his case to juvenile court, the district court conducted a hearing pursuant to Neb. Rev. Stat. § 29-1816(2)(a) (Cum. Supp. 2012). That statute provides the "customary rules of evidence shall not be followed at such hearing," and requires consideration of the 15 factors set forth in Neb. Rev. Stat. § 43-276 (Cum. Supp. 2012). In order to retain the proceedings, the court need not resolve every factor against the juvenile, and there are no weighted factors and no prescribed method by which more or less weight is assigned to a specific factor.[1] It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.[2] After the court considers the evidence in light of the § 43-276 factors, "the case shall be transferred unless a sound basis exists for retaining the case."[3] The court is required to "set forth findings for the reason for its decision" on the motion to transfer.[4]

The burden of proving a sound basis for retention lies with the State.[5] Dominguez' caseworker, Angela Miles, testified for the State at the hearing on Dominguez' motion to transfer his case to juvenile court. Miles provided information about Dominguez' prior law violations and placements. She also described the services that had been provided to Dominguez in juvenile court. Summarized, the evidence showed that Dominguez had been placed in shelter care, a group home, foster care, and at a youth rehabilitation and treatment center

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[1] See *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[2] *Id.*

[3] § 29-1816(2)(a).

[4] § 29-1816(2)(c).

[5] *State v. Goodwin, supra* note 1.

(YRTC). He was in secure detention at least four times, and had run away from a placement three times since 2010. He has previously escaped from the YRTC. He was adjudicated for an assault in 2008, an assault in 2009, and various criminal mischief violations in 2010 and 2011. Dominguez was 11 years old when he committed his first assault. There was also evidence that Dominguez identifies with a gang.

Miles testified that Dominguez has received drug and alcohol testing, a psychological evaluation, an electronic monitor, individual therapy, counseling, medical care, and transportation services. In general, he was uncooperative with many of the services offered to him. Miles opined that the juvenile system had provided "all the services necessary" for Dominguez and that there were "no additional ones" that could be provided.

In its order denying Dominguez' motion to transfer, the district court considered each of the factors listed in § 43-276 that were applicable. It noted that Dominguez had been previously adjudicated in juvenile court on more than one law violation, and had been in out-of-home placements since January 2010 as a result of juvenile court adjudications. The court noted that he had been confined at the YRTC on at least two occasions and had been in secure detention on at least four occasions, but had been "on runaway status at least three different times since January of 2010" while under commitment to the Office of Juvenile Services, and had escaped from the YRTC following a commitment in July 2011. The court observed that Dominguez had failed to take advantage of many treatment options which had been offered to him, and had "a pattern of absconding from placements designed to provide needed treatment and engaging in conduct that places him and others at risk of harm."

The court further found that the charged offense was committed "in an aggressive and premeditated manner." Based upon Miles' testimony, the court determined that Dominguez "refused to cooperate with drug testing after testing positive, he refused to go to school, he refused to participate in individual therapy and he refused to participate in drug and

alcohol treatment." The court concluded that Dominguez "has demonstrated an unwillingness to participate in programming through the juvenile court over a nearly three-year span" and that "[h]is admitted involvement with a gang, coupled with his history of violence[,] leads this court to conclude that not only his best interests, but those of the public may require his custody or supervision extend well beyond his minority." The court noted that under Neb. Rev. Stat. § 29-2204(3) (Cum. Supp. 2012), it had the same dispositional alternatives as a juvenile court would have under the Nebraska Juvenile Code. After weighing the various factors, it concluded there was a sound basis for retaining jurisdiction over the case.

[2] When a district court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to juvenile court.[6] That is the case here. The record fully supports the reasoning of the district court in denying Dominguez' motion to transfer the case to juvenile court. We find no abuse of discretion in the court's disposition of the motion.

Motion to Sever

Dominguez originally agreed to have his trial conducted jointly with the trial of Stevens. But after Stevens' fingerprints were found on the exterior of the robbery victim's car, Dominguez filed a motion to sever. The district court denied the motion, and Dominguez argues on appeal that the court erred in doing so.

[3-5] There is no constitutional right to a separate trial.[7] Instead, the right is statutory and depends upon a showing that prejudice will result from a joint trial.[8] The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.[9] A trial court's

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[6] *Id.*

[7] *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013).

[8] *Id.*; Neb. Rev. Stat. § 29-2002 (Reissue 2008).

[9] *State v. Foster, supra* note 7.

ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.[10]

[6] According to § 29-2002(2), the court may order two or more informations to be tried together "if the defendants . . . are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The court may order separate trials if "it appears that a defendant or the state would be prejudiced by a joinder of offenses . . . for trial together."[11] We have held:

> "[T]he propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial."[12]

[7] A court should grant a severance only if there is a serious risk that a joint trial could compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.[13] Prejudice serious enough to meet this standard may occur when evidence that the jury should not consider against a defendant and that would not be admissible against a defendant if a defendant were tried alone is admitted against a codefendant, when many defendants are tried together in a complex case and they have markedly different degrees of culpability, when essential exculpatory evidence that would be available to a defendant tried alone would be unavailable in a joint trial, or in other situations.[14]

[8,9] To prevail on a severance argument, a defendant must show compelling, specific, and actual prejudice from the court's

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[10] *Id.*

[11] § 29-2002(3).

[12] *State v. Foster, supra* note 7, 286 Neb. at 836, 839 N.W.2d at 795, quoting *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003).

[13] See *State v. Foster, supra* note 7.

[14] *Id.*

refusal to grant the motion to sever.[15] On appeal, a denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.[16]

Here, there is no question that the two cases arose out of the same act or transaction and were thus joinable for trial. Dominguez was therefore required to show that joinder was prejudicial in order to prevail on his motion to sever. He contends that prejudice existed because the State had fingerprint evidence linking Stevens to the stolen vehicle. He essentially concedes that this evidence would have been admissible against him even had he had a separate trial, but argues it was nevertheless prejudicial because of the possibility that the jury would find the evidence against Stevens so overwhelming that it would necessarily conclude Dominguez must have participated in the robbery as well.

We rejected a similar argument made by Stevens in his direct appeal, and we reach the same conclusion here. As we noted in *State v. Stevens*,[17] this was not a complicated case. The jury was well aware that it was to decide whether one or both of the defendants, Dominguez and Stevens, participated in the robbery. The mere fact that fingerprint evidence linked Stevens to the stolen vehicle was not specific and actual prejudice to Dominguez. The district court did not abuse its discretion in denying Dominguez' motion to sever.

Impeachment of Grant and Neal

Dominguez argues that the State was allowed to elicit improper impeachment evidence from witnesses Grant and Neal. As noted, both Grant and Neal were also arrested in connection with the robbery.

The record is unclear as to whether Grant was ultimately charged. Neal, however, confessed and had been convicted prior to Dominguez' trial. The State called both Grant and Neal at trial. Grant testified that Stevens is his brother and

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[15] *Id.*

[16] *Id.*

[17] *State v. Stevens, ante* p. 460, 860 N.W.2d 717 (2015).

that Grant was with Stevens and Dominguez on the morning after the robbery. Grant originally testified that during that time, he could hear Stevens and Dominguez talking, but was unable to hear what they were saying. He was then asked if he spoke to a police officer after he was arrested later that day, and he responded that he did not remember. The trial was then recessed for the day.

When Grant resumed his testimony on the following day, he stated that he heard Stevens and Dominguez talking and that they were looking at a newspaper Web site and discussing the carjacking/robbery. He recalled that they were talking about a news article reporting the crime, but not talking as if they committed the crime. Grant was then asked if, after his arrest, he told the police that Stevens and Dominguez had been talking about the actual crime. Dominguez' objection to that question was sustained.

Neal testified that he came to Lincoln from Omaha, Nebraska, on approximately December 2, 2012, to meet Stevens and Dominguez. The three had been close in the past, and he considered them as his brothers. He admitted that he was with Stevens and Dominguez at the Walgreens store near the scene of the crime and near the time of the crime and that they tried to get a cab there. He testified that Dominguez and Stevens left soon after and that he decided to "jack a car." He described the robbery in some detail and stated that two other persons whose names he did not know participated in the crime, but he denied that Stevens and Dominguez were there. He stated that he did not remember telling police that Stevens and Dominguez participated in the robbery. Over an objection of improper impeachment, Neal was then asked whether a police officer had asked him at the time of his arrest for the names of his accomplices, and Neal admitted that he had given the officer Dominguez' name. Neal also admitted that he had mentioned Stevens' name to police, although he stated that he had never said Stevens was involved in the robbery.

[10,11] Dominguez argues on appeal that the district court erred in permitting the State to impeach Grant and Neal with prior inconsistent statements over objection. When the

Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[18] Generally, the credibility of a witness may be attacked by any party, including the party who called the witness.[19] This principle, first articulated by this court in *State v. Fronning*[20] and subsequently codified in the Nebraska rules of evidence,[21] is a departure from the common-law voucher rule, which "assumed that the party calling a witness vouched for his or her credibility and, therefore, prohibited the party calling a witness from attacking that person's credibility," subject to certain exceptions.[22]

[12-14] One means of attacking the credibility of a witness is by showing inconsistency between his or her testimony at trial and what he or she said on previous occasions.[23] The trial court has considerable discretion in determining whether testimony is inconsistent with prior statements.[24] As a general rule, a witness makes an inconsistent or contradictory statement if he or she refuses to either deny or affirm that he or she did, or if he or she answers that he or she does not remember whether or not he or she made it.[25] It is elementary that out-of-court statements offered to prove the truth of the matter asserted are hearsay.[26] Thus, prior extrajudicial statements of a witness may be received into evidence for the

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[18] *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013); *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[19] Neb. Rev. Stat. § 27-607 (Reissue 2008); *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985).

[20] *State v. Fronning*, 186 Neb. 463, 183 N.W.2d 920 (1971).

[21] § 27-607.

[22] R. Collin Mangrum, Mangrum on Nebraska Evidence § 27-607 at 491 (2014). See, also, *State v. Fronning, supra* note 20; *Welton v. State*, 171 Neb. 643, 107 N.W.2d 394 (1961).

[23] *State v. Marco, supra* note 19.

[24] *Id.*

[25] *Id.*

[26] Neb. Rev. Stat. § 27-801(3) (Reissue 2008); *State v. Marco, supra* note 19.

purpose of assisting the jury in ascertaining the credibility of the witness, but unless they are otherwise admissible, they may not be considered as substantive evidence of the facts declared in the statements.[27]

[15,16] A party cannot impeach his or her own witness without limitation.[28] In *State v. Brehmer*,[29] we stated that the rule permitting a party to impeach his or her own witness

> "may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made."

One commentator refers to this as a "'no artifice'" rule.[30] In *State v. Marco*,[31] we cited with approval a federal case holding that the prosecution should not be permitted

> "to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence—or if it didn't miss it, would ignore it."

More recently, we have said that "a party may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible."[32]

An exception to the common-law voucher rule prohibiting impeachment by a party of its own witness existed if the calling party could show surprise and affirmative damage to

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[27] *State v. Marco, supra* note 19.

[28] See *id.*

[29] *State v. Brehmer*, 211 Neb. 29, 44, 317 N.W.2d 885, 893 (1982). See *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960).

[30] Mangrum, *supra* note 22 at 492.

[31] *State v. Marco, supra* note 19, 220 Neb. at 100-01, 368 N.W.2d at 473, quoting *United States v. Webster*, 734 F.2d 1191 (7th Cir. 1984).

[32] *State v. Boppre*, 243 Neb. 908, 926, 503 N.W.2d 526, 537 (1993).

its case.[33] In *Brehmer*,[34] we noted that while it was no longer necessary to show surprise in order to impeach one's own witness with a prior inconsistent statement, the impeachment was nevertheless improper, in part because there was no "affirmative damage" to the prosecution's case by the witness' answers at trial. We employed similar reasoning in *Marco*.

[17] There is tension between our reference to the "affirmative damage" exception in the *Brehmer* and *Marco* cases and our statement in *State v. Price*,[35] decided before either *Brehmer* or *Marco*, that "surprise" and "affirmative damage" were exceptions to the voucher rule and that their reinstatement under the rule stated in § 27-607 "would likely engender unnecessary confusion." We conclude that a party's impeachment of its own witness under § 27-607 with a prior inconsistent statement is not necessarily dependent upon a showing that the trial testimony sought to be impeached caused affirmative damage to the party's case. To the extent that *Brehmer* and *Marco* can be read to hold otherwise, they are disapproved.

The language of § 27-607 is similar to and patterned after rule 607 of the Federal Rules of Evidence.[36] When a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.[37] Summarizing federal court decisions on this point, one commentator articulates the limitation on the scope of rule 607:

> [I]mpeachment of a party's own witness by means of a prior statement may not be employed as a "mere subterfuge" or for the "*primary* purpose of placing before the

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[33] See, Mangrum, *supra* note 22; 4 Michael H. Graham, Handbook of Federal Evidence § 607:3 (7th ed. 2012); Annot., Propriety, Under Federal Rule of Evidence 607, of Impeachment of Party's Own Witness, 89 A.L.R. Fed. 13 (1988).

[34] *State v. Brehmer, supra* note 29, 211 Neb. at 42, 317 N.W.2d at 893.

[35] *State v. Price*, 202 Neb. 308, 322, 275 N.W.2d 82, 90 (1979).

[36] See Mangrum, *supra* note 22.

[37] *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012).

> jury substantive evidence which is not otherwise admissible" when the party is aware prior to calling the witness that the witness will not testify consistent with the witness' prior statement.[38]

This rule "focuses upon the content of the witness' testimony as a whole" so that "if the witness' testimony is important in establishing any fact of consequence significant in the context of the litigation, the witness may be impeached as to any other matter testified to by means of a prior inconsistent statement."[39] We conclude that these principles are consistent with the "no artifice" rule employed in our prior cases.[40]

Because the State was not permitted to impeach Grant with a prior inconsistent statement, we focus our attention on the State's direct examination of Neal. Without any reference to his prior statement, Neal's testimony established facts of consequence to the prosecution. Specifically, his testimony established that Stevens and Dominguez were with him in the area where the robbery was committed, shortly before it occurred, and that they shared his motive for finding free transportation to Dominguez' home. Neal's testimony also corroborated Robinett's in-court identification of Stevens as one of the three individuals who attempted to hire his cab. This testimony, when considered together with Stevens' fingerprints found on Yaunk's vehicle and Dominguez' DNA found on the gun, provided at least circumstantial evidence that Stevens and Dominguez participated with Neal in committing the robbery.

Neal's testimony that the other two perpetrators of the robbery were not Stevens and Dominguez, but, rather, two persons whose names he did not know, created an obvious issue of credibility in his account of the crime. Reference to his prior statement implicating Stevens and Dominguez was a legitimate and proper means of impeachment. Because Neal provided key evidence useful to the prosecution independent of his prior

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[38] 4 Graham, *supra* note 33, § 607:3 at 234-40.

[39] *Id.* at 240-41.

[40] See, Mangrum, *supra* note 22; *State v. Boppre, supra* note 32; *State v. Price, supra* note 35.

statement linking Stevens and Dominguez to the robbery, we cannot conclude that the State called him as a witness for the primary purpose of placing his prior statement before the jury. We conclude that the district court did not abuse its discretion in permitting the State to impeach Neal, over objection, with his prior inconsistent statement.

Aiding and Abetting Instruction

Over Dominguez' objection, the district court gave an aiding and abetting instruction to the jury. It provided:

> A defendant can be guilty of robbery even though he personally did not commit any act involved in the crime so long as he aided someone else to commit it. A defendant aided someone else if:
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> (1) the defendant intentionally encouraged or intentionally helped another person to commit the robbery; and
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> (2) the defendant intended that the robbery be committed; or the defendant knew that the other person intended to commit, or expected the other person to commit the robbery; and
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> (3) the robbery in fact was committed by that other person.

On appeal, Dominguez argues the instruction was improper because there was no evidence to support it. He contends that the evidence showed either he committed robbery or he did not, and that the evidence cannot be construed to show he aided and abetted a robbery.

[18,19] The determination of whether a jury instruction is correct is a question of law, and an appellate court resolves questions of law independently of the determination reached by the trial court.[41] 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.[42]

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

[42] *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005); *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

We addressed a similar situation in *State v. Spidell*.[43] There, a man named "Jorstad" was arrested by police while in the act of burglarizing a service station. Shortly after his arrest, Jorstad told police that Robert Spidell had also been in the station with him and had suggested the burglary. Spidell was arrested a few minutes later a short distance away from the station, driving Jorstad's car. At trial, Spidell testified he had simply borrowed Jorstad's car that evening and had been out running errands when he was arrested.

The district court gave an aiding and abetting instruction over Spidell's objection. Spidell argued it was improper, because the State's theory was that he was an actual participant in the robbery and the evidence supported only that theory. But we reasoned the instruction was proper, in part because the evidence was such that "the jury could . . . have believed [Spidell] was present, merely aiding and abetting as by driving the defendant's vehicle, or giving assistance at the scene by breaking the window, but not making entry."[44] We held:

> Where the evidence in a prosecution for burglary is such as to permit the jury to find that the defendant's participation with another in the crime was such as would make him at common law either an accessory before the fact, a principal in the second degree, or a principal, then it is proper to give an instruction on aiding and abetting . . . .[45]

This case is slightly different, because there was no indication that Dominguez acted as an accessory either before or after the robbery. Instead, the evidence was that all three men were involved in the robbery. Nevertheless, Yaunk testified that only one man struck her with the gun and demanded her money and that another man took her cell phone and keys. It is possible the jury could have found the other two aided and abetted these acts. Notably, the jury was instructed that to find Dominguez guilty of robbery, it had to find he "took money

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[43] *State v. Spidell*, 194 Neb. 494, 233 N.W.2d 900 (1975).

[44] *Id.* at 498, 233 N.W.2d at 903.

[45] *Id.* at 498, 233 N.W.2d at 903-04.

or personal property of any value" "with the intent to steal" and "did so forcibly and by violence or by putting . . . Yaunk in fear." The aiding and abetting instruction was appropriate here, because the jury could have determined that it was not Dominguez who brandished the gun or took the cell phone and keys, but that he nevertheless participated in the robbery.

Sufficiency of Evidence

Dominguez argues there was insufficient evidence to convict him of robbery, largely because there was no way to identify him as one of the participants in the robbery.

[20] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[46]

Dominguez' argument is without merit. Yaunk identified him at trial as one of the perpetrators, his DNA was found on the gun abandoned near the stolen vehicle, Neal's testimony placed him near the scene of the robbery near the time of the robbery, and Grant's testimony showed Dominguez demonstrated an interest in the crime the morning after it occurred. This evidence, if believed by the trier of fact, was more than sufficient to convict him.

Excessive Sentence

[21] Dominguez argues the sentence of 6 to 10 years' imprisonment was excessive. The 6- to 10-year sentence was well within the statutory limits for robbery, which is a Class II felony with a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment.[47] An appellate court will not

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[46] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014); *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

[47] Neb. Rev. Stat. §§ 28-105 and 28-324 (Reissue 2008 & Cum. Supp. 2014).

disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.[48] We thus can find it excessive only if we conclude the district court abused its discretion in imposing it.

[22,23] When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense.[49] The sentencing court is not limited to any mathematically applied set of factors.[50] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[51]

Dominguez contends the sentence was an abuse of discretion, because the district court did not adequately consider that he was only 15 years old at the time of the offense, that he had no prior felonies, that he had a turbulent childhood, and that he could benefit from treatment, not incarceration.

But a review of the sentencing order shows the district court considered all of these factors. What Dominguez is really contesting is the weight the court gave those factors. A sentencing court has considerable discretion in imposing sentences, and in light of all the evidence, the district court did not abuse its discretion in imposing a sentence of 6 to 10 years' imprisonment.

CONCLUSION

For the foregoing reasons, we affirm Dominguez' conviction and sentence.

AFFIRMED.

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[48] *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

[49] See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[50] *Id.*

[51] *Id.*

VALPAK OF OMAHA, LLC, APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE ET AL., APPELLEES.

861 N.W.2d 105

Filed March 27, 2015. No. S-14-125.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
4. **Administrative Law.** Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
5. **Ordinances: Presumptions: Proof.** In considering the validity of regulations, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

William Hargens, Nicholas K. Niemann, and Matthew R. Ottemann, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

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

WRIGHT, J.

NATURE OF CASE

Between October 1, 2004, and December 31, 2009, Valpak of Omaha, LLC (Valpak), paid over $5.5 million to Val-pak

Direct Marketing Systems, Inc. (Direct Marketing), to print direct mail advertisements and distribute them in and around Omaha, Nebraska. When Valpak was assessed use taxes on that amount, it asked for a redetermination that no taxes were due. It claimed that the payments to Direct Marketing were not transactions that were subject to use taxes under Nebraska law.

The Tax Commissioner of the Nebraska Department of Revenue (Department) rejected Valpak's argument and denied its petitions for redetermination. The district court affirmed, and Valpak now appeals. Because we conclude that Valpak was liable for use taxes on its payments to Direct Marketing, we affirm the judgment of the district court which affirmed the decision of the Tax Commissioner.

SCOPE OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Nebraska Account. & Disclosure Comm. v. Skinner*, 288 Neb. 804, 853 N.W.2d 1 (2014). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Skinner, supra*.

[3] In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings. *Skinner, supra*. "But '[t]o the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.'" *Id*. at 806, 853 N.W.2d at 6 (alteration in original).

FACTS

Background

Valpak is a Nebraska limited liability corporation with its principal place of business in Omaha. It is owned by Scott Farkas and Mary P. Rogers-Farkas and is a franchisee of Direct Marketing. Direct Marketing is a Delaware corporation with its principal place of business in Florida.

Direct Marketing sells advertising and marketing services. Principally, it offers "cooperative direct mail services," which services consist of printing and distributing "cooperative direct mail advertising." This advertising is a "method of advertising in which advertisements from multiple businesses are included in a single envelope or package for mailing."

The cooperative direct mail advertising offered by Directing Marketing employs "VALPAK® Envelopes" (envelopes), which bear one or more of Direct Marketing's trade names, trademarks, or logos. The envelopes are filled with multiple printed advertisements from national, regional, and local advertisers.

Direct Marketing distributes the envelopes according to a "unique proprietary segmentation system" that allows for targeted advertising. This system is based on "Neighborhood Trade Areas." Each "Neighborhood Trade Area" (NTA) is a "geographic area containing 10,000 residential addresses" that have been grouped "based on income demographics, purchase behaviors, proximity to retail shopping locations, traffic patterns and postal carrier routes." The envelopes sent to each NTA contain different advertisements. Purchasers of Direct Marketing's cooperative direct mail services designate which NTA's should receive their advertisements.

Production and Mailing of Envelopes

As one of Direct Marketing's franchisees, Valpak "sells and markets" Direct Marketing's cooperative direct mail services to businesses who wish to have advertisements included in the envelopes. Henceforth, we refer to such businesses as "clients."

At the beginning of the production and mailing process, clients enter into a "Participation Agreement" with Valpak. This agreement specifies the "amount and type of advertising services purchased," which NTA's the client wants to target, and with what frequency the client wants its advertisements included in the envelopes. Through the agreement, Valpak "agrees to provide . . . assistance in planning and preparation of rough copy, proof, printing, insertion, addressing, postage, envelopes, and mailing distribution specified in this agreement."

A client often provides its own art for its advertisements. Where the client does not, the art is created by Direct Marketing using a template chosen by the client, as well as information provided by the client. Whether supplied by the client or created from a template, all art is reviewed by Direct Marketing for compliance with production specifications (such as size and resolution) and intellectual property law.

Valpak places an order for the printing and mailing of advertisements by submitting an "Insertion Order" to Direct Marketing. Direct Marketing is responsible for (1) printing the advertisements, (2) collating them with other advertisements designated for delivery in the same NTA, (3) inserting the advertisements into the envelopes, and (4) labeling the envelopes for distribution to the residential addresses within the specified NTA. On a date set by Direct Marketing, it delivers the envelopes to a U.S. Postal Service facility in Florida to be sent by direct mail. At no point in the process does Valpak have physical possession of the advertisements or the envelopes. It receives a "*de minimis* number" of the envelopes for "record keeping or other business purposes."

For each "mailing" completed by Direct Marketing, Valpak receives an invoice and remits payment. Its clients do not receive an invoice from Direct Marketing. They are billed by and make payments to Valpak. Valpak does not collect sales taxes from its clients.

Legal Relationship Between Valpak and Direct Marketing

The franchise agreement between Valpak and Direct Marketing states that Valpak is an independent contractor and "[d]ealer" of Direct Marketing. Valpak has the right "to sell, and place orders for distribution of advertising, Advertising Inserts, or other products and/or services offered by [Direct Marketing], to be placed in [the envelopes] to be distributed within the Territory." Valpak is contractually obligated to pay Direct Marketing "for Production of [the envelopes] for all Mailings within the Territory, and for any other products and services ordered from" Direct Marketing.

Under the franchise agreement, Direct Marketing is designated as the "sole publisher and distributor" of the envelopes. It is obligated to "produce and distribute, or arrange for the Production and distribution, of all" the envelopes, including the advertisements sold by Valpak. Direct Marketing provides "all goods and services in connection with the Production" of the envelopes. Valpak is prohibited from printing, publishing, or distributing the envelopes itself.

With certain exceptions not applicable to this case, Direct Marketing has no liability for any taxes, including use taxes, levied on Valpak "in connection with sales made, services performed or business conducted by [Valpak], or payments made to [Direct Marketing] by [Valpak]."

Tax Assessments

On January 2, 2008, the Department issued a "Notice of Deficiency Determination and Assessment" to Valpak indicating that it owed $183,071.72 in use taxes, plus penalties and interest, for the tax period from October 1, 2004, to October 31, 2007. The use taxes were assessed on "Untaxed Invoiced Amounts" and "Valpak Direct Marketing System Amounts." The amounts described as "Valpak Direct Marketing System Amounts" reflected payments made by Valpak to Direct Marketing for mailings.

On July 2, 2009, the Department notified Valpak that it owed $49,194 in use taxes, plus penalties and interest, for the tax period from December 1, 2008, to May 31, 2009. The use taxes were assessed on payments made by Valpak to Direct Marketing. During the proceedings that followed, the assessment was amended by stipulation of the parties and the amount of use taxes was reduced to $48,518.10.

On February 10, 2012, the Department issued a "Notice of Deficiency Determination" to Valpak indicating that it owed $185,697.27 in use taxes, plus penalties and interest, for the tax periods from November 1, 2007, to November 30, 2008, and June 1 to December 31, 2009. The use taxes were assessed on payments made by Valpak to Direct Marketing.

Together, the three assessments covered the tax period from October 1, 2004, to December 31, 2009, and assessed a total of $417,287.09 in use taxes on Valpak's payments to Direct Marketing. Because Valpak claimed that these payments were not subject to use taxes under Nebraska law, it did not pay any of the taxes in question. Instead, in response to the assessments, it timely filed three separate petitions for redetermination, which were consolidated for consideration. During the proceedings that followed, Valpak agreed to pay $1,367.40 of the use taxes assessed against it. The Department also agreed to reduce the assessment for the tax period from October 1, 2004, to February 28, 2005.

After an administrative hearing, the Tax Commissioner determined that Valpak was an "advertising agency" subject to use taxes under the Department's sales and use tax regulations, specifically 316 Neb. Admin. Code, ch. 1, § 056 (1994). The Tax Commissioner explained (1) that in *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996), use taxes had been imposed on a licensee of Direct Marketing and (2) that the "business model and transactions" in the instant case did "not differ in any material respect from the business model and transactions" in *Val-Pak of Omaha*. The Tax Commissioner denied Valpak's petitions for redetermination, except for the use taxes assessed from October 1, 2004, to February 28, 2005, which the Department agreed to reduce.

Valpak petitioned for review with the district court, claiming that the hearing officer erred in "determining that the assessments of sales and consumers use tax set forth in the Notices (as amended) were correct." On January 14, 2014, the court affirmed the decision of the Tax Commissioner. It concluded that there were two alternative grounds for assessing use taxes against Valpak—the regulation upon which the Tax Commissioner had relied and Neb. Rev. Stat. § 77-2703(2) (Cum. Supp. 2004). In particular, the court found (1) that Valpak was an advertising agency for purposes of § 056 and (2) that Valpak "exercised sufficient rights and powers over the Envelopes with advertising inserts incident to ownership and possession to meet the statutory definitions of 'use' and 'purchase.'"

Valpak 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).

ASSIGNMENT OF ERROR

Valpak assigns, restated, that the district court erred in concluding that Valpak was liable for use taxes on its payments to Direct Marketing.

ANALYSIS

[4,5] The State's authority to impose use taxes is established by statute. See § 77-2703(2). However, there are various regulations which also relate to use taxes. See 316 Neb. Admin. Code, ch. 1 (2013). In particular, § 056 of the sales and use tax regulations addresses the imposition of sales and use taxes on advertising and advertising agencies. Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 1631, 185 L. Ed. 2d 616 (2013). And, in considering the validity of regulations, "courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those

who challenge their validity." *Smalley*, 283 Neb. at 557, 811 N.W.2d at 256.

There is no challenge to the validity of § 056 in the instant case. Valpak did not bring a facial or as-applied challenge to § 056, and it does not argue that the Department exceeded its authority in enacting § 056. Thus, if Valpak was an advertising agency during the relevant tax periods, § 056 controls whether Valpak was required to pay use taxes on the payments in question.

The district court concluded that Valpak was an advertising agency governed by § 056 and that it was liable for use taxes pursuant to the regulation. We review these determinations for errors appearing on the record. See *Nebraska Account. & Disclosure Comm. v. Skinner*, 288 Neb. 804, 853 N.W.2d 1 (2014). Because we find no error on the record, we affirm.

Advertising Agency

Section 056 of the Department's regulations governs the imposition of sales and use taxes on purchases and sales made by advertising agencies. "An advertising agency performs advertising services and develops advertising materials for its clients." 316 Neb. Admin. Code, ch. 1, § 056.01 (1994). For purposes of § 056, advertising materials "include all types of printed material, audio tapes, video tapes, signs, posters, pictures, drawings, computer graphics, computer music, paste-ups, mechanicals, or other artwork." See 316 Neb. Admin. Code, ch. 1, § 056.05C(1) (1994). See, also, 316 Neb. Admin. Code, ch. 1, §§ 056.03C(1) and 056.04C(2) (1994).

In the instant case, the evidence established that Valpak provided advertising services. The participation agreement used by Valpak stated that it would provide "assistance in planning and preparation of rough copy, proof, printing, insertion, addressing, postage, envelopes, and mailing distribution" of advertisements. In practice, this "assistance" included assimilating the abundance of information provided by Direct Marketing and using it to guide clients through the process of developing advertisements to be included in the envelopes. Farkas testified that Valpak filtered through the "thousands" of blank templates available to find ones which were appropriate

for a particular client and selected "two or three" blank templates to present to that client. He explained that Valpak used its knowledge of "best practices" in advertising to explain to a client how it could design an advertisement to be most effective. And he stated that Valpak supplied its clients with research that was relevant to deciding where and how frequently to send advertisements.

We consider the services of assimilating information and using it to guide clients through the process of developing advertisements to be advertising services, as did Valpak. Per its own description, it had a franchise to "offer . . . [a]dvertising services."

There was also evidence that Valpak developed advertising materials. To develop is to "evolve (as an idea) into a clear, full, and explicit presentation (as in a drawing or specification)." See Webster's Third New International Dictionary of the English Language, Unabridged 618 (1993). As noted above, Valpak was integrally involved in the process of choosing a template for each client. It then obtained the necessary information from the client, filled in the template, "prepare[d] a draft," and submitted the draft to Direct Marketing as part of an "Insertion Order." Through such actions, Valpak evolved each of its clients' desires and ideas into explicit, full designs for advertisements that could be sent to Direct Marketing for production.

The paper advertisements which ultimately were printed from these designs qualified as advertising materials, because they were "printed material." See § 056.05C(1). Accordingly, it could be ascertained from the foregoing evidence of Valpak's activities that it developed advertising materials. Valpak itself describes the advertisements it helped to create as "advertising materials." See brief for appellant at 22.

The aforementioned evidence established that Valpak provided advertising services and developed advertising materials. Therefore, there was competent evidence to support the district court's finding of fact that Valpak was an advertising agency. This finding was neither arbitrary nor unreasonable.

In addition to being supported by competent evidence, the district court's conclusion that Valpak was an advertising

agency is consistent with *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996), which recognized that a licensee of Direct Marketing was an advertising agency under the sales and use tax regulations. The version of § 056 in effect at that time differed in many respects from the current regulation. See 316 Neb. Admin. Code, ch. 1, § 056 (1984). But the use of the term "advertising agency" is consistent in both versions.

For purposes of applying the definition of an advertising agency, we find no significant differences between the actions of the licensee in *Val-Pak of Omaha, supra*, and of Valpak in the instant case. The licensee had an agreement with Direct Marketing that allowed it to sell advertisements that would be printed and distributed by Direct Marketing. The franchise agreement granted this same right to Valpak. The licensee entered into "'participation agreements' with local businesses" in which it "agreed to provide assistance in planning and preparing draft copies and proofs of the proposed advertising." See *id.* at 778, 545 N.W.2d at 448. Valpak agreed to provide identical services to its clients. The licensee "prepared the preliminary advertising material for submission to Direct Marketing" and then "forwarded" the advertisements to Direct Marketing to be printed and distributed. See *id.* at 778, 545 N.W.2d at 448-49. In this case, the evidence showed that Valpak also performed these tasks.

During the relevant tax periods, Valpak provided the same services to its clients as did the licensee in *Val-Pak of Omaha, supra*, and performed a substantially similar role in the development of advertisements. The actions of the licensee in *Val-Pak of Omaha* qualified it as an advertising agency. Therefore, by engaging in comparable actions, Valpak also acted as an advertising agency for purposes of the regulation.

Tax Liability Under Advertising Agency Regulation

Section 056 of the Department's regulations imposes sales and use taxes on the purchases and sales of advertising agencies. Advertising agencies are taxed differently depending on whether they are designated as the agents of their clients. See

316 Neb. Admin. Code, ch. 1, § 056.02 (1994). In the instant case, Valpak was not designated as the agent of its clients. Accordingly, its tax liability must be determined according to 316 Neb. Admin. Code, ch. 1, § 056.05 (1994), which "applies when the client has not designated the advertising agency as its agent for tax purposes."

Section 056.05 imposes taxes on specific types of purchases made by an advertising agency. As is relevant for our purposes, 316 Neb. Admin. Code, ch. 1, § 056.05A (1994), imposes a tax "on labor or creative talent purchased from third-parties for the development or production of the ideas or for work on advertising materials." The tax is assessed against the advertising agency purchasing the labor or creative talent. See *id*.

Valpak's payments to Direct Marketing fall within the category of purchases for which an advertising agency must pay taxes under § 056.05A. During these proceedings, Valpak conceded that its payments to Direct Marketing constituted purchases of services. Valpak stated that it purchased services only and that it did not purchase any tangible property. In light of this concession, we treat the entire amount of Valpak's payments to Direct Marketing as corresponding to purchases of services.

The services purchased with Valpak's payments to Direct Marketing were those performed by Direct Marketing in completing mailings, including printing and collating advertisements, inserting the advertisements into the envelopes, labeling the envelopes, and delivering the envelopes to the U.S. Postal Service. Valpak's purchase of these services was functionally equivalent to the purchase of the labor required to perform such services. And such labor was performed during the production of paper advertisements that constituted advertising materials. Thus, we conclude that each time Valpak remitted payment to Direct Marketing for the services it provided, Valpak purchased labor for work on advertising materials. In the case of some payments, Valpak also purchased creative talent for work on advertising materials, because Direct Marketing's services occasionally included creating artwork for advertisements.

The entire amount of Valpak's payments to Direct Marketing was taxable under § 056.05A, because those payments constituted purchases of labor and, in some cases, creative talent for work on advertising materials. The regulation speaks of taxes generally and does not differentiate between sales and use taxes. See *id*. However, it is well established that if an "item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies." See *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 119, 459 N.W.2d 519, 526 (1990). Accordingly, the taxes imposed on Valpak's purchases from Direct Marketing, a Florida business, were properly classified as use taxes.

Under § 056.05A, Valpak was required to pay use taxes on the payments it made to Direct Marketing. Therefore, the district court did not err by upholding the assessment of such taxes on those payments.

CONCLUSION

For the foregoing reasons, we find no error on the record in the district court's conclusion that under § 056 of the Department's regulations, Valpak was an advertising agency and was liable for use taxes on its payments to Direct Marketing. Therefore, we affirm the judgment of the district court which affirmed the decision of the Tax Commissioner to deny Valpak's petitions for redetermination.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

THOMAS R. GRIFFITH AND HEATHER GRIFFITH, APPELLEES, V. DREW'S LLC, APPELLANT.

860 N.W.2d 749

Filed March 27, 2015. No. S-14-456.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the party's brief.
2. **Courts: Appeal and Error.** The district court and higher appellate courts 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, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
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. And an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party.
6. **Real Estate: Property: Annexation.** Whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact.
7. **Damages.** While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.
8. **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.
9. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
10. **Deeds: Merger.** The rule or doctrine of merger is that upon the delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged therein. This rule is equally applicable where prior oral negotiations result in a written contract.
11. **Deeds: Merger: Fraud.** The doctrine of merger does not apply where there has been fraud or mistake.
12. **Fraud.** Where one has a duty to speak, but deliberately remains silent, his or her silence is equivalent to a false representation.
13. ____. In fraudulent concealment cases, existence of a duty to disclose the fact in question is a matter for the determination of the court, although, if there are disputed facts bearing upon the existence of the duty, they are to be determined by the trier of fact under appropriate instructions as to the existence of the duty.
14. ____. Justifiable reliance must be decided on a case-by-case basis.
15. **Actions: Fraud.** Where ordinary prudence would have prevented a deception, an action for the fraud perpetrated by such deception will not lie.
16. **Real Estate: Property: Words and Phrases.** Fixtures are usually thought of as personal property which has become a part of the real estate, but a trade fixture is defined as personalty.
17. **Real Estate: Property: Appurtenances: Words and Phrases.** Trade fixtures are articles annexed to the realty by a tenant for the purpose of carrying on trade and are ordinarily removable by him during his term.

18. **Real Estate: Property: Appurtenances.** In determining whether an article annexed to real estate has become a part of the real estate, a court should consider (1) actual annexation to the realty or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold, said intention being inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.
19. ____: ____: ____. The second component of the test to determine whether an article annexed to real estate has become a part of the real estate focuses on whether a chattel is specific to the type of business conducted on realty, or on whether it is the type of property that would generally be found on realty and that would have utility to a hypothetical purchaser of the underlying realty.
20. **Courts: Real Estate: Property: Words and Phrases.** It is incumbent on the court to define a fixture, but whether an article of property is a fixture in a particular instance depends upon the facts of that case.
21. **Real Estate: Property: Damages.** The rule that the measure of damages for fixtures is the difference in value of the real property before and after the removal of the articles is not an exclusive rule.
22. **Real Estate: Sales: Property: Valuation: Damages.** Fixtures ordinarily have a value separate and apart from the realty to which they are attached. That value may properly be submitted to the fact finder to enable it to more accurately determine a loss suffered by a purchaser.
23. **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.
24. **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.
25. **Trial: Testimony.** The weight to be given a witness' testimony is a question for the trier of fact.
26. **Trial: Evidence: Records: Appeal and Error.** The erroneous admission of evidence in a bench trial is not reversible error if other relevant evidence, properly admitted, sustains the trial court's necessary factual findings; in such case, reversal is warranted only if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.

Appeal from the District Court for Custer County, KARIN L. NOAKES, Judge, on appeal thereto from the County Court for Custer County, TAMI K. SCHENDT, Judge. Judgment of District Court affirmed.

Matthew S. McKeever, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellant.

Christopher P. Wickham, of Sennett, Duncan, Jenkins & Wickham, P.C., L.L.O., for appellees.

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

CASSEL, J.

INTRODUCTION

After two buyers closed on their purchase of a building that had formerly been leased as a dental clinic, they discovered that the interior doors had been removed. They sued the seller. The county court entered judgment for the buyers and awarded damages based on the cost they paid for replacement doors. The district court affirmed. Upon further appeal, we conclude that the doctrine of merger did not bar their claim and that the doors were fixtures rather than trade fixtures. We affirm.

BACKGROUND

For ease of understanding, we generally refer to the parties as "the buyers" and "the seller" throughout this opinion. But for the sake of completeness, we identify the respective parties. The buyers, Thomas R. Griffith and Heather Griffith, purchased the real estate from the seller, Drew's LLC. The seller's sole member was Andrew Solomon. Although we recognize that this business entity is a legal entity separate and distinct from its member, for purposes of this opinion, we will refer to the business entity and its member interchangeably as "the seller." The buyers and the seller signed a purchase agreement on February 8, 2012.

The seller had previously renovated the building for use as a dental clinic. Through May 2012, the seller leased the property to a dental practice owned by the seller's wife (former tenant). The former tenant began operating at a new location in January 2012.

The buyers planned to transform the building into their personal residence. The buyers first viewed the interior of

the property with the seller in approximately November 2011. At that time, the dental practice was still operating in the building.

The buyers also viewed the property after the dental practice had relocated. The buyers could not recall the exact date of the visit, but one of the buyers testified that "[i]t was between the February date and the closing date." Presumably, "the February date" referred to the date of the purchase agreement. Although the dental equipment was no longer in the building, the interior doors remained.

The parties never discussed whether the interior doors would stay with the property. At no time did the seller state that the doors were excluded from the purchase agreement. The seller and the former tenant removed the doors on Memorial Day 2012.

The parties closed on the property on June 1, 2012. The buyers did not inspect the property within the 24-hour period immediately before the closing, even though the purchase agreement would have permitted them to do so. After closing, one of the buyers discovered that the interior doors had been removed. Although the buyers requested that the doors be returned, the seller refused.

The buyers commenced a small claims action against the seller. They alleged that the interior doors were fixtures included in the purchase, and they sought damages or the return of the property. The seller transferred the matter to the regular civil docket of the county court. In an answer, the seller asserted that the items of property were trade fixtures. The seller also affirmatively alleged that the claim was barred by the doctrine of merger.

The county court, without a jury, conducted a trial. Evidence established that the doors were commercial, 60-minute-rated fire doors. The former tenant had purchased and installed the interior doors in 2004. The seller testified that the doors were in good, used condition and that they had "scuffing" and "a couple had dents."

In replacing the doors, the buyers did not purchase the same type of door. Instead, they purchased residential doors that were not fire rated. These prehung, unfinished, solid-core oak

doors cost approximately $250 each, and the doorknobs cost approximately $35 each.

The buyers obtained a quote from a lumber company for doors similar to those removed. The company's manager prepared an estimate for a new "90-minute fire door, flush oak, . . . a solid core slab door with the gypsum core, typically used in commercial applications." The estimate included the cost "to machine the door to specifications of the existing frame." In preparing the estimate, the manager took information from the buyers, called a door manufacturer to obtain a price, and then added the lumber company's general markup. He had never seen the doors at issue. He testified that his estimate, received in evidence over the seller's relevance and foundation objections, was an estimate commonly used in the business. Over the seller's objection, the manager testified that he quoted a per-door price of $380 plus a $39 "hinge and knob match."

The seller presented contrary evidence regarding the value of the doors. A construction worker in the area, who had familiarity with prices paid by contractors, examined the doors and opined that the doors were not worth $270 each. He felt that $75 would "be the going price," but that they were possibly worth even less due to their weight.

The county court entered judgment in favor of the buyers. The court found that the interior doors were not trade fixtures as defined by Neb. Rev. Stat. § 77-105 (Cum. Supp. 2014). The court also determined that an exception to the doctrine of merger existed due to fraud and misrepresentation by the seller. The court found that the buyers replaced 12 doors and that the cost of replacement was $250 per door plus $35 per doorknob. The court entered judgment against the seller in the amount of $3,420, plus costs.

The seller appealed to the district court, and the district court affirmed. The district court reasoned that the doors were not trade fixtures because "doors are not fixtures used directly in the field of dentistry" and that the doctrine of merger did not apply because the buyers pursued the action based on misrepresentation under the law of torts and not as an action on a contract. The district court determined that the county court's

findings were not clearly erroneous and that the evidence supported the county court's award of damages.

The seller timely appeals. We moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

The seller assigns 17 errors. It alleges, consolidated and restated, that the county court erred in (1) failing to apply the doctrine of merger, (2) failing to find that the doors were trade fixtures owned by the former tenant, (3) determining damages, and (4) overruling the seller's evidentiary objections.

[1] The seller also assigns that the county court erred in finding that an appraisal was done, at which time the appraiser observed the doors; in finding that the buyers were damaged by any misrepresentations; in finding that a duty existed to disclose that the interior doors belonged to the former tenant and were going to be removed prior to the transfer of the deed, and in overruling the seller's foundational objections to testimony regarding whether the dental practice had moved. However, the seller's brief contains no corresponding argument concerning these alleged errors. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the party's brief.[2] Thus, we do not consider the errors assigned but not argued in the seller's brief.

STANDARD OF REVIEW

[2-4] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.[3] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4] In instances when an

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

[2] *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment*, 287 Neb. 779, 844 N.W.2d 755 (2014).

[3] *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013).

[4] *Id.*

appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.[5]

[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. And an appellate court does not reweigh the evidence but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party.[6]

[6] Whether an article annexed to the real estate has become a part thereof is a mixed question of law and fact.[7]

[7] While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.[8]

[8,9] 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.[9] The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.[10]

ANALYSIS

The seller principally contends that the doors were trade fixtures. But it also relies upon the doctrine of merger. If that doctrine applies, we would not need to determine the character of the doors as fixtures or trade fixtures. Thus, we first address the argument pertaining to merger.

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[5] *Id.*

[6] *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 825 N.W.2d 779 (2013). See, also, *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990).

[7] *Swift Lumber & Fuel Co. v. Elwanger*, 127 Neb. 740, 256 N.W. 875 (1934).

[8] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

[9] *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014).

[10] *Id.*

Doctrine of Merger

[10,11] The rule or doctrine of merger is that upon the delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged therein. This rule is equally applicable where prior oral negotiations result in a written contract.[11] However, the doctrine of merger does not apply where there has been fraud or mistake.[12]

The county court applied the exception based upon the seller's fraud and misrepresentation. The court reasoned that the buyers had a reasonable belief the interior doors were part of the purchase agreement and that their belief was reinforced when the doors remained after the purchase agreement had been signed and the dental practice had relocated. The court determined that the failure to disclose that the doors belonged to the former tenant and would be removed amounted to a misrepresentation and a fraud.

[12] Where one has a duty to speak, but deliberately remains silent, his or her silence is equivalent to a false representation.[13] Although the circumstances of each case typically determine whether a duty to disclose exists, there are several situations which have been consistently recognized as creating a duty to disclose.[14] Those situations have been set forth in the Restatement (Second) of Torts.[15] The Restatement recognizes a duty to disclose "facts basic to the transaction" if a party to the transaction "knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts."[16] The Restatement also acknowledges a duty

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[11] *Beltzer v. Willeford Farms*, 215 Neb. 102, 337 N.W.2d 406 (1983).

[12] *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

[13] *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000), *overruled in part on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

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

[15] See Restatement (Second) of Torts § 551 (1977).

[16] *Id.*, § 551(2)(e) at 119.

to disclose "matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading."[17]

[13] In fraudulent concealment cases, existence of a duty to disclose the fact in question is a matter for the determination of the court, although, if there are disputed facts bearing upon the existence of the duty, they are to be determined by the trier of fact under appropriate instructions as to the existence of the duty.[18] But, here, the facts are essentially undisputed. Thus, we review the question as a matter of law and make an independent determination.

Under the circumstances of this case, we agree that a duty to disclose existed. Like windows, interior doors located within a property are customarily included with a real estate purchase. Their inclusion is assumed, and one would not expect a purchase agreement to explicitly state that they are included. Thus, if the seller did not intend to include the doors—contrary to ordinary experience—that information should have been disclosed.

[14,15] The seller responds that the buyers' reliance was not justified. Justifiable reliance must be decided on a case-by-case basis.[19] Where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie.[20] Here, the buyers inspected the property, both before and after the dental practice had relocated. At the time of the second inspection, the dental equipment had been removed but the doors remained. It would not be obvious to anyone that the doors would be removed later. At that point, the building's appearance conveyed the message that the trade fixtures had been removed and all that remained was property included in the sale. From that time forward, the seller had the duty to disclose its intention to remove the interior doors.

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[17] *Id.*, § 551(2)(b) at 119.

[18] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, *supra* note 14. See, also, Restatement, *supra* note 15, comment *m*.

[19] *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009).

[20] *Bibow v. Gerrard*, 209 Neb. 10, 306 N.W.2d 148 (1981).

We conclude that the evidence in this case supports the county court's conclusion that the buyers reasonably relied on the misrepresentation. Thus, the doctrine of merger did not prevent the seller from being liable for its misrepresentation.

Fixture or Trade Fixture?

[16,17] The principal question in this appeal is whether the doors were fixtures or trade fixtures. Fixtures are usually thought of as personal property which has become a part of the real estate, but a trade fixture is defined as personalty.[21] Trade fixtures are articles annexed to the realty by a tenant for the purpose of carrying on trade and are ordinarily removable by him during his term.[22]

The seller asserts that the county court erred in relying upon a definition of a trade fixture found within Nebraska's revenue and taxation statutes.[23] Section 77-105 states in pertinent part, "The term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased." While this description may have some utility as persuasive authority, the more sound approach is to look to the common law and the test developed thereunder.

Determining whether an item is a fixture or a trade fixture can be a difficult task. "[W]hile the general principles applicable to the question of trade fixtures are well settled, the courts have experienced much difficulty in applying them to variant fact situations, and as a result, it may be said that what constitutes a 'trade fixture' depends on the facts of the particular case."[24]

[18] Long ago, we set forth a test to assist in the determination of whether an article annexed to real estate has become a part of the real estate. In determining the question, a court

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[21] See *Frost v. Schinkel*, 121 Neb. 784, 238 N.W. 659 (1931).

[22] *Id.*

[23] See § 77-105.

[24] 36A C.J.S. *Fixtures* § 37 at 316 (2014).

should consider (1) actual annexation to the realty or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold, said intention being inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.[25]

[19] We apply the three-part test to resolve the question. First, the doors were attached to doorframes, which were then affixed to the building. We have previously stated that doors are a part of the real estate, even though they are often hung but not fastened to a building.[26] Second, the doors were reasonably necessary for the purposes for which the real estate was being used—they served to divide the interior of the building and to enclose rooms, supplying privacy.

> The second part of the test focuses on whether a chattel is specific to the type of business conducted on realty, or on whether it is the type of property that would generally be found on realty and that would have utility to a hypothetical purchaser of the underlying realty.[27]

The parties stipulated that fire doors were required in the building under a building code applicable to new health care occupancies, but doors are not specific to a dental practice and are the type of property that would be useful to any purchaser of the realty. Third, permissible inferences support a conclusion favorable to the buyers as to the former tenant's intent. The record establishes that the former tenant, owned and operated by the seller's wife, had the doors installed in a building owned by the seller. Given this relationship between tenant and landlord, the county court could reasonably infer that the former tenant intended to make the doors a permanent part of the real estate. We agree with the courts below that the

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[25] See *Swift Lumber & Fuel Co. v. Elwanger, supra* note 7.

[26] *Frost v. Schinkel, supra* note 21.

[27] 35A Am. Jur. 2d *Fixtures* § 34 at 708 (2010).

doors were fixtures rather than trade fixtures. Consequently, the law did not permit the former tenant to remove them.

[20] It is incumbent on the court to define a fixture, but whether an article of property is a fixture in a particular instance depends upon the facts of that case.[28] And under the facts of this case, we conclude the county court's determination that the doors were not trade fixtures conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

DAMAGES

The county court based its award of damages on the cost to replace the doors. The seller makes two primary arguments related to the county court's determination and award of damages.

First, the seller argues that the county court erred in failing to use the proper formula for damages. The seller suggests that the proper measure of damages is the difference between the value of the property conveyed and the value of the property if it had been as represented.[29] The seller also directs us to a Nebraska jury instruction indicating that the measure of damages for breach or misrepresentation in a contract for sale of property is the lesser of the reasonable cost of placing the property in the condition warranted or the value the property would have had were it in the condition it had been warranted to be in, minus its actual value.[30]

[21,22] The rule that the measure of damages for fixtures is the difference in value of the real property before and after the removal of the articles is not an exclusive rule.[31] "The primary object is to determine the amount of the loss. Whatever rule is best suited to that determination should be followed. The recovery must be reasonable having its basis in a proper consideration of all relevant facts."[32] Fixtures ordinarily have a value

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[28] See *Hurst v. Furniture Company*, 95 S.C. 221, 78 S.E. 960 (1913).

[29] See *Bibow v. Gerrard, supra* note 20.

[30] See NJI2d Civ. 4.49.

[31] *Joiner v. Pound*, 149 Neb. 321, 31 N.W.2d 100 (1948).

[32] *Id.* at 327, 31 N.W.2d at 104.

separate and apart from the realty to which they are attached. That value may properly be submitted to the fact finder to enable it to more accurately determine the loss suffered by the purchaser.[33] "The replacement cost may more accurately reflect the loss than opinion evidence as to the difference in value of the real estate before and after the removal."[34] Here, there was no damage to the building itself caused by removal of the doors. The cost of replacing the property appears to be a more appropriate measure of damages under the circumstances. We find no error in the court's use of the cost of replacement doors and doorknobs.

Second, the seller argues that the county court erred in failing to give appropriate weight to the opinion of the seller's expert. Determining the weight that should be given expert testimony is uniquely the province of the fact finder.[35] It appears that the county court gave little weight to the testimony of the seller's expert, and we find no error in that regard.

Evidentiary Issues

The seller also argues that the county court abused its discretion in two evidentiary rulings. First, it argues that the court improperly allowed testimony regarding the cost of replacement doors that were residential, and not commercial, fire-rated doors. Second, it contends that an exhibit should not have been received. We find no merit in either argument.

[23] As we have already noted, we review the trial court's relevancy determinations for abuse of discretion. 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.[36]

[24,25] The testimony regarding the cost of residential doors had at least a minimal relationship to the replacement cost of commercial, fire-rated doors. The seller claims that because

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[33] See *Joiner v. Pound*, *supra* note 31.

[34] *Id.* at 327, 31 N.W.2d at 104.

[35] *Cingle v. State*, 277 Neb. 957, 766 N.W.2d 381 (2009).

[36] *ConAgra Foods v. Zimmerman*, 288 Neb. 81, 846 N.W.2d 223 (2014).

the removed doors were commercial, fire-rated doors, testimony regarding the value of residential doors was irrelevant. 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.[37] As we have already observed, replacement cost was a proper consideration in assessing damages. According to the testimony, the commercial doors were heavier and were fire rated. The residential doors weighed less and were not fire rated. The county court, as the finder of fact, was certainly not required to accept this testimony as conclusive. But the testimony had at least a minimal bearing on the amount of the loss. The court had before it different opinions as to the question of damages and was informed about the difference between the replacement doors and the doors actually removed. Nonetheless, the court accepted testimony of one of the buyers as to damages. The weight to be given a witness' testimony is a question for the trier of fact.[38] We cannot say that the court abused its discretion in admitting this evidence.

The seller also maintains that the lumber company's manager "was not qualified or noticed as an expert,"[39] that he based his testimony as to the value of the doors upon hearsay and had never viewed the doors, and that the court abused its discretion in receiving into evidence the witness' estimate.

[26] Even assuming, without deciding, that the county court abused its discretion in receiving this testimony and exhibit, there is no reversible error. The erroneous admission of evidence in a bench trial is not reversible error if other relevant evidence, properly admitted, sustains the trial court's necessary factual findings; in such case, reversal is warranted only if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.[40] The county

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[37] *Id.*

[38] See *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

[39] Brief for appellant at 15.

[40] *In re Estate of Mousel*, 271 Neb. 628, 715 N.W.2d 490 (2006).

court computed damages based on testimony of one of the buyers regarding the cost paid for replacement doors. Because there is no indication that the court relied upon the other witness' testimony or estimate, any error in the court's decision to receive such evidence was harmless.

CONCLUSION

We conclude that the doctrine of merger was inapplicable, because the seller had a duty to disclose that the interior doors would be removed and the seller's nondisclosure amounted to a misrepresentation. We further conclude that the doors were fixtures rather than trade fixtures and, thus, were not removable by the former tenant. Because the county court's award of damages is supported by competent evidence, we affirm the decision of the district court affirming the county court's judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JAMES BRANCH, APPELLANT.
860 N.W.2d 712

Filed March 27, 2015. No. S-14-711.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Evidence: Witnesses.** In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.

5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In a nonplea context, the defendant must show a reasonable probability that the result would have been different had counsel not performed deficiently. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
6. **Effectiveness of Counsel: Presumptions.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable.
7. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
8. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Sean M. Conway, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

STEPHAN, J.

A jury convicted James Branch of robbery and kidnapping, and we affirmed his convictions and sentences on direct appeal.[1] Branch sought postconviction relief, which was denied by the district court without an evidentiary hearing.[2] Branch appealed, and we reversed, and remanded for an evidentiary hearing on the issue of whether Branch's trial counsel was

[1] *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

[2] *State v. Branch*, 286 Neb. 83, 834 N.W.2d 604 (2013).

ineffective in not calling a witness to corroborate Branch's alibi defense.[3] On remand, the district court conducted an evidentiary hearing on this issue and again denied postconviction relief. Branch now appeals from the order dismissing his postconviction motion. We find no error and affirm.

BACKGROUND

The underlying facts are fully set forth in our opinion denying Branch relief in his direct appeal.[4] We repeat only the relevant facts here. Paul Miller was the primary witness against Branch at his trial. Miller testified that he, Branch, and Michael Johnson developed a plan to rob a vehicle storage facility. Miller testified that he and Branch went to the business "6 days before the robbery to 'scope it out.'"[5] Miller testified that on July 16, 2007, "Branch and Johnson picked up Miller in [Laquesha] Martin's white Chevrolet Corsica. They arrived at [the victim's] business at around 11 or 11:15 a.m."[6] They beat the victim, robbed him, and placed him in the trunk of a car in the building.

At trial, Branch testified in his own behalf. He admitted using a credit card taken from the victim during the robbery but denied involvement in the robbery itself. He testified that he slept in an apartment he shared with his girlfriend, Laquesha Martin, until either 11 a.m. or 2 p.m. on July 16, 2007, and then picked up Martin from work. Branch stated that he did not know whether they returned to the apartment at 2:30 or 4:30 p.m., but then he said he and Miller left the apartment around 2 or 3 p.m. Branch said they arrived at the convenience store, where the credit card was used, around 4 p.m. and were there for 2 hours.

In April 2011, Branch filed a pro se motion for postconviction relief.[7] His appointed counsel filed an amended motion.

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[3] *Id.*

[4] *Branch, supra* note 1.

[5] *Id.* at 743, 764 N.W.2d at 871.

[6] *Id.* at 744, 764 N.W.2d at 871.

[7] *Branch, supra* note 2.

The district court denied the motion without an evidentiary hearing. Branch appealed, and we remanded for a hearing on the issue of whether trial counsel was ineffective for failing to present alibi evidence in the form of Martin's testimony.[8]

On remand, the court received the depositions of Martin, Branch, and the attorney who represented Branch at trial and on direct appeal. The court found Branch's deposition testimony was consistent with his testimony at trial. Significantly, Branch testified in the deposition that on July 16, 2007, he slept until 11 a.m. or 2 p.m. at Martin's house and then left to pick up Martin from work. He said they then ran some errands and returned to Martin's home between 2 and 4 p.m. Branch testified that later that afternoon, he and Miller left in Martin's car to use some credit cards which Miller had obtained to fill up gas tanks. Branch testified that he wanted his trial counsel to call Martin as a witness at trial because he felt that "she could have pretty much told them where we was that day and probably helped me out a little bit with this case."

Martin testified that she and Branch ran errands on the morning of July 16, 2007, before he took her to work around noon. She testified that Branch picked her up from work between 5 and 6 p.m. and that she was with him for the remainder of the evening.

Branch's trial counsel testified in her deposition that she talked to Martin on the telephone several times before trial, but that Martin was evasive and said she could not testify that Branch was with her or picked her up from work at the time the crime occurred. Martin further told counsel she could not testify that Branch's version of events was "factually correct." Nevertheless, counsel subpoenaed Martin for trial. When counsel approached Martin during the trial about what her testimony would be, Martin again told her that she could not testify to Branch's version of events. Counsel testified that she decided not to have Martin testify because

> she didn't want to be put up on the stand, which obviously makes a terrible witness because [potential witnesses]

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[8] *Id.*

become somewhat hostile if you call them and they don't want to be up there.

Secondly, if she told the truth, which I'm assuming she would have, it would have destroyed any of his testimony . . . .

In denying postconviction relief, the district court determined that the testimony of Branch and Martin was inconsistent as to the events of July 16, 2007. It noted that Branch claimed "to have been alone all morning until he picked . . . Martin up at 11 a.m. or 2 p.m., whereas . . . Martin states she was with [Branch] all morning until he dropped her off at work around noon." The court found that "[c]onsidering the evidence adduced at trial in combination with this extreme contrast[, Branch] failed to establish that . . . Martin even provides an alibi."

The court then addressed whether trial counsel was deficient for failing to call Martin at trial. It found that counsel's decision not to call Martin as a witness was reasonable "based on the interactions with . . . Martin, especially in light of the fact that such testimony would be in direct contradiction with [Branch's] own version of the events he insisted on relaying during trial." Thus, the court found Branch failed to establish that trial counsel performed deficiently in not calling Martin as a witness. The court also determined that this decision was not prejudicial to Branch because "the inconsistencies between [Branch's] and . . . Martin's testimony would lead one to believe her testimony would actually have hindered his efforts to establish his defense at trial." Thus, the court concluded that Branch had not been denied his constitutional right to effective assistance of counsel.

ASSIGNMENT OF ERROR

Branch assigns the district court erred in denying his amended motion for postconviction relief.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the

district court will not be disturbed unless they are clearly erroneous.[9]

[2] In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.[10]

[3,4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[11] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[12] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[13] an appellate court reviews such legal determinations independently of the lower court's decision.[14]

ANALYSIS

Branch claims that Martin's testimony would have corroborated his alibi and that thus, trial counsel was deficient for failing to call Martin at trial. His claim is based solely upon an alleged deprivation of his constitutional right to effective assistance of counsel. Because Branch's trial counsel was also his appellate counsel, this is his first opportunity to assert his claims relating to ineffective assistance of his trial and appellate counsel.[15]

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[9] *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009); *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

[10] *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004); *McDermott, supra* note 9.

[11] *Glover, supra* note 9; *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

[12] *Id.*

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

[14] *Glover, supra* note 9; *Hudson, supra* note 11.

[15] *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013); *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[5,6] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[16] In a nonplea context, the defendant must show a reasonable probability that the result would have been different had counsel not performed deficiently.[17] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[18] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable.[19]

[7,8] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[20] The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.[21]

Branch's trial counsel articulated two reasons for not calling Martin at trial. First, Martin appeared reluctant to testify and thus would have made a bad witness. Second, Martin told counsel that her version of events would not have corroborated Branch's testimony. Both are sound reasons for counsel's strategic decision not to call Martin as a witness. Based upon what Martin told her, counsel reasonably believed that Martin's testimony would not benefit Branch's defense but would in fact be detrimental.

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[16] *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009); *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

[17] See, *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014); *Glover, supra* note 9.

[18] *Id.*

[19] See *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

[20] *Glover, supra* note 9; *Benzel, supra* note 10.

[21] *Robinson, supra* note 15; *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009).

Even when viewed with the benefit of hindsight, counsel's decision not to call Martin as a witness was correct. It is evident from Martin's subsequent deposition testimony that she could not corroborate Branch's claim that he was alone in her home all morning before leaving to pick her up from work. Martin testified that she was with Branch in the morning until he took her to work in the afternoon. Faced with inconsistent testimony of this nature, a jury would likely have concluded that either Branch, Martin, or both of them were not telling the truth. Martin's testimony would likely have undermined Branch's credibility as to his whereabouts at the time of the crime. Based upon our review of the record, we agree with the district court that Branch has not shown that he was denied the effective assistance of counsel. The evidence does not support either the deficient performance prong or the prejudice prong of the *Strickland* standard.

CONCLUSION

For the foregoing reasons, the judgment of the district court denying postconviction relief is affirmed.

AFFIRMED.

WADE B. ANDERSON, APPELLANT, V.
OLIVE N. ANDERSON, APPELLEE.
861 N.W.2d 113

Filed April 3, 2015. No. S-14-179.

1. **Judgments: Child Support: Alimony: Taxation: Appeal and Error.** An appellate court reviews a trial court's determinations on matters such as child support, alimony, and the child dependency exemption de novo on the record to determine whether the trial judge abused his or her discretion.
2. **Judgments: Appeal and Error.** An appellate court reviewing a trial court's determination de novo on the record to determine whether the trial judge abused his or her discretion conducts its own appraisal of the record to determine whether the trial court's judgments are untenable such as to have denied justice.
3. **Child Support: Rules of the Supreme Court.** A court may deviate from the Nebraska Child Support Guidelines if their application in an individual case would be unjust or inappropriate.

4. ____: ____. A deviation from the Nebraska Child Support Guidelines without a clearly articulated justification is an abuse of discretion.
5. **Child Support.** A trial court may consider the status and situation of the parties, including their financial condition, in determining the amount of child support.
6. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.
7. ____: ____: ____. In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), in dividing property and considering alimony upon a dissolution of marriage, a court should consider the income and earning capacity of each party and the general equities of the situation.
8. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
9. **Alimony.** The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.
10. ____. In an alimony award, the ultimate criterion is one of reasonableness.
11. ____. Alimony is not a tool to equalize the parties' income, but a disparity of income or potential income might partially justify an alimony award.
12. **Child Support: Taxation: Presumptions.** In general, the custodial parent is presumptively entitled to the federal tax exemption for a dependent child.
13. **Child Support: Taxation: Waiver.** A court may exercise its equitable powers and order the custodial parent to execute a waiver of his or her right to claim the tax exemption for a dependent child if the situation of the parties so requires.
14. **Child Support: Taxation.** Allocation of the dependency exemption to the noncustodial parent is not warranted if the parent pays a relatively small amount of child support.
15. **Divorce: Attorney Fees.** A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.
16. ____: ____. In awarding attorney fees in a dissolution action, a court should consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Washington County: JOHN E. SAMSON, Judge. Affirmed as modified.

Andrew M. Ferguson, of Carlson & Burnett, L.L.P., for appellant.

Karen S. Nelson, of Schirber & Wagner, L.L.P., for appellee.

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

CONNOLLY, J.

SUMMARY

Olive N. Anderson, a Filipino national, moved to Nebraska and married Wade B. Anderson after meeting him through an online dating service. Their marriage soured, and the court entered a dissolution decree giving Wade custody of their only child. Wade argues that the court ordered Olive to pay child support that is too low and ordered him to pay alimony that is too high. Wade further contends that the court erred by failing to require Olive to pay part of the childcare and nonreimbursed medical expenses, allowing Olive to claim the dependency exemption in even-numbered years, and awarding Olive attorney fees. We conclude that the court abused its discretion by ordering Wade and Olive to alternate the dependency exemption, but otherwise affirm.

BACKGROUND

FACTUAL BACKGROUND

Wade met Olive through an online dating service. Wade lived in Blair, Nebraska, and Olive lived in the Philippines with her parents. Wade made a 10-day trip to the Philippines in 2007, during which Olive conceived a child. In July 2008, Olive gave birth to a girl in the Philippines. Wade was not present for the birth but sent Olive money.

Wade started "naturalization proceedings" for his daughter after a paternity test showed that he was her father. In July 2009, Wade brought Olive and their daughter to his home in Blair. Wade testified that Olive came to the United States on a "fiancee visa." Wade and Olive married in October 2009.

Olive testified that she had never been away from her family before she moved to Blair. Olive said that she had friends and "a lot of extended family" in the Philippines, and "felt sad and fear" about leaving them.

Olive stated that she came to Nebraska so that both parents could raise her child and because Wade promised to "give [her] a better life" and help her pursue higher education.

Wade testified that he discussed college with Olive before she came to the United States. Olive testified that she would not have left her "support system" in the Philippines without these promises.

Olive has the Filipino equivalent of a high school diploma but said that her degree is not "recognize[d]" in the United States. The record shows that her lack of education limits her job opportunities. Olive speaks English, but Visayan is her "primary language."

Wade is an electrician with 20 years' experience. He is paid $31.75 an hour and works about 40 hours per week. Wade has been "steadily employed" despite some "periodic" layoffs, the most recent of which occurred in 2012. Wade said that he had to work a "supplemental job" in 2012, and his tax filings show that he earned about $29,000 of wages and unemployment benefits that year.

Olive stated that she found her first job in the United States in November 2010. Before then, she cared for her daughter and maintained the home. After Wade was laid off, Olive worked more hours to help support the family.

According to Wade, his union with Olive "went fairly smooth" for the first few months, but then "kind of waxed and waned." In July 2012, Olive told Wade that she had had an affair. In August, Olive told Wade that she was pregnant. Olive left the marital home the same month. The parties stipulated that Wade is not the biological father of Olive's second child.

Olive currently works about 16 hours a week for a car parking company, earning $8.25 per hour. Olive said that her current employer has "full-time hours available," but that the additional hours would interfere with her parenting obligations and that she wants a job that does not require her to work weekends. Olive sought other full-time jobs but encountered "difficulties" because of her parental duties and lack of education.

Regarding future goals, Olive stated that she wants to "get a GED" and study accounting at a community college. Olive said that she is ineligible for student aid because she is not a U.S. citizen.

Olive had moved to three different residences in the 10 months before trial. She testified that she currently lives with her boyfriend in Omaha, Nebraska, but that she is not "on the lease." Olive has not looked for her own apartment because she believes doing so is futile without a credit history. Olive testified that she pays $400 of rent per month and pays unspecified credit card, car, insurance, childcare, and telephone bills. Olive said that she does not have private health insurance or Medicaid coverage.

Procedural Background

Wade filed a complaint for dissolution in August 2012, requesting sole custody of his child with Olive and child support. Olive filed an answer and counterclaim, requesting sole custody, alimony, child support, and attorney fees.

At the end of the August 2013 trial, the court awarded Wade permanent legal and physical custody of the parties' daughter. Regarding child support, the court deemed Olive capable of working 40 hours per week and earning a minimum wage. In worksheet 1 of the Nebraska Child Support Guidelines incorporated by the decree, Olive's imputed total monthly income was $1,256 and, after the subsistence limitation was applied, she would owe $169.70 of child support each month. But the decree ordered Olive to pay only $50 per month of child support. The decree stated that the deviation from the guidelines was "specifically approved by the Court based on the current financial circumstances of [Olive]." At the conclusion of trial, the court stated that the deviation was warranted because of Olive's "limited income," lack of insurance, and "other issues."

The court ordered Wade to pay Olive $600 of alimony per month for the next 60 months. The court acknowledged the relatively short duration of the marriage but found that the "unique circumstances of this case" put Olive "in a difficult situation." Wade interrupted Olive's "personal career and educational opportunity" in the Philippines by bringing her to a foreign country where she lacked a "recognized high school diploma." The court emphasized that Wade had promised to help Olive pursue an education in the United States, and it

stated that "the only way that [Olive] is going to be able to further her education is to have some kind of spousal support." The court stated that its alimony award reflected the "fairness of the situation" and gave Olive "an opportunity to try and proceed with her education and to get on her feet."

The court stated that it also relied on exhibit 33 in arriving at the alimony award. Exhibit 33 is the immigration Form I-134, an "Affidavit of Support," that is signed by Wade but not dated or notarized. The form states that the affiant agrees to "receive, maintain and support" the sponsored immigrant so that the immigrant "will not become a public charge during his or her stay in the United States." The form states that it is binding for 3 years after the sponsored immigrant's arrival in the United States. The court also received exhibit 35, which is the immigration Form I-864, a different affidavit of support. But the court said that it did not rely on exhibit 35 because Wade neither filled in nor signed the form.

The decree ordered Wade to maintain health insurance coverage for the parties' daughter and expressly ordered Olive to pay zero percent of "daycare expenses" and nonreimbursed medical expenses. The court explained that it did not order Olive to contribute to childcare and nonreimbursed medical expenses because "she is at or below the poverty level now with the child support" and because of "her current economic situation."

The decree ordered Wade and Olive to alternate the dependency exemption for their child. Wade can claim the exemption in odd-numbered years, and Olive can claim the exemption in even-numbered years if she is current on her child support.

The decree ordered Wade to pay Olive attorney fees of $4,250. The court noted that Wade had enough money to pay three different attorneys. The court also stated that the affidavit submitted by Olive's attorney was "not unreasonable."

ASSIGNMENTS OF ERROR

Wade assigns, restated, that the court erred by (1) deviating from the child support guidelines, (2) awarding Olive an excessive amount of alimony, (3) allocating all of the cost

of childcare and nonreimbursed medical expenses to Wade, (4) ordering the parties to alternately claim the dependency exemption, and (5) awarding Olive attorney fees of $4,250.

STANDARD OF REVIEW

[1,2] Domestic matters such as child support, alimony, and the child dependency exemption are entrusted to the discretion of trial courts.[1] 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.[2] 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.[3]

ANALYSIS

Child Support

Wade argues that a downward deviation of Olive's child support obligation is not warranted. He notes that he has borne the bulk of their daughter's expenses and contends that Olive is "capable of obtaining and maintaining gainful employment, enabling her potential to pay an amount that complies with the Nebraska Child Support Guidelines."[4] Wade argues that the decree did not "clearly indicate" the basis for the deviation.[5] Finally, Wade asserts that the court should not have imputed Olive's earning capacity based on the minimum wage because Olive was actually earning an hourly wage that was slightly more than the minimum.

Olive notes that the decree expressly states that the deviation is "based on the current financial circumstances of [Olive]." Reading the decree as a whole, she argues that "it is clear

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[1] *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007); *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005).

[2] See *Gress v. Gress, supra* note 1.

[3] See *id.*

[4] Brief for appellant at 13.

[5] *Id.* at 14.

that the trial court was concerned that [her] 'economic circumstances' meant that she was near, at, or below the poverty guidelines."[6]

[3,4] In general, child support payments should be set according to the Nebraska Child Support Guidelines.[7] But a court may deviate from the guidelines if their application in an individual case would be unjust or inappropriate.[8] The court must specifically find that a deviation is warranted based on the evidence[9] and state the reason for the deviation in the decree.[10] A deviation without a clearly articulated justification is an abuse of discretion.[11]

[5] We conclude that the court did not abuse its discretion by deviating from the guidelines and ordering Olive to pay child support of $50 per month. A trial court may consider the status and situation of the parties, including their financial condition, in determining the amount of child support.[12] The decree states that the court deviated from the guidelines because of Olive's financial circumstances. Because of Olive's precarious financial situation, we cannot say that the court abused its discretion. Because the circumstances presented do not fit neatly into the calculation structure, a flexible application of the guidelines is justified.[13]

ALIMONY

Wade argues that the alimony award—$600 per month for 60 months—is unreasonable in both amount and duration.

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[6] Brief for appellee at 14.

[7] *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007).

[8] See *id.*

[9] *Gress v. Gress, supra* note 1.

[10] Neb. Ct. R. § 4-203 (rev. 2011).

[11] See *Gress v. Gress, supra* note 1.

[12] See, *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991); *Hafer v. Hafer*, 3 Neb. App. 129, 524 N.W.2d 65 (1994).

[13] See *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

Wade emphasizes that he was married to Olive for only 4 years, sent money to the Philippines before they were married, and made significant contributions to the marriage thereafter. Wade also argues that the court did not consider the uncertainty of his future income. Finally, Wade contends that the court should not have relied on the affidavit of support in exhibit 33, because "its ultimate purpose is to prevent the immigrant from relying on government support, not to facilitate unbridled support from [Wade]."[14]

Olive, of course, views it differently. She argues that the alimony is reasonable because of her lack of education and the other obstacles to her "employability" in the United States.[15] She left her family and friends in the Philippines to come to Nebraska, and she contends that she only did so after Wade promised to support her. Olive argues that exhibit 33 is evidence of Wade's promise to support her and was only one factor that the court considered.

[6,7] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of each party.[16] In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2008), in dividing property and considering alimony upon a dissolution of marriage, a court should consider the income and earning capacity of each party and the general equities of the situation.[17]

[8-10] In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a

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[14] Brief for appellant at 17.

[15] Brief for appellee at 17.

[16] *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

[17] *Id.*

substantial right or just result.[18] The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.[19] The ultimate criterion is one of reasonableness.[20]

[11] Considering the "unique circumstances of this case," we conclude that the alimony award is not an abuse of discretion. As the court noted, Olive disrupted her life in the Philippines to move to Nebraska and marry Wade. The effect of dislocation on a person who moves to be with his or her spouse is relevant to alimony.[21] Furthermore, Wade earns significantly more money than Olive. It is true that alimony is not a tool to equalize the parties' income, but a disparity of income or potential income might partially justify an alimony award.[22] The court awarded alimony for the valid purpose of helping Olive "proceed with her education and to get on her feet."[23]

We are not troubled by the court's consideration of exhibit 33. The court could consider the affidavit of support—signed by Wade but neither dated nor notarized—as evidence of the parties' circumstances, a factor that § 42-365 directs courts to consider. We note that Olive did not assert an independent breach of contract claim based on Wade's obligations under an affidavit of support.[24]

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[18] *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

[19] *Gress v. Gress, supra* note 1.

[20] See *Sitz v. Sitz, supra* note 18.

[21] See, *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994); *Hanson v. Hanson*, 378 N.W.2d 28 (Minn. App. 1985).

[22] *Hosack v. Hosack*, 267 Neb. 934, 678 N.W.2d 746 (2004); *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004).

[23] See, *Millatmal v. Millatmal, supra* note 16; *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002); *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

[24] See, *Naik v. Naik*, 399 N.J. Super. 390, 944 A.2d 713 (2008); Michael J. Sheridan, *The New Affidavit of Support and Other 1996 Amendments to Immigration and Welfare Provisions Designed to Prevent Aliens From Becoming Public Charges*, 31 Creighton L. Rev. 741 (1998).

Childcare and Nonreimbursed Medical Expenses

Wade argues that the court abused its discretion by allocating none of the childcare and nonreimbursed medical expenses to Olive. The guidelines provide that childcare expenses due to either parent's employment or education and nonreimbursed reasonable and necessary health care expenses shall be allocated to the obligor parent in an amount determined by the court, so long as the court does not exceed the proportion of the obligor's parental contribution.[25] Because of the unique circumstances of this case, we conclude that the court did not abuse its discretion by expressly allocating none of the childcare and nonreimbursed medical expenses to Olive.[26]

Dependency Exemption

Wade argues that the court abused its discretion by ordering the parties to alternate the dependency exemption. Wade contends that he should claim the exemption each tax year because he "clearly provides the child with the majority of support."[27] He urges us to not allow Olive "to reap the financial benefits of the dependency exemption," because she provides only "minimal support."[28]

[12,13] A tax dependency exemption is an economic benefit nearly identical to an award of child support or alimony.[29] In general, the custodial parent is presumptively entitled to the federal tax exemption for a dependent child.[30] But a court may exercise its equitable powers and order the custodial parent to execute a waiver of his or her right to claim the tax

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[25] Neb. Ct. R. §§ 4-214 and 4-215 (rev. 2011).

[26] See *Kearney v. Kearney*, 11 Neb. App. 88, 644 N.W.2d 171 (2002).

[27] Brief for appellant at 20.

[28] *Id.*

[29] *Emery v. Moffett, supra* note 1; *Babka v. Babka*, 234 Neb. 674, 452 N.W.2d 286 (1990).

[30] See *Emery v. Moffett, supra* note 1.

exemption for a dependent child if the situation of the parties so requires.[31]

[14] We conclude that the court abused its discretion by allowing Olive to claim the dependency exemption for the parties' daughter in even-numbered years. The federal government grants a dependency exemption to a parent who provides support to a dependent minor.[32] The primary purpose for permitting a trial court to reallocate the exemption is to allow the party paying support to have more disposable income from which to make such payment.[33] Accordingly, allocation of the dependency exemption to the noncustodial parent is not warranted if the parent pays a relatively small amount of child support.[34] The court ordered Olive to pay only $50 of child support. Wade's monthly share of their daughter's support is about $850. In these circumstances, Olive has not rebutted the presumption that Wade, as the custodial parent, is entitled to claim the exemption.

Attorney Fees

[15,16] Wade argues that the trial court abused its discretion by awarding Olive attorney fees. A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.[35] In awarding attorney fees in a dissolution action, a court should consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of

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[31] See, *id.*; *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

[32] *McDonald v. McDonald*, 21 Neb. App. 535, 840 N.W.2d 573 (2013).

[33] See, *El-Hajji v. El-Hajji*, 67 So. 3d 256 (Fla. App. 2010); *Ford v. Ford*, 592 So. 2d 698 (Fla. App. 1991).

[34] See *McDonald v. McDonald*, *supra* note 32. See, also, *Prochaska v. Prochaska*, 6 Neb. App. 302, 573 N.W.2d 777 (1998).

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

the bar for similar services.[36] We conclude that the trial court did not abuse its discretion by ordering Wade to pay attorney fees of $4,250.

CONCLUSION

We conclude that the court abused its discretion by ordering the parties to alternately claim the dependency exemption for their minor child, but we otherwise affirm the decree. We modify the decree to award solely to Wade the dependency exemption attributable to the parties' daughter.

AFFIRMED AS MODIFIED.

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[36] *Id.*

STATE OF NEBRASKA, APPELLEE, V.
DERRICK U. STRICKLIN, APPELLANT.
861 N.W.2d 367

Filed April 3, 2015. No. S-14-182.

1. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
2. **Pleadings: Parties: Judgments: Appeal and Error.** A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.
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: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
5. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
6. **Motions for New Trial: Appeal and Error.** A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.
7. **Criminal Law: Trial.** In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.
8. **Trial: Joinder.** There is no constitutional right to a separate trial.

9. **Trial: Joinder: Proof: Appeal and Error.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
10. **Trial: Joinder: Indictments and Informations.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
11. **Trial: Joinder.** Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated.
12. **Rules of Evidence.** Under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008), all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence.
13. **Trial: Evidence.** Evidence which is not relevant is not admissible.
14. **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.
15. **Trial: Joinder.** A defendant is not considered prejudiced by a joinder where the evidence relating to both offenses would be admissible in a trial of either offense separately.
16. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.
17. **Rules of Evidence: Rules of the Supreme Court: Hearsay.** Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of the Nebraska Supreme Court.
18. **Rules of Evidence: Hearsay.** When an out-of-court statement relates the content of another out-of-court statement, there must be an independent hearsay exception for each statement.
19. **Confessions: Rules of Evidence.** For a statement against penal interest, the question under Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008), is always whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true.
20. ____: ____. As an initial matter, to qualify as a statement against penal interest under Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008), the statement must be self-inculpatory.
21. **Confessions: Rules of Evidence: Words and Phrases.** A "statement" within the meaning of Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008), is a specific individual statement that a proponent offers into evidence rather than the entire narrative of which the statement is a part.
22. **Rules of Evidence: Hearsay.** Individual remarks under examination pursuant to the hearsay exception of Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c)

(Reissue 2008), must meet the test of whether the particular remark at issue meets the standard set forth in the rule.

23. ____: ____. In determining whether a statement is admissible under the residual hearsay exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of the statement, the interests of justice, and whether notice was given to an opponent.
24. ____: ____. In determining admissibility under the residual hearsay exception, a court must examine the circumstances surrounding the declaration in issue and may consider a variety of factors affecting the trustworthiness of a statement. A court may compare the declaration to the closest hearsay exception as well as consider a variety of other factors affecting trustworthiness, such as the nature of the statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement.
25. **Rules of Evidence: Hearsay: Appeal and Error.** Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to review hearsay rulings under this exception.
26. **Trial: Testimony: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.
27. **Rules of Evidence: Witnesses: Prior Convictions.** When impeaching a witness pursuant to Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 2008), after the conviction is established, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
28. **Rules of Evidence: Witnesses.** Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 2008), permits questioning during cross-examination only on specific instances of conduct not resulting in a criminal conviction.
29. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.
30. **Jury Instructions: Appeal and Error.** The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.
31. **Trial: Motions for Mistrial.** When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial.
32. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial

misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.

33. **Rules of Evidence: Jurors: Affidavits.** Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2008), does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations.
34. **Jury Misconduct: Trial: Appeal and Error.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed.
35. **Witnesses: Juror Misconduct: Appeal and Error.** An appellate court reviews the trial court's determinations of witness credibility and historical fact for clear error and reviews de novo the trial court's ultimate determination whether the defendant was prejudiced by juror misconduct.
36. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
37. **Criminal Law: Juror Misconduct: Presumptions: Proof.** In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.
38. **Jury Misconduct.** Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror.
39. **Trial: Evidence: Appeal and Error.** Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent.

Appeal from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Affirmed.

Jeremy C. Jorgenson for appellant.

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

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ., and MOORE, Chief Judge.

CASSEL, J.

I. INTRODUCTION

This case is Derrick U. Stricklin's direct appeal from multiple felony convictions, including two convictions for first degree murder. Stricklin's convictions arose from the shooting deaths of Carlos Morales and Bernardo Noriega during a planned drug transaction. The State alleged that Stricklin committed the crimes with an accomplice, Terrell E. Newman, and the two were tried together. Stricklin's assignments of error relate to the consolidation of his and Newman's trials, the exclusion of statements made by a confidential informant, the scope of his cross-examination of the State's primary witness, the instructions given to the jury, prosecutorial misconduct, and juror misconduct. Finding no merit to his claims, we affirm his convictions and sentences.

II. BACKGROUND

1. SHOOTINGS

Morales operated an automobile body shop in Omaha, Nebraska. On the morning of December 2, 2012, Morales' fiance dropped him off at the shop and returned home. At approximately 2:15 p.m., she returned to the shop to pick up Morales in order to take him to their son's birthday party.

Morales' fiance arrived at the shop, opened the shop's door, and called for Morales. When he did not respond, she climbed the stairs to the shop's office and saw Morales lying on his stomach with "blood coming out" of him. She observed another man lying face down, but she did not know who the man was. She called the 911 emergency dispatch center, but the operator was unable to understand her. She observed a man outside the shop, and the man was able to give the shop's address to the 911 operator.

Police officers identified the men in the office of Morales' shop as Morales and Noriega. Both men were deceased upon the officers' arrival, and autopsies revealed that both men died of gunshot wounds to the head.

While investigating the shootings, officers interviewed Jose Herrera-Gutierrez, who claimed to have been present during the incident. Although Herrera-Gutierrez did not know the names of the shooters, he had recognized them from prior occasions at Morales' shop. He knew that one of the shooters had a brother who was potentially a business partner of Morales' and that the other shooter was associated with a green Volkswagen Beetle that Herrera-Gutierrez had seen at Morales' shop. Based upon the information provided by Herrera-Gutierrez, officers compiled photographic lineups containing photographs of Stricklin and Newman, and Herrera-Gutierrez identified them as the shooters.

2. Trial

Stricklin was charged by information with seven counts, including two counts of first degree murder, attempted first degree murder, three counts of use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Newman was charged with the same offenses. Upon the State's motion, Stricklin's and Newman's trials were consolidated into a joint trial.

(a) Herrera-Gutierrez' Testimony

The events of December 2, 2012, revolved around a drug transaction planned to occur at Morales' shop. Herrera-Gutierrez testified that Morales had asked him if he could get Morales some cocaine. Herrera-Gutierrez and Noriega were supposed to deliver the cocaine to the shop.

At approximately 11:30 a.m., Herrera-Gutierrez and Noriega left a restaurant to go to Morales' shop. Upon their arrival, Herrera-Gutierrez exited the vehicle and telephoned Morales to unlock the shop's door. Morales opened the door and came outside. Herrera-Gutierrez saw Noriega linger in the vehicle for a moment, grab something, and put it underneath his arm. Herrera-Gutierrez testified that the thing Noriega had grabbed was "that cocaine."

The three proceeded into Morales' shop and up the stairs to the shop's office. Herrera-Gutierrez testified that when they arrived in the office, two black males were already present.

Herrera-Gutierrez identified them as Stricklin and Newman. And he testified that he had recognized them from prior visits to the shop. He had seen Stricklin approximately four times at the shop, and he had seen Newman approximately three times at the shop. However, he had never learned their names, because Morales had not mentioned any names.

Upon entering the office, Noriega gave the cocaine to Morales and Morales set the cocaine on a table. Newman approached the table, and he and Morales opened the cocaine. Although Stricklin had a "see-through bag" containing wrinkled bills, Newman told Morales that he was going to get the money.

Newman turned around as if he was going to leave the office. But rather than leaving, he turned back around with a gun in his hand. Newman pointed the gun at them, and Herrera-Gutierrez saw that Stricklin also had a gun. Newman instructed Morales to tell Herrera-Gutierrez and Noriega to lie down. Herrera-Gutierrez and Noriega lay face down on the ground. Newman tied Herrera-Gutierrez' wrists, and a piece of plastic was wrapped around his face. Although Herrera-Gutierrez was able to breathe, he was unable to see if Stricklin and Newman were doing the same to Noriega.

Herrera-Gutierrez heard Stricklin and Newman instruct Morales to lie down as well. He heard Morales say, "No, you respect me, my house is your second house," and Newman reply, "I'm sorry, [Morales], business is business." Herrera-Gutierrez felt Morales lie down close to him. Herrera-Gutierrez was then lifted up a "little bit" and a plastic bag was placed over his head. Right after the bag was placed over his head, he heard "boom, boom, boom" and someone screaming. He testified that he heard two or three gunshots.

Herrera-Gutierrez started to feel like he was "asphyxiating." After he heard the shots, he heard a voice that he thought was Noriega, "lamenting, like AH, AH, AH." He then heard one more shot.

Someone grabbed Herrera-Gutierrez, the bag was taken off his head, and his hands were untied. He was dropped back to the ground, where he stayed and did not try to move. He heard footsteps, as if someone was walking quickly, and

then heard someone turn around, as if the person had forgotten something and returned to grab it. After approximately 5 minutes, Herrera-Gutierrez turned around and saw a "circle" of blood where Morales was lying. He called out to Morales, but Morales made no response. Herrera-Gutierrez ran out of the office, walked down a nearby street, and was eventually picked up by a passing driver. After being dropped off, he traveled to the home of Noriega's family in order to tell them what had happened.

(b) Verdicts and Sentences

The jury returned verdicts finding Stricklin guilty of two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, attempted intentional manslaughter, and possession of a deadly weapon by a prohibited person.

Stricklin was sentenced to life imprisonment for each of the first degree murder convictions, 15 to 25 years' imprisonment for each of the three use of a deadly weapon convictions, 20 months' to 5 years' imprisonment for the attempted intentional manslaughter conviction, and 15 to 25 years' imprisonment for the possession of a deadly weapon by a prohibited person conviction. Each sentence was ordered to run consecutively.

3. Appeal

Stricklin filed a timely notice of appeal—an appeal which is taken directly to this court.[1]

III. ASSIGNMENTS OF ERROR

Stricklin assigns, restated and reordered, that the district court erred in (1) consolidating his and Newman's trials, overruling his motion to sever, and permitting the State to use exhibit 288; (2) excluding the statements of a confidential informant; (3) prohibiting him from questioning Herrera-Gutierrez concerning his prior drug dealing; (4) failing to include all relevant and mandatory language in the instructions given to the jury; (5) overruling his motion for new

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

trial on the basis of juror misconduct; and (6) overruling his motion to reopen the evidence. Stricklin further asserts that the State committed prosecutorial misconduct during its closing argument.

IV. STANDARD OF REVIEW

[1,2] A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.[2] A denial of a motion to sever will not be reversed unless clear prejudice and an abuse of discretion are shown.[3]

[3,4] 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] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[5]

[5] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[6]

[6] A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.[7]

[7] In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.[8]

V. ANALYSIS

We address Stricklin's assignments of error in the order in which they occurred before the district court, beginning with the consolidation of his and Newman's trials.

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[2] *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013).

[3] *Id.*

[4] *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013).

[5] *Id.*

[6] *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

[7] *Id.*

[8] *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008).

1. Joint Trial

[8,9] Stricklin contends that the district court erred in granting the State's motion to consolidate his and Newman's trials and in overruling his subsequent motion to sever. The law governing separate and joint trials is well settled. There is no constitutional right to a separate trial.[9] The right is statutory and depends upon a showing that prejudice will result from a joint trial.[10] The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.[11]

[10] The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.[12]

[11] As to the first question, the district court specifically found that Stricklin and Newman could have been charged in a single indictment or information. We find no error in this conclusion. The charges against Stricklin and Newman were identical and arose from their alleged involvement in the shooting deaths of Morales and Noriega. Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated.[13]

As to prejudice, Stricklin's arguments arise from the admission of certain evidence at trial, specifically Newman's cell phone records and exhibit 288. Cell phone records played a significant role at trial in corroborating Herrera-Gutierrez' testimony and in tying Stricklin and Newman to Morales' shop on December 2, 2012. Newman's cell phone records showed multiple calls with Morales and Stricklin on December 2. And exhibit 288 showed six calls received by Newman from

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[9] *Foster, supra* note 2.

[10] *Id*. See Neb. Rev. Stat. § 29-2002 (Reissue 2008).

[11] *Foster, supra* note 2.

[12] *Id*.

[13] *Id*.

11:42 a.m. to 12:36 p.m. and indicated that the cell tower used to service Newman's cell phones for the calls was located in the immediate vicinity of Morales' shop.

Stricklin asserts that he was prejudiced by the admission of Newman's cell phone records and exhibit 288, because this evidence would not have been admissible against him in a separate trial. We disagree.

[12-14] Both the evidence of Newman's cell phone records and exhibit 288 would have been relevant, admissible evidence in a separate trial against Stricklin. Under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008), all relevant evidence is admissible unless there is some specific constitutional or statutory reason to exclude such evidence.[14] Evidence which is not relevant is not admissible.[15] 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.[16]

The State's theory of the case was that Stricklin and Newman committed the crimes together. And the State presented the testimony of Herrera-Gutierrez identifying Stricklin and Newman as the shooters. Newman's cell phone records and exhibit 288 served to bolster the State's theory and to corroborate Herrera-Gutierrez' identification of Stricklin and Newman. Newman's cell phone records showed that Newman was in communication with both Morales and Stricklin on the day of the shootings. And from exhibit 288, the jury could properly infer that Newman was in some proximity to Morales' shop at the time that he received the six calls. Because Newman was Stricklin's alleged accomplice, this evidence further supported the State's theory and was relevant to the issue of Stricklin's guilt.

[15] Because the evidence of Newman's cell phone records and exhibit 288 would have been admissible against Stricklin

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[14] *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

[15] See rule 402.

[16] Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008).

in a separate trial, Stricklin has failed to show that the consolidation of his and Newman's trials caused him prejudice. A defendant is not considered prejudiced by a joinder where the evidence relating to both offenses would be admissible in a trial of either offense separately.[17]

Stricklin further claims that exhibit 288 was a demonstrative exhibit for which a limiting instruction was required, and he attempts to compare this case to *State v. Pangborn*.[18] In *Pangborn*, we determined that the trial court abused its discretion in permitting the jury to use a demonstrative exhibit during deliberations without providing a limiting instruction.[19]

Contrary to Stricklin's assertion, exhibit 288 was not admitted as a demonstrative exhibit, but as substantive evidence. Foundation was provided for the calls and the location of the cell tower shown on the exhibit, and the exhibit was admitted into evidence. Thus, no limiting instruction was required. This assignment of error is without merit.

2. Confidential Informant

Stricklin assigns that the district court erred in excluding evidence of statements made by a confidential informant. And he argues that the exclusion of the statements violated his constitutional right to present a complete defense.

(a) Facts

At a hearing on the defendants' motions in limine, a detective testified as to certain statements made by an informant who had spoken to Morales approximately 1 week before the shootings. According to the detective, the informant stated that Morales was seeking to obtain two firearms, because he was having problems with two black males. The informant stated that one of the male's nicknames was "Sip."

According to the detective, the informant was not sure of the origin of Morales' problems with the males. But the informant

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[17] *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[18] *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

[19] See *id.*

believed that Morales' problems possibly arose from a "drug tax" for selling drugs in the neighborhood. However, Morales never told the informant exactly what the tax was for. The informant further stated that he did not provide Morales with any firearms.

Additionally, the detective testified that he met with the informant on two occasions and that he showed the informant photographic lineups containing photographs of Stricklin and Newman. However, the informant did not identify either Stricklin or Newman as being "Sip."

The district court excluded the evidence of the confidential informant's statements on the basis that the evidence contained two levels of hearsay: (1) Morales' statements to the informant and (2) the informant's statements to the detective. And the court concluded that Morales' statements did not fall under either the exception for statements against interest[20] or the residual hearsay exception.[21]

(b) Resolution

[16,17] Our case law and rules of evidence provide that hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.[22] Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of the Nebraska Supreme Court.[23]

[18] Stricklin does not contest the district court's conclusion that the evidence of the confidential informant's statements contained two levels of hearsay. When an out-of-court statement relates the content of another out-of-court statement, there must be an independent hearsay exception for each

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[20] Neb. Evid. R. 804(2)(c), Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008).

[21] Rule 804(2)(e).

[22] See, Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008); *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[23] See, Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008); *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

statement.[24] We discuss each of the hearsay exceptions considered by the district court.

(i) Statement Against Interest

Rule 804(2)(c) provides that when the declarant is unavailable as a witness, a statement may be admitted when it,

> at the time of its making . . . so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[19] For a statement against penal interest, the question under rule 804(2)(c) is always whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true.[25]

[20] None of Morales' statements were sufficiently against his penal interest so as to fall within the purview of rule 804(2)(c). Morales had stated that he sought to obtain two firearms, that he was having trouble with two black males, that one of the males was called Sip, that the males wanted him to pay a tax, and that he owed "a lot" of money. None of these statements tended to expose Morales to criminal liability. Morales had not disclosed the basis for the tax or admitted to selling drugs; the informant only assumed that the tax was for selling drugs. Further, the informant stated that he did not provide Morales with any guns. As an initial matter, to qualify as a statement against penal interest under rule 804(2)(c), the statement must be self-inculpatory.[26]

[21,22] Stricklin argues that the investigation into the shootings revealed that Morales was in fact selling drugs. But

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[24] See, Neb. Evid. R. 805, Neb. Rev. Stat. § 27-805 (Reissue 2008); *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995).

[25] See *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013).

[26] See *id.*

in considering whether a statement qualifies as a statement against penal interest, a court must constrain its analysis to the individual statement at issue.[27] A "statement" within the meaning of rule 804(2)(c) is a specific individual statement that a proponent offers into evidence rather than the entire narrative of which the statement is a part.[28] Individual remarks under examination pursuant to the hearsay exception of rule 804(2)(c) must meet the test of whether the particular remark at issue meets the standard set forth in the rule.[29] Morales' statements, standing alone, did not tend to expose him to criminal liability. Thus, his statements did not fall within the purview of rule 804(2)(c).

(ii) Residual Hearsay Exception

Under rule 804(2)(e), when the declarant is unavailable as a witness, a hearsay statement "not specifically covered" by any other hearsay exception may still be admitted if the statement has "equivalent circumstantial guarantees of trustworthiness" and the court determines that

> (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Further, the proponent of the statement must notify the adverse party of his or her intent to offer the statement and of the particulars of the statement, including the name and address of the declarant.[30]

[23] We have stated that in determining whether a statement is admissible under the residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of

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[27] See *id.*

[28] See *id.*

[29] See *id.*

[30] See rule 804(2)(e).

the statement, the interests of justice, and whether notice was given to an opponent.[31]

[24] Moreover, in determining admissibility under the residual hearsay exception, a court must examine the circumstances surrounding the declaration in issue and may consider a variety of factors affecting the trustworthiness of a statement.[32] A court may compare the declaration to the closest hearsay exception as well as consider a variety of other factors affecting trustworthiness, such as the nature of the statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement.[33]

[25] Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to review hearsay rulings under this exception.[34]

Using these factors, we find no abuse of discretion in the district court's conclusion that Morales' statements were not admissible under the residual hearsay exception. Morales' statements did not exhibit similar guarantees of trustworthiness as a statement against penal interest, because his statements did not incriminate him in any wrongdoing. As to other factors affecting trustworthiness, Morales' statements were oral, the circumstances of the statements in seeking to obtain illegal firearms did not necessarily motivate Morales to speak truthfully, the statements were not made under oath, Morales

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[31] See *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[32] *Phillips, supra* note 25.

[33] *Id.*

[34] *Epp, supra* note 31.

was not subject to cross-examination, and there is no evidence that Morales subsequently reaffirmed the statements.

We further consider the probative value of Morales' statements in addition to their trustworthiness. Stricklin asserts that Morales' statements proved that two other black males had a motive to kill Morales. However, Morales' statements did not prove that Stricklin and Newman were innocent of the crimes. And his statements were not evidence of third-party guilt. The statements established only that Morales was having problems with persons other than Stricklin and Newman.

The above factors demonstrate that Morales' statements failed to exhibit sufficient guarantees of trustworthiness in order to be admitted under the residual hearsay exception. Because Morales' statements were inadmissible hearsay, we find no error in the exclusion of the evidence of the confidential informant's statements under the hearsay rule.

(iii) Complete Defense

Stricklin relies on *Holmes v. South Carolina*[35] for the assertion that the exclusion of the confidential informant's statements violated his constitutional right to present a complete defense. In *Holmes*, the U.S. Supreme Court held that a defendant's right to present a complete defense was violated when the trial court used an arbitrary rule to exclude evidence of third-party guilt.

However, in *State v. Phillips*,[36] we addressed a similar argument and concluded that the exclusion of a hearsay statement under the hearsay rule did not violate a defendant's right to present a complete defense. In the case at bar, the evidence of the confidential informant's statements was properly excluded under the hearsay rule. Thus, Stricklin's right to present a complete defense was not violated.

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[35] *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

[36] See *Phillips*, *supra* note 25.

3. Cross-Examination of Herrera-Gutierrez

Stricklin assigns that the district court abused its discretion in limiting the scope of his cross-examination of Herrera-Gutierrez. He contends that he should have been permitted to question Herrera-Gutierrez regarding his gang affiliation, his knowledge of the confidential informant, and his history of drug trafficking, including the circumstances of a 2002 conviction.

(a) Facts

Before Herrera-Gutierrez testified, the State moved to prevent Stricklin and Newman from asking any questions regarding Herrera-Gutierrez' membership in a gang and, specifically, his affiliation with "MS-13." The State further sought to prevent any questions regarding Herrera-Gutierrez' knowledge of the confidential informant. The district court sustained the State's motion as to the informant and as to Herrera-Gutierrez' affiliation with "MS-13." But it permitted the defendants to make a general inquiry into his membership in a gang.

And during cross-examination, Newman's counsel asked Herrera-Gutierrez, "You're pretty familiar with the sale of drugs. Is that fair to say?" Herrera-Gutierrez responded, "I don't think so because if it was that way, I would have a nice house, cars, but I didn't have money to pay my rent." Newman's counsel then asked, "You went to federal prison for it, didn't you?" The State objected, and the district court determined that the form of the question was improper.

Newman's counsel made an offer of proof, in which Stricklin joined, that Herrera-Gutierrez had been indicted by a federal court in 2002, had signed a plea agreement as to one count of knowingly and intentionally distributing less than 50 grams of methamphetamine, and had pled guilty. The district court explained that Herrera-Gutierrez could be questioned regarding the prior conviction and that if he denied it, the record of conviction could be offered. However, the court determined that he could not be asked any questions regarding the circumstances of the conviction. And it further

provided that any questions regarding the sale of drugs were to be limited to the individuals and locations involved in this case.

(b) Resolution

Stricklin's assertions regarding Herrera-Gutierrez' affiliation with a gang and his knowledge of the confidential informant are without merit. There was no indication that Herrera-Gutierrez was a member of "MS-13." Further, the district court permitted the defendants to ask general questions as to Herrera-Gutierrez' membership in a gang, and neither defendant chose to do so. As to Herrera-Gutierrez' knowledge of the confidential informant, the court correctly concluded that Herrera-Gutierrez could provide no testimony that would overcome the exclusion of the confidential informant's statements under the hearsay rule.

[26] As to the scope of cross-examination, we find no abuse of discretion in the limitation of questions regarding Herrera-Gutierrez' history of drug trafficking and his 2002 conviction. The scope of cross-examination of a witness rests largely in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.[37]

[27] Evidence of the circumstances of Herrera-Gutierrez' 2002 conviction was inadmissible under Neb. Evid. R. 609, Neb. Rev. Stat. § 27-609 (Reissue 2008). That rule permits the offer of evidence of a witness' having committed a crime punishable by death or imprisonment of more than 1 year, or a crime which involved dishonesty or false statement regardless of the punishment, provided that not more than 10 years have elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date. But once having established the conviction, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.[38]

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[37] *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

[38] See, *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014); *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987).

[28] As to Herrera-Gutierrez' prior history of drug trafficking, Stricklin was authorized to inquire into specific instances of conduct not resulting in conviction under Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 2008). There appears to have been some confusion regarding the interplay between rules 608(2) and 609, and we have not previously addressed the issue. However, several federal courts have arrived at a uniform conclusion. They hold that the federal equivalent of rule 608(2) applies only to specific instances of conduct that were not the basis of a criminal conviction. Evidence relating to a conviction is treated solely under the federal equivalent of rule 609.[39] Because rules 608(2) and 609 are substantially similar to their federal counterparts, we adopt the federal courts' conclusion.[40] Rule 608(2) permits questioning during cross-examination only on specific instances of conduct not resulting in a criminal conviction.

[29] Moreover, rule 608(2) conditions inquiry into specific instances of conduct upon the trial court's discretion. And under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[41] In the case at bar, the district court permitted inquiry into any incidents of prior drug trafficking involving the locations and individuals in this case. But the court determined that any other instances of drug trafficking were too remote for cross-examination. We find no abuse of discretion in this determination. This assignment of error is without merit.

4. Jury Instructions

Stricklin contends that instructions Nos. 5 and 6 omitted key and vital language in instructing the jury on the elements of the charged offenses. Specifically, he asserts that the

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[39] See, *U.S. v. Osazuwa*, 564 F.3d 1169 (9th Cir. 2009); *U.S. v. Lightfoot*, 483 F.3d 876 (8th Cir. 2007); *U.S. v. Parker*, 133 F.3d 322 (5th Cir. 1998); *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991).

[40] See *Pangborn, supra* note 18.

[41] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

instructions failed to charge the jury as to the requirement that the defendant intentionally used a deadly weapon to commit the crime, as to attempted robbery, and as to death as a natural and continuous result of the defendant's acts. He further claims that the omission of such language caused the jury confusion, as evidenced by a letter sent to the trial judge during deliberations. Because only instruction No. 6 pertained to Stricklin, we restrict our analysis to that instruction.

First, there is no indication that instruction No. 6 caused the jury confusion. The letter espoused by Stricklin in his appellate brief does not appear within the record on appeal.

[30] Second, Stricklin failed to object to the district court's jury instructions at trial. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.[42]

Instruction No. 6 contained no plain error. The jury was instructed on the felony murder theory of first degree murder, and the intentional use of a deadly weapon is not an element of felony murder.[43] While such intentional use is an element of the offense of use of a deadly weapon to commit a felony, instruction No. 6 charged the jury on all of the necessary elements of that offense.

Further, there was no need to instruct the jury as to death as a natural and continuous result of the defendant's acts. The comment to NJI2d Crim. 3.5 provides that "[i]n the normal case there will be no issue regarding causation and no instruction on proximate cause need be given." In the case before us, there was no dispute that Morales' and Noriega's deaths were caused by the gunshot wounds sustained during the robbery at Morales' shop.

And there was no need to instruct the jury as to attempted robbery. Based upon the evidence received at trial, the jury could determine either that Stricklin and Newman were the two black males who had committed the robbery and killed Morales and Noriega, or that they were not. There was no issue

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[42] *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013).

[43] See NJI2d Crim. 3.5.

as to whether the robbery forming the basis for felony murder actually occurred. This assignment of error is without merit.

5. Prosecutorial Misconduct

Stricklin assigns that the State committed prosecutorial misconduct during its closing argument. During its argument, the State emphasized the multiple calls between Stricklin and Newman on the morning of December 2, 2012, and the lack of calls between the two after 11:13 a.m.:

> So they're calling back and forth from 9:26 in the morning until 11:13. And in between there on Newman's records, you'll see his calls with [Morales]. At 11:13 . . . Stricklin has no more calls. From 11:13 until 12:34, he has no more calls. And the call that he wants you to believe he's traveling while it's being made, that call wasn't answered at 12:34. Why are there no more calls? The two of them are together. And in my mind, . . . Stricklin turned his phone off. He had no incoming or outgoing calls at all between 11:13 and 12:34.

[31,32] Stricklin objected to the State's comments, and the district court overruled the objection. However, he did not move for a mistrial. When a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial.[44] A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.[45] Stricklin has waived any error resulting from the State's comments due to his failure to move for mistrial.[46] This assignment of error is without merit.

6. New Trial

Stricklin assigns that the district court erred in overruling his motion for new trial on the basis of juror misconduct. His arguments relate both to the evidence received by the court

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[44] *Robinson, supra* note 22.

[45] *Id.*

[46] See *id.*

and to the court's ultimate conclusion that he was not prejudiced by juror misconduct.

(a) Facts

After submission of the verdicts, Stricklin moved for a new trial and attached an affidavit from one of the jurors. In the affidavit, the juror stated that he had made a telephone call to his brother after the first day of deliberations and before a verdict had been reached. During the conversation, the juror's brother revealed that the juror's family had a connection to the defendants. The affidavit provided, in relevant part:

> 4. When the phone call was placed, I was the only person on the jury at that time that wanted to vote not guilty.
>
> 5. The purpose for having a discussion with [my brother] about the deliberations was two-fold:
>
> a. First, at some point late in the trial . . . I realized that I recognized people in the audience who were familiar to me, then subsequently realized that I knew both of the defendants and my family has family relationships with them. In fact, at some point I learned that . . . Newman had an altercation with my father . . . and injured his shoulder in the past. . . .
>
> b. Second, I felt that I was being pressured by the other jurors to change my vote to guilty and felt that I was in a moral dilemma because I didn't think that the State had proven their case. I discussed the fact that I wasn't sure how long I could hold the other jurors off and maintain my position of not guilty.
>
> 6. During the deliberations, the other jurors persuaded me to change my vote to guilty primarily because the defendants did not testify and attempt to clear their names.
>
> 7. On October 10, 2013[,] I returned to the deliberations room with the other jurors and changed my vote to guilty.

A hearing was conducted, and the juror testified that on the third or fourth day of trial, he had recognized a person in the audience that he knew from "growing up." The juror spoke with his brother after the first day of the jury's deliberations. The juror told his brother that he was serving on a jury for

a murder trial. Although the juror did not inform his brother of Stricklin's or Newman's name, his brother knew about the trial and explained that he knew Stricklin and Newman. The juror's brother told the juror that Stricklin and Newman had known their father from growing up together. Although the juror's brother and father were not his biological family, the juror testified that he considered them as such.

As to the juror's knowledge of Stricklin and Newman, the juror confirmed that prior to the conversation with his brother, he had not made a connection between himself, his family, and either of the defendants. And he testified that he had never met Stricklin or Newman and that he had not known who they were. Additionally, the juror indicated that his brother did not inform him that Newman and their father had a negative history or relationship. And his brother did not tell the juror that Newman and their father had ever been involved in a physical altercation.

The juror also testified as to his vote, and he confirmed that he had discussed his desire to vote not guilty with his brother. The juror told his brother that he was the only member of the jury who wanted to vote not guilty and that he did not know what he was going to do.

At the hearing, the district court excluded certain portions of the juror's affidavit on the basis that they impermissibly revealed the juror's mental processes under Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2008). However, in its subsequent written order, the court stated that the portions were excluded because they were misleading.

Additionally, the district court received an affidavit from the presiding juror, stating that no outside or personal information regarding either Stricklin or Newman was brought to the jury's attention during deliberations.

The district court overruled Stricklin's motion for new trial. The court agreed that the juror had committed misconduct in communicating with his brother during deliberations; however, it concluded that no prejudice resulted from the misconduct. And it further rejected the defendants' assertion that the juror had committed additional misconduct in failing to reveal his family connection with the defendants.

(b) Resolution

(i) Evidence

Stricklin's arguments as to the evidence considered by the district court pertain to the stricken portions of the juror's affidavit. The court excluded all portions of the affidavit relating to the juror's vote, the jury's deliberations, the juror's knowledge of Stricklin and Newman, and the altercation between the juror's father and Newman. And during the juror's testimony, it further prevented the defendants from inquiring into whether the juror believed that the State had failed to meet its burden of proof, whether the juror had been experiencing a "moral dilemma," and whether the jury had considered the defendants' failure to testify.

We find no prejudicial error in the exclusion of the above evidence. The admissibility of evidence concerning the validity of a jury's verdict is governed by rule 606(2), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

[33] Additionally, we have explained that no evidence may be received concerning the effect of any statement upon a juror's mind, its influence upon the juror, or the mental processes of a juror.[47] Rule 606(2) does not allow a juror's affidavit to impeach a verdict on the basis of jury motives, methods,

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[47] See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

misunderstanding, thought processes, or discussions during deliberations.[48]

The juror's statements as to his desire to vote not guilty, pressure from the other jurors to change his vote, the juror's "moral dilemma," and the jury's reliance upon the defendants' failure to testify fell directly within the purview of rule 606(2). These statements revealed the juror's mental processes and attempted to impeach the jury's verdicts on the basis of its motives, methods, and discussions during deliberations. As such, the statements were inadmissible and could not have been considered by the district court. And the questions posed to the juror during his testimony similarly attempted to elicit such improper information.

Stricklin argues that the district court's exclusion of the above statements, particularly the jury's reliance upon the defendants' failure to testify, violated the court's duty to undertake a full investigation into the allegations of juror misconduct. And he cites the U.S. Court of Appeals for the Fifth Circuit's holding in *United States v. McKinney*[49] that when jury misconduct is alleged in a motion for new trial, the trial judge must conduct a full investigation to ascertain whether jury misconduct actually occurred and, if it occurred, the judge must determine whether or not it was prejudicial.

[34] We have held that when an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed.[50]

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[48] See *id*.

[49] *United States v. McKinney*, 429 F.2d 1019 (5th Cir. 1970).

[50] *State v. Arnold*, 253 Neb. 789, 572 N.W.2d 74 (1998).

However, this duty to hold an evidentiary hearing does not extend into matters which are barred from inquiry under rule 606(2). And the jury's consideration of the defendants' failure to testify was clearly barred from inquiry under that rule.[51] The district court permitted the juror to be examined as to the nature of the alleged misconduct and the extent of the extraneous information that he received. We see no violation of the court's duty to conduct an evidentiary hearing.

As to the statements in the affidavit regarding the juror's knowledge of Stricklin and Newman and the altercation between Newman and the juror's father, the exclusion of the statements did not cause Stricklin prejudice. At the hearing, the defendants were permitted to question the juror as to his conversation with his brother, his family's relationship with the defendants, his knowledge of the defendants, and whether he had been informed of any negative history or altercation involving his father and Newman.

Finally, we find no error in the district court's receipt of the affidavit of the presiding juror. The affidavit merely denied that extraneous information was brought to the jury's attention during deliberations. Rule 606(2) permits a juror to provide evidence on the limited question of "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

(ii) Misconduct

[35] Stricklin also challenges the district court's ultimate conclusion that he was not prejudiced by juror misconduct. We review the trial court's determinations of witness credibility and historical fact for clear error and review de novo the trial court's ultimate determination whether the defendant was prejudiced by juror misconduct.[52]

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[51] See, *U.S. v. Kelley*, 461 F.3d 817 (6th Cir. 2006); *U.S. v. Rodriquez*, 116 F.3d 1225 (8th Cir. 1997).

[52] See, *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010); *State v. Podrazo*, 21 Neb. App. 489, 840 N.W.2d 898 (2013).

[36,37] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.[53] In a criminal case, misconduct involving an improper communication between a nonjuror and a juror gives rise to a rebuttable presumption of prejudice which the State has the burden to overcome.[54]

The record establishes that the juror committed misconduct in communicating with his brother during deliberations. The juror testified that he called his brother during deliberations and discussed the status of his vote and the other jurors' votes prior to the submission of the verdicts. This was clear misconduct.

[38] However, we agree with the district court that Stricklin was not prejudiced by the extraneous information received by the juror during the telephone call to his brother. Whether prejudice resulted from jury misconduct must be resolved by the trial court's drawing reasonable inferences as to the effect of the extraneous information on an average juror.[55] The test to determine whether extraneous material was prejudicial looks to the possible effect of the extraneous material on an average juror's deliberative process.[56]

The extraneous information received by the juror would not have affected an average juror's deliberative process. The district court determined that the juror had testified credibly that his brother informed him only that his father and the defendants had a neutral acquaintance. The juror confirmed that his brother did not tell him that his father and Newman had a negative history or relationship or that his father and Newman had been involved in a physical altercation. We agree with the district court that such knowledge of a neutral family

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[53] *Thorpe, supra* note 52.

[54] *Id.*

[55] *Id.*

[56] *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002).

acquaintance would not motivate an average juror to change his vote from not guilty to guilty.

Moreover, the jury was instructed to determine the facts based solely upon the evidence presented at trial and to disregard any personal knowledge. And the affidavit of the presiding juror established that no extraneous information was presented to the other jurors during deliberations. Based upon the nature of the extraneous information received by the juror, the limitation of that information to the juror, and the instruction to disregard personal knowledge, we conclude that the juror's misconduct did not prejudice Stricklin and deprive him of a fair trial.

Stricklin claims that in addition to communicating with a nonjuror, the juror committed misconduct in failing to reveal his family connection to the defendants prior to the submission of the verdicts. However, this claim similarly fails for lack of prejudice. As previously discussed, the district court determined that the juror had testified credibly that his brother revealed only a neutral family acquaintance with the defendants. And the juror testified that he did not personally know the defendants and that he never knew who they were. Thus, assuming that the juror committed misconduct in failing to reveal his family connection, Stricklin failed to show that such a remote connection prevented the juror from being impartial. This assignment of error is without merit.

7. Withdrawal of Rest

Stricklin contends that the district court erred in overruling his motion to withdraw his rest and to submit additional evidence on the issue of juror misconduct. After the hearing on his motion for new trial, Stricklin sought to introduce an affidavit from the juror's brother that provided:

> When [the juror] called me the first day of deliberations, it was clear that he knew that our family knows the Defendants. He wasn't honest when he said at the Motion for New Trial that he didn't really know the Defendants. He told me that he didn't recognize them until he recognized people in the audience.

The district court overruled the motion to withdraw rest and excluded the affidavit. On appeal, Stricklin contends that the relevant factors weighed in favor of reopening the evidence and receiving the affidavit.

[39] Among factors traditionally considered in determining whether to allow a party to reopen a case to introduce additional evidence are (1) the reason for the failure to introduce the evidence, i.e., counsel's inadvertence, a party's calculated risk or tactic, or the court's mistake; (2) the admissibility and materiality of the new evidence to the proponent's case; (3) the diligence exercised by the requesting party in producing the evidence before his or her case closed; (4) the time or stage of the proceedings at which the motion is made; and (5) whether the new evidence would unfairly surprise or unfairly prejudice the opponent.[57]

The district court considered the above factors, and it determined that the defendants had not been diligent in offering the affidavit of the juror's brother. The brother was known to the defendants prior to the hearing, but they did not produce his statements.

And the district court further observed that receiving the affidavit would result in unfair surprise or unfair prejudice. At the hearing on the motion for new trial, the witnesses had been sequestered and, thus, they were not present for each other's testimony. The brother's affidavit "skirt[ed] the hearing's sequestration order," because it attempted to impeach the testimony given by the juror. If the brother had been present at the hearing, he would not have been allowed to hear and respond to the juror's testimony.

Based upon the district court's analysis of the relevant factors, we see no abuse of discretion in the denial of Stricklin's motion to withdraw his rest and to reopen the evidence. This assignment of error is without merit.

VI. CONCLUSION

We find no merit to Stricklin's assertions that the district court erred in consolidating his and Newman's trials, excluding

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[57] *Myhra v. Myhra*, 16 Neb. App. 920, 756 N.W.2d 528 (2008).

the statements of the confidential informant, and instructing the jury. And the court did not abuse its discretion in limiting the scope of his cross-examination of Herrera-Gutierrez, overruling his motion for new trial, and denying his request to reopen the evidence. Further, Stricklin failed to preserve his claim of prosecutorial misconduct for appellate review. We affirm Stricklin's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. TERRELL E. NEWMAN, ALSO KNOWN AS MONROE E. TERRELL, ALSO KNOWN AS EDWARD N. TERRELL, APPELLANT.

861 N.W.2d 123

Filed April 3, 2015. No. S-14-229.

1. **Identification Procedures: Due Process: Appeal and Error.** A district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.
2. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **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: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
5. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
6. **Constitutional Law: Identification Procedures: Due Process.** The Due Process Clause does not require a preliminary judicial inquiry into the reliability of an

eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.

7. **Trial: Identification Procedures.** When no improper law enforcement activity is involved, it suffices to test the reliability of identification testimony at trial, through the rights and opportunities generally designed for that purpose, such as the rights to counsel, compulsory process, and confrontation and cross-examination of witnesses.
8. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
9. **Effectiveness of Counsel: Proof.** To show prejudice on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
10. **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.
11. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
12. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.
13. **Trial: Evidence: Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
14. **Trial: Rules of Evidence.** A trial court is required to weigh the danger of unfair prejudice against the probative value of the evidence only when requested to do so at trial.
15. **Motions for Mistrial.** A mistrial is generally granted when a fundamental failure prevents a fair trial. Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury.

Appeal from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Affirmed.

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

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

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ., and MOORE, Chief Judge.

CASSEL, J.

I. INTRODUCTION

This case is Terrell E. Newman's direct appeal from multiple felony convictions, including two convictions for first degree murder. Newman's convictions arose from the shooting deaths of Carlos Morales and Bernardo Noriega during a planned drug transaction. The State alleged that Newman committed the crimes with an accomplice, Derrick U. Stricklin, and the two were tried together. Newman's assignments of error relate to his identification by the State's primary witness, the sufficiency of the evidence, ineffective assistance of trial counsel, the admissibility of evidence based upon cell phone records, comments made by a prospective juror, the exclusion of statements made by a confidential informant, the scope of his cross-examination of the State's primary witness, and juror misconduct. Finding no merit to his claims, we affirm his convictions and sentences.

II. BACKGROUND

We address Newman's and Stricklin's appeals in separate opinions. The basic facts of this case are contained in *State v. Stricklin*[1] and are not repeated herein, except as otherwise indicated.

As previously noted, the deaths of Morales and Noriega occurred during a planned drug transaction. One of the victims, Jose Herrera-Gutierrez, was not killed and identified Newman and Stricklin as Morales' and Noriega's killers. At trial, Herrera-Gutierrez was the State's primary witness. He testified that Morales had asked him to obtain some cocaine and that he and Noriega were supposed to deliver the cocaine

[1] *State v. Stricklin, ante* p. 542, 861 N.W.2d 367 (2015).

to Morales' automobile body shop. When they arrived at the shop, they entered the shop's office to find two black males already present. The males ordered Herrera-Gutierrez, Morales, and Noriega to lie down. They subsequently shot and killed Morales and Noriega.

Newman was convicted of two counts of first degree murder, three counts of use of a deadly weapon to commit a felony, attempted intentional manslaughter, and possession of a deadly weapon by a prohibited person. He was sentenced to life imprisonment for each of the first degree murder convictions, 15 to 25 years' imprisonment for each of the three use of a deadly weapon convictions, 20 months' to 5 years' imprisonment for the attempted intentional manslaughter conviction, and 15 to 25 years' imprisonment for the possession of a deadly weapon by a prohibited person conviction. Each sentence was ordered to run consecutively.

Newman filed a timely notice of appeal—an appeal which is taken directly to this court.[2]

III. ASSIGNMENTS OF ERROR

Newman assigns, reordered and restated, that (1) the police employed unnecessary and unduly suggestive photographic lineups in order to identify him; (2) the State introduced insufficient evidence to support his convictions; and (3) his trial counsel failed to introduce the affidavit or testimony of a juror's brother regarding Newman's allegations of juror misconduct, to object to jury instructions Nos. 5, 11, and 12, and to adequately investigate his defenses.

Newman further assigns that the district court erred in (1) admitting exhibit 288 into evidence, (2) overruling his motion for mistrial due to comments made by a prospective juror, (3) excluding the statements of a confidential informant, (4) limiting the scope of his cross-examination of Herrera-Gutierrez, (5) overruling his motion for a new trial due to juror misconduct, and (6) overruling his motion to withdraw his rest and to reopen the evidence.

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

IV. STANDARD OF REVIEW

[1] A district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.[3]

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[4]

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[5] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[6]

[5] Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.[7]

V. ANALYSIS

Newman and Stricklin assign several of the same issues as error. And as to these issues, there is no material difference in the applicable facts or law in the two appeals. Thus, we will refer to our opinion in *Stricklin*[8] for the disposition of their common claims. This opinion addresses only those assignments

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

[4] *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

[5] *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013).

[6] *Id.*

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

[8] *Stricklin, supra* note 1.

of error unique to Newman. We begin with Newman's identification through the use of photographic lineups.

1. Identification

Newman assigns that the police employed unnecessary and unduly suggestive photographic lineups in order to identify him. He contends that the photographic lineups violated his due process rights, because a photograph of him was included in multiple lineups. He further argues that the police should have conducted a live, physical lineup.

The State argues that the photographic lineups were not unduly suggestive and did not violate Newman's due process rights. Moreover, the State points out that Herrera-Gutierrez had previously seen Newman and Stricklin at Morales' shop. Herrera-Gutierrez did not know their names. But the shootings were not his first exposure to the perpetrators. Thus, the witness began the identification process with more familiarity with the shooters than a mere eyewitness. We analyze the procedures in that light.

(a) Facts

Herrera-Gutierrez identified both Newman and Stricklin as the shooters in photographic lineups conducted by police. Prior to trial, Newman moved to suppress any in-court identification of him by persons who had identified him in a police lineup. The district court held a hearing, and multiple officers testified as to the circumstances of the lineups.

Det. Dave Schneider testified that he interviewed Herrera-Gutierrez 2 days after the shootings and that, at that time, he had not developed any suspects. During the interview, Herrera-Gutierrez informed Schneider that he had recognized the shooters from prior occasions at Morales' shop. He explained that one of the shooters had a brother who was potentially a business partner of Morales' and that the other shooter was associated with a green Volkswagen Beetle that Herrera-Gutierrez had seen at the shop. Through investigating vehicles matching that description, Schneider developed Newman as a suspect.

Several weeks after the initial interview with Herrera-Gutierrez, Schneider and another detective showed

Herrera-Gutierrez a photographic lineup containing a photograph of Newman. Schneider had created the lineup using the police department's "mugshot program," and he had placed Newman's photograph in "[p]osition number three." The photograph of Newman was from 1999, and it was almost 12 years old. Schneider had a more recent photograph of Newman from Newman's "Nebraska ID card," but Schneider used the 1999 photograph because it was the only photograph of Newman available in the mug shot program. He also printed the lineup in black and white, because the 1999 photograph was "distorted" in comparison to the other five photographs. But the distortion was less noticeable in black and white.

Herrera-Gutierrez was presented with the lineup, and he indicated that the photograph of Newman resembled one of the shooters. The presentation of the lineup was recorded, and the recording was received by the district court. After Herrera-Gutierrez had indicated the photograph of Newman, the other detective translated that "number three looks a lot like him, but he can't assure you that that's him." When asked to give a percentage, the detective translated that Herrera-Gutierrez was "about 50 percent," but not sure, because "he looks a little heavier." Additionally, according to the detective, Herrera-Gutierrez explained that he believed he might be able to make an identification from a more recent photograph.

On the following day, a second lineup was presented to Herrera-Gutierrez by Schneider and two other detectives. Schneider had obtained a more recent photograph of Newman using "DMV photos," and the photographs appearing in the second lineup were in color. Schneider confirmed that Newman was the only individual to appear in both lineups.

After the presentation of the second lineup, Herrera-Gutierrez identified Newman. Schneider described that Herrera-Gutierrez did not hesitate "at all." And one of the other detectives testified that "within two seconds," Herrera-Gutierrez identified Newman and indicated that Newman was "the fat one that he was talking about in the garage that was orchestrating the homicide[s]."

After the hearing, the district court entered an order overruling Newman's motion to suppress. The court concluded that the identification process used by police was not unduly suggestive and that there had been no improper police influence. The court observed that Herrera-Gutierrez was able to describe prior instances when he had seen the shooters and that he had provided physical descriptions of the shooters prior to being presented with any lineups.

(b) Resolution

The U.S. Supreme Court has stated a two-part test for determining the admissibility of an out-of-court identification: "First, the trial court must decide whether the police used an unnecessarily suggestive identification procedure. . . . If they did, the court must next consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible."[9]

[6,7] "[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement."[10] When no improper law enforcement activity is involved, it suffices to test the reliability of identification testimony at trial, through the rights and opportunities generally designed for that purpose, such as the rights to counsel, compulsory process, and confrontation and cross-examination of witnesses.[11]

We have previously stated that a determination of impermissible suggestiveness is based on the totality of the circumstances.[12] Based upon the totality of the circumstances surrounding the lineups in this case, we find no unnecessary suggestiveness in the procedures used by police to identify Newman.

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[9] *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 722, 181 L. Ed. 2d 694 (2012). See *Nolan, supra* note 3.

[10] *Perry, supra* note 9, 132 S. Ct. at 730. See *Nolan, supra* note 3.

[11] *Nolan, supra* note 3.

[12] See *State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014).

Before being presented with both of the photographic lineups, Herrera-Gutierrez was admonished that the lineups may or may not have contained a photograph of one of the perpetrators. And an examination of the photographs in each of the lineups reveals that the arrays were not suggestive. Each of the lineups contained photographs of individuals with characteristics similar to Newman's. And Newman's photographs did not stand out due to age or any apparent distortion.

Newman's arguments as to unnecessary suggestiveness focus on his inclusion in multiple photographic lineups. And he attempts to compare this case to *Foster v. California*,[13] in which the U.S. Supreme Court determined that a petitioner's due process rights were violated by his identification through multiple lineups in a robbery investigation. In *Foster*, the petitioner was placed in an initial lineup in which he stood out by the contrast of his height and by the fact that he was wearing a leather jacket similar to the one worn by the robber. And when the witness was unable to identify the petitioner, the police permitted a one-to-one confrontation between the petitioner and the witness—a practice which, according to the Court, has been widely condemned. After a tentative identification, the police again placed the petitioner in another lineup. Thus, "[i]n effect, the police repeatedly said to the witness, 'This is the man.'"[14]

We do not find *Foster* to be analogous to the present case. Although Newman was included in two lineups, the similarities to *Foster* end there. Further, in this case, the use of multiple lineups was prompted by Herrera-Gutierrez' statement that he might be able to make an identification of Newman from a more recent photograph.

After reviewing the first lineup, Herrera-Gutierrez indicated that the photograph of Newman resembled one of the shooters, but stated that he was not sure, because the individual in the photograph appeared to be heavier. And he further explained that he might be able to make an identification from

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[13] *Foster v. California*, 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969).

[14] *Id.*, 394 U.S. at 443 (emphasis omitted).

a more recent photograph. Schneider subsequently obtained a more recent photograph of Newman and compiled a second lineup, from which Herrera-Gutierrez identified Newman without hesitation.

The U.S. Supreme Court has emphasized that each challenge to a pretrial identification must be considered on its own facts.[15] Considering the facts of the present case, we do not conclude that the procedures used by police effectively told Herrera-Gutierrez, "'This is the man.'"[16] Although Newman appeared in both lineups, the second lineup was created to address Herrera-Gutierrez' concerns with the 1999 photograph. And in the second lineup, police used a different photograph of Newman and placed the photograph in a different position.

Under some circumstances, the inclusion of the same suspect in multiple photographic lineups in order to obtain an identification might be unnecessarily suggestive. But this determination must be made on a case-by-case basis. Under the facts of the present case, we find no unnecessary suggestiveness in the procedures used by police.

Additionally, Newman asserts that the procedures used to identify him were unnecessarily suggestive, because Schneider prepared both of the photographic lineups and was present when they were presented to Herrera-Gutierrez. And he cites a policy of the Omaha Police Department that a photographic lineup should not be presented by the person who prepared it.

Notwithstanding any police policy regarding the presentation of photographic lineups, the evidence received at the hearing established that Herrera-Gutierrez' identification of Newman was not tainted by Schneider's presence. The recording of the first lineup does not reveal any attempt by Schneider to influence Herrera-Gutierrez in making an identification. And Schneider testified that the second lineup was presented by another detective and that both he and the other detective did not point to any of the photographs to indicate Newman's

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[15] See *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968).

[16] *Foster, supra* note 13, 394 U.S. at 443 (emphasis omitted).

photograph. The other detective also testified that he presented the second lineup and that he did not know who was in the lineup.

Finally, Newman contends that police should have used a live, physical lineup in order to identify him, rather than photographic lineups. However, he cites no statute or case law requiring the use of live, physical lineups. And the U.S. Supreme Court has expressly declined to espouse such a requirement.[17] This assignment of error is without merit.

2. Insufficient Evidence

Newman claims that the evidence introduced at trial was so insufficient that no rational trier of fact could have found that the State had satisfied its burden of proving the defendants' guilt beyond a reasonable doubt. He argues that Herrera-Gutierrez' testimony as to the events of the shootings was not credible and was uncorroborated by forensic or circumstantial evidence.

Newman's arguments invite us to exceed the scope of our appellate review. We decline to do so. We have repeatedly stated that 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.[18] From the jury's verdicts, it is apparent that the jury found Herrera-Gutierrez to be credible. It is not the province of this court to question that determination. This assignment of error is without merit.

3. Ineffective Assistance of Trial Counsel

Newman assigns that his trial counsel was ineffective in several ways. He claims that his trial counsel was ineffective in (1) failing to introduce the affidavit or testimony of a juror's brother regarding Newman's allegations of juror misconduct; (2) failing to object to jury instructions Nos. 5, 11, and 12; and (3) failing to adequately investigate his defenses.

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[17] See *Simmons*, *supra* note 15.

[18] See, e.g., *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[8,9] The test for ineffective assistance of counsel is well settled. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[19] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[20] An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[21] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[22]

[10] Newman obtained new, different counsel for this direct appeal. 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.[23]

[11,12] However, the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.[24] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[25]

(a) Affidavit or Testimony of Juror's Brother

The relevant facts surrounding Newman's allegations of juror misconduct are contained in *Stricklin*.[26] Briefly summarized, Newman moved for a new trial on the basis that a

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

[20] *Filholm, supra* note 18.

[21] *Id.*

[22] *Id.*

[23] *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

[24] *Filholm, supra* note 18.

[25] *Ramirez, supra* note 23.

[26] *Stricklin, supra* note 1.

juror committed misconduct in communicating with the juror's brother, a nonjuror, after the first day of deliberations and before a verdict had been reached. A hearing was conducted, and the juror testified that he called his brother and that his brother informed him that their father had known the defendants from growing up together. But the juror testified that he did not know either of the defendants personally.

Although the juror's brother was known to the defendants, neither Newman nor Stricklin produced the statements of the brother at the hearing. After the hearing, Newman moved to withdraw his rest and to introduce the brother's affidavit, but the district court overruled the motion.

The record is insufficient to resolve this ineffective assistance claim. Newman claims that the brother's affidavit provided "critical evidence" which contradicted the juror's testimony at the hearing.[27] The brother's affidavit stated, in relevant part, that the juror had lied when he testified that he was unaware of his family's connection to the defendants until the connection had been revealed by his brother.

But at the hearing, an investigator also testified that the juror was aware of his family's connection to the defendants at the time that he called his brother. Thus, the evidence contained in the brother's affidavit was cumulative of other evidence presented at the hearing. Consequently, Newman's trial counsel could have made a reasonable strategic decision to refrain from introducing the brother's statements at the hearing. Without a more complete record, we decline to address the issue.

(b) Jury Instructions
Nos. 5, 11, and 12

Newman claims that his trial counsel was ineffective in failing to object to jury instructions Nos. 5, 11, and 12, because the instructions omitted key phrases and explanations included in the Nebraska pattern jury instructions.

Instruction No. 5 informed the jury of the elements of the charged offenses. Newman argues that the instruction was erroneous, because it omitted language as to attempted robbery and

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[27] Brief for appellant at 46.

as to death as a natural and continuous result of the defendant's acts. But there was no need to instruct the jury as to attempted robbery. Based upon the evidence received at trial, the jury could determine either that Newman and Stricklin were the two black males who had committed the robbery and killed Morales and Noriega, or that they were not. There was no issue as to whether the robbery forming the basis for the charged offenses actually occurred.

And there was also no need to instruct the jury as to death as a natural and continuous result of the defendant's acts. There was no dispute that Morales' and Noriega's deaths were caused by the gunshot wounds sustained during the robbery at Morales' shop.

Instruction No. 11 provided the jury with definitions. Newman contends that the instruction was erroneous for omitting the phrase "'or intentional manslaughter,'" as stated in the pattern jury instruction.[28] He does not identify the erroneous definition or the relevant pattern jury instruction, but we presume that he refers to the definition of "'[a] felony.'" Notwithstanding any error in that definition, the jury correctly understood that the offense of attempted intentional manslaughter constituted a felony. The jury found Newman guilty of attempted intentional manslaughter and the corresponding charge of use of a deadly weapon to commit a felony.

As to instruction No. 12, Newman contends that the instruction failed to correctly charge the jury on intent. However, instruction No. 12 was modeled on the relevant pattern jury instruction. As such, the instruction was not erroneous.

None of Newman's allegations of error in the instructions given to the jury caused him prejudice. Thus, the record affirmatively establishes that this claim of ineffective assistance of counsel is without merit.

(c) Failure to Adequately Investigate Defenses

Newman asserts that his trial counsel was ineffective in failing to interview, depose, and subpoena several witnesses.

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[28] *Id.* at 47.

And he further identifies the witnesses and the testimony that the witnesses would have given had they been called to testify. However, the record is silent as to whether Newman informed his trial counsel of the witnesses. And there is no evidence as to trial counsel's motivations in failing to interview and subpoena the witnesses or as to any efforts trial counsel made to do so. Consequently, the record is inadequate to resolve the issue.

4. Exhibit 288

Newman contends that the district court erred in admitting exhibit 288 into evidence. He claims that the exhibit was more prejudicial than probative and that the court should have given a limiting instruction as to the jury's consideration of the exhibit.

Exhibit 288 showed six calls received by Newman between 11:42 a.m. to 12:36 p.m. on the day of the shootings. And the exhibit further indicated that the cell tower used to service Newman's cell phones for the calls was located in the immediate vicinity of Morales' shop. An "RF engineering manager" and a legal compliance analyst testified as to the calls and confirmed the accuracy of the cell tower's location as shown on the exhibit.

[13,14] Newman has waived any claim that exhibit 288 was unfairly prejudicial. Newman objected to the admission of exhibit 288 on the basis of foundation, and the objection was properly overruled. He did not object on the basis of unfair prejudice. An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.[29] A trial court is required to weigh the danger of unfair prejudice against the probative value of the evidence only when requested to do so at trial.[30]

And there was no need for the district court to provide a limiting instruction as to the jury's use of exhibit 288. Exhibit 288 was received as substantive evidence. No

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[29] *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003).

[30] *Id.*

limiting instruction was required.[31] This assignment of error is without merit.

5. Motion for Mistrial

Newman contends that the district court should have granted his motion for mistrial, because the entire jury pool was tainted by comments made by a prospective juror during voir dire.

In response to the State's inquiry as to the prospective juror's opinion of laws that prohibit certain persons from possessing firearms, the juror stated:

> I think all the laws are misconstrued. I think they're a moral fabric in this country. They get broke down so bad. So many people are walking the streets that need to be locked up behind bars and be kept there. . . . It's become a sham. I think a tall tree and a short piece of rope is the way the justice system fights back. I'm sorry I feel that way, but that's just the way it is.

After the prospective juror's response, the State moved to strike the juror for cause. Neither defendant objected, and the juror was stricken. Newman moved for mistrial, claiming that the prospective juror's comments were inflammatory, because the defendants were two African-American males. And he further argued that the comments had polluted the entire jury pool. The district court overruled the motion.

[15] We have stated that a mistrial is generally granted when a fundamental failure prevents a fair trial.[32] Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury.[33]

Newman argues that the district court should have granted his motion for mistrial, because a new jury venire was the only remedy that could have cured the prejudice caused by the

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[31] Cf. *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

[32] See *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[33] *Id.*

prospective juror's comments. However, the record affirmatively shows that Newman was not deprived of a fair trial by the juror's comments.

After the prospective juror's comments, the juror was stricken for cause and the defendants were permitted to question other prospective jurors as to their reactions to the comments. The questioned jurors expressed that their opinions had not been influenced by the juror's comments. Thus, we find no abuse of discretion in the district court's refusal to grant a mistrial. This assignment of error is without merit.

6. Remaining Assignments of Error

Newman's arguments regarding the exclusion of the statements of the confidential informant, the scope of his cross-examination of Herrera-Gutierrez, his motion for new trial, and his motion to withdraw his rest and to reopen the evidence are addressed in *Stricklin*.[34] As discussed in that opinion, each of these claims is without merit. We see no need to repeat our analysis here.

VI. CONCLUSION

We find no merit to Newman's assertions that his identification by Herrera-Gutierrez violated his due process rights and that the State introduced insufficient evidence. And the district court did not err in admitting exhibit 288 into evidence, overruling Newman's motion for mistrial, excluding the statements of the confidential informant, limiting the scope of his cross-examination of Herrera-Gutierrez, overruling his motion for new trial, and denying his request to withdraw his rest and to reopen the evidence. Further, his claims of ineffective assistance of trial counsel either lack merit or cannot be resolved, because the record on direct appeal is insufficient. We affirm Newman's convictions and sentences.

Affirmed.

Heavican, C.J., not participating.

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[34] *Stricklin, supra* note 1.

IN RE INTEREST OF OCTAVIO B. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MELISSA R., APPELLANT.

861 N.W.2d 415

Filed April 3, 2015. Nos. S-14-484 through S-14-489.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **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.
3. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
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.
5. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** Juvenile court proceedings are special proceedings under Neb. Rev. Stat. § 25-1902 (Reissue 2008), and an order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child.
6. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
7. **Juvenile Courts: Parental Rights: Parent and Child: Time: Final Orders.** Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.
8. **Juvenile Courts: Judgments: Parental Rights.** A review order in a juvenile case does not affect a parent's substantial right if the court adopts a case plan or permanency plan that is almost identical to the plan that the court adopted in a previous disposition or review order.
9. **Juvenile Courts: Judgments: Appeal and Error.** A dispositional order which merely continues a previous determination is not an appealable order.
10. **Judgments: Parental Rights: Appeal and Error.** An order that adopts a case plan with a material change in the conditions for reunification with a parent's child is a crucial step in proceedings that could possibly lead to the termination of parental rights; such an order affects a parent's substantial right in a special proceeding and is appealable.
11. **Juvenile Courts: Parental Rights.** The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with

preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. The goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests.

12. **Juvenile Courts: Jurisdiction: Child Custody.** Once a child has been adjudicated under Neb. Rev. Stat. § 43-247(3) (Reissue 2008), the juvenile court ultimately decides where a child should be placed. Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests.
13. **Juvenile Courts: Minors: Proof.** The State has the burden of proving that a case plan is in the child's best interests.
14. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeals from the County Court for Scotts Bluff County: KRISTEN D. MICKEY, Judge. Affirmed.

Bernard J. Straetker, Scotts Bluff County Public Defender, for appellant.

Dave Eubanks, Scotts Bluff County Attorney, and Kelli L. Ceraolo for appellee.

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

CASSEL, J.

INTRODUCTION

In each of these consolidated juvenile appeals, the mother presents two issues. First, did changing the primary permanency objective from reunification to adoption affect the mother's substantial right? Because the juvenile court's actions effectively ended services directed toward reunification, we conclude that it did. Thus, the orders were final and appealable. Second, was changing the permanency objective in the children's best interests? The evidence showed that it was. Accordingly, we affirm.

BACKGROUND

PARENTS AND CHILDREN

Melissa R. is the mother of the six minor children involved in these juvenile proceedings. The oldest child was born in 1999, and the youngest child was born in 2011. The fathers

of the children are not parties to these appeals and will not be discussed further.

Prior Procedural History

In March 2013, the State filed a petition seeking to adjudicate the children under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The petition alleged that Melissa failed to provide adequate supervision. Melissa was in jail at the time. On that same day, the county court, sitting as a juvenile court, entered an order removing the children from the home and placing them in the custody of the Nebraska Department of Health and Human Services (DHHS). The State later filed a second amended petition, alleging that the children lacked proper parental care through no fault of Melissa. In May, the court adjudicated the children. Since the time of the dispositional hearing in July, the children have remained in DHHS' custody, and DHHS' case plans have been geared toward reunification.

The juvenile court's first review hearing appearing in our record occurred in October 2013. At that time, Melissa was still incarcerated but had been placed on house arrest since early September. She was working full time and having supervised visitations with the children in her mother's home. The court report noted that poor progress was being made to alleviate the causes of out-of-home placement. In an October 1 order, the court directed the parties to comply with a September 24 case plan. The goal of the case plan was for Melissa to be able to appropriately care for her children and to provide a stable home free of domestic violence and illegal drugs in order to meet the emotional, psychological, and developmental needs of the children. The case plan set forth a number of strategies to assist Melissa in reaching the goal.

In January 2014, the juvenile court held another review hearing. Melissa testified she had been attending "NA," but that she had not started a relapse group prevention class because the class was full. Melissa admitted that because she was upset and emotional, she canceled a visit with the children the night before the hearing. During a recess in the hearing, she submitted to a urinalysis—which tested positive

for methamphetamine. The court adopted DHHS' January 7 court report and case plan. The report stated that fair progress was being made to alleviate the causes of out-of-home placement. The plan contained the same goal and strategies identified in the September 2013 case plan. The court additionally ordered random drug testing and a new psychological evaluation and parenting assessment by Dr. John Meidlinger. The court ordered Melissa to follow the recommendations of the substance abuse evaluation, the psychological evaluation, and the parenting assessment.

Proceedings Leading to Instant Appeals

On April 15, 2014, the juvenile court conducted a review and permanency hearing. The family's children and family services specialist testified. From his testimony, we glean several pertinent facts:

- The children had been in out-of-home placements for 13 months.
- Since the last review hearing, Melissa had two visits with two of her sons but she had not participated in visitation with her other children.
- During a team meeting the previous month, Melissa stated that she was not "doing what she was supposed to because she was mad."
- Melissa was not complying with family support services or random drug testing.
- The specialist was not aware of any employment on Melissa's part.
- Melissa had expressed interest in a residential treatment program for mothers with children, but there was no guarantee that she would be accepted into the program.

The specialist recommended that the permanency plan be changed to adoption for all of the children, with a concurrent goal of reunification with the father for the oldest three children and a concurrent goal of guardianship for the younger three children. The specialist based his recommendation partially on Melissa's lack of substantial progress with the case plan and also on Meidlinger's report.

The juvenile court also received Meidlinger's psychological screening report into evidence. The report made the following recommendation:

> Any decisions made in regarding [sic] to case plan and disposition should be made with the understanding that Melissa has severe underlying characterological issues and is at high risk to return to previous problems in the future. Any decision to return custody of her children to her should be preceded by [an] extended period of time in which she demonstrate[s] stability in regard to work, relationships, finances and contact with her children.

Melissa testified regarding her compliance with the case plan. She claimed that she was consistent with her visitation from October 2013 to January 2014. Melissa explained that she did not participate in visits during the second half of January and the month of February, aside from two visits, because she "was very upset." She also claimed that for the 6 weeks prior to the review hearing, the only days that she did not see any of her children were Mondays and Fridays. According to Melissa's testimony, she had steady employment from September 2013 until January 16, 2014, when she traveled to Colorado to be with a son who was hospitalized there. That absence, she testified, caused the loss of her job. Melissa admitted that she was not capable of parenting all six children without help, stating "I can't even take care of myself right now, so how could I take care of anybody else?"

The juvenile court agreed that the permanency goals for the children should be changed as recommended by DHHS. The court orally stated that it adopted "[t]he balance of those recommendations not otherwise in conflict with those permanency goals." Counsel for the State inquired whether DHHS was required to continue to provide services to Melissa. The court responded, "Only as is required under [an April 9, 2014,] case plan that's identified on pages 28 through 32 that are — that is consistent with the permanency goals."

The pages of the case plan referred to by the juvenile court contained a number of goals and strategies. The case plan set forth the following goals for Melissa: (1) continue to work with a family support worker to improve her parenting

skills, (2) attend individual mental health counseling with an approved mental health provider, (3) take her prescribed medication and work with her physician with regard to medication management for her mental health needs, (4) have supervised parenting time with her children as arranged by DHHS, (5) participate in random drug screening, and (6) follow all of the strategies outlined in the case plan. The case plan listed the following strategies: (1) have monthly contact with the DHHS case manager, (2) participate in a parenting assessment and follow any recommendations, (3) participate in a substance abuse evaluation and follow any recommendations, (4) participate in individual mental health counseling, (5) participate in individual substance abuse counseling, (6) participate in a relapse prevention group as recommended in her substance abuse evaluation, (7) regularly attend an "AA/NA" program, (8) participate in family therapy with her children when it is recommended by the children's therapists, (9) secure a safe and stable home, and (10) maintain stable employment. The majority of these strategies are the same as those contained in the previous case plan.

Juvenile Court's Disposition

In an April 15, 2014, order entered in each case, the juvenile court formally changed the permanency goal for the children. The court changed the primary permanency goal to adoption for all children, with a concurrent plan of reunification with the father for the three oldest children and a concurrent plan of guardianship for the three youngest children. The court found that reasonable efforts had been made to reach the primary goal of reunification, but that those efforts were not successful. The court adopted the provisions of the April 9 case plan and ordered all parties to comply with the case plan's terms, including any amendments ordered by the court.

Melissa timely appealed. The Nebraska Court of Appeals originally summarily dismissed the appeals, stating that the order entered in each case did not affect a substantial right. Melissa filed a motion for rehearing, which the Court of Appeals sustained. The Court of Appeals reserved the issue of jurisdiction and directed the parties to address the jurisdictional

issue in their briefs. We subsequently moved the cases to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENT OF ERROR

Melissa assigns that the juvenile court erred in finding that the State presented sufficient evidence to establish that the change in permanency objective was in the children's best interests.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[2]

[2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[3] 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.[4]

ANALYSIS

JURISDICTION

[3-5] We must first determine whether we have jurisdiction, which turns upon whether the orders changing the primary permanency objective affected a substantial right. 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.[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.[6] Juvenile court proceedings are

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

[2] *In re Interest of Mya C. & Sunday C.*, 286 Neb. 1008, 840 N.W.2d 493 (2013).

[3] *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014).

[4] *Id.*

[5] *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013).

[6] *Id.*

special proceedings under Neb. Rev. Stat. § 25-1902 (Reissue 2008), and an order in a juvenile special proceeding is final and appealable if it affects a parent's substantial right to raise his or her child.[7] Thus, if changing the permanency objective affected Melissa's substantial right to raise her children, the orders were final and appealable. But if the change did not affect a substantial right, we lack jurisdiction and must dismiss the appeals.

[6-9] The governing principles are easily stated. A substantial right is an essential legal right, not a mere technical right.[8] Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.[9] A review order does not affect a parent's substantial right if the court adopts a case plan or permanency plan that is almost identical to the plan that the court adopted in a previous disposition or review order.[10] Thus, a dispositional order which merely continues a previous determination is not an appealable order.[11]

But because the inquiry is so fact specific, applying these principles can easily lead to different results from case to case. On at least two occasions, the Court of Appeals has considered the appealability of a juvenile court order changing the permanency goal from reunification to adoption. As those cases illustrate, the resolution is dependent on the facts. This makes it impractical to declare a uniform rule regarding the finality of an order changing the permanency goal.

In *In re Interest of Tayla R.*,[12] the Court of Appeals determined that an order in one of the consolidated appeals of the case which changed the permanency plan from reunification

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[7] *In re Interest of Mya C. & Sunday C., supra* note 2.

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

[9] *In re Interest of Danaisha W. et al., supra* note 5.

[10] *In re Interest of Mya C. & Sunday C., supra* note 2.

[11] *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

[12] *In re Interest of Tayla R.*, 17 Neb. App. 595, 767 N.W.2d 127 (2009).

to adoption was not appealable because it did not affect the mother's substantial rights. The court observed that the terms of the new order had the effect of continuing reasonable efforts to preserve the family. The court reasoned that the new order contained the same services as the previous order, that it did not change the mother's visitation or status, and that it implicitly provided the mother an opportunity for reunification by complying with the terms of the rehabilitation plan.[13]

A different panel found an order modifying a permanency goal from reunification to guardianship/adoption to be appealable in *In re Interest of Diana M. et al*.[14] In that case, the order modifying the permanency plan objective was coupled with an order ceasing further reasonable efforts to bring about reunification.[15] The court reasoned that because the order affected the mother's right to reunification with her children, it affected a substantial right and was appealable.[16]

In both of those cases, the Court of Appeals' jurisdictional analysis was consistent with our precedent. In *In re Interest of Sarah K.*,[17] we scrutinized orders entered 2 months apart. The first order approved a case plan which identified reunification as the goal and provided for long-term foster care for the child and supervised visitation by the parents. The second order adopted the State's permanency plan of long-term foster care transitioning to independent living which provided for the possibility of reunification. On appeal, we stated that the terms of the second order "merely repeat the essential terms" of the first order and that "[t]he parents were not disadvantaged by the juvenile court's [second] order . . . , nor were their substantial rights changed or affected thereby."[18] We further stated that the second order "effects no

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[13] *Id*.

[14] *In re Interest of Diana M. et al*., 20 Neb. App. 472, 825 N.W.2d 811 (2013).

[15] *Id*.

[16] See *id*.

[17] *In re Interest of Sarah K., supra* note 11.

[18] *Id*. at 58, 601 N.W.2d at 785.

change in the parents' status or the plan to which the parents and [child] were previously subject."[19] Thus, we concluded that the second order was not an appealable order. Similarly, in *In re Guardianship of Rebecca B. et al.*,[20] we dismissed one of the consolidated appeals after concluding that a later order merely continued the terms of the previous dispositional order and, thus, did not affect a substantial right of the mother.

In the instant case, the thrust and parry of arguments ultimately favor Melissa. The State contends that the April 2014 orders did not affect a substantial right because Melissa was still provided with an opportunity to comply with the case plan adopted by the juvenile court. But Melissa points out that the court's change of the permanency objective to adoption was accompanied by an order relieving DHHS of any obligation to provide her with services. In response, the State suggests that although DHHS was no longer required to pay for services not related to the new permanency objective, Melissa could still complete the case plan and move toward reunification. We agree with Melissa.

The juvenile court's April 2014 order entered in each case was not merely a continuation of previous orders. Although it contained many of the same goals and strategies, it changed the permanency objective to adoption for all children and did not provide for reunification with Melissa as a concurrent goal. Because the order contained many of the same goals and strategies, the order would suggest that the situation here resembles that presented in *In re Interest of Tayla R.*[21] But the juvenile court's statements from the bench essentially eviscerated the opportunity to achieve reunification. The court stated that DHHS was required to continue to provide services to Melissa only as consistent with the new permanency goals. Because reunification with Melissa was no longer a goal, it appears that

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[19] *Id.* at 59, 601 N.W.2d at 785.

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

[21] *In re Interest of Tayla R., supra* note 12.

services aimed at reunification were effectively ended. Thus, Melissa was disadvantaged by the orders.

[10] An order that adopts a case plan with a material change in the conditions for reunification with a parent's child is a crucial step in proceedings that could possibly lead to the termination of parental rights; such an order affects a parent's substantial right in a special proceeding and is appealable.[22] We conclude that the order entered in each case affects Melissa's substantial right and is a final, appealable order.

This case illustrates the importance of ensuring that the record shows the full import of a court's ruling. The written orders entered in each case stated only that the juvenile court adopted DHHS' case plan and that the parties were to comply with its terms, including any court-ordered amendments. The orders did not reflect the court's statement from the bench relieving DHHS from providing services to Melissa that were inconsistent with the new permanency goals. Here, we are aware of the real effect of the court's ruling through a question from DHHS' counsel and the court's response, which were contained in the bill of exceptions. Had this colloquy not been included in the record, our conclusion regarding appealability would likely have been different.

Best Interests

Melissa argues that the State presented insufficient evidence to prove that changing the permanency objective was in the children's best interests. We disagree.

[11-13] The foremost purpose and objective of the Nebraska Juvenile Code is the protection of a juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents where the continuation of such parental relationship is proper under the law. The goal of juvenile proceedings is not to punish parents, but to protect children and promote their best interests.[23] Once a child has been adjudicated under § 43-247(3), the juvenile court ultimately decides where a child should be placed. Juvenile courts are

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[22] See *In re Interest of Mya C. & Sunday C., supra* note 2.

[23] *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014).

accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests.[24] The State has the burden of proving that a case plan is in the child's best interests.[25]

The evidence demonstrated that Melissa has not made sufficient progress toward the goal of reunification. The specialist testified that Melissa's progress began when he took over the family's case in March 2014, stating "she wasn't doing anything she was supposed to be doing until I showed up this last month or the month of March until now." And although Melissa had arranged mental health counseling, she had already missed three appointments. For a period of time, Melissa did not participate in visitations with her children because she was upset.

Melissa admitted during the April 2014 hearing that she was not capable of parenting her children on her own at that time. She had never been able to provide financially for herself and her children. And Melissa's mother had done most of the parenting of the children for the past 7 or 8 years. Further, Meidlinger's report recommended that "[a]ny decision to return custody of [Melissa's] children to her should be preceded by [an] extended period of time in which she demonstrate[s] stability in regard to work, relationships, finances and contact with her children."

[14] Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.[26] At the time of the April 2014 hearing, the children had been in out-of-home placements for 13 months. The evidence established that Melissa had made little progress toward reunification with her children, and an expert recommended that there be an extended period of time of stability in Melissa's life before custody of the children be returned to her. Given this evidence, it was in the children's best interests to change the primary permanency objective from reunification with Melissa.

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[24] *In re Interest of Karlie D., supra* note 8.

[25] *In re Interest of Diana M. et al., supra* note 14.

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

CONCLUSION

Because the juvenile court's orders affected Melissa's substantial right to raise her children, they were final and appealable. Upon our de novo review, we find that the evidence supports the juvenile court's order changing the primary permanency objective from reunification with Melissa to adoption, with a concurrent plan of reunification with the father for the three oldest children and a concurrent plan of guardianship for the three youngest children. We therefore affirm the juvenile court's order in each case.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DONALD M. LEE, APPELLANT.
861 N.W.2d 393

Filed April 3, 2015. No. S-14-537.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
3. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed.

Donald M. Lee, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

WRIGHT, J.

NATURE OF CASE

Donald M. Lee was convicted of second degree murder and sentenced to life imprisonment. On direct appeal in case No. S-09-779, he asserted only a claim of excessive sentence, which on December 10, 2009, we summarily affirmed. Lee now appeals the denial of his motion for postconviction relief, asserting that he was not brought to trial in a timely manner. The issue is whether the district court erred in denying Lee postconviction relief.

SCOPE OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[2] Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008). When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015).

FACTS

The following statement of facts is based upon *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011), which was a prior postconviction action. In July 2008, the State filed a complaint in county court, charging Lee with first degree murder. On July 21, the court arraigned him. On November 3, after Lee waived his preliminary hearing, the State filed the information in district court, charging Lee with first degree murder.

On May 19, 2009, under a plea bargain, Lee pleaded no contest to one count of second degree murder. The district

court sentenced Lee to a term of 70 years to life in prison. His direct appeal asserted excessive sentence, and we summarily affirmed. Lee moved for postconviction relief and alleged violations of his right to speedy trial, his right to due process, and his right to effective assistance of counsel. The court denied relief without granting an evidentiary hearing. The court found that two continuances—one of a motion to suppress hearing and one of the trial itself—tolled the time in which Lee was to be brought to trial.

We reviewed Lee's first denial of postconviction relief, and we affirmed the district court's order in part. However, we reversed the judgment and remanded the cause with regard to Lee's claim that his trial counsel was ineffective for failing to assert his speedy trial rights.

We noted that Lee was mistaken in his claim that the speedy trial clock began to run July 18, 2008, the day the State filed the complaint, because that was not the operative date. Instead, we stated that the operative date was November 3, 2008, the date the State filed the information in district court. Although the court found that the speedy trial clock was tolled by several motions to continue, it did not show the dates during which those motions were pending.

We concluded that the district court should have certified and included in the transcript any files or records, which would have included any documents related to the supposed continuances considered by the court in denying Lee an evidentiary hearing. The record did not show who filed the continuances, when they were granted, or the duration of the continuances. We found that the record did not affirmatively show that Lee's ineffective assistance of counsel claim regarding his speedy trial claim was without merit. We reversed the district court's order in part and remanded the cause for further proceedings.

At the evidentiary hearing upon remand, the only testimony offered was the deposition of Robert Lindemeier, who was Lee's trial and direct appeal counsel. Lindemeier is an experienced criminal attorney who has practiced law since 1984. He stated in his deposition that he had defended 15 to 20 first degree murder cases and 10 to 15 second degree

murder cases and that he handles approximately 300 felonies per year. Lindemeier testified that Lee was charged with first degree murder in an information filed November 3, 2008. He had filed three motions to continue in the case on Lee's behalf, and he obtained Lee's verbal consent before filing each motion. He specifically told Lee that the time elapsed after a motion to continue was excluded from the 180-day speedy trial period, and he stated that Lee had no objection to the continuances.

The district court found that the first motion for continuance was filed January 23, 2009. The court sustained the motion on January 26 and continued the case until March 17. The purpose for the motion was to allow Lindemeier to take a number of depositions, file a motion to suppress, and await pending DNA results. According to Lindemeier, eight depositions were taken and he hired a private investigator and mitigation expert from Minnesota to work on the case. As a result of this continuance, 48 days were excluded for speedy trial purposes from January 26 to March 17, 2009. The second motion for continuance was filed on March 13, 2009. The court sustained the motion, and the speedy trial time was tolled an additional 48 days. The third motion was filed on March 17, 2009. The court sustained the motion and continued the case until May 19. Because of the overlap in the time period between the second and third motion, another 15 days were tolled from the speedy trial time period.

On May 13, 2014, the district court entered an order denying Lee's motion for postconviction relief. The court found that a total of 195 days had elapsed from the filing of the information on November 3, 2008, until Lee entered his plea of no contest on May 19, 2009. The court determined that a total of 111 days were excluded from the speedy trial statutory period by virtue of continuances sought by counsel for Lee. The court concluded that only 84 days had elapsed which were chargeable to the State pursuant to the speedy trial statute and that therefore, Lee's right to a speedy trial was not violated.

The district court's order discussed Lindemeier's substantial experience in representing clients in criminal cases and accepted his testimony. It found that Lindemeier obtained

Lee's verbal consent before seeking any of the continuances. Lee did not offer evidence at the evidentiary hearing. Lee now appeals.

ASSIGNMENTS OF ERROR

Lee contends that the district court erred and abused its discretion in denying his motion for postconviction relief on his claim that his right to a speedy trial was violated.

Lee also assigns that the district court erred and abused its discretion by failing to determine whether Lee's Sixth Amendment rights were violated.

ANALYSIS

In *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011), we determined that the record did not affirmatively show that Lee was not entitled to postconviction relief for ineffective assistance of counsel for failure to assert violation of his statutory speedy trial rights. The district court denied an evidentiary hearing because it found that Lee had asked for continuances which tolled the time in which the State had to commence the trial. Because of this tolling, the court concluded that the State had not violated Lee's right to a speedy trial. But the court did not certify and include in the transcript files and records that illustrated why it denied the evidentiary hearing. Therefore, we remanded the cause for further proceedings.

On remand, the district court conducted an evidentiary hearing to determine whether Lee's speedy trial rights had been violated and subsequently denied Lee's motion for postconviction relief. The issue is whether the court erred in denying Lee's motion.

The record presented to the district court contained sufficient evidence to support its finding that Lee's right to a speedy trial was not violated and that therefore, Lindemeier was not ineffective for failing to raise that argument. Lee's assertion that he had been denied a speedy trial was based on the mistaken belief that the date on which his speedy trial clock began was July 18, 2008, the date the complaint was filed, rather than November 3, 2008, the date the information was filed in district court. The record from the hearing

included documentation of the three continuances that tolled Lee's speedy trial clock for a total 111 days and that only 84 days had lapsed under the 180-day speedy trial statute.

There was substantial evidence that counsel was not ineffective for requesting continuances. The record showed that Lindemeier believed the continuances were necessary to obtain more time to take depositions, hire a private investigator, hire a mitigation expert, and file a motion to suppress evidence. Negotiations for a plea bargain also continued during the third continuance. Lindemeier testified that he explained the consequences of the continuances to Lee before filing each motion and that Lee consented each time.

[3] Lee takes issue with the amount of weight the district court gave to Lindemeier's testimony. An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. See *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014). The district court did not abuse its discretion in accepting Lindemeier's testimony that he explained to Lee the effect of a motion to continue on the speedy trial clock and that Lee consented to each continuance. Nor did the court in any way hinder Lee from offering evidence to rebut Lindemeier's testimony. The record does not show that Lee offered any such evidence.

Lee has not presented evidence that the district court erred in any of its findings. We find no clear error in the court's judgment.

CONCLUSION

For the reasons stated above, we affirm the judgment of the district court denying Lee's motion for postconviction relief.

AFFIRMED.

IN RE INTEREST OF MIAH S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MIAH S., APPELLANT.

861 N.W.2d 406

Filed April 3, 2015. No. S-14-632.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, the appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which the appellate court reviews independently of the trial court's determination.
2. **Miranda Rights.** *Miranda* warnings, once given, are not to be accorded unlimited efficacy or perpetuity.
3. **Miranda Rights: Constitutional Law: Time.** A suspect need not be advised of his or her constitutional rights more than once unless the time of warning and the time of subsequent interrogation are too remote in time from one another.
4. **Miranda Rights: Waiver.** Courts must consider the totality of the circumstances with respect to a suspect's waiver of his or her rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
5. ____: ____. An initial *Miranda* warning and waiver continue to be valid, unless the circumstances change so seriously that the suspect's answers no longer are voluntary, or unless the suspect no longer is making a knowing and intelligent relinquishment or abandonment of rights.
6. **Miranda Rights: Waiver: Constitutional Law.** With respect to a juvenile's waiver of his or her *Miranda* rights, a totality of the circumstances analysis mandates inquiry into all the circumstances surrounding the interrogation, including an evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he or she has the capacity to understand the warnings given to him or her, the nature of his or her Fifth Amendment rights, and the consequences of waiving those rights.
7. **Miranda Rights: Waiver.** A valid *Miranda* waiver must be made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.
8. **Miranda Rights: Waiver: Time.** In the determination whether a *Miranda* waiver was valid, the amount of time elapsed between the warning and the subsequent interrogation is not the only factor to be considered, but is a very relevant one.

9. **Miranda Rights.** The fact that a suspect indicates he or she still recalls his or her rights is a factor that tends to prove the initial *Miranda* warning is still effective.
10. ____. The purpose of the warnings in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), were in part to guard against the inherently compelling pressures of the custodial interrogation.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Affirmed.

Joseph Kuehl for appellant.

Donald W. Kleine, Douglas County Attorney, and Cortney Wiresinger for appellee.

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

HEAVICAN, C.J.

NATURE OF CASE

Miah S., the juvenile defendant, was arrested for burglary. Miah initially waived his *Miranda* rights[1] and agreed to speak to a detective. The next day, two different detectives went to Miah's home to interview him about additional burglaries in the area. The detectives did not readvise Miah of his rights, but did notify him that the warnings from the day before were still in effect. Miah then admitted to being involved in other burglaries and was eventually charged with seven additional counts of burglary.

At trial, Miah filed a motion to suppress the statements made during the second encounter with law enforcement, claiming they were obtained in violation of *Miranda*. The trial court overruled the motion and subsequently adjudicated Miah as being a minor within Neb. Rev. Stat. § 43-247(2) (Supp. 2013).

We find the juvenile court did not err in overruling the motion to suppress and affirm the adjudication.

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[1] See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

BACKGROUND

Miah was arrested on November 18, 2013, along with four other individuals after they were caught while allegedly burglarizing a home. At the time of the arrest, Miah was 14 years old and had no prior criminal history. The five individuals were transported to central police headquarters in Omaha, Nebraska, and were interviewed by detectives. Miah and another suspect were interviewed by Det. Rosemary Henn. Det. Shawn Loontjer interviewed two of the other suspects, and Det. Chris Perchal interviewed the fifth suspect.

Prior to questioning, Henn advised Miah of his rights under *Miranda* by reading the standard Omaha Police Department rights advisory form. Henn testified that Miah appeared to understand his rights and that Miah stated he wished to speak to her at that time. The interview lasted 45 minutes to an hour, and at the end of the interview, Miah was booked for the burglary. Miah was released to his home and placed on an electronic monitoring program.

During their interrogations, two of the other suspects admitted to participating in multiple burglaries. On the next day, November 19, 2013, Loontjer and Perchal went to Miah's home to follow up on Miah's possible participation in the other burglaries. The record is silent as to exactly how much time passed between the two interviews, but at oral argument, counsel for Miah indicated that less than 24 hours had passed.

Miah's mother answered the door, and Loontjer asked if they could speak with Miah. Loontjer testified that Miah came into the living room, "plopped down on the couch," and appeared "very aloof." Loontjer sat approximately 2 feet away from Miah on the couch, and Perchal stood in between the couch and the front door. Miah's mother was present for almost the entire interview, and Loontjer described her as "an active participant in the conversation." Loontjer conducted the interview. Perchal's primary role was to take notes.

Both detectives testified that Loontjer first confirmed with Miah that he had been advised of his *Miranda* rights by Henn. Loontjer then advised Miah that those rights were still in

effect. According to the detectives, Miah told Loontjer that "he was aware of [his rights] and did not need [the detectives] to go over them again." Miah admitted to the detectives that he had participated in other break-ins and agreed to go along with the detectives to point out where the break-ins occurred. The detectives believed Miah's mother gave consent for Miah to go with the detectives. The detectives both testified that they asked if Miah's mother wished to accompany them, but that she said she had to stay at the home to look after a child in the house.

Miah accompanied the detectives in the detectives' car and pointed out seven different locations of recent burglaries. Each time, Miah told the detectives how entry was gained into the residence, who participated, and what they took. For all seven residences, Miah's statements were corroborated by police reports that were filed at the time of the burglaries. Miah was then taken home. Both officers denied they had offered to be lenient if Miah cooperated, threatened Miah with jail time if he did not speak to them, or promised to talk to prosecutors on Miah's behalf if he cooperated. Miah was subsequently charged with seven additional counts of burglary.

At trial, Miah's mother gave a different account of what occurred during the encounter on November 19, 2013. She testified that the issue of *Miranda* was never brought up during the interview. Miah's mother described Miah as "[s]cared, nervous," during the encounter with the detectives and stated that Miah was "fidgety" and did not make eye contact with the detectives. She also alleged that the detectives made several threats to Miah about what would happen if he did not cooperate, and also that the detectives offered to be lenient if Miah would help them. Miah's mother testified that the detectives did not ever invite her to accompany Miah, but that she also never asked if she could go along.

There is very little in the record to indicate Miah's level of intelligence or comprehension ability. According to Miah's mother, Miah was in the ninth grade at the time of trial and was receiving poor grades. Miah's mother attributed Miah's poor grades to his lack of attendance at school. Miah has never been diagnosed with any learning disability. Miah also

had minimal, if any, experience with law enforcement prior to his arrest.

At trial, Miah filed a motion to suppress Miah's statements to law enforcement on November 19, 2013, claiming they were obtained in violation of *Miranda*. A hearing was held, and the juvenile court subsequently entered an order overruling Miah's motion to suppress. First, the juvenile court "assign[ed] particular credibility to the testimony of . . . Loontjer and Perchal where said testimony is in conflict with that of the child's mother." The juvenile court held that

> [w]hile the better practice would be to re-advise any suspect, particularly a child, of his or her Miranda Rights in a situation where a child is being re-interviewed by police, the Court finds that this is not a requirement, including where a suspect (including a child suspect) is reminded that the rights previously described to him/her continue to apply, and the suspect or child indicates understanding.

The juvenile court went on to determine that Miah's "statements were freely, knowingly and voluntarily given under the protocol of having been previously advised of his constitutional rights, per Miranda." The juvenile court also assumed the interaction between Miah and the detectives was a custodial interrogation, without ever explicitly addressing the issue in the order or explaining what facts the juvenile court used to reach that conclusion. By not specifically addressing that issue, the State, in its brief, also appears to assume that the interaction was a custodial interrogation.

Miah appealed from the judgment of the juvenile court. In his brief, Miah notes that the motion to suppress affected only counts 2 through 8. Those charges stemmed from the statements made on November 19, 2013, which Miah now seeks to exclude. Consequently, count 1, which charged Miah with the November 18 burglary, was not impacted by the motion to suppress.

ASSIGNMENT OF ERROR

Miah assigns that the juvenile court erred in determining that he made a knowing, voluntary, and intelligent waiver of

his right to counsel and his privilege against self-incrimination during the November 19, 2013, interrogation.

STANDARD OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*,[2] an appellate court applies a two-part standard of review. With regard to historical facts, we review the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which we review independently of the trial court's determination.[3]

ANALYSIS

Miah does not challenge the validity of the initial waiver of his rights under *Miranda* or the statements he made to law enforcement on November 18, 2013; therefore, we assume that Miah's initial waiver was valid. Nor does Miah challenge that the juvenile court clearly erred in its findings of fact; therefore, we must accept the facts as determined by the juvenile court. By the same token, the State does not challenge the custodial nature of the interrogation. Therefore, the sole issue before us is whether the *Miranda* warnings given the previous day were still fresh such that Miah could voluntarily and knowingly waive his rights.

[2,3] Miah assigns that the juvenile court erred in determining the *Miranda* warnings given on November 18, 2013, still applied while Miah was being interrogated by the detectives the next day. It is clear that "*Miranda* warnings, once given, are not to be accorded unlimited efficacy or perpetuity."[4] But at the same time, a suspect "need not be advised of his constitutional rights more than once unless the time of warning and the time of subsequent interrogation are too remote in time

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[2] *Id.*

[3] *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014).

[4] *United States v. Hopkins*, 433 F.2d 1041, 1045 (5th Cir. 1970).

from one another."[5] This is, however, the first occasion this court has had to address the issue of under what circumstances a readvisement would be necessary.

[4] There is no fixed time limit as to how much time must pass before the warnings are ineffective, because courts must consider the totality of the circumstances with respect to a suspect's waiver of his or her rights under *Miranda*.[6] The U.S. Supreme Court confirmed this approach in *Wyrick v. Fields*.[7] In that case, the defendant was arrested on a rape charge and requested a polygraph examination. Prior to the polygraph examination, the defendant had waived his rights to have his attorney present and to remain silent. At the conclusion of the test, the examiner informed the defendant that the test revealed that the defendant had been deceitful. The examiner asked if the defendant wished to explain the results. The defendant then admitted to having sexual contact with the victim, but claimed it was consensual. The defendant sought to suppress these statements, but the trial court denied the motion and the defendant was subsequently convicted. The Eighth Circuit overturned his conviction and, citing *Edwards v. Arizona*,[8] held that although the defendant waived his right to have counsel present during the polygraph examination, the defendant had not waived that right during the post-test interrogation.

[5] The U.S. Supreme Court reversed the Eighth Circuit's decision, because the circuit court "did not examine the 'totality of the circumstances,' as *Edwards* requires."[9] There was nothing to suggest that the completion of the test and the defendant's being asked to explain the results were

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[5] *State v. Davis*, 261 Iowa 1351, 1354, 157 N.W.2d 907, 909 (1968).

[6] See *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009). See, also, *Upton v. State*, 257 Ark. 424, 516 S.W.2d 904 (1974); *Miller v. State*, 337 So. 2d 1360 (Ala. Crim. App. 1976).

[7] *Wyrick v. Fields*, 459 U.S. 42, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982).

[8] *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

[9] *Wyrick, supra* note 7, 459 U.S. at 47.

significant enough occurrences to cause the defendant to immediately forget his rights under *Miranda* or render his statements involuntary. The Court held that the initial warning and waiver would still be valid, "unless the circumstances changed so seriously that [the suspect's] answers no longer were voluntary, or unless [the suspect] no longer was making a 'knowing and intelligent relinquishment or abandonment' of his rights."[10]

Because the analysis involves an examination of the totality of the circumstances, the amount of time that elapsed between the warning and subsequent interrogation is not the sole dispositive factor in determining whether there has been a violation of *Miranda*. We note the lack of consistency across different jurisdictions in addressing this issue. For example, some courts have required a readvisement of *Miranda* rights after 4 hours,[11] 18 hours,[12] 2 days,[13] and 3 days.[14] While at the same time, other courts have held that a readvisement was not necessary after 5 hours,[15] 17 hours,[16] 2 days,[17] 3 days,[18] and all the way up to a week or more if law enforcement asks if the suspect remembers his or her rights.[19]

The analysis is dependent upon the facts of a particular situation. We find it useful, as other courts have also done, to enumerate the circumstances often relevant to the decision

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[10] *Id.*

[11] *People v. Sanchez*, 88 Misc. 2d 929, 391 N.Y.S.2d 513 (N.Y. Sup. 1977).

[12] *U.S. v. Jones*, 147 F. Supp. 2d 752 (E.D. Mich. 2001).

[13] *Franklin v. State*, 6 Md. App. 572, 252 A.2d 487 (1969).

[14] *People v. Quirk*, 129 Cal. App. 3d 618, 181 Cal. Rptr. 301 (1982).

[15] *Stumes v. Solem*, 752 F.2d 317 (8th Cir. 1985).

[16] *State v. Myers*, 345 A.2d 500 (Me. 1975).

[17] *Babcock v. State*, 473 S.W.2d 941 (Tex. Crim. App. 1971).

[18] *Maguire v. United States*, 396 F.2d 327 (9th Cir. 1968); *Johnson v. State*, 56 Ala. App. 583, 324 So. 2d 298 (1975).

[19] *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985), *modified on denial of rehearing* 781 F.2d 185 (11th Cir. 1986); *Biddy v. Diamond*, 516 F.2d 118 (5th Cir. 1975).

of whether a *Miranda* warning has gone stale. The factors adopted by the North Carolina Supreme Court seem particularly useful:

> (1) the length of time between the giving of the first warnings and the subsequent interrogation. . . ; (2) whether the warnings and the subsequent interrogation were given in the same or different places . . . ; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers . . . ; (4) the extent to which the subsequent statement differed from any previous statements . . . ; (5) the apparent intellectual and emotional state of the suspect.[20]

Other jurisdictions have applied similar factors in the case of juvenile suspects.[21] These factors are simply meant to provide guidance; a court's analysis need not be limited only to these factors. As discussed earlier and as *Wyrick*[22] makes clear, we are to consider the *totality* of the circumstances.

[6] For example, in the case at bar, the suspect's age and relative inexperience with law enforcement are particularly relevant considerations. Indeed, the U.S. Supreme Court has held that the totality of the circumstances analysis "mandates . . . inquiry into all the circumstances surrounding the interrogation," including an "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[23] This court has previously applied the totality of the circumstances approach in the case of a 14-year-old's waiver of his *Miranda* rights, adding that

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[20] *State v. McZorn*, 288 N.C. 417, 434, 219 S.E.2d 201, 212 (1975), *judgment vacated in part* 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976). See, also, *State v. DeWeese*, 213 W. Va. 339, 582 S.E.2d 786 (2003).

[21] See *In re Kevin K.*, 299 Conn. 107, 7 A.3d 898 (2010).

[22] *Wyrick, supra* note 7.

[23] *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).

we must "necessarily exercise[] 'special caution' with respect to juveniles."[24]

[7] A valid *Miranda* waiver must be "made with a full awareness [of] both . . . the nature of the right being abandoned and the consequences of the decision to abandon it."[25] We acknowledge the growing body of research suggesting that many of those in Miah's age group may not be able to adequately comprehend the warnings and provide a meaningful waiver of those rights.[26] In most cases, however, the age of a suspect is not enough on its own to render a waiver invalid under the totality of the circumstances test. We must consider Miah's actual intellectual capabilities and experience and weigh that against the other circumstances of the case.

The record in this case is left wanting with regard to Miah's intelligence level or exactly what he understood he was waiving. We are aware that Miah had no previous experience with law enforcement. Miah's mother also testified that Miah had poor grades in school, but explained that it was "because he skipped a lot [of classes] in the first quarter." But Miah has also never been diagnosed with any type of learning disability. Miah's age, level of education, and lack of experience must factor into our analysis, but the circumstances of this case are not such that Miah's age, intelligence, and experience would overwhelmingly outweigh all other factors.

[8] As previously discussed, although the amount of time that elapsed between the warning and the subsequent interrogation is not the only factor to be considered, it is certainly a very relevant one. The record is also silent on precisely how much time passed between the first and second interrogations. Miah's attorney stated at oral argument that the attorney believed the time lapse to be less than 24 hours. Even assuming 24 hours elapsed, or even slightly longer, it appears that that length of time is not clearly excessive across many

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[24] *Goodwin, supra* note 6, 278 Neb. at 958, 774 N.W.2d at 744 (quoting *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)).

[25] *Goodwin, supra* note 6, 278 Neb. at 956, 774 N.W.2d at 743.

[26] See, e.g., Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. Crim. L. & Criminology 219 (2006).

jurisdictions. Several courts have found warnings to still be effective after longer time lapses.[27] Of course, in some situations, other factors may still render *Miranda* warnings stale after a 1-day lapse.

[9] Perhaps one of the most critical factors to this case is that during the second interrogation, the detective asked Miah if he had been given the warnings the day before, asked if Miah still recalled the warnings, and also offered to repeat the warnings if Miah wished. We cannot overlook the fact that Miah indicated he understood his rights and did not request the detectives to repeat them. Numerous courts have cited the fact that the suspect indicated he or she still recalls his or her rights as a factor that tends to prove the initial *Miranda* warning was still effective.[28] The fact that a suspect indicates he or she remembers the *Miranda* warnings and understands that the warnings still apply is a strong factor in favor of finding that the *Miranda* warnings were still fresh.

[10] Other factors in this case also suggest that the *Miranda* warnings were still fresh. We note that the second interrogation occurred in a much less intimidating environment than the initial interrogation. The purpose of the warnings in *Miranda* were in part to guard against the "inherently compelling pressures" of the custodial interrogation.[29] In particular, the Court also recognized the extent to which being in a police station adds to that compulsion.[30]

In the present case, the first interrogation and initial waiver occurred at the police station without another adult present. By contrast, the second interrogation occurred in Miah's living room with his mother present. Additionally, even though different detectives questioned Miah the second time, the detectives were from the same department and questioned Miah about burglaries related to the one for which he had already

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[27] See cases cited *supra* notes 16-18.

[28] See, *U.S. v. Nguyen*, 608 F.3d 368 (8th Cir. 2010); *State v. Dixon*, 107 Ariz. 415, 489 P.2d 225 (1971); *State v. Smith*, 90 So. 3d 1114 (La. App. 2012).

[29] *Miranda, supra* note 1, 384 U.S. at 467.

[30] *Miranda, supra* note 1.

been booked the day before. There is less risk of confusion in this type of situation than there would be if the suspect was being questioned by officials from a different agency or about completely different crimes.

As explained above, with respect to a juvenile's waiver of his or her *Miranda* rights, we consider the totality of the circumstances.[31] Ultimately, the facts that the initial waiver occurred less than 24 hours beforehand, that the second detective checked that the warnings had been given and asked whether Miah wished for them to be repeated, that the second interrogation occurred primarily in Miah's living room with his mother present, and that Miah was questioned about crimes related to the first interrogation, lead us to the conclusion that the *Miranda* warnings were not stale.

Taking into account that "the age, education, and intelligence of an accused are included within the totality of circumstances which a court must assess in determining whether there has been a knowing and voluntary waiver,"[32] we do not believe that the "circumstances changed so seriously" between the initial warning, the effect of which Miah does not contest, and the subsequent interrogation that Miah was "no longer . . . making a 'knowing and intelligent relinquishment or abandonment' of his rights."[33] The juvenile court did not err in overruling Miah's motion to suppress.

CONCLUSION

The adjudication of the juvenile court is affirmed.

AFFIRMED.

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[31] *Goodwin, supra* note 6.

[32] *Id.* at 958, 774 N.W.2d at 744.

[33] *Wyrick, supra* note 7, 459 U.S. at 47.

In re Interest of Cassandra B. and Moira B., children under 18 years of age. State of Nebraska, appellee, v. Angel B., appellant.

861 N.W.2d 398

Filed April 3, 2015. No. S-14-708.

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. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Juvenile Courts: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
4. **Final Orders: Appeal and Error.** Among the three types of final orders which may be reviewed on appeal is an order that affects a substantial right made during a special proceeding.
5. **Juvenile Courts: Appeal and Error.** A proceeding before the juvenile court is a special proceeding for appellate purposes.
6. **Juvenile Courts: Parental Rights: Parent and Child: Time: Final Orders.** Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.
7. **Constitutional Law: Parental Rights.** Parents have a fundamental liberty interest in directing the education of their children.
8. **Parental Rights: Final Orders: Appeal and Error.** Orders which temporarily suspend a parent's custody, visitation, or education rights for a brief period of time do not affect a substantial right and are therefore not appealable.
9. **Juvenile Courts: Final Orders: Constitutional Law: Parent and Child.** The substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child.
10. **Juvenile Courts: Minors.** The State has a right, derived from its parens patriae interest, to protect the welfare of its resident children.
11. **Juvenile Courts: Parental Rights.** A juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication.

Appeal from the Separate Juvenile Court of Lancaster County: Linda S. Porter, Judge. Affirmed.

John C. Ball, of Pollack & Ball, L.L.C., for appellant.

Joe Kelly, Lancaster County Attorney, and Lory A. Pasold for appellee.

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

STEPHAN, J.

Angel B. is the mother of Cassandra B., born in 1998, and Moira B., born in 2008. She appeals from an order of the separate juvenile court of Lancaster County prohibiting her from homeschooling Moira until further order of the court. We conclude that the order was final and appealable. Finding no error, we affirm.

FACTS

In May 2012, the State asked the juvenile court to place Cassandra and Moira in the temporary custody of Nebraska's Department of Health and Human Services (DHHS) pursuant to Neb. Rev. Stat. § 43-248 (Cum. Supp. 2012). The request was supported by the affidavit of a representative of the Lancaster County sheriff's office describing an incident that occurred at a home in rural Lancaster County, Nebraska, on May 11, 2012. The juvenile court entered the requested order, based upon its finding that Cassandra, who was then 13 years old, had been forced to sleep outside in a tent when the temperature was 55 degrees. When Cassandra attempted to reenter the house, she was forced back into the tent and her uncle "zip tied" the tent shut. Cassandra escaped, and Angel then turned on a water hose, which Cassandra's uncle used to spray Cassandra with water. Angel also gave the uncle a rope, which he attempted to tie around Cassandra's wrists. The court found that these facts placed both Cassandra and Moira at risk of harm.

Angel subsequently entered a no contest plea to an amended petition alleging that both Cassandra and Moira were children who came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008), and the children were

adjudicated on August 1, 2012. The adjudication order included a finding that Cassandra had "severe mental and behavioral health needs" which required "immediate intervention for the safety and well-being of both minor children." The order further found that "[o]n one or more occasion[s]," Angel had "used inappropriate discipline when trying to handle Cassandra['s] extensive needs. Angel . . . needs assistance in addressing the extensive needs of Cassandra . . . and learning appropriate discipline. The above situation places both of the minor children at risk of harm."

The court ordered that temporary legal and physical custody of both children should remain with DHHS. Cassandra was placed outside the home, but Moira was returned to the physical care of Angel and has remained there since. Cassandra now resides with her paternal grandparents in another state. This appeal pertains only to Moira.

The original disposition was on October 22, 2012. At that time, the court adopted a case plan, which provided in relevant part that Angel should not subject Moira to any form of physical discipline or restraint and that Angel would complete a full psychological evaluation.

A review hearing was held on December 10, 2013. At that hearing, DHHS requested that Angel be ordered to undergo an updated psychological evaluation. This request was based on concerns regarding Angel's mental health, expressed by both the DHHS family services caseworker assigned to the case and Moira's therapist. Evidence also showed that in September and October 2013, Angel had locked Moira in her bedroom as a form of discipline. The caseworker testified that in late November or early December, Moira had hit and kicked a visitation worker and was so uncontrollable that the police had to be called. The caseworker also testified that Angel continued to think that forcing Cassandra to stay alone in a tent in the middle of the night had been an acceptable form of discipline. The caseworker thought Angel was making very little progress in therapy. She further reported that Angel was at times volatile in her interactions with her and in November 2013, had yelled at the caseworker for an extended period of time during a home visit.

In its order entered after the hearing, the court found, inter alia, that Angel was not cooperating with DHHS and that she had failed to take responsibility for the improper discipline of Cassandra. The court ordered that Moira should remain physically placed with Angel, but noted that Angel's "care of Moira, including her emotional well being, should be carefully monitored by [DHHS] pending further hearing in this case." The court also ordered both Angel and Moira to participate in individual therapy.

Another review hearing was held on June 30, 2014. By that time, Cassandra was residing with her grandparents. The same caseworker testified that Moira had attended kindergarten at a Catholic school during the 2013-14 school year and had done well. She testified that Angel expressed no complaints about the curriculum at the school. Moira's behavior had improved, and her therapist was recommending less frequent therapy. The caseworker also testified that there had been no recent concerns regarding parenting or safety during random drop-in visits at Angel's residence.

The caseworker testified in June 2014 that DHHS had concerns about Angel's desire to homeschool Moira. School officials informed the caseworker that Moira was behind academically when she started kindergarten but was catching up, and the officials were concerned that she might fall behind again if homeschooled. The peer interaction at school had also helped Moira improve her ability to share and communicate with others. DHHS was also concerned about Angel's ability to homeschool Moira, because Angel worked full time, and when asked to provide information about a proposed schedule and curriculum, she became defensive and did not provide the information. Further, DHHS was concerned that Angel wished to homeschool Moira in order to limit the adults Moira could communicate with or confide in. The caseworker testified that when Cassandra was in Angel's custody, "[s]he would go periods of time being homeschooled and then she would be in traditional school, and then she'd go back to homeschooling, so it was very inconsistent." The caseworker expressed her opinion that academically and socially, it was in Moira's best

interests to remain in a traditional school setting, rather than a homeschool environment controlled by Angel.

In an order issued on July 9, 2014, the court found that Angel was not cooperating with DHHS and had not taken responsibility for the improper discipline of Cassandra. It also found that Angel had made "minimal progress" to alleviate the causes of the adjudication. It ordered both Angel and Moira to continue in individual therapy. In addition, it ordered that Moira "shall continue to be enrolled in an educational program as arranged or approved by [DHHS] and shall not be home schooled at this time, pending further order of this Court." In the same order, it set the next review hearing in the case for January 26, 2015.

Angel appealed from this order, alleging it improperly infringed on her right to educate Moira as she chose. The Nebraska Court of Appeals issued an order to show cause as to why the case should not be dismissed for lack of jurisdiction. It questioned both whether the prohibition against homeschooling was a new order in the case and, if it was, whether it was an order affecting a substantial right in a special proceeding that was subject to appeal. After finding that cause had been shown, the Court of Appeals ordered the parties to address the jurisdictional issue in their briefs. We subsequently moved the case to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state.[1]

ASSIGNMENTS OF ERROR

Angel assigns that the juvenile court erred in (1) prohibiting her from homeschooling Moira and (2) ordering that Moira continue to be enrolled in an educational program arranged or approved by DHHS.

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,

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

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]

ANALYSIS

JURISDICTION

[2-5] The order from which this appeal was taken was the first time that the juvenile court had specifically prohibited Angel from homeschooling Moira. The State contends that it nevertheless was not a final order for purposes of appeal. In a juvenile case, as in any other appeal, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.[4] Among the three types of final orders which may be reviewed on appeal is an order that affects a substantial right made during a special proceeding.[5] A proceeding before the juvenile court is a special proceeding for appellate purposes.[6] Therefore, we must consider whether the order of the juvenile court which prohibited Angel from homeschooling Moira affected a substantial right.

[6,7] Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.[7] The U.S. Supreme Court has clearly established that parents have a fundamental liberty interest in directing the education of their children.[8] Thus, there

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[2] *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014); *In re Interest of Edward B.*, 285 Neb. 556, 827 N.W.2d 805 (2013).

[3] *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] See, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

can be no doubt that the object of the July 9, 2014, order is of sufficient importance to affect a substantial right.

[8] The issue, then, is the length of time over which Angel's ability to homeschool Moira may reasonably be expected to be disturbed. Orders which temporarily suspend a parent's custody, visitation, or education rights for a brief period of time do not affect a substantial right and are therefore not appealable.[9] For example, in *In re Interest of Danaisha W. et al.*,[10] we held that an order imposing restrictions on a parent's visitation rights was temporary in nature and therefore did not affect a substantial right so as to be appealable when it was in effect only until a hearing on a motion to terminate parental rights, which was scheduled for approximately 5 weeks later. Similarly, in *In re Guardianship of Sophia M.*,[11] we held an order which denied a parent visitation rights pending a guardianship hearing 3 weeks later was not of sufficient duration to affect a substantial right.

The Court of Appeals recently relied in part upon this precedent in *In re Interest of Nathaniel P.*[12] In that case, a juvenile court entered an order which "'suspended'" the mother's right to direct the child's education "'at least on a temporary basis at this time.'"[13] Although the next scheduled review hearing was almost 6 months later, the Court of Appeals construed the order as providing a means for the parent to regain her education rights before the review hearing by participating in rehabilitative services, and it thus concluded that it was not a final order, because it was "expected to disturb [the parent's] education rights for a relatively short period of time."[14] It therefore dismissed the appeal, and neither party sought further review by this court.

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[9] See *In re Interest of Nathaniel P.*, 22 Neb. App. 46, 846 N.W.2d 681 (2014).

[10] *In re Interest of Danaisha W. et al., supra* note 3.

[11] *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

[12] *In re Interest of Nathaniel P., supra* note 9.

[13] *Id.* at 48, 49, 846 N.W.2d at 683, 684 (emphasis omitted).

[14] *Id.* at 52, 846 N.W.2d at 686.

There is tension between the reasoning of *In re Interest of Nathaniel P.* and our holding in *In re Interest of Karlie D.*,[15] in which we determined that the ability of a juvenile court to change conditions of an adjudicated juvenile's custody or care "has no bearing on whether the court's order is final and appealable." And neither the language of the order in this case nor the context in which it was entered denotes a temporary interruption of Angel's right to direct Moira's education. The juvenile court's July 9, 2014, order provided that Moira "shall not be home schooled at this time, pending further order of this Court." The order gave no indication that the court would revisit this issue prior to the next review hearing scheduled for January 26, 2015, approximately 6 months in the future. This is a considerably longer duration of time than the 5 weeks and 3 weeks we characterized as temporary in *In re Interest of Danaisha W. et al.* and *In re Guardianship of Sophia M.* And because juvenile courts are required to review the cases of juveniles adjudicated under § 43-247(3) every 6 months,[16] virtually no order would have a longer duration than that. The order challenged in this appeal encompassed at least the first semester of Moira's school year and, potentially, an even longer period. We conclude that it was not a temporary order, but, rather, one which affected the parent's substantial right to direct the education of her child. It was therefore a final order, which we have jurisdiction to review.

MERITS

[9,10] The substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child.[17] As we have noted above, this includes the parents' fundamental liberty interest in directing the education of their children.[18] But the State also has a right, derived from its parens patriae interest, to protect the welfare of its resident

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[15] *In re Interest of Karlie D.*, 283 Neb. 581, 587, 811 N.W.2d 214, 221 (2012).

[16] See Neb. Rev. Stat. § 43-278 (Cum. Supp. 2014).

[17] *In re Interest of Karlie D., supra* note 15.

[18] See, *Troxel v. Granville, supra* note 8; *Meyer v. Nebraska, supra* note 8.

children.[19] In a juvenile abuse and neglect case such as this, a court must balance these sometimes competing interests so as to achieve a result that is in the best interests of the child. In other words, a parent's right to determine the educational needs of an adjudicated child is not absolute.

[11] When a court's order of disposition permits an adjudicated juvenile to remain in the parental home, a court has statutory authority to impose certain conditions, which may include requiring the parent to "[e]liminate the specified conditions constituting or contributing to the problems which led to juvenile court action," to "[t]ake proper steps to [e]nsure the juvenile's regular school attendance," and to "[c]ease and desist from specified conduct and practices which are injurious to the welfare of the juvenile."[20] Such terms and conditions "shall relate to the acts or omissions of the juvenile, the parent, or other person responsible for the care of the juvenile which constituted or contributed to the problems which led to the juvenile court action in such case."[21] Thus, a juvenile court has the discretionary power to prescribe a reasonable program for parental rehabilitation to correct the conditions underlying the adjudication.[22]

Angel argues that "the adjudicated issue in this matter has nothing to do with Moira's educational needs" and in fact "does not involve Moira specifically at all."[23] That is not accurate. In adjudicating both children, the juvenile court specifically found that Angel's inappropriate discipline of Cassandra "places both of the minor children at risk of harm." And, as noted, the record reflects that even after both children were adjudicated, DHHS received a report that Angel had disciplined Moira inappropriately by locking her in her bedroom.

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[19] See, *In re Interest of Karlie D., supra* note 15; *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998); *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).

[20] Neb. Rev. Stat. § 43-288(1), (4), and (5) (Reissue 2008).

[21] § 43-288.

[22] See *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990).

[23] Brief for appellant at 10.

The juvenile court permitted Angel to retain physical custody of Moira but placed legal custody of the child with DHHS. Under the Nebraska Juvenile Code, "[l]egal custody" has the same meaning as under the Parenting Act, i.e., "the authority and responsibility for making fundamental decisions regarding the child's welfare, including choices regarding education and health."[24] Thus, the juvenile court was entitled to give weight to the testimony of the DHHS caseworker that homeschooling by Angel was not in Moira's best interests. And this was the only evidence before the court on the issue of Moira's educational needs. Although Angel was present with her counsel at the hearings at which the caseworker testified, she did not testify or offer any evidence regarding her reasons for wanting to homeschool Moira or the specific manner in which she planned to do so.

In explaining its reasoning from the bench, the juvenile court stated that it was not in Moira's best interests to be homeschooled because of the adjudicated findings of inappropriate discipline by Angel "for which she continues to maintain a complete lack of understanding as to how inappropriate that was and . . . that that was a problematic way to deal with a child." The court stated its view that

> there's plenty of evidence before the Court that [Angel's] decision making with regard to parenting and discipline issues still places Moira at risk and I don't think it's in the child's best interest to have no other contacts with individuals and to have her mother be in charge of her educational setting as well. And I think it's not a huge inference for the Court to make that this is designed, in part, to isolate the child from others that she may be exposed to and talk to and I'm concerned about that. . . . I'm not dictating which . . . educational setting she needs to be in, but I am going to preclude her from being homeschooled at this point in time because I don't find that to be in her best interest.

Based upon our de novo review of the record, we reach the same conclusion. Cassandra and Moira were adjudicated on

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[24] See Neb. Rev. Stat. §§ 43-245(13) and 43-2922(13) (Cum. Supp. 2014).

the basis of a finding that Angel's inappropriate discipline of Cassandra placed both children at risk of harm. There is some indication in the record that this discipline was intended as punishment for Cassandra's "back-talking and not doing her homework." Following adjudication, there was a subsequent incident of inappropriate discipline directed at Moira which prompted the juvenile court to specifically order that Angel "shall not lock Moira . . . in her room at any time." Given the court's finding that Angel had made "minimal progress . . . to alleviate the causes of the Court's adjudication," to which no exception was taken on appeal, and the recommendation of DHHS against homeschooling, the juvenile court was entirely justified in concluding that Moira's best interests would not be served by an educational setting which would place her under Angel's exclusive control with no opportunity for regular interaction with other adults interested in her welfare. The court's prohibition of homeschooling was directly related to the parental conduct which resulted in adjudication, and the court properly exercised its discretion to prohibit homeschooling as a part of a rehabilitation program to address such conduct.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the separate juvenile court.

AFFIRMED.

UNLIMITED OPPORTUNITY, INC., DOING BUSINESS AS JANI-KING OF OMAHA, APPELLANT, V. ANTHONY WAADAH, AN INDIVIDUAL, DOING BUSINESS AS LEGBO SERVICES, ET AL., APPELLEES.

861 N.W.2d 437

Filed April 10, 2015. No. S-14-012.

1. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.

2. **Restrictive Covenants: Courts: Reformation.** It is not the function of the courts to reform a covenant not to compete in order to make it enforceable.
3. **Restrictive Covenants: Employer and Employee.** A partial restraint of trade such as a covenant not to compete must meet three general requirements to be valid. First, the restriction must be reasonable in the sense that it is not injurious to the public. Second, the restriction must be reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate business interest. Third, the restriction must be reasonable in the sense that it is not unduly harsh and oppressive on the party against whom it is asserted.
4. **Restrictive Covenants: Sales.** A covenant not to compete ancillary to the sale of a business must be reasonable in both space and time so that it will be no greater than necessary to achieve its legitimate purpose. Whether such a covenant not to compete is reasonable with respect to its duration and scope is dependent upon the facts of each particular case.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Edward F. Pohren, of Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., for appellant.

Philip J. Kosloske and Ryan M. Hoffman, of Anderson, Bressman & Hoffman, P.C., L.L.O., for appellees.

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

Heavican, C.J.

I. INTRODUCTION

In 2008, appellant Unlimited Opportunity, Inc., doing business as Jani-King of Omaha (Jani-King), granted appellee Anthony Waadah a franchise in the Omaha, Nebraska, area. The franchise agreement was ultimately broken, and Waadah diverted a number of Jani-King's Omaha customers to his new business. Jani-King filed suit against Waadah for breach of the noncompete clause in the franchise agreement.

The district court found the noncompete clause included an unreasonable restraint on competition and refused to sever the offending subpart from the larger noncompete clause. Jani-King asks us to reconsider our law against severability as generally set out in *H & R Block Tax Servs. v. Circle A*

Enters.[1] and *CAE Vanguard, Inc. v. Newman*.[2] We reaffirm our stance against severability of noncompete clauses and affirm the judgment of the district court.

II. BACKGROUND

The parties have stipulated to the following facts as summarized below:

Jani-King is a franchisor of professional cleaning and maintenance services. Its franchisees belong to a "franchise system" under the control of Jani-King. Jani-King provides to its franchisees its trade name, name recognition, goodwill, and reputation.

Under Jani-King's franchise model, Jani-King identifies, markets to, solicits, and negotiates with customers in a given operations area. Jani-King secures each client contract and then turns the client over to the franchisee. The franchisee provides the contracted-for janitorial services.

The parties have further stipulated that the noncompetition covenant in the agreement protected "the reputation and goodwill associated with the franchise's trademarks," Jani-King's "overall investment in its franchise system," and the "proprietary information and knowledge [Jani-King] disclosed to franchisees" through the course of the franchise relationship. The parties also stipulated that the "intended purpose" of the noncompetition agreements for the franchise was the "protection of the integrity of the overall franchise system [and] protection of current franchisees in the Jani-King system."

The section of the franchise agreement containing the disputed noncompete clause states in pertinent part:

> Franchisee . . . agrees that, during the term of this Agreement and for a continuous uninterrupted period of (2) years thereafter . . . commencing upon expiration or termination of this Agreement, . . . Franchisee . . . shall not . . . :
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> . . . .

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[1] *H & R Block Tax Servs. v. Circle A Enters.*, 269 Neb. 411, 693 N.W.2d 548 (2005).

[2] *CAE Vanguard, Inc. v. Newman*, 246 Neb. 334, 518 N.W.2d 652 (1994).

> *(d) Own, maintain, operate, engage in or have any interest in any business (hereinafter referred to as "Competing Business") which is the same as or similar to the business franchised under the terms of this Agreement, which Competing Business operates, solicits business, or is intended to operate or solicit business: (i) within the Territory of this Agreement; and (ii) for a period of one (1) year commencing upon expiration or termination of this Agreement (regardless of the cause for termination), in any other territory in which a Jani-King franchise operates.*

(Emphasis supplied.) This clause prohibited a franchisee from operating for 2 years the same or a similar business within the territory of the agreement. It also prohibited a franchisee from operating for a period of 1 year a competing business in any other territory in which a Jani-King franchise operates. The clause was set to run upon expiration or termination of the agreement.

Waadah was a franchisee of Jani-King. In 2010, Jani-King began receiving reports from its customers that Waadah was attempting to divert Jani-King customers for his own janitorial business. Notably, in January 2010, a dairy company terminated its relationship with Jani-King and immediately began receiving janitorial services from Waadah. Jani-King claims this constituted a breach of the Jani-King franchise contract, and Jani-King terminated its relationship with Waadah.

In the approximately 18 months following this contract termination, Waadah formed Legbo Services of Omaha (Legbo). Legbo began providing janitorial services to several of Jani-King's client accounts. Legbo also secured janitorial contracts with new clients in the Omaha area. The parties stipulated that had the franchise agreement been followed, these new contracts would have belonged to Jani-King.

Jani-King sued Waadah; his wife; and Legbo Group, LLC, a corporation run by his wife, seeking to enforce and receive damages from the breach of the franchise agreement. For ease of reading, in the remainder of the opinion, we generally speak of the defendants as Waadah. In the district court,

Jani-King alleged that the 2-year noncompete clause had been breached.

After a bench trial, the district court issued a ruling for Waadah. In so finding, the court relied on *H & R Block Tax Servs.* and held that it was unreasonable to restrict competition outside of the area in which Waadah actually conducted business.[3] Since the 1-year restraint restricted commencement of a competing business "in any other territory in which a Jani-King franchise operates," and since Jani-King operated in countries throughout the world, this restraint was deemed unreasonable in geographic scope. The court found it need not address the remaining parts of the noncompete clause, because "'it is not the function of the courts to reform a covenant not to compete in order to make it enforceable.'"

The court also dismissed a tortious interference claim, concluding that competitors fall under a privilege to interfere in business relationships. Because the court found the covenant not to compete legally unenforceable, Waadah was found to be a competitor to Jani-King and was immune from a claim of tortious interference.

Jani-King appealed and petitioned this court for a bypass of the Nebraska Court of Appeals. We granted that motion.

III. ASSIGNMENTS OF ERROR

Jani-King (1) "seeks a reexamination of the Nebraska public policy as it pertains to non-competition covenants in franchise agreement[s], to overrule those parts" of *H & R Block Tax Servs.*[4] that "bar 'severability' of integrated restraints of trade in franchise agreements and that do not permit courts to 'reform' the scope or duration of covenants against competition within a franchise agreement"; (2) assigns, restated, as error the district court's analysis of the 1-year restraint because (a) no evidence as to that restraint was presented, (b) Jani-King did not seek enforcement of that restraint, and (c) the 1-year restraint was moot by the passage of time;

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[3] *H & R Block Tax Servs., supra* note 1.

[4] *Id.*

and (3) assigns, restated, as error the finding that the noncompete clause was unreasonable and, thus, the finding that the breach of contract and tortious interference claims must be dismissed.

IV. STANDARD OF REVIEW

[1] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.[5]

V. ANALYSIS

This case presents two distinct issues: first, whether the 1-year noncompetition covenant was severable from the 2-year covenant, and if not, second, whether the entirety of the noncompetition agreement is valid and enforceable.

1. Severability

[2] We turn first to severability. This court has long held that it is not the function of the courts to reform a covenant not to compete in order to make it enforceable.[6] We have declined to apply the "'blue pencil' rule," which allows for the reformation of covenants to make them enforceable, stating that "we must either enforce [a covenant] as written or not enforce it at all."[7] We have found that "reformation is tantamount to the construction of a private agreement and that the construction of private agreements is not within the power of the courts."[8]

Though this position against the severability of noncompete covenants is the minority one, it is backed by important public policy considerations. Severability of noncompete covenants is against public policy because it creates uncertainty in employees' contractual relationships with franchisors, increases the

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[5] *Id.*

[6] See *CAE Vanguard, Inc., supra* note 2. See, also, *Gaver v. Schneider's O.K. Tire Co.*, 289 Neb. 491, 856 N.W.2d 121 (2014).

[7] *CAE Vanguard, Inc., supra* note 2, 246 Neb. at 338, 339, 518 N.W.2d at 655, 656.

[8] *Id.* at 339, 518 N.W.2d at 655.

potential for confusion by parties to a contract, and encourages litigation of noncompete clauses in contracts.[9]

In *H & R Block Tax Servs.*, we affirmed our rejection of the blue pencil rule.[10] There, a noncompete clause restrained franchisees from competing in the business of preparing tax returns within 45 miles of the franchise territory for 1 year following termination of the franchise contract. One of the defendants had done tax planning for the franchisor in Ogallala, Nebraska, and later moved to North Platte, Nebraska, where she began an independent tax return preparation business. Some of her former clients from the franchisor's similar business wished to retain her services after she moved. The former clients pursued and enlisted her services in North Platte.[11] In that case, we found that separate paragraphs of a covenant not to compete were not severable, so that if any portion of the covenant was invalid and unenforceable, the remainder of it was unenforceable as well.[12]

In this case, the district court found that the 1-year provision restricting competition anywhere a Jani-King franchise operates was unenforceable and did not further consider Jani-King's claim with respect to the 2-year covenant. In its first assignment of error, Jani-King argues that this was error, asking that we reexamine Nebraska law barring severability of integrated restraints of trade and that we instead permit courts to reform or modify the scope or duration of covenants against competition, particularly within the context of franchise agreements. Jani-King further asserts that Nebraska's Franchise Practices Act (Act)[13] should guide our decision and that *H & R Block Tax Servs.*, as well as other Nebraska case law rejecting the blue pencil rule, is contrary to the Act.[14]

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[9] Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 Neb. L. Rev. 672 (2008).

[10] *H & R Block Tax Servs., supra* note 1.

[11] *Id.*

[12] *Id.*

[13] Neb. Rev. Stat. §§ 87-401 through 87-410 (Reissue 2014).

[14] Brief for appellant at 19.

We decline Jani-King's invitation to reconsider our rejection of the blue pencil rule. As explained above, public policy considerations dictate our conclusion that such agreements should not be severable.

We also disagree that the Act is contrary to our case law. The section of the Act declaring its "Legislative intent" states:

> The Legislature . . . declares that distribution and sales through franchise arrangements in the state vitally affect the general economy of the state, the public interest and public welfare. It is therefor necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in connection with franchise arrangements.[15]

While the Act defines the relationship and responsibilities between franchisors and franchisees, it does not reference noncompete covenants in franchise agreements.

Nor is the Act contrary to the severability holdings of *H & R Block Tax Servs.* and *CAE Vanguard, Inc*.[16] Essentially, the Act attempts to stabilize relationships between franchisors and franchisees by providing guidelines on what is and what is not acceptable in the context of a franchise agreement. For example, the sections of this Act state that it is a violation for a franchisor to terminate a franchise without good cause, to restrict the sale of securities or stock to employees or other personnel of the franchise, to impose unreasonable standards of performance upon a franchisee, or to prohibit the right of free association among franchisees for any lawful purpose.[17] However, the Act does not discuss noncompete covenants in a franchise agreement. We decline to conclude that the Act dictates public policy for the severability of franchise agreements.

For these reasons, we conclude that the 1-year covenant not to compete is not severable from the 2-year covenant.

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[15] § 87-401.

[16] See, *H & R Block Tax Servs., supra* note 1; *CAE Vanguard, Inc., supra* note 2.

[17] § 87-406(3), (4), and (5).

The district court was correct to consider the two covenants together and find the entire clause invalid if one portion is invalid.

2. Enforceability

We next turn to whether the district court erred in finding the noncompete agreement unenforceable as Jani-King contends in its second and third assignments of error.

(a) Nature of Transaction

Whether a noncompete clause is valid and enforceable requires us to categorize the covenant as either an employment contract or the sale of goodwill.

[3] Regardless of the context, a partial restraint of trade such as a covenant not to compete must meet three general requirements to be valid.[18] First, the restriction must be reasonable in the sense that it is not injurious to the public.[19] Second, the restriction must be reasonable in the sense that it is no greater than reasonably necessary to protect the employer in some legitimate business interest.[20] Third, the restriction must be reasonable in the sense that it is not unduly harsh and oppressive on the party against whom it is asserted.[21]

[4] Nebraska courts are generally more willing to uphold promises to refrain from competition made in the context of the sale of goodwill as a business asset than those made in connection with contracts of employment,[22] reasoning that in the sale of a business, "[i]t is almost intolerable that a person should be permitted to obtain money from another upon solemn agreement not to compete for a reasonable period within a restricted area, and then use the funds thus obtained to do

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[18] *H & R Block Tax Servs., supra* note 1.

[19] *Id.* See, also, *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987).

[20] *H & R Block Tax Servs., supra* note 1.

[21] *Id.*

[22] *Id.*; *Presto-X-Company v. Beller*, 253 Neb. 55, 62, 568 N.W.2d 235, 239 (1997).

the very thing the contract prohibits."[23] Thus, a covenant not to compete ancillary to the sale of a business must be reasonable in both space and time so that it will be no greater than necessary to achieve its legitimate purpose. Whether such a covenant not to compete is reasonable with respect to its duration and scope is dependent upon the facts of each particular case.[24]

In *H & R Block Tax Servs.*, the franchisor provided various goods and services to its franchisees, including training, advertising, and forms.[25] It retained significant control over its franchisees, but the "main purpose of obtaining a franchise from [the franchisor was] to trade on the reputation and goodwill of its service mark and thereby acquire customers."[26] There, we found that the franchise agreement was analogous to the sale of a business for purposes of determining enforceability of the covenant not to compete.[27] We then applied the analysis outlined for the sale of goodwill of a business asset to determine whether the noncompete clause was valid.[28]

We conclude that the characterization of the noncompete agreement contained in a franchise agreement used in *H & R Block Tax Servs.* is the correct one, and we apply the standard used in the sale of goodwill.

(b) Reasonableness of Restriction

We turn next to whether the noncompete agreement in this case was reasonable in its restriction of competition. There is no allegation that the restriction is injurious to the public. We therefore focus our analysis on whether the covenant was reasonable in both space and time such that the restraint imposed

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[23] *Swingle & Co. v. Reynolds*, 140 Neb. 693, 695, 1 N.W.2d 307, 309 (1941).

[24] See, *H & R Block Tax Servs., supra* note 1; *Presto-X-Company, supra* note 22.

[25] *H & R Block Tax Servs., supra* note 1.

[26] *Id.* at 421, 693 N.W.2d at 556.

[27] *H & R Block Tax Servs., supra* note 1.

[28] *Id.*

will be no greater than necessary to achieve its legitimate purpose.[29] We conclude that it is not.

In order for something to be reasonable in both space and time, it must usually have a territorial restriction.[30] For example, a covenant restricting a prospective rent-a-car franchisee from operating in competition anywhere in the western hemisphere for a period of 2 years has been held unreasonable as being a restraint of trade.[31] Similarly held unreasonable was the covenant of a franchisee of a tax preparation firm, which covenant did not expressly have any territorial restriction placed upon it.[32]

In *H & R Block Tax Servs.*, the noncompete clause restrained its franchisees from competing in the business of preparing tax returns within 45 miles of the franchise territory for 1 year following termination of the franchise contract.[33] There, we found that such a restriction was reasonable in time and geographic scope because it only prohibited competition for one tax season.

Jani-King's 1-year covenant is quite different from the restriction in *H & R Block Tax Servs.* Jani-King's 1-year restraint prohibited the franchisee from operating a "Competing Business" "in any other territory in which a Jani-King franchise operates." Since Jani-King operates on a multi-state and international basis, on continents as far away as Australia, the restriction from competing in "any . . . territory in which a Jani-King franchise operates" is similar to having no territorial restriction at all. We find that this is unreasonable in geographic scope. And because this 1-year restraint is not severable from the 2-year restraint also presented by this covenant, the entire noncompete agreement is unenforceable.

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[29] *Id.*

[30] See, e.g., *Budget Rent-A-Car Corporation of America v. Fein*, 342 F.2d 509 (1965); *H & R Block, Inc. v. Lovelace*, 208 Kan. 538, 493 P.2d 205 (1972).

[31] *Budget Rent-A-Car Corporation of America, supra* note 30.

[32] *H & R Block, Inc., supra* note 30.

[33] *H & R Block Tax Servs., supra* note 1.

Because we find that the noncompete covenant is invalid and unenforceable, we affirm the dismissal of Jani-King's breach of contract and tortious interference claims.

VI. CONCLUSION

We affirm the district court's decision.

AFFIRMED.

SHASTA LINEN SUPPLY, INC., APPELLEE, V. APPLIED UNDERWRITERS, INC., AND APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., APPELLANTS.

861 N.W.2d 425

Filed April 10, 2015. No. S-14-270.

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. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court has the power to determine whether it has jurisdiction over an appeal and to correct jurisdictional issues, even though a party's failure to appeal from a final order precludes an appellate court from exercising jurisdiction over the matters decided in the order.
4. ____: ____: ____. An appellate court lacks jurisdiction to entertain an appeal unless it is from a final order or a judgment.
5. ____: ____: ____. The first step in determining the existence of appellate jurisdiction is to determine whether the lower court's order was final and appealable.
6. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, 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.
7. **Injunction: Final Orders: Appeal and Error.** A temporary injunction is not a final, appealable order.
8. **Arbitration and Award.** A motion to compel arbitration invokes a special proceeding.
9. **Injunction: Final Orders: Appeal and Error.** A court's temporary injunction or stay that merely preserves the status quo pending a further order is not an order

that amounts to a dismissal of the action or that permanently denies relief to a party. It is an interlocutory order that is not appealable.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Appeal dismissed.

Jeffrey A. Silver for appellants.

Robert D. Mullin, Jr., of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

SUMMARY

Shasta Linen Supply, Inc. (Shasta), a California corporation, contracted to have the appellant insurer, Applied Underwriters, Inc. (Applied), a Nebraska corporation, provide workers' compensation coverage to Shasta. Shasta accepted Applied's proposed policy through an agreement entitled a "Request to Bind Coverages & Services." On the same day, Shasta entered into a "Reinsurance Participation Agreement" (RPA) with Applied's subsidiary, Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA), a British Virgin Islands corporation. The request to bind and the RPA contained conflicting provisions regarding the parties' agreed-upon arbitration process for resolving disputes.

After a dispute arose, Shasta filed this action, seeking a declaration that the request to bind required arbitration by "JAMS" in Omaha, Nebraska. Shasta also sought injunctive relief. Applied and AUCRA moved to dismiss the proceeding, arguing that the RPA required Shasta's contract dispute to be arbitrated by the American Arbitration Association (AAA). The court determined that it had jurisdiction to decide which contract provision controlled. It issued a temporary injunction and stay of the AAA arbitration until it decided the parties' rights. Applied and AUCRA appeal from this order, assigning that the court erred in exercising jurisdiction over the matter and granting a temporary injunction.

We conclude that Applied and AUCRA have not appealed from a final order and dismiss their appeal.

BACKGROUND

In 2009, Shasta applied for workers' compensation insurance coverage from Applied, and Applied responded with a quote for a proposed policy. The proposed policy included a profit-sharing plan that was directly tied to Shasta's execution of the RPA:

> This Profit Sharing Plan is a reinsurance transaction separate from the guaranteed cost policies. Your risk retention is created by your participation in, and cession of allocated premiums and losses to our facultative reinsurance facility, [AUCRA]. . . .
>
> . . . .
>
> Your actual, final net cost will be determined using the ultimate costs of your claims along with the factors and tables set forth in your [RPA].

About January 5, 2010, Applied prepared and presented to Shasta's president the request to bind and the RPA. In the request to bind, through language drafted by Applied, Shasta requested that

> [Applied] through its affiliates and/or subsidiaries (collectively "Applied") . . . cause to be issued to [Shasta] one or more workers' compensation insurance policies and such other insurance coverages identified in the Proposal (collectively the "Policies") subject to [Shasta's] executing the following agreements (collectively the "Agreements"): (1) [the RPA]; and where available, (2) Premium Finance Agreement.

The request to bind included an agreement to resolve any dispute "involving the Proposal or any part thereof (including but not limited to the Agreements and Policies)" through binding arbitration by JAMS in Omaha. The request to bind stated that Shasta had paid $100 for this dispute resolution agreement and that the agreement was enforceable independent of any other agreement.

Shasta's president signed the request to bind on January 5, 2010. Also, on the same day, he signed the RPA, which was

the reinsurance program that was tied to the profit-sharing plan in the workers' compensation policy. Under the RPA, Shasta agreed to share a portion of AUCRA's premiums and losses related to its underwriting activities. As noted, the RPA contained a conflicting arbitration provision. Paragraph 13 required the parties to arbitrate any dispute under the agreement "in the British Virgin Islands under the provisions of the [AAA]." A separate integration clause provided that the RPA superseded all prior understandings between the parties.

In March and April 2013, Shasta and Applied disputed the amount of money that Shasta owed to Applied, apparently over charges tied to the RPA. In June, the AAA acknowledged receipt of AUCRA's demand for arbitration. In July, Shasta objected to AAA arbitration in the British Virgin Islands. In August, the AAA responded that absent a court order to stay the proceeding, it would conduct the arbitration. In September, Shasta filed this action. In an affidavit, AUCRA's attorney stated that at some point, AUCRA had agreed to arbitrate in Omaha, and that in October, the AAA had appointed an Omaha attorney to be its arbitrator.

Shasta's complaint sought (1) a declaratory judgment that the defendants were not entitled to arbitration by the AAA and (2) temporary and permanent injunctive relief from the AAA arbitration. Shasta also moved for a "Temporary Stay and/or Preliminary Injunction" of the AAA arbitration. The defendants moved to dismiss the complaint, alleging that the court lacked jurisdiction to decide the matter and that Shasta had failed to state a claim for which relief could be granted.

After a hearing, the court determined that it had jurisdiction to decide which contract governed the arbitration procedures for the parties' dispute. The court also concluded that Shasta had stated sufficient facts for relief. It determined that the request to bind defined the term "agreements" to mean the RPA and, where applicable, a premium finance agreement. So it reasoned that the RPA was necessarily included within the document's arbitration clause: "'[A]ny claims, disputes and/or controversies between the parties involving the [P]roposal [or] any part thereof (including but not limited to the [A]greements and [P]olicies) shall be resolved'" through

the JAMS arbitration. The court also noted that Shasta had paid additional consideration for the arbitration procedures in the request to bind. It concluded that "there is a high probability that Shasta will prevail" on the merits. Additionally, the court concluded that Shasta would be irreparably harmed unless it issued a temporary injunction because its monetary exposure was significantly higher under the RPA's arbitration procedures. Accordingly, it issued a temporary injunction pending the final resolution of Shasta's complaint.

ASSIGNMENTS OF ERROR

Applied and AUCRA contend that the court erred in (1) determining that it had subject matter jurisdiction over the parties' contract dispute and (2) issuing a temporary injunction and staying the AAA arbitration proceedings. The parties also dispute whether Applied and AUCRA have appealed from a final order.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute presents a question of law.[1]

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction.[2] Applied and AUCRA incorrectly argue that we have decided the jurisdictional dispute by denying Shasta's motion for summary dismissal on jurisdictional grounds. We have the power to determine whether we have jurisdiction over an appeal and to correct jurisdictional issues,[3] even though a party's failure to appeal from a final order precludes us from exercising jurisdiction over the matters decided in the order.[4] We turn to the parties' jurisdictional arguments.

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[1] See *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014).

[2] See *In re Estate of Gsantner*, 288 Neb. 222, 846 N.W.2d 646 (2014).

[3] See, e.g., *Conroy v. Keith Cty. Bd. of Equal.*, 288 Neb. 196, 846 N.W.2d 634 (2014).

[4] See *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013).

Shasta contends that a court's order overruling a motion to dismiss for lack of jurisdiction and an order issuing a temporary injunction are not final orders. It also argues that the court's order did not affect a substantial right in a special proceeding because it only determined which arbitration provision controls and did not deny Applied and AUCRA the right to arbitrate.

Applied and AUCRA disagree. They contend that the district court's order did affect a substantial right in a special proceeding and is therefore a final order. They argue that an order "requiring [them] to go through the time and expense of a trial is without question the functional equivalent of a denial of a motion to compel arbitration."[5]

[4,5] It is well settled that we lack jurisdiction to entertain an appeal unless it is from a final order or a judgment.[6] We recognize that Applied and AUCRA's claim that the district court lacked jurisdiction to decide their dispute also raises an issue of appellate jurisdiction: If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.[7] But when an appeal presents these two distinct jurisdictional issues, the first step in determining the existence of appellate jurisdiction is to determine whether the lower court's order was final and appealable.[8] So we first decide whether Applied and AUCRA are appealing from a final order or judgment.

"A judgment is the final determination of the rights of the parties in an action."[9] The action here is one for a declaratory judgment and injunctive relief, and there is no judgment in this action. In the court's order of a temporary injunction and stay, it concluded that Shasta was highly likely to prevail on its contract claim, but it did not finally determine that issue. It merely

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[5] Brief for appellants at 9.

[6] See *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

[7] *Federal Nat. Mortgage Assn. v. Marcuzzo*, 289 Neb. 301, 854 N.W.2d 774 (2014).

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

[9] Neb. Rev. Stat. § 25-1301(1) (Reissue 2008).

stayed the arbitration proceedings until it could decide which contract controlled the arbitration procedures that the parties were bound to follow. So we have jurisdiction only if Applied and AUCRA have appealed from a final order under Neb. Rev. Stat. § 25-1902 (Reissue 2008).

[6] Under § 25-1902, an appellate court may review three types of final orders: (1) an order affecting a substantial right in an action that, 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]

[7] Shasta correctly argues that a temporary injunction is not a final, appealable order.[11] And for multiple reasons, the court's order is distinguishable from the stay that was a final order in *Kremer v. Rural Community Ins. Co.*,[12] the case on which Applied and AUCRA rely.

[8] In *Kremer*, we reviewed a court's order sustaining motions to compel arbitration and stay court proceedings. A motion to compel arbitration invokes a special proceeding,[13] so the issue was whether the appeal was from a final order in a special proceeding,[14] not an action. We concluded that "an order compelling arbitration or staying judicial proceedings pending arbitration is a final order under the second category of § 25-1902: It affects a substantial right in a special proceeding."[15]

We had previously explained that the Federal Arbitration Act does not preempt state procedural rules for appeals.[16] In

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[10] *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[11] *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

[12] *Kremer, supra* note 10.

[13] See *id.*, citing *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[14] See § 25-1902(2).

[15] *Kremer, supra* note 10, 280 Neb. at 602, 788 N.W.2d at 549.

[16] See *Webb, supra* note 13.

Kremer, we agreed with the reasoning of courts that permit parties to appeal from a final order compelling arbitration, regardless of whether the trial court also dismissed the court proceedings. We concluded that the same reasoning applies to an order compelling arbitration when the court stays court proceedings pending arbitration. In either case, "the order has the same effect: The parties cannot litigate their dispute in state courts because by enforcing the arbitration agreement, the order divests the court of jurisdiction to hear their dispute."[17] We recognized that "an order issuing a stay within an action or proceeding is usually interlocutory and not appealable absent a statute or court rule permitting an interlocutory appeal."[18] But we concluded that the applicable rule was the one that permits a party to appeal from "a stay which is tantamount to a dismissal of an action or has the effect of a permanent denial of the requested relief."[19] We held that such orders are a final determination of arbitrability.

We further explained in *Kremer* that the order affected a substantial right under § 25-1902(2) for two reasons. First, we reasoned that a party cannot effectively vindicate a claim that it is entitled to arbitrate *or* to litigate in court after a court has compelled it to do that which the party claims it is not required to do. More important, we concluded that an order disposing of all the issues raised in an independent special proceeding obviously affects the subject matter of the litigation by determining all of the parties' rights raised in the proceeding.

[9] But these circumstances are not present here. Applied and AUCRA did not file a motion to compel arbitration, so this is not a special proceeding. And even if they had filed a motion to compel, the court would not have finally determined the parties' rights. It has not directed the parties to arbitrate under any arbitration procedures and obviously has not directed the parties to litigate their underlying dispute in court. So even if we equated this step in the action to a

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[17] *Kremer, supra* note 10, 280 Neb. at 600-01, 788 N.W.2d at 548.

[18] *Id.* at 600, 788 N.W.2d at 548.

[19] *Id.*

special proceeding invoked by a motion to compel arbitration, the order would not be final or affect any substantial right. Finally, a court's temporary injunction or stay that merely preserves the status quo pending a further order is not an order that amounts to a dismissal of the action or that permanently denies relief to a party.[20] So the stay here was not a final order in an action that effectively determines the action and prevents a judgment under § 25-1902(1). We conclude that the court's temporary injunction and stay is an interlocutory order that is not appealable.

We recognize that Applied and AUCRA contend they are entitled to have the AAA arbitrators decide which contract provision governs the arbitration process. But they are not prejudiced by waiting to appeal that issue until the court issues a final judgment in the declaratory judgment action. Accordingly, we dismiss this appeal.

APPEAL DISMISSED.

[20] See *Pennfield Oil Co., supra* note 11.

DEBRA S. RYDER, APPELLANT, V.
ROCKY R. RYDER, APPELLEE.
861 N.W.2d 449

Filed April 10, 2015. No. S-14-294.

1. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Divorce: Property Settlement Agreements.** If the terms of a property settlement agreement with respect to real and personal property and maintenance are not found unconscionable, the agreement is binding upon the dissolution court and the initial decree must carry such agreement into effect.
4. **Judgments: Divorce: Property Settlement Agreements.** A dissolution decree which approves and incorporates into the decree the parties' property settlement agreement is a judgment of the court itself.

5. **Contracts.** Ambiguity exists in a document when a word, phrase, or provision therein has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. In other words, a document is ambiguous if, after application of the pertinent rules for construction, there is uncertainty concerning which of two or more reasonable meanings represents the intention of the parties.
6. **Divorce: Modification of Decree: Property Settlement Agreements.** Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions will not thereafter be vacated or modified in the absence of fraud or gross inequity.
7. **Divorce: Judgments.** The meaning of a dissolution decree presents a question of law.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Vacated in part and remanded with direction.

Joel B. Jay for appellant.

No appearance for appellee.

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

CASSEL, J.

INTRODUCTION

In a marital dissolution proceeding, the parties' property settlement agreement required the husband to "assist" the wife in obtaining a bank loan to purchase a residence. The dissolution decree adopted the agreement. Later, the bank declined to make the loan without the husband's cosignature. On the husband's motion, the district court vacated the assistance clause as ambiguous. The wife appeals.

We conclude that in the absence of fraud or gross inequity, the district court abused its discretion in vacating the portion of the decree implementing the assistance clause. We vacate the portion of its order purporting to do so. Because the district court did not determine whether the assistance clause had been satisfied, we remand with direction that it do so.

BACKGROUND

Debra S. Ryder and Rocky R. Ryder's marriage was dissolved via a decree entered in June 2013. Prior to the decree, Debra

and Rocky entered into a "Property Settlement Agreement and Parenting Plan," providing for the disposition of various items of property. Rocky was granted the marital residence, which was his before the marriage. Thus, the agreement required Debra to leave the marital home.

Anticipating her need for different housing, the parties signed an agreement with a third party to acquire a residence on Ash Street in Sidney, Nebraska. The agreement is not in the record. Thus, the record is unclear whether the purchase agreement was signed before or after the signing of the property settlement, although Debra testified that she was the last to sign and that she did so in August 2013—which would have been after the property settlement agreement was signed and the decree was entered.

In the property settlement agreement, Rocky agreed that he

> shall assist [Debra] in obtaining a loan from Points West Bank in Sidney for up to Ninety-four Thousand Dollars ($94,000.00) in order to purchase the residence located at . . . Ash Street, Sidney, NE[,] and will do the work necessary to place the home in marketable condition, as determined by a Sidney realtor, prior to [Debra] moving into said home. [Rocky] shall have said house in marketable condition no later than December 31, 2013.

In the dissolution decree, the district court acknowledged the above provision of the property settlement agreement and ordered Rocky to comply with his obligations as to the Ash Street residence.

On December 19, 2013, Rocky filed a "Motion for an Order to Vacate and Modify Divorce Decree or in the Alternative to Deem Judgment Satisfied," pursuant to Neb. Rev. Stat. § 25-2001 (Reissue 2008). Rocky alleged that he had assisted Debra in obtaining a loan from Points West Bank, but that Debra was unwilling to enter into the loan agreement. And he further claimed that due to Debra's refusal, the purchase agreement for the Ash Street residence had expired.

However, in an effort to comply with his obligations under the dissolution decree, Rocky explained that he had purchased the Ash Street residence and had offered Debra a loan to purchase the residence from him. But Debra refused to agree to

the arrangement. He therefore requested that the district court vacate or modify the decree or find that he had satisfied his obligations as to the Ash Street residence.

A hearing was conducted, and both Rocky and Debra testified. Rocky explained that he had been contacted by a representative from Points West Bank concerning a loan for the Ash Street residence. The representative first informed Rocky that the representative believed he would be able to assist Debra in obtaining a loan. However, Rocky was later informed that he would need to cosign the loan. And the bank required additional collateral from Rocky, because he would not be living in the Ash Street residence.

After learning of the terms of the loan, Rocky approached Debra with a "side" agreement. Under the agreement, Debra would execute a quitclaim deed conveying the Ash Street residence to Rocky. The deed would be held in escrow, and upon Debra's failure to make a loan payment for 60 days, the deed would be filed with the "Register of Deeds." Rocky would then make any necessary loan payments and place the residence on the market for sale. In his testimony, Rocky confirmed that the agreement was a way to protect himself from having to pay Debra's loan. And he also sought to protect his credit score and his collateral if Debra failed to make the loan payments.

Debra, however, told Rocky that she would not sign the agreement. And the purchase agreement for the Ash Street residence subsequently expired. The purchase agreement with the third party apparently allowed the buyers to make repairs and improvements to the property prior to closing. Rocky testified that he had invested $20,000 to $30,000 in the residence and that if the purchase was not completed, those amounts would have been lost. Because of this investment, he obtained a loan and purchased the residence himself.

After signing the loan documents and closing on the Ash Street residence, Rocky approached Debra with another agreement. He offered Debra a loan to purchase the residence from him under the same terms as the loan he had obtained from Points West Bank. Rocky testified that he would not have made any money under the arrangement, but that it would

"just . . . resolve the situation." But Debra did not want to sign the agreement.

As to his obligations regarding the Ash Street residence, Rocky testified that he believed he was required to "help [Debra] obtain a loan and a fair contract between both of us." And he confirmed that there had been no discussion that he would offer additional collateral and no agreement that he would make any loan payments. He indicated that he would have been willing to cosign a loan with Debra, but under terms that "were fair and equal" and that "protect[ed] both sides." He further confirmed that he believed he had fulfilled his obligation to assist Debra in obtaining a loan.

Additionally, Rocky testified that he was no longer willing to provide Debra with a loan to purchase the Ash Street residence. He and Debra were already "having problems," and the loan arrangement would "cause more problems."

Debra testified that her understanding of Rocky's obligations as to the Ash Street residence was that he would cosign a loan and make any required downpayment. And in order to purchase the residence, she had signed a purchase agreement and loan documents from Points West Bank. However, when she contacted Rocky about the loan documents, he "gave [her] the run around." And approximately 1 week later, he sent her paperwork for another agreement.

Debra confirmed that at the time of the dissolution decree, she and Rocky had never discussed an additional agreement. She told Rocky that she was not going to sign the agreement, because she believed that it was unnecessary and controlling. However, she confirmed that she was both willing to enter into a loan from Points West Bank and able to make the loan payments. But when asked what recourse Rocky would have if she failed to make the loan payments, Debra responded, "That I pay him back?"

As to Rocky's offer to extend her a loan to purchase the Ash Street residence, Debra testified that she "did not want [Rocky] to be [her] loan officer for 20 years." She had attempted to obtain a loan on her own, but she was unable to purchase the residence from Rocky.

The district court entered a written order granting Rocky's request to modify the dissolution decree. The court first determined that Rocky had fulfilled his obligation to place the Ash Street residence in marketable condition. However, it concluded that his obligation to assist Debra in obtaining a loan was "too vague to be enforceable." It observed that both parties had divergent beliefs as to the nature of the obligation and that Debra believed Rocky was required to "meet and accept whatever conditions the bank may have put on the loan." And she could not identify any recourse Rocky would have if she failed to pay the loan. Thus, the court concluded that the obligation "ought to have [been] more fully explained or defined in the [property settlement agreement]." It therefore vacated Rocky's obligation to assist Debra in obtaining a loan.

Debra filed a timely notice of appeal. We moved the case to our docket pursuant to statutory authority.[1]

ASSIGNMENT OF ERROR

Debra assigns, restated, that the district court abused its discretion in modifying the dissolution decree by vacating the provision requiring Rocky to assist her in obtaining a loan to purchase the Ash Street residence.

Debra does not attack the portion of the district court's order determining that Rocky had fulfilled his obligation to place the Ash Street residence in marketable condition. Thus, that portion of the order is not affected by our resolution of the appeal.

STANDARD OF REVIEW

[1,2] An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.[2] A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a

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

[2] *Eihusen v. Eihusen*, 272 Neb. 462, 723 N.W.2d 60 (2006).

substantial right and denying just results in matters submitted for disposition.[3]

ANALYSIS

Debra assigns that the district court erred in vacating the provision of the dissolution decree requiring Rocky to assist her in obtaining a loan to purchase the Ash Street residence. She asserts that the provision was based upon the parties' property settlement agreement and that their agreement should have been binding upon the court. She further claims that Rocky's obligation to assist her was not ambiguous.

[3] Debra's assertion as to the binding effect of the property settlement agreement is well taken. Neb. Rev. Stat. § 42-366(1) (Reissue 2008) provides that parties to a dissolution of marriage may enter into a written property settlement agreement containing provisions for, among other things, "the disposition of any property owned by either of them." And in applying § 42-366, we have held that if the terms of a property settlement agreement with respect to real and personal property and maintenance are not found unconscionable, the agreement is binding upon the dissolution court and the initial decree must carry such agreement into effect.[4]

[4] Rocky's obligation to assist Debra in obtaining a loan was not found to be unconscionable by the dissolution court. And his obligation was incorporated into the dissolution decree. Upon entry of the decree, Rocky's obligation to assist Debra became a judgment of the dissolution court. We have long held that a dissolution decree which approves and incorporates into the decree the parties' property settlement agreement is a judgment of the court itself.[5] Thus, Rocky was required by judgment to assist Debra in obtaining a loan to purchase the Ash Street residence.

[5] However, contrary to Debra's argument, Rocky's obligation was ambiguous. We have stated that ambiguity exists in a document when a word, phrase, or provision therein has, or is

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[3] *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008).

[4] See *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000).

[5] See *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (2014).

susceptible of, at least two reasonable but conflicting interpretations or meanings.[6] In other words, a document is ambiguous if, after application of the pertinent rules for construction, there is uncertainty concerning which of two or more reasonable meanings represents the intention of the parties.[7]

As the district court observed, the parties possessed divergent understandings of the nature of Rocky's obligation. Debra testified that she believed Rocky was required to cosign a loan and to make any required downpayment. But Rocky's obligation could reasonably be interpreted as requiring only one such action or neither. Rocky could also assist Debra in obtaining a loan in a myriad of other ways, such as providing copies of the parties' income tax returns or other financial documents. We therefore agree that the nature of Rocky's obligation was ambiguous and that it should have been more fully explained or defined in the property settlement agreement.

[6] But the ambiguity of Rocky's obligation did not provide grounds to vacate it from the dissolution decree. We have consistently stated that where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, its provisions will not thereafter be vacated or modified in the absence of fraud or gross inequity.[8] In his motion, Rocky did not allege the existence of fraud or gross inequity. And no evidence of such was received by the district court. Thus, no grounds permitting modification of the decree were established before the district court.

Although Rocky's motion invoked the district court's inherent authority to vacate or modify its decisions within term,[9] this does not affect the outcome. Rocky's motion was filed within the same term as the dissolution decree.[10] And although

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[6] See *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[7] *Id.*

[8] See, *Whitesides v. Whitesides*, 290 Neb. 116, 858 N.W.2d 858 (2015); *Rice, supra* note 5; *Strunk, supra* note 6.

[9] See *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

[10] See Rules of Dist. Ct. of 12th Jud. Dist. 12-0 (rev. 2010) (providing for calendar year as regular term of court).

the district court did not issue its modification order until after the term expired, it retained the inherent authority to do so.[11] However, the court's inherent authority did not permit the partial modification of the terms of Debra and Rocky's property settlement agreement. As previously discussed, a property settlement agreement with respect to real and personal property and maintenance is binding upon the dissolution court unless its terms are found to be unconscionable.[12] And if unconscionable, the dissolution court may request that the parties revise the agreement or proceed to make its own division of the marital property.[13] The court is not free to selectively vacate a provision of the agreement on the basis of ambiguity as was done in this case.

In vacating Rocky's obligation for ambiguity, the district court apparently misconstrued the nature of the underlying property settlement agreement. A contract may be found to be unenforceable due to a lack of definite or certain terms or a binding mutual understanding between the parties.[14] But in *Rice v. Webb*,[15] we specifically disapproved of the application of contract principles to a property settlement agreement that had been incorporated into a dissolution decree. Once a property settlement agreement has been incorporated into a dissolution decree, the contractual character of the agreement is subsumed into the court-ordered judgment.[16] "'At that point the court and the parties are no longer dealing with a mere contract between the parties.'"[17]

Ambiguity as to a party's obligation under a dissolution decree does not provide grounds for vacation or modification

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[11] See *Jarrett, supra* note 9.

[12] See *Reinsch, supra* note 4.

[13] See, § 42-366(3); *Prochazka v. Prochazka*, 198 Neb. 525, 253 N.W.2d 407 (1977).

[14] See *MBH, Inc. v. John Otte Oil & Propane*, 15 Neb. App. 341, 727 N.W.2d 238 (2007).

[15] See *Rice, supra* note 5.

[16] See *id.*

[17] *Id.* at 723, 844 N.W.2d at 299, quoting *Henderson v. Henderson*, 307 N.C. 401, 298 S.E.2d 345 (1983).

of the decree. Rather, we have stated that when a decree is ambiguous, "the parties must bring some form of action which raises the issue and thereby requires the court before whom the matter is then pending to resolve the issue as a matter of law in light of the evidence and the meaning of the decree as it appears."[18]

Rocky raised the issue of the dissolution decree's ambiguity, and the district court received testimony on that issue. But rather than resolving the matter, the court vacated the provision from the decree. And without a basis for doing so, the court's modification constituted an abuse of discretion. We therefore vacate that portion of the court's order purporting to modify the decree.

[7] Ultimately, the issue presented by Rocky's motion was his compliance with his obligation to assist Debra in obtaining a loan. Because the meaning of a dissolution decree presents a question of law,[19] we may address the issue in the first instance. We reject Debra's interpretation of the assistance clause. The clause required Rocky to "assist" Debra. But it did not require him to "obtain" the loan in his own behalf by a cosignature or to provide a downpayment, as Debra advocates.

And the required assistance could take many forms. Because the district court erroneously vacated the assistance clause, it did not decide whether Rocky had fully complied. And because this is a task that the district court should undertake in the first instance, and which we would review for abuse of discretion, we remand the cause with direction to the district court to decide this issue.

CONCLUSION

The district court determined that Rocky had fulfilled his obligation to place the Ash Street residence in marketable condition. Our decision does not affect that portion of the court's order.

Although Rocky's obligation to assist Debra in obtaining a loan was ambiguous, such ambiguity did not provide a basis

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[18] *Neujahr v. Neujahr*, 223 Neb. 722, 728, 393 N.W.2d 47, 51 (1986).

[19] See *Strunk, supra* note 6.

to modify the dissolution decree. Without evidence of fraud or gross inequity, modification of the decree was an abuse of discretion. We vacate the portion of the district court's order purporting to do so.

Finally, we address the portion of Rocky's motion seeking an order determining that he had performed his obligation under the assistance clause. Because the district court did not determine whether, based on the evidence before it, Rocky had fully complied with the assistance clause, we remand the cause with direction that the court do so.

VACATED IN PART AND REMANDED WITH DIRECTION.

DONALD PETERSON, APPELLANT, V. KINGS GATE PARTNERS - OMAHA I, L.P., AND PICERNE KINGS GATE, LLC, APPELLEES.

861 N.W.2d 444

Filed April 10, 2015. No. S-14-383.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
4. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
5. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
6. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
7. ____. The existence of a duty generally serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances.

8. ____. Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.
9. ____. Whether a duty exists is a policy decision.
10. ____. Special relationships can give rise to a duty.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

Thomas M. Locher, Amy M. Locher, and Douglas W. Krenzer, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellant.

Mary M. Schott and Ronald E. Frank, of Sodoro, Daly, Shomaker & Selde, P.C., L.L.O., for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

Donald Peterson filed suit against Kings Gate Partners - Omaha I, L.P., and Picerne Kings Gate, LLC (collectively Kings Gate), for injuries Peterson received following an assault by Floyd Wallace on Kings Gate's premises. The district court granted Kings Gate's motion to dismiss for failure to state a claim. Peterson appeals. We reverse, and remand for further proceedings.

FACTUAL BACKGROUND

Peterson filed his first amended complaint against Kings Gate on January 7, 2014. That complaint alleged that Peterson and Wallace's mother were both residents of Kings Gate senior apartment homes in Omaha, Nebraska. According to the complaint, Peterson and Wallace's mother lived across the hall from each other.

According to the complaint, despite lease provisions prohibiting it, Wallace resided with his mother in her apartment. On or about December 8, 2012, Wallace's mother was notified that due to Wallace's residing in her apartment, she was in violation of her lease. On December 17, Wallace assaulted Peterson in Peterson's apartment.

Peterson alleged in his complaint that Kings Gate conducted a background check on Wallace. After the assault occurred, Peterson was informed on one occasion that the background check did not reveal any felony convictions, and he was informed on another occasion that drug-related felony convictions were found. Peterson further alleges that, in fact, Wallace had several convictions for crimes of violence, including assault and battery in 2000; violation of a protection order for verbally assaulting a mentally challenged woman via telephone in 2002; and abuse of a vulnerable adult in 2004.

Peterson alleged that Kings Gate was negligent in failing to (1) exercise reasonable care in performing a criminal background check on Wallace, (2) exclude Wallace from the Kings Gate senior apartment homes premises, (3) warn tenants about or otherwise protect tenants from Wallace, and (4) provide safe premises for tenants.

On January 14, 2014, Kings Gate filed a motion to dismiss for failure to state a claim. That motion was granted on April 23, with the district court's reasoning that Kings Gate had no duty to protect Peterson from Wallace. Peterson appealed.

ASSIGNMENTS OF ERROR

On appeal, Peterson assigns, restated, that the district court erred in (1) granting Kings Gate's motion to dismiss and (2) finding that Kings Gate owed no duty to Peterson.

STANDARD OF REVIEW

[1-3] A district court's grant of a motion to dismiss is reviewed de novo.[1] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[2] To prevail against a motion to dismiss for

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[1] *Bruno v. Metropolitan Utilities Dist.*, 287 Neb. 551, 844 N.W.2d 50 (2014).

[2] *Id.*

failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[3]

[4] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[4]

ANALYSIS

The sole issue presented by this appeal is whether Kings Gate owed a duty to Peterson such as to overcome Kings Gate's motion to dismiss. Peterson argues that Kings Gate owes a duty of either reasonable care under *A.W. v. Lancaster Cty. Sch. Dist. 0001*[5] and § 7 of the Restatement (Third) of Torts,[6] or by virtue of the special relationship owed by a landlord to its tenant under § 40 of the Restatement.[7] Peterson also argues that once Kings Gate undertook a background check on Wallace, it had a duty under § 43 of the Restatement[8] to undertake it nonnegligently.

[5,6] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[9] The question whether a legal duty exists for actionable negligence

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[3] *Id.*

[4] *Id.*

[5] *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[6] 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010).

[7] 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40 (2012).

[8] *Id.*, § 43.

[9] *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011).

is a question of law dependent on the facts in a particular situation.[10]

In the past, we used the risk-utility test to determine the existence of a tort duty.[11] But in *A.W.*, we abandoned the risk-utility test and adopted the duty analysis set forth in the Restatement (Third) of Torts.[12] We generally held that

> foreseeable risk is an element of the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.[13]

[7-9] After *A.W.*, the existence of a duty generally serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances.[14] Moreover, "[d]uty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases."[15] Whether a duty exists is a policy decision.[16]

[10] But special relationships can give rise to a duty.[17] And in this case, the issue presented is of the duty owed by a landlord to a tenant. Section 40 of the Restatement provides for such a duty:

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[10] *Id.*

[11] See *id.*

[12] *A.W., supra* note 5.

[13] *Id.* at 216, 784 N.W.2d at 917.

[14] See *id.*

[15] *Id.* at 212-13, 784 N.W.2d at 914-15.

[16] *A.W., supra* note 5.

[17] *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012); *A.W., supra* note 5.

> (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:
>
> . . . .
>
> (6) a landlord with its tenants . . . .[18]

We previously cited to § 40, and explicitly adopted the duty set forth in subsection (b)(4), dealing with the employment relationship.[19] We remain persuaded that the reasoning of the Restatement (Third) is consistent with our case law, notably, the framework we set forth in *A.W.*, and accordingly find that the legal duty applicable here is that set forth by § 40(b)(6), pertaining to the landlord-tenant relationship.

We recognize our prior case law holds that there is no general duty of a landlord to ensure the safety of tenants.[20] But this case law predates our decision in *A.W.* and is not helpful in the duty determination presented here. And in any case, as we noted in *A.W.*, the

> endorsement of the Restatement (Third) [is not] a fundamental change in our law. It is better understood as rearranging the basic questions that are posed by any negligence case and making sure that each question has been put in its proper place. But it does not change those questions. To say, as we have in the past, that a defendant had no duty, under particular circumstances, to foresee a particular harm is really no different from saying that the defendant's duty to take reasonable care was not breached, under those circumstances, by its failure to foresee the unforeseeable.[21]

Thus, while there might now be a duty in such a situation, such a duty does not imply either a breach of that duty or liability for negligence. As we noted, the questions are the

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[18] 2 Restatement, *supra* note 7 at 40.

[19] See *Martensen, supra* note 17.

[20] See *C.S. v. Sophir*, 220 Neb. 51, 368 N.W.2d 444 (1985).

[21] *A.W., supra* note 5, 280 Neb. at 217, 784 N.W.2d at 917-18.

same—it is the arrangement of those questions into the elements of negligence that has changed.

Peterson's appeal was dismissed for failure to state a claim, with the district court's concluding that Kings Gate owed no duty to Peterson. At this stage in the proceedings, we conclude that Peterson has stated a claim for relief that is plausible on its face and therefore survives a motion to dismiss. Kings Gate did owe a duty under § 40 of the Restatement; it remains for the finder of fact to determine whether Kings Gate breached that duty. As such, we reverse the decision of the district court granting Kings Gate's motion to dismiss, and remand the cause for further proceedings.

CONCLUSION

The decision of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

CREDIT MANAGEMENT SERVICES, INC., APPELLANT, V. LORINDA JEFFERSON, APPELLEE.

861 N.W.2d 432

Filed April 10, 2015. No. S-14-545.

1. **Judgments: Costs: Appeal and Error.** The standard of review for an award of costs is whether an abuse of discretion occurred.
2. **Judgments: 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. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court must resolve independently of the trial court.
4. ____: ____. Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
5. ____: ____. An appellate court does not consider a statute's clauses and phrases as detached and isolated expressions. Instead, the whole and every part of the statute must be considered in fixing the meaning of any of its parts.
6. **Statutes.** Statutes which change or take away a common-law right must be strictly construed.

7. ____. Any statutory construction restricting or abolishing common-law rights should not be adopted, unless the plain words of the statute compel such result.

Appeal from the District Court for Douglas County, DUANE C. DOUGHERTY, Judge, on appeal thereto from the County Court for Douglas County, THOMAS K. HARMON, Judge. Judgment of District Court reversed, and cause remanded with directions.

John M. Guthery, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

No appearance for appellee.

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

WRIGHT, J.

NATURE OF CASE

Under certain circumstances, Neb. Rev. Stat. § 25-1708 (Cum. Supp. 2014) provides for the award of costs to plaintiffs in actions for the recovery of money. Pursuant to this statute, Credit Management Services, Inc. (CMS), filed a motion for costs in its action for the recovery of money against Lorinda Jefferson. She had voluntarily paid CMS' claim after the action was filed but before a judgment was entered.

The county court interpreted § 25-1708 as precluding the award of costs to a plaintiff where he or she received a voluntary payment from the defendant after the action was filed but before a judgment was entered. The county court overruled CMS' motion for costs, and on appeal, the district court affirmed the county court's determination that CMS was not entitled to costs. We conclude that CMS was entitled to costs. Therefore, we reverse the order of the district court and remand the cause with directions.

SCOPE OF REVIEW

[1,2] The standard of review for an award of costs is whether an abuse of discretion occurred. *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (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. *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[3] Statutory interpretation is a question of law, which we must resolve independently of the trial court. *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014).

FACTS

Jefferson owed $277.50 to a cash advance company, which assigned the debt to CMS. After unsuccessfully making a demand for payment, CMS filed a complaint for the recovery of money in county court. Prior to the entry of judgment, Jefferson voluntarily paid CMS the amount sought in the complaint.

On August 12, 2013, CMS filed a motion for costs pursuant to § 25-1708. CMS sought a judgment against Jefferson for the costs of the action, which totaled $56.06.

The county court overruled CMS' motion for costs and dismissed CMS' complaint with prejudice. The court determined that § 25-1708 excluded an award of costs "when there have been voluntary payments made after the action is filed '**but before judgment**.'" (Emphasis in original.)

CMS appealed the county court's judgment to the district court. It assigned, consolidated and restated, that the county court erred in interpreting § 25-1708 to preclude the award of costs to CMS. On May 22, 2014, the district court affirmed the judgment of the county court.

CMS 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).

ASSIGNMENT OF ERROR

CMS assigns, consolidated and restated, that the district court erred in interpreting § 25-1708 to preclude the award of costs to CMS where Jefferson voluntarily paid CMS' claim after the action was filed but before a judgment was entered.

ANALYSIS

The question presented is whether a plaintiff in an action for the recovery of money is entitled to costs where he or she received a voluntary payment from the defendant after the action was filed but before a judgment was entered. To answer this question, we must interpret the language of § 25-1708, which governs the award of costs to plaintiffs in such actions.

Section 25-1708 is an embodiment of the common-law rule that "[c]osts as a general rule are given to the prevailing party." See *Keller v. State*, 184 Neb. 853, 856, 172 N.W.2d 782, 785 (1969). Until 2009, § 25-1708 did not provide for any exceptions to this general rule. See § 25-1708 (Reissue 2008). It stated in its entirety:

> Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property.

See *id*.

In 2009, the Legislature amended § 25-1708. See 2009 Neb. Laws, L.B. 35, § 11. In its current form, § 25-1708 states:

> Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, except as waived or released in writing by the plaintiff, upon a voluntary payment to the plaintiff after the action is filed but before judgment, or upon a judgment in favor of the plaintiff, in actions for the recovery of money only or for the recovery of specific real or personal property.

[4-7] The instant appeal presents our first opportunity to interpret § 25-1708 since it was amended. In doing so, we apply basic principles of statutory interpretation. Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning. *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014). "We do not consider a statute's clauses and phrases '"'as detached and isolated expressions.'"' Instead, '"'the whole and every part of the statute must be

considered in fixing the meaning of any of its parts.'"'" *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 817-18, 829 N.W.2d 703, 712 (2013). "[S]tatutes which change or take away a common-law right must be strictly construed." *Spear T Ranch v. Knaub*, 269 Neb. 177, 195, 691 N.W.2d 116, 133 (2005). Any statutory construction restricting or abolishing common-law rights should not be adopted, unless the plain words of the statute compel such result. *Id.*

CMS argues that under § 25-1708, it is entitled to costs, because Jefferson, the defendant, voluntarily paid CMS' claim after the action was filed but before there was a judgment. We agree.

A plain reading of § 25-1708 establishes that in actions for the recovery of money, a plaintiff is entitled to costs (1) where he or she received a voluntary payment from the defendant after the action was filed but before judgment or (2) where there was a judgment in favor of the plaintiff. In both of these scenarios, the plaintiff has recovered from the defendant and can be considered the prevailing party. In this way, § 25-1708 remains consistent with the common-law rule regarding costs, of which the statute is an embodiment. See *Keller v. State, supra*.

The fact that § 25-1708 includes the word "except" indicates that there is an exception to the statute. But this exception is limited to a plaintiff's waiver or release of costs in writing. The only time "except" is mentioned in § 25-1708 is as part of the phrase "except as waived or released in writing by the plaintiff." This phrase is offset from the surrounding phrases by commas, and it is not followed by the conjunction "and" or "or." It constitutes a complete phrase that must be read independently of the phrases that follow it.

We specifically reject the county and district courts' interpretation that in addition to the exception for the waiver or release of costs in writing, § 25-1708 provides for an exception where the defendant voluntarily paid the plaintiff's claim after the action was filed but before a judgment was entered. Such an interpretation would restrict the common-law right to costs where the plain language of the statute does not so compel.

The grammatical structure of § 25-1708 is such that if there were an exception that applied in the case of a voluntary payment, there would also be an exception that applied where there was a judgment in the plaintiff's favor. The exact language of the statute is as follows: "upon a voluntary payment to the plaintiff after the action is filed but before judgment, *or* upon a judgment in favor of the plaintiff." (Emphasis supplied.) The conjunction "or" is used to indicate "the synonymous, equivalent, or substitutive character of two words or phrases." See Webster's Third New International Dictionary of the English Language, Unabridged 1585 (1993). The use of the word "or" in § 25-1708 thus signals that a plaintiff who has not waived or released costs in writing is in the identical position, for purposes of recovering costs, whether he or she obtained a judgment in his or her favor or simply received a voluntary payment after the action was filed but before a judgment was entered. Because these two scenarios must be treated as equivalent, the interpretation adopted by the county and district courts, which would deny costs to all plaintiffs who received voluntary payments prior to a judgment, would also deny costs to all plaintiffs who obtained judgments in their favor.

But to deny costs to all plaintiffs who obtained judgments in their favor would be to deprive those plaintiffs of the common-law right of a prevailing party to recover costs. See *Keller v. State*, 184 Neb. 853, 172 N.W.2d 782 (1969). Any statutory construction restricting or abolishing common-law rights should not be adopted, unless the plain words of the statute compel such result. *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005). In the case of § 25-1708, the plain language does not compel that all plaintiffs who obtained judgments in their favor should be deprived of costs. The plain language compels only that such plaintiffs should be denied costs where they have waived or released costs in writing.

In summary, a plain reading of § 25-1708 establishes that the scope of the exception to § 25-1708 is limited to a plaintiff's waiver or release of costs in writing. This plain reading is reaffirmed by the fact that the broader exception adopted

by the county and district courts would restrict the common-law right to costs where the plain language does not so compel. Accordingly, we hold that § 25-1708 has but one exception and that the exception is limited to a plaintiff's waiver or release of costs in writing. The Legislature has provided that in an action for the recovery of money, if an individual makes a voluntary payment prior to judgment but does not obtain a written waiver or release of costs from the plaintiff, the plaintiff is entitled to costs under § 25-1708. The wisdom of this policy is for the Legislature, and our role is to determine the plain meaning of the statute.

In the instant case, Jefferson voluntarily paid CMS' claim after the action was filed but prior to the entry of judgment. CMS did not waive or release costs in writing. As such, under § 25-1708, CMS was entitled to its costs in the action. By affirming the order of the county court that overruled CMS' motion for costs, the district court deprived CMS of its statutory right to costs and thereby abused its discretion. We therefore reverse the order of the district court, and we remand the cause with directions for the district court to direct the county court to enter an order awarding CMS its costs in this action.

CONCLUSION

For the foregoing reasons, we reverse the order of the district court that affirmed the order of the county court which overruled CMS' motion for costs. We remand the cause with directions for the district court to direct the county court to enter an order awarding CMS its costs in this action.

REVERSED AND REMANDED WITH DIRECTIONS.

Jose E. Gonzalez, appellant, v. Brian Gage, warden of the Tecumseh State Correctional Institution, appellee.

861 N.W.2d 457

Filed April 10, 2015. No. S-14-568.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Constitutional Law: Judgments.** Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to appeal in a felony case, Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2008) allows the court on its own motion to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue a written statement of its reasons, findings, and conclusions for denial.
3. **Actions: Words and Phrases.** A frivolous legal position pursuant to Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is one wholly without merit, that is, without rational argument based on the law or on the evidence.
4. **Habeas Corpus.** Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.
5. ____. A writ of habeas corpus challenges and tests the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
6. **Habeas Corpus: Proof.** Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.
7. **Habeas Corpus.** A writ of habeas corpus in Nebraska is limited in comparison to the writ in federal courts.
8. **Habeas Corpus: Jurisdiction: Sentences.** A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose.
9. **Habeas Corpus.** A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.
10. **Jurisdiction: Judgments: Appeal and Error.** Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, will not render the judgment void, although they may render the judgment erroneous and subject to being set aside in a proper proceeding for that purpose.

Appeal from the District Court for Johnson County: Daniel E. Bryan, Jr., Judge. Affirmed.

Jose E. Gonzalez, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Jose E. Gonzalez appeals the order of the district court for Johnson County which determined that his action seeking a writ of habeas corpus was frivolous and denied his motion to proceed in forma pauperis. We conclude that Gonzalez' action is frivolous, because the claims he asserts are not claims that, if proved, would support issuance of a writ of habeas corpus. We therefore affirm the order of the district court which denied Gonzalez' motion to proceed in forma pauperis.

STATEMENT OF FACTS

In 2008, Gonzalez was charged with first degree sexual assault on a child. Gonzalez was found guilty in a jury trial in the district court for Dakota County, and he was sentenced to imprisonment for 30 to 32 years. Gonzalez' conviction was affirmed by the Nebraska Court of Appeals in a direct appeal in which he had counsel different from his trial counsel and raised several claims of ineffective assistance of trial counsel. See *State v. Gonzalez*, No. A-10-179, 2010 WL 4241022 (Neb. App. Oct. 26, 2010) (selected for posting to court Web site). In 2012, Gonzalez filed a pro se motion for postconviction relief in which he raised various claims, including additional claims of ineffective assistance of counsel. The district court for Dakota County denied the postconviction motion, and the Court of Appeals affirmed. See *State v. Gonzalez*, No. A-12-073, 2012 WL 3740570 (Neb. App. Aug. 28, 2012) (selected for posting to court Web site).

On May 19, 2014, Gonzalez, who was in custody at the Tecumseh State Correctional Institution, filed a pro se petition for a writ of habeas corpus in the district court for Johnson County against the warden, Brian Gage. Gonzalez alleged that

he was a foreign national and that when he was arrested in 2008, he was not informed of his rights under article 36, paragraph 1(b), of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 (Vienna Convention). In particular, he alleged that under the Vienna Convention, he had a right to contact the Mexican consulate for advice and assistance with his criminal prosecution. Gonzalez also alleged that his trial counsel was deficient in various respects, and he implied that he would have been better represented with assistance from the Mexican consulate. He claimed that because of the violation of the Vienna Convention, "the district court of Dakota County lost its jurisdiction to proceed to judgment, and lacked the legal authority to impose the sentence."

The district court for Johnson County denied Gonzalez' motion to proceed in forma pauperis on the ground that Gonzalez' action was frivolous. The court stated that "[t]he legal positions advanced by petitioner are frivolous. The writ is a collateral attack on a judgment of a valid conviction. The court had jurisdiction of the parties and subject matter and such a writ will not lie. See Peterson v. Houston, 284 Neb. 861 (2012)."

Gonzalez appeals the order which denied his motion to proceed in forma pauperis.

ASSIGNMENTS OF ERROR

Gonzalez generally claims, restated, that the district court erred when it found that his action was frivolous and denied his motion to proceed in forma pauperis. He claims that various errors at his original criminal trial deprived the trial court of jurisdiction. He specifically claims that the district court for Johnson County erred when it failed to recognize that the alleged violation of the Vienna Convention deprived the district court for Dakota County of jurisdiction in his original criminal case.

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de

novo on the record based on the transcript of the hearing or the written statement of the court. *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

ANALYSIS

Gonzalez generally claims that the district court erred when it denied his motion to proceed in forma pauperis based on its determination that his action for a writ of habeas corpus was frivolous. Because we conclude that the claims asserted by Gonzalez would not entitle him to habeas corpus relief, we determine that the district court did not err when it denied his motion to proceed in forma pauperis.

In Forma Pauperis and Gonzalez' Claims.

[2,3] Applications to proceed in forma pauperis are governed by § 25-2301.02. Except in those cases where the denial of in forma pauperis status would deny a defendant his or her constitutional right to appeal in a felony case, § 25-2301.02(1) allows the court on its own motion to deny in forma pauperis status on the basis that the legal positions asserted by the applicant are frivolous or malicious, provided that the court issue a written statement of its reasons, findings, and conclusions for denial. *Peterson v. Houston, supra*. 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. *Peterson v. Houston, supra*. When an objection to an application to proceed in forma pauperis is sustained, the party filing the application shall have 30 days to proceed with an action or appeal upon payment of fees, costs, or security. *Id.*; § 25-2301.02(1).

In his petition for a writ of habeas corpus, Gonzalez set forth four claims that he alleged would entitle him to habeas corpus relief. His claims were generally that (1) trial counsel waived voir dire without Gonzalez' informed consent, (2) trial counsel waived a preliminary hearing without Gonzalez' informed consent, (3) the trial court erroneously admitted evidence of prior bad acts, and (4) he was not advised of his rights under the Vienna Convention.

In order to determine whether these claims are frivolous or have legal merit entitling Gonzalez to habeas corpus relief, we must examine the nature of the claims. As an initial step in our examination of Gonzalez' claims, we review the principles regarding habeas corpus relief.

Nebraska Habeas Corpus Jurisprudence.

[4-6] Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained. *Peterson v. Houston, supra*. See, Neb. Const. art. I, § 8; Neb. Rev. Stat. § 29-2801 (Reissue 2008). A writ of habeas corpus challenges and tests the legality of a person's detention, imprisonment, or custodial deprivation of liberty. *Peterson v. Houston, supra*. Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ. *Id*.

[7,8] A writ of habeas corpus in Nebraska is limited in comparison to the writ in federal courts. See *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012). Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction. *Id*. Only a void judgment may be collaterally attacked. *Id*. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *Id*. Thus, a writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose. *Id*.

[9,10] A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose. *Peterson v. Houston, supra*. The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for a writ of habeas corpus, because that inquiry is available only in a direct proceeding. *Id*. Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, will not render the judgment void, although they may render the judgment

erroneous and subject to being set aside in a proper proceeding for that purpose. See *id*.

The limited availability of relief in Nebraska based on habeas corpus is illustrated in our recent case of *Peterson v. Houston, supra*. In that case, the petitioner alleged in a petition for a writ of habeas corpus that he was being illegally detained, because the information pursuant to which he entered a plea was defective in certain respects and deprived the trial court of jurisdiction. He also claimed that the conviction subjected him to double jeopardy and that he was provided ineffective assistance of counsel in various respects. In *Peterson*, we first concluded that the information contained no deficiencies that would have deprived the trial court of jurisdiction and that the petitioner's allegations to the contrary were wholly without legal merit. We then considered the petitioner's other claims, including, inter alia, claims of double jeopardy and ineffective assistance of counsel, and concluded that "[n]one of these provide a proper ground for granting a writ of habeas corpus in Nebraska." *Id*. at 869, 824 N.W.2d at 34.

In *Peterson*, we reasoned that because the trial court had jurisdiction, the petitioner's claims of mere errors or irregularities in the proceedings would not render the judgment void, even though such claims, if proved, might render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose. We therefore concluded that because the claims would not support a writ of habeas corpus, the legal positions asserted in the petition for a writ of habeas corpus were frivolous, and that the district court did not err when it denied the petitioner's application to proceed in forma pauperis.

Application of Nebraska Habeas Corpus Jurisprudence and U.S. Supreme Court Precedent Regarding the Vienna Convention.

Based on the habeas corpus standards set forth above and the reasoning in *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012), we determine that Gonzalez' claims that

trial counsel improperly waived voir dire and a preliminary hearing and that the trial court made erroneous evidentiary rulings are claims of mere errors or irregularities in the proceedings that did not deprive the trial court of jurisdiction and did not render the judgment of criminal conviction void. These claims, even if proved, would not entitle Gonzalez to habeas corpus relief, and therefore, by applying the reasoning illustrated in *Peterson*, we conclude that these claims were frivolous and do not entitle Gonzalez to an order granting in forma pauperis status.

Gonzalez' claim that his rights under the Vienna Convention were violated merits further discussion and analysis. This type of claim has not been addressed by this state's appellate courts, but there is relevant U.S. Supreme Court precedent, which we apply.

The appellate courts of this state appear to have addressed the Vienna Convention in the following few reported cases: *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009); *In re Interest of Antonio O. & Gisela O.*, 18 Neb. App. 449, 784 N.W.2d 457 (2010); and *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005). Each of the foregoing cases involved provisions of the Vienna Convention relating to proceedings for termination of parental rights; these cases did not involve article 36, upon which Gonzalez relies. We note for completeness that recently, in *State v. Fernando-Granados*, 289 Neb. 348, 854 N.W.2d 920 (2014), we decided an appeal and affirmed the dismissal of a motion for postconviction relief in which the appellant had raised, inter alia, a claim of an infringement of his rights under the Vienna Convention. Although the appellant in *Fernando-Granados* assigned error with respect to certain claims, he did not claim error with respect to the allegation involving the Vienna Convention and, as a result, our opinion in *Fernando-Granados* does not offer guidance.

In the present case, Gonzalez' claim involves article 36 of the Vienna Convention relating to criminal proceedings. Gonzalez contends that the violation of these provisions deprived the district court of jurisdiction and that he is therefore entitled to a writ of habeas corpus. We must therefore

review the law regarding the rights afforded under article 36 of the Vienna Convention to determine whether such rights are enforceable individually and, in particular, whether a violation of such rights would deprive a court presiding over a criminal proceeding of jurisdiction and entitle a defendant to a writ of habeas corpus.

Article 36, paragraph 1(b), of the Vienna Convention generally provides that when a foreign national is arrested, committed to prison or custody pending trial, or detained in any other manner, authorities in the United States shall so inform the consulate of the foreign national's home country. The paragraph provides that the foreign national's communications with the consulate shall be forwarded without delay. The paragraph further provides that U.S. "authorities shall inform the person concerned without delay of his rights under this sub-paragraph."

The U.S. Supreme Court has discussed relevant issues related to article 36 of the Vienna Convention in several opinions. In two consolidated cases reported in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006), state court defendants sought to enforce what they asserted were individual rights created by article 36. In the first case, the criminal defendant sought suppression of his statements to police as a remedy for a claimed violation of his rights under article 36. In the second case, the defendant sought to raise a claim of a violation of his various rights under article 36 in a postconviction action.

In *Sanchez-Llamas*, the U.S. Supreme Court first noted that both cases implicated the issue of whether article 36 grants rights that may be invoked by individuals in a judicial proceeding. However, because the Court ultimately concluded that neither defendant would be entitled to the relief sought, the Court determined that it was "unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights," and for purposes of these cases, the Court assumed without deciding that article 36 did grant such rights. 548 U.S. at 343. With that understanding, the Court concluded with respect to the first case that "neither the Vienna Convention itself nor our precedents applying the exclusionary

rule support suppression of [the defendant's] statements to police." 548 U.S. at 350. With regard to the second case, the Court concluded that "claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims," 548 U.S. at 360, and that the defendant's article 36 claim raised in a state postconviction action was also subject to default under the state's procedural rules. Applying the procedural default rules, the Court determined that because the defendant had not raised the claims at trial, the rules barred the claim. We read *Sanchez-Llamas* as approving the application of state jurisprudence substantively and procedurally to criminal defendants' state court actions claiming violations of article 36, paragraph 1(b), of the Vienna Convention.

The U.S. Supreme Court considered article 36 of the Vienna Convention in cases subsequent to *Sanchez-Llamas*. In *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008), the Court noted that the International Court of Justice (ICJ) in *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. 12 (Mar. 31) (*Avena*), had determined that the United States had violated article 36 of the Vienna Convention when it failed to inform Mexican nationals of their rights under the Vienna Convention. However, the Court determined in *Medellin* that neither the ICJ's decision nor a determination by the President, through a Memorandum for the Attorney General directing state courts to give effect to the ICJ's decision, constituted directly enforceable federal law that preempted state procedural rules, the application of which had been endorsed in *Sanchez-Llamas*.

In *Medellin*, the Court characterized article 36 as non-self-executing and observed that "[a] non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force." 552 U.S. at 527. The Court also noted that implementation of ICJ judgments is not provided for in the Vienna Convention. The Court noted instead that it was necessary for Congress to enact statutes implementing the treaty, and Congress had not taken such action. The Court therefore concluded in *Medellin* that

the ICJ's decision in *Avena* did not change the Court's holding in *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006), to the effect that the Vienna Convention did not preclude the application of state law to a claimed violation of article 36.

In *Leal Garcia v. Texas*, 564 U.S. 940, 131 S. Ct. 2866, 180 L. Ed. 2d 872 (2011), the Court noted that it had been 7 years since the ICJ ruling in *Avena* and 3 years since the Court's decision in *Medellin* and that Congress had not yet enacted a statute implementing the Vienna Convention or the ICJ ruling. The Court concluded in *Leal Garcia* that relief for an alleged Vienna Convention violation could not be given "on the ground that Congress *might* enact implementing legislation." 564 U.S. at 942 (emphasis supplied).

Because the U.S. Supreme Court has not conclusively decided that article 36 of the Vienna Convention does not create individually enforceable rights, we take the approach that the Court itself applied in *Sanchez-Llamas*. That is, we assume without deciding that such rights exist, and then we decide whether the remedy sought by Gonzalez—a writ of habeas corpus—is a proper method to enforce such rights under state law. We conclude that it is not.

With respect to jurisdiction, we note the case of *U.S. v. Guzman-Landeros*, 207 F.3d 1034 (8th Cir. 2000), in which a defendant claimed that he had not been advised of his right to contact his consul in violation of article 36 of the Vienna Convention. The U.S. Court of Appeals for the Eighth Circuit analyzed the claim and stated that an alleged error based on a claimed violation of individual rights under article 36 of the Vienna Convention "does not constitute a jurisdictional defect." 207 F.3d at 1035. See, also, *U.S. v. Gonzales*, 339 F.3d 725 (8th Cir. 2003). We similarly determine that the violation of the Vienna Convention alleged by Gonzalez is not a jurisdictional defect and, thus, did not deprive the court of jurisdiction of the offense and the person of the defendant and that it did not void the sentence entered by the court.

With respect to the substance of Gonzalez' claim, we note that in *Sanchez-Llamas*, the Court concluded that the states could apply their substantive and procedural jurisprudence to

claims of violations of article 36 of the Vienna Convention brought by state criminal defendants. We therefore apply Nebraska jurisprudence regarding habeas corpus relief. As noted above, habeas corpus relief in the form of discharge will not lie in Nebraska where an alleged violation is a claim of mere irregularity in the proceeding that does not deprive the trial court of jurisdiction and does not render the judgment void. See *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

Gonzalez' assertion that his rights under the Vienna Convention were violated, like his other claims discussed above, is a claim of a mere error or irregularity in the proceedings that does not deprive the trial court of jurisdiction and does not render the judgment void. Because the claims Gonzalez raised in his petition for a writ of habeas corpus, including the claimed violation of the Vienna Convention, were not claims that would entitle him to a writ of habeas corpus, we conclude that the district court did not err when it determined that Gonzalez' action was frivolous and therefore denied his request to proceed in forma pauperis.

CONCLUSION

For the reasons explained above, we conclude that the district court did not err when it determined that Gonzalez' action seeking a writ of habeas corpus was frivolous and denied Gonzalez' motion to proceed in forma pauperis. Accordingly, we affirm.

AFFIRMED.

CASSEL, J., not participating.

THOMAS BALAMES, INDIVIDUALLY AND AS ATTORNEY IN FACT FOR RICHARD J. KOSTYRA ET AL., APPELLEE, V. ROBERT V. GINN AND BRASHEAR LLP, FORMERLY KNOWN AS BRASHEAR AND GINN, APPELLANTS.

861 N.W.2d 684

Filed April 17, 2015. No. S-13-1087.

1. **New Trial: Appeal and Error.** An appellate court reviews a trial court's ruling on a motion for a new trial for abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **New Trial.** A court should sustain a motion for new trial only when an error has occurred that is prejudicial to the rights of the unsuccessful party.
4. ____. A district court has inherent authority to order a new trial, in the same term, where necessary to correct prejudicial errors—especially its own errors—in the trial.
5. **New Trial: Juries.** A court's inherent authority to correct prejudicial errors in a trial does not include the power to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury.
6. **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) the attorney's negligence was a proximate cause of the client's loss.
7. **Malpractice: Attorney and Client.** A client cannot recover in a legal malpractice case when the alleged injury was caused by the client's own conduct.
8. **Malpractice: Negligence: Proximate Cause.** A plaintiff's contributory negligence is a defense in a malpractice action when it contributed to the professional's inability to meet the standard of care and was a proximate cause of the plaintiff's injury.
9. **Malpractice: Torts.** A legal malpractice action is governed by tort principles.
10. **Malpractice: Attorney and Client: Negligence.** A client's contributory negligence may be a defense in an appropriate legal malpractice action.
11. **Attorneys at Law: Trial.** A trial court has discretion to determine whether an attorney's closing argument exceeds the legitimate scope of the issues.
12. **Directed Verdict: Evidence.** 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.
13. **Directed Verdict: Appeal and Error.** In reviewing a directed verdict, an appellate court gives the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.

14. **Attorney and Client.** A client has the ultimate authority to determine the objective of a legal representation.
15. ____. An attorney should make reasonable efforts to explain the legal consequences of a course of conduct that a client insists upon taking.
16. **Malpractice: Attorney and Client.** The breach of a duty in a legal malpractice action is a fact-specific inquiry. Only when reasonable people could not disagree about the foreseeability of the injury should a court decide this issue as a matter of law.
17. **Malpractice: Attorney and Client: Expert Witnesses.** In a legal malpractice action, the factual inquiry as to whether an attorney breached a duty of care must be supported by expert opinion.
18. **Attorney and Client.** Upon the termination of a legal representation, a lawyer should take steps to the extent reasonably practicable to protect a client's interests.
19. **Malpractice: Attorney and Client.** A client cannot recover for legal malpractice when the attorney has relied on the client's misrepresentations.
20. **Juries: Verdicts: Presumptions.** When the jury returns a general verdict for one party, a court presumes that the jury found for the successful party on all issues raised by that party and presented to the jury, particularly when the opposing party did not ask the court to give the jury a special verdict form or require the jury to make special findings.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Judgment vacated, and cause remanded with directions.

Mark C. Laughlin and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellants.

Steven E. Achelpohl, of Gross & Welch, P.C., L.L.O., Lawrence J. Acker, of Lawrence J. Acker, P.C., and Jay Ferguson for appellee.

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

CONNOLLY, J.

SUMMARY

The appellee, Thomas Balames, filed this legal malpractice action against Robert Ginn and Brashear LLP, formerly known as Brashear and Ginn (collectively Ginn), the firm where Ginn practiced when the alleged malpractice occurred. Balames brings this action for himself and three other individuals for whom he serves as attorney in fact (collectively

Balames). Balames claimed that Ginn negligently failed to obtain signatures on a guaranty for a loan that Balames made to a third party and failed to inform Balames of the missing signatures. When the third party defaulted, Balames could not obtain a judgment against the individuals who were the intended guarantors for the full amount of the third party's obligation. The jury returned a general verdict for Ginn, but the court granted Balames a new trial.

Ginn assigns multiple errors to the district court's rulings, but we decide this appeal primarily on one issue: whether the court erred in granting Balames a new trial. We conclude that it did. We therefore vacate the court's order that sustained Balames' motion for a new trial and remand the cause with instructions for the court to reinstate the judgment for Ginn.

BACKGROUND

Transaction Documents to Restructure Debt Owed to Balames

In 2003, a large hog farm operation called Bell Farms defaulted on a $3-million loan from Balames. In 2004, Balames agreed to restructure the debt with a new entity called Banopu, LLC, which is an acronym for "Balames Note Purchase." Two members of Banopu were the general partners of Bell Farms. Ginn was Balames' attorney for this transaction and worked with the attorney for Banopu and the guarantors to draft the closing documents.

The first document was a purchase agreement in which Banopu agreed to (1) "purchase" the loan that Balames made to "Sun Prairie"—an entity related to Bell Farms—for $3 million; (2) assign its right to payments from Sun Prairie to Balames for 4 years; (3) execute a promissory note to Balames for the purchase price; and (4) make payments to Balames as set out in a payment schedule. Members of Banopu who were identified as "guarantors" promised to guarantee payment of the purchase price. Balames promised to deliver the original loan documents—including promissory notes and guaranties—to Banopu on the effective date. That date was whenever a separate financial transaction closed, and the purchase agreement was contingent upon that event.

Under the purchase provision, the interest rate for the purchase price was the prime rate plus 4 percent. But under a separate "default interest" provision, the interest rate increased to the prime rate plus 13.25 percent if Banopu or Sun Prairie defaulted on their payments.

The second document was the promissory note. It stated that the note was secured by the guaranties of Banopu's members. The transaction contemplated that Banopu's 11 members would sign a separate guaranty, promising to pay Balames the amount due under the note if Banopu failed to cure any default in payments. Like the purchase agreement, the note included a provision for a higher interest rate if Banopu defaulted on payments.

North Dakota Litigation

In 2007, Banopu defaulted on the loan. The record shows that only one Banopu member had signed the separate guaranty. In 2008, Balames sued Banopu and its members in a North Dakota court to collect the money and interest that Banopu owed on the loan. After a trial, that court determined that Banopu's members intended to guarantee the purchase price of $3 million plus regular interest. But because all the intended guarantors did not sign the separate guaranty, the court determined that Banopu's members were not liable for the higher interest rate imposed on Banopu if it defaulted on the payments. It determined that Banopu was liable for $3,946,092.92, which included interest at the rate of prime plus 13 percent. But it ruled that Banopu's members were liable for only $3,349,865.48 at the statutory interest rate of 7 percent.

Parties' Pleadings

Balames alleged that Ginn was negligent for failing to (1) draft a complete guaranty to secure the purchase price and the promissory note; (2) circulate and secure the guaranties; (3) notify Balames of Ginn's failure to secure the guaranties; and (4) assist Balames to collect the balance of the note, interest, and attorney fees. For damages, he sought the difference between the $3,946,092.92 judgment

he obtained against Banopu at the higher interest rate and the amounts he collected from Banopu and its members. He also sought $337,051.14 in attorney fees for his attempted enforcement of the guaranty, for total damages in the amount of $1,315,598.46.

Ginn denied all allegations of negligence and alleged that Balames had failed to state a cause of action. Additionally, Ginn alleged that Balames' claim was barred by the statute of limitations, equitable estoppel, laches, failure to mitigate damages, the doctrine of unclean hands, and the negligence or contributory negligence of Balames or other individuals.

Evidence at Trial

In 2000, Balames formed a business called Accelerated Assets (Accelerated), an investment company specializing in purchasing or "lending against" debt portfolios. To make the loan to Bell Farms, he and his business associates borrowed money from their bank and personally guaranteed the loan. When they restructured Sun Prairie's debt with Banopu, they determined that Banopu's members were capable of repaying the debt if it defaulted.

Balames said that Ginn was responsible for circulating the transaction documents for signatures and that he believed this effort was ongoing in February or March of 2004. Ginn never told Balames that any intended guarantor had balked.

Ginn agreed that he had a duty to ensure the signatures were properly affixed to the closing documents and that he had not delegated this responsibility. Ginn said that he had anticipated being able to review the documents after the circulation for signatures was completed. He knew that obtaining the Banopu members' personal guaranties was crucial to Balames. But Banopu's members were reluctant to sign the guaranty until they had possession of the original loan documents. Ginn said Balames knew about their resistance and Ginn's efforts to obtain their signatures. Ginn explained that the Banopu transaction was a smaller part of a much larger reconfiguration of Sun Prairie's debt. He said a larger and separate transaction had to close before Ginn could get signed copies for the Banopu transaction. He said there was

no scheduled closing date for the Banopu transaction because he could not control when the Banopu members would finally sign the documents.

The larger transaction was scheduled to close on July 6, 2004. Ginn said that on June 30, just before he went on vacation, he sent the documents for the larger transaction, with Balames' signature, to an attorney for the guarantors and to Balames. Ginn said Balames expressed no sense of urgency about closing the Banopu transaction when Ginn left for vacation. But after the larger transaction closed on July 6, Ginn received e-mails and telephone calls from Balames that he had to close the Banopu transaction immediately because the bank was pressuring him. Balames agreed his bank was pressuring him to obtain the loan documents.

The record shows that on July 7, 2004, Balames e-mailed Ginn while he was on vacation and asked him to "overnight today — if at all possible — a complete set of executed banopu loan documents" to his bank. Balames provided the address of the banker to whom he wanted the documents sent: "if you could confirm via email that when they go, i would appreciate it very much." Balames e-mailed again: "are you going to have them tomorrow??? i need to get them to the bank as quickly as humanly possible...any ideas???" Ginn then forwarded Balames' original e-mail with the banker's address to an attorney for the guarantors with the following message: "I have talked to [Balames] and he absolutely needs you to overnight the originals to his bank per the e-mail forwarded herewith. Please send copies to me." Afterward, Ginn reported to Balames that the documents "are being overnighted to me and, upon receipt, I will copy and send on per your instructions." About an hour later, Ginn e-mailed Balames again: "I will have the originals sent directly to the bank, if you wish, with copies to me. My fear is there will be something wrong/missing/etc that we won't have the opportunity to catch and fix first."

On July 9, 2004, the opposing attorney sent Ginn an e-mail that referred to an attachment: "See attached completely executed Purchase Agreement. The original note and a copy of the Purchase Agreement with Banopu's signature has been

delivered to Balames' bank today. They need the guarantors' signatures yet for the Purchase Agreement. Please forward them on to [Balames'] bank." The opposing attorney sent this e-mail to Balames also.

On July 12, 2004, Balames sent Ginn another e-mail: "[T]his is what i have received from [the opposing attorney] and have subsequently forwarded to the bank. is this everything???" Ginn responded on July 13: "I am on vacation with the worst dial-up internet access imaginable and I can't open documents. [I have] confirmed that the purchase agreement was sent to you and that the note and guaranty were sent directly to the bank. Can you confirm this with the bank?"

Balames said that when Ginn wrote he would forward the copies to the bank and keep a copy, he believed that Ginn would review the documents to make sure they were properly executed. He could not recall Ginn's reporting that he did not receive the documents. Balames said Ginn never told him to go to the bank and inspect the documents for signatures or to ensure that the bank received them. Balames could not recall having any telephone calls with Ginn while Ginn was on vacation or asking the bank to postpone the closing until Ginn returned from vacation.

On cross-examination, however, Balames said that he called the bank to confirm that the documents had arrived. He could not recall the conversation but remembered receiving a confirmation that the documents were there. He could not recall telling Ginn that he confirmed the bank's receipt of the documents. When asked if he would dispute Ginn's testimony that he had done so, Balames said that he would have only checked to see if the bank received a package from Ginn.

Balames knew that the guaranty was being circulated and had to be signed to close the deal. But he could not recall a separate transaction that had to close before the Banopu transaction could close. Balames denied telling Ginn to stop work in July 2004. But he was impeached with his deposition testimony that he could not recall telling Ginn to stop work.

Ginn testified that he received no attachment to the July 9, 2004, e-mail from the opposing attorney and could not open the attachment that Balames sent with his July 12 e-mail.

Ginn said the e-mails were only part of his conversations with Balames. He advised that they postpone the closing until he returned, but Balames refused to wait. So Ginn suggested that Balames send him the documents overnight for review and then Ginn would send them to the bank. Balames said that this procedure was not fast enough. Ginn then called the opposing attorney, who told him the signed copies had been sent to the bank. And Ginn said Balames confirmed to him in a telephone call that the bank had received the *signed* note and guaranty. Ginn told Balames that as soon as he returned, they would get everything "tied up."

But Ginn said that he performed no further work because Balames fired him on July 13, 2004. Ginn said Balames told him that the guarantors were paying for Ginn's services only through the closing and that Balames would not pay Ginn after that. So Ginn did not attempt to confirm that all the signatures had been obtained. He said Balames never asked him to do any further work. He denied that he had any responsibility to review the documents after Balames directed him to stop work. Eventually, it was discovered that no copy of the separate guaranty was filed with the bank for the Banopu transaction.

Both parties presented expert testimony to opine whether Ginn had breached the professional standard of care. Two of Balames' experts testified that Ginn had breached the standard because he failed to ensure that someone in his firm was available to review the documents while he was on vacation and failed to review the documents after he returned. One expert opined that Ginn had breached the standard of care even if he offered to review the documents while he was on vacation. The other agreed that Ginn could meet the standard of care by reviewing the documents while on vacation. Both of them believed Ginn had a professional duty to review the documents when he returned from vacation to protect Balames' interests, even if Balames had terminated his services. But one of Balames' experts conceded that if Balames told Ginn the bank had received signed closing documents, then Ginn was entitled to rely on that statement and did not breach the standard of care.

Ginn's expert opined that Balames had changed the scope of the attorney-client relationship while Ginn was on vacation by insisting that the closing go forward despite Ginn's warning that he should review the documents and later by directing Ginn to stop work. Because Ginn had no expectation that the Banopu transaction would suddenly become urgent while he was on vacation and he had kept in touch with Balames, he did not breach any duty by failing to prepare another attorney to handle the transaction while he was gone. And once Balames directed the transaction to close despite Ginn's advice to wait, all Ginn could do was to inform Balames that he could not review the documents and things could go wrong. Ginn's expert believed that this limited duty particularly applied with a client sophisticated in making these types of loans because Balames needed only to verify the presence of signatures, a task that is ministerial in nature.

Additionally, because of Balames' experience, Ginn's expert believed Ginn could trust Balames' confirmation that the bank had received the signed documents. Because both Balames and the bank had an interest in ensuring the signatures were present, he believed Ginn had reasonably relied on Balames' confirmation. Finally, he opined that when Balames' directed Ginn to stop work, he had a duty to follow that direction because the relationship had terminated. He explained that to countermand such directions from a competent client might harm the client in a way that an attorney could not anticipate.

The Court's Directed Verdicts and Closing Argument Ruling

After both sides rested, Balames moved for a directed verdict on Ginn's contributory negligence defense. The court granted the motion. The court also ruled that it would not instruct the jury on this defense. Ginn renewed his motions for a directed verdict on the malpractice claim and Ginn's statute of limitations defense, which motions the court again overruled.

The closing arguments were not recorded, but the court did record the parties' in camera arguments regarding closing

arguments. The court stated that Ginn had exposed a large chart, exhibit 140, to the jurors. Exhibit 140 listed Ginn's points in closing argument:

> FACTORS TO CONSIDER REGARDING MR. BALAMES' CONFIRMATION THAT EXECUTED DOCUMENTS HAD BEEN RECEIVED
>
> 1. BELIEVABLE?
> 2. CLERICAL TASK
>   - Signatures
>   - vs. drafting guaranty
>   - within competence of sophisticated client and Bank
> 3. SOPHISTICATED/RELIABLE
>   - Random, unknown person
>   - Mr. Balames
>   - Bank
> 4. SIMILAR INCENTIVE TO COMPLETE TASK
>   - Mr. Balames
>   - As quickly as humanly possible
>   - Loan expired? (Ex. 98-101)
>   - Bank
>   - $3 million loan; default; no securing documents

During the in camera hearing, Balames stated that the court had sustained his three objections to Ginn's arguments or charts as violating the court's ruling for Balames on Ginn's contributory negligence defense. Ginn responded that he was not using the charts to show Balames' contributory negligence. He argued that whether Balames was sophisticated in these transactions was relevant to whether Ginn had reasonably relied on his statements: "[T]here was testimony from every single expert in this trial not as to contributory negligence but as to the standard of care breach alone." Balames countered that Ginn was attempting to shift the duty to him to verify that the documents were signed. He argued that Ginn's testimony showed he had asked Balames only to confirm that the bank received the closing documents, not to confirm that it received signed documents. The court ruled that exhibit 140 impermissibly raised the issue of Balames' contributory negligence and that Ginn could not show it to the jury.

The court also permitted Balames to make a record of his objection to exhibit 141, a different chart. Exhibit 141 is a summary of Ginn's arguments regarding Balames' claim that he checked with the bank only to see if it had received a package from Ginn:

THE "PACKAGE" DEFENSE

Note: brand new theory

1. [Balames] knew there were 3 separate closing docs, including a separate guaranty
   Source: [Balames]; [Ginn]; numerous e-mails
2. [Balames] knew guarant[i]es had to be signed
3. [Balames] understood [Ginn] couldn't confirm signatures and something could be missed
4. Limited [Ginn] requests make no sense:
   - confirm unsigned guarant[i]es received by the Bank?
   - confirm some, but not all, executed docs received?
   - vaguely confirm the Bank received a "package"
5. [Balames] called his own banker
   - No recollection as to who
   - No docs produced
   - No info as to where bankers are today
6. [Balames], not [Ginn], decides the deal has closed and [Ginn] should stop work.

After Balames objected, the parties discussed exhibit 141 in a sidebar. The court sustained Balames' objection to Ginn's argument using exhibit 141 and directed Ginn not to further exhibit it to the jurors. But the court stated, "It's available to them prior to [the objection]." Ginn said that he would follow the court's order but asked the court not to cause the jury to unnecessarily focus on its ruling by giving a curative instruction. The court rejected this request. It told the jurors that before the parties' in camera discussion, they had at least glimpsed a page that Ginn wanted to use in argument, but that the court had ruled the page was objectionable. It instructed the jurors that the page was argument, not evidence, and to ignore it.

Posttrial Motions and Rulings

After the jury returned its verdict, Balames moved for a new trial and judgment notwithstanding the verdict. He offered exhibit 142, which was a summary of Ginn's alleged admissions from the trial transcript. The court responded that Balames should not waste time on the motion for judgment notwithstanding the verdict, because Balames had not moved for a directed verdict at the close of the evidence. Balames argued that the most important reason to grant a new trial was "the prejudice that occurred from repeated illustration of arguments that the Court had already ruled upon that should have been regarded as impermissible." Balames argued that Ginn used the charts to buttress arguments that were not a proper part of the trial.

Balames argued that Ginn admitted he alone had a duty to ensure the documents contained the required signatures and that he had not delegated this duty. Balames argued that Ginn had a continuing duty to protect his client and that his arguments and charts had confused the jury as to who had the duty of care by suggesting that he had reasonably relied on Balames' statements. He contended that the court could not presume the jurors had followed the law and not decided the case on Ginn's affirmative defense.

In the court's order granting a new trial, it stated that Ginn had repeatedly referred to matters relevant to Balames' contributory negligence despite the court's directed verdict for Balames and its order that this defense could not be submitted to the jury. It concluded that Ginn's repeated violation of this order was not amenable to cure by any admonition to the jury. The court further determined that Ginn's testimony made it "abundantly clear that [Ginn] violated his ethical duty to complete the transaction on the part of his client, and that his failure to complete that duty caused damage to his client." The court concluded that it had also committed plain error in failing to instruct the jury that Ginn was liable as a matter of law for all damages proximately caused by his conduct.

ASSIGNMENTS OF ERROR

Ginn assigns, condensed and restated, that the court erred as follows:

(1) overruling his motion for directed verdict because Balames presented no competent evidence to show that Balames could have collected the third party's obligation from the intended guarantors;

(2) overruling his objections to a witness' deposition testimony and an accompanying report, which Balames presented to show the financial status of two intended guarantors;

(3) overruling his motion for a directed verdict because the statute of limitations barred Balames' malpractice claim;

(4) sustaining Balames' motion for a new trial; and

(5) sustaining Balames' motion for a directed verdict on Ginn's contributory negligence defense and refusing to instruct the jury on that defense.

STANDARD OF REVIEW

[1,2] We review a trial court's ruling on a motion for a new trial for abuse of discretion.[1] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[2]

ANALYSIS

Our analysis necessarily discusses the role that a client's negligence or contributory negligence plays in a legal malpractice case. As stated, however, we primarily focus on the court's order granting a new trial.

Ginn contends that the court erred in granting Balames' motion for a new trial for three reasons: (1) Ginn's closing arguments were proper, (2) the evidence supported the jury's unanimous general verdict for him, and (3) the court's admonishment to the jury that closing arguments are not evidence cured any possibility of prejudice. Ginn also contends that

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[1] See *First Express Servs. Group v. Easter*, 286 Neb. 912, 840 N.W.2d 465 (2013).

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

the court incorrectly concluded that it should have directed a verdict for Balames on the issue of liability and instructed the jury that Ginn was liable as a matter of law.

Balames views it differently. He contends that the court's order was correct for two reasons: (1) Ginn's closing argument violated the court's directed verdict for Balames on Ginn's contributory negligence defense, and (2) Ginn continued this line of argument even after the court sustained Balames' objections to it. Balames argues that Ginn's repeated arguments ran afoul of two rules of professional conduct: (1) Neb. Ct. R. of Prof. Cond. § 3-503.3(a)(1) and (3), which prohibit attorneys from knowingly making a false statement or offering false evidence to a court; and (2) Neb. Ct. R. of Prof. Cond. § 3-503.4(e), which prohibits an attorney from alluding to a matter that the attorney does not reasonably believe is relevant or supported by admissible evidence. And because Ginn repeated his argument regarding Balames' negligent conduct, Balames argues that the court correctly determined that it could not cure the improper argument by any admonition to the jury. Thus, a new trial was required.

The court's reasoning in granting a new trial shows that it considered any reference to evidence of Balames' negligence during Ginn's closing argument to be prejudicial misconduct. So even without having the parties' arguments, we can review the court's order.

[3,4] We have held that a court should sustain a motion for new trial only when an error has occurred that is prejudicial to the rights of the unsuccessful party.[3] And we have held that a district court has inherent authority to order a new trial, in the same term, where necessary to correct prejudicial errors—especially its own errors—in the trial:

> The purpose of a motion for a new trial is to afford the trial court an opportunity to correct errors that have occurred in the conduct of the trial. The trial court has inherent power over its judgments to correct errors and mistakes therein even to the extent of granting a new trial where such is necessary, whether or not a new trial is

[3] See *Wendeln v. Beatrice Manor*, 271 Neb. 373, 712 N.W.2d 226 (2006).

> requested or a motion for a new trial is filed. Such inherent power to grant a new trial is limited to those situations where prejudicial error appears in the record.[4]

[5] But a court's inherent authority to correct prejudicial errors in a trial does not include the power to invade the province of the jury and to set aside the verdict and grant a new trial because the court arrived at a different conclusion than the jury on the evidence that went to the jury.[5] And the court failed to recognize that the parties were disputing genuine issues of material fact.

Initially, we reject Balames' baseless argument that Ginn's attorney knowingly made false statements to the court, offered false evidence, or made arguments based on evidence that he reasonably should have known was inadmissible or irrelevant. The record contains ample *admitted* evidence from which a jury could have determined that (1) Balames insisted upon immediately closing the restructured debt transaction despite Ginn's advice to wait until he could review the documents and (2) Balames directed Ginn to stop working on the case immediately after the closing. Moreover, even if Ginn's attorney was wrong that Balames' negligence was a relevant consideration after the court directed a verdict on Ginn's contributory negligence defense, he did not refer to evidence in his closing argument that he knew to be irrelevant.

But Ginn was not wrong in thinking that the evidence was relevant. Instead, the problem was the court's conclusion that Balames had no duty to protect his own interests in the closing and therefore could not be a proximate cause of his own injury.

[6,7] 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

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[4] *Harman v. Swanson*, 169 Neb. 452, 454, 100 N.W.2d 33, 35 (1959). Accord, *Quinlan v. City of Omaha*, 203 Neb. 814, 280 N.W.2d 652 (1979); *DeVries v. Rix*, 203 Neb. 392, 279 N.W.2d 89 (1979); *Gate City Co. v. Douglas County*, 135 Neb. 531, 282 N.W. 532 (1938).

[5] See *Greenberg v. Fireman's Fund Ins. Co.*, 150 Neb. 695, 35 N.W.2d 772 (1949).

attorney's neglect of a reasonable duty, and (3) the attorney's negligence was a proximate cause of the client's loss.[6] So a client cannot recover in a legal malpractice case when the client's own conduct caused the injury.[7] As relevant here, courts have held that a client cannot recover for malpractice in the following circumstances: (1) when the client failed to follow the attorney's reasonable advice[8]; (2) when the client directed the attorney's actions in a matter and the attorney acted in accordance with the client's instruction[9]; and (3) when the client misrepresented material facts upon which the attorney relied.[10]

[8-10] We have similarly held that a plaintiff's contributory negligence is a defense in a malpractice action when it contributed to the professional's inability to meet the standard of care and was a proximate cause of the plaintiff's injury.[11] We have explained that tort principles govern a legal malpractice action.[12] And we upheld an affirmative defense under the doctrine of avoidable consequences, which bars a plaintiff's recovery for those damages that the plaintiff could have avoided by reasonable efforts.[13] So we agree that a client's contributory negligence may be a defense in an appropriate legal malpractice action. And there was evidence from which a reasonable fact finder could have found that Balames prevented Ginn from meeting the standard of care, and that his

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[6] See *Harris v. O'Connor*, 287 Neb. 182, 842 N.W.2d 50 (2014).

[7] See, generally, Annot., 10 A.L.R.5th 828 (1993).

[8] See, e.g., *Ott v. Smith*, 413 So. 2d 1129 (Ala. 1982); *W. Fiberglass v. Kirton, McConkie etc.*, 789 P.2d 34 (Utah App. 1990).

[9] See, e.g., *Boyd v. Brett-Major*, 449 So. 2d 952 (Fla. App. 1984); *Grenz v. Prezeau*, 244 Mont. 419, 798 P.2d 112 (1990).

[10] See, e.g., *Blackstock v. Kohn*, 994 S.W.2d 947 (Mo. 1999); *Martinson Bros. v. Hjellum*, 359 N.W.2d 865 (N.D. 1985).

[11] See, *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990); *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

[12] See *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006).

[13] See *id.*

conduct was a proximate cause of his own injury, by insisting on proceeding with the closing when he knew that Ginn had not reviewed the documents.

[11] Although we do not agree with the court's directed verdict on contributory negligence, we agree that at trial, its ruling precluded Ginn from arguing that defense to the jury. And a trial court has discretion to determine whether an attorney's closing argument exceeds the legitimate scope of the issues.[14] But even within those parameters, the court erred in concluding that Ginn's repeated references to Balames' negligence were prejudicial misconduct. Balames' negligence was also relevant to the causation element of his malpractice claim.

Frequently, a client's negligence in a legal malpractice case is more relevant to negating the proximate causation element of the claim than to showing that the plaintiff's negligence was a contributing cause of the plaintiff's injury:

> Most of the earlier decisions, which purported to involve contributory negligence, instead concerned acts or omissions by the client that demonstrated or explained why the attorney was not negligent. Such decisions do not involve contributory negligence, since the defense presupposes negligence by the attorney and precludes or reduces recovery if the client's negligence also was a contributing or proximate cause. Thus, a jury instruction to deny recovery if the plaintiff's negligence was the proximate cause of the damage concerns causation, not contributory negligence.[15]

Here, Ginn specifically alleged that Balames' own negligence *or* contributory negligence barred his claim. So even if the court had correctly directed a verdict for Balames on Ginn's contributory negligence defense, it failed to recognize that the same evidence was relevant to proving that Ginn did not cause Balames' injury.

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[14] See, e.g., Jacob A. Stein, Closing Argument § 16 (2001); 75A Am. Jur. 2d *Trial* § 453 (2007).

[15] 3 Ronald E. Mallen & Allison Martin Rhodes, Legal Malpractice § 22:2 at 104-05 (2015).

Equally important, the court erred in concluding that plain error permeated the proceedings because it did not instruct the jury that Ginn was liable for malpractice as a matter of law for failing to complete the transaction for Balames. Ginn correctly argues that questions of fact would have precluded a directed verdict on that issue.

[12,13] 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.[16] In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.[17] Viewing the evidence in the light most favorable to Ginn, the jury could have reasonably determined Balames knew that Ginn had not reviewed the transaction documents and insisted on proceeding with the closing despite that knowledge. Under Ginn's version of the facts, Balames both ignored Ginn's advice and directed his actions.

[14,15] Balames admitted to being pressured by his bank to complete the transaction, and he insisted upon getting the documents to the bank as soon as humanly possible. Ginn's evidence supported a reasonable inference that because Balames and his business associates had personally guaranteed the loan, they had an immediate need to show the bank that they had renegotiated the debt with Banopu. The crucial point here is that a client has the ultimate authority to determine the objective of a legal representation.[18] Of course, an attorney should make reasonable efforts to explain the legal consequences of a course of conduct that a client insists upon taking.[19] Yet, evidence regarding Ginn's advisement raised a question of fact whether Ginn had breached a duty of care. That is, if the jury determined that Balames insisted upon closing without Ginn's review, whether Ginn's advisements

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[16] *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012).

[17] See *id*.

[18] See Neb. Ct. R. of Prof. Cond. § 3-501.2(a) (rev. 2008).

[19] See Neb. Ct. R. of Prof. Cond. §§ 3-501.2(f) (rev. 2008) and 3-501.4.

were sufficient to inform Balames of the potential consequences was a question of fact.

[16,17] In other words, a question of fact existed whether Ginn breached a duty to advise Balames because it was reasonably foreseeable that Balames would not understand that he must check the transaction documents for signatures.[20] Because tort principles govern,[21] the breach of a duty in a legal malpractice action is a fact-specific inquiry.[22] Only when reasonable people could not disagree about the foreseeability of the injury should a court decide this issue as a matter of law.[23] And in a legal malpractice action, the factual inquiry as to whether an attorney breached a duty of care must be supported by expert opinion:

> Although the general standard of an attorney's conduct is established by law, the question of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct fell below that specific standard is a question of fact. . . . Expert testimony is generally required to establish an attorney's standard of conduct in a particular circumstance and that the attorney's conduct was not in conformity therewith. . . . A conflict of expert testimony regarding an issue of fact establishes a genuine issue of material fact which precludes summary judgment.[24]

Based on the conflicting evidence and expert testimony here, reasonable people could have disagreed whether Ginn's advisement to Balames was insufficient because it was foreseeable Balames would fail to grasp that a potential problem could be the absence of signatures. Ginn's expert specifically testified that Ginn had reasonably advised Balames things could go wrong because Ginn could not review the

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[20] See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[21] See *Borley Storage & Transfer Co., supra* note 12.

[22] See *A.W., supra* note 20.

[23] *Id.*

[24] *Guinn v. Murray*, 286 Neb. 584, 608-09, 837 N.W.2d 805, 824 (2013) (citations omitted).

documents. And the expert believed Ginn's advice was particularly sufficient because of Balames' experience in these transactions and because checking for signatures required no legal expertise.

In our view, Ginn correctly argued that Balames' understanding of Ginn's warning must be assessed in light of his experience in such transactions generally and his dependence on Ginn's guidance.[25] And there was evidence from which the jury could have determined that Balames understood the importance of checking for signatures because Ginn testified that Balames told him the bank had received signed documents. If the jury believed that Balames insisted on proceeding with the closing despite an adequate advisement that things could go wrong and an understanding that he should check for signatures, then Balames was acting of his own accord and not depending upon Ginn's advice. In that circumstance, Ginn did not breach a duty to advise and Balames' failure to adequately review the documents was the sole proximate cause of his injury.

[18,19] Evidence that Balames told Ginn the bank had received signed documents, if believed, was also relevant to whether Ginn had a duty to check the documents for signatures when he returned from his vacation. It is true that upon the termination of a legal representation, a lawyer should take steps to the extent reasonably practicable to protect a client's interests.[26] But if the jury believed Ginn's testimony that Balames told him the documents were signed, then Ginn was entitled to assume the truth of this statement. As explained, a client cannot recover for legal malpractice when the attorney has relied on the client's misrepresentations.

In sum, because there were genuine issues of material fact that precluded judgment as a matter of law for Balames, the court erred in reasoning that it should have directed a verdict that Ginn was liable for malpractice as a matter of law. We refuse to hold that Ginn is liable for malpractice even if he proved that his client rejected his advice, alleviated his

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[25] See, e.g., *Scognamillo v. Olsen*, 795 P.2d 1357 (Colo. App. 1990).

[26] See Neb. Ct. R. of Prof. Cond. § 3-501.16(d).

concerns about not following his advice, and terminated his services with instructions not to do further work on the matter for which he was hired.

[20] When the jury returns a general verdict for one party, a court presumes that the jury found for the successful party on all issues raised by that party and presented to the jury, particularly when the opposing party did not ask the court to give the jury a special verdict form or require the jury to make special findings.[27] This is true both for Ginn's failure-of-proof defense and his statute of limitations defense which barred Balames' recovery even if he proved his malpractice claim. Because the court erred in concluding that plain error permeated the trial, this presumption controlled.

CONCLUSION

We conclude that the court abused its discretion in sustaining Balames' motion for a new trial. The court erred in failing to recognize that evidence of Balames' negligence was relevant to whether Ginn caused Balames' injury, which was a question of fact involving conflicting evidence and expert opinion.

The court also erred in concluding that plain error permeated the proceedings because the court did not instruct the jury that Ginn was liable for malpractice as a matter of law. The evidence raised questions of fact whether Ginn breached a duty to advise Balames of adverse consequences or a duty to take reasonable steps to protect Balames' interests even after Balames terminated Ginn's services. And the jury could have drawn the following inferences from Ginn's evidence:

- Balames insisted upon immediately proceeding with the closing, despite Ginn's advice to wait and offer to review the documents while he was on vacation;
- Ginn reasonably advised Balames that something could go wrong if Balames proceeded without Ginn's review because Balames understood the guarantors' signatures must be on the transaction documents;
- Ginn relied on Balames' statement that the bank had received signed transaction documents.

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[27] *Golnick v. Callender, ante* p. 395, 860 N.W.2d 180 (2015).

If the jury believed Ginn's version of the facts, then Ginn did not breach a duty to ensure that the documents were signed before or after the closing. Instead, Balames' injury was caused by his failure to follow Ginn's advice, his failure to review the documents for the required signatures, and his misrepresentation to Ginn that the documents were signed.

Because the court incorrectly concluded that plain error permeated the trial, we presume that the jury's general verdict for Ginn shows it found for him on all the submitted issues. Those issues included (1) whether Ginn breached a duty of care, (2) whether Balames' negligence was the sole proximate cause of his own injury, and (3) whether the statute of limitations for malpractice claims barred Balames' recovery even if he proved his claim. Because we presume that the jury determined these issues in Ginn's favor, we vacate the court's judgment and remand with directions for it to reinstate the judgment for Ginn.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

CHAD P. JOHNSON, APPELLANT AND CROSS-APPELLEE, V. CHRIS M. NELSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEWART S. MINNICK, DECEASED, ET AL., APPELLEES AND CROSS-APPELLANTS.

861 N.W.2d 705

Filed April 17, 2015. No. S-14-049.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Jurisdiction: Appeal and Error.** When reviewing cross-motions for summary judgment, an appellate court acquires jurisdiction over

both motions and may determine the controversy that is the subject of those motions; an appellate court may also specify the issues as to which questions of fact remain and direct further proceedings as the court deems necessary.

4. **Specific Performance: Real Estate: Contracts.** The equitable remedy of specific performance regarding a contract for the sale of real estate may be granted where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligation, free from overreaching fraud and unfairness, and where the remedy at law is inadequate.
5. **Contracts: Specific Performance: Proof.** Before a court may compel specific performance, there must be a showing that a valid, legally enforceable contract exists. The burden of proving a contract is on the party who seeks to compel specific performance.
6. **Contracts: Insurance: Public Policy.** At common law, life insurance policies issued to a party not having an insurable interest in the life of an insured are considered a wager on the life of another and therefore void as being against public policy.
7. **Public Policy: Words and Phrases.** Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.
8. **Contracts: Public Policy.** A contract which is clearly contrary to public policy is void.
9. ____: ____. The determination of whether a contract violates public policy presents a question of law.
10. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case; only a party who has standing may invoke the jurisdiction of a court.
11. **Standing.** It is the party initiating the suit who must meet the standing requirement, not a defendant.
12. **Courts: Contracts: Public Policy.** The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Frontier County: DAVID URBOM, Judge. Affirmed.

Nathaniel J. Mustion, of Mousel, Brooks, Garner & Schneider, P.C., L.L.O., and Victor E. Covalt III and Adam R. Little, of Ballew, Covalt & Hazen, P.C., L.L.O., for appellant.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

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

STEPHAN, J.

In 2007, Chad P. Johnson and Stewart S. Minnick entered into a written agreement whereby, after Minnick's death, Johnson would purchase farmland he had been renting from Minnick and Minnick's sister for a specified price. The purchase price was to be funded by an insurance policy owned by Johnson on Minnick's life. Following Minnick's death in 2012, the proceeds of the policy were paid to Johnson. He tendered them pursuant to the agreement, but the personal representative of Minnick's estate refused to consummate the sale.

Johnson then brought an action for specific performance and other relief. The district court for Frontier County held the purchase agreement was unenforceable, because (1) Minnick lacked authority to enter into it on behalf of his sister and (2) the agreement provided no means of allocating the purchase price to only that portion of the property which Minnick owned in his own right. The court also held that Johnson's claim for damages was time barred and dismissed a counterclaim filed by the personal representative and Minnick's heirs seeking equitable distribution of the insurance proceeds that had been paid to Johnson. Although our reasoning differs from that of the district court, we affirm its judgment.

BACKGROUND

FACTS

Since 1997, Johnson has farmed land owned by Minnick and Minnick's sister Mary E. Nelson pursuant to an oral lease agreement. The lease terms required Johnson to pay cash rent for pastureland and to pay a share of the crop on the remaining land. The land is made up of two contiguous tracts. What is referred to in the record as "Tract 1" was owned solely by Minnick, and what is referred to as "Tract 2" was owned by Minnick and Nelson as tenants in common. Minnick's family had a long association with the land. Johnson always dealt directly with Minnick on matters pertaining to both tracts; Nelson had no direct involvement.

In the fall of 2006, Johnson met with an insurance agent and discussed taking out a life insurance policy on Minnick and then using the proceeds to purchase the farmland after Minnick's death. The agent was Johnson's cousin. The agent advised Johnson that he would need an insurable interest in Minnick's life and recommended that Johnson and Minnick enter into a buyout agreement. Minnick agreed to the plan and worked with the agent to find a company willing to issue a $500,000 insurance policy on his life. Eventually, an application for life insurance signed by both Johnson and Minnick was submitted to a life insurance company and a policy was issued with an effective date of March 12, 2007. Johnson was the owner of the policy, Minnick was the named insured, and Johnson and his wife were the primary and secondary beneficiaries, respectively. On the effective date of the policy, Minnick was 80 years old.

The buyout agreement is dated January 16, 2007. It specifically provides that Johnson will purchase life insurance on Minnick; that on Minnick's death, Johnson will pay the proceeds of the policy to the personal representative of Minnick's estate; and that the estate shall then transfer the farmland to Johnson. The agreement is signed by Johnson, Minnick, and "Mary Nelson by Stewart Minnick, P.O.A."

Minnick died in January 2012. He never married, and had no surviving children. Nelson was his only surviving sibling. His will, executed in 2002, designates Nelson's three adult children as residual beneficiaries.

Prior to Minnick's death, Johnson paid approximately $170,000 in premiums on the life insurance policy. After Minnick died, the insurer paid the policy proceeds of $500,000 to Johnson. Johnson then tendered this amount to the personal representative of Minnick's estate and requested conveyance of the farmland pursuant to the buyout agreement. The personal representative refused to convey the farmland.

Nelson testified that she and Minnick discussed the possibility of selling the farmland on only one occasion, in late 2006, and that she told Minnick at that time she was unwilling to sell. She denied giving Minnick either verbal permission or

a written power of attorney authorizing him to enter into the agreement with Johnson on her behalf. There is no power of attorney in the record, and the parties agree that Minnick had no authority to enter into the agreement on behalf of Nelson. During his lifetime, Minnick did not disclose the agreement to Nelson, her children, or the attorney who drew his will and regularly handled his financial affairs.

Procedural History

Following Minnick's death, the personal representative published a notice to creditors stating that claims against the estate were to be filed by April 17, 2012. On March 21, Johnson filed a claim against Minnick's estate in the county court for Furnas County, seeking specific performance of the buyout agreement. On April 2, the personal representative mailed a notice of disallowance of the claim to Johnson.

On July 2, 2012, Johnson filed this action in the district court for Frontier County seeking specific performance of the buyout agreement and other relief. In the operative complaint, he alleged that when the agreement was executed in 2007, the farmland was worth approximately $450,000, and that the farmland was worth $1.25 million at the time of Minnick's death in 2012. The original defendants were Nelson and the personal representative. Nelson's three children later intervened in their individual capacities. For purposes of clarity, we shall refer to the personal representative, Nelson, and her children collectively as "the estate."

In his amended complaint, Johnson alleged that Minnick owned tract 1 in fee simple and owned an undivided one-half interest in tract 2. Johnson acknowledged that when Minnick executed the buyout agreement, he lacked the requisite power of attorney to convey Nelson's interest. Johnson further alleged that an award of damages would not adequately compensate him for the personal representative's "refusal to convey that portion of the ***Real Estate*** that . . . Minnick had the power to contract to sell." Johnson sought specific performance of the buyout agreement; he asked the court to require the personal representative to convey to him title to

tract 1 and title to "Minnick's undivided one-half (1/2) interest" in tract 2. In separate causes of action, Johnson sought reformation of the contract and damages for negligent and fraudulent misrepresentation.

The estate filed an answer alleging that the buyout agreement was void for various reasons, including that Johnson lacked an insurable interest in Minnick's life. It also alleged that Johnson's claim for damages was barred by his failure to file a timely claim as required by Neb. Rev. Stat. § 30-2485 (Cum. Supp. 2014). In addition, it asserted counterclaims for slander of title and equitable distribution of the insurance proceeds.

Johnson moved for partial summary judgment on his specific performance claim, and the estate moved for summary judgment in its favor with respect to all of Johnson's claims. In overruling Johnson's motion for summary judgment, the district court rejected the estate's claim that the buyout agreement was void as against public policy because Johnson had no insurable interest in Minnick's life, reasoning the estate had no standing to raise that claim. The court also rejected the estate's claims that the buyout was unenforceable as an "agreement to agree" or as an unreasonable restraint on alienation of land. The court determined, however, that the buyout agreement could not be specifically performed, because there was no means of apportioning the $500,000 purchase price between Minnick's interest in the land and Nelson's interest in the land. Further, the court determined that Johnson's claim for damages was time barred by § 30-2485(a)(1), because he filed this action more than 60 days after the notice of disallowance of claim was mailed.

The district court also dismissed the estate's counterclaim for equitable distribution, concluding that only the insurer can assert a claim against a beneficiary based upon a lack of insurable interest. The court ultimately entered summary judgment for the estate on all of Johnson's claims, and the estate dismissed its counterclaim for slander of title.

Johnson filed this timely appeal, and the estate cross-appealed. We granted the estate's petition to bypass.

ASSIGNMENTS OF ERROR

Johnson assigns, restated and summarized, that the district court erred (1) in failing to grant specific performance of the buyout agreement and (2) in dismissing his claim for damages.

On cross-appeal, the estate assigns, restated and summarized, that the district court erred in (1) failing to rule that the buyout agreement was an unreasonable restraint on alienation, an unenforceable agreement to agree, or void due to the absence of an insurable interest, and (2) holding that it could not assert an equitable claim to the insurance proceeds paid to Johnson based upon a claim that Johnson lacked an insurable interest in Minnick's life.

STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1]

[2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[2]

[3] When reviewing cross-motions for summary judgment, an appellate court acquires jurisdiction over both motions and may determine the controversy that is the subject of those motions; an appellate court may also specify the issues as to which questions of fact remain and direct further proceedings as the court deems necessary.[3]

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[1] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015); *Southwind Homeowners Assn. v. Burden*, 283 Neb. 522, 810 N.W.2d 714 (2012).

[2] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015); *Brothers v. Kimball Cty. Hosp.*, 289 Neb. 879, 857 N.W.2d 789 (2015).

[3] *Chicago Lumber Co. of Omaha v. Selvera*, 282 Neb. 12, 809 N.W.2d 469 (2011).

ANALYSIS

Specific Performance

[4,5] The equitable remedy of specific performance regarding a contract for the sale of real estate may be granted where a valid, binding contract exists which is definite and certain in its terms, mutual in its obligations, free from overreaching fraud and unfairness, and where the remedy at law is inadequate.[4] Before a court may compel specific performance, there must be a showing that a valid, legally enforceable contract exists.[5] The burden of proving a contract is on the party who seeks to compel specific performance.[6]

The estate alleged that specific performance was improper for four reasons: (1) The buyout agreement was simply an agreement to agree, (2) the buyout agreement was an unreasonable restraint on alienation, (3) there was no means of abating the purchase price to account for Nelson's interest, and (4) the buyout was void because Johnson lacked an insurable interest in Minnick's life. The district court determined the buyout was not simply an agreement to agree and was not an unreasonable restraint on alienation. It also concluded that because there was no means of abating the purchase price to account for Nelson's interest, the buyout agreement could not be enforced by ordering specific performance. The court refused to decide whether Johnson lacked an insurable interest in Minnick's life, reasoning the estate lacked standing to raise that defense. Both Johnson and the estate challenge the district court's ruling on specific performance.

We first address the estate's claim that the buyout was void because Johnson lacked an insurable interest in Minnick's life.

[6-9] At common law, life insurance policies issued to a party not having an insurable interest in the life of an insured are considered a wager on the life of another and therefore

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[4] See *Mohrlang v. Draper*, 219 Neb. 630, 365 N.W.2d 443 (1985).

[5] *Satellite Dev. Co. v. Bernt*, 229 Neb. 778, 429 N.W.2d 334 (1988).

[6] *Id.*

void as being against public policy.[7] In contract and insurance law, public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.[8] A contract which is clearly contrary to public policy is void.[9] The determination of whether a contract violates public policy presents a question of law.[10]

The district court rejected this defense on the ground that the estate did not have standing to question Johnson's insurable interest in Minnick's life. In reaching this conclusion, it relied on *Ryan v. Tickle*,[11] an action brought by the widow of the insured and the executrix of his estate to recover the proceeds of a life insurance policy taken out by the insured's former business partner and paid to the partner upon the insured's death. The issue was whether the executrix could sue the former partner to recover the policy proceeds, based on a claim that he lacked an insurable interest in the life of the insured. We concluded that the widow/executrix had "no standing or right to bring [the] lawsuit."[12]

[10,11] In the estate's cross-appeal, it argues that the district court erred in concluding that *Ryan* precluded it from asserting that the buyout agreement was void as a defense to Johnson's claim for specific performance. It argues that *Ryan*

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[7] See, *Warnock v. Davis*, 104 U.S. (14 Otto) 775, 26 L. Ed. 924 (1881); *Chamberlain v. Butler*, 61 Neb. 730, 86 N.W. 481 (1901). See, also, 28 Bertram Harnett & Irving I. Lesnick, Appleman on Insurance 2d, Life Insurance § 174.01[A] (2006).

[8] *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002); *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002).

[9] *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010).

[10] *Law Offices of Ronald J. Palagi v. Howard*, 275 Neb. 334, 747 N.W.2d 1 (2008); *American Fam. Mut. Ins. Co. v. Hadley, supra* note 8; *Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436 (1998).

[11] *Ryan v. Tickle*, 210 Neb. 630, 316 N.W.2d 580 (1982).

[12] *Id.* at 634, 316 N.W.2d at 582.

involved an issue of standing to seek affirmative relief, not the assertion of a defense. Standing is a jurisdictional component of a party's case; only a party who has standing may invoke the jurisdiction of a court.[13] In *Community Dev. Agency v. PRP Holdings*,[14] we stated that it is the party initiating the suit who must meet the standing requirement, not a defendant. Other jurisdictions hold likewise. For example, the Colorado Supreme Court has observed that "[t]raditional concerns surrounding standing are not implicated when a defendant's standing is challenged; a defendant may assert an affirmative defense in response to a complaint, which asserts that the defendant has an interest in the action."[15] Similarly, the Idaho Supreme Court has held that "'[s]tanding is a subcategory of justiciability, and the standing inquiry is focused on the party seeking relief.'"[16]

We acknowledge that there is language in *Ryan* which, taken out of context, could suggest that a party other than the insurer cannot raise the lack of an insurable interest under any circumstances. For example, we stated in *Ryan* that there was established law in other jurisdictions that "only the insurer can raise the objection of want of an insurable interest."[17] But, as noted, *Ryan* involved a claim brought against a beneficiary to recover policy proceeds on the ground that the beneficiary lacked an insurable interest, as did *Secor v. Pioneer Foundry*,[18] the principal case on which *Ryan* relied. Because *Ryan* dealt with a challenge to insurable interest only in the context of standing to assert a claim to insurance proceeds,

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[13] *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

[14] *Community Dev. Agency v. PRP Holdings*, 277 Neb. 1015, 767 N.W.2d 68 (2009).

[15] *Mortgage Investments v. Battle Mountain*, 70 P.3d 1176, 1182 (Colo. 2003).

[16] *Stonebrook Const. v. Chase Home Finance*, 152 Idaho 927, 930, 277 P.3d 374, 377 (2012), quoting *Taylor v. AIA Services Corp.*, 151 Idaho 552, 261 P.3d 829 (2011).

[17] *Ryan, supra* note 11, 210 Neb. at 634, 316 N.W.2d at 582.

[18] *Secor v. Pioneer Foundry*, 20 Mich. App. 30, 173 N.W.2d 780 (1969).

we do not read it as precluding the assertion of the estate's defense that the buyout agreement is unenforceable because its funding mechanism is an insurance policy on the life of one in whom the owner and beneficiary of the policy had no insurable interest.

The question, then, is whether the defense has merit. In Nebraska, an "[i]nsurable interest, in the matter of life and health insurance, exists when the beneficiary because of relationship, either pecuniary or from ties of blood or marriage, has reason to expect some benefit from the continuance of the life of the insured."[19] Johnson and Minnick were not related by blood or marriage, so the question of whether Johnson had an insurable interest in Minnick's life turns on their "pecuniary" relationship.

This court has not decided the type of pecuniary or economic relationship which may form the basis of an insurable interest in the context of life insurance. Some courts have held that one business partner may have an insurable interest in the life of another business partner where there is an expectation of pecuniary benefit from the continued life of the insured partner.[20] But Johnson acknowledged that he and Minnick were not business partners. Courts have also held that a business entity may have an insurable interest in the life of a key employee whose death would adversely affect the business.[21] But there was no employment relationship between Johnson and Minnick. Under some circumstances, a creditor has been held to have an insurable interest in the life of a debtor.[22] But the record reflects no such relationship between Johnson and Minnick.

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[19] Neb. Rev. Stat. § 44-103(13)(b) (Reissue 2010).

[20] See, e.g., *Graves v. Norred*, 510 So. 2d 816 (Ala. 1987); *Ridley v. VanderBoegh*, 95 Idaho 456, 511 P.2d 273 (1973).

[21] See, e.g., *U.S. v. Supplee-Biddle Co.*, 265 U.S. 189, 44 S. Ct. 546, 68 L. Ed. 970 (1924); *Murray, Exrs., v. G. F. Higgins Co.*, 300 Pa. 341, 150 A. 629 (1930); *Mutual Life Ins. Co. v. Board*, 115 Va. 836, 80 S.E. 565 (1914).

[22] See, e.g., *Cosentino v. William Penn Life Ins. Co. of New York*, 224 A.D.2d 777, 636 N.Y.S.2d 943 (1996).

At the time the policy issued, the relationship between Johnson and Minnick was that of (1) landlord and tenant under an oral farm lease and (2) parties to the buyout agreement, which could be performed only after Minnick's death. A similar relationship was the subject of a Maryland case, *Beard v. American Agency*.[23] There, a farmer who leased land and had an option to purchase it after the owner's death purchased an insurance policy on the life of the owner, planning to use the proceeds to purchase the land after the owner died. After the landowner's death, the insurer sought a declaratory judgment that the farmer had no insurable interest in the life of the landowner and that the policy was therefore void. A Maryland statute defined an insurable interest in the life of an unrelated person as "'a lawful and substantial economic interest in having the life . . . of the individual insured continue, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death'"[24] of such person. The court reasoned that this standard was not met, because the farmer would not receive any particular benefit from the continued life of the landlord; at best he would remain a tenant on the land while the landlord was alive, and would realize an economic benefit only after the landowner died. And the court held that the relationship between the farmer and the landowner could not be considered a partnership, noting that payment of rent, whether in the form of cash or a share of the farm's profits, would not create an inference supporting the existence of a partnership.

We need not decide whether a landlord-tenant relationship with respect to agricultural property could ever form the basis of an insurable interest. We conclude only that in this case, as in *Beard*, it did not. The agent who procured the policy for Johnson described the insurable interest as "guaranteeing a buyer for . . . Minnick and his sister at a price agreeable to both parties, while at the same time ensuring . . . Johnson and his family the opportunity and resources to purchase this farm property essential to continuing their farm business." But

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[23] *Beard v. American Agency*, 314 Md. 235, 550 A.2d 677 (1988).

[24] *Id.* at 245, 550 A.2d at 681.

this does not meet the requirement of § 44-103(13)(b) that for there to be an insurable interest, the beneficiary must have "reason to expect some benefit from the continuance of the life of the insured." Like the farmer in *Beard,* Johnson had no reason to expect any pecuniary benefit from the continuance of his landlord's life. As long as Minnick lived and was willing to rent the land to Johnson, Johnson would remain a tenant on the land. The only difference in the relationship after the execution of the buyout agreement was that Johnson had the financial obligation to pay premiums on the life insurance policy. The longer Minnick lived, the more premiums Johnson had to pay to keep the policy in force. Under this arrangement, Johnson's pecuniary interest would not benefit from the continuation of Minnick's life; to the contrary, it would benefit from Minnick's death before additional premiums came due. In effect, Johnson was gambling that Minnick would die sooner rather than later. This is precisely the reason why an insurance policy on the life of one in whom the owner and beneficiary of the policy lacks an insurable interest is void as against public policy.[25]

[12,13] The insurance policy on Minnick's life was an integral component of the buyout agreement which Johnson sought to enforce after Minnick's death. The agreement was the reason for the policy, and the policy was the exclusive financing mechanism for the agreement. The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt.[26] We are satisfied that this is one of those cases. We conclude that the buyout agreement was void as against public policy because it incorporated a financing mechanism consisting of a life insurance policy in which the owner and beneficiary lacked an insurable interest in the life of the insured. We therefore agree with the district court that the buyout agreement was not specifically

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[25] See sources cited *supra* note 7.

[26] *Hearst-Argyle Prop. v. Entrex Comm. Servs.*, 279 Neb. 468, 778 N.W.2d 465 (2010); *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

enforceable as a matter of law, although for different reasons than those articulated by the district court.[27] Because we reach this determination, we need not address the other assignments of error relating to specific performance; an appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[28]

Claim for Damages

Johnson argues that the district court erred in determining that his alternative claim for damages based on theories of breach of contract, fraudulent misrepresentation, and negligent misrepresentation was time barred by § 30-2485(a)(1). That statute provides that all claims against a decedent's estate which arose before the death of the decedent are barred unless presented within 2 months after the date of the first publication of notice to creditors. Under Neb. Rev. Stat. § 30-2486 (Reissue 2008), claims against a decedent's estate may be presented either by filing a written statement with the clerk of the court[29] or by commencing an action against the personal representative in any court having subject matter jurisdiction and personal jurisdiction.[30] If the claim is presented by filing a written statement with the clerk of the court, then "no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance."[31]

Here, notice to creditors was first published on February 2, 2012, and creditors were required to file claims by April 17. Johnson filed a claim with the clerk of the Furnas County Court on March 21. A notice of disallowance of his claim was mailed to him on April 2. The notice specifically stated that failing to commence a proceeding within 60 days after the mailing of the notice would forever bar the claim.

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[27] See *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

[28] *Whitesides v. Whitesides*, *ante* p. 116, 858 N.W.2d 858 (2015); *Millennium Laboratories v. Ward*, 289 Neb. 718, 857 N.W.2d 304 (2014).

[29] § 30-2486(1).

[30] § 30-2486(2).

[31] § 30-2486(3).

This action was filed on July 2, 2012, which was outside the 60-day period specified in § 30-2486(3), and for that reason, the district court concluded it was time barred. In his brief, Johnson asserts that he filed and served a petition for allowance of claim in the county court on April 10, 2012. He concedes this document does not appear in the record, but argues its existence "can, and should have been, inferred from the record."[32] Specifically, he contends the existence of this document can be inferred because the attorney for the personal representative testified that he prepared a motion to summarily deny a claim on May 21, thus creating the inference that there was a claim to deny.

We find no merit in this argument. If such a document existed, Johnson had the opportunity to offer it into evidence at the summary judgment hearing. Even though Johnson as the party opposing a motion for summary judgment is entitled to all reasonable inferences in his favor,[33] he cannot avoid summary judgment on a record that clearly demonstrates his claim was time barred by speculating that he may have actually filed in time in another court.

For completeness, we note that Johnson also argues that the district court lacked subject matter jurisdiction to decide whether his claim for damages was timely filed, because the probate court has exclusive jurisdiction over claims against the estate. This argument is also without merit. Johnson invoked the jurisdiction of the district court to adjudicate his claim for damages, and the district court clearly had subject matter jurisdiction to interpret and apply the nonclaim statutes in order to adjudicate the defense that the action was time barred.

Counterclaim for Insurance Proceeds

The estate counterclaimed for "Equitable Distribution of [the] Insurance Proceeds," alleging that because Johnson

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[32] Brief for appellant at 27.

[33] See *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014).

lacked an insurable interest in Minnick's life, Minnick's estate and heirs "are the proper beneficiaries of any insurance upon his life." The estate prayed for judgment against Johnson in the amount of $500,000, the amount of the life insurance policy proceeds.

The district court dismissed this counterclaim, reasoning it was barred by our holding in *Ryan v. Tickle*.[34] In its cross-appeal, the estate contends this was error and asks us to impose a constructive trust on the life insurance proceeds paid to Johnson in favor of the estate.

This claim is barred by our holding in *Ryan*, because the estate lacks standing to assert the claim against Johnson. But the estate asks that we overrule *Ryan*, because the "only effective means of enforcing the prohibition against wagers on an individual's life is to remove the economic incentive for such wagers by recognizing that the estate and heirs of the deceased have standing to challenge the payment of policy proceeds to a beneficiary lacking an insurable interest."[35]

Although *Ryan* is consistent with case law in other jurisdictions,[36] the reasoning on which it and other similar cases relies has been questioned. The insurable interest doctrine "evolved to protect the *public* from wagering contracts and incentives to the destruction of property or lives."[37] Nothing about the doctrine was meant to protect the interests of insurance companies; thus, for the courts to allow only the insurer to raise the issue seems incongruent. The rule that only the insurer can raise a lack of an insurable interest is also somewhat at odds with a corollary rule, also followed by a majority of jurisdictions, that an insurer, by entering into a life

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[34] *Ryan v. Tickle, supra* note 11.

[35] Reply brief for appellees at 4.

[36] See, generally, 28 Harnett & Lesnick, *supra* note 7, § 174.10[A]; 3 Steven Plitt et al., Couch on Insurance 3d §§ 41:5 and 41:6 (2011).

[37] Peter Nash Swisher, *The Insurable Interest Requirement for Life Insurance: A Critical Reassessment*, 53 Drake L. Rev. 477, 532 (2005) (emphasis supplied), quoting Robert H. Jerry II, Understanding Insurance Law § 47[b] (3d ed. 2002).

insurance contract with someone who lacks an insurable interest in the insured, does not waive the lack of an insurable interest defense by waiver or estoppel, or even by an incontestability clause in the contract.[38] Courts adopt this rule by reasoning that the insurable interest doctrine is intended to protect the public, not the insurer, and that thus, the insurer cannot waive something designed to protect the public.[39] One commentary notes that as a general rule, "the social goal underlying the insurable interest requirement would be better served by allowing the estate of the insured to recover the proceeds of a policy issued without insurable interest than by continuing to allow that issue to be raised by the insurer as a defense."[40]

A few state courts have departed from the majority position and held that an estate has standing to challenge a beneficiary's right to retain insurance proceeds where the beneficiary lacked an insurable interest in the life of the deceased insured.[41] And in a number of states, the standing of an estate to sue for recovery of insurance proceeds from a beneficiary who lacked an insurable interest has been conferred by statute.[42] For example, South Dakota has statutes which provide that if a beneficiary lacking an insurable interest receives insurance benefits, "the individual insured or his executor or administrator, as the case may be, may maintain an action to recover such benefits from the person so receiving them."[43] And Oklahoma statutes provide "in substance that if anyone takes out a contract of insurance . . . on a person in whom it does not have an

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[38] See 3 Plitt et al., *supra* note 36, § 41:7.

[39] *Id.* See, *Phillips v. Ins. Co.*, 60 Ohio St. 2d 180, 398 N.E.2d 564 (1979); *Farm Bur. Mut. Ins. Co. of Ark. v. Glover*, 2 Ark. App. 79, 616 S.W.2d 755 (1981).

[40] 28 Harnett & Lesnick, *supra* note 7, § 174.11 at 134.

[41] See, *Tamez v. Certain Underwriters at Lloyd's*, 999 S.W.2d 12 (Tex. App. 1998); *Smith v. Coleman*, 184 Va. 259, 35 S.E.2d 107 (1945); *Tate v. Building Ass'n.*, 97 Va. 74, 33 S.E. 382 (1899).

[42] 28 Harnett & Lesnick, *supra* note 7, § 174.10[B].

[43] S.D. Codified Laws § 58-10-5 (2004). See, also, S.D. Codified Laws § 58-10-3 (2004).

insurable interest, the insured or his representative may maintain a cause of action to recover the proceeds."[44]

We find some merit in the criticism of the rule established in *Ryan* and similar cases in other jurisdictions. But simply overruling *Ryan*, which has been the law in this state for more than 30 years, would not necessarily achieve legal clarity or an equitable result in all instances. For example, the liability of a beneficiary who obtains insurance proceeds in the good faith belief that an insurable interest existed may be different than the liability of one who achieves the same result through fraud or undue influence. In the former instance, recovery of the full amount of the policy proceeds by an estate may constitute a windfall, at least to the extent of premiums paid by the beneficiary. And, depending on the facts, there could be tension with a Nebraska statute which provides that "any money used as a bet or stake in gambling activity . . . shall be forfeited to the state."[45]

We conclude that the better course is not to overrule *Ryan*. We leave to the Legislature the policy questions of whether and under what circumstances an estate of an insured may recover insurance proceeds paid to a beneficiary who lacks an insurable interest in the life of the insured. Accordingly, we conclude that the district court did not err in dismissing the counterclaim.

CONCLUSION

Although our reasoning differs from that of the district court, we conclude that it did not err in dismissing Johnson's claims and the estate's counterclaim. Accordingly, we affirm.

AFFIRMED.

WRIGHT, J., not participating.

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[44] *Tillman ex rel. Estate v. Camelot Music*, 408 F.3d 1300, 1302 (10th Cir. 2005), citing Okla. Stat. Ann. tit. 36, §§ 3601 and 3604(B) (West 1999).

[45] Neb. Rev. Stat. § 28-1111 (Reissue 2008).

MICHAEL J. WILCZEWSKI AND MICHELLE A. WILCZEWSKI, APPELLEES, V. CHARTER WEST NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLANT.

861 N.W.2d 700

Filed April 17, 2015. No. S-14-693.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.
4. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court lacks jurisdiction to entertain appeals from nonfinal orders.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Appeal dismissed.

Jeffrey A. Silver for appellant.

John D. Stalnaker, Robert J. Becker, and Ashley A. Dreyer, of Stalnaker, Becker & Buresh, P.C., for appellees.

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

STEPHAN, J.

Michael J. Wilczewski and Michelle A. Wilczewski filed a civil action for damages in the district court for Douglas County, alleging that Charter West National Bank (Charter West) misrepresented certain facts pertaining to a real estate transaction. Charter West filed a motion to compel arbitration, which the district court denied without prejudice. Charter West appeals from that order. Because we conclude that no final, appealable order has been entered by the district court, we dismiss the appeal.

BACKGROUND

In their complaint, the Wilczewskis allege that they are residents of Douglas County, Nebraska, and that Charter West is a national banking association doing business in Douglas County. The parties' dispute involves real property, located

in Douglas County, which the Wilczewskis purchased from Charter West in 2010. The Wilczewskis allege that Charter West represented that the property would be conveyed free and clear of all liens, but knew that another financial institution had a lien on the property. The Wilczewskis allege Charter West then "manipulated" the language of the deed to reflect that the conveyance was subject to liens of record. They sought damages based upon alternative theories of fraudulent misrepresentation, negligent misrepresentation, common-law fraud, and quantum meruit or unjust enrichment.

Charter West filed a motion to compel arbitration pursuant to the real estate purchase agreement, which provided: "Any controversy or claim between the parties to this Nebraska Purchase Agreement, its interpretation, enforcement or breach, including but not limited to claims arising from tort, shall be settled by binding arbitration . . . ." The Wilczewskis filed an objection asserting that the arbitration clause was void because (1) it failed to comply with Nebraska's enactment of the Uniform Arbitration Act (UAA)[1] and (2) the Federal Arbitration Act (FAA)[2] was inapplicable because the transaction in question did not involve interstate commerce.

The district court denied the motion to compel arbitration without prejudice. The court noted that Charter West contended the dispute was arbitrable under the FAA, which preempted the UAA. Apparently, from the face of the complaint, it further noted that Charter West was a national banking association doing business in Nebraska and that the transaction in question occurred in Nebraska. On the issue of whether the transaction affected interstate commerce so as to trigger the provisions of the FAA, the district court recognized precedent from this and other courts holding that a broad range of commercial transactions fall within the scope of the FAA. It then stated that

> [although] one could naturally assume that the transactions of Charter West (even intrastate), affect interstate

[1] Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2008 & Cum. Supp. 2014).

[2] 9 U.S.C. § 1 et seq. (2012).

> commerce, *I have no evidence before me to that effect*. All I have are statements in the defendant's brief that, "The acceptance of the purchase agreement was done via the internet, the defendant is a National Bank, funds were wired through the banking system."

(Emphasis supplied.) The court specifically stated that it was not deciding whether the arbitration clause in the purchase agreement complied with the UAA or whether Charter West made a timely demand for arbitration. It denied the motion to compel arbitration "without prejudice."

Charter West perfected a timely appeal, and we granted its petition to bypass.

ASSIGNMENTS OF ERROR

Charter West assigns that the district court erred in (1) failing to compel arbitration under the FAA and/or the UAA and (2) deciding the arbitration issue without conducting an evidentiary hearing.

STANDARD OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law.[3] When reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[4]

ANALYSIS

[3,4] Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.[5] That is so even where, as here, no party has raised the issue.[6]

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[3] *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

[4] See *id.*

[5] *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011); *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal.*, 281 Neb. 93, 798 N.W.2d 823 (2011).

[6] See, *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

An appellate court lacks jurisdiction to entertain appeals from nonfinal orders.[7] In this case, we must decide whether the order denying Charter West's motion to compel arbitration without prejudice was a final, appealable order.

The UAA authorizes a party to a judicial proceeding to apply for an order compelling arbitration of the dispute,[8] and further provides that an appeal may be taken from an order denying such an application.[9] But Charter West did not invoke the UAA in its motion to compel arbitration, and the district court specifically stated that it was not deciding issues of arbitrability under the UAA. During oral argument, Charter West's counsel conceded that arbitration could not be compelled under the UAA and that Charter West was relying solely upon the FAA. Thus, the provision of the UAA permitting an appeal from an order denying an application to compel arbitration is inapplicable to this case.

We thus consider whether the order is appealable under Neb. Rev. Stat. § 25-1902 (Reissue 2008), which provides that an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[10] In *Webb v. American Employers Group*,[11] we held that an order denying a motion to compel arbitration under the FAA is a final, appealable order under the second of these categories, because it affects a substantial right and is made during a special proceeding. In reaching this conclusion, we reasoned that such an order affected the moving party's substantial right by preventing it from enjoying the contractual benefit

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[7] *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 3; *Connelly v. City of Omaha, supra* note 6.

[8] § 25-2603.

[9] § 25-2620(a)(1).

[10] *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011); *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

[11] *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

of arbitrating the dispute between the parties as an alternative to litigation.

Subsequently, in *Kremer v. Rural Community Ins. Co.*,[12] we employed the same reasoning in concluding that an order compelling arbitration under the FAA and staying judicial proceedings was a final, appealable order. We concluded that

> [j]ust as an order refusing to compel arbitration diminishes a party's claim that it is entitled to arbitrate, so does an order compelling arbitration diminish a party's claim that it is entitled to litigate in court. These claims cannot be effectively vindicated after the party has been compelled to do that which it claims it is not required to do.[13]

Where enforcement of an arbitration clause is sought pursuant to the FAA, the initial question is whether the contract in which the arbitration clause is contained "'evidenc[es] a transaction involving commerce'" as defined by the FAA.[14] Unlike the orders we considered in *Webb* and *Kremer*, the order we are asked to review in this case did not decide that crucial issue. The district court specifically noted that while it was possible that the transaction affected interstate commerce, it had no evidence upon which it could make that determination. We understand this as a statement by the district court that it could not resolve the arbitration issue solely on the basis of the pleadings and would not regard arguments of counsel as evidence.

The inconclusive nature of the order is reinforced by the fact that it dismissed the motion to compel arbitration "without prejudice." Generally, that phrase means "[w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party . . . ."[15] Simply put, the order makes no determination, one way or another, as to whether the arbitration clause is enforceable under the FAA. Because the order

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[12] *Kremer v. Rural Community Ins. Co., supra* note 3.

[13] *Id.* at 601-02, 788 N.W.2d at 549 (citations omitted).

[14] *Aramark Uniform & Career Apparel v. Hunan, Inc.*, 276 Neb. 700, 704, 757 N.W.2d 205, 209 (2008), quoting 9 U.S.C. § 2.

[15] Black's Law Dictionary 1837 (10th ed. 2014).

does not resolve that issue, it does not affect a substantial right of Charter West and therefore is not a final order under § 25-1902.

We note that it may have been more expedient for the district court to conduct an evidentiary hearing and defer any ruling on the motion to compel arbitration until the parties had an opportunity to present evidence on the issue of whether the real estate transaction involved interstate commerce. But the dismissal of the motion to compel arbitration without prejudice achieved essentially the same result, which was to defer a final determination of the arbitrability of the dispute. On this record, that determination has not yet been made, and therefore, there is no final, appealable order capable of appellate review.

CONCLUSION

For the foregoing reasons, we conclude that we lack jurisdiction to review the order from which this appeal was taken, and we dismiss the appeal.

APPEAL DISMISSED.

CARGILL MEAT SOLUTIONS CORPORATION, APPELLEE, V. COLFAX COUNTY BOARD OF EQUALIZATION, APPELLANT.

861 N.W.2d 718

Filed April 17, 2015. No. S-14-701.

1. **Taxation: Judgments: Appeal and Error.** An appellate court reviews decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Taxation: Appeal and Error.** An appellate court reviews questions of law arising during appellate review of decisions by the Tax Equalization and Review Commission de novo on the record.

4. **Statutes.** Statutory interpretation is a question of law.
5. **Taxation: Equity.** The assessment, levy, and collection of taxes are not equitable proceedings; they necessarily have to be governed by rules, and the taxing power and the taxpayers must comply with these rules.
6. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
8. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
9. **Taxation: Jurisdiction.** County boards of equalization can exercise only such powers as are expressly granted to them by statute, and statutes conferring power and authority upon a county board of equalization are strictly construed.
10. ____: ____. Where a county board of equalization's actions are void, the Tax Equalization and Review Commission lacks jurisdiction over the merits of the appeal.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Edmond E. Talbot III, Special Colfax County Attorney, for appellant.

Timothy L. Moll and Christopher C. Cassiday, of Rembolt Ludtke, L.L.P., for appellee.

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

CASSEL, J.

I. INTRODUCTION

A taxpayer timely filed a 2010 personal property tax return properly listing the taxable property, but the property was not placed on the tax rolls. The primary issue in this appeal is whether in 2013, the Colfax County Board of Equalization (Board) had statutory authority to add the property to the 2010 tax rolls. The Tax Equalization and Review Commission (TERC) considered and rejected two statutory

sources of authority, but the Board assigns error only as to one statute.[1]

Because § 77-1507(1) applies only to real estate and not to personal property, it did not authorize the Board's action. Without supporting statutory authority, the action was void. We therefore affirm TERC's decision reversing and vacating the Board's decision.

II. BACKGROUND

1. Taxation of Personal Property

Under Nebraska law, the owner of personal property must compile a list of all its tangible personal property having a tax situs in Nebraska.[2] The list must be on the forms prescribed by the Department of Revenue's Tax Commissioner and must be filed as a personal property tax return on or before May 1 of each year.[3] A party seeking a personal property exemption shall file a claim on the form and supporting schedules prescribed by the Tax Commissioner.[4]

The county assessor reviews the personal property tax returns and changes the reported valuation of any item of taxable tangible personal property to conform the valuation to net book value.[5] The assessor also lists any item of taxable tangible personal property omitted from a personal property return and values the item at net book value.[6]

2. 2010 Personal Property Tax Return

Cargill Meat Solutions Corporation (Cargill) timely filed a personal property tax return for the 2010 tax year. As part of that return, Cargill submitted personal property schedules to the Colfax County assessor's office identifying numerous items

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[1] See Neb. Rev. Stat. § 77-1507(1) (Cum. Supp. 2014).

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

[3] Neb. Rev. Stat. § 77-1229(1) (Reissue 2009); *Kaapa Ethanol v. Board of Supervisors*, 285 Neb. 112, 825 N.W.2d 761 (2013).

[4] See § 77-1229(2) and Neb. Rev. Stat. § 77-4105(2) (Reissue 2009).

[5] See Neb. Rev. Stat. § 77-1233.04(1) (Cum. Supp. 2014).

[6] *Id*.

of personal property. One of the schedules showed the assessed value of the property to be $18,382,151. The assessor accepted the return.

However, the personal property was not placed on the tax rolls in 2010, and no tax was assessed or paid. Because of an evidentiary ruling by TERC excluding an exhibit, the record sheds little light on the procedures followed or overlooked in 2010.

3. Action by Board

In October 2013, the Board sent a letter to Cargill stating that it was placing the personal property identified by Cargill in 2010 "back on the tax rolls." The Board's letter asserted that the assessor had "held the personal property schedule . . . pending an approval of the exemption," that no exemption had been authorized, and that the property had not been "placed back" on the tax rolls in 2010 due to a "clerical error." The letter "[gave] notice" that "[p]ursuant to . . . § 77-1507(1)," the property would be "placed back on the tax rolls for collection."

Cargill filed a protest of the Board's action, but the Board denied the protest. Cargill then appealed. Pursuant to § 77-1507(3), the appeal from the Board's denial of the protest was taken to TERC.

4. TERC's Hearing and Decision

Pursuant to the rules of practice and procedure for hearings before TERC, the chairperson issued an order to show cause and notice of hearing which directed the parties to participate in a hearing and show cause regarding jurisdiction.[7] The order stated in part: "[TERC] does not have jurisdiction to hear an appeals [sic] if: [TERC] does not have the power or authority to hear the appeal [if] the Board of Equalization does not have the authority to act."

During the show cause hearing before TERC, the Board sought to introduce into evidence an order of the Department of Revenue's Tax Commissioner concerning Cargill's 2011

[7] See 442 Neb. Admin. Code, ch. 5, § 029 (2011).

tax return. TERC sustained Cargill's objection to the exhibit, noting that it had not been exchanged in advance of the hearing. The Board's third assignment of error pertains to this exhibit.

At the time of the Board's attempt to offer this exhibit, Cargill's attorney explained that "from 2011, there's a personal property tax appeal pending that has to do with whether Cargill qualified for LB775 credits." He also explained that the Department of Revenue "sent a letter to Colfax County that said, 'Based on the results of 2011, we think you should include 2010 personal property tax back on the tax rolls . . . .'"

TERC entered a decision and order vacating and reversing the Board's decision. TERC first rejected the Board's claim that § 77-1507(1) authorized the Board's action of adding items of omitted personal property to the tax rolls. TERC reasoned that § 77-1507(1) applied to real property only. Thus, TERC stated that the Board's action, if performed under § 77-1507(1), was void and that both the Board and TERC lacked jurisdiction to hear the appeal in the absence of a statute authorizing the Board to place omitted personal property on the tax rolls.

TERC next stated that the letter sent by the Board to Cargill was void because it did not meet several requirements of Neb. Rev. Stat. § 77-1233.06 (Reissue 2009). TERC reasoned that the Board did not have the authority to make an initial change or to send notice under the statute and that without such authority, the Board's actions were void.

TERC also rejected the Board's claim that §§ 77-1233.04 and 77-1233.06 provided a process for correction based on clerical errors. TERC noted that the definition of omitted property "specifically excludes listing errors by the county assessor and clerical errors." TERC reasoned that the Board's action was void if it was relying on § 77-1233.04.

TERC ultimately determined that the Board's action was void. It recited that "[w]here the actions of an administrative agency are void, appellate administrative agencies lack subject matter jurisdiction." TERC concluded that the Board did not have authority to place the items of personal property on the

tax rolls and that, thus, TERC did not have jurisdiction over the appeal.

The Board 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.[8]

III. ASSIGNMENTS OF ERROR

The Board assigns that TERC erred in (1) interpreting § 77-1507 to apply to omitted real property only, (2) failing to determine whether mistakenly entering taxable tangible personal property as exempt was a clerical error, (3) failing to receive as an exhibit an order from the Tax Commissioner which directed county officials to place Cargill's taxable tangible personal property on the tax rolls, and (4) failing to consider whether Cargill was entitled to an exemption of its taxable tangible personal property.

IV. STANDARD OF REVIEW

[1,2] An appellate court reviews decisions rendered by TERC for errors appearing on the record.[9] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[10]

[3,4] An appellate court reviews questions of law arising during appellate review of decisions by TERC de novo on the record.[11] Statutory interpretation is a question of law.[12]

V. ANALYSIS

1. Statutory History

Before addressing the Board's specific arguments, we briefly discuss the history of valuation of personal property in Nebraska and how the statutory language of § 77-1507 evolved over the

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

[9] *Conroy v. Keith Cty. Bd. of Equal.*, 288 Neb. 196, 846 N.W.2d 634 (2014).

[10] *Id.*

[11] *Id.*

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

years. We note that § 77-1507 is included under the statutes in chapter 77, article 15, of the Nebraska Revised Statutes, which relate to "Equalization by County Board."

(a) Valuation of Personal Property

Prior to 1992, personal property, like real property, was valued at its actual value.[13] A series of federal and state court decisions prompted changes to Nebraska's framework for taxation of personal property.[14]

In 1992, voters approved an amendment to portions of Neb. Const. art. VIII, §§ 1 and 2.[15] As amended, article VIII, § 1, provided that "tangible personal property, as defined by the Legislature, not exempted by this Constitution or by legislation, shall all be taxed at depreciated cost using the same depreciation method with reasonable class lives, as determined by the Legislature, or shall all be taxed by valuation uniformly and proportionately." And, as amended, article VIII, § 2, provided that "the Legislature may exempt inventory from taxation" and that "the Legislature may define and classify personal property in such manner as it sees fit, whether by type, use, user, or owner, and may exempt any such class or classes of property from taxation if such exemption is reasonable or may exempt all personal property from taxation." By means of special sessions, the Nebraska Legislature adopted the legislation necessary to implement these constitutional changes.[16]

Effective January 1, 1992, personal property, unless expressly exempt from taxation, was to be valued at its net book value.[17] The county board of equalization and the State Board of Equalization and Assessment—TERC's predecessor—were

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[13] See Neb. Rev. Stat. § 77-201(1) (Supp. 1991).

[14] See, generally, *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

[15] See 1992 Neb. Laws, L.R. 219CA.

[16] See 1992 Neb. Laws, L.B. 1, 2d Spec. Sess. (Aug. 12, 1992) and 4th Spec. Sess. (Nov. 12, 1992).

[17] See § 77-201(3) (Reissue 1996).

no longer required to equalize the values of personal property, but their obligation to equalize the values of real property remained.[18]

(b) Evolution of § 77-1507

Under a precursor to § 77-1507, the county board of equalization had the duty to "[f]airly and impartially equalize the valuation of the personal property of the county" and, upon complaint, to "review the assessment and correct the same as shall appear to be just."[19] The same statute authorized the county board of equalization to equalize the valuation of real property and provided that "in cases of evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property, the county board of equalization may at its annual meetings consider and correct the same by raising . . . or by lowering the assessed valuation of such real property."[20] The statute further empowered the county board of equalization to "add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owners thereof as the assessor should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county."[21]

By 1943, § 77-1507 had been condensed considerably. The statute, in its entirety, stated:

> The county board of equalization shall also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owners thereof as the assessor should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county.[22]

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[18] See Neb. Rev. Stat. §§ 77-505 (Reissue 1996) and 77-1504 (Cum. Supp. 1992).

[19] Rev. Stat. § 6437 (1913).

[20] *Id.*

[21] *Id.*

[22] § 77-1507 (1943).

But like its predecessor statutes,[23] § 77-1507 pertained to both real property and personal property. The same continued to be true after a 1987 amendment.[24] The statute then provided in part:

> The county board of equalization may meet at any time upon the call of the chairperson or any three members of the board for the purpose of determining and equalizing the assessments of any omitted or undervalued real or personal property. The board shall add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owners thereof. Omitted or undervalued personal property shall be added only after the owner or agent of the owner thereof is notified.[25]

As we noted above, the statutory framework for personal property tax in Nebraska changed dramatically beginning in 1992. But the above-quoted portion of the statute remained unchanged following a 1995 amendment.[26]

However, in 1997, the Legislature changed § 77-1507 significantly in connection with an overhaul of the taxation statutes.[27] As a result, the statute no longer contained any mention of personal property. Instead, it provided that the county board of equalization could "meet at any time for the purpose of assessing any omitted real property which was not reported to the county assessor pursuant to section 77-1318.01."[28] The statute further provided that "[n]o omitted real property which was properly reported to the county assessor pursuant to section 77-1318.01 shall be added to the assessment roll after July 25 of the year or years in which the property was omitted."[29]

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[23] See § 6437 and Comp. Stat. §§ 5972 (1922) and 77-1702 (1929).

[24] See 1987 Neb. Laws, L.B. 508, § 48.

[25] § 77-1507 (Cum. Supp. 1988).

[26] See § 77-1507 (Reissue 1996) and 1995 Neb. Laws, L.B. 490, § 150.

[27] See 1997 Neb. Laws, L.B. 270, § 89.

[28] § 77-1507(1) (Cum. Supp. 1998).

[29] § 77-1507(4).

A 1999 amendment[30] added the provision on which the Board relies. This change allowed the county board of equalization to meet "for clerical errors as defined in section 77-128 that result in a change of valuation."[31] Although the Board contends that this language applies to personal property, the word "personal" does not appear in the statute as amended in 1999.

The statute was later amended several more times,[32] but no reference to personal property was ever reinserted. Thus, for purposes of our inquiry, the statute has not changed in any significant way since 1999.

Currently, § 77-1507(1) (Cum. Supp. 2014) states in part:

> The county board of equalization may meet at any time for the purpose of assessing any omitted real property that was not reported to the county assessor pursuant to section 77-1318.01 and for correction of clerical errors as defined in section 77-128 that result in a change of assessed value. The county board of equalization shall give notice of the assessed value of the real property to the record owner or agent at his or her last-known address. For real property which has been omitted in the current year, the county board of equalization shall not send notice pursuant to this section on or before June 1.
>
> Protests of the assessed value proposed for omitted real property pursuant to this section or a correction for clerical errors shall be filed with the county board of equalization within thirty days after the mailing of the notice. All provisions of section 77-1502 except dates for filing a protest, the period for hearing protests, and the date for mailing notice of the county board of equalization's decision are applicable to any protest filed pursuant to this section.

With that history in place, we turn to the issues on appeal.

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[30] See 1999 Neb. Laws, L.B. 194, § 27.

[31] § 77-1507 (Reissue 2003).

[32] See 2005 Neb. Laws, L.B. 263, § 14, and L.B. 283, § 5; 2006 Neb. Laws, L.B. 808, § 39; 2010 Neb. Laws, L.B. 877, § 5; and 2011 Neb. Laws, L.B. 384, § 17.

2. Applicability of § 77-1507

[5] The chief issue is whether in 2013, § 77-1507(1) empowered the Board to add the specified personal property to the 2010 tax rolls. As this court explained over 100 years ago, the assessment, levy, and collection of taxes are not equitable proceedings; they necessarily have to be governed by rules, and the taxing power and the taxpayers must comply with these rules.[33] At various times, the Board has relied on either § 77-1507(1) or § 77-1233.04. TERC concluded that neither statute authorized the Board to place the personal property on the tax rolls for 2010. On appeal, the Board does not assign error to TERC's finding that § 77-1233.04 did not apply. Thus, we consider only whether § 77-1507(1) was applicable under the circumstances of this case.

The Board argues that TERC erred in interpreting § 77-1507(1) to apply to omitted real property only. The Board also contends that the statute allows for correction of clerical errors concerning personal property. We disagree that § 77-1507(1) applies to personal property.

The plain language of § 77-1507(1), its reading in the context of other statutes, and the Nebraska Administrative Code support our conclusion that § 77-1507(1) applies only to real property. Each reason requires elucidation.

[6] We primarily rely on the plain language of the statute, both generally and specifically. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[34]

The general language of the statute refers only to real property. The evolution of § 77-1507, which we have set forth above, shows deliberate action by the Legislature to change the statute from applying to both real and personal property to applying solely to real property. Subsequent amendments to the statute were made, but none of them restored personal property to the section's scope.

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[33] See *Darr v. Dawson County*, 93 Neb. 93, 139 N.W. 852 (1913).

[34] *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014).

The specific language of the statute also demonstrates that it applies only to real property. The statute explicitly mentions real property four times, while never referring to personal property. The Board observes that although § 77-1507(1) specifically refers to "omitted real property," no property type is specified with respect to the correction of clerical errors. It follows, they argue, that the latter phrase was intended to apply to all "property," whether real or personal.

But that sentence must be read in context. The key language appears in the first two sentences. The first sentence states, "The county board of equalization may meet at any time for the purpose of assessing any omitted real property . . . and for correction of clerical errors . . . ." The second sentence states, "The county board of equalization shall give notice of the assessed value of the real property to the record owner or agent . . . ."[35] In essence, the Board is trying to insert the words "or personal" into the latter sentence. Without those words, the first sentence would supposedly allow the board to change the value of personal property, but the second sentence would require notice only to owners of real property. That makes no sense.

[7] And we cannot read those words into the statute. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[36] If the Legislature had intended to allow a county board of equalization to correct a clerical error concerning personal property, it surely would have changed the second sentence of § 77-1507(1) to require notice to owners of "real or personal property."

[8] Reading § 77-1507 in the context of other statutes within the chapter on revenue and taxation also persuades us that it applies to real property only. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different

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[35] § 77-1507(1).

[36] *Johnson v. City of Fremont*, 287 Neb. 960, 845 N.W.2d 279 (2014).

provisions are consistent, harmonious, and sensible.[37] Statutes mentioning § 77-1507 do so in the context of real property.[38] And, as Cargill highlights, the overall tax scheme addresses personal property and real property separately for purposes of omitted property and correction of errors. Section 77-1507 pertains to real property, while § 77-1233.04 addresses the procedure for personal property.

The regulations in the Nebraska Administrative Code also demonstrate that § 77-1507(1) is limited to the correction of clerical errors for real property only. The chapter concerning real property contains several regulations concerning clerical errors,[39] while the chapter addressing personal property contains no regulation mentioning clerical errors.[40] Because we conclude that § 77-1507 applies to correction of clerical error concerning real property only, we need not decide whether a clerical error occurred in this case.

[9] We conclude that § 77-1507(1) does not apply to personal property and, thus, did not give the Board authority to place Cargill's personal property on the tax rolls. County boards of equalization can exercise only such powers as are expressly granted to them by statute, and statutes conferring power and authority upon a county board of equalization are strictly construed.[41] Because the Board lacked statutory authority under § 77-1507(1) to place Cargill's personal property on the tax rolls, its action was void.[42]

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[37] *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012).

[38] See Neb. Rev. Stat. §§ 77-202.03(4) and 77-1317 (Cum. Supp. 2014) and 77-1345(3) and 77-1345.01(4) (Reissue 2009). Compare Neb. Rev. Stat. § 77-5017(2) (Cum. Supp. 2014).

[39] See 350 Neb. Admin. Code, ch. 10, §§ 002.06, 003.02B(2), 003.02G, 003.04C, 003.06H, and 003.07 (2014).

[40] See 350 Neb. Admin. Code, ch. 20 (2009).

[41] *John Day Co. v. Douglas Cty. Bd. of Equal.*, 243 Neb. 24, 497 N.W.2d 65 (1993).

[42] See, generally, *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010); *Big John's Billiards v. Balka*, 254 Neb. 528, 577 N.W.2d 294 (1998).

3. Remaining Assignments of Error

[10] We need not address the Board's remaining assignments of error. Because the Board did not have statutory authority to add Cargill's personal property to the tax rolls under § 77-1507(1) and because the Board does not challenge TERC's finding that § 77-1233.04 did not provide such authority, the Board's action was void. Where a county board of equalization's actions are void, TERC lacks jurisdiction over the merits of the appeal.[43]

VI. CONCLUSION

Our conclusion is driven by the very narrow way in which the issue was presented to us. We confront both a limited record and the Board's reliance on § 77-1507(1) to the exclusion of any other potential avenue of addressing the problem. We were not asked to review whether § 77-1233.04 would allow the county assessor to make this change, and we therefore express no opinion on that question. We are also constrained by the language used by the Legislature in its 1999 amendment to § 77-1507(1), which did not make the statute applicable to personal property. We conclude that the Board's action in placing Cargill's personal property on the tax rolls for 2010 was void, because it lacked statutory authority to do so under § 77-1507(1). TERC reached the same conclusion and correctly determined that it lacked jurisdiction to hear the appeal. We affirm.

Affirmed.

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[43] See *Darnall Ranch v. Banner Cty. Bd. of Equal.*, 280 Neb. 655, 789 N.W.2d 26 (2010).

RICHARD J. NEBUDA ET AL., APPELLANTS, V. DODGE COUNTY SCHOOL DISTRICT 0062 (SCRIBNER-SNYDER COMMUNITY SCHOOLS) IN THE STATE OF NEBRASKA, APPELLEE.

861 N.W.2d 742

Filed April 23, 2015. No. S-14-477.

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. **Judgments: Justiciable Issues.** A justiciability issue that does not involve a factual dispute presents a question of law.
4. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not always preclude appellate jurisdiction, it is a justiciability doctrine that weighs against rendering a decision that will no longer have an impact on a live dispute between the parties.
5. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the dispute's resolution that existed at the beginning of the litigation.
6. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.
7. **Moot Question.** The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.
8. ____. A case is not moot if a court can fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances.
9. **Injunction: Intent.** Injunctive relief is intended to prevent future harm and is not available when the act complained of is already completed.
10. **Moot Question: Injunction.** A court's inability to grant injunctive relief does not necessarily render a claim for declaratory relief moot.
11. **Declaratory Judgments: Justiciable Issues.** A plaintiff's interest in a declaratory judgment action must be more than the satisfaction of having a court declare that the defendant's conduct was wrong. The declaration must be relevant to a live controversy or threat of harm.
12. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.
13. ____. Unless an exception applies, a court or tribunal must dismiss a moot case when changed circumstances have precluded it from providing any meaningful relief because the litigants no longer have a legally cognizable interest in the dispute's resolution.
14. ____. Nebraska recognizes a public interest exception to the mootness doctrine.
15. **Moot Question: Appeal and Error.** Under the public interest exception to mootness, an appellate court can review an otherwise moot case if it involves a matter

affecting the public interest or when other rights or liabilities may be affected by its determination.

16. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.
17. ____: ____. A party's strategic mistakes do not preclude an appellate court's review under the public interest exception to mootness when the issues on appeal require a generic statutory analysis instead of a fact-specific inquiry unique to the parties.
18. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
19. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
20. **Bonds: Words and Phrases.** Generally, a governmental entity's issuing of bonds refers to its offering and delivery of certificates of indebtedness for sale in a market to raise money for improvements—not to executing an instrument of indebtedness to a single lender.
21. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When judicial interpretation of a statute has not evoked a legislative amendment, an appellate court presumes that the Legislature has acquiesced in the court's interpretation.

Appeal from the District Court for Dodge County: GEOFFREY C. HALL, Judge. Affirmed.

Jovan W. Lausterer, of Bromm, Lindahl, Freeman-Caddy & Lausterer, for appellants.

James B. Gessford, Gregory H. Perry, and Derek A. Aldridge, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

SUMMARY

After the voters in the appellee school district rejected a bond proposal to build an addition, the school district entered into a lease-purchase agreement with Scribner Bank to finance an addition. The appellants, residents and taxpayers in the

district, sought declaratory and injunctive relief. The taxpayers contend that the agreement violates Neb. Rev. Stat. § 79-10,105 (Reissue 2012).

After a trial, the district court denied relief and dismissed the taxpayers' complaint. It concluded that under § 79-10,105, we have upheld the use of lease-purchase agreements to make school improvements without the voters' approval if the project is not funded by bonded debt. The court found that the school district had not funded the project through bonded indebtedness.

Because the addition has been completed, we address the issues presented under the public interest exception to the mootness doctrine. We conclude that a lease-purchase agreement is not the issuance of a bond under § 79-10,105. We affirm.

BACKGROUND

Dodge County School District 0062, Scribner-Snyder Community Schools, is a Class III school district. At some point in 2009, the State Fire Marshal declared that the high school building had several safety concerns and code deficiencies. The marshal gave the district until January 2014 to make corrections. The district's superintendent worked with an architectural firm and construction manager to obtain cost estimates for their work on improvements and then made recommendations to the board for a bond proposal.

In March 2012, the voters rejected a $7.5 million bond proposal to construct additional classrooms and renovate the existing building. Afterward, the district asked the construction company and architectural firm to modify its project. The new plan called for adding an additional six classrooms in a detached preengineered metal building. The estimated construction cost was $623,000. The district did not submit a bond proposal to the voters for the modified project. The school board president testified that the district had funds to pay for the modified project but that it could not have done so without borrowing money to pay its monthly bills.

In June 2012, the school board passed a resolution to authorize the superintendent to create a nonprofit "leasing" corporation, which would be controlled by the district, to make the improvements and lease the building back to the district. The superintendent and two school board members served as the corporation's board of directors. The resolution stated that it did not constitute the board's final approval of the project's financing or the leasing corporation's issuance of any bond obligations. In July, the school board authorized a lease-purchase agreement with the leasing corporation. The leasing corporation's board then approved a resolution authorizing the corporation to issue "certificates of participation" to a bond underwriter to solicit buyers. The leasing corporation intended to raise a maximum principal of $750,000 through bonds with a maximum interest rate of 3 percent. When the underwriter sought interested buyers (primarily banks), Scribner Bank expressed interest in "buying" the entire lease-purchase agreement.

In October 2012, the school board received construction bids and the taxpayers filed their complaint, alleging that the lease-purchase agreement with the leasing corporation violated § 79-10,105. They sought a declaration that the district's lease-purchase agreement was unlawful and an injunction barring the district from taking action in furtherance of the agreement. They did not seek a temporary restraining order.

On November 1, 2012, the district changed course and entered into a lease-purchase agreement with Scribner Bank, which agreed to finance the project (the addition and its equipment). The leasing corporation never issued any bond certificates. The new lease-purchase agreement called for the district to lease the building site to the bank so that the bank could make and pay for the improvements, with the district acting as the bank's agent in making the improvements. The bank agreed to pay the costs of the project up to $750,000. The district was unconditionally obligated to pay the "Base Rentals" and "Additional Rentals." The base rental payments were set out in a schedule to repay $750,000 in principal

plus interest. The parties incorporated the legal fees and underwriter fees for the original bond program into the principal indebtedness. The additional rental payments were the district's obligations to pay for taxes, utilities, insurance, and legal fees.

The agreement provided that the lease term ended in November 2019 or upon the earliest of four events: (1) the month in which the district paid its base rental obligation; (2) August 31 of any fiscal year in which the district failed to appropriate payments toward its obligations; (3) the date on which the district purchased the leased property by paying for the base rentals and additional rentals; or (4) upon the district's default on its obligations. If a default occurred, the district's accrued obligations continued and it lost the right to possess the leased property. It agreed to vacate the site and return the equipment to the bank if it defaulted. The attorney who prepared the lease-purchase agreement testified as a bond expert for the district and stated that the agreement did not constitute a bond. But he admitted that the interest paid to the bank was tax-exempt income for the bank, just like the interest paid on bonds.

In a separate project construction agreement, the bank agreed to make the planned improvements, with the school district acting as its agent. The bank did not participate in the design and work decisions. In a site lease agreement, the district leased the school building and the property underlying the proposed addition to the bank for $1 for the entire lease period. In this agreement, the district warranted that the site was not subject to any encumbrances and not threatened by environmental hazards. Before signing these agreements, the district paid for surveying work and an environmental study. It had also paid for an architectural firm's services. On November 12, 2012, the school board explicitly abandoned its plan to finance the project through its leasing corporation by repealing the authorizing resolution. On the same day, the construction company and the architectural firm signed addendums to their agreements with the school district. They acknowledged that the district had assigned its rights and obligations under

the original agreements to the bank and would be working as the bank's agent.

The project was completed in August 2013, before the trial began in September. The evidence showed that the detached building was built in sections at a factory, assembled at the site, and set in a permanent foundation. The district planned to pay its obligations within 4 to 5 years. It was making payments out of a special building fund at the time of trial but intended to make payments out of its general funds.

After a bench trial, the court issued an order that denied relief for the taxpayers and dismissed their complaint. The court concluded that the Legislature had acquiesced in this court's interpretations of § 79-10,105 in *George v. Board of Education*[1] and *Foree v. School Dist. No. 7*.[2] It reasoned that in *Foree*, we did not interpret § 79-10,105 to preclude a school from entering into a lease-purchase agreement for school improvements. The court further noted that in *Banks v. Board of Education of Chase County*,[3] this court held that architectural fees are general expenses, not building expenditures that a school district must submit to the voters. It stated that the taxpayers would have been better served by a transparent discussion and input from the taxpayers and that the school board's actions appeared to be a "back-door effort to circumvent the will of the voters." But it concluded that we have held "the lease purchase of a school building is allowed without the vote of the people if the project is not funded by bonded debt." It concluded that because there was no evidence that this had occurred, the taxpayers' claim failed.

ASSIGNMENTS OF ERROR

The taxpayers assign, restated and reduced, that the district court erred as follows:

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[1] *George v. Board of Education*, 210 Neb. 127, 313 N.W.2d 259 (1981).

[2] *Foree v. School Dist. No. 7*, 242 Neb. 166, 493 N.W.2d 625 (1993).

[3] *Banks v. Board of Education of Chase County*, 202 Neb. 717, 277 N.W.2d 76 (1979).

(1) considering the school district's safety concerns and code deficiencies;

(2) failing to consider that before the district entered into its lease-purchase agreement with Scribner Bank, it had entered into or approved an architectural agreement, construction agreement, final construction design, site survey, environmental study, and construction bids;

(3) failing to consider testimony that the district could not relocate significant parts of the project;

(4) considering the district's attempt to retroactively rescind its prior acts;

(5) concluding that the Legislature had acquiesced in this court's decision in *George*[4] when that decision preceded the 1985 amendment to § 79-10,105;

(6) concluding that the Legislature had acquiesced in *Banks*[5] when *Banks* preceded the 1985 amendment to § 79-10,105;

(7) failing to conclude that *Foree*[6] is distinguishable and does not apply to lease-purchase agreements for the construction of a school building;

(8) finding that the lease-purchase agreement here was not funded by bonded debt;

(9) concluding that our case law permits a school district to construct a school building through a lease-purchase agreement;

(10) admitting exhibit 47, because it contains legal conclusions by an attorney for the school district, and overruling the taxpayers' objections to legal conclusions by an attorney testifying for the district.

STANDARD OF REVIEW

[1-3] We independently review questions of law decided by a lower court.[7] The meaning and interpretation of a statute

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[4] *George, supra* note 1.

[5] *Banks, supra* note 3.

[6] *Foree, supra* note 2.

[7] See *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014).

presents a question of law.[8] A justiciability issue that does not involve a factual dispute also presents a question of law.[9]

ANALYSIS

Taxpayers' Claims Are Moot

[4] Although mootness does not always preclude appellate jurisdiction,[10] it is a justiciability doctrine that weighs against rendering a decision that will no longer have an impact on a live dispute between the parties.[11] So we first address the district's claim that the taxpayers' claims on appeal are moot. It argues that the taxpayers never sought a temporary restraining order to stop the project from proceeding and that injunctive relief could no longer bar any district actions. Additionally, the district argues that the taxpayers' request for declaratory relief is moot because they did not seek repayment of any illegally expended funds under the lease-purchase agreement.

[5-8] Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the dispute's resolution that existed at the beginning of the litigation.[12] A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.[13] The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.[14] A case is not moot if a court can fashion some meaningful form of

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[8] See *McDougle v. State ex rel. Bruning*, 289 Neb. 19, 853 N.W.2d 159 (2014).

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

[10] See, e.g., *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012).

[11] See, *Blakely, supra* note 9; 13B Charles Alan Wright et al., Federal Practice and Procedure § 3533 (2008).

[12] *Blakely, supra* note 9.

[13] *Id.*

[14] *In re Interest of Nathaniel M.*, 289 Neb. 430, 855 N.W.2d 580 (2014).

relief, even if that relief only partially redresses the prevailing party's grievances.[15]

[9] In *Rath v. City of Sutton*,[16] we addressed a mootness problem arising from the plaintiff's unsuccessful action to enjoin a city's construction project because the city had unlawfully awarded the contract to a contractor who did not submit the lowest bid. While the case was pending on appeal, the project was completed. We explained that injunctive relief is intended to prevent future harm and is not available when the act complained of is already completed. So, "any opinion on the court's denial of injunctive relief would be 'worthless.' . . . Simply put, we lack the power, 'once a bell has been rung, to unring it.'"[17] We concluded that the plaintiff's claim for injunctive relief was moot.

[10] We also explained that a court's inability to grant injunctive relief does not necessarily render a claim for declaratory relief moot. But we rejected the plaintiff's argument that he was entitled to declaratory relief because if he prevailed, he could then seek to recover funds that the city paid out under an illegal contract. We concluded that he was required to specifically allege in his complaint that he was entitled to recoup the funds and had not done so. Thus, the declaratory judgment claim was also moot because the declaration would have been advisory, with no effect on the plaintiff's rights.

[11,12] In sum, a plaintiff's interest in a declaratory judgment action must be more than the satisfaction of having a court declare that the defendant's conduct was wrong. The declaration must be relevant to a live controversy or threat of harm. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.[18]

As in *Rath*, we cannot provide any relief to the taxpayers. Injunctive relief is not available to them because the

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[15] *Blakely, supra* note 9.

[16] *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

[17] *Id.* at 273, 673 N.W.2d at 880 (citations omitted).

[18] *State v. Johnson*, 287 Neb. 190, 842 N.W.2d 63 (2014).

construction under the lease-purchase agreement that they challenged was already completed by the time of trial. And like the taxpayer in *Rath*, they did not allege that they were entitled to recoup any illegal expenditures. Because declaratory relief would not affect a live controversy, the taxpayers no longer have a cognizable interest in the appeal.

Public Interest Exception to Mootness Applies

[13,14] Unless an exception applies, a court or tribunal must dismiss a moot case when changed circumstances have precluded it from providing any meaningful relief because the litigants no longer have a legally cognizable interest in the dispute's resolution.[19] Nebraska recognizes a public interest exception to the mootness doctrine,[20] and we consider its application here.

[15,16] Under the public interest exception to mootness, we can review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.[21] When determining whether a case involves a matter of public interest, we consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.[22]

In *Rath*, we concluded that the public interest exception applied to two issues presented by the appeal: (1) the proof required to establish an irreparable harm based on an alleged illegal expenditure of public funds and (2) the meaning of the statutory phrase "lowest responsible bidder." We concluded that a decision on the proof question was obviously of paramount importance to Nebraska's taxpayers and would provide needed guidance because we had not previously decided the

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[19] *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200, 803 N.W.2d 17 (2011).

[20] See *id.*

[21] *In re Trust Created by Nabity*, 289 Neb. 164, 854 N.W.2d 551 (2014).

[22] *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011).

question. We further concluded that the issue was likely to recur because taxpayers frequently filed suits to enjoin illegal expenditures.

Similarly, we concluded that (1) the statutory interpretation question was of a public nature, because competitive bidding statutes exist to protect the public and the taxpayer had commenced the suit on behalf of the public; (2) our interpretation would provide guidance to all state entities and officials charged with procuring products and services; and (3) the issue was likely to recur because of frequent disputes over public contracting.

[17] Finally, in *Rath*, we rejected the city's argument that we should not apply the exception because the taxpayer failed to take actions to prevent the claim from becoming moot. We concluded that a party's strategic mistakes do not preclude our review under the public interest exception to mootness when the issues on appeal require a generic statutory analysis instead of a fact-specific inquiry unique to the parties.

This reasoning from *Rath* also applies here. The meaning of § 79-10,105 unquestionably involves a matter affecting the public interest because it governs whether taxpayers in every school district can be taxed for capital improvements without their approval of the expenditure. Although we previously considered this issue in *Foree*, the taxpayers argue that *Foree* is factually distinguishable. Finally, despite the district's argument in its brief, at oral argument, its attorney stated that many school districts have used lease-purchase agreements to make capital improvements and that others are looking for further guidance from this decision. We conclude that the requirements for the public interest exception to mootness are satisfied and address the merits of the taxpayers' appeal.

3. § 79-10,105 Does Not Require Voter Approval for All Lease-Purchase Agreements Exceeding $25,000

Despite the taxpayers' multiple assignments of error, the central issue in this appeal is whether the district's lease-purchase

contract with Scribner Bank to finance capital improvements violated § 79-10,105, which provides the following:

> The school board or board of education of any public school district may enter into a lease or lease-purchase agreement for the exclusive use of its individual jurisdiction for such buildings or equipment as the board determines necessary. Such lease or lease-purchase agreements may not exceed a period of seven years, except that lease-purchase agreements entered into as part of an energy financing contract pursuant to section 66-1065 may not exceed a period of thirty years. All payments pursuant to such leases shall be made from current building funds or general funds. *No school district shall directly or indirectly issue bonds to fund any such lease-purchase plan for a capital construction project exceeding twenty-five thousand dollars in costs unless it first obtains a favorable vote of the legal voters pursuant to Chapter 10, article 7.* This section does not prevent the school board or board of education of any public school district from refinancing a lease or lease-purchase agreement without a vote of the legal voters for the purpose of lowering finance costs regardless of whether such agreement was entered into prior to July 9, 1988.

(Emphasis supplied.)

The taxpayers' argument focuses on the italicized language in the above quote, which was added in 1985 to the precursor of § 79-10,105.[23] They argue that through this amendment, the Legislature intended to bar school districts from using lease-purchase agreements as a way to avoid requirements for voter approval of construction projects that cost more than $25,000. They point to senators' arguments during the 1985 floor debate that they contend support their interpretation. And they argue that the definition of a "bond" broadly includes a

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[23] See, Neb. Rev. Stat. § 79-4,154 (Reissue 1981); 1996 Neb. Laws, L.B. 900, § 751 (renumbering statute); Legislative Journal, 89th Leg., 1st Sess. 1974-76 (Apr. 30, 1985) (adding amendment language to L.B. 633).

"certificate or evidence of a debt on which the issuing company or governmental body promises to pay the bondholders a specified amount of interest for a specified length of time, and to repay the loan on the expiration date."[24]

The school district contends that under our decision in *Foree*, the 1985 amendment's restriction applies only when a school district directly or indirectly issues bonds to fund a lease-purchase plan for a capital construction project, which did not happen here. The taxpayers counter that *Foree* is distinguishable because the school district used a lease-purchase agreement to acquire modular units, not to construct a building.

[18,19] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[25] We will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.[26] So we first consider whether the meaning of the 1985 amendment to the precursor of § 79-10,105 is clear from the text itself: "No school district shall directly or indirectly issue bonds to fund any such lease-purchase plan for a capital construction project exceeding twenty-five thousand dollars in costs unless it first obtains a favorable vote of the legal voters pursuant to Chapter 10, article 7."

Section 79-10,105 is one of many statutes dealing with a school district's "Site and Facilities Acquisition, Maintenance, and Disposition."[27] It is true that neither § 79-10,105 nor any of the other statutes in this section define the word "bond" for applying the 1985 restriction on the issuing of bonds. But we disagree for three reasons that the word "bond" in the amendment has the broad meaning that the taxpayers assign to it.

First, the taxpayers' interpretation of § 79-10,105 is contrary to statutory interpretation principles. If the Legislature had meant for school districts to obtain the voters' approval before

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[24] See Black's Law Dictionary 178 (6th ed. 1990).

[25] *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

[26] *Id.*

[27] See Neb. Rev. Stat. §§ 79-1094 to 79-10,136 (Reissue 2014).

entering into any lease-purchase agreement exceeding $25,000, it would have simply stated that. This supports the school district's argument that the restriction is focused on the issuing of bonds.

Moreover, the taxpayers' interpretation of § 79-10,105—to include a lease-purchase agreement as the issuing of a bond—gives the amendment a nonsensical reading: "No school district shall directly or indirectly issue bonds [i.e., any instrument of indebtedness, including a lease-purchase agreement] to fund any such lease-purchase plan for a capital construction project exceeding twenty-five thousand dollars" without voter approval.

[20] Obviously, no district enters into a lease-purchase agreement to fund a lease-purchase agreement. So this interpretation renders the language absurd or the reference to the issuing of bonds meaningless, and we attempt to avoid both results when interpreting statutes.[28] Because the taxpayers' broad interpretation of the word bond renders the amendment nonsensical, it illustrates that the restriction on the *issuing of* bonds has a different meaning than the word "bond" standing alone. That is, the word bond in this context does not mean any debt obligation. Government entities do not "issue" all instruments of debt. Generally, a governmental entity's issuing of bonds refers to its offering and delivery of certificates of indebtedness for sale in a market to raise money for improvements—not to executing an instrument of indebtedness to a single lender.[29]

Second, even if the amendment could be construed as ambiguous, the legislative history of the original 1985 bill to amend the statute does not support the taxpayers' argument. It shows that the Legislature intended to preclude school

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[28] See, *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015); *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014).

[29] See, e.g., *Alabama Power Co. v. City of Scottsboro*, 238 Ala. 230, 190 So. 412 (1939); *Moore v. Vaughn*, 167 Miss. 758, 150 So. 372 (1933); Black's Law Dictionary 217, 960 (10th ed. 2014); 64 Am. Jur. 2d *Public Securities and Obligations* § 165 (2011); 64A C.J.S. *Municipal Corporations* § 2118 (2011).

districts from creating nonprofit corporations to issue bonds for the district's capital improvements without a bond election, which obligation the district repays through a lease-purchase agreement with its own corporation.[30] But that did not happen here. It is true that the district attempted this maneuver, but the school board repealed the resolution that created its leasing corporation and abandoned that plan. The leasing corporation never issued any bond certificates to finance the construction project.

Third, and most important, the district court correctly concluded that the Legislature has acquiesced in our 1993 interpretation of § 79-10,105 in *Foree*. Although the taxpayers argue that the court erred in relying on our 1981 decision in *George*, because it preceded the 1985 amendment, the court correctly reasoned that understanding *George* was relevant to understanding the holding in *Foree*.

In *George*, the school district formed a "Building Corporation" that issued bonds for a school addition and then "donated" the addition to the school at the end of a 5-year lease term.[31] We rejected the taxpayer's argument that the school district had no power to issue bonds without the voters' approval because the district had not issued any bonds. We also rejected the argument that the building corporation was a sham because the Legislature had specifically authorized this method of financing under the lease-purchase statute.

After the 1985 amendment, we decided *Foree*.[32] There, the school district entered into a 4-year "'Equipment Lease/Purchase Agreement'" with a corporation for the "lease/purchase of eight modular homes for use as classrooms."[33] The taxpayer argued that the agreement was invalid under the

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[30] See, Introducer's Statement of Intent, L.B. 50, Committee on Education, 89th Leg., 1st Sess. (Mar. 18, 1985); Committee on Education Hearing, L.B. 50, 89th Leg., 1st Sess. 46 (Mar. 18, 1985); Floor Debates, 1st Sess. 3790-91 (Apr. 19, 1985) and 1st Sess. 4429-30 and 4436-37 (Apr. 30, 1985).

[31] *George, supra* note 1, 210 Neb. at 128, 313 N.W.2d at 260-61.

[32] *Foree, supra* note 2.

[33] *Id.* at 167, 493 N.W.2d at 625.

amended lease-purchase statute and that the Legislature had amended the statute in response to our decision in *George*. We concluded that even if the amendment was in response to *George*, the statute, as amended, still did not require the voters' approval of a lease-purchase agreement:

> The plaintiff's principal contention seems to be that the provision requiring a favorable vote of the electorate for a direct or indirect issue of bonds to fund a lease-purchase agreement for a capital construction project exceeding $25,000 prohibits the defendant from entering into its lease-purchase agreement for the modular units. . . .
>
> While the Legislature's amendment to § 79-4,154 in 1985 may have been in response to the *George* decision, it is clear that § 79-4,154 still authorizes school districts to acquire buildings or equipment through lease-purchase agreements. See *George v. Board of Education, supra*.
>
> In the present case, no bonds were issued *directly or indirectly* by any party in order to fund the modular units. Furthermore, the defendants are not required to finance the lease/purchase of the modular units by bonds.[34]

This passage shows that we rejected the taxpayer's argument that the lease-purchase agreement was an "indirect" bond. We implicitly interpreted the issuing of bonds to mean the issuing of certificates of indebtedness to be purchased by unknown investors in a market. We further stated that the funds for the lease payments were properly budgeted. In this regard, § 79-10,105, then and now, explicitly authorizes school districts to make payments under lease-purchase agreements "from current building funds or general funds."

Contrary to the taxpayers' argument, *Foree* is not distinguishable because we said the lease-purchase statute "authorizes school districts to *acquire buildings* or equipment through lease-purchase agreements."[35] In stating this, we focused on upholding the district's challenged act—acquiring premade modular units. But the statutory language we were interpreting

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[34] *Id*. at 168-69, 493 N.W.2d at 626-27 (emphasis supplied).

[35] *Id*. at 169, 493 N.W.2d at 626.

restricts issuing bonds "'to fund any such lease-purchase plan for a capital construction project.'"[36] So our reasoning logically applies to any capital construction project financed through a lease-purchase agreement.

[21] When judicial interpretation of a statute has not evoked a legislative amendment, we presume that the Legislature has acquiesced in the court's interpretation.[37] We recognize that other statutes that authorize expenditures for a school district's capital improvements require the voters' approval to raise the funds.[38] But any incongruity between these statutes and § 79-10,105 is a policy issue for the Legislature to resolve. Because it has not amended § 79-10,105 in response to *Foree*, we presume that it has decided the issue in accordance with that decision.

CONCLUSION

We conclude that the taxpayers' claims for injunctive and declaratory relief are moot because they no longer have a cognizable interest in our resolution of the case. But because of the public nature of their dispute, we have resolved the issue presented under the public interest exception to the mootness doctrine. We conclude that § 79-10,105 does not prohibit a school district from entering into a lease-purchase agreement to finance a capital construction project, if it has not created a nonprofit corporation to issue bonds for the school district. Because that maneuver did not occur here, the district did not violate § 79-10,105 by entering into a lease-purchase agreement with the bank.

AFFIRMED.

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[36] *Id.* at 168, 493 N.W.2d at 626 (quoting § 79-4,154).

[37] *Lenz v. Central Parking System of Neb.*, 288 Neb. 453, 848 N.W.2d 623 (2014).

[38] See Neb. Rev. Stat. §§ 79-1098 (Reissue 2014) and 10-701 and 10-702 (Reissue 2012).

STATE OF NEBRASKA, APPELLEE, V. RONALD L. LANTZ, SR., APPELLANT.

861 N.W.2d 728

Filed April 23, 2015. No. S-14-517.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **Sentences.** Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.
4. ____. In Nebraska, unless prohibited by statute or unless the sentencing court states otherwise when it pronounces the sentences, multiple sentences imposed at the same time run concurrently with each other.

Appeal from the District Court for Jefferson County: PAUL W. KORSLUND, Judge. Judgment vacated, and cause remanded with directions.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Ronald L. Lantz, Sr., was convicted of three counts of first degree sexual assault of a child, a crime which carries a mandatory minimum sentence. He was sentenced to 15 to 25 years' imprisonment on each count with two counts to be served consecutively and the third to be served concurrently with the other two.

On his direct appeal, the Nebraska Court of Appeals found plain error in the sentencing, remanded the cause, and ordered the district court to resentence Lantz to three consecutive sentences. *State v. Lantz*, 21 Neb. App. 679, 842 N.W.2d

216 (2014). On his appeal from the resentencing, we granted bypass in order to address sentencing for crimes carrying mandatory minimum penalties.

SCOPE OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013).

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013).

FACTS

A jury convicted Lantz on three counts of first degree sexual assault of a child, defined in Neb. Rev. Stat. § 28-319.01 (Cum. Supp. 2014), which carries a mandatory minimum sentence of 15 years for the first offense. See, § 28-319.01(2); *State v. Lantz, supra*. The district court sentenced him to 15 to 25 years' imprisonment for each offense. Counts I and II were to run consecutively, whereas count III was to be served concurrently.

On direct appeal, the State argued that it was plain error to give Lantz a concurrent sentence for the third count of sexual assault, because § 28-319.01 prescribed a mandatory minimum sentence and, therefore, each sentence for a conviction under § 28-319.01 must be served consecutively. The Court of Appeals agreed with the State and affirmed the convictions but remanded the cause with directions for the district court to sentence Lantz consecutively on all three counts. The Court of Appeals relied on the following language from *Castillas*: "Mandatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying a mandatory minimum sentence must serve the sentence on each count consecutively." 285 Neb. at 191, 826 N.W.2d at 268.

On May 8, 2014, pursuant to the opinion of the Court of Appeals, the district court resentenced Lantz to 15 to 25

years' imprisonment for counts I, II, and III, each to be served consecutively.

Lantz petitioned this court for further review and assigned that the Court of Appeals erred in ordering the district court to resentence him to three consecutive sentences. Lantz asserted that unlike mandatory minimum sentences for use of a deadly weapon under Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2014), which specifically requires that the sentences be served consecutively to all other sentences, mandatory minimum sentences for first degree sexual assault of a child are not required by § 28-319.01 to be served consecutively to any other sentence imposed. We denied further review.

On June 20, 2014, we issued our opinion in *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014). In *Berney*, a district court interpreted our decision in *Castillas* to mean that a sentence for any crime with a mandatory minimum sentence must be served consecutively. The court applied the rule to the two burglary convictions of a defendant who had been convicted of being a habitual criminal. The court sentenced Matthew Berney to two 10-year minimum sentences, to be served consecutively. In *Berney*, 288 Neb. at 382, 847 N.W.2d at 736, we clarified our holding in *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), stating, "We were not speaking of enhancements under the habitual criminal statute, but of those specific crimes that required a mandatory minimum sentence to be served consecutively to other sentences imposed."

Lantz now argues that our holding in *Berney* conflicts with the Court of Appeals' decision in *State v. Lantz*, 21 Neb. App. 679, 842 N.W.2d 216 (2014), and that the district court had discretion to impose concurrent sentences. Lantz' fundamental argument is that § 28-319.01 does not prescribe that sentences for crimes under that section be served consecutively in the same manner as provided under § 28-1205(3) and that therefore, the district court retains its discretion to order concurrent sentences.

We granted bypass on Lantz' appeal.

ASSIGNMENT OF ERROR

Lantz assigns that the Court of Appeals erred in ordering the district court to resentence his three convictions to be served consecutively to each other because § 28-319.01 does not require sentences to be served consecutively.

ANALYSIS

We are presented with a question of statutory interpretation. The question is whether a defendant convicted of multiple crimes each carrying a mandatory minimum sentence must serve the sentence on each crime consecutively. Based upon our statements in *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), the Court of Appeals concluded that mandatory minimum sentences cannot be served concurrently. See *State v. Lantz, supra*. Five months after the Court of Appeals' opinion was filed, we released our decision in *State v. Berney, supra*.

Berney pled no contest to two counts of burglary. His crimes were enhanced under the habitual criminal statute, which provides that each crime enhanced under that statute carries a mandatory minimum sentence of 10 years. See Neb. Rev. Stat. § 29-2221(1) (Reissue 2008). Berney was sentenced to the mandatory minimum of 10 years for each conviction, and the court ordered the sentences to be served consecutively. Based on its interpretation of *State v. Castillas, supra*, the lower court concluded it was required to order the sentences to be served consecutively. Berney appealed, claiming the court abused its discretion by imposing consecutive sentences on the enhanced convictions. We affirmed his convictions and sentences of 10 to 10 years' imprisonment on each conviction, but we remanded the cause to the sentencing court for a determination of whether the sentences were to be served concurrently or consecutively. See *State v. Berney, supra*.

Because of the conflict between our opinion in *State v. Berney, supra*, and the Court of Appeals' opinion in *State v. Lantz, supra*, we granted bypass of Lantz' appeal from his sentencing to three consecutive sentences of 15 to 25 years' imprisonment for each conviction of first degree sexual assault of a child.

The Court of Appeals, using the above language from our decision in *State v. Castillas, supra*, found plain error because the district court did not sentence Lantz to three consecutive sentences. The Court of Appeals' decision was filed after our opinion in *Castillas* but before we filed our decision in *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014). In *Berney*, we distinguished and limited our holding in *Castillas* to those specific crimes that required a mandatory minimum sentence to be served consecutively to all other sentences imposed. We noted there was a distinction between (1) a conviction for a crime that requires both a mandatory minimum sentence and mandates consecutive sentencing and (2) the enhancement of the penalty for a crime under the habitual criminal statute. See *State v. Berney, supra*. In the former, the mandatory sentence must be served consecutively to any other sentence imposed because the statute for that crime requires it. In the latter, the statute does not require the enhanced penalty to be served consecutively to any other sentence imposed, and therefore, the sentence is left to the discretion of the court. Since Berney was convicted of burglary, which did not require a mandatory minimum sentence, the punishment enhanced under the habitual criminal statute did not require the enhanced penalties to be served consecutively.

The tension between *Berney* and *Lantz* was created by the overly broad language used in *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013). David Castillas was convicted of two counts of discharging a firearm at a dwelling while in or near a motor vehicle, one count of second degree assault, and three counts of use of a firearm to commit a felony. The aggregate sentences amounted to 30 to 80 years: 5 to 20 years in prison on each conviction of discharging a firearm, 5 to 10 years in prison on the conviction of second degree assault, and 5 to 10 years in prison on each conviction of use of a weapon to commit a felony. The court ordered all sentences to be served consecutively. At sentencing, the court advised Castillas that he would be parole eligible in 25 years and that, if he lost no "good time," he would be released after 40 years. On appeal, Castillas assigned, inter alia, that the court erred

in ordering a sentence that was substantially different from its intended sentence.

Only the conviction of second degree assault did not carry a mandatory minimum sentence of 5 years in prison. Each of the three sentences for use of a weapon under § 28-1205 were required by statute to be served consecutively to all other sentences.

Because all the sentences were ordered to be served consecutively, the only good time that could be earned was on the 5-year sentence for second degree assault, which was Castillas' only conviction not carrying a mandatory minimum. Neb. Rev. Stat. § 83-1,110 (Reissue 2014) provides that good time reductions do not apply to mandatory minimum sentences. We concluded that the trial court had erred in telling Castillas that he would be eligible for parole in 25 years, because he would have to serve a minimum of 27½ years before parole eligibility. We affirmed the sentences because Castillas was given valid sentences, even though the sentences were contrary to the court's stated intent. But our language was overly broad regarding our discussion of mandatory minimum sentences. "Mandatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying a mandatory minimum sentence must serve the sentence on each count consecutively." *Castillas*, 285 Neb. at 191, 826 N.W.2d at 268. We clarified this statement in *Berney*, 288 Neb. at 382-83, 847 N.W.2d at 736, stating:

> We were not speaking of enhancements under the habitual criminal statute, but of those specific crimes that required a mandatory minimum sentence to be served consecutively to other sentences imposed.
>
> There is a distinction between a conviction for a crime that requires both a mandatory minimum sentence and mandates consecutive sentences, and the enhancement of the penalty for a crime because the defendant is found to be a habitual criminal. In the former, the mandatory minimum sentence must be served consecutively to any other sentence imposed, because the statute for that crime requires it. In the latter, the law does not require the enhanced penalty to be served consecutively to any other

sentence imposed. The sentence is left to the discretion of the court.

To the extent that our language in *Castillas* can be interpreted to mean that all convictions carrying a mandatory minimum sentence must be served consecutively to all other sentences, such interpretation is expressly disapproved.

With that said, we proceed to Lantz' claim that it was error to order the district court to sentence him to three consecutive sentences for first degree sexual assault of a child. In *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), we were speaking of those specific crimes that require a mandatory minimum sentence to be served consecutively to other sentences imposed. Our overly broad language, upon which the Court of Appeals relied, was misleading.

[3,4] Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. *State v. Policky*, 285 Neb. 612, 828 N.W.2d 163 (2013). In Nebraska, unless prohibited by statute or unless the sentencing court states otherwise when it pronounces the sentences, multiple sentences imposed at the same time run concurrently with each other. *State v. King*, 275 Neb. 899, 750 N.W.2d 674 (2008).

Our conclusion reflects our deference to the Legislature's intent in statutorily prescribing criminal penalties. The Legislature included a provision in § 28-1205 expressly requiring consecutive sentencing, but it did not do so in other sections of the criminal code imposing mandatory minimum sentences. Additionally, the Legislature provided very specific penalty guidelines for mandatory minimum sentences in § 83-1,110(1).

Together, the above statutes demonstrate that the Legislature uses very specific language to prescribe sentencing guidelines. Therefore, we conclude that the exclusion of a requirement that all mandatory minimum sentences be served consecutively was intended to leave this issue to the discretion of the trial court.

Consequently, we find that it was not plain error for the district court to sentence Lantz concurrently for his third conviction under § 28-319.01.

CONCLUSION

For the reasons stated above, we vacate the district court's May 8, 2014, resentencing order and we remand the cause with directions to reinstate the original sentences imposed by the district court ordering that the sentences for counts I and II be served consecutively and that the sentence for count III be served concurrently.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

MELANIE M., INDIVIDUALLY AND AS NEXT FRIEND OF GAIGE M. ET AL., HER MINOR CHILDREN, APPELLANT, V. KERRY T. WINTERER AND RYAN C. GILBRIDE, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS EMPLOYEES AND AGENTS OF THE STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND THE STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

862 N.W.2d 76

Filed April 23, 2015. No. S-14-538.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented which an appellate court decides independently of the decision made by the court below.
4. **Constitutional Law: Due Process.** The process required under the Due Process Clause of the 14th Amendment is that necessary to provide "fundamental fairness" under the particular facts of the case.

5. **Due Process.** There are three factors a court considers in resolving a procedural due process claim: first, the private interest that the official action will affect; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
6. **Evidence.** The importance of demeanor evidence depends on the role that credibility plays in a particular determination.
7. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
8. ____. Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary.
9. ____. An agency does not generally have the discretion to waive, suspend, or disregard a validly adopted rule.
10. ____. For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.
11. ____. In the absence of anything to the contrary, language in a rule or regulation is to be given its plain and ordinary meaning.
12. **Administrative Law: Appeal and Error.** A court accords deference to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.
13. **Attorney Fees.** Generally, a party may recover attorney fees and expenses in a civil action only if provided for by statute or if a recognized and accepted uniform course of procedure allows the recovery of attorney fees.
14. **Federal Acts: Attorney Fees.** A plaintiff is a prevailing party under 42 U.S.C. § 1988 (2012) if the plaintiff obtains actual relief on the merits of his or her claim that alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.
15. ____: ____. A plaintiff who obtains temporary injunctive relief is not a prevailing party under 42 U.S.C. § 1988 (2012) if the plaintiff eventually loses on the merits.
16. **Injunction: Intent.** The purpose of a temporary restraining order is only to maintain the status quo until a court can hear both parties on the propriety of a temporary injunction.
17. **Federal Acts: Attorney Fees.** The catalyst theory does not apply to claims for attorney fees under 42 U.S.C. § 1988 (2012).
18. **Federal Acts: Attorney Fees: Civil Rights.** A plaintiff who prevails under state law can obtain fees under 42 U.S.C. § 1988 (2012) if the claim on which the plaintiff prevailed is accompanied by a substantial, though undecided, claim arising under 42 U.S.C. § 1983 (2012) from the same nucleus of facts.

Appeal from the District Court for Lincoln County: RICHARD A. BIRCH, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

William J. Erickson and Blaine T. Gillett for appellant.

Jon Bruning, Attorney General, and Blake E. Johnson for appellees.

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

CONNOLLY, J.

SUMMARY

Melanie M. requested an administrative hearing after the Department of Health and Human Services (Department) informed her that it was going to change her benefits under the Supplemental Nutrition Assistance Program (SNAP). The Department informed Melanie—a resident of North Platte, Nebraska—that it would hold the hearing in Lincoln, Nebraska. Melanie could participate telephonically at the Department's North Platte office or travel to Lincoln and participate in person.

Melanie filed a complaint in district court, asserting that the Department's regulations and the Due Process Clause required a "face-to-face" hearing in North Platte. The court entered a temporary restraining order, but overruled Melanie's motion for a temporary injunction and sustained the defendants' motion for summary judgment. After applying the three-factor test under *Mathews v. Eldridge*,[1] we affirm the summary judgment as to Melanie's due process claim. But we reverse, and remand for further proceedings on her prayer for relief under the Department's regulations.

BACKGROUND

Melanie is the mother of four minor children who reside with her in North Platte. She works 15 to 20 hours per week in a retail position. Her husband is estranged, but sometimes helps care for the children.

According to Melanie, caring for one of her children, Ethan M., presents "logistical problems" that are "more than simply extraordinary." Ethan was born without kidneys and suffered

[1] *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

a brain embolism. He cannot care for himself. Ethan's former attending physician opined that Melanie's absence from Ethan "is far more than a mere inconvenience" because Melanie is Ethan's "primary caregiver." Melanie said that it is very difficult to find someone else to care for Ethan.

Melanie receives benefits under "SNAP," formerly known as the Food Stamp Program. In Nebraska, the Department administers SNAP and issues electronic benefits transfer cards to eligible households, which they can use to purchase food.[2]

In early 2014, the Department notified Melanie that her SNAP benefits were going to change because her net adjusted income had changed. The Department also informed Melanie that it planned to recover overpayments. Melanie requested an administrative hearing regarding the proposed changes. Her attorney sent a letter to the Department demanding an "in-person, face-to-face hearing in the local office in North Platte."

The Department sent Melanie notices informing her that it would hold a hearing in Lincoln and that Melanie could participate "in person" or telephonically. The notices informed Melanie that she had certain rights, including the right to testify, present testimony from other witnesses, submit documentary evidence, and confront adverse witnesses. Ryan C. Gilbride signed the notices as the hearing officer.

Before any administrative hearing occurred, Melanie filed a complaint in district court individually and as next friend of her four minor children. The complaint named as defendants Kerry T. Winterer and Gilbride (identified as "Employees and Agents of State of Nebraska- Department of Health and Human Services") in their individual and official capacities. Melanie also sued "The State of Nebraska- Department of Health and Human Services."

Citing 42 U.S.C. § 1983 (2012), Melanie alleged that the defendants' refusal to grant her a face-to-face hearing at the Department's North Platte office deprived her of procedural due process. She stated that her "ability to confront and

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[2] See 475 Neb. Admin. Code, ch. 5, § 001 (2005). See, also, *U.S. v. Mohamed*, 727 F.3d 832 (8th Cir. 2013).

cross-examine witnesses is certainly crippled by the Hobson's choice of either travelling approximately 450 miles round-trip, or participating by telephone without the ability to even see the fact-finder or the adverse witnesses." Melanie also alleged that regulations required the Department to offer her a face-to-face hearing in North Platte and, pending the administrative hearing, to maintain her SNAP benefits at their original level.

Melanie requested injunctive relief requiring the defendants to hold a face-to-face hearing in North Platte, the restoration of SNAP benefits pending an administrative hearing, damages, and attorney fees under 42 U.S.C. § 1988 (2012).

Along with the complaint, Melanie moved for a temporary restraining order and injunction. "Because of the medical conditions of [Melanie's] children," the court entered on the same day a temporary order that restrained the defendants from holding an administrative hearing and ordered them to "continue or resume SNAP benefits." The temporary restraining order remained in effect until the court overruled Melanie's motion for a temporary injunction. The court stated that Melanie had not shown a clear right to her requested relief.

In their answer, the defendants admitted that they offered Melanie a face-to-face hearing only in Lincoln. Winterer and Gilbride affirmatively alleged that they were entitled to qualified immunity. Gilbride also affirmatively alleged that he was entitled to "quasi-judicial immunity since his participation in this matter was limited to his role as a hearing officer."

The court sustained the defendants' motion for summary judgment. First, the court considered whether the Department's regulations entitled Melanie to a face-to-face hearing at the North Platte office. Giving deference to the Department's interpretation of its own rules, the court decided that the Department's reading was consistent with the regulation's plain language. As to Melanie's due process claim, the court acknowledged that she had a property interest in her SNAP benefits and that the Due Process Clause entitled her to a hearing. But it could "find no case that extends [Melanie's] right to participate in the hearing to the right to control the location of the hearing." Alternatively, the court held that Winterer

and Gilbride were entitled to qualified immunity in their individual capacities and that Gilbride was entitled to absolute immunity because he acted in a quasi-judicial capacity.

ASSIGNMENTS OF ERROR

Melanie generally assigns that the court erred by sustaining the defendants' motion for summary judgment. She specifically assigns, renumbered and restated, that the court erred by (1) finding that the defendants offered Melanie a hearing that "met the regulatory and constitutional requirements of due process," (2) finding that the "individual defendants" were entitled to qualified immunity, and (3) not awarding attorney fees.

STANDARD OF REVIEW

[1,2] We will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[3] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and give that party the benefit of all reasonable inferences deducible from the evidence.[4]

[3] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented which an appellate court decides independently of the decision made by the court below.[5]

ANALYSIS

Procedural Due Process

Melanie argues that the Due Process Clause of the 14th Amendment requires the defendants to offer her a face-to-face hearing before reducing her SNAP benefits. Because of Ethan's

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[3] *D-CO, Inc. v. City of La Vista*, 285 Neb. 676, 829 N.W.2d 105 (2013).

[4] *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014).

[5] See *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011).

health problems and the distance between Lincoln and North Platte, she contends that the defendants effectively restricted her to a telephonic hearing.

The first step in a due process analysis is to identify a property or liberty interest entitled to due process protection.[6] The defendants do not dispute that a property interest is at stake here. SNAP benefits are a statutory entitlement and, therefore, "property" protected by the Due Process Clause.[7]

[4] Once we decide that due process applies, the question remains what process is due.[8] Due process is a flexible concept that defies precise definition.[9] The process required is that necessary to provide "fundamental fairness" under the particular facts of the case.[10]

[5] In *Mathews*,[11] the U.S. Supreme Court set forth three factors relevant to the specific requirements of due process: first, the private interest that the official action will affect; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[12]

But Melanie argues that we do not have to apply a *Mathews* analysis because in *Goldberg v. Kelly*,[13] the U.S. Supreme Court has specifically held that face-to-face hearings are required in welfare cases. In *Goldberg*, the Court decided that

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[6] *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

[7] See, *Atkins v. Parker*, 472 U.S. 115, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985); *Bliek v. Palmer*, 102 F.3d 1472 (8th Cir. 1997).

[8] *Hass v. Neth, supra* note 6.

[9] *Casey v. O'Bannon*, 536 F. Supp. 350 (E.D. Pa. 1982); *In re Interest of Brian B.*, 268 Neb. 870, 689 N.W.2d 184 (2004).

[10] See, *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011); *In re Interest of Brian B., supra* note 9.

[11] *Mathews v. Eldridge, supra* note 1.

[12] See *Hass v. Neth, supra* note 6.

[13] *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

the government must provide a "pre-termination evidentiary hearing" before discontinuing welfare benefits.[14] The Court identified six elements of an evidentiary hearing: (1) notice of the reasons for the proposed termination; (2) an opportunity to confront adverse witnesses and present "arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decisionmaker; (5) a decision that rests "solely on the legal rules and evidence adduced at the hearing"; and (6) a statement describing the reasons for the decision and the evidence relied on.[15]

The procedures challenged in *Goldberg* allowed a welfare recipient to contest in writing a proposed termination. But a recipient could not "appear personally" before the final decisionmaker to "present evidence to that official orally" and cross-examine adverse witnesses.[16] The Court noted that "written submissions do not afford the flexibility of oral presentations" and are a poor basis for a decision, "[p]articularly where credibility and veracity are at issue . . . ."[17] But *Goldberg* cautioned that a predeprivation evidentiary hearing "need not take the form of a judicial or quasi-judicial trial."[18]

We conclude that *Goldberg* does not specifically mandate a predeprivation face-to-face hearing in every welfare case. *Goldberg* plainly requires the opportunity to present evidence orally. But the Court did not decide whether due process requires the oral presentation of evidence in a face-to-face hearing. We note that, so far as we can tell, no court has held that telephonic hearings in welfare cases are categorically deficient under *Goldberg*.[19]

So, we must determine the adequacy of a telephonic hearing under the *Mathews* factors. Melanie's private interest is substantial. SNAP recipients "are, by definition, low-income

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[14] *Id.*, 397 U.S. at 264.

[15] *Id.*, 397 U.S. at 268, 271. See *Mathews v. Eldridge*, *supra* note 1.

[16] *Goldberg v. Kelly*, *supra* note 13, 397 U.S. at 268.

[17] *Id.*, 397 U.S. at 269.

[18] *Id.*, 397 U.S. at 266.

[19] See Annot., 88 A.L.R.4th 1094 (1991).

persons who live 'on the very margin of subsistence.'"[20] But the government's interest in the efficient use of public resources weighs in favor of telephonic hearings.[21] Contrary to Melanie's argument, the state's interest in efficiency is not irrelevant when welfare benefits are at stake.[22]

The last *Mathews* factor we must consider is the risk of erroneous deprivation from a telephonic hearing compared to a face-to-face hearing. The difference between the two is, obviously, that the hearing officer in a telephonic hearing is unable to visually observe the witnesses in the flesh. Thus, the officer is deprived of the full range of demeanor evidence.[23]

The "'wordless language'" of a witness' demeanor is an important tool for evaluating credibility.[24] Even the "best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried."[25] Of course, a witness' aural mannerisms are observable telephonically. But a decisionmaker who can hear but not see a witness does not get the whole picture: "Over the phone, the fact finder cannot see the way a witness sits, shifts around, or blushes. Over the phone, the fact finder cannot observe if the witness shakes nervously, smiles maliciously, or grimaces with pain."[26]

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[20] *Bliek v. Palmer, supra* note 7, 102 F.3d at 1476, quoting *Mathews v. Eldridge, supra* note 1. See *Casey v. O'Bannon, supra* note 9.

[21] See, *Casey v. O'Bannon, supra* note 9; *Murphy v. Terrell*, 938 N.E.2d 823 (Ind. App. 2010). See, also, *Mathews v. Eldridge, supra* note 1; *Penry v. Neth*, 20 Neb. App. 276, 823 N.W.2d 243 (2012).

[22] See, e.g., *Casey v. O'Bannon, supra* note 9.

[23] See, *id*.; *State, ex rel. Human Services Dept. v. Gomez*, 99 N.M. 261, 657 P.2d 117 (1982); Allan A. Toubman et al., *Due Process Implications of Telephone Hearings: The Case for an Individualized Approach to Scheduling Telephone Hearings*, 29 U. Mich. J.L. Reform 407 (1996).

[24] *Broadcast Music v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949).

[25] *Id*. See, also, 3 William Blackstone, Commentaries *373.

[26] Neil Fox, Note, *Telephonic Hearings in Welfare Appeals: How Much Process is Due?*, 1984 U. Ill. L. Rev. 445, 471 (1984).

[6] The question here, though, is not whether the in-person observation of witnesses has value—it does—but whether its value is so great that the Due Process Clause requires it in Melanie's welfare appeals. While "[p]hysical appearance can be a clue to credibility, . . . of equal or greater importance is what a witness says and how she says it."[27] Furthermore, the importance of demeanor evidence depends on the role that credibility plays in a particular determination.[28] Here, the actions which Melanie administratively appealed are reductions in her benefits because her net income changed.

We conclude that for this type of hearing, the risk of erroneous deprivation is not so great that a face-to-face hearing in North Platte is constitutionally required.[29] Credibility does not play a large role in every welfare case.[30] Melanie argues that SNAP entitlement depends on "'"an individualized determination of income, expenses, and deductions for each recipient," thereby creating substantial risks of erroneous deprivations.'"[31] But, after reviewing the applicable regulations, we believe that determining the amount by which a recipient's net income has changed will usually "involve

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[27] *Babcock v. Employment Division*, 72 Or. App. 486, 490, 696 P.2d 19, 21 (1985).

[28] See, *Gray Panthers v. Schweiker*, 716 F.2d 23 (D.C. Cir. 1983); *Stiver v. Shalala*, 879 F. Supp. 1021 (D. Neb. 1995); *In re Suspension of Driver's License*, 143 Idaho 937, 155 P.3d 1176 (Idaho App. 2006); *State, ex rel. Human Services Dept. v. Gomez, supra* note 23; Fox, *supra* note 26; Toubman et al., *supra* note 23.

[29] See, *Casey v. O'Bannon, supra* note 9; *Murphy v. Terrell, supra* note 21; *State, ex rel. Human Services Dept. v. Gomez, supra* note 23. See, also, *Penry v. Neth, supra* note 21; *Sterling v. District of Columbia*, 513 A.2d 253 (D.C. 1986); *Babcock v. Employment Division, supra* note 27; *Greenberg v. Simms Merchant Police Service*, 410 So. 2d 566 (Fla. App. 1982).

[30] See, *Gray Panthers v. Schweiker, supra* note 28; Fox, *supra* note 26.

[31] Brief for appellant at 9, quoting *Bliek v. Palmer*, 916 F. Supp. 1475 (N.D. Iowa 1996).

relatively straightforward matters of computation."[32] In fact, Melanie stated at oral argument that her credibility would not play a large role in the Department's decision.

In conclusion, after weighing the private interest, the government's interest, and the risk of erroneous deprivation, we determine that the Due Process Clause does not require a face-to-face hearing at the local office in the particular SNAP appeals in question. We do not consider whether a telephonic hearing violates the Equal Protection Clause because Melanie did not specifically assign this issue as error in her opening brief. For an appellate court to consider an alleged error, a party must specifically assign and argue it.[33]

Nebraska Regulations

Apart from her rights under the federal Constitution, Melanie argues that the Department's regulations entitle her to a face-to-face hearing at the local office. The defendants respond that Melanie did not specifically assign this issue as error. But we decide that the third assignment in her brief—which asks us to consider whether a telephonic hearing "met the regulatory and constitutional requirements of due process"—is sufficient to put the question before this court.

Section 1983 does not provide a remedy for the violation of state law.[34] But, while Melanie could have been more precise, we read her complaint to include a prayer for a declaration that a face-to-face hearing is independently required by the Department's regulations.[35] Furthermore, an injunction—but not damages—would be within the scope of such declaratory

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[32] *Califano v. Yamasaki*, 442 U.S. 682, 696, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979). See 475 Neb. Admin. Code, ch. 3, §§ 002.02A and 002.02B (2005) and 003 (2013).

[33] *deNourie & Yost Homes v. Frost, supra* note 4.

[34] See, e.g., Martin A. Schwartz & Kathryn R. Urbonya, Section 1983 Litigation 26 (2d ed. 2008).

[35] See *Weeks v. State Board of Education*, 204 Neb. 659, 284 N.W.2d 843 (1979).

relief.[36] The court's order sustaining the defendants' motion for summary judgment treated Melanie's regulatory and constitutional arguments as separate theories. So, we consider whether the court erred by entering a summary judgment against Melanie's requests for declaratory and injunctive relief based on the Department's regulations. We note that the defendants have not raised sovereign immunity at trial or on appeal.[37]

[7-9] Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.[38] Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary.[39] An agency does not generally have the discretion to waive, suspend, or disregard a validly adopted rule.[40]

[10-12] For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.[41] In the absence of anything to the contrary, language in a rule or regulation is to be given its plain and ordinary meaning.[42] We accord deference to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.[43]

The regulation in question is 475 Neb. Admin. Code, ch. 1, § 007 (2005). Section 007 provides:

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[36] See, *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012); *Duggan v. Beerman*, 249 Neb. 411, 544 N.W.2d 68 (1996).

[37] See, *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014); *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[38] *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007).

[39] *Id.*

[40] See *id.*

[41] See *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002).

[42] *Carey v. City of Hastings*, 287 Neb. 1, 840 N.W.2d 868 (2013).

[43] See *Marion's v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 982, 858 N.W.2d 178 (2015).

> A fair hearing must be provided to any household wishing to appeal any action or inaction of the local office which affects the household's participation. Fair hearings may be conducted at the local office either by telephone with a hearing officer or a hearing officer coming to the local office. The household member requesting the fair hearing will be notified by the [Department's] Legal Division of which type of hearing will be held. The household must be given the option of requesting a face-to-face hearing if a telephone hearing was scheduled.

As the district court noted, the second sentence provides that the Department may hold either a telephonic or a face-to-face hearing at the local office. The last sentence provides the household can request a face-to-face hearing if the Department initially schedules a telephonic hearing. The court reasoned that "[t]o interpret the last sentence . . . as allowing [Melanie] to require that the face-to-face hearing be held in the county of her residence, would contradict the prior provision of the regulation and essentially turn the word 'may' into 'shall.'" So, the court appeared to conclude that § 007 gave Melanie the right to a face-to-face hearing, but that the location of such hearing was left to the Department's discretion.

But the court's interpretation renders the last sentence meaningless. The plain and ordinary meaning of § 007 requires that the Department hold the face-to-face hearing at the local office. Although the choice between a face-to-face or a telephonic hearing at the local office is initially permissive, a face-to-face hearing is mandatory if the household requests one. Read in the context of the regulation as a whole, the household's right to request a face-to-face hearing in the last sentence is a right to request such a hearing at the local office, not at a location of the Department's choosing. Thus, Melanie is entitled to a face-to-face hearing at the North Platte office.

Attorney Fees

Melanie argues that she is entitled to attorney fees under 42 U.S.C. § 1988. Apparently referring to the temporary

restraining order, she asserts that the district court "issued an enforceable order to restore benefits, which [the defendants] indisputably did."[44] The defendants argue that Melanie's § 1983 action did not materially alter her legal relationship with the Department.

[13,14] Generally, a party may recover attorney fees and expenses in a civil action only if provided for by statute or if a recognized and accepted uniform course of procedure allows the recovery of attorney fees.[45] The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), provides that the court may award a reasonable attorney fee to the "prevailing party" in an action that enforces 42 U.S.C. § 1983. A plaintiff is a "prevailing party" under § 1988 if the plaintiff obtains actual relief on the merits of his or her claim that alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.[46] An injunction or a declaratory judgment, like a damages award, will usually satisfy the prevailing party test.[47] In some circumstances, a plaintiff can "prevail" by obtaining temporary injunctive relief.[48]

[15] But a plaintiff who obtains temporary injunctive relief is not a prevailing party under § 1988 if the plaintiff eventually loses on the merits. In *Sole v. Wyner*,[49] the plaintiff informed Florida state officials, the defendants, of her intent to protest war by assembling nude persons in the shape of a "peace sign." The defendants told the plaintiff that the participants had to wear bathing suits. The plaintiff sued under

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[44] Reply brief for appellant at 5.

[45] See *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

[46] *Lefemine v. Wideman*, ___ U.S. ___, 133 S. Ct. 9, 184 L. Ed. 2d 313 (2012).

[47] *Id.*

[48] See, *McQueary v. Conway*, 614 F.3d 591 (6th Cir. 2010); *People Against Police Violence v. City of Pitts.*, 520 F.3d 226 (3d Cir. 2008); Annot., 81 A.L.R. Fed. 2d 1 (2014); 2 Rodney A. Smolla, Federal Civil Rights Acts § 16:4 (3d ed. 2015).

[49] *Sole v. Wyner*, 551 U.S. 74, 78, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007).

§ 1983, asserting her rights under the First Amendment. The complaint requested a temporary injunction against interference with the peace sign demonstration and a permanent injunction against interference with "'future expressive activities.'"[50] The court issued a temporary injunction. But, after rogue nudists at the peace sign demonstration refused to stay behind a partition, the court sustained the defendants' motion for summary judgment.

The U.S. Supreme Court held that the plaintiff's victory at the temporary injunction stage did not entitle her to attorney fees. The Court stated that "a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under § 1988(b) if the merits of the case are ultimately decided against her."[51] The Court expressed no opinion of whether attorney fees might be awarded for a preliminary injunction if the case was resolved without a final decision on the merits.[52] But a "plaintiff who achieves a transient victory at the threshold of an action" does not deserve an attorney fee if "her initial success is undone and she leaves the courthouse emptyhanded."[53]

[16] Here, the court issued a temporary restraining order against the defendants, but overruled Melanie's motion for a temporary injunction and eventually entered a judgment on the merits against Melanie's due process claim. We note that the purpose of a temporary restraining order is only to maintain the status quo until a court can hear both parties on the propriety of a temporary injunction.[54] The order issued by the court was not a decision on the merits.[55] Furthermore, to the extent that Melanie prevailed under federal law, her victory was

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[50] *Id.*, 551 U.S. at 79.

[51] *Id.*, 551 U.S. at 86.

[52] *Id.*

[53] *Id.*, 551 U.S. at 78.

[54] See *State ex rel. Beck v. Associates Discount Corp.*, 161 Neb. 410, 73 N.W.2d 673 (1955).

[55] See, e.g., *Garcia v. Yonkers School Dist.*, 561 F.3d 97 (2d Cir. 2009).

fleeting.[56] The court terminated the temporary restraining order by overruling Melanie's motion for a temporary injunction, and it finally denied her any judicial relief under federal law by sustaining the defendants' motion for summary judgment. Melanie "may have won a battle, but [she] lost the war."[57] She is not a prevailing party under § 1988(b).

[17] Alternatively, Melanie suggests that she does not have to prevail in the courtroom to be a prevailing party. She contends that if "a lawsuit produces voluntary action by a defendant that affords all or some of the relief sought through a judgment, the plaintiff is deemed to have prevailed regardless of the absence of a favorable formal judgment."[58] However, we have held that the "'catalyst theory'" does not apply to claims for attorney fees under § 1988.[59] A plaintiff cannot be a prevailing party under federal fee-shifting statutes without "the necessary judicial *imprimatur* on the change."[60]

[18] Finally, we note again that § 1983 does not remedy violations of Nebraska law.[61] A plaintiff who prevails under state law can obtain fees under § 1988 if the claim on which the plaintiff prevailed is accompanied by a "'substantial,'" though undecided, § 1983 claim arising from the same nucleus of facts.[62] But, here, the district court decided Melanie's due process claim against her and we have affirmed that part of the judgment. Thus, in this case, a victory under Nebraska law will not make Melanie a prevailing party under § 1988.

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[56] See *Sole v. Wyner, supra* note 49.

[57] See *National Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57, 65 (3d Cir. 2013).

[58] Reply brief for appellant at 4.

[59] *Simon v. City of Omaha, supra* note 45, 267 Neb. at 727, 677 N.W.2d at 137.

[60] *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). See, also, Schwartz & Urbonya, *supra* note 34, at 200.

[61] See, e.g., Schwartz & Urbonya, *supra* note 34.

[62] *Manning v. Dakota Cty. Sch. Dist.*, 279 Neb. 740, 746, 782 N.W.2d 1, 8 (2010).

CONCLUSION

We conclude that Melanie is entitled to a face-to-face hearing at the Department's local office under 475 Neb. Admin. Code, ch. 1, § 007, but not under the Due Process Clause. She is not a prevailing party for purposes of attorney fees under 42 U.S.C. § 1988, because she lost on the merits of her claim under federal law. We reverse, and remand for further proceedings on Melanie's request for a declaration of rights under 475 Neb. Admin. Code, ch. 1, § 007, and injunctive relief within the scope of such declaration.

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

ARCHER DANIELS MIDLAND COMPANY, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

861 N.W.2d 733

Filed April 23, 2015. No. S-14-724.

1. **Taxation: Judgments: Appeal and Error.** An appellate court reviews decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Taxation: Appeal and Error.** An appellate court reviews questions of law arising during appellate review of decisions by the Tax Equalization and Review Commission de novo on the record.
4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the lower tribunal.
5. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
7. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

8. ____. A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme, giving effect to every provision.
9. **Statutes: Taxation.** Tax exemption provisions are to be strictly construed, and their operation will not be extended by construction.
10. **Property: Taxation.** Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
11. **Property: Taxation: Time.** The exemption provisions in Neb. Rev. Stat. § 77-5725(8)(c) (Reissue 2009) impose a mandatory statutory deadline for the filing of the prescribed form.
12. **Administrative Law: Taxation: Equity: Legislature.** The Tax Equalization and Review Commission is an agency whose only equitable powers are those conferred upon it by the Legislature.
13. **Stipulations.** In Nebraska, parties are free to make stipulations that govern their rights, and such stipulations will be respected and enforced by courts so long as the agreement is not contrary to public policy or good morals.

Appeal from the Tax Equalization and Review Commission. Affirmed.

James G. Powers, Patrick D. Pepper, and Nicholas K. Niemann, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

After the Department of Revenue (the Department) rejected the claim of Archer Daniels Midland (ADM), the Nebraska Tax Commissioner denied ADM's protest seeking a personal property tax exemption under the Nebraska Advantage Act, Neb. Rev. Stat. § 77-5701 et seq. (Reissue 2009) (the Act) for the year 2010 because the claim was not timely filed. ADM appealed to the Tax Equalization Review Commission (TERC). TERC affirmed. ADM now appeals to this court, assigning that TERC erred when it concluded that it did not have authority to apply the doctrine of "substantial

compliance" to ADM's untimely filings and when it concluded that it did not have equitable authority to enter orders of remand or mandamus to the Tax Commissioner for further consideration of issues relating to the hearing officer. We agree with TERC that there is no basis or authority to apply the doctrine of substantial compliance to vary the terms of the mandatory statutory deadlines and that ADM's untimely claim was properly denied. We further determine that by stipulation, ADM waived the issue relating to the hearing officer, and that TERC did not err when it afforded no relief. Accordingly, we affirm.

STATEMENT OF FACTS

The parties stipulated to the controlling facts in this case. ADM is a corporation that at all times relevant to these proceedings has been engaged in business in the State of Nebraska and is a taxpayer under Neb. Rev. Stat. § 77-2753 (Reissue 2009). Pursuant to the Act, ADM applied for and entered into an agreement (the Agreement) with the Tax Commissioner with the aim of using incentives set forth in the Act for a project in Platte County, Nebraska. The personal property for which ADM seeks exemption from ad valorem taxes is generally described as involving agricultural processing equipment.

The Agreement provided, inter alia, that ADM would be eligible for exemption from personal property tax if it met "minimum levels of employment and investment" before December 31, 2009. The Agreement further provided:

> (c) To receive the property tax exemptions, the taxpayer shall annually file a claim for exemption with the . . . Tax [Commissioner] and with the county assessor in each county in which the taxpayer is requesting exemption on or before May 1.
>
> . . . .
>
> (ii) The form and supporting schedules [to claim the exemption] shall be prescribed by the . . . Tax [Commissioner] and shall list all property for which exemption is being sought.

The Tax Commissioner prescribed "Form 5725X" as the form for claiming exemption from personal property taxes. See, § 77-5725(8)(c); 350 Neb. Admin. Code, ch. 43, § 003.01A (2009). Because May 1, 2010, fell on a Saturday, the deadline for ADM to file Form 5725X was May 3. See 350 Neb. Admin. Code, ch. 43, § 003.01C (2009).

ADM accomplished the necessary hiring and investing prior to December 31, 2009. ADM built three facilities in Platte County: a dry-mill ethanol plant, a wet-mill ethanol plant, and a cogeneration electrical production plant. The taxable values of these properties totaled $431,236,152.

ADM reported its compliance with the Agreement to the offices of the Tax Commissioner and the Platte County assessor (the Assessor), and those agencies took measures to review ADM's compliance. The Department conducted an audit of ADM, and the Assessor's office had multiple conversations with ADM's property tax manager concerning the potential exemptions.

Prior to May 3, 2010, ADM filed a series of Nebraska personal property tax returns with the Assessor and notified the Assessor that the filings related to ADM's property exemption under the Act.

On May 7, 2010, ADM filed three Forms 5725X with both the Department's property assessment division and the Assessor. They were dated May 1, 2010.

On May 20, 2010, the Department issued a "Notice of Late Filing of Claim for Exemption of Personal Property" to ADM. The notice cited Neb. Rev. Stat. § 77-1229(2) (Reissue 2009) and stated, "Failure to timely file the required forms shall cause the forfeiture of the exemption for the tax year." The notice continued, "Your late filing acts as a waiver of the exemption for tax year 2010" with respect to the subject property.

On May 27, 2010, ADM filed three amended Forms 5725X with the Department's property assessment division and the Assessor.

ADM filed a protest and requested a hearing. It specifically petitioned for redetermination of the Department's conclusion

that ADM's personal property tax exemption claim for the 2010 tax year had not been timely filed.

On June 23, 2010, prior to the hearing, ADM filed a motion to recuse the hearing officer, for the reason that the hearing officer was engaged as a volunteer attorney and member of the advisory board of a public interest organization which had expressed dissatisfaction with the Act.

After ADM filed the motion for recusal, the hearing officer sent an e-mail message to counsel for the Department stating in part: "I am sorry to bother you but is there any precedent for the substance of [ADM's recusal] motion? . . . Is the problem because of any association, past or present? Or continuing? Thanks so much."

Counsel for the Department disclosed the e-mail message to ADM's counsel. On June 30, 2010, ADM filed a second motion to recuse the hearing officer, based on the e-mail message, contending that the e-mail was an impermissible ex parte communication requiring recusal. The hearing officer heard argument on the two recusal motions and denied both motions.

After the rulings on the recusal motions, the parties filed with the Department an "Amended and Restated Stipulation of Facts and Issue," dated July 27, 2010. With respect to the issue, the parties stipulated and agreed as follows:

> IT IS FURTHER STIUPLATED AND AGREED by and between all parties to this stipulation that the only question at issue in this matter (and any appeal thereof) is whether ADM is eligible for a 2010 personal property tax exemption under the . . . Act based on those documents and records filed by ADM with the State of Nebraska and/or Platte County, Nebraska and ADM's correspondence with the State of Nebraska and/or Platte County, Nebraska, and the other communications between ADM, the State of Nebraska, and/or Platte County, Nebraska, based on testimony at the hearing.

Following the hearing, the Tax Commissioner denied the petition for redetermination. The Tax Commissioner agreed with the Department's conclusion that because ADM's personal property tax exemption claim for the 2010 tax year was

not timely filed, denial of the exemption as to the subject property was required.

ADM appealed to TERC. Prior to the hearing on the merits, ADM raised the recusal issue in the form of a motion for remand and writ of mandamus seeking an appointment of an unbiased hearing officer. TERC denied the motion.

Following the hearing on the merits of the appeal, in its order dated July 18, 2014, TERC discussed the recusal issue, explaining its understanding that it had no express authority to order a remand. As to the merits of ADM's appeal, TERC affirmed the Tax Commissioner's determination that the subject property was not exempt from taxation for the year 2010. TERC reviewed the relevant filing provisions of the Act, noted that the filings were not timely, and cited case law stating, inter alia, that statutes relating to exemptions ought to be strictly construed. TERC observed that it does not generally have equitable powers and, therefore, does not have the authority to render equitable decisions without express constitutional or statutory authority. In this regard, it noted that its power to hear appeals "'as in equity'" had been repealed by 2007 Neb. Laws, L.B. 167, § 6. TERC, therefore, rejected ADM's suggestion to the effect that ADM had substantially complied with filing requirements and that its claim should be deemed timely. TERC stated it "found no authority to conclude that ADM substantially complied with the filing requirements of the Act" when ADM undisputedly filed the required forms after the mandatory statutory deadline.

ADM appeals.

ASSIGNMENTS OF ERROR

ADM generally claims, restated, that TERC erred when it affirmed the Tax Commissioner's determination that the subject property was not exempt from taxation for the year 2010. It specifically claims that TERC erred when it concluded (1) it did not have authority to apply the doctrine of substantial compliance to ADM's untimely filing and (2) it did not have authority to enter orders of remand or mandamus to the Tax Commissioner for further consideration of issues relating to the hearing officer.

STANDARDS OF REVIEW

[1-3] An appellate court reviews decisions rendered by TERC for errors appearing on the record. *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (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 not arbitrary, capricious, or unreasonable. *Id.* An appellate court reviews questions of law arising during appellate review of decisions by TERC de novo on the record. *Id.*

[4] Statutory interpretation is a question of law, which an appellate court resolves independently of the lower tribunal. See *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012).

ANALYSIS

TERC Correctly Concluded That the Late Filing of the Forms Required by the Act Resulted in Forfeiture of the Tax Exemption.

The statutory framework under the Act controls the outcome in this case. Timely filing of the right form in the right place is required to properly claim a property tax exemption.

There seems to be no dispute that ADM satisfied the investment and hiring requirements of the Act, and the Tax Commissioner and the Assessor reviewed ADM's compliance. In order to obtain the exemption under the Act, ADM was required to file Form 5725X with the Tax Commissioner and the Assessor on or before May 3, 2010, and the terms of the Agreement are to the same effect. See, § 003.01A (prescribing Form 5725X); § 77-5725(8)(c) (setting May 1 as annual deadline); 350 Neb. Admin. Code, ch. 43, § 003.01B (2009) (copies to be filed with Tax Commissioner and Assessor); § 003.01C (providing for filing on next business day). However, ADM did not file the Forms 5725X with the Tax Commissioner and Assessor until May 7.

ADM claims that TERC erred when it concluded that TERC did not have authority to apply the doctrine of substantial compliance to ADM's untimely filing for the exemption. Upon

our de novo review, we find no error. Thus, we conclude that TERC did not err when it affirmed the Tax Commissioner's order which determined that the subject property was not exempt from taxation for the year 2010.

Under the statutory scheme, the Tax Commissioner has been authorized to "adopt and promulgate all rules and regulations necessary to carry out the purposes of the . . . Act." § 77-5733. With respect to the proper form, the Tax Commissioner prescribed the "Claim for Nebraska Personal Property Exemption," Form 5725X as the required form for claiming the exemption. § 003.01A.

Having identified the proper form, we next consider the Act to determine the filing deadline for Form 5725X. At the time of ADM's claim, § 77-5725(8)(c) (now recodified and amended as § 77-5725(8)(d) (Cum. Supp. 2014)) provided, in part:

> In order to receive the property tax exemptions allowed by . . . this section, the taxpayer shall annually file a claim for exemption with the Tax Commissioner on or before May 1. The form and supporting schedules shall be prescribed by the Tax Commissioner and shall list all property for which exemption is being sought under this section. A separate claim for exemption must be filed for each project and each county in which property is claimed to be exempt. A copy of this form must also be filed with the county assessor in each county in which the applicant is requesting exemption. The Tax Commissioner shall determine the eligibility of each item listed for exemption . . . .

Reference to the May 1 deadline appears elsewhere in the Act and regulations. See, e.g., § 77-1229(2).

Consequences of a failure to timely file are found in the language of § 77-1229(2), which addresses the procedure for filing with the Assessor to obtain the personal property exemption at issue. Section 77-1229(2) provides:

> Any person seeking a personal property exemption pursuant to . . . the . . . Act shall annually file a copy of the forms required pursuant to . . . the [A]ct with the county assessor in each county in which the person is requesting

> exemption. The copy shall be filed on or before May 1. *Failure to timely file the required forms shall cause the forfeiture of the exemption for the tax year*.

(Emphasis supplied.)

The consequences of an untimely filing are also addressed in agency regulations which, having been adopted by the Department and filed with the Secretary of State, have the effect of statutory law. See *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011). Those regulations provide that failure to timely file Form 5727X with the Tax Commissioner "shall constitute a waiver of the exemption." § 003.01B. Those regulations further provide that no extension of time shall be granted for filing Form 5727X and supporting schedules. § 003.01C.

[5-8] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012). In discerning the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.* If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Id.* A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme, giving effect to every provision. See *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

[9,10] This court has previously considered tax exemption provisions and stated that they are to be strictly construed and that their operation will not be extended by construction. See *Bridgeport Ethanol v. Nebraska Dept. of Rev., supra*. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation. *Id.* Significantly, in TERC cases, we have required strict compliance with statutory time requirements. See, e.g., *Republic Bank v. Lincoln Cty. Bd. of Equal.*, 283 Neb. 721, 811 N.W.2d 682 (2012) (determining that despite unclear deadline language in

taxpayer form, TERC did not obtain subject matter jurisdiction because deadline for filing appeal was controlled exclusively by statute, and that appeal was not timely filed).

[11] We review the exemption provisions in § 77-5725 as well as the remainder of the Act and the implementing regulations in light of the foregoing principles of statutory construction. In so doing, it is clear that the provisions impose a mandatory statutory deadline for the filing of Form 5725X which we are not free to ignore.

In its order, TERC correctly noted that the required filing deadline was May 1, 2010, which, because it fell on a Saturday, was extended to Monday, May 3. See § 003.01C. TERC stated that the "evidence in this appeal is undisputed that ADM did not file the required Form 5725X with both the . . . Assessor and the . . . Department . . . until May 7, 2010, four days after the statutorily required filing deadline of May 3, 2010." The evidence included the Agreement, which is consistent with the Act and in which ADM agreed to file its claim with the Tax Commissioner and Assessor on or before May 1. TERC concluded that "the required filings were not made until after the statutorily required filing deadlines [and] that the Tax Commissioner's decision" was not arbitrary or unreasonable. TERC's decision affirming the ruling of the Tax Commissioner was supported by the applicable law and evidence.

Notwithstanding the acknowledged lateness of its filings, ADM urged TERC to apply the equitable doctrine of substantial compliance to effectively extend the statutory deadline. ADM claims TERC erred when it rejected this suggestion. We conclude TERC did not err.

[12] TERC is an agency whose only equitable powers are those conferred upon it by the Legislature. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). We find no statutory language that would have allowed TERC to deviate from the mandatory deadline clearly set forth in the Act. To the contrary, as noted by TERC, L.B. 167, § 6, repealed the statutory provision which had authorized TERC to hear appeals "'as in equity.'"

Our conclusion that TERC did not have authority to apply the doctrine of substantial compliance to the untimely filing

is reinforced by the language of the statutes and regulations pertaining to late filings. As noted in our recitation above, the relevant provisions regarding the consequences of untimely filings provide variously that a "[f]ailure to timely file the required forms shall cause the forfeiture of the exemption for the tax year," § 77-1229(2); no extensions of time to file Form 5725X shall be granted, § 003.01C; and failure to timely file Form 5725X "shall constitute a waiver of the exemption," § 003.01B. Construing the deadline and forfeiture provisions together, there is no basis to ignore the filing schedule set by the Legislature in order to grant relief to ADM. We conclude that TERC did not err when it declined to apply the doctrine of substantial compliance to ADM's untimely filings and when it affirmed the order of the Tax Commissioner denying ADM's protest.

The Parties' Amended Stipulation Waived the Recusal Issue.

ADM asks this court to address its recusal claim and consider whether TERC erred when it determined it did not have authority to enter orders of remand or mandamus to the Tax Commissioner for further consideration of the issue relating to the hearing officer. Because we conclude that ADM waived this issue, we do not reach this claim of error.

As stated above, ADM filed two motions for recusal which were denied. After those rulings, ADM stipulated and agreed that "the only question at issue in this matter (and any appeal thereof) is whether ADM is eligible for a 2010 personal property tax exemption" under the Act.

[13] In Nebraska, parties are free to make stipulations that govern their rights, and such stipulations will be respected and enforced by courts so long as the agreement is not contrary to public policy or good morals. *Lincoln Lumber Co. v. Lancaster*, 260 Neb. 585, 618 N.W.2d 676 (2000). See, also, *Shearer v. Shearer*, 270 Neb. 178, 700 N.W.2d 580 (2005) (stating that parties are bound by stipulations voluntarily made and that relief from such stipulations is warranted only under exceptional circumstances); *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987) (stating

that stipulation was equivalent of pretrial order and that party which stipulated to issues to be tried could not complain on appeal that other issues should have been included).

We conclude that ADM is bound by its stipulation to limit the issues in this matter—including on appeal—to its entitlement to the claimed 2010 personal property tax exemption, thereby excluding consideration of the issue regarding the hearing officer on appeal. In any event, given the clear provisions of the Act and implementing regulations requiring rejection of ADM's untimely claimed exemption, there is no basis to expect a different outcome at the Department or at TERC; nor is it reasonable to expect that a ruling contrary to our decision discussed above would be upheld on appeal to this court.

CONCLUSION

Because ADM did not timely file its claim for a personal property tax exemption for the subject property for the year 2010, ADM is not entitled to the exemption, and TERC did not err when it affirmed the order of the Tax Commissioner which denied ADM's protest. Accordingly, we affirm.

AFFIRMED.

IN RE ESTATE OF MARVIN H. SHELL, DECEASED. JANE M. VOBORIL, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARVIN H. SHELL, DECEASED, APPELLEE, V. MARVIN G. VANOSDALL, PERSONAL REPRESENTATIVE OF THE ESTATE OF SHARON VANOSDALL, DECEASED, APPELLANT.

862 N.W.2d 276

Filed May 1, 2015. No. S-14-281.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Wills: Trusts.** The interpretation of the words in a will or a trust presents a question of law.

4. **Decedents' Estates: Taxation.** The inheritance tax is a tax on the beneficiary, not the decedent.
5. **Decedents' Estates: Wills: Taxation: Intent.** A testator who wants to shift the burden of the inheritance tax may employ any word or combination of words that the testator desires, and a few simple words might be enough to show his or her intent. But the direction in the will must be clear and unambiguous in order to supplant the statutory pattern.
6. **Decedents' Estates: Taxation: Intent.** Any ambiguities about whether a testator intended to shift the burden of the inheritance tax are resolved in favor of the statutory pattern.

Appeal from the County Court for Lancaster County: MATTHEW L. ACTON, Judge. Affirmed.

Patrick M. Heng, of Waite, McWha & Heng, for appellant.

Mary Stoughton Wenzel for appellee.

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

CONNOLLY, J.

SUMMARY

Jane M. Voboril and Sharon Vanosdall are the two beneficiaries of Marvin H. Shell's will. The distributions to Voboril and Vanosdall are subject to different amounts of inheritance taxes, but the county court found that the will expressed Shell's intent to treat the taxes as an expense of the estate. Vanosdall contended that the will does not clearly express this intent. Therefore, she argued that each beneficiary's distribution should bear the inheritance tax allocable to that distribution under the statutory pattern. Because the will shows Shell's intent to treat inheritance taxes as an expense of his estate, we affirm.

BACKGROUND

Shell died in February 2012. Voboril is Shell's niece. Vanosdall was Shell's sister-in-law. At oral argument, counsel for the appellant indicated that Vanosdall died during the pendency of her appeal. Counsel filed a suggestion of death and moved to revive the action. We sustained the motion and substituted the personal representative of Vanosdall's estate as the appellant.

The last will and testament of Shell gives one-half of the residue of the estate to Voboril and one-half to Vanosdall. The will does not make any general or specific devises or bequests. Paragraph I directs the payment of expenses and taxes:

> I authorize my Personal Representative to pay from the principal of my residuary estate as soon as is practicable, all of my debts legally owing at the time of my death and/or as allowed in the administration of my estate, the expenses of my funeral and last illness, all of the expenses of the administration of my estate, including a reasonable fee for my Personal Representative. I also authorize my Personal Representative to pay from my probate estate, without contribution or reimbursement from any person, all inheritance, legacy or estate taxes, including interest and penalties thereon, payable by reason of my death with respect to property passing under my Will, or otherwise, including any property held by me jointly with any person with right of survivorship and any collateral taxes on property passing by this Will.

The will nominates Voboril to serve as the personal representative.

Voboril applied for informal probate of the will in February 2012. The county court found that the will was the original, duly executed, and unrevoked last will and testament of Shell. The court issued a statement of informal probate and appointed Voboril as the personal representative.

Voboril filed inventories listing about $204,000 of "Probate Items" and $1,083,000 of "Non-probate Items." The nonprobate property consisted of several "Annuities" owned by Shell with payable-on-death designations in favor of Voboril and Vanosdall. The court entered an order determining and assessing inheritance tax which stated that Voboril owed $64,900.80 of inheritance taxes and Vanosdall owed $7,103.57.

Voboril petitioned for a complete settlement. The accounting Voboril submitted included "Nebraska Inheritance Tax payment $72,004.37" as an expense of the estate. By treating inheritance taxes as an expense of the estate, Voboril effectively subtracted an equal amount from her and Vanosdall's distributions. Vanosdall filed an objection, asserting that the

submitted accounting and distribution schedule made "deductions for the Nebraska State Inheritance Tax and other distributions contrary to both the Will and the current Nebraska State Law."

At the hearing on the petition for complete settlement, Voboril's lawyer argued that paragraph I of the will showed Shell's intent to treat inheritance taxes "as any other type of expense of the administration." The court entered an order to "resolv[e] a question of inheritance tax in the administration of the estate." Because the will made a "specific reference to inheritance tax," the court found that it clearly and unambiguously expressed Shell's intent to pay inheritance taxes "from the assets of the estate."

The court entered an order for complete settlement approving Voboril's accounting—which treated inheritance taxes as an expense of the estate—and the distribution schedule.

ASSIGNMENT OF ERROR

Vanosdall assigned, consolidated, that the court erred by finding that the will clearly and unambiguously showed Shell's intent to treat inheritance taxes as an expense of the estate.

STANDARD OF REVIEW

[1-3] An appellate court reviews probate cases for error appearing on the record made in the county court.[1] When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.[2] The interpretation of the words in a will or a trust presents a question of law.[3]

ANALYSIS

Vanosdall argued that the court erred by treating inheritance taxes "as an expense of the estate prior to any distribution."[4] Instead, she contended that Voboril, as personal representative,

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[1] *In re Estate of Odenreider*, 286 Neb. 480, 837 N.W.2d 756 (2013).

[2] *Id.*

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

[4] Brief for appellant at 7.

should subtract inheritance taxes from Vanosdall's and Voboril's distributions "in proportion to the actual tax rate that each would be taxed on the amounts [she] receive[s]."[5] Vanosdall argued that treating inheritance taxes as an expense of the estate runs afoul of the will's instruction to pay inheritance taxes "without contribution or reimbursement from any person." Voboril responds that the will expresses Shell's intent that "his estate be equally divided between two people after the payment of all expenses of the estate."[6]

Chapter 77, article 20, of the Nebraska Revised Statutes imposes inheritance taxes on a beneficiary's distribution based on the beneficiary's relationship to the decedent.[7] Neither party disputes that the portion of Vanosdall's distribution in excess of $40,000 is taxed at 1 percent[8] and that the portion of Voboril's distribution in excess of $15,000 is taxed at 13 percent.[9] Generally, the fiduciary charged with distributing a decedent's property deducts the inheritance taxes from that property.[10] But under Neb. Rev. Stat. § 77-2038 (Reissue 2009), "the decedent's will may provide direction for the apportionment of the taxes."

[4-6] The inheritance tax is imposed on the beneficiary's right to receive a portion of the decedent's property.[11] It is therefore a tax on the beneficiary, not the decedent.[12] A testator who wants to shift the burden of the tax may employ any word or combination of words that the testator desires, and a few simple words might be enough to show his or her intent.[13] But the direction in the will must be clear and unambiguous

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[5] *Id.* at 8.

[6] Brief for appellee at 3 (emphasis in original).

[7] See, Neb. Rev. Stat. §§ 77-2004 and 77-2005 (Reissue 2009); *Nielsen v. Sidner*, 191 Neb. 324, 215 N.W.2d 86 (1974).

[8] See § 77-2004 and Neb. Rev. Stat. § 77-2005.01(1) (Reissue 2009).

[9] See § 77-2005.

[10] Neb. Rev. Stat. § 77-2011 (Reissue 2009).

[11] *In re Estate of Smatlan*, 1 Neb. App. 295, 501 N.W.2d 718 (1992).

[12] *Id.*

[13] *Stuckey v. Rosenberg*, 169 Neb. 557, 100 N.W.2d 526 (1960).

in order to supplant the statutory pattern.[14] Any ambiguities are resolved in favor of the statutory pattern.[15]

Consistent with these principles, we have held that language in a will directing the personal representative to pay "'my'" debts, expenses, and "'taxes'" is not an effective "apportionment clause."[16] But we have determined that clauses expressly referring to estate and inheritance taxes and directing that they be paid from the residuary estate are sufficient to supplant statutory apportionment methods.[17]

We conclude that paragraph I of the will clearly shows Shell's intent to treat inheritance taxes as an expense of the estate, instead of a tax proportionally borne by the beneficiaries under the statutory pattern. The will expressly refers to inheritance taxes and directs that they be paid "from my probate estate." Generally, courts have concluded that language directing the executor to pay estate and inheritance taxes exonerates the beneficiaries of their tax burden.[18] Furthermore, the sentence in question immediately follows a direction to pay Shell's debts, the expenses of his funeral, and the expenses of the administration of his estate. Coupling a direction to pay estate and inheritance taxes with a direction to pay the testator's debts, funeral expenses, and administration costs shows the testator's intent to pay the taxes "'off the top.'"[19]

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[14] *Nielsen v. Sidner, supra* note 7; *In re Estate of Smatlan, supra* note 11. See, also, *In re Estate of Eriksen*, 271 Neb. 806, 716 N.W.2d 105 (2006); *Naffziger v. Cook*, 179 Neb. 264, 137 N.W.2d 804 (1965).

[15] *Nielsen v. Sidner, supra* note 7; *In re Estate of Smatlan, supra* note 11. See, also, *In re Estate of Eriksen, supra* note 14.

[16] *In re Estate of Eriksen, supra* note 14, 271 Neb. at 809, 716 N.W.2d at 108. See, also, *Nielsen v. Sidner, supra* note 7; *Naffziger v. Cook, supra* note 14; *In re Estate of Smatlan, supra* note 11.

[17] See, *Wondra v. Platte Valley State Bank & Trust Co.*, 194 Neb. 41, 230 N.W.2d 182 (1975); *Gretchen Swanson Family Foundation, Inc. v. Johnson*, 193 Neb. 641, 228 N.W.2d 608 (1975). See, also, *Rasmussen v. Wedge*, 190 Neb. 818, 212 N.W.2d 637 (1973).

[18] Annot., 69 A.L.R.3d 122 (1976). See, e.g., *In re Estate of Roser*, 128 Ill. App. 3d 411, 470 N.E.2d 1135, 83 Ill. Dec. 715 (1984).

[19] See *University of Louisville v. Liberty Nat. Bank & T. Co.*, 499 S.W.2d 288, 289 (Ky. App. 1973).

Contrary to Vanosdall's argument, treating inheritance taxes as an expense of the estate does not result in a "contribution" or "reimbursement" under the terms of the will. In the context of estate and inheritance taxes, the terms "contribution" and "reimbursement" might refer to the equitable apportionment of estate taxes,[20] the apportionment of estate and inheritance tax liability between probate and nonprobate property,[21] or attempts by fiduciaries or beneficiaries who paid more than their share of estate or inheritance taxes to recover the amount of overpayment from other beneficiaries or the estate.[22] So, Shell's direction to pay inheritance and estate taxes "without contribution or reimbursement" shows his intent to avoid the sometimes complicated prorating of such taxes between fiduciaries, beneficiaries, and probate and nonprobate assets by simply treating inheritance taxes as an expense of the probate estate.[23] Other courts interpreting similar language have reached like conclusions.[24]

CONCLUSION

We conclude that the will expresses Shell's intent to treat inheritance taxes as an expense of the estate.

AFFIRMED.

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[20] See *National Newark & Essex Bank v. Hart*, 309 A.2d 512 (Me. 1973).

[21] See, *Oviatt v. Oviatt*, 24 Ohio Misc. 98, 260 N.E.2d 136 (Ohio Prob. 1970); *Cornwell v. Huffman*, 258 N.C. 363, 128 S.E.2d 798 (1963); *Matter of Durkee*, 183 Misc. 382, 47 N.Y.S.2d 721 (N.Y. Sur. 1944).

[22] See, I.R.C. § 2205 (2012); 47B C.J.S. *Internal Revenue* § 512 (2015); 47C C.J.S. *Internal Revenue* § 745 (2015); 85 C.J.S. *Taxation* § 2032 (2010).

[23] See *In re Estate of Williams*, 366 Ill. App. 3d 746, 853 N.E.2d 79, 304 Ill. Dec. 547 (2006).

[24] See, *Bunting v. Bunting*, 60 Conn. App. 665, 760 A.2d 989 (2000); *Estate of Flanigan v. Flanigan*, 175 Colo. 499, 488 P.2d 897 (1971). See, also, *In re Poffenbarger*, 40 Misc. 3d 482, 961 N.Y.S.2d 731 (N.Y. Sur. 2013); *Landmark Trust Co. v. Aitken*, 224 Ill. App. 3d 843, 587 N.E.2d 1076, 167 Ill. Dec. 461 (1992).

THOMAS KALKOWSKI, APPELLANT, V. NEBRASKA NATIONAL TRAILS MUSEUM FOUNDATION, INC., AND GREGORY J. BEAL, APPELLEES.

862 N.W.2d 294

Filed May 1, 2015. No. S-14-317.

1. **Leases: Judgments: Appeal and Error.** The interpretation of a lease is a question of law that an appellate court decides independently of the district court.
2. **Contracts: Restitution.** Any quasi-contract claim for restitution is an action at law.
3. **Judgments: Appeal and Error.** The judgment and factual findings of the trial court in an action at law tried to the court without a jury have the effect of a verdict and will not be set aside unless clearly wrong.
4. ____: ____. In reviewing an action at law, an appellate court reviews the evidence in the light most favorable to the prevailing party. However, regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the lower courts.
5. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
6. **Contracts.** When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
7. **Contracts: Words and Phrases.** Trade terms, legal terms of art, numbers, common words of accepted usage, and terms of a similar nature should be interpreted in accord with their specialized or accepted usage unless such an interpretation would produce irrational results or the contract documents are internally inconsistent.
8. **Unjust Enrichment.** The fact that a recipient has obtained a benefit without paying for it does not of itself establish that the recipient has been unjustly enriched.
9. ____. Unjust enrichment occurs when there has been a transfer of a benefit without adequate legal ground.
10. **Contracts: Restitution.** Restitution is not available for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of a contract.
11. **Restitution.** Restitution is unavailable if it would subject an innocent recipient to a forced exchange.
12. **Contracts: Restitution.** Restitution will not be available if the effect of payment would be to complete an exchange that, had it been proposed as a contract, the recipient would have been free to reject.
13. **Judges: Recusal.** A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.

14. ____: ____. A party may not rely on his or her own conduct as a way to force a judge to recuse himself or herself from the proceedings.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS, Judge. Affirmed.

Randy Fair, of Dudden & Fair, P.C., L.L.O., for appellant.

James R. Korth, of Reynolds, Korth & Samuelson, P.C., L.L.O., for appellee Nebraska National Trails Museum Foundation, Inc.

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

HEAVICAN, C.J.

NATURE OF CASE

Thomas Kalkowski donated 159 acres of land to the Nebraska National Trails Museum Foundation (NNTM). At the time of the donation, NNTM leased the land back to Kalkowski and allowed Kalkowski to farm the land. Kalkowski's upgrades to the land ultimately caused the number of certified irrigated acres (CIAs) assigned to the land to almost double. Hoping to transfer the CIAs to a nearby property, Kalkowski filed suit, claiming that he was entitled to the CIAs and that NNTM had been unjustly enriched. After a bench trial, the district court found in favor of NNTM and Gregory J. Beal, a lienholder of the property. Kalkowski now appeals that decision. We determine that Kalkowski is not entitled to the CIAs either under the lease agreement or under the theory of unjust enrichment.

In addition, while this case was pending before the judge, Kalkowski contacted the general manager of another natural resources district and inquired about the water rights associated with property owned by the judge hearing the case. After the conversation with Kalkowski, the general manager contacted the judge and the two had a discussion regarding Kalkowski. The judge then disclosed the conversation pursuant to Neb. Rev. Code of Judicial Conduct § 5-302.9(B).

Kalkowski filed a motion to recuse, arguing that the judge should have ended the conversation after Kalkowski's name

was brought up and also that the judge's status as an owner of irrigated farmland which was being leased to a farmer created a conflict of interest or at least the appearance of a conflict of interest. The district court denied the motion to recuse, and Kalkowski now also appeals that order. We hold that the district court did not abuse its discretion in denying the motion to recuse.

BACKGROUND

Removal of CIAs.

In 2000, Kalkowski agreed to donate 159 acres of land located in Keith County, Nebraska, to NNTM. Due to a problem with a tax form, the land was not actually deeded to NNTM until 2003. A warranty deed granting NNTM the property in fee simple absolute and a quit claim deed were both filed with the Keith County register of deeds. This is not the first dispute between Kalkowski and NNTM concerning this parcel of land.[1]

At the time the gift was made, Kalkowski and NNTM entered into a lease agreement. Under the lease agreement, Kalkowski agreed to pay the annual taxes on the property and $500 per year in exchange for the right to farm the land. The lease will terminate if and when NNTM constructs a museum of at least 5,000 square feet which would be open to the public. A museum has yet to be built on the property.

The lease also provides that Kalkowski owns all of the irrigation equipment on the property and is responsible for all expenses related to the farming operations conducted on the real estate. With regard to improvements, Kalkowski has "the right to make any and all improvements he deems necessary." Kalkowski must "pay for and maintain these improvements," and Kalkowski has "the right to remove any and all improvements." The term "improvements" is not defined under the lease agreement.

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[1] See, *Kalkowski v. Nebraska Nat. Trails Museum Found.*, 20 Neb. App. 541, 826 N.W.2d 589 (2013); *Kalkowski v. Neb. Nat. Trails Museum Found.*, No. A-07-268, 2008 WL 2839037 (Neb. App. July 22, 2008) (selected for posting to court Web site).

This dispute is over the ownership of the CIAs associated with the land. In 2004, the Nebraska Legislature granted natural resources districts more authority and autonomy in regulating ground water within their respective districts.[2] In particular, the legislation provided that each natural resources district could craft its own rules on how to best regulate the use of ground water.[3]

The Twin Platte Natural Resources District (TPNRD), where the relevant parcel of land is located, settled on a CIAs system of water management. A TPNRD representative testified that this system works by designating a finite number of acres within the district which are approved for irrigation by ground water, in conjunction with instituting a moratorium on the creation of new wells within the district. The representative testified that any acre of land within the district that had been irrigated for at least 1 year between 2001 and 2005 would be designated as a CIA by TPNRD.

The legislation also provides that subject to district approval, CIAs can be transferred "between parcels or tracts under the control of a common landowner or other person."[4] The initial certification of the CIAs by TPNRD was recorded with the register of deeds of the county where the land was located. Any subsequent transfers of the CIAs to another parcel must also be recorded with the county's register of deeds.[5]

The CIAs were assigned by TPNRD to specific parcels of land, and individual CIAs are under the control of the owner of those specific parcels of land. Unless reserved, the CIAs assigned to a particular parcel would run with the land in the event of a transfer of the real estate. The district court determined that the market value of a single CIA within the area in question is approximately $2,000 to $2,500.

Kalkowski testified that in anticipation of the impending certification process, he commenced irrigation activities on

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[2] See 2004 Neb. Laws, L.B. 962, § 79.

[3] Neb. Rev. Stat. § 46-739 (Reissue 2010).

[4] § 46-739(1)(k).

[5] Neb. Rev. Stat. § 46-739.02 (Reissue 2010).

the NNTM land and cleared out shrubs and trees to increase the number of CIAs prior to the certification date. The district court determined that as a result of Kalkowski's actions, the number of CIAs on the NNTM land increased from 75.9 to 152.9. A representative from TPNRD testified that had Kalkowski done nothing between 2000 and 2005, those additional CIAs would have been lost forever and the parcel would have been certified with only 75.9 CIAs.

In 2010, Kalkowski purchased 78 acres of land near the NNTM land. Although Kalkowski had received preliminary approval from TPNRD to transfer the CIAs from the NNTM land to the newly purchased land, the NNTM board of directors refused to complete the necessary transfer documents. Kalkowski filed a complaint in the district court for Keith County alleging that NNTM would be unjustly enriched if it were allowed to maintain possession of the CIAs. Kalkowski requested that the district court either direct NNTM to execute the transfer documents or award Kalkowski the value of the benefit accrued by NNTM.

After a bench trial, the district court determined that NNTM was not unjustly enriched by Kalkowski's upgrades to the land. The district court stated that Kalkowski's "sole reason in improving the condition of the subject real estate was to benefit himself in raising crops through the implementation of irrigation on the subject real estate" and that while NNTM certainly did receive a benefit, "NNTM did nothing to encourage [Kalkowski] to remove trees or shrubbery, or to utilize his own equipment, labor, or irrigation wells located on adjacent real estate to irrigate the subject property between 2000 and 2005."

Recusal.

Kalkowski also assigns that the district court judge who heard the case erred in not recusing himself from the proceedings after the judge had a telephone conversation with the manager of another natural resources district regarding Kalkowski. While this case was pending before the judge, Kalkowski contacted the general manager of another natural resources district and inquired about the water rights on property owned

by the judge. The general manager then contacted the judge and indicated to the judge that Kalkowski represented himself as a prospective buyer of the judge's property within that district. The judge notified the general manager that the judge did not intend to sell his property. Kalkowski denies representing himself as a prospective buyer. Pursuant to § 5-302.9(B), the judge later notified the parties of the conversation with the general manager.

Kalkowski filed a motion to recuse, contending that the judge should not have had any further conversation with the manager after Kalkowski's name was brought up. Kalkowski also argued that the fact the judge was leasing irrigated farmland located in another natural resources district to a farmer created a conflict of interest. Finally, Kalkowski suggested that at the very least, the judge's ownership of the property created the appearance of impropriety.

The judge denied the motion to recuse. The judge ruled that Kalkowski presented no evidence that the two natural resources districts had similar rules or that the judge's tenant paid or provided the labor for the irrigation system on the judge's property. Additionally, the judge noted that it was Kalkowski's own actions which caused the general manager to contact the judge and that Kalkowski could not use his own conduct as an opportunity to "'judge-shop.'"

ASSIGNMENTS OF ERROR

Kalkowski assigns, reordered and restated, that the district court erred in (1) ruling that Kalkowski was not entitled to the CIAs or compensation for the CIAs in lieu of transfer and (2) overruling the motion to recuse the trial judge.

STANDARD OF REVIEW

[1] The interpretation of a lease is a question of law that an appellate court decides independently of the district court.[6]

[2-4] Any quasi-contract claim for restitution is an action at law.[7] The judgment and factual findings of the trial court in an

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[6] *Gibbons Ranches v. Bailey*, 289 Neb. 949, 857 N.W.2d 808 (2015).

[7] *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

action at law tried to the court without a jury have the effect of a verdict and will not be set aside unless clearly wrong.[8] In reviewing an action at law, an appellate court reviews the evidence in the light most favorable to the prevailing party.[9] However, regarding questions of law, an appellate court is obligated to reach a conclusion independent of determinations reached by the lower courts.[10]

[5] A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[11]

ANALYSIS

Removal of CIAs.

Kalkowski assigns that the district court erred in ruling that Kalkowski was not entitled to the additional CIAs or to compensation for the CIAs. Kalkowski set forth two different arguments as to why he is entitled to recovery: First, Kalkowski argues that under the lease agreement, he is entitled to remove the CIAs, and second, Kalkowski argues he is entitled to restitution, because NNTM was unjustly enriched.

Recovery Under Lease Agreement.

[6,7] The lease agreement provides that Kalkowski is entitled to remove improvements from the parcel of land. Kalkowski argues that the CIAs should be treated as improvements under the lease, which would legally entitle Kalkowski to remove the CIAs. The lease agreement does not define the term "improvements"; therefore, we give the term its plain and ordinary meaning.[12] "Trade terms, legal terms of art, numbers, common words of accepted usage and terms of a similar nature should

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[8] *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 618 N.W.2d 429 (2000).

[9] *Id.*

[10] *Id.*

[11] *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013).

[12] *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008).

be interpreted in accord with their specialized or accepted usage unless such an interpretation would produce irrational results or the contract documents are internally inconsistent."[13] Our interpretation of the term "improvements," as a legal term of art, should be informed by its typical usage within farm lease agreements.

This court has previously defined improvements, generally, as "'everything that enhances the value of premises permanently for general uses.'"[14] This includes "'not only buildings and fixtures, but also many other things which are not buildings or fixtures.'"[15] An improvement has also been defined as a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs."[16] A CIA, in the sense that its attachment to a piece of property increases the value of said property, may fall within this broad definition.

However, it appears that the term "improvement," within the context of a lease, has never traditionally included intangible property like CIAs. The few courts to have addressed the issue have limited the definition of improvement to tangible property only.[17] Furthermore, this court's own list of "'the most common illustrations of improvements'" all involved the addition of tangible property to the real estate.[18] The plain and ordinary definition of the term "improvement" does not include CIAs.

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[13] *Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1013 (3d Cir. 1980). See, also, 11 Samuel Williston, A Treatise on the Law of Contracts § 32:4 (Richard A. Lord ed., 4th ed. 2012).

[14] See *Watson Bros. Realty Co. v. County of Douglas*, 149 Neb. 799, 802, 32 N.W.2d 763, 764 (1948).

[15] *Id.*

[16] 41 Am. Jur. 2d *Improvements* § 1 at 336 (2005).

[17] See, *Kentucky Tax Commission v. Jefferson Motel, Inc.*, 387 S.W.2d 293 (Ky. 1965); *Cadle Co. v. Butler*, 951 S.W.2d 901 (Tex. App. 1997).

[18] See *Watson Bros. Realty Co., supra* note 14, 149 Neb. at 802, 32 N.W.2d at 764.

Although Kalkowski did the work that resulted in TPNRD's assigning the CIAs to the property, Kalkowski did not actually transfer the CIAs to the land. Under TPNRD rules, NNTM, as the owner of the real estate, is entitled to legal ownership of the additional CIAs. Kalkowski is arguably entitled to the tangible property (i.e., irrigation equipment) that he installed which led to the creation of the additional CIAs, but the CIAs themselves are a different matter. The CIAs are intangible property legally owned by NNTM, and the lease agreement does not permit Kalkowski to remove the CIAs. The argument that Kalkowski is entitled to the CIAs under the terms of the lease agreement is without merit.

Recovery Under Unjust Enrichment Theory.

[8,9] Kalkowski argues, in the alternative, that NNTM was unjustly enriched by Kalkowski's work on the property. There is no doubt that NNTM was enriched by Kalkowski's work on the property, but we must determine whether NNTM was enriched *unjustly*. "The fact that a recipient has obtained a benefit without paying for it does not of itself establish that the recipient has been unjustly enriched."[19] It is a "bedrock principle of restitution" that unjust enrichment occurs when there has been a "'transfer of a benefit without adequate legal ground.'"[20]

[10] Unjust enrichment is a malleable concept and available in a variety of situations. However, the Restatement (Third) of Restitution and Unjust Enrichment[21] makes it clear that restitution is not available "for an unrequested benefit voluntarily conferred, unless the circumstances of the transaction justify the claimant's intervention in the absence of [a] contract." For example, restitution is not available on an

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[19] 1 Restatement (Third) of Restitution and Unjust Enrichment § 2(1) at 15 (2011).

[20] *City of Scottsbluff, supra* note 7, 282 Neb. at 866, 809 N.W.2d at 743 (quoting 1 Restatement, *supra* note 19, § 1, comment *b*.).

[21] 1 Restatement, *supra* note 19, § 2(3) at 15. See, also, *Indiana Lumbermens Mut Ins v. Reinsurance Results*, 513 F.3d 652 (7th Cir. 2008).

assumpsit claim when the payments were voluntarily made to the recipient.[22]

[11,12] Similarly, restitution is unavailable if it would "subject an innocent recipient to a forced exchange."[23] The idea of avoiding a "forced exchange" through restitution stems from the concept that the parties should usually be free to enter—or not enter—into contracts according to their own free will.[24] Therefore, subject to various exceptions,[25] restitution will not be available "if the effect of payment would be to complete an exchange that—had it been proposed as a contract—the recipient would have been free to reject."[26]

Kalkowski had no reasonable grounds to expect compensation from NNTM in the form of the CIAs or their fair market value for the upgrades made to the property. NNTM in no way indicated that it wished for Kalkowski to undertake the work. Although in hindsight Kalkowski's work appears reasonable and a good investment, he was not actually compelled to carry out the work in a way that made his actions involuntary. In addition, NNTM should have been free to decide whether it wished to enter into an agreement where NNTM compensated Kalkowski in some way in exchange for Kalkowski's performing work on the land which was aimed at increasing the number of CIAs assigned to the parcel. Had Kalkowski made the offer before he undertook his work, NNTM certainly would have been free to refuse. An award of restitution in this case would result in a classic forced exchange. Because the benefits were voluntarily conferred by Kalkowski and NNTM would have been free to reject Kalkowski's offer had it been made, NNTM was not unjustly enriched.

Kalkowski's assignment of error is without merit.

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[22] See, e.g., *City of Scottsbluff, supra* note 7; *Malec v. ASCAP*, 146 Neb. 358, 19 N.W.2d 540 (1945).

[23] 1 Restatement, *supra* note 19, § 2(4) at 16.

[24] See Michael Traynor, *The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions*, 68 Wash. & Lee L. Rev. 899, 900 (2011).

[25] See 1 Restatement, *supra* note 19, §§ 26 to 30.

[26] *Id.*, § 30, comment *b*. at 465.

Recusal.

[13] Kalkowski assigns that the trial judge erred in failing to recuse himself from the proceedings after the judge had a discussion with the general manager of another natural resources district concerning Kalkowski. A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.[27]

[14] A party may not rely on his or her own conduct as a way to force a judge to recuse himself or herself from the proceedings. For instance, in *State v. Ellefson*,[28] a criminal defendant, after his conviction, professed his innocence in several letters to the judge who presided over the defendant's trial. We held that the judge was not required to recuse himself from hearing the defendant's motion for postconviction relief.[29] To hold otherwise would mean that "all any party in a legal proceeding would have to do in order to disqualify a judge would be to write a series of nasty letters, and then claim 'foul.'"[30]

In this case, the only reason the judge had any contact with the general manager of the natural resources district was due to Kalkowski's own actions. Kalkowski could have avoided the entire situation by simply refraining from contacting the other natural resources district concerning the judge's property. The fact that the judge owns and leases irrigated farmland in another natural resources district would not lead a reasonable person to question the judge's impartiality. There is no evidence in the record before us to indicate that the natural resources district where the judge's land is located even regulates its water supply in the same way TPNRD does. The district court did not abuse its discretion in denying Kalkowski's

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[27] *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

[28] *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989).

[29] *Id.*

[30] *Id.* at 127, 435 N.W.2d at 658.

motion for recusal. Kalkowski's assignment of error is without merit.

CONCLUSION

Accordingly, we find that the district court did not err in determining Kalkowski was not entitled to the CIAs and in denying Kalkowski's motion for recusal.

AFFIRMED.

BRIAN MARCUZZO AND DONNA MARCUZZO, APPELLANTS, v. BANK OF THE WEST ET AL., APPELLEES.

862 N.W.2d 281

Filed May 1, 2015. No. S-14-367.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Courts: Dismissal and Nonsuit: Appeal and Error.** The exercise of the power to dismiss a matter for lack of prosecution rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion.
3. **Appeal and Error.** Appellants are required to point out the factual and legal bases that support their assignments of error.
4. ____. An argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.
5. ____. An appellate court will not address arguments that are too generalized or vague to be understood.
6. **Actions: Parties: Standing: Jurisdiction.** Before a party is entitled to invoke a court's jurisdiction, that party must have standing to sue, which involves having some real interest in the cause of action.
7. **Actions: Parties: Standing.** To have standing to sue, a plaintiff must have some legal or equitable right, title, or interest in the subject matter of the controversy.
8. ____: ____: ____. The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
9. **Declaratory Judgments.** Where declaratory relief is sought, an actual controversy must be present.
10. **Standing: Claims: Parties.** Standing requires that a plaintiff show his or her claim is premised on his or her own legal rights as opposed to rights of a third party.

11. **Contracts: Parties.** Only a party (actual or alleged) to a contract can challenge its validity.
12. **Contracts: Parties: Standing.** The fact that a third party would be better off if a contract were unenforceable does not give him or her standing to sue to void the contract.
13. **Contracts: Parties.** Parties can recover as third-party beneficiaries of a contract only if it appears that the rights and interest of the third parties were contemplated and that provision was being made for them.
14. **Mortgages: Assignments: Parties: Standing.** A borrower who is not a party to a mortgage assignment, or a party intended to benefit from the assignment, lacks standing to challenge the assignment.
15. **Actions: Parties.** The plaintiff bears the responsibility to prosecute a case with reasonable diligence.
16. **Actions: Dismissal and Nonsuit: Rules of the Supreme Court.** In the absence of a showing of good cause, a litigant's failure to prosecute a civil action, resulting in noncompliance with the Nebraska Supreme Court's progression standards for civil actions in district courts, is a basis to dismiss an action on account of a lack of diligent prosecution.
17. **Courts: Dismissal and Nonsuit.** The district court has the inherent power to dismiss a case for failure to prosecute with due diligence.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Douglas W. Ruge for appellants.

Ryan K. Forrest, of Kozeny & McCubbin, L.C., for appellee Erika Knapstein.

Jennifer L. Andrews and Alison M. Gutierrez, of Kutak Rock, L.L.P., for appellees Wells Fargo Bank, N.A., and Federal National Mortgage Association.

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

MCCORMACK, J.

NATURE OF CASE

Brian Marcuzzo and Donna Marcuzzo asserted causes of action against Wells Fargo Bank, N.A. (Wells Fargo), the Federal National Mortgage Association (Fannie Mae), Erika Knapstein, Bank of the West, and Jeff T. Courtney (collectively the defendants), relating to the foreclosure and subsequent sale of their residence. All causes of action are premised on

the assertion that the assignment of the Marcuzzos' mortgage was improper. The district court granted summary judgment to Wells Fargo, Fannie Mae, and Knapstein, and dismissed Bank of the West and Courtney. The Marcuzzos appeal.

BACKGROUND

The Marcuzzos asserted six causes of action against the defendants. All causes of action arose out of the sale of the Marcuzzos' residence, pledged as collateral for a mortgage loan on which the Marcuzzos defaulted. Actions for quiet title, declaratory judgment, and injunctive relief were asserted against all of the defendants. The Marcuzzos sought actions for accounting, conversion, and slander of title against Wells Fargo. The Marcuzzos sought an action for wrongful foreclosure against Wells Fargo, Fannie Mae, and Knapstein, the successor trustee of the deed of trust. In the district court, the actions against Wells Fargo, Fannie Mae, and Knapstein were dismissed in summary judgment and the remaining causes against Bank of the West and Courtney were dismissed for failure to prosecute. The Marcuzzos appeal.

Mortgage Documents

On February 6, 2004, the Marcuzzos executed and delivered a promissory note in the principal amount of $214,949 to Advantage Mortgage Service, Inc. (Advantage Mortgage). To secure payment of the note, the Marcuzzos executed and delivered a deed of trust to Mortgage Electronic Registration Systems, Inc. (MERS). The deed of trust granted Advantage Mortgage a secured interest in the Marcuzzos' residential property located in Sarpy County, Nebraska. The deed of trust was duly recorded in the office of the Sarpy County register of deeds.

The note executed in the Marcuzzos' names was negotiated from Advantage Mortgage to Commercial Federal Bank (Commercial Federal). Wells Fargo purchased Commercial Federal's loan portfolio, including the note and deed of trust. Commercial Federal endorsed the note in blank and transferred possession of it to Wells Fargo in July 2005. Commercial Federal was acquired by Bank of the West.

On July 27, 2011, MERS, as nominee for Advantage Mortgage, assigned all of its rights, title, and interest in the deed of trust to Wells Fargo by a corporate assignment of deed of trust. The corporate assignment of deed of trust was recorded in the office of the Sarpy County register of deeds.

Wells Fargo has had possession of the note and deed of trust since it was delivered to it in July 2005. No other entity has claimed ownership of the note and deed of trust or has demanded payment. When the Marcuzzos made payment on their note, the payments were made to and received by Wells Fargo.

Foreclosure and Bankruptcy

In May 2011, the Marcuzzos instituted bankruptcy proceedings under chapter 7 of the U.S. Bankruptcy Code. The Marcuzzos identified Wells Fargo on their bankruptcy schedules as a creditor holding a secured claim on their residence.

The Marcuzzos also began to default on their mortgage loan payments in May 2011. Wells Fargo sent the Marcuzzos multiple notices of default and then accelerated the Marcuzzos' loan balance that was due. The notices provided the Marcuzzos with the opportunity to cure the default.

The Marcuzzos stated that they voluntarily decided to stop making payments until they received adequate answers from Wells Fargo in regard to claimed issues in the paperwork of their mortgage assignment. The Marcuzzos claimed that they are ready and able to pay the past due principal and interest amounts to the proper beneficiary of the loan.

After obtaining relief from the stay in the bankruptcy court, Wells Fargo instituted foreclosure proceedings against the Marcuzzos' residential property. In November 2011, Wells Fargo appointed a successor trustee, Knapstein, in place of the original trustee, Courtney, by recording a substitution of trustee in the office of the Sarpy County register of deeds. Knapstein filed a notice of default in that office on November 9, 2011. Knapstein further sent a notice of default and letter of default to the Marcuzzos.

Notice of sale of the property was published in a local newspaper once a week for 5 weeks beginning on December

14, 2011, and ending on January 11, 2012. This notice provided that the sale was scheduled to take place on January 23. An agreement was reached between Wells Fargo and the Marcuzzos to postpone the sale of the property until February 7. At the sale on February 7, Fannie Mae was the highest bidder, and the property was sold to Fannie Mae for $196,350.47. Knapstein executed a trustee's deed, conveying the property to Fannie Mae, which was filed in the office of the Sarpy County register of deeds.

Procedural History

The Marcuzzos filed an amended complaint alleging six causes of action regarding their foreclosed residence.

The first cause of action asked for the court to quiet title in the name of the Marcuzzos. The second cause of action asked for declaratory judgment setting forth the "rights and status of the respective parties in the real property, for a temporary and permanent injunction." The third cause of action alleged conversion and asked for an accounting against Wells Fargo based on the mortgage payments Wells Fargo received "when it had not obtained a proper Assignment of the Deed of Trust and Promissory Note." The fourth cause of action alleged slander of title against Wells Fargo. The fifth cause of action asked for "a Temporary Restraining Order and Temporary and Permanent Injunction preventing the sale of the property." Finally, the sixth cause of action alleged a wrongful foreclosure suit against Wells Fargo, Fannie Mae, and Knapstein. As a premise for all causes of action, the Marcuzzos allege that the assignment of their mortgage was defective.

The Marcuzzos averred that Wells Fargo supplied the Marcuzzos copies of the assignment, deed of trust, and promissory note that had been altered from the original documents. At the hearing on the motion for summary judgment, counsel for the Marcuzzos submitted Brian Marcuzzo's affidavit and attached to it several of these mortgage documents, including several deeds of trust, corporate assignments of deeds of trust, and the promissory note.

The Marcuzzos also alleged the assignment was defective because a Wells Fargo employee signed the assignment rather

than a Bank of the West employee. Further, the Marcuzzos averred that the assignment by MERS showed a loan servicing number which was different from the original loan servicing number.

Wells Fargo, Fannie Mae, and Knapstein all filed answers to the amended complaint. Bank of the West filed a "Disclaimer of Interest." Bank of the West disclaimed any interest in the property described in the Marcuzzos' amended complaint and acknowledged that it would have no further standing to appear in regard to this case. Courtney did not file such a disclaimer of interest.

Wells Fargo and Fannie Mae filed a motion for summary judgment asking the court to dismiss all causes of action against them. Knapstein also filed a motion for summary judgment to dismiss all causes of action against her.

The district court granted the summary judgment motion in favor of Wells Fargo as to the conversion, accounting, and slander of title claims, and granted summary judgment in favor of Wells Fargo, Fannie Mae, and Knapstein as to the injunctive relief claim. The court granted summary judgment on the alleged action for conversion and accounting, because the prayer for relief had not specifically requested relief relating to conversion and because the court found Wells Fargo to be the holder of the note since 2005, rightfully entitling it to payments on the note, and not meriting an accounting action. The court granted summary judgment on the slander of title claim, because the evidence did not reflect that Wells Fargo or an agent had filed any document with knowledge that the statement was false or with reckless disregard for its falsity. The court also granted summary judgment on the claim for injunctive relief, because the real property had been sold and, thus, the request was moot.

The district court denied the motions for summary judgment as to the actions for quiet title, declaratory judgment, and wrongful foreclosure. The court reasoned that Wells Fargo, Fannie Mae, and Knapstein had not shown that the Marcuzzos were served proper notice of foreclosure proceedings as required by Nebraska statutes. Therefore, the district court

found they had not met their burdens of establishing no material issue of fact that they complied with such statutes.

Wells Fargo, Fannie Mae, and Knapstein then filed renewed motions for summary judgment. The renewed motions included evidence that Wells Fargo and Knapstein sent notices to the Marcuzzos prior to acceleration of their debt, notifying them of the default, actions required to cure the default, and a date by which the default must be cured to prevent sale of the property.

The district court granted the renewed motions for summary judgment with regard to the claims of quiet title, declaratory judgment, and wrongful foreclosure. The district court found that there was no material issue of fact that Wells Fargo was the rightful holder and owner of the mortgage on the Marcuzzos' residence, since (1) Wells Fargo had possession of the note and deed of trust, (2) no other entity had claimed ownership of the note and deed of trust or demanded payment, (3) the Marcuzzos' prior payments were received by Wells Fargo, and (4) Wells Fargo was included in bankruptcy proceedings as the creditor of the Marcuzzos' residence. Therefore, the court granted summary judgment on the actions for quiet title, declaratory judgment, and wrongful foreclosure.

Because no final order had yet been issued as to Courtney or Bank of the West, Wells Fargo and Fannie Mae filed a motion to dismiss "any and all claims [the Marcuzzos] may have against any and all of the Defendants in this action due to [the Marcuzzos'] failure to diligently prosecute such claims." The Marcuzzos filed a "Resistance to Motion to Dismiss and Motion for Final Order." The Marcuzzos agreed that the court should dismiss all actions as to Courtney and Bank of the West. However, the Marcuzzos asserted that the action as to Bank of the West should have been dismissed because Bank of the West had filed a disclaimer of interest, and not because of a failure to prosecute. The Marcuzzos argued that the action against Courtney should have been dismissed through the district court's ruling that there had been a proper substitution of trustee and conveyance of title, and

not dismissed because of a failure to prosecute. Following these motions, the district court issued an order dismissing the actions against Courtney and Bank of the West for lack of prosecution.

The Marcuzzos now appeal the district court's grant of summary judgment to Wells Fargo, Fannie Mae, and Knapstein and the dismissal of the case against Courtney and Bank of the West for lack of prosecution. The Marcuzzos argue that because there are issues in the evidence regarding the assignment of their mortgage, summary judgment should not have been granted. The Marcuzzos also argue that the actions against Courtney and Bank of the West should not have been dismissed *for lack of prosecution*, because the Marcuzzos did not fail to prosecute Courtney and Bank of the West, but, rather, Courtney and Bank of the West were, effectively, no longer parties to the suit.

ASSIGNMENTS OF ERROR

The Marcuzzos assign as error the district court's (1) award of "summary judgment since there were material facts when the evidence, viewed in a light most favorable to the [Marcuzzos], including reasonable inferences therefrom," and (2) dismissal of Courtney and Bank of the West for lack of prosecution.

STANDARD OF REVIEW

[1] 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.[1]

[2] The exercise of the power to dismiss a matter for lack of prosecution rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion.[2]

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[1] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[2] See *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978).

ANALYSIS

[3-5] As an opening matter, we begin our analysis by reiterating that appellants are required to point out the factual and legal bases that support their assignments of error.[3] Further, an argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.[4] Finally, this court will not address arguments that are too generalized or vague to be understood.[5] As we read the Marcuzzos' brief, they set forth two arguments. First, they assert that summary judgment was improperly granted because there were material issues of fact as to whether their mortgage was properly assigned and, second, that the district court should not have dismissed Courtney and Bank of the West for failure to prosecute. To the extent the Marcuzzos wished to assert any more specific errors or arguments, their assignments and arguments were too generalized and vague to be addressed.[6]

Causes of Action Challenging Assignment

The Marcuzzos' first assignment of error broadly states that the district court erred in granting summary judgment, because there were genuine issues of material fact. But there were six separate claims relating to three of the defendants, which were all dismissed in summary judgment, on differing grounds, and as a part of separate summary judgment orders.

We will generously assume this assignment of error refers to each order, and each claim upon which the court awarded summary judgment. However, the Marcuzzos do not argue in their brief that the district court's award of summary judgment as to injunctive relief was improper. Because this court

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[3] See *Stiver v. Allsup, Inc.*, 255 Neb. 687, 587 N.W.2d 77 (1998).

[4] *In re Interest of S.C.*, 283 Neb. 294, 810 N.W.2d 699 (2012).

[5] See, *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004); *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000); *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

[6] See, *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014); *Coyle v. Janssen*, 212 Neb. 785, 326 N.W.2d 44 (1982).

addresses only assignments of error both assigned and argued, we will not address the award of summary judgment as to the Marcuzzos' prayer for injunctive relief.[7]

The Marcuzzos' remaining five causes of action—for quiet title, declaratory judgment, accounting, slander of title, and wrongful foreclosure—were all premised on the allegation that Wells Fargo is not the proper holder of the mortgage and note, because the assignment of the mortgage was defectively executed. The Marcuzzos thus argue in this appeal that the district court erred in granting summary judgment as to all these claims because, viewing the evidence in a light most favorable to the Marcuzzos, the assignment of the mortgage to Wells Fargo was defective or improper.

Repeatedly, the Marcuzzos argue that there were discrepancies and irregularities in the paperwork of the assignment that create material issues of fact as to whether the assignment was properly executed. The Marcuzzos argue that because the assignment was not proper, Wells Fargo is not the proper holder of its note and mortgage.

However, Wells Fargo, Fannie Mae, and Knapstein argue that the Marcuzzos do not have standing to challenge the validity of the assignment of their mortgage, because they were not a party to the mortgage and cannot articulate an injury caused by the assignment of their mortgage. We agree. We hold that the Marcuzzos lack standing to attack the assignment of their mortgage, because the validity of the mortgage, even under the facts viewed in a light most favorable to the Marcuzzos, would have no effect on the Marcuzzos' obligation to pay. Stated another way, whether or not the assignment of the mortgage was properly executed is not a material issue in the five causes of action addressed in this appeal, because the Marcuzzos cannot show an injury arising from the assignment, regardless of whether the assignment was proper or improper. Therefore, we affirm the district court's grant of summary judgment and dismissal of such causes of action.

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[7] See, *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 528 N.W.2d 335 (1995).

[6-9] Before a party is entitled to invoke a court's jurisdiction, that party must have standing to sue, which involves having some real interest in the cause of action.[8] In other words, to have standing to sue, a plaintiff must have some legal or equitable right, title, or interest in the subject matter of the controversy.[9] The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.[10] Even where declaratory relief is sought, an actual controversy must be present.[11]

[10-13] And of particular importance here, standing requires that a plaintiff show his or her claim is premised on his or her own legal rights as opposed to rights of a third party.[12] Accordingly, Nebraska law states that "only a party (actual or alleged) to a contract can challenge its validity."[13] "'[T]he fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract.'"[14] Parties can recover as third-party beneficiaries of a contract only if it appears that the rights and interest of the third parties "'were contemplated and that provision was being made for them.'"[15]

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[8] *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998).

[9] *Id.* See, *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996); *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996); *In re Interest of Archie C.*, 250 Neb. 123, 547 N.W.2d 913 (1996).

[10] *Cornhusker Pub. Power Dist. v. City of Schuyler*, 269 Neb. 972, 699 N.W.2d 352 (2005); *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004); *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004); *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003); *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002).

[11] *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994).

[12] See *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

[13] *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 138, 655 N.W.2d 390, 397 (2003).

[14] *Id.*

[15] *Palmer v. Lakeside Wellness Ctr.*, 281 Neb. 780, 785, 798 N.W.2d 845, 850 (2011).

[14] Though we have never addressed the more specific question of whether a borrower has standing to challenge the assignment of their mortgage, it follows from these rules that a borrower who is not a party to a mortgage assignment, or a party intended to benefit from the assignment, lacks standing to challenge the assignment.

While not many courts have addressed this specific question, the majority of courts have found under these principles that borrowers do not have standing to challenge an assignment of their mortgage, because they are not a party to the assignment contract.[16] This is true even if there is proof that the assignment is somehow flawed.[17] Where the mortgage assignment does not alter the borrower's obligations under the note or mortgage, and no injury is traceable to the mortgage assignment, the borrowers simply have shown no injury.[18] In reaching this conclusion, courts rely on the general common-law principle that the maker of a promissory note cannot challenge his or her obligations under the note by asserting that an invalid assignment had occurred.[19]

For example, in *Yuille v. American Home Mortg. Services, Inc.*,[20] the court held that borrowers in default lacked standing to challenge the validity of the mortgage's assignment where

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[16] See, e.g., Richard A. Vance and Katherine A. Bell, *MERS Litigation in 2012 and 2013: A Survey of Claims by Borrowers and Others*, 69 Bus. Law. 657 (2014). See, also, *Ward v. Security Atlantic Mortg. Elec. Reg.*, 858 F. Supp. 2d 561 (E.D.N.C. 2012); *Velasco v. Security Nat. Mortg. Co.*, 823 F. Supp. 2d 1061 (D. Haw. 2011), *affirmed* 508 Fed. Appx. 679 (9th Cir. 2013); *Montgomery v. Bank of America*, 321 Ga. App. 343, 740 S.E.2d 434 (2013); *Yuille v. American Home Mortg. Services, Inc.*, 483 Fed. Appx. 132 (6th Cir. 2012); *Dehdashti v. Bank of N.Y. Mellon*, No. 1:12-CV-595-TCB, 2012 U.S. Dist. LEXIS 187433 (N.D. Ga. June 7, 2012) (unpublished opinion).

[17] *Montgomery v. Bank of America, supra* note 16.

[18] See *Bank of New York Mellon Trust Co. v. Unger*, No. 97315, 2012 Ohio App. LEXIS 1723 (Ohio App. 8th Dist. May 3, 2012) (unpublished opinion).

[19] See *Bowles v. Oakman*, 246 Mich. 674, 225 N.W. 613 (1929).

[20] *Yuille v. American Home Mortg. Services, Inc., supra* note 16, 483 Fed. Appx. at 135.

the borrower was a "stranger to the assignment." The court in *Livonia Properties Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC*[21] agreed, stating that "if the assignment were in fact irregular, that would be an issue between the assignor and assignee."

Some courts while accepting this general rule have recognized an exception if the borrower can show actual prejudice by the improper assignment of the loan.[22] For example, if the borrower was at risk of paying the same debt twice, then the borrower could establish a concrete injury arising from the improper assignment of the mortgage.[23] If the borrower can show any injury that is directly traceable to the assignment of the mortgage, then, under this exception, the borrower would have standing to challenge that assignment.

Only one circuit court has held that the borrower does not need to demonstrate injury in order to have standing to challenge the validity of an assignment that the borrower was not a party to.[24] But, the court strictly circumscribed the type of challenge for which a borrower may have standing.[25] In *Culhane v. Aurora Loan Services of Nebraska*,[26] the First Circuit Court of Appeals held that a borrower can have standing to challenge the assignment of his or her mortgage where the borrower is arguing the mortgage is invalid, ineffective, or void. Examples of void assignments include where the right attempted to be assigned is not assignable, or a prior revocation of the assignment.[27]

However, the *Culhane* court held that a borrower does not have standing to challenge shortcomings in an assignment that

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[21] *Livonia Properties Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC*, 399 Fed. Appx. 97, 103 (6th Cir. 2010).

[22] See *In re Sandri*, 501 B.R. 369 (N.D. Cal. 2013).

[23] *Livonia Properties Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC*, *supra* note 21.

[24] *Culhane v. Aurora Loan Services of Nebraska*, 708 F.3d 282 (1st Cir. 2013).

[25] *Id.*

[26] *Id.*

[27] 6A C.J.S. *Assignments* § 132 (2004).

render it merely voidable at the election of one party, but otherwise effective to pass legal title.[28]

The plaintiff in *Culhane* argued that the assignor of the mortgage never had valid title to the mortgage, and therefore never had the right to assign the mortgage.[29] If true, the mortgage assignment would be void ab initio. The First Circuit Court of Appeals found that the harm to the plaintiff in such circumstances would be the foreclosure, which could be traced directly to the creditor's "exercise of the authority purportedly delegated by the assignment."[30] The court also found two key facts in favor of standing in light of the allegations presented: (1) that, in Massachusetts, debtors have a statutory right under state law to ensure that any attempted foreclosure on his or her home is conducted lawfully and (2) that the mortgage contained a power of sale without prior judicial authorization.[31] The court was careful to caution that its holding was narrow, specific to Massachusetts law, and applied only when the borrower challenged the mortgage assignment as invalid, ineffective, or void.[32]

We find *Culhane* to be distinguishable from the case at bar. The Marcuzzos did not allege a void assignment. They did not allege that MERS, or Bank of the West, had no legally cognizable right to assign under the mortgage documents. Instead, the Marcuzzos' argument is that the assignment paperwork between the assignor and Bank of the West did not follow the proper procedural framework. Even if this were true, the assignment would not be defective.[33]

Moreover, the Marcuzzos do not argue that they should not be liable for the remainder of their debt under the mortgage.

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[28] *Culhane v. Aurora Loan Services of Nebraska, supra* note 24. See, also, *Service Mortgage Corp. v. Welson*, 293 Mass. 410, 200 N.E. 278 (1936); *Murphy v. Barnard*, 162 Mass. 72, 38 N.E. 29 (1894).

[29] *Culhane v. Aurora Loan Services of Nebraska, supra* note 24.

[30] *Id.* at 290.

[31] *Id.*

[32] *Id.*

[33] See 21 C.J.S. *Creditor and Debtor* § 27 (2006).

Indeed, when their mortgage was purchased by Wells Fargo in 2005, the Marcuzzos paid Wells Fargo their mortgage payments for nearly 6 years before they defaulted on their loan and demanded explanation as to the irregularities in the assignment paperwork.

In sum, all parties involved, including the assignor of the mortgage, Bank of the West, accepted Wells Fargo as the proper assignee of the mortgage. The Marcuzzos also accepted Wells Fargo as the creditor of their mortgage for nearly 6 years. From our understanding, nothing else changed at the point that the Marcuzzos began to refuse payment, other than their entrance into bankruptcy. No other bank claimed mortgage payments. Neither the amount due on the mortgage nor the terms of the mortgage changed. Thus, even if the Marcuzzos' allegations were proved true, those allegations would fail to establish a real injury in fact caused by a defective assignment.

We need not decide in this case whether a borrower who is at risk of paying the same debt twice, or otherwise at risk of prejudice from an improper assignment, would have standing to challenge that assignment of its mortgage. Had the Marcuzzos established an injury that directly related back to the assignment of their mortgage, our holding may have been different. But no such injury caused by the assignment is alleged or found. Strictly applying Nebraska law, the Marcuzzos were not a party to the assignment. Nor was the assignment made for their benefit. Thus, the Marcuzzos cannot challenge the assignment contract's validity.

The alleged five causes of action, as stated and argued by the Marcuzzos, all depended upon the Marcuzzos' allegation that the assignment was defective or improperly executed. The Marcuzzos failed to demonstrate at the summary judgment hearings that there was any material issue of fact that, if ultimately determined in their favor, would establish standing to challenge the assignment. As such, the Marcuzzos failed to establish standing to challenge the assignment. Because they lacked standing to challenge the assignment, they also lacked standing to assert any cause of action that depended upon the

validity of the assignment. Therefore, albeit for a different reason than stated by the court below, we affirm the district court's grant of summary judgment dismissing the Marcuzzos' actions to quiet title, declaratory judgment, accounting, slander of title, and wrongful foreclosure.

Failure to Prosecute

As far as we can discern, the Marcuzzos' second assignment of error asserts that the district court erred in finding that the Marcuzzos failed to prosecute Courtney and Bank of the West. The Marcuzzos' argument on appeal pertaining to their second assignment of error is as follows:

> The District Court should not have dismissed . . . Courtney and Bank of the West for lack of prosecution . . . . The [Marcuzzos'] Resistance to this motion shows that the District Court effectively ruled on any issues affecting these Defendants. Namely it ruled that Wells Fargo [i]s the proper owner of the loan documents and that the substation of trustee and trustee's sale was proper. These rulings dispose of any interest by these defendants and it was improper to dismiss them. Rather they should have been dismissed as having no interest in the subject property and loan by virtue of the District Court's prior rulings. Dismissal for lack of prosecution should also not be allowed as the [Marcuzzos] were prevented from doing discovery.[34]

We agree with the district court that Courtney and Bank of the West were properly dismissed from the action, and we affirm the district court's dismissal, although again for a slightly different reason than that articulated by the district court.

[15-17] The plaintiff bears the responsibility to prosecute a case with reasonable diligence.[35] In the absence of a showing of good cause, a litigant's failure to prosecute a civil action, resulting in noncompliance with the Nebraska Supreme Court's

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[34] Brief for appellants at 23.

[35] *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995); *Schaeffer v. Hunter*, 200 Neb. 221, 263 N.W.2d 102 (1978).

progression standards for civil actions in district courts, is a basis to dismiss an action on account of a lack of diligent prosecution.[36] The district court has the inherent power to dismiss a case for failure to prosecute with due diligence.[37]

On the record provided, Bank of the West filed a disclaimer of interest in the case, stating that it acknowledged it had no interest in the subject matter of the action, and acknowledging that it therefore lacked standing to proceed in the action. However, the record does not show that Courtney filed a disclaimer of interest.

Wells Fargo and Fannie Mae moved for the district court to dismiss "any and all of the Defendants in this action due to [the Marcuzzos'] failure to diligently prosecute such claims." The Marcuzzos filed a resistance to this motion to dismiss, stating that Courtney should be dismissed, since the court already ruled there was no defect in the substitution of Knapstein as the substitute trustee. They also argued that Bank of the West did not need to be dismissed, because it filed a disclaimer of interest on which it should have been dismissed from the case.

The district court granted the motion to dismiss for failure to prosecute "due to no good cause shown why this case should not be dismissed for lack of prosecution." We can find no abuse of discretion in the district court's dismissal of Courtney for lack of prosecution. The record does not reflect that Courtney was included in any of the arguments by the Marcuzzos, and Courtney never entered an appearance in the matter.

However, it was an abuse of discretion for the district court to dismiss Bank of the West *for failure to prosecute*. Because Bank of the West filed a disclaimer of interest and acknowledged that it had no interest in the subject matter of the action, it should have been dismissed from the action for lack of standing.

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[36] *Billups v. Jade, Inc.*, 240 Neb. 494, 482 N.W.2d 269 (1992).

[37] *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 366 N.W.2d 751 (1985).

Although our reasoning differs from that of the district court, the court did not err in dismissing Bank of the West. We affirm the district court's dismissal of Courtney and Bank of the West.

CONCLUSION

For the foregoing reasons, we affirm the grant of summary judgment to Wells Fargo, Fannie Mae, and Knapstein, and we affirm the dismissal of Courtney and Bank of the West.

AFFIRMED.

STEPHAN and MILLER-LERMAN, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY D. DAVIS, APPELLANT.

862 N.W.2d 731

Filed May 8, 2015. No. S-14-508.

1. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
2. **Convictions: Evidence: Appeal and Error.** In reviewing a claim that the evidence was insufficient to support a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
4. **Motions for Mistrial: Motions to Strike: Proof: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
5. **Appeal and Error.** When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.
6. **Criminal Law: Trial.** In some cases, the damaging effect of an event during trial may be such that it cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.

7. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
8. **Criminal Law: Pretrial Procedure.** After a proper request by the defendant, the State is required to disclose all material information.
9. **Criminal Law: Pretrial Procedure: Motions for Mistrial.** The failure of the State to disclose properly requested information could potentially impact the defendant's ability to receive a fair trial to such a degree that a mistrial may be necessary.
10. **Criminal Law: Evidence: Appeal and Error.** In reviewing a claim that the evidence was insufficient to support the verdict, 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.
11. **Evidence: Appeal and Error.** As with any sufficiency claim, regardless whether the evidence is direct, circumstantial, or a combination thereof, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.

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

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

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

Heavican, C.J.

I. NATURE OF CASE

Miguel Avalos and two of his sons were shot to death in their Omaha, Nebraska, home during an apparent home invasion robbery. Avalos was a known drug dealer. The attempted robbery was allegedly orchestrated by Greg Logemann, another drug dealer in the area. Logemann contacted the defendant, Anthony D. Davis, and another individual, Timothy Britt, about the opportunity to rob Avalos.

At Davis' trial, multiple witnesses testified to observing that Logemann had pointed out the Avalos home to Davis earlier in the day and also testified that Davis and Britt were at the Avalos home at the time the murders took place. One

witness made an unsolicited comment that Davis had previously been in prison. Another witness' testimony differed substantially from her earlier deposition testimony regarding incriminating statements made by Davis about the murders. On both occasions, Davis moved for a mistrial. The district court denied both motions.

Davis was convicted of three counts of first degree murder and three counts of use of a deadly weapon to commit a felony, and he was sentenced to three life sentences and 75 to 90 years' imprisonment. Davis now appeals. We determine that the district court did not abuse its discretion in overruling Davis' two motions for mistrial and that the verdicts were not based on evidence that was insufficient to prove Davis guilty beyond a reasonable doubt.

II. BACKGROUND

1. Murders

On July 9, 2012, Avalos and two of his sons were killed inside Avalos' home in Omaha. All three had been shot multiple times and died as a result of their wounds. Avalos' oldest son was in the house in a downstairs bedroom with his wife and child at the time the three were shot upstairs. He testified that he woke up to the sound of gunshots at approximately 3:45 a.m. He locked the door to the bedroom and called the 911 emergency dispatch service, remaining on the telephone until police arrived. Police observed signs of forced entry at one of the entrances to the residence. Inside Avalos' bedroom within the residence, police discovered methamphetamine and over $5,000 in cash. A defaced .40-caliber semiautomatic pistol was also found in the residence.

The State alleges that the three victims were killed by Davis and Britt during an attempted robbery. Logemann testified that he had orchestrated the robbery. Logemann and Avalos were both drug dealers, and Logemann believed Avalos was an easy target. Logemann had previously tried to eliminate Avalos as a competitor by assisting the Omaha Police Department in making controlled drug buys from Avalos. In exchange for his testimony at trial, Logemann was granted use immunity and not charged with the murders. Logemann was charged

with criminal conspiracy to commit robbery, a Class II felony. Logemann admitted to lying to the detectives the first time he spoke with them about the murders, but testified that he told the detectives everything he knew the second time he was interviewed.

Logemann testified that on July 8, 2012, he offered to show Davis where Avalos lived. Davis contacted Crystal Branch, an acquaintance, and asked for a ride. Branch then asked her roommate, Charice Jones, if she would be willing to give Davis a ride. Jones agreed. Branch and Jones drove in Jones' vehicle to Davis' apartment in Council Bluffs, Iowa. According to both Branch and Jones, the two picked up Davis and the group then picked up Logemann.

Branch and Jones both testified that Logemann had Jones drive past the Avalos residence and that Logemann pointed out which house belonged to Avalos. While in the vehicle, neither Branch nor Jones heard anyone mention a potential robbery. According to Branch and Jones, Logemann told them that Logemann saw his sister outside of Avalos' house. Logemann's sister, who purchased drugs from Avalos, testified that she was at Avalos' home on the evening of July 8, 2012, and had observed a "weird dark colored truck" slowly drive by the residence.

Davis, Britt, Branch, and Jones then returned to Jones and Branch's residence. The group remained there until approximately 2 a.m. Branch testified that Davis then told her, "[O]kay we can go now, the guy's home." After stopping for gas, Jones drove Davis, Britt, and Branch back to the Avalos residence in her vehicle. Jones parked the vehicle "a block or two away" from the house. Davis and Britt both exited the vehicle, while Jones and Branch waited inside the vehicle. Both Jones and Branch testified that they believed the two men were going to Avalos' house to purchase more drugs. After approximately 20 minutes, Davis and Britt returned to the vehicle. Branch testified that she saw Davis running back to the vehicle and that Britt came back to the vehicle a few minutes after Davis. Britt was wearing all black and had a handkerchief over his face. Davis had on jeans and a light-colored T-shirt.

At approximately 4 a.m., Davis called Tiaotta Clairday, his ex-girlfriend, several times before she finally answered the telephone. Davis told Clairday that he "really needed" her to pick him up. Clairday testified that Davis sounded nervous. When Clairday arrived, Davis got in the front seat of the vehicle. Clairday testified that Davis admitted to robbing a house and that Davis and the person he was with "just started shooting" when they saw someone coming down the hall. Davis informed Clairday that Britt needed to come along with them too, because Britt had a gun. After Britt got into the vehicle, Britt handed a .22-caliber revolver to Clairday.

Clairday, Davis, and Britt then drove to Larry Lautenschlager's apartment in Council Bluffs. Lautenschlager is another acquaintance of Clairday and Davis. Clairday testified that she gave the gun to Lautenschlager and told him to get rid of it. Clairday then had a private conversation with Davis inside the bathroom of Lautenschlager's apartment. Clairday testified that Davis told her that "some people got shot and that he didn't want [Clairday] by [Britt] by [herself]." After Davis and Clairday left the bathroom, Clairday testified that she observed Britt outside the apartment burning a pair of gloves on the grill.

Davis also allegedly spoke to Logemann about what had occurred. Logemann testified that shortly after the murders, Davis told him that Britt "started flipping out" and began firing his weapon in the hallway of the house. However, Davis gave a different account to Logemann the following day and denied any involvement. Logemann testified that he received a text from Davis the next day "[s]aying that nothing took place [the day before] because his girlfriend found him with another woman." Several days after the incident, Logemann testified that Davis "wanted to know if [Logemann had] heard anything about a gun being dropped at the scene" and that Davis "was worried about his DNA being on the gun."

Clairday testified that several days later, she and Lautenschlager drove out to a concrete mill near Ashland, Nebraska, and put the revolver in a culvert, although Lautenschlager denied helping dispose of the gun. The revolver

was eventually discovered by police in the exact place where Clairday had told police it was located.

Investigators with the Omaha Police Department crime laboratory testified that both .22- and .40-caliber bullets were recovered from the victims' bodies and from inside Avalos' house. The investigators testified that the .22- and .40-caliber bullets were consistent with having been fired from the same models of both the .22-caliber revolver and .40-caliber semi-automatic pistol, respectively, which were recovered by police. However, due to the condition of the bullets, the evidence was inconclusive to establish that the bullets had actually been fired specifically from those two firearms.

On August 20, 2012, Davis was arrested and charged with three counts of first degree murder and three counts of use of a deadly weapon to commit a felony. Davis' jury trial began on February 24, 2014.

2. Davis' Motions for Mistrial

Davis' first motion for mistrial occurred during Branch's testimony. During her testimony, Branch made a reference to Davis' having previously been in prison. While on direct examination from the State, the following exchange occurred: "Q. Now, you had stated earlier that you had met . . . Davis when you were teenagers? A. Correct. Q. And you had been pen pals? A. Correct. He was writing me. When he got sentenced to prison, he was . . . ." Davis promptly objected, and the district court sustained the objection. The district court then admonished the jury, instructing the jury to disregard Branch's last answer "in its entirety." Branch never explained why Davis was in prison or how long Davis was incarcerated.

Davis then moved for a mistrial. Davis did not argue that the State was trying to intentionally elicit the information about Davis' previous incarceration from Branch, but that it was impossible for "the bell [to] be unrung" now that the information had been revealed to the jury. Counsel for the State explained that he had previously admonished Branch not to provide any extraneous information in her answers, but did not tell Branch specifically not to mention Davis' previous

incarceration. The district court determined that the admonishment to the jury was sufficient to cure any prejudice and denied the motion for mistrial.

Davis moved for a mistrial a second time during Clairday's testimony. Portions of Clairday's trial testimony were apparently inconsistent with her deposition testimony, as reflected by Davis' questions on cross-examination. Clairday's deposition testimony was never entered as an offer of proof, and the deposition testimony is not included in the appellate record. On cross-examination, Davis did, however, question Clairday about several of her prior inconsistent statements. During her deposition testimony, Clairday stated that Davis told Clairday that "some people were hurt, something happened that shouldn't have happened," but Clairday denied that Davis had made any other statements about the attempted robbery or the murders. On cross-examination, Clairday admitted that her testimony at trial was different from her testimony in her deposition. Clairday explained that she was not trying to be deceptive in her deposition testimony, but that at the time of the deposition, she simply did not remember some of the details recited at trial. Clairday testified that she had been a user of methamphetamine, that she had been under the influence of methamphetamine at the time she spoke with Davis about the incidents, and that she has memory problems, especially when she is nervous.

After it became clear that Clairday's testimony differed from her previous deposition testimony, Davis moved for a mistrial. Davis argued that there had been a discovery violation, alleging that in Clairday's deposition testimony, "there's only one occasion where [Clairday] attributes a statement similar to that to [Davis] under oath." Therefore, according to Davis, Clairday must have communicated with the State at some point after her deposition and the State failed to "advise us of incriminating statements of [Davis] when they [knew] them to be available." The State strongly denied having any meetings with Clairday after the deposition and stated that it "did not have any other information aside from everything that's been provided by this witness in her previous statements, nothing different from meetings." The district court overruled

the motion, because Davis was "effectively cross-examining" Clairday on the inconsistencies between her deposition and trial testimony.

3. Convictions and Sentences

The jury found Davis guilty on all charges, and the district court accepted the verdicts. Davis was sentenced to a total of three life sentences and 75 to 90 years' imprisonment. Davis now appeals.

III. ASSIGNMENTS OF ERROR

Davis assigns that the district court erred in (1) denying Davis' motions for mistrial and (2) supporting verdicts based on evidence insufficient to prove Davis guilty beyond a reasonable doubt.

IV. STANDARD OF REVIEW

[1] Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.[1]

[2] In reviewing a claim that the evidence was insufficient to support a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[2]

V. ANALYSIS

1. Denial of Motions for Mistrial

(a) First Motion for Mistrial

Davis first moved for a mistrial after Branch mentioned that Davis had previously been in prison. Reference to Davis' prior conviction was likely impermissible under both Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), and

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[1] *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

[2] *State v. Sing*, 275 Neb. 391, 746 N.W.2d 690 (2008).

Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008). Davis immediately objected to Branch's testimony, and the district court sustained the objection and admonished the jury to disregard Branch's previous answer. Davis argues that the prejudice from Branch's answer could not be cured by admonishment and that the district court abused its discretion in failing to grant a mistrial.

[3-5] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[3] An admonishment of the jury is typically sufficient to cure any prejudice. Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.[4] Therefore, Davis faces the burden of proving that "he was actually prejudiced" by the alleged errors and not merely that "'the errors . . . created a possibility of prejudice.'"[5] When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.[6]

[6] In some cases, the damaging effect of an event during trial may be such that it "cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial."[7] Fleeting, unsolicited remarks by a witness regarding the defendant's previous crimes or time spent in prison, however, are not typically the type of errors that cannot be cured by admonishment. In *State v. Lotter*,[8] we held that an

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[3] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[4] *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[5] *Id.* at 710, 715 N.W.2d at 546-47.

[6] *Id.* (citing *U.S. v. Wheeler*, 322 F.3d 823 (5th Cir. 2003); *Hester v. BIC Corp.*, 225 F.3d 178 (2d Cir. 2000); *State v. Wildenberg*, 573 N.W.2d 692 (Minn. 1998); *State v. Lyons*, 951 S.W.2d 584 (Mo. 1997)).

[7] *State v. Kibbee*, 284 Neb. 72, 102, 815 N.W.2d 872, 896 (2012).

[8] *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999).

admonishment was sufficient to cure any prejudice when a witness testified that she had previously gone to Missouri to bail the defendant out of jail. In *State v. Robinson*,[9] we determined that a reference to the defendant's involvement in prior gang-related crimes, accompanied with an admonishment, did not result in actual prejudice.

[7] There is nothing in the record to suggest that Branch's reference to Davis' previous time in prison influenced the outcome of the case. Branch's testimony was cut off before she revealed the crime or the length of the sentence. We must also assume that the jury followed the district court's instruction and disregarded the answer. "[E]ven though it is hard to 'unring the bell' in certain instances, absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict."[10] It cannot be said that this single mention of Davis' prior conviction influenced the jury to such a degree that the entire outcome of the case is now tainted. The district court did not abuse its discretion in denying Davis' motion for mistrial.

(b) Second Motion for Mistrial

[8,9] Davis moved for a mistrial a second time after Clairday's testimony allegedly differed substantially from her deposition testimony. Davis alleged that the State had committed a discovery violation when it withheld incriminating statements attributed to Davis. Prior to trial, Davis properly requested the State to disclose "[a]ny and all admissions, statements, confessions or other inculpatory or exculpatory statements or admissions it has procured from [Davis] or any other person relative to this case." After a proper request by the defendant, the State is required to disclose all material information.[11] The failure of the State to disclose such information could potentially impact the defendant's ability to receive a fair trial to such a degree that a mistrial may be necessary.[12]

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[9] *Robinson, supra* note 5.

[10] *State v. Daly*, 278 Neb. 903, 933, 775 N.W.2d 47, 71 (2009).

[11] See *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

[12] See *id.*

Davis argues that the State committed a discovery violation and that the district court abused its discretion in overruling Davis' motion for mistrial.

The record before us on appeal, however, presents no evidence that a discovery violation occurred. There is no other evidence to suggest that Clairday actually had any undisclosed contact with the State. In fact, Clairday's testimony at trial appeared to be a surprise to the State's counsel as well. During a sidebar, counsel for the State adamantly denied knowing Clairday would testify about additional incriminating statements. We find no reason to disagree with the district court's determination that no prosecutorial misconduct had occurred.

Even if prosecutorial misconduct did occur, the extent to which Davis was actually prejudiced is unclear. We have no way of determining how Clairday's deposition testimony actually differed from the hypothetical undisclosed statements. Clairday's deposition testimony is not included in the record on appeal; the deposition testimony can only partially be adduced from Davis' questions on cross-examination. And, as the district court correctly noted, Davis was able to effectively cross-examine Clairday on her prior inconsistent statements. Davis pointed out several instances where Clairday's story had changed between when Clairday initially spoke with police, testified at the deposition, and finally testified at trial. The district court did not abuse its discretion in denying Davis' motion for mistrial.

Davis' first assignment of error is without merit.

2. Sufficiency of Evidence

[10,11] Davis assigns that the district court erred in supporting a verdict based on insufficient evidence. 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.[13] As with any sufficiency claim, regardless whether the evidence is direct,

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[13] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

circumstantial, or a combination thereof, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[14]

Davis was convicted on three counts of first degree murder and three counts of use of a deadly weapon to commit a felony. Under the felony murder rule, a person is guilty of first degree murder "if he or she kills another person . . . (2) in the perpetration of or attempt to perpetrate . . . robbery . . . or burglary."[15] The elements of the deadly weapon charge simply required the State to prove that Davis used a firearm or other weapon to commit a felony.[16] That charge is separate and distinct from the underlying felony.[17]

The prosecution presented a significant amount of evidence from multiple witnesses to establish that Davis was involved in the robbery attempt that led to the murders. The orchestrator of the robbery, Logemann, testified about Davis' involvement. Logemann testified that he pointed out Avalos' home to Davis the evening of the robbery attempt and murders. Two other witnesses corroborated this portion of Logemann's testimony. The same two witnesses also testified that Davis and Britt were at the scene of the crime at the approximate time the murders occurred.

In addition, Clairday and Logemann both testified to statements and actions by Davis, after the murders, which indicated his involvement. Clairday testified that shortly after the murders occurred, Davis admitted to having taken part in the murders. Clairday also testified that she took a .22-caliber revolver from Davis and Britt and hid the weapon near Ashland. That revolver was later recovered by the police in the area Clairday described. The revolver was consistent with bullets found at the scene of the crime. Logemann testified that Davis admitted to being involved in the murders, but that

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[14] *State v. Norman*, 285 Neb. 72, 824 N.W.2d 739 (2013).

[15] Neb. Rev. Stat. § 28-303 (Reissue 2008).

[16] Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2014).

[17] § 28-1205(3).

Davis recanted the next day. At trial, Logemann also recalled a conversation he had with Davis several days after the murders about the possibility of a gun being left at the scene. Logemann testified that Davis was concerned that through DNA evidence, investigators would be able to link the gun to Davis as the shooter. The .40-caliber semiautomatic pistol abandoned at the site of the murders was consistent with bullets recovered from the scene.

The prosecution presented a significant amount of evidence to establish Davis' involvement at every step, from the planning stage of the robbery to the actual robbery attempt and murders, to disposing of one of the murder weapons, and to Davis' incriminating statements after the murders occurred. The evidence was sufficient such that a rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could find that Davis was guilty of all charges beyond a reasonable doubt.

Davis' second assignment of error is without merit.

VI. CONCLUSION

We affirm Davis' convictions and sentences.

AFFIRMED.

ELIZABETH GRANT JOHNSON, NOW KNOWN AS ELIZABETH D'ALLURA, APPELLANT AND CROSS-APPELLEE, V. KARI JOHNSON, APPELLEE AND CROSS-APPELLANT.

862 N.W.2d 740

Filed May 15, 2015. No. S-13-775.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. The same standard applies to the modification of child support.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the court below.
3. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.

4. **Child Support.** Use of earning capacity to calculate child support is useful when it appears that the parent is capable of earning more income than is presently being earned.
5. **Child Support: Evidence.** Generally, earning capacity should be used to determine a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts.
6. **Social Security.** Social Security benefits are not a mere gratuity from the federal government but have been earned through an employee's payment of Social Security taxes.
7. **Child Support: Appeal and Error.** Whether a child support order should be retroactive is entrusted to the discretion of the trial court, and an appellate court will affirm its decision absent an abuse of discretion.
8. **Modification of Decree: Child Support.** In determining whether to order a retroactive modification of child support, a court must consider the parties' status, character, situation, and attendant circumstances.
9. **Modification of Decree: Child Support: Time.** Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
10. **Modification of Decree: Child Support.** In modification of child support proceedings, the children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay.
11. **Child Support.** The general rule is that no credit is given for voluntary overpayments of child support, even if they are made under a mistaken belief that they are legally required.

Petition for further review from the Court of Appeals, MOORE, Chief Judge, and IRWIN and PIRTLE, Judges, on appeal thereto from the District Court for Douglas County, SHELLY R. STRATMAN, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Rodney C. Dahlquist, Jr., and Christine A. Lustgarten, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Virginia A. Albers, of Slowiaczek, Albers & Astley, P.C., L.L.O., for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Kari Johnson filed a petition for further review of the Nebraska Court of Appeals' decision which affirmed in part

and reversed in part the order of the district court for Douglas County which modified his child support obligation. We conclude that (1) the Court of Appeals correctly determined that the district court erred when it imputed to Elizabeth Grant Johnson, now known as Elizabeth D'Allura, a wage-earning capacity of $52,000 per year and reversed the order and remanded the cause for a hearing on Elizabeth's wage-earning capacity, (2) the Court of Appeals did not err when it affirmed the district court's conclusion that the Social Security benefits paid to the children were a gratuity and that Kari should not be given a credit for them upon remand, and (3) although the Court of Appeals correctly affirmed the district court's decisions that a downward modification in Kari's child support could be retroactive to the month after the filing of the application to modify, that the judgment against Elizabeth for $25,472.11 should be reversed, and that a judgment against Elizabeth for $2,357.90 should be entered, it erred when it reasoned that upon remand, Kari could not receive credit for overpayments, if any, made during the pendency of the modification proceedings for the reason that Kari had continued to pay the $3,000-per-month child support ordered in the original decree. To the contrary, the fact that Kari continued to pay what had been ordered does not preclude consideration of a potential credit after receipt of additional evidence upon remand. Accordingly, we affirm in part, and in part reverse and remand with directions.

II. STATEMENT OF FACTS

Kari and Elizabeth were married in 1996. Two children were born to the marriage: one born in May 1995 and one born in July 1998. Kari and Elizabeth were divorced in January 2010, when the district court entered a stipulated decree and parenting plan. The dissolution decree, inter alia, provided for joint legal custody of the children and awarded physical custody to Elizabeth. Per the stipulation, the decree required Kari to pay child support of $3,000 per month while both children were minors and $1,500 per month when only the younger child was a minor.

Approximately 6 months after entry of the decree of dissolution, Kari moved for an order nunc pro tunc, in which motion he asserted that the dissolution court was not aware of the Social Security payments the children were receiving and that had the dissolution court been aware of the Social Security benefits, Kari "would be responsible for far less than the $3,000" monthly amount of child support. Kari later withdrew the motion, and thus the dissolution court never entertained it.

At the January 2013 modification trial which gives rise to this appeal, Kari acknowledged that when he stipulated to the terms of the original decree, filed on January 10, 2010, he understood that the children were receiving Social Security benefits by virtue of his status as a retired taxpayer. He acknowledged that the receipt of the Social Security benefits was in addition to his obligations for child support and alimony. The record shows that the children received Social Security benefits in 2010, 2011, and part of 2012.

Nine months after the decree of dissolution was entered, Kari moved to vacate the decree, asserting that the decree was void because the district court lacked personal jurisdiction over him. We affirmed the district court's order denying the motion to vacate the decree of dissolution. *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011). At the modification trial, Kari testified that he pursued the personal jurisdiction issue rather than first applying for a modification, because he wanted a "do-over" and to have the entire decree overturned.

In September 2011, Kari filed an application to modify the decree, in which he sought to be awarded physical custody based on the children's preference and to have child support recalculated accordingly. Elizabeth filed a cross-application in which she sought sole legal custody based on Kari's uncooperative behavior and his failure to pay his share of medical bills and to maintain his life insurance. Kari thereafter amended his application to allege that in the event physical custody remained with Elizabeth, his child support obligation should be modified downward because he had experienced a decrease in income which constituted a material change in

circumstances. The parties ultimately stipulated to a modification of physical custody to a joint physical (as well as legal) custody arrangement.

In January 2013, trial was eventually held on the issue of appropriate modification of child support. A review of the supplemental transcript shows that during the pendency of Kari's motion to modify which had been filed in September 2011, a trial was set for April 10, 2012; the parties "settled" the matter, but after the trial date had passed, Elizabeth repudiated the settlement. On September 6, Kari sought temporary abatement of child support. And on October 19, 2012, Kari filed an additional motion for temporary adjustment of child support and a motion for credit. Elizabeth successfully sought continuance of Kari's temporary motions to adjust or credit child support. Specifically, the district court ordered that Kari's motions for abatement or credit of child support were to be addressed at trial. The trial was set for January 2013. The judge who heard the modification matter was not the judge who entered the decree.

At the time of trial, Kari was 69 years old and Elizabeth was 47 years old. Both parties testified that Elizabeth had remained in the family home because they wanted to maintain stability for the children. The record reflects that at the time of trial, Elizabeth's only income was payments she received from a blind trust. She testified that she generally received about $27,000 to $28,000 per year from the trust, or approximately $2,300 per month. Her monthly expenses at the time of the modification trial for the mortgage, utilities, and food totaled more than $4,000, but she admitted that her food expenses would be reduced by the joint custody arrangement. Elizabeth testified that she did not have any money. In its ruling on the modification, the district court found that the evidence showed that Elizabeth received a $95,000 inheritance during the marriage, the equity in the $500,000 marital home in the divorce, and an unexplained deviation upward in child support, and that her new husband contributed to the family's home expenses.

Elizabeth had previously been employed by an aircraft charter company as a pilot; in 2004, she was employed full

time and earned $23,000. There was evidence that Elizabeth would be eligible for a copilot position with her former employer at a salary of $1,500 per month, or $18,000 per year. However, to accept the position, she would have to move from Omaha, Nebraska, to California and undergo a minimum of 4 weeks' requalification training, which training Elizabeth testified would cost $10,000 and would be deducted from her pay. Elizabeth testified that there were no jobs available for her as a pilot in the Omaha area. Elizabeth further testified that she had an ongoing medical condition which prevented her from attaining the medical clearance necessary to work as a commercial pilot. Neither party elicited an explanation of Elizabeth's medical condition.

At the time of trial, Kari was employed as a director of safety at a charter management company for aircraft. Kari testified that he had been involved in the aviation industry for 50 years. Kari testified that while he "may not be an expert witness," in his opinion, Elizabeth could earn "anywhere from 60 to 80,000 a year" as a licensed pilot. Kari testified that he could provide "lots of names" of companies paying in the $60,000 to $80,000 range, "but they're supposed to be confidential." Kari testified that Elizabeth could earn $52,000 per year at her former workplace, though he had "no idea" whether she had achieved such earnings there previously. He requested that the district court impute a wage-earning capacity of $52,000 per year to Elizabeth.

The parties submitted their respective proposed support calculations. Kari proposed that his child support obligation, based on joint physical custody, be reduced to $1,692 per month, retroactive to October 2011 (the month after he filed for modification), and that after the date of the modification order, his obligation be set at $450 per month for two children. He requested a "credit" of more than $19,000 which would reflect the difference between the $3,000 per month he had paid for child support since October 2011 (during the pendency of the modification) and the new amount he proposed as his obligation during that time. He also requested a credit for almost $63,000 for Social Security benefits received by the children but never credited against his support obligation.

Elizabeth testified that she inadvertently removed $2,357.90 from an account of Kari's to pay her American Express bill. Kari requested a judgment to reimburse him for that amount.

Elizabeth proposed that Kari's child support obligation, based on joint physical custody, be set at $1,095 per month. She testified that adjusting the support obligation to give Kari a credit for past Social Security benefits paid to the children would present a significant hardship for her and the children. Elizabeth's counsel also informed the district court that Kari had previously filed a motion seeking to address the Social Security benefits but had withdrawn it. Elizabeth's counsel argued that to allow a retroactive credit after the accumulation of such benefits for more than 3 years since the decree had been entered would be inequitable.

The ensuing orders are complicated and summarized here. In summary, the district court entered an order in May 2013; then later in May, entered a nunc pro tunc order clarifying certain issues; and on August 16, filed an order ruling on Kari's motion to alter or amend in which the district court amended aspects of its prior order. The August order is the order appealed from, but earlier orders found facts relevant to our consideration on further review. For purposes of the issues relevant to this appeal concerning child support, the district court ultimately made rulings as follows:

Reasonable expenditures for the children, such as clothing and extracurricular activities, were allocated between the parents, commencing October 1, 2011, such that Elizabeth would be responsible for 40 percent and Kari would be responsible for 60 percent.

The district court applied the Nebraska Child Support Guidelines, and in connection with its calculation of Kari's child support obligations, the district court used Kari's earnings at the time of the modification trial, which were less than his earnings at the time of the divorce, to calculate his monthly income. The district court found Kari's testimony concerning Elizabeth's earning capacity to be credible and reasonable, based on his experience as a pilot and his knowledge of the aviation industry, and determined that Elizabeth had a wage-earning capacity of $52,000 per year, even though she was

not employed at the time of trial. The district court calculated Elizabeth's monthly income based on the $52,000 potential wage earnings as well as the approximately $27,000 per year that she received as payments from a blind trust. The district court did not find Elizabeth's testimony to the effect that she was unable to work due to an unspecified medical condition to be credible.

In determining Kari's child support obligation, the district court noted that Kari's child support obligation from January 2010, when the divorce decree was entered, through September 2011, when he filed his application to modify the decree, was $3,000 per month as set forth in the stipulated decree. The district court determined that Kari's child support obligation should be reduced to $1,658 per month from October 2011, the month following the month in which he applied to modify the decree, through December 2012. In January 2013, the parties began joint physical custody. The district court determined that Kari's child support obligation should be set at $443 per month from January 2013 through May 2014, a period during which both children would be minors, and $311 per month from June 2014 until July 2017, a period during which only one child would be a minor.

In its several orders, the district court reasoned that because Kari had paid an upward adjustment of $3,000 per month during the pendency of the modification proceedings but his obligation was reduced retroactive to October 2011, Kari had in effect overpaid child support. Specifically, in view of the fact that, applying the child support guidelines, it had determined that Kari's child support payment should be reduced from $3,000 per month to $1,658 per month from October 2011 to December 2012, $443 from January 2013 to May 2014, and $311 from June 2014 to July 2017, and its order was not filed until August 16, 2013, the district court determined that Kari was entitled to a credit of $41,852.11 as a result of his "overpayment" of child support obligations during the pendency of the modification proceedings. The district court awarded Kari a credit of $16,380 against his future child support obligations and, because the overpayment credit would not be wholly consumed, a judgment against Elizabeth for the

remaining $25,472.11. This judgment included the $2,357.90 that Elizabeth had withdrawn from an account of Kari's to pay her American Express bill, but this portion of the judgment is not disputed on appeal.

With respect to the payment of Social Security benefits to the children, the district court concluded that under Nebraska jurisprudence, it could not equitably provide Kari a credit for the Social Security benefits received by the children. The district court reasoned that if such benefits had been disclosed at the time of the decree of dissolution, it could have reduced Kari's child support obligation by effectively attributing such payments to Kari's child support obligation, but because the parties had stipulated to a child support obligation of $3,000 per month in the stipulated decree, the district court had to treat the Social Security benefits as a gratuitous overpayment.

Elizabeth appealed the district court's order to the Court of Appeals, and Kari cross-appealed. In her appeal, Elizabeth claimed, inter alia, that the district court erred when it (1) determined the parties' earning capacities and (2) granted Kari a credit against future child support obligations for past overpayments of child support during the pendency of these modification proceedings and granted Kari a judgment against her for the balance of the credit which exceeded future child support obligations. Elizabeth made another assignment of error regarding retroactivity of the modification, which assignment of error the Court of Appeals rejected. Elizabeth did not cross-petition for further review of this issue. In his cross-appeal, Kari claimed only that the district court erred when it refused to award him a credit against his child support obligations for the Social Security benefits that had been paid to the children based on his work history.

The Court of Appeals affirmed the district court's orders in part, reversed the orders in part, and remanded the cause for further proceedings in a memorandum opinion filed October 1, 2014, in case No. A-13-775. The Court of Appeals determined that the district court abused its discretion when it imputed a wage-earning capacity of $52,000 per year to Elizabeth. The Court of Appeals determined that there was not sufficient evidence demonstrating that she could realize such a level

of earnings and remanded the cause for the determination of "an appropriate level of earning capacity [for Elizabeth] that is supported by competent evidence in the record." The Court of Appeals also determined that although the district court's determination that Kari should get relief retroactively was not error, because Kari continued to pay the $3,000 per month child support required in the decree, the district court erred when it granted Kari a credit against future child support obligations and further erred when it entered a judgment against Elizabeth for the anticipated unused overpayment of child support. Finally, the Court of Appeals rejected Kari's assignment of error on cross-appeal and concluded that the district court did not err when it had concluded that the Social Security benefits received by the children were a gratuitous payment that could not be credited against Kari's child support obligations. We summarize the Court of Appeals' memorandum opinion in more detail in the analysis portion of this opinion.

Kari petitioned for further review of the Court of Appeals' memorandum opinion. We granted the petition.

III. ASSIGNMENTS OF ERROR

Kari claims the Court of Appeals erred when it determined that (1) the district court erred when it imputed to Elizabeth a wage-earning capacity of $52,000 per year, (2) the district court correctly determined that Kari should not be given credit against his child support obligation for Social Security benefits paid to the children, and (3) the district court erred when it gave Kari credit for overpayment of child support obligations in the form of a credit against future child support obligations and in the form of a judgment against Elizabeth.

IV. STANDARDS OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014). The same standard applies to the modification of child support. *Id.*

[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the court below. See *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008).

V. ANALYSIS

1. Elizabeth's Wage-Earning Capacity

Kari claims that the Court of Appeals erred when it reversed the portion of the district court's order imputing a wage-earning capacity of $52,000 per year to Elizabeth and remanded the cause for a determination of Elizabeth's earning capacity. We reject this assignment of error.

[3-5] We have previously addressed the law applicable to determining a parent's earning capacity for child support purposes and stated:

> In general, child support payments should be set according to the Nebraska Child Support Guidelines. The guidelines provide that "[i]f applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources." Use of earning capacity to calculate child support is useful "when it appears that the parent is capable of earning more income than is presently being earned."

Freeman v. Groskopf, 286 Neb. 713, 720, 838 N.W.2d 300, 307 (2013). Generally, earning capacity should be used to determine a child support obligation only when there is evidence that the parent can realize that capacity through reasonable efforts. See *Johnson v. Johnson*, 20 Neb. App. 895, 834 N.W.2d 812 (2013).

The record shows that at the time of trial, Elizabeth's actual income was about $27,000 to $28,000 per year from a trust. The record indicates that the trust income was expected to continue. Therefore, the issue with regard to her earning capacity focuses on her ability for wage earning.

At the time of trial, Kari worked as a director of safety at a charter management company for aircraft. Based on his nearly

50 years in the aviation industry, Kari opined that Elizabeth could earn $60,000 to $80,000 per year as a licensed pilot. Kari testified that while he knew "lots of names" of companies paying in that range, those names were "supposed to be confidential." Kari requested that the district court impute to Elizabeth an annual earning capacity of $52,000, which he testified she could earn at her former workplace, though he had "no idea" whether she had achieved such earnings there in the past. The district court found Kari's testimony concerning Elizabeth's wage-earning capacity to be credible and reasonable based on his years of experience in the aviation industry and determined that Elizabeth had a wage-earning capacity of $52,000 per year.

The trial record shows that Elizabeth's wage earnings had peaked at $23,000 in 2004, when she was employed as a full-time pilot. Elizabeth testified that there were no jobs available for her as a pilot in the Omaha area at the time of trial. There was evidence that she was eligible for a pilot position with a former employer at a salary of $18,000 per year, but that accepting the position would require her to relocate to California and pay $10,000 for training. Elizabeth stated that a medical condition prevented her from working as a commercial pilot. The district court did not find Elizabeth's testimony concerning her unspecified medical condition to be credible.

With regard to Elizabeth's wage-earning capacity, the Court of Appeals determined that the record supported imputing some level of earning capacity to Elizabeth, but that the only evidence setting that figure at $52,000 annually was Kari's unsupported testimony of his opinion of Elizabeth's potential earnings in the aviation field. There was conflicting evidence regarding Elizabeth's ability to work as a pilot, and as it was permitted to do, the Court of Appeals gave weight to the fact that the trial judge heard and observed the witnesses and rejected Elizabeth's version in which she testified that an unspecified medical condition rendered her unable to work as a pilot. See *Brockman v. Brockman*, 264 Neb. 106, 646 N.W.2d 594 (2002). Thus, the Court of Appeals accepted the district court's conclusion that Elizabeth was able to work, but it

determined that the district court abused its discretion when it imputed an annual wage-earning capacity of $52,000 based on the record and remanded the cause for further evidence on this issue. Following our de novo review of the evidence, we find no error by the Court of Appeals in this regard.

A review of the record shows that although Kari was employed in the aviation industry in some capacity for many years, he did not testify that he had a specific basis for his purported knowledge of compensation for pilots or positions available for pilots. He did not refer to any research or inquiries on the matter, demonstrated limited knowledge of Elizabeth's past earnings, declined to specify names of potential employers, and admitted that he "may not be an expert witness." Further, as the Court of Appeals pointed out, the evidence of Elizabeth's full-time job offer with her former employer for $18,000 per year called into question Kari's opinion that she could obtain employment there at a rate of $52,000 per year, as well as his contention that she is capable of earning that sum. On the record before us, it appears that with relocation and training requirements, attaining the position with Elizabeth's former employer could require her to exert something more than "reasonable efforts."

Following our de novo review of the record, we agree with the Court of Appeals that the evidence does not support the district court's determination Elizabeth had an annual wage-earning capacity of $52,000 and that in so finding, the district court abused its discretion. Because determination of the parties' income or earning capacity is critical to the determination of child support, this portion of the order must be reversed and the cause remanded for a determination of Elizabeth's wage-earning capacity. Accordingly, we affirm the Court of Appeals' ruling reversing the matter of Elizabeth's earning capacity and remand the cause to the district court.

Kari raises several issues in addition to Elizabeth's earning capacity in his petition for further review. Although the resolution of these issues is not entirely necessary to the disposition of the current appeal, we address them below because they are relevant to the complete disposition of the matter upon remand. See *In re Interest of Laurance S.*, 274 Neb. 620, 742

N.W.2d 484 (2007) (appellate court may, at its discretion, discuss issues unnecessary to disposition of appeal where those issues are likely to recur during further proceedings).

2. Social Security Benefits Paid to Children

Kari claims that the Court of Appeals erred when it affirmed the district court's determination that Kari should not be given credit against his child support obligation for the Social Security benefits which were paid to the children. He contends that these benefits should not have been treated as gratuitous payments to the children. Kari asserts that he was entitled to have his child support obligation offset by the amount of Social Security benefits the children have received. We find no merit to this assignment of error and therefore affirm the decision of the Court of Appeals which affirmed the ruling of the district court which deemed the Social Security benefits a gratuity.

[6] We have considered the issue of applying Social Security benefits to meet a parent's child support obligation on several occasions. E.g., *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999); *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990); *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985); *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591 (1974). The cases often involve disability benefits or child support arrearages, but we find guidance in their reasoning. We have explained that Social Security benefits are not a mere gratuity from the federal government but have been earned through an employee's payment of Social Security taxes. See *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993). A request to apply Social Security benefits to a child support obligation is merely a request to identify the source of payment. See *Gress v. Gress, supra*. A Social Security benefit can serve as a substitute source for income. See *id*.

Cases illustrate that the better practice is to make the dissolution court cognizant of the payment of Social Security benefits to the children at the time of entering the decree so that the dissolution court can make a fully informed decision. See *Hanthorn v. Hanthorn, supra* (discussing collected cases).

It nevertheless remains at the court's discretion, depending on the overall situation of both the parties and children, to order child support in addition to the amounts received from Social Security. E.g., *Lainson v. Lainson, supra*.

With respect to the Social Security payments under the facts of this case, the district court determined that under Nebraska jurisprudence, it could not equitably provide Kari a credit for the Social Security benefits received by the children. The district court reasoned that if the Social Security benefits had been disclosed at the time of the divorce proceedings, the dissolution court could have attributed such payments to Kari's child support obligation. However, because the parties did not inform the dissolution court of the Social Security payments at the time of the divorce and had agreed to a child support obligation of $3,000 per month in the stipulated decree with no explanation of the upward deviation, the district court determined that it was obligated to treat the Social Security benefits as a gratuitous payment. On appeal, the Court of Appeals agreed.

Based on the jurisprudence set forth above, the procedural history, and the equities of the case, we conclude that the Court of Appeals correctly affirmed the district court's determination and we affirm the Court of Appeals' decision on this issue. The record shows that the children received Social Security benefits in 2010, 2011, and part of 2012. Kari testified that when he stipulated to the terms of the original decree, entered January 10, 2010, he understood that the children were receiving Social Security benefits by virtue of his status as a retired taxpayer and that these benefits were in addition to his obligations for child support and alimony.

Approximately 6 months after entry of the decree of dissolution, Kari filed a motion for an order nunc pro tunc, in which motion he asserted that the dissolution court was not aware of the fact the children were receiving Social Security payments and that had the dissolution court been aware of such fact, Kari's child support amount would have been "far less." Kari later chose to withdraw the motion, and the dissolution court did not address it. Rather than applying early on for a modification of the child support order to reflect

receipt of Social Security benefits as the partial source of his obligation, Kari decided to pursue the personal jurisdiction issue—which we rejected in *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011)—because he wanted a "do-over." Thus, Kari knowingly waived an early opportunity to address the Social Security issue and chose instead "to gamble on the ultimate outcome" of his first appeal. *Hanthorn v. Hanthorn*, 236 Neb. 225, 231, 460 N.W.2d 650, 654 (1990).

In light of our jurisprudence and the equities of the case, we conclude that the Court of Appeals did not err when it affirmed the district court's determination that the Social Security payments made to the children should be treated as a gratuity. Accordingly, Kari should receive no child support credit for the Social Security payments upon remand.

3. Child Support Credit and Judgment

Kari claims the Court of Appeals erred when it reversed the district court's decision which found that Kari had overpaid child support during the pendency of the modification proceedings, granted Kari a credit for overpayment against future child support, and entered a judgment against Elizabeth for the anticipated unused overpayment. Because of our remand for a determination of Elizabeth's earning capacity, we address Kari's assignment of error for guidance on remand.

(a) Retroactive Modification of Child Support

[7] We begin by addressing whether a retroactive modification of Kari's child support is permissible under the facts of this case. Both the district court and the Court of Appeals determined that if Kari was found to have overpaid during the pendency of the modification proceedings and it was determined that he was entitled to a credit, the credit could be applied retroactively to the month after Kari filed for modification. Whether a child support order should be retroactive is entrusted to the discretion of the trial court, and we will affirm its decision absent an abuse of discretion. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013). Applying the law to the facts of this case, we agree that retroactive

modification is appropriate if the further evidence shows an overpayment and the principles applicable to awarding a credit are met.

[8-10] In determining whether to order a retroactive modification of child support, a court must consider the parties' status, character, situation, and attendant circumstances. See, *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005); *Cooper v. Cooper*, 8 Neb. App. 532, 598 N.W.2d 474 (1999). Absent equities to the contrary, modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification. See *Freeman v. Groskopf, supra*. The children and the custodial parent should not be penalized by delay in the legal process, nor should the noncustodial parent gratuitously benefit from such delay. *Pursley v. Pursley*, 261 Neb. 478, 623 N.W.2d 651 (2001); *McDonald v. McDonald*, 21 Neb. App. 535, 840 N.W.2d 573 (2013).

In ruling on Kari's motion for modification, the district court based its child support calculation on its finding that Elizabeth had a wage-earning capacity of $52,000 per year and reasoned that Kari had overpaid his child support obligation when he paid $3,000 per month during the pendency of the modification proceedings. Kari had filed his application for modification in September 2011, and the district court retroactively reduced Kari's child support obligation by varying amounts from October 2011 to the time of the modification ruling and forward to July 2017. The district court ordered that Kari be compensated for his overpayment by receiving credit against his future child support obligations and by receiving a lump-sum judgment against Elizabeth for the unused overpayment. Although the Court of Appeals determined that the district court's conclusion approving retroactive modification was not an abuse of discretion, the Court of Appeals ultimately concluded that because Kari had agreed to pay $3,000 per month in the decree, he was not eligible to receive a credit.

Regarding the retroactive issue, on our de novo review of the record, we find no equities that would support a decision not to apply a modified child support obligation of Kari's

retroactively to October 2011, the month following the filing of Kari's motion to modify. Although Elizabeth's wage-earning capacity is yet to be determined, it is undisputed that she will continue to receive income of approximately $27,000 per year from the trust; that she now shares joint physical custody with Kari, resulting in some reduction of expenses; and that the children have retained the Social Security benefits, which at trial were approximately $63,000.

We also observe that the legal process for resolving Kari's modification effort has contributed to delay, and in equity, he should not be penalized therefor. We have stated that in the context of retroactive modification, parties ought not be penalized by delay in the legal process, nor should a party gratuitously benefit from such delay. See *Pursley v. Pursley, supra*. The judge who presided over the dissolution was not the judge who presided over the modification, and it has been suggested that some delay in the disposition of this matter was due, in part, to the retirement of the first judge and the ensuing reassignment of the case.

Accordingly, we conclude that retroactive modification of Kari's child support obligation and the timing of retroactive modification from the first day of the month following the filing of the application for modification are permissible in this case.

(b) Credit for Modified Child Support

As noted above, the district court partly based its child support calculation on its erroneous finding that Elizabeth had an annual wage-earning capacity of $52,000. The district court applied the child support guidelines and found that Kari was entitled to a reduced child support obligation and that he had overpaid his child support obligation by paying $3,000 per month while the modification proceedings were pending. The court ordered that Kari be compensated for his overpayment, in part by a credit against his future child support obligations and in part by a lump-sum judgment against Elizabeth. On appeal, the Court of Appeals essentially determined that Kari could not have overpaid child support, because he had stipulated to the $3,000-per-month child support payment in the

decree, and that therefore, Kari was not eligible for a credit. We disagree with the reasoning of the Court of Appeals. Upon remand, after receipt of evidence of Elizabeth's wage-earning capacity and application of the child support guidelines, if it appears that Kari has overpaid child support during the pendency of the modification proceedings, on the facts of this record, Kari is not ineligible for a credit by virtue of having paid the $3,000 per month. Whether Kari is awarded a credit under the exception in *Griess v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000), explained below, is to be determined by the district court upon remand.

[11] The Court of Appeals has enunciated the general rule for support overpayment claims: No credit is given for voluntary overpayments of child support, even if they are made under a mistaken belief that they are legally required. See *id*. However, the general rule continues that "[e]xceptions are made to the 'no credit for voluntary overpayment rule' when the equities of the circumstances demand it and when allowing a credit will not work a hardship on the minor children." *Id*. at 115, 608 N.W.2d at 224. Nebraska appellate courts have generally considered the application of overpayment credits as a question of law. See, *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008); *Jameson v. Jameson*, 13 Neb. App. 703, 700 N.W.2d 638 (2005).

In determining that Kari was not entitled to the relief provided by the district court, the Court of Appeals cited to *Griess v. Griess, supra*. The Court of Appeals acknowledged that it had decided that the relief of a credit against future support payments was appropriate in *Griess*, because the trial court had entered a grossly erroneous modification order that was prepared by the attorney for the party receiving the child support and the attorney for the paying party had overlooked, ignored, and implicitly approved the erroneous calculation. The Court of Appeals distinguished the present case from *Griess* primarily on the basis that Kari's claimed overpayment was not the result of a mistake but was an amount to which he had agreed in the stipulated decree. Because Kari had agreed to the $3,000, the Court of Appeals reasoned that Kari was precluded

from receiving a credit and that the district court had erred when it had found Kari eligible for a credit.

On the record before us, we disagree with the Court of Appeals' application of *Griess* and determine that upon remand, Kari is not ineligible for a credit for overpayment of child support that may be found on remand. The determination of Kari's entitlement to a credit, if any, will necessarily be made by the district court upon remand based on a more developed record regarding the parties' relative incomes.

Our jurisprudence permits a credit for overpayment under the circumstances of this case. See, *Jensen v. Jensen, supra* (stating that credit against child support is permissible where equity requires it, citing *Griess*); *Jameson v. Jameson, supra* (quoting rule in *Griess* but finding it inapplicable); *Griess v. Griess, supra*. Other jurisdictions are in accord with Nebraska jurisprudence and have allowed a credit for overpayments made under earlier, higher child support orders, after a later retroactive modification reduced the child support order. See, e.g., *In re Marriage of Frazier*, 205 Ill. App. 3d 621, 563 N.E.2d 1236, 151 Ill. Dec. 130 (1990) (after reducing obligor father's child support obligations retroactively to date of his petition for modification, court allowed father credit against ongoing child support obligations for having paid higher child support amounts due prior to modification); Annot., 7 A.L.R.6th 411 (2005).

We believe the circumstances in this case permit the award of a credit upon remand for overpayment of child support if, upon application of the child support guidelines, and in the absence of hardship, the district court finds an overpayment has been made during the pendency of the modification proceedings. We find it relevant the record shows that Kari repeatedly attempted to lower his obligation during the pendency of the modification process, but that his efforts were unsuccessful, due in part to Elizabeth's resistance and delay in processing the case. Kari filed his application for modification in September 2011, but the last order disposing of the application was not filed until August 2013. Trial was initially set for April 10, 2012. Prior to trial, the parties reported that

they had "settled" the matter. However, after the trial date had passed, according to the pleadings, Elizabeth repudiated the settlement. On September 6, Kari sought temporary abatement of child support. On September 11, the pretrial order set the trial for January 24, 2013. On October 19, 2012, prior to the new trial date, Kari filed a motion to temporarily reduce his child support and a motion for credit. Elizabeth sought and obtained a continuance of Kari's temporary motions. The district court ordered that Kari's temporary motions were to be addressed at the modification trial, and the trial was set for January 2013. So, Kari continued to abide by the original order of $3,000 per month.

Our appellate jurisprudence has addressed the efforts an obligor parent has made during the pendency of a motion to modify a child support obligation. In *Lucero v. Lucero*, 16 Neb. App. 706, 750 N.W.2d 377 (2008), the Court of Appeals indicated that the obligor parent's failure to seek relief during the pendency of the case weighed against granting credit. The Court of Appeals stated: "[The ex-husband] could have sought and likely obtained a temporary order upon motion and affidavit, suspending his payments pending the final hearing on his request to terminate child support payments rather than paying them and hoping to get them back from his financially distressed ex-wife." *Id.* at 720, 750 N.W.2d at 388. Unlike the obligor in *Lucero*, Kari made repeated attempts to lower his child support obligation during the pendency of the modification. His efforts to obtain relief sooner should be recognized.

We have observed, in the context of retroactive modification, that parties ought not be penalized by delay in the legal process. See *Pursley v. Pursley*, 261 Neb. 478, 623 N.W.2d 651 (2001). We logically apply the principle to our consideration of granting a credit. Although Kari was not subject to a grossly erroneous child support order like the obligor in *Griess v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000), we believe the exception in *Griess* is applicable to the facts of this case and makes Kari eligible for a credit.

(c) Judgment Against Elizabeth for Anticipated Unused Child Support Overpayment Credit

The district court found that Kari had overpaid child support during the pendency of the modification proceedings, and ordered that the overpayment serve as a credit for Kari's obligations during the pendency of the modification proceedings and during the remainder of the children's minority. The district court calculated that the overpayment would not be exhausted and entered judgment against Elizabeth for the anticipated unused overpayment. The Court of Appeals reversed the judgment in part, because "there was no showing [that Elizabeth] has the means to pay" the approximately $23,114.21 portion of the judgment attributable to the anticipated unused overpayment. Kari claims the Court of Appeals erred when it reversed the judgment against Elizabeth for the future unused overpayment of child support. Although our reasoning differs somewhat from that of the Court of Appeals, we find no error and affirm the reversal of the judgment attributable to the anticipated unused child support credit. Upon remand, the district court is instructed that entry of a judgment against Elizabeth for future anticipated unused overpayment is not permitted under Nebraska jurisprudence.

The judgment under review suffers from the same weaknesses as do lump-sum child support judgments in satisfaction of future payments, which are disfavored in Nebraska. In *Gibson v. Gibson*, 147 Neb. 991, 26 N.W.2d 6 (1947), the trial court awarded, in advance, all the child support to be paid for the following 13 years. On appeal, this court observed that child support is at all times subject to change and that the Nebraska Legislature had provided for such changes by allowing for modification of child support. In *Gibson*, we reasoned that lump-sum awards of child support are not supported by the law, because the modification statute "would be entirely ineffective if such a final judgment could be entered as was done in this case." 147 Neb. at 1000, 26 N.W.2d at 10. In *Gibson*, we stated:

> It is improper under the law to make a final, definite, and positive entry of such a judgment for the support of a minor child, for the amount to be paid must vary with the several needs of the child for food, clothing, and expenses involved in his education, with his necessary medical and surgical requirements, and the court may also consider such changes in the financial condition of the father [obligor] as are shown by the testimony. Therefore, the law has provided that the monthly payments can be changed from time to time as the evidence warrants.

147 Neb. at 1000, 26 N.W.2d at 10. See, similarly, *Gress v. Gress*, 257 Neb. 112, 117, 596 N.W.2d 8, 13 (1999) (discussing credits, wherein we stated: "Future obligations are not yet accrued, and because they are subject to modification, they are not ascertainable"). For completeness, we note that although lump-sum child support awards are not favored under the law in Nebraska, an obligor may receive credit against future obligations for payments already made, including a lump-sum payment already made where such payment does not preclude future child support awards or adjustments. *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008).

In the present case, the district court's judgment against Elizabeth was based on its assumption as calculated in 2013 that there would be no changes to the child support obligations of the parties throughout the remainder of the children's minority ending in 2017. The assumption that there will be no further modifications is not correct and contrary to law. Our reasoning in *Gibson* still applies. Therefore, we agree with the Court of Appeals that the lump-sum judgment against Elizabeth for the anticipated unused child support credit should be reversed.

In sum, on remand, the amount of the parties' child support obligations shall be calculated based, in part, on a determination of Elizabeth's wage-earning capacity that is supported by competent evidence in the record, the Social Security benefits received by the children are to be considered a gratuity, and Kari is not to receive a credit therefor. Given the record and equities, we conclude that modification of Kari's child

support obligation retroactive to October 2011 is permissible. In the event that the district court determines that Kari has overpaid child support during the pendency of the modification proceedings, Kari is eligible to receive a credit. Such credit may be applied against future child support obligations on a month-to-month basis. However, because our jurisprudence disfavors lump-sum final child support judgments, we reverse the district court's judgment against Elizabeth for $25,472.11, which included $23,114.21 of Kari's anticipated unused overpayment credit, and we remand the cause with directions in accordance with this opinion.

(d) Judgment Regarding American Express Reimbursement

The $25,472.11 judgment entered by the district court was composed of $23,114.21 attributable to the impermissible award against Elizabeth for Kari's anticipated future unused child support overpayment credit and $2,357.90 attributable to the withdrawal that Elizabeth made from Kari's account, which she used to pay an American Express bill. The Court of Appeals disapproved of the $23,114.21 portion and approved of the $2,357.90 portion, as do we.

We have reversed the district court's judgment of $25,472.11 against Elizabeth. However, that judgment included $2,357.90 that Elizabeth withdrew from an account of Kari's to pay an American Express bill. The parties do not dispute the propriety of that portion of the judgment, and it is supported by evidence in the record. Accordingly, on remand, we order the district court to enter a judgment against Elizabeth in the amount of $2,357.90.

VI. CONCLUSION

For the foregoing reasons, on further review, we conclude as follows: (1) The Court of Appeals correctly determined that the district court erred when it imputed to Elizabeth a wage-earning capacity of $52,000 per year and reversed the order and remanded the cause for a hearing on Elizabeth's wage-earning capacity, and we affirm this decision; (2) the Court of Appeals did not err when it affirmed the district

court's conclusion that the Social Security benefits paid to the children were a gratuity and that Kari should not be given a credit upon remand, and we affirm this decision; and (3) although the Court of Appeals correctly affirmed the district court's decisions that a downward modification in Kari's child support could be retroactive to the month after the filing of the application to modify, that the judgment against Elizabeth for $25,472.11 should be reversed, that a judgment against Elizabeth for $2,357.90 should be entered, and we affirm these decisions, it erred when it reasoned that upon remand, Kari could not receive credit for overpayments, if any, made during the pendency of the modification proceedings for the reason that Kari had continued to pay the $3,000-per-month child support ordered in the decree. To the contrary, the fact that Kari continued to pay what had been ordered does not preclude consideration of a potential credit after receipt of additional evidence upon remand pursuant to the exception in *Griess v. Griess*, 9 Neb. App. 105, 608 N.W.2d 217 (2000). Accordingly, we affirm in part, and in part reverse and remand with directions.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CRAIG ANTHONY JOHNSON, ALSO KNOWN AS CRAIG A. JOHNSON, APPELLANT.

862 N.W.2d 757

Filed May 15, 2015. No. S-14-101.

1. **Appeal and Error.** For an appellate court to consider an alleged error, a party must specifically assign and argue it.
2. **Juries: Discrimination: Equal Protection: Prosecuting Attorneys.** A prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his view concerning the outcome of the case. But under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), a peremptory challenge to remove a prospective juror for a racially discriminatory reason violates the Equal Protection Clause.
3. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Determining whether a prosecutor impermissibly sought to remove 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.

4. **Juries: Discrimination: Prosecuting Attorneys: Moot Question.** Once a prosecutor has offered a race-neutral explanation for a peremptory challenge and the trial court has decided the ultimate question of intentional discrimination, the preliminary issue of whether the defendant made a prima facie showing that the challenge was racially motivated is moot.
5. **Juries: Discrimination: Prosecuting Attorneys: 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. It reviews for clear error a trial court's factual determinations whether an attorney's race-neutral explanation is persuasive and whether his or her use of a peremptory challenge was purposefully discriminatory.
6. **Juries: Discrimination: Prosecuting Attorneys.** Under the second step of an inquiry under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), a prosecutor must present a comprehensible reason for using a peremptory strike against a prospective juror in response to a *Batson* challenge. But in determining whether the explanation is race-neutral, a court is not required to reject the explanation because it is not persuasive, or even plausible; it is sufficient if the reason is not inherently discriminatory.
7. ____: ____: ____. Whether a prosecutor's explanation for using a peremptory strike against a prospective juror is pretextual falls within the trial court's ultimate factual determination in the third step of the inquiry under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
8. **DNA Testing: Words and Phrases.** In forensic analysis, a DNA profile is a person's combination of alleles at each tested locus.
9. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
10. **Trial: Rules of Evidence.** A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value.
11. **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.
12. **Rules of Evidence.** Under Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008), irrelevant evidence is inadmissible.
13. **Rules of Evidence: Words and Phrases.** Under Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), 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.

14. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), even relevant evidence is properly excluded if its probative value is substantially outweighed by its potential for unfair prejudice.
15. **DNA Testing: Evidence.** The relevance of DNA evidence depends on whether it tends to include or exclude an individual as the source of a biological sample.
16. ____: ____. Nebraska case law generally requires that DNA testing results be accompanied by statistical evidence or a probability assessment that explains whether the results tend to include or exclude the individual as a potential source.
17. **Expert Witnesses: Words and Phrases.** An expert does not have to couch his or her opinion in the magic words of "reasonable certainty," but it must be sufficiently definite and relevant to provide a basis for the fact finder's determination of a material fact.
18. **Expert Witnesses.** A court should exclude an expert's opinion when it gives rise to conflicting inferences of equal probability, so the choice between them is a matter of conjecture.
19. **Expert Witnesses: Proof: Words and Phrases.** An expert opinion which is equivocal and is based upon such words as "could," "may," or "possibly" lacks the certainty required to sustain the burden of proof of causation for which the opinion has been offered.
20. **Trial: DNA Testing: Evidence.** Unless the State presents the statistical significance of DNA testing results that shows a defendant cannot be excluded as a potential source in a biological sample, the results are irrelevant. They are irrelevant because they do not help the fact finder assess whether the defendant is or is not the source of the sample. And because of the significance that jurors will likely attach to DNA evidence, the value of inconclusive testing results is substantially outweighed by the danger that the evidence will mislead the jurors.
21. **Criminal Law: Trial: Evidence: Appeal and 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.
22. **Verdicts: Juries: Appeal and Error.** 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.

Appeal from the District Court for Cheyenne County: DEREK C. WEIMER, Judge. Affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

CONNOLLY, J.

I. SUMMARY

A jury convicted the appellant, Craig Anthony Johnson, of first degree murder, use of a weapon to commit a felony, and possession of a deadly weapon by a prohibited person. The court sentenced him to prison terms of, respectively, life, 40 to 50 years, and 10 to 20 years, with all terms to be served consecutively.

On appeal, Johnson argues that the court erred in (1) admitting evidence of inconclusive DNA testing results; (2) overruling his *Batson*[1] challenge to the State's use of a peremptory strike against the only African-American prospective juror; and (3) admitting cumulative, gruesome autopsy photographs.

We conclude that Johnson has waived any claimed error regarding the photographs and that the court did not err in overruling his *Batson* challenge. We conclude, however, that the court improperly admitted irrelevant DNA testing results. But because we also conclude that the evidentiary error was harmless beyond a reasonable doubt, we affirm Johnson's convictions.

II. BACKGROUND

In the spring of 2011, April Smith separated from her husband, Edward Smith (Ed), and began dating Johnson. At some point, Johnson began working near Sidney, Nebraska, at a pipe distributor for oil rig operations. April managed a convenience store near the distributor and lived in a duplex within eyesight of the store. Johnson moved in with April about the end of the summer. But April continued to maintain a close relationship with Ed, and Ed continued to help her with some financial

[1] See, *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

obligations and the maintenance of her white van, which they jointly owned.

For Thanksgiving 2011, April invited Ed to have dinner with herself, Johnson, and April's nephew and his family. Just before Thanksgiving, Johnson told a coworker that he was upset that April had invited Ed and that he would kill her if she ever left him to go back to Ed. During the Thanksgiving gathering, Ed refused Johnson's offer to repair April's van.

On Saturday morning, December 10, 2011, Ed went to April's duplex and took her van to repair the brakes. He returned it around noon. Ed was a truckdriver and left shortly after returning the van to go to Texas.

Johnson worked on Saturday morning. His supervisor said that Johnson asked to leave work early because he heard that Ed was going to April's house. She said that Johnson frequently mentioned meetings between April and Ed and was upset and jealous about their relationship. On Saturday morning, he told his supervisor that if he ever caught them together, he would "beat the shit out of both of them." His supervisor advised him to leave if he was unhappy, and he apologized for his remark. On Saturday afternoon, Johnson called a coworker and asked whether he could come over because he and April were fighting, but the coworker had plans to leave town.

Later that evening, April's nephew, his wife, and their children went to visit April at her duplex. Robert Gray, April's nephew, said that Johnson was drinking beer and was unusually quiet most of the evening. Robert and his wife both said that Johnson was upset about other men flirting with April at the convenience store and about Ed's repairing the brakes on April's van. Robert's wife described Johnson's demeanor as angry and said that his and April's interactions were tense; they went into the kitchen to talk privately a couple of times during the evening. Just before Robert and his family left around midnight, April and Johnson had started to argue. April's neighbors reported hearing loud voices and arguing around 1 or 2 a.m. They recognized Johnson's voice from previous fights between April and Johnson when they had tried to intervene. A neighbor in the adjacent duplex said that the

arguing continued for 30 to 45 minutes and that she heard "a couple of thuds."

On Sunday morning, December 11, 2011, April's employer saw her white van in front of her duplex while he was at the convenience store. At about 11:50 a.m., a sheriff's officer was at the convenience store to respond to an alarm that had gone off. While he was checking the outside of the building, Johnson pulled up in April's van. Johnson said that his girlfriend was the manager and that they had received a call from the alarm company. He told the officer that his girlfriend was having back problems and preparing to resign her position. Johnson opened the door with a key and deactivated the alarm.

Meanwhile, Robert and his wife tried to call April about 11 a.m. and noon on Sunday, but she did not answer or return their calls, which was unusual. They went to April's duplex a couple of times that afternoon, but the van was gone, she did not respond to knocks, the blinds were closed, and the deadbolt was locked, which was also unusual. Johnson's pickup was parked in front of the duplex. They returned to April's duplex that night but could not see inside. About 8:45 p.m., a security camera filmed Johnson while he was purchasing gas for a white van in Chapman, Nebraska, which is about 3 hours 45 minutes from Sidney.

On Monday morning, December 12, 2011, Robert and his wife contacted the sheriff's department. April's employer had also contacted the office when she did not show up for work. Johnson had requested time off in advance for a doctor's appointment.

At about 8 a.m. on Monday, two officers went to the duplex to check on April. When she did not answer their knocks, the officers spoke to people who might know where she was and learned that Johnson had taken the day off. They eventually broke into the duplex and found April's body lying face down in the living room. A chief deputy sheriff believed she had been dead for quite a while from the appearance of her body. The officers could see that her hands and feet were tied, and there was blood on the couch beside her and on her arms and legs. After determining that April was dead, the sheriff's

officers secured the duplex until State Patrol investigators could help.

A witness testified that while he was at a gas station in Brooklyn, Iowa, on Tuesday, December 13, 2011, a driver in a white van—whom he identified as Johnson—asked him for money to pay for gas. The van had South Dakota plates on it, even though Johnson had said he was from Sterling, Nebraska. Johnson was emotional and told the witness that he was having relationship problems and trying to get to a job in Illinois.

Two days later, on December 15, 2011, a sheriff's officer in Jackson County, Michigan, pulled over April's white van with South Dakota license plates for a traffic violation. Johnson was driving the van. But when the officer got out of his vehicle, Johnson accelerated back into traffic. A high-speed chase ensued, which ended when other officers set up "stop sticks" to puncture the van's tires. Johnson initially refused to get out, so the officers arrested and handcuffed him. The arresting officer found the van's Nebraska license plates inside and learned that it was stolen from the scene of a homicide, but he did not say this to Johnson. The South Dakota plates did not match the van's vehicle identification number. Later, while the officer was booking Johnson, he blurted out, "'What do you want from me I'm wanted for murder.'"

When Nebraska investigators learned that Michigan officers had arrested Johnson, they went to Michigan to bring Johnson back to Nebraska. They also obtained a search warrant to photograph his body and obtain fingernail scrapings. The photographs did not show any injuries. But when they attempted to scrape his right-hand fingernails, Johnson became confrontational and began to dig at his right-hand nails, discarding the debris on the floor, until the officers could restrain him. The deputy sheriff could not obtain scrapings from his right hand. The scrapings he obtained from Johnson's left hand tested negative for the presence of blood, and DNA testing showed nothing of evidentiary value.

During the return trip to Nebraska, Johnson told a Nebraska investigator that he had planned to see an old friend in

Michigan and then turn himself in. Later, he said that "dope would play a role in the investigation."

When the Nebraska investigators searched the van, they found Johnson's T-shirt and athletic shoes with dark stains that they believed to be blood. The stains on both the T-shirt and shoes tested positive for blood, and the DNA profile extracted from these stains matched April's profile. The investigators traced the South Dakota license plates to a vehicle in a Sioux Falls, South Dakota, salvage yard.

1. Jury Selection

During jury selection, the State used one of its peremptory challenges to strike juror No. 8. In a juror questionnaire, she listed her race or ethnicity as African-American and Hispanic Latino. Johnson is African-American, and juror No. 8 was the only minority represented in the jury pool. The defense challenged the strike in a side bar.

During an in camera discussion, the prosecutor explained that the juror had indicated on her questionnaire that she was acquainted with April because April was a customer at a pharmacy where the juror worked. The prosecutor believed that the juror could have knowledge related to April's use of drugs—evidence that the prosecutor believed was irrelevant but knew that Johnson would use in his defense.

The defense responded that the State's proffered reason was pretextual and irrational. The defense argued that the prosecutor had not questioned the juror about her knowledge, i.e., whether she had filled any of April's prescriptions. The State responded that it did not want to highlight the reason for striking her. The court overruled the objection.

2. Evidence Presented of the Crime Scene and April's Injuries

The investigators found blood in the main bedroom, bathroom, a second bedroom, and the dining room. They found dark-colored vomit in a trash can by the bed, and blood smeared on and around the toilet, suggesting that April had vomited there too. They believed the evidence showed signs of

a struggle throughout the duplex or that April was moving from place to place in an effort to survive.

When they turned over April's body, they saw a ligature abrasion on her neck, a hand wound, a facial wound, and a gaping wound in the left side of her abdomen about 2 inches long. They also found a clump of April's hair by her body and in other parts of the duplex, and several of her acrylic fingernails.

Inside a kitchen trash can, investigators found a white trash bag, a cell phone, a black baseball cap, and two blue knit hats. The cell phone belonged to April. The trash bag had blood splattered on the end by the drawstring, and a V-shaped piece was ripped out of it. Investigators found the ripped-out piece beside April's body. A Nebraska State Patrol investigator stated that the trash bag appeared to have an imprint in it where it had been stretched over something. He believed the imprint was of a human face. He opined that the blood pattern indicated that the blood had been aspirated or exhaled onto the bag. The pathologist who performed the autopsy concluded that the pinpoint hemorrhages found on April's mouth could have been caused by strangulation or suffocation. The ligature abrasion on her neck indicated strangulation. A forensic scientist found a fingerprint on the trash bag that matched one of Johnson's fingerprints. DNA testing of the blood on the bag and the ripped-out piece produced DNA profiles that matched April's profile.

Investigators also found a couple of knives in the sink, one of which had an 8-inch blade and a red substance dried on it. No identifiable fingerprints were found on the knife. The knife tested positive for the presence of blood; DNA testing of the knife handle and blade produced DNA profiles from a single source that matched April's profile and excluded Johnson.

During the deputy sheriff's testimony, the court admitted, without objection, a photograph showing the position of April's body face-down beside the couch. During the other investigators' testimonies, the State submitted, without objection, three photographs of blood found in the duplex. But Johnson objected to the State's offer of eight more photographs of April's body and the crime scene as cumulative and

an attempt to inflame the jurors' passions. The State argued that photographs gave the jurors a perspective of the body's location in the house and the violent scene that investigators encountered. The court overruled Johnson's objections. After this ruling, the court admitted two more photographs from the crime scene, without objection, showing April's bound hands—including the wound in her palm and the ligature abrasions around her wrists—and the stab wound to her abdomen.

The evidence showed that April had been prescribed hydrocodone pills for back problems, and investigators found three prescription bottles with these pills in her bedroom: one on the floor, one on her bed, and one in a plastic bag with other prescription bottles. But the State presented witnesses who testified that April had not abused her prescription drugs and was not involved in drug dealing. The pathologist stated that the toxicology report showed April had a toxic level of hydrocodone in her body, sufficient to cause death, and also some amount of a barbiturate. He stated that this evidence did not show that April had abused the drugs. But the evidence did show that she had taken the drugs close to the time of her death.

In addition to the stab wound and ligature abrasions, April had multiple bruises and abrasions on her face and body. The hand wound could have been a defensive wound. The stab wound in her abdomen was 7½ inches deep and punctured her small intestine in a couple of places. It would not have caused immediate death, but it would have caused vomiting. The pathologist believed that April was alive after sustaining the stab wound to her abdomen because an inflammatory response had started in her body. The State submitted, without objection, several autopsy photographs of the injuries to April's body. The pathologist opined that her death was a homicide caused by the stab wound to her abdomen and suffocation, with a contributing cause of multiple drug toxicity.

The State's DNA expert testified about her testing of biological samples that investigators took from the crime scene. The court overruled Johnson's continuing objections to three of the expert's inconclusive testing results and her testimony

about them. Johnson objected that under Neb. Evid. R. 402 and 403,[2] the evidence was irrelevant and its potential for unfair prejudice outweighed its probative value.

III. ASSIGNMENTS OF ERROR

Johnson assigns, reordered, that the court erred as follows: (1) admitting cumulative, gruesome autopsy photographs that depicted the same injuries and thus allowing the prosecutor to inflame the jurors' passions; (2) denying his *Batson* challenge based on an irrational and pretextual justification; and (3) admitting testimony and exhibits that Johnson's DNA profile contained certain alleles that matched alleles found in a mixed blood sample, because such evidence lacked sufficient probative value.

IV. ANALYSIS

1. Johnson Has Not Preserved Error Regarding the Court's Admission of Photographs

Johnson assigns that the court erred in admitting gruesome autopsy photographs of April's injuries. But he did not object to the admission of the photographs at trial. And in his brief, he argues that the court erred in admitting cumulative photographs taken at the crime scene—not autopsy photographs.

[1] For an appellate court to consider an alleged error, a party must specifically assign and argue it.[3] Johnson has not assigned that the court erred in admitting cumulative crime scene photographs, and he has not argued his assignment that the court erred in admitting gruesome autopsy photographs. So we do not address whether the court erred in admitting any photographs.

2. The Court Was Not Clearly Wrong in Determining That the Prosecutor's Peremptory Challenge Was Not Based on Race

Johnson assigns that the court erred in overruling his *Batson* challenge to the prosecutor's use of a peremptory challenge

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[2] See Neb. Rev. Stat. §§ 27-402 and 27-403 (Reissue 2008).

[3] See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

to remove juror No. 8, the only prospective juror of African-American descent. He contends that the prosecutor's proffered reason for the challenge was pretextual. He argues that the prosecutor did not ask juror No. 8, who worked at the pharmacy where April filled her prescriptions, whether she possessed any special knowledge about April. Johnson also points out that the juror had stated that she could be impartial on her questionnaire. He contends that these facts raised an inference that the prosecutor sought her removal because of her race. We disagree.

[2,3] A prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his view concerning the outcome of the case.[4] But under *Batson v. Kentucky*, a peremptory challenge to remove a prospective juror for a racially discriminatory reason violates the Equal Protection Clause.[5] Determining whether a prosecutor impermissibly sought to remove 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.[6]

[4,5] Once a prosecutor has offered a race-neutral explanation for a peremptory challenge and the trial court has decided the ultimate question of intentional discrimination, the preliminary issue of whether the defendant made a prima facie

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[4] See *Nave, supra* note 1, citing *Batson, supra* note 1.

[5] See, *id.*; *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999).

[6] *Nave, supra* note 1, 284 Neb. at 485, 821 N.W.2d at 730-31.

showing that the challenge was racially motivated is moot.[7] So we determine only whether the prosecutor's reasons were race neutral and whether the trial court's final determination regarding purposeful discrimination was clearly erroneous. We review de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law.[8] We review for clear error a trial court's factual determinations whether an attorney's race-neutral explanation is persuasive and whether his or her use of a peremptory challenge was purposefully discriminatory.[9]

[6] Under the second step of a *Batson* inquiry, a prosecutor must present a comprehensible reason for using a peremptory strike against a prospective juror in response to a *Batson* challenge. But in determining whether the explanation is race-neutral, a court is not required to reject the explanation because it is not persuasive, or even plausible; it is sufficient if the reason is not inherently discriminatory.[10] Under our de novo review of the prosecutor's proffered explanation for the peremptory challenge, we conclude that his explanation was not inherently discriminatory.

[7] Whether a prosecutor's explanation for using a peremptory strike against a prospective juror is pretextual falls within the trial court's ultimate factual determination in the third step of the *Batson* inquiry: "[W]hether an attorney's race-neutral explanation for a peremptory challenge should be believed presents a question of fact."[11] A trial court's determination that the explanation was race-neutral frequently involves its evaluation of a prosecutor's credibility, which requires deference to the court's findings absent exceptional circumstances.[12]

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[7] See *Nave, supra* note 1.

[8] *Id.*

[9] *Id.*

[10] See *id.*

[11] *State v. Thorpe*, 280 Neb. 11, 17, 783 N.W.2d 749, 757 (2010).

[12] See *Nave, supra* note 1.

Here, the prosecutor explained that he did not want to ask juror No. 8 whether she had knowledge of April's drug use because the questioning would have emphasized his reason for seeking her removal. The record supports his belief that such questions could have raised concerns in the jurors' minds about the validity of Johnson's defense. In his opening statement, Johnson suggested that the evidence would show April was probably addicted to hydrocodone and could have been involved with dangerous individuals who killed her. Because the prosecutor explained that he knew Johnson would rely on April's drug use as a defense, his decision to not question juror No. 8 about her knowledge of April's drug use did not show that his proffered reason was pretextual. Moreover, the prosecutor denied that race was a factor in his decision and argued that if not for juror No. 8's potential knowledge about the case, he would have "like[d] her" as a juror. He noted that she had recently served on a jury that had found the defendant guilty. The court was not clearly wrong in finding that this testimony was credible.

3. The Court Erred in Admitting Evidence of Inconclusive DNA Testing Results

(a) Additional Facts

The State's DNA expert, Melissa Kreikemeier, is a forensic scientist from the Nebraska State Patrol Crime Laboratory. She tested biological samples from the crime scene with the PCR-STR testing method.[13] Using this method, she tried to detect genetic variations that are known to exist at specific segments in the DNA molecule.[14] Kreikemeier explained that the individual variations are the number of times that a small sequence in the DNA molecule is repeated at a particular segment. The

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[13] See *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

[14] See *State v. Carter*, 246 Neb. 953, 967-69, 524 N.W.2d 763 (1994), *overruled in part on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

segments are called loci, and the individual variations are called alleles.[15]

[8] In forensic analysis, a DNA profile is a person's combination of alleles at each tested locus.[16] Kreikemeier stated that the combination of alleles found at 15 designated loci produces a profile that is very rare and that she had never heard of two people having the same profile unless they were identical twins. She tested for alleles at these 15 loci, plus a locus that is tested to determine the sex of the contributor. Kreikemeier recorded the alleles she detected at each of the 15 designated loci as a number that represents the number of times a DNA sequence is repeated there. She used the known DNA profiles for April, Ed, and Johnson to compare against the alleles that she found in samples from unknown sources.

Kreikemeier explained that because individuals inherit an allele from each parent at every locus (which may be the same allele), if she detected more than two alleles at a locus, her testing showed the sample contained a mixture of DNA from more than one person.[17] She said that for mixed-source samples, an analyst can sometimes (1) determine that one person contributed the majority of the DNA in the sample and (2) assign separate profiles to the major and minor contributors. But she explained that DNA testing can be affected by the quantity of the DNA present in a sample and whether it has been degraded.[18]

As stated, the court overruled Johnson's continuing objections under evidence rules 402 and 403 to three of Kreikemeier's inconclusive testing results and her testimony about them. She obtained the inconclusive results from testing the underside of

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[15] See, e.g., *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012), citing David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Identification Evidence*, in Reference Manual on Scientific Evidence 129 (Federal Judicial Center 3d ed. 2011).

[16] See Kaye & Sensabaugh, *supra* note 15 at 139.

[17] See *id.* at 183.

[18] See *id.* at 151. See, also, *Kofoed, supra* note 15.

two acrylic nails found in the duplex and the rope tied around April's ankles where it was knotted at her feet.

Regarding the first acrylic nail, Kreikemeier determined that the sample contained mixed DNA and she produced profiles for major and minor contributors. The full major contributor profile matched April's profile. But she obtained only a partial DNA profile for a minor contributor. In total, Kreikemeier recorded 12 alleles for a minor profile at the 15 designated loci and none for the locus used to determine the contributor's sex. Ten of these matched alleles in Johnson's known profile, which showed 30 total alleles at the same 15 loci, and two did not. Each recorded allele in the minor profile had an asterisk beside it. Kreikemeier stated that the asterisks meant "the data that we are seeing his [sic] lower, it's kind of a low-level sample for the minor contributor." Despite the weakness of the sample, she excluded April and Ed as the minor contributors. But she said she could not draw a conclusion about Johnson:

> That means when I was doing my comparisons I was unable to include him because there was not a lot of DNA present but the DNA that I was saying [sic] did correspond with his so that way I could not exclude him. So I could neither include nor exclude so I could make no conclusions.

Upon Johnson's questioning, Kreikemeier admitted that she could not even determine the sex of the minor contributor.

Regarding the second acrylic nail, Kreikemeier stated that the sample she took of it showed a "possible mixture" with a minor contributor's DNA. The DNA profile she produced from the second nail exactly matched April's profile and excluded Johnson. But beside one of the recorded alleles, Kreikemeier wrote a "+" sign. She stated that this sign indicated "a possible allele" but that she could not determine if this was "a true allele or not."

Regarding her testing of the rope segment, Kreikemeier stated that she determined it also contained mixed DNA from major and minor contributors. The major profile matched April's profile and excluded Johnson. She stated that she could

not draw any conclusions about the minor profile because she did not have enough information. The testing results show that Kreikemeier recorded three alleles in the minor profile, which were also marked by asterisks. Two of these alleles were recorded for the same locus and did not match either of Johnson's known alleles at the same locus.

When discussing the minor profile for the first acrylic nail and the rope, Kreikemeier did not state the number of alleles that matched alleles in Johnson's profile. Nor did she explain the frequency at which the possible matches occurred in the general population or the probability that an unknown random person could have the same combination.

(b) Parties' Contentions

Relying on *State v. Glazebrook*,[19] Johnson assigns that the court erred in admitting DNA evidence that was unaccompanied by any statistical significance. The State contends that *Glazebrook* is distinguishable because it dealt with mitochondrial DNA (mtDNA), which cannot identify the source of an unknown biological sample. Alternatively, the State contends that a prosecutor needs to inform the jurors about the testing results, even if inconclusive, so they do not speculate that a sample contained DNA from a third person.

(c) Standard of Review

[9-11] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion.[20] A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value.[21] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[22]

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[19] *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

[20] *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

[21] See *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[22] *Henderson, supra* note 20.

(d) Analysis

[12-14] Under evidence rule 402, irrelevant evidence is inadmissible.[23] Under Neb. Evid. R. 401,[24] 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.[25] Relevancy requires only that the degree of probativeness be something more than nothing.[26] Under evidence rule 403, even relevant evidence is properly excluded if its probative value is substantially outweighed by its potential for unfair prejudice.[27]

[15,16] It is true, as the State argues, that DNA evidence is normally used to identify a defendant as the perpetrator of a crime. But this argument only states a purpose for which the State may present the evidence. DNA evidence can also contradict the State's theory that a defendant was the perpetrator of a crime.[28] But the relevance of DNA evidence depends on whether it tends to include or exclude an individual as the source of a biological sample. This does not mean that the test results must show that no other individual could be source. But our case law generally requires that DNA testing results be accompanied by statistical evidence or a probability assessment that explains whether the results tend to include or exclude the individual as a potential source.

For example, in *State v. Bauldwin*,[29] we stated that if a DNA profile from a mixed-source sample matches an individual's known DNA profile, the analyst calculates the probability that someone other than the individual in question could have contributed DNA to the sample. In rejecting the defendant's

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[23] See *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013).

[24] See Neb. Rev. Stat. § 27-401 (Reissue 2008).

[25] *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014).

[26] *State v. Lavalleur*, 289 Neb. 102, 853 N.W.2d 203 (2014).

[27] See *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

[28] See, *State v. Parmar*, 283 Neb. 247, 808 N.W.2d 623 (2012); *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (2007).

[29] *Bauldwin, supra* note 21.

argument that these probabilities confuse jurors, we stated the following:

> This is essentially a claim that a jury is not smart enough to understand and give weight to the statistical analysis that accompanies DNA evidence. Bauldwin offers no authority for this argument, and we reject it out of hand—juries are asked to analyze complex topics and evidence in many cases, and that is what the jury was asked to do here. Furthermore, *DNA evidence without the accompanying probability assessment would be inadmissible because it would not aid the trier of fact. We have specifically held that DNA evidence is inadmissible without the probability assessment for that very reason*. We are not persuaded to reconsider that position today.[30]

Other courts have reached the same conclusion.[31]

In *Glazebrook*, we considered testing results that could not exclude a defendant as the source of a hair found on the murder victim's nightgown.[32] There, we reversed the defendant's conviction because of the trial court's improper admission of his criminal history and remanded the cause for a new trial. In concluding that the error was not harmless, we noted that the mtDNA evidence had shown the defendant could not be excluded as the source of the hair. But we concluded that this evidence was not compelling because mtDNA evidence can only exclude individuals as a source and cannot identify a person as the source. We then considered whether the mtDNA evidence would be admissible on remand.

The defendant argued that the evidence was irrelevant absent evidence that the hair did not belong to any of the 10 persons investigating at the crime scene. We rejected that argument. But we concluded that when courts have upheld the admission of mtDNA evidence, "the evidence has included expert testimony regarding the statistical significance of the

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[30] *Id*. at 703, 811 N.W.2d at 288, citing *Carter, supra* note 14.

[31] See, e.g., *Peters v. State*, 18 P.3d 1224 (Alaska App. 2001); *Nelson v. State*, 628 A.2d 69 (Del. 1993); *People v. Coy*, 243 Mich. App. 283, 620 N.W.2d 888 (2000).

[32] *Glazebrook, supra* note 19.

fact that the defendant could not be excluded as the donor."[33] We cited an example of a case in which an expert testified that most of the general population could be excluded. But in *Glazebrook*, the database recording the number of people with the hair's genetic variation was small and the State's expert testified only about the number of times that the variation had been found in different populations. We emphasized that the record did not show the significance of the "raw data in arriving at a statistical probability analysis to establish relevancy."[34] We held that on remand, "the statistical significance of the fact that a particular individual cannot be excluded as the donor of mtDNA is an important factor in determining the relevancy of mtDNA evidence."[35]

Contrary to the State's argument, *Glazebrook* is not distinguishable solely because it dealt with mtDNA evidence. We reasoned that the relevance of genetic testing evidence that shows a defendant cannot be excluded as the potential source of a crime scene sample depends upon the statistical significance of that result. The same reasoning applies here. Obviously, if an allele, or a combination of alleles, is so common that a majority of people in the relevant population could not be excluded, then not excluding the defendant is weak evidence that he or she is the source. But without knowing that statistical probability, jurors cannot be expected to assess information that a defendant cannot be excluded.

Here, the evidence was even weaker and more difficult to assess. Kreikemeier testified that the partial minor profile she produced from the first acrylic nail was from a weak sample, suggesting that she could not even state with certainty that the alleles she recorded were accurate. Yet, her data was apparently strong enough for her to exclude April and Ed as the minor contributors. So based on Kreikemeier's exclusions of two known profiles and her testimony that she could not exclude Johnson as the minor contributor because of the

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[33] *Id.* at 434, 803 N.W.2d at 785.

[34] *Id.* at 435, 803 N.W.2d at 786.

[35] *Id.*

consistencies she saw with his profile, a juror could rationally conclude that her inability to exclude Johnson was significant. Presenting this evidence without offering any statistical relevance of the matching alleles she found, or the probability that the minor profile would exclude a random person, suggested to the jury that Johnson was linked to the evidence and that the proof would be even stronger if investigators had found more DNA. That is, decoupling inconclusive results from their statistical relevance allows the State to suggest that the defendant's DNA is present in a sample even if, in reality, its expert could exclude no one as a potential contributor.[36]

Similarly, the State presented irrelevant testimony that (1) Kreikemeier could not draw any conclusions about the minor profile found on the rope because she did not have enough information and (2) her testing of the second acrylic nail showed a "possible mixture" with a minor contributor.

[17-19] An expert does not have to couch his or her opinion in the magic words of "reasonable certainty," but it must be sufficiently definite and relevant to provide a basis for the fact finder's determination of a material fact.[37] A court should exclude an expert's opinion when it gives rise to conflicting inferences of equal probability, so the choice between them is a matter of conjecture.[38] "An [expert] opinion which is equivocal and is based upon such words as 'could,' 'may,' or 'possibly' lacks the certainty required to sustain the burden of proof of causation for which the opinion has been offered."[39]

Kreikemeier's testimony that there *may* have been a minor contributor's DNA on the second nail was not probative of the source of the DNA. And her testimony that she could not draw any conclusions about the partial minor profile she found from the rope sample followed her earlier testimony that her inconclusive testing results from the first acrylic nail meant

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[36] See, *Com. v. Nesbitt*, 452 Mass. 236, 892 N.E.2d 299 (2008); *Deloney v. State*, 938 N.E.2d 724 (Ind. App. 2010); *State v. Tester*, 185 Vt. 241, 968 A.2d 895 (2009).

[37] See *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[38] See *id.*

[39] *State v. Kuehn*, 273 Neb. 219, 226, 728 N.W.2d 589, 598 (2007).

she could neither include nor exclude Johnson as the minor contributor. Nor did she explain why the partial minor profile from the rope did not exclude Johnson, despite contradictions with his profile. And if this court cannot say with certainty whether Johnson should have been excluded or included, we assume that the jurors could have concluded from her testimony that Johnson was a possible source. So her testimony was either irrelevant or improperly suggested that the DNA evidence was stronger than it actually was.

"Because the potential precision of DNA testing is so well known, a jury might assume that any DNA profile match is extremely unlikely and therefore extremely probative"—even when this is not true.[40] By permitting Kreikemeier to testify that a minor contributor's DNA was found on the rope, without providing any statistical relevance for the alleles she detected, the court allowed the jurors to speculate that Johnson's DNA was detected even if the State knew that conclusion was false.

It is no answer to argue, as the State does, that the presentation of inconclusive testing results is necessary to prevent jurors from speculating that a sample contains DNA from a third person. Inconclusive results cannot dispel that possibility. More important, the State creates the speculation by introducing the inconclusive testing results. During an in camera conference to discuss Johnson's objections, the prosecutor specifically argued that presenting the testing results allows the jurors to draw their own conclusions about the significance of an unknown person's DNA in a sample. But without knowing the statistical significance of DNA testing results, any conclusion that a juror draws from such evidence will likely be pure speculation.

[20] Consistent with our decision in *Glazebrook*, we hold that unless the State presents the statistical significance of DNA testing results that shows a defendant cannot be excluded as a potential source in a biological sample, the results are irrelevant. They are irrelevant because they do not help the fact finder assess whether the defendant is or is not the source

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[40] See *Peters, supra* note 31, 18 P.3d at 1227.

of the sample. And because of the significance that jurors will likely attach to DNA evidence, the value of inconclusive testing results is substantially outweighed by the danger that the evidence will mislead the jurors. We conclude that the court erred in admitting evidence of the inconclusive DNA testing results from the two acrylic nails and the rope segment.

4. The Court's Error Was Harmless Beyond a Reasonable Doubt

[21,22] 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.[41] 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.[42]

Although DNA testing results can be potent evidence, that is not true here. Kreikemeier admitted that her DNA sample from the first acrylic nail was weak and that she could not include Johnson as a potential source of the minor contributor's DNA. She admitted that she could not draw any conclusion about the rope segment and that she was not even sure that there was a minor contributor's DNA on the second acrylic nail. It is true that through Kreikemeier's testimony and reports, the State allowed the jurors to speculate about the significance of her testing results. But when considered in the context of the overwhelming evidence of guilt, we conclude that the verdict was surely unattributable to speculation.

April's nephew and his wife testified that April and Johnson were arguing when they left on Saturday night shortly before midnight. April's neighbor in the adjacent duplex testified that she heard "a couple of thuds" and loud arguing for 30

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[41] *State v. Matthews*, 289 Neb. 184, 854 N.W.2d 576 (2014); *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved in part on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988).

[42] See, *Matthews, supra* note 41; *Faust, supra* note 41.

to 45 minutes around 1 to 2 a.m. on Sunday. April did not respond to calls on Sunday morning, and by that evening, Johnson had fled in her van. When officers found April on Monday morning, she had been dead for quite a while. After Michigan officers arrested Johnson, he told one of them that he was wanted for murder, and he resisted efforts to scrap his fingernails for DNA evidence. On the return trip, he told Nebraska investigators that he had planned to turn himself in and that drugs would play a role in the investigation.

This evidence proved his consciousness of guilt. But even more damning was the DNA evidence showing that April's blood was on his shirt and shoes that were found in the van. And investigators found his fingerprint on the trash bag that was used to suffocate or strangle April. We reject Johnson's argument that a single white hair, from an unidentified female, which was found in April's hand, is sufficient to undermine confidence in the verdict. Officers found April face down on carpet, and they believed that she had moved throughout the house before she was killed. Any visitor to the duplex could have left a hair behind. We conclude that the verdict was surely unattributable to the court's error in admitting inconclusive DNA testing results.

V. CONCLUSION

We conclude that under our briefing rules, Johnson has waived any error related to the court's admission of autopsy or crime scene photographs. We conclude that the court was not clearly wrong in determining that the prosecutor's peremptory challenge to juror No. 8 was not racially motivated. We conclude that the court erred in admitting inconclusive DNA evidence without accompanying evidence showing the statistical relevance of the testing results. But we conclude that the error was harmless beyond a reasonable doubt because the jury's guilty verdicts were surely unattributable to the error. We therefore affirm Johnson's convictions.

AFFIRMED.

CASSEL, J., concurring.

I write separately for two reasons. First, it is important to distinguish between inconclusive results and testimony that

a subject can be included, but not excluded, as the source of DNA evidence. Second, while inconclusive DNA results are normally not admissible, there are circumstances where they may become admissible. I have no quarrel with the majority's abuse of discretion standard of review.

Inconclusive results arise when the DNA test provides no information to include or exclude a person, because of an insufficient sample or some other reason.[1] Truly inconclusive results, in failing to either include or exclude the defendant, are wholly neutral.[2] Thus, such results are not relevant, because they do not have a tendency to prove any particular fact that would be material to an issue in the case.[3] In the normal case, inconclusive results should not be admitted.[4] But if admitted, the admission is harmless error.[5]

However, "[w]hether or not DNA test results fail to exclude a person as a potential contributor to sample material poses a wholly different question from whether the test results are inconclusive[.]"[6] Evidence that a subject may be included, but not excluded, as the source of DNA evidence is probative evidence.[7] It may serve "to corroborate other evidence and support the Government's case as to the identity of the relevant perpetrators."[8]

And as reflected in the majority opinion, evidence that a person may be included, but not excluded, must be accompanied by testimony explaining the statistical relevance of the nonexclusion results.[9] Without reliable accompanying evidence as to the likelihood that the test could not exclude

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[1] *Com. v. Almonte*, 465 Mass. 224, 988 N.E.2d 415 (2013).

[2] See *Com. v. Cavitt*, 460 Mass. 617, 953 N.E.2d 216 (2011).

[3] See *id.*

[4] See *id.*

[5] See, *Clark v. State*, 96 A.3d 901 (Md. Spec. App. 2014); *Cavitt, supra* note 2.

[6] *Almonte, supra* note 1, 465 Mass. at 239-40, 988 N.E.2d at 427.

[7] See *U.S. v. Morrow*, 374 F. Supp. 2d 51 (D.D.C. 2005).

[8] *Id.* at 65.

[9] See *Com. v. Mattei*, 455 Mass. 840, 920 N.E.2d 845 (2010).

other individuals in a given population, the jury has no way to evaluate the meaning of the result.[10] Admitting such evidence without proper interpretation creates a greater risk of misleading the jury and unfairly prejudicing the defendant.[11] Thus, trial courts confronted by testimony that a subject cannot be excluded must insist that the evidence be accompanied by evidence of its statistical relevance.

In the case before us, the results were truly inconclusive. Kreikemeier testified that she could neither include nor exclude Johnson as a source of the minor profile recovered from the first acrylic nail. And her testimony as to the minor profiles on the second acrylic nail and the rope segment were similarly inconclusive. Thus, as to Johnson, Kreikemeier's testimony was wholly neutral and irrelevant. It did not tend to establish that Johnson was the contributor of the minor profiles recovered from any of the samples. I agree with the majority that its improper admission was harmless error.

But I wish to make clear that while inconclusive DNA results are normally not admissible, there are circumstances where they may become admissible. Inconclusive results may properly be admitted to rebut an attack on the sufficiency of a police investigation.[12] "When faced with such a suggestion, the prosecutor is entitled to introduce testimony to demonstrate that tests were performed and results (even if inconclusive) were obtained."[13] Thus, I emphasize that in another case and under different circumstances, inconclusive DNA testing results may be admissible.

HEAVICAN, C.J., joins in this concurrence.

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[10] See *id.*

[11] See *id.*

[12] See, *Clark, supra* note 5; *Com. v. Mathews*, 450 Mass. 858, 882 N.E.2d 833 (2008).

[13] *Mathews, supra* note 12, 450 Mass. at 872, 882 N.E.2d at 844.

GRAYLIN GRAY, APPELLANT, V. MICHAEL KENNEY, DIRECTOR OF NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

863 N.W.2d 127

Filed May 15, 2015. No. S-14-378.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Reissue 2008) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.
2. **Habeas Corpus: Judgments: Collateral Attack.** Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction.
3. **Judgments: Collateral Attack.** Only a void judgment may be collaterally attacked.
4. **Judgments: Jurisdiction: Collateral Attack.** Where a court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
5. **Habeas Corpus.** A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.
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.

Petition for further review from the Court of Appeals, IRWIN, BISHOP, and RIEDMANN, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals affirmed as modified.

Graylin Gray, pro se.

Douglas J. Peterson, Attorney General, and George R. Love and, on brief, Jon Bruning, former Attorney General, for appellee.

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

PER CURIAM.

Graylin Gray filed a petition in the district court for Lancaster County seeking a writ of habeas corpus. He moved to proceed in forma pauperis, and the district court denied the motion. The Nebraska Court of Appeals affirmed, and Gray petitioned for further review. We affirm as modified.

BACKGROUND

Gray was convicted of unlawful possession of four or more financial transaction devices and unlawful circulation of financial transaction devices in the first degree. He was found to be a habitual criminal and sentenced to 10 to 20 years' imprisonment on each count, the sentences to run consecutively. On direct appeal, in case No. A-08-336, the Nebraska Court of Appeals affirmed his convictions and sentences in an unpublished memorandum opinion filed on March 12, 2009. Subsequently, on July 28, 2010, in case No. A-10-147, the Court of Appeals affirmed in another unpublished memorandum opinion a judgment denying Gray's motion for postconviction relief. The U.S. District Court for the District of Nebraska then dismissed Gray's petition for habeas corpus challenging the same convictions.[1]

In 2014, Gray filed a verified petition for writ of habeas corpus in the district court for Lancaster County, naming "Michael Kenney, Director of Nebraska Department of Correctional Services" as respondent. In his petition, Gray alleged his convictions and sentences were void, because the trial court made the habitual criminal determination utilizing the standard of "beyond a reasonable doubt," rather than the standard of "by a preponderance of the evidence." Gray filed a motion to proceed in forma pauperis, supported by his poverty affidavit. Kenney objected to the motion on the ground that Gray's petition for writ of habeas corpus had "no basis in fact or law and [was] frivolous." The district court agreed and denied Gray's motion to proceed in forma pauperis. Gray appealed.

In a published opinion, the Nebraska Court of Appeals affirmed.[2] It agreed that Gray's habeas petition was frivolous within the meaning of Neb. Rev. Stat. § 25-2301.02 (Reissue 2008), reasoning: "The fact that the district court applied a higher burden of proof in determining Gray's habitual criminal status does not make his sentences void. Because the district court had proper jurisdiction and Gray's sentences were

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[1] *Gray v. Britten*, No. 4:10CV3219, 2011 WL 3962124 (D. Neb. Sept. 7, 2011).

[2] *Gray v. Kenney*, 22 Neb. App. 739, 860 N.W.2d 214 (2015).

within its power to impose, his petition for habeas corpus is frivolous."[3]

Although this determination was dispositive of the appeal, the Court of Appeals went on to address Kenney's arguments that any claims regarding Gray's status as a habitual criminal were precluded under the doctrines of res judicata and law of the case. The court determined that res judicata did not apply, because Kenney was not a party to the original criminal prosecution and there was no showing that he was in privity with the State of Nebraska, which filed the original criminal case and was also a party to a subsequent postconviction proceeding. But, reasoning that we have applied the law-of-the-case doctrine in postconviction cases, the Court of Appeals held as a matter of first impression that "the law-of-the-case doctrine applies to issues raised in a petition for a writ of habeas corpus if that same issue was raised in the appellate court on direct appeal."[4]

We granted Gray's petition for further review and ordered that the matter be submitted without oral argument or further briefing.

ASSIGNMENT OF ERROR

Gray assigns, restated, that the Court of Appeals erred in determining that the district court properly denied his motion to proceed in forma pauperis on the ground that his petition for writ of habeas corpus was frivolous.

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under § 25-2301.02 is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.[5]

ANALYSIS

Section 25-2301.02(1) permits a court to deny a party's application to proceed in forma pauperis where the party

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[3] *Id.* at 743, 860 N.W.2d at 219.

[4] *Id.* at 746, 860 N.W.2d at 221.

[5] *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012).

"(a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious." In this context, a frivolous legal position is "one wholly without merit, that is, without rational argument based on the law or on the evidence."[6] The only issue in this appeal is whether the legal position asserted in Gray's petition for a writ of habeas corpus was frivolous.

[2-5] We agree with the district court and the Court of Appeals that it was. Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction.[7] Only a void judgment may be collaterally attacked.[8] Where a court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.[9] A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.[10]

Gray alleged that his convictions and sentences were void because the district court determined that he was a habitual criminal "beyond a reasonable doubt," when the applicable standard for that determination is "by a preponderance of the evidence."[11] This allegation has nothing to do with the jurisdiction of the court which convicted and sentenced Gray. As the Court of Appeals correctly determined, application of a more stringent burden of proof than the law required to determine Gray's habitual criminal status does not make his sentences void.

[6] Because the Court of Appeals correctly determined from the face of Gray's pleading that his legal position was frivolous, it did not need to address whether res judicata applied or whether the law-of-the-case doctrine applies in a

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[6] *Id.* at 866, 824 N.W.2d at 32.

[7] *Peterson v. Houston, supra* note 5. See *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999).

[8] *Peterson v. Houston, supra* note 5.

[9] *Id.*

[10] *Id.*

[11] See, *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013); *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012); *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003).

state habeas corpus action. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[12] And for the same reason, we do not reach the merits of these issues. The Court of Appeals' discussion of res judicata and the applicability of the law-of-the-case doctrine is dicta and should not be regarded as precedential.[13] The applicability of the law-of-the-case doctrine in a state habeas corpus action is an issue to be resolved in another case on another day.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Court of Appeals, as modified.

AFFIRMED AS MODIFIED.

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[12] *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013); *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

[13] See *Blue Tee Corp. v. CDI Contractors, Inc.*, 247 Neb. 397, 529 N.W.2d 16 (1995).

JEREMY SCHAFFER, APPELLANT, V.
CASS COUNTY ET AL., APPELLEES.
863 N.W.2d 143

Filed May 15, 2015. No. S-14-542.

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 decision made by the court below.
2. **Administrative Law: Appeal and Error.** Sheriffs' merit commissions are considered "tribunals" under Neb. Rev. Stat. § 25-1901 (Reissue 2008).
3. **Jurisdiction: Time: Appeal and Error.** A failure to file a timely appeal deprives the district court of jurisdiction to hear the appeal.
4. **Statutes.** Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute.

Appeal from the District Court for Cass County: DANIEL E. BRYAN, JR., Judge. Reversed and remanded for further proceedings.

Steven M. Delaney and A. Bree Robbins, of Reagan, Melton & Delaney, L.L.P., for appellant.

Erin L. Ebeler, of Woods & Aitken, L.L.P., for appellees.

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

MCCORMACK, J.

NATURE OF CASE

This action stems from an employment relationship between the Cass County sheriff's office and Jeremy Schaffer, a deputy sheriff. Schaffer appealed a disciplinary action through a hearing with the Cass County Merit Commission (the Commission). Schaffer appealed the Commission's finding within 30 days of the written order, but not within 30 days of the oral pronouncement. This dispute centers over whether an oral announcement of a decision triggers the 30-day time period for appeal or whether Neb. Rev. Stat. § 23-1734(1) and (2) (Reissue 2012) requires a written and certified order before the appeal period begins to toll.

BACKGROUND

Appellant, Schaffer, was employed as a deputy sheriff at the Cass County sheriff's office. The appellees in this case are Cass County, Nebraska; the Cass County sheriff's office; Cass County Sheriff William Brueggeman; and the Commission. The Commission is an administrative body authorized to affirm, modify, or revoke decisions of management of the Cass County sheriff's office and Cass County.

On January 17, 2014, the sheriff's office informed Schaffer that he was being suspended for 10 days. The notification stated the suspension began on January 15. Schaffer filed a grievance of his suspension. The sheriff's office declared Schaffer's grievance unsubstantiated. Schaffer appealed his grievance to the Commission.

The Commission held a hearing regarding Schaffer's grievance on February 24, 2014. At the hearing, the Commission voted and announced on the record its decision to affirm the

actions of the sheriff's office. The Commission stated that a written order would follow.

The Commission thereafter issued a written decision dated March 6, *2013*, and entitled "Deputy Sheriff Jeremy Schaffer Merit Commission Decision on Grievance." Although the date on the order says March 6, *2013*, we assume the Commission intended the date to be March 6, *2014*, since all operative facts in this case occurred in 2014. The Commission faxed the decision to Schaffer's counsel on March 21. The Commission mailed the decision by certified mail to Schaffer's counsel on March 21. Schaffer states his counsel received the decision via certified mail on March 26.

Schaffer's counsel filed a petition in error with the Cass County District Court on April 7, 2014. This was 42 days from the date the Commission orally announced its decision. This was 32 days from the issuance of the decision; but the 30th day from the issuance of the decision fell on April 5, which was a Saturday. According to Neb. Rev. Stat. § 25-2221 (Cum. Supp. 2014), the time for appeal was thus extended to the next workday, which was April 7, the same day that Schaffer filed his petition in error. The notice of appeal was filed 17 days from the date the decision was faxed and mailed to counsel.

The district court dismissed Schaffer's appeal for lack of jurisdiction. The court reasoned that Schaffer did not file for a review in accordance with Neb. Rev. Stat. § 25-1931 (Reissue 2008), because the appeal was not filed within the 30-day time period. The court determined that the period for filing began the date of the oral pronouncement, February 24, 2014, and that because Schaffer filed 42 days after this date, Schaffer was outside the 30-day time period. The court did not agree with Schaffer that § 23-1734(1) and (2) require a "certified or written order delivered to the sheriff" before the judgment or final order is rendered under Neb. Rev. Stat. § 25-1901 (Reissue 2008).

ASSIGNMENTS OF ERROR

Schaffer argues the district court improperly dismissed his appeal for lack of jurisdiction, because it erred in finding that

a judgment or final order rendered by an inferior tribunal under § 25-1901 is when the decision is orally announced on the record, not when it was written, certified, and delivered pursuant to § 23-1734(1) and (2). Schaffer argues that since he filed his appeal with the district court within 30 days of the time the decision was written, certified, and delivered, the district court should not have declined jurisdiction.

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 decision made by the court below.[1]

ANALYSIS

Schaffer argues that there are two statutes that may apply in this case and that because one is more specific to the facts at hand, the more specific statute should control over the more general statute. Schaffer claims that § 23-1734 was intentionally created by the Legislature to require sheriff's merit commissions to follow specific procedures before implementing sanctions on an employee. Schaffer contends that according to § 23-1734, an appeal is timely filed if it is filed within 30 days from when the "written order was certified and delivered."[2] Therefore, the district court should not have declined jurisdiction over the case for failure to comply with the 30-day appeal date, because his appeal was filed within the statutory 30 days of both issuance and delivery of the Commission's written order.

The appellees argue that § 23-1734 does not require a written order as a precondition to a merit commission's finding and decision for purposes of appeal. The appellees state that the time for appeal begins upon the oral pronouncement of the judgment or order and that the written "'transmittal

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

[2] Brief for appellant at 7.

of the order to the parties is not an integral part of the judicial act.'"[3]

[2,3] There is no debate that under § 25-1901, Schaffer needed to file his appeal 30 days from the date judgment was rendered. Under § 25-1901, a "judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court." We have treated sheriff's merit commissions as tribunals under § 25-1901.[4] Such appeal under § 25-1901 "shall be commenced within thirty days after the *rendition of the judgment or making of the final order complained of*."[5] A failure to file an appeal within 30 days of the judgment or final order deprives the district court of jurisdiction to hear the appeal.[6] The issue is *when* the "rendition of the judgment" occurred.[7]

In contrast to the written notation or order required when appealing from a district court decision, we have interpreted a "judgment rendered" by an inferior tribunal within Neb. Rev. Stat. §§ 25-1901 through 25-1931 (Reissue 2008) to be an oral announcement of the decision or a pronounced vote at a hearing.[8] We have said that when the decision is pronounced by an inferior tribunal under § 25-1901, then, for purposes of appeal, only an oral pronouncement is necessary, and not the entry of the final decision or vote on the record.[9]

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[3] Brief for appellee at 9, quoting *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976).

[4] See, e.g., *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

[5] § 25-1931 (emphasis supplied).

[6] See, e.g., *Brown v. City of Omaha*, 179 Neb. 224, 137 N.W.2d 814 (1965).

[7] See §§ 25-1901 and 25-1931.

[8] See, *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007); *Marcotte v. City of Omaha, supra* note 3; *Brown v. City of Omaha, supra* note 6.

[9] See *id.*

In *McNally v. City of Omaha*,[10] in determining the timeliness of the appeal, we held that an "administrative body's pronounced vote . . . is the final order to be appealed from, not any entry of that vote on the record." The appellants had assigned as error the board's failure to ever render a decision in writing. We found that because the record contained a copy of the minutes reflecting the board's decision at the hearing, there was no merit to such assignment of error.[11]

In *Marcotte v. City of Omaha*,[12] a city employee sought review of the city personnel board's decision regarding his suspension and dismissal. We found that the oral pronouncement of the judgment was "'rendered'" when it was announced and that "the transmittal of the order to the parties is not an integral part of the judicial act."[13]

But in *McNally* and *Marcotte*, the lower tribunal, board, or commission was not governed by a statute specifying the board's procedure for rendering a final judgment. It can be inferred that our holdings in those cases were limited to situations in which no other statute specified the requirements for a final judgment. Schaffer argues that § 23-1734 is a more specific statute that requires a written order before the judgment of the Commission is considered rendered, and we agree.

Section 23-1734(2) states in relevant part:

> After hearing or reviewing the grievance, the commission shall issue a written order either affirming or denying the grievance. Such order shall be delivered to the parties to the grievance or their counsel or other representative within seven calendar days after the date of the hearing or the submission of the written grievance.

(Emphasis supplied.)

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[10] *McNally v. City of Omaha, supra* note 8, 273 Neb. at 565, 731 N.W.2d at 580.

[11] *McNally v. City of Omaha, supra* note 8.

[12] *Marcotte v. City of Omaha, supra* note 3.

[13] *Id.* at 218, 241 N.W.2d at 840.

Brown v. City of Omaha[14] is the only case in which we have specifically addressed when a law enforcement merit commission renders its judgment. In *Brown*, the appellant had sought review of his dismissal as a city police officer. We held that the date a city board orally announced its decision was the date that commenced the 1-month appeal time.[15] However, the decision in *Brown* occurred approximately 4 years before the passing of § 23-1734, which occurred in 1969.

[4] Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute.[16] Section 23-1734 specifically prescribes procedures for a deputy sheriff's grievance filing and for the resolution of such grievances, including that a written order is required for the rendition of judgment.

Though under §§ 25-1901 and 25-1931, we have found in other circumstances that the final judgment was rendered at the time of the oral announcement of a decision of an inferior tribunal, board, or commission,[17] § 23-1734 necessitates more specific requirements for a final order of a sheriff's merit commission. Since we have a statute that specifically pertains to orders of a sheriff's merit commission, the statutory language prevails over our own common-law interpretation of another, more general statute that also applies.[18]

Subsection (2) of § 23-1734 requires that orders of a merit commission be written and delivered to the parties or counsel. Since the order in this case was not written *and* delivered until March 21, 2014, the order was not finalized until that date. Schaffer filed his petition in error by April 7, which was within 30 days of March 21. Even if the clock ran from issuance of the opinion on March 6, April 7 was

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[14] *Brown v. City of Omaha, supra* note 6.

[15] *Id.*

[16] See, *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009); *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

[17] See, *Marcotte v. City of Omaha, supra* note 3; *Brown v. City of Omaha, supra* note 6.

[18] See, *Sack v. Castillo, supra* note 16; *Bergan Mercy Health Sys. v. Haven, supra* note 16.

the first workday after the 30-day appeal time ended on Saturday, April 5. The petition was filed within the statutory 30-day time period of both issuance and delivery of the Commission's order. Thus, the petition in error was timely filed, and the district court erred when it dismissed the case for lack of jurisdiction.

CONCLUSION

Although, typically, decisions rendered by an inferior tribunal, board, or commission are final when they are announced on the record, the specificity in § 23-1734 overrides that general rule. An order is not final until it meets the requirements in § 23-1734. Those requirements state that the order must be in writing, "certified" to the sheriff, and delivered. This order was not in writing until it was issued on March 6, 2014, and not delivered until March 21. March 21 is the earliest date from which the order can be considered final under § 23-1734(2), because the order was not delivered to the parties until that date. The appeal was taken well within 30 days of this date. We reverse the district court's judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BAUERMEISTER DEAVER ECOLOGY LAND USE DEVELOPMENT, LLC, AS SUCCESSOR IN INTEREST TO DOROTHY L. BAUERMEISTER, INDIVIDUALLY, ET AL., APPELLANT, V. WASTE MANAGEMENT CO. OF NEBRASKA, INC., APPELLEE.

863 N.W.2d 131

Filed May 15, 2015. No. S-14-553.

1. **Equity: Quiet Title: Accounting.** An action to quiet title and for an accounting sound in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.
3. **Waiver: Words and Phrases.** Waiver is a voluntary relinquishment of a known right.

4. **Equity: Estoppel.** The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.
5. ____: ____. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

David A. Domina and Christopher A. Mihalo, of Domina Law Group, P.C., L.L.O., for appellant.

Thomas A. Grennan, Adam J. Wachal, and Abbie M. Schurman, of Gross & Welch, P.C., L.L.O., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

This case was originally docketed as an action for specific performance and an accounting. The two actions were severed, with this court and the Nebraska Court of Appeals finding for Dorothy Bauermeister and the other plaintiffs[1] with respect to the specific performance action. On remand, Waste Management Co. of Nebraska, Inc. (WMN), was ordered to, and did, convey title of the disputed property to the plaintiffs, subject to specified exceptions.

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[1] See, *Bauermeister v. Waste Mgmt. Co.*, 280 Neb. 1, 783 N.W.2d 594 (2010); *Bauermeister v. Waste Mgmt. Co.*, A-09-019, 2010 WL 4009059 (Neb. App. Oct. 12, 2010) (selected for posting to court Web site).

The accounting action then proceeded. The district court found primarily for WMN. Bauermeister Deaver Ecology Land Use Development, LLC (BDELUD), successor in interest to the plaintiffs, appeals. We affirm.

FACTUAL BACKGROUND

Fred and Dorothy Bauermeister and Richard and Clara Deaver entered into an agreement with WMN on March 22, 1989, for the sale of 280 acres of farmland. WMN intended to build a landfill on this property. This agreement provided that WMN, as the purchaser, pay on a monthly basis to the Bauermeisters and the Deavers, as sellers, $3,000 in base rent and another $1, later adjusted to $1.15, per ton of refuse added to the landfill (referred to as the "royalty fee" or "royalty payment").

As relevant to this appeal, paragraph 6 of the agreement, dealing with the construction of improvements, provided:

> Purchaser, at its cost, shall have the right to make any alternations, modifications or improvements to the Premises including, without limitation: (a) the demolition of existing facilities without replacement thereof and renovation of existing facilities; (b) the right to construct roads, berms, ditches, stream diversions, embankments, temporary waste holding and storage facilities, office and garage facilities[,] laboratories, equipment shelters and any and all other facilities or land improvements necessary or required for Purchaser's operations (including storage and maintenance of Purchaser's waste collection vehicles); (c) the right to excavate, extract and, except as otherwise provided herein, relocate on the Premises for any purpose, gravel, soil, clay and all other minerals, materials and substances of any nature whatsoever (whether solid, liquid or gaseous) produced at or under the Premises or emanating therefrom or incident to the utilization of the Premises as a Landfill (title to all of such substances being, upon extraction thereof from the Premises, the sole and exclusive property of Seller[s], except that the title to any gas generated by the Refuse shall remain the sole and exclusive property of

> Purchaser); (d) the right to drill and establish water wells, install utilities, such as, but not limited to, electric lines, sewer lines, gas lines, underground storage tanks and telephone lines; (e) the right to carry out all gasification, waste handling, storage, treatment, disposal and similar operations, including, but not limited to, ponding, cover stock piling, fill and cover placement and compaction, drainage, pollution and nuisance prevention; and (f) the right to deposit subject to applicable permit within the Premises, all manner and form of solid and liquid waste materials. Seller[s] reserve[] for themselves, their successors, heirs and assigns, all insitu oil, gas and mineral deposits located on the Premises, and the right to extract from the Premises such deposits so long as such extraction in no way interferes with the conduct of Purchaser's Landfill operations.

Paragraph 10 of the agreement, entitled "Taxes," stated:

> Purchaser covenants that it will promptly pay, as and when they become due, all real estate taxes and assessments against the Premises, and all levies and impositions of any nature relating to or imposed upon the Premises. Purchaser's obligations to pay real estate taxes shall continue beyond closure of the Landfill site and remain until such time as the Premises no longer require post-closure monitoring as provided in Paragraph 17 hereof.

Paragraph 14, regarding the removal of improvements, provided:

> The parties hereto understand and agree that title to all buildings, equipment and other improvements (collectively, "Improvements") installed, constructed or located by Purchaser upon the Premises shall remain in Purchaser and the same shall at all times remain Purchaser's personal property regardless of the nature of fixation to the Premises. Should Seller[s] exercise their option to purchase contained in Paragraph 30 hereof, Purchaser shall remove, unless otherwise agreed to in writing by Purchaser and Seller[s], all such Improvements that Purchaser has installed, constructed or located upon the

> Premises, except those Improvements required or necessary to protect the environment, provided the same shall be removed within sixty (60) days after the termination or cancellation of this Agreement, or any extension thereof, for any reason. Title to any Improvements not so removed by Purchaser shall vest in Seller[s].

Paragraph 16 provided for closure and postclosure monitoring of the landfill:

> After termination of this Agreement and the exercise of Seller[s] of their option contained in Paragraph 30 hereof, for any reason, Seller[s] shall not disturb the integrity of the cover materials placed over the Premises in any manner, whether through excavation, cultivation, boring, regrading or otherwise, nor construct any structures on the Premises (except that paving shall be permitted), nor alter any venting wells, vegetation or drainage then existing at the Premises unless Purchaser expressly consents to such activity until such time as the Premises no longer require post-closure monitoring. . . .
>
> After the termination of this Agreement and the exercise of Seller[s] of their option contained in Paragraph 30 hereof, for any reason, Purchaser shall be granted access to the Premises to conduct such post-operation care, maintenance and monitoring of the Premises as it deems advisable, and/or shall be required by the then regulating government agency responsible for the oversight of the operation of sanitary landfills, and Purchaser shall continue to care for, maintain and monitor the Landfill site for the greater of a period of ten (10) years or until such regulating government agency determines that such post-closure care is no longer required.

Finally, paragraph 30 provided for the sellers' option to buy:

> If Seller(s), their successors or heirs so choose, Seller(s) shall have the option to repurchase all or any portion of the Premises from Purchaser in consideration for the sum of One Dollar ($1.00), at the termination, for any reason, of this Agreement, and Purchaser shall be obligated to

> sell the Premises to Seller(s), their successors or heirs, if they so choose. Seller[s'] option may be exercised from the date of termination of the Landfill until two years after the date of termination of the required monitoring of the Landfill pursuant to Paragraph 16.
>
> . . . .
>
> The parties shall execute a short form memorandum of this option pertaining to each parcel, *as deeded*, in recordable form which shall be recorded in the official records (Register of Deeds) in Douglas County, Nebraska.

(Emphasis supplied.)

WMN began receiving municipal solid waste at the site on September 1, 1989. Municipal solid waste generates methane gas. In the early years, this gas was collected and "flared" off, as otherwise the gas was a nuisance, possible contaminant, and fire hazard. But beginning in spring 2001, WMN and the Omaha Public Power District entered into a series of agreements whereby the district agreed to purchase the landfill gases generated at the site. According to the record, WMN had total gross revenues of $1,224,231.91 in landfill gas sales, as well as $369,594.19 in tax credits under the federal tax code.

Meanwhile, on June 24, 2002, WMN and another company entered into an agreement for a monofill to be located on the site. A monofill is a type of landfill that accepts only one type of waste—in this case, gypsum—from the company's nearby plant. WMN began accepting gypsum in January 2003. During this time, it is undisputed that WMN made all base rent and royalty payments.

On November 19, 2003, WMN stopped accepting municipal solid waste at the site, but continued to accept gypsum at the monofill. WMN continued to make base rent and royalty payments as a result of the operation of the monofill.

On August 31, 2006, the Bauermeisters and the Deavers attempted to exercise their option to purchase under paragraph 30 of the agreement. On October 17, they filed suit against WMN for specific performance and an accounting. On October 18, 2007, they made a second attempt to exercise

their option. As explained in more detail below, a trial, appeal, remand, and eventually judgment for the Bauermeisters and the Deavers followed. On March 17, 2011, WMN executed deeds for the property in favor of the Bauermeisters and the Deavers.

In December 2009, WMN made a final base rental payment to the Bauermeisters and the Deavers. In October 2010, WMN made a final royalty payment to the Bauermeisters. A month later, in November, WMN stopped accepting gypsum at the monofill. According to the record, WMN's net revenue for the monofill was $4,653,313.93.

At this point, neither the landfill nor the monofill are accepting further waste. Both are now in their respective monitoring periods as required by state law.

PROCEDURAL BACKGROUND

In the action filed on October 17, 2006, the Bauermeisters and the Deavers sought specific performance, accounting, quiet title, and declaratory judgment. WMN asserted several affirmative defenses, including that Dorothy Bauermeister and Clara Deaver lacked standing and were not the real parties in interest, and that the option to repurchase violated the common-law rule against perpetuities.

The district court severed the specific performance and quiet title actions from the accounting and declaratory judgment actions and concluded that Dorothy Bauermeister and Clara Deaver had standing and were the real parties in interest. The district court then concluded that they clearly intended to exercise the option to repurchase and had validly done so. WMN was ordered to convey title of the property to the Bauermeisters and the Deavers as follows: "Defendant, [WMN], shall convey, by warranty deed, with a covenant against liens, mortgages, or encumbrances, *except encumbrances of record as of March 22, 1989*, all the following described real estate . . . ." (Emphasis supplied.) As noted, the parties signed the purchase agreement on March 22, 1989.

In lieu of a supersedeas bond for an appeal, WMN sought the court's approval of its deposit of two warranty deeds with

the court[2] and served notice of its request on BDELUD. The court approved the deposit of the warranty deeds in lieu of a bond on January 2, 2009, and WMN filed its appeal on the same day. Only a portion of the deeds were included in the record of the 2009 appeal. But copies of the warranty deeds in the 2014 transcript show that they were signed on February 4, 2009, shortly after the first appeal was docketed. The exceptions in the warranty deeds that the court approved were consistent with its judgments against WMN:

> GRANTOR covenants with GRANTEES that GRANTOR:
>
> (1) is lawfully seized of such real estate and that it is free from encumbrances, except:
>
> a) encumbrances of record as of March 22, 1989;
>
> b) applicable local, state and federal ordinances, rules, regulations, statutes, permits and licenses;
>
> c) encumbrances arising by law from the use of the real property as a landfill and/or monofill;
>
> d) the Purchase Agreement executed March 22, 1989 . . . .

In the first appeal, the Court of Appeals reversed, concluding that the option was barred by the common-law rule against perpetuities.[3] But we reversed, concluding that the common-law rule against perpetuities did not apply to the option from the agreement.[4] We ordered the cause remanded to the Court of Appeals for further consideration of WMN's appeal. Finding no other error, the Court of Appeals affirmed the

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[2] See Neb. Rev. Stat. § 25-1917 (Reissue 2008) ("[i]nstead of the undertaking prescribed in subdivision (2) of section 25-1916, the conveyance or other instrument may be executed and deposited with the clerk of the court in which the judgment was rendered or order made, to abide the judgment of the appellate court").

[3] *Bauermeister v. Waste Mgmt. Co.*, No. A-09-019, 2009 WL 6473172 (Neb. App. Dec. 8, 2009) (selected for posting to court Web site), *reversed, supra* note 1, 280 Neb. 1, 783 N.W.2d 594 (2010).

[4] *Bauermeister v. Waste Mgmt. Co., supra* note 1, 280 Neb. 1, 783 N.W.2d 594 (2010).

district court's judgment.[5] Following this affirmance, WMN conveyed the warranty deeds to the the Bauermeisters and the Deavers.

The accounting portion of the underlying action was then heard by the district court. On March 31, 2014, the district court entered an order largely finding for WMN. First, the district court found that the 1989 agreement had continuing viability, because the parties both had continuing obligations under that agreement. Second, the district court concluded that WMN must continue to monitor the landfill for a period of time and pay taxes on the property, per the agreement. Third, the district court found that WMN was entitled to the profits earned from the landfill gases and owned the pipes and underground equipment used in the gasification process. Fourth, the district court found that the Bauermeisters and the Deavers, now BDELUD, were entitled to payment from WMN for its failure to remove structures from the property which were unrelated to the ongoing environmental monitoring process. Fifth, because the Bauermeisters and the Deavers waived any objection to the monofill, the district court concluded that BDELUD was not entitled to any profit received by WMN in connection with its operation of the monofill. And because the district court concluded that the gas refuse and monofill profits were owned by WMN, BDELUD was not entitled to an accounting or a declaratory judgment or recovery for conversion. The district court further declined to address any of WMN's affirmative defenses and declined to award prejudgment interest.

On April 16, 2014, WMN paid $88,499.80 to satisfy the judgment against it. Meanwhile, BDELUD filed a motion for new trial, which was denied on June 6. BDELUD appeals.

ASSIGNMENTS OF ERROR

On appeal, BDELUD's assignments of error can be restated and consolidated into two general assignments: The district

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[5] *Bauermeister v. Waste Mgmt. Co., supra* note 1, No. A-09-019, 2010 WL 4009059 (Neb. App. Oct. 12, 2010) (selected for posting to court Web site).

court erred in (1) finding that WMN owned the landfill gases and equipment associated with collecting and transporting the landfill gases and that WMN was entitled to all landfill gas revenue and (2) finding that BDELUD was not entitled to past or future revenues from the monofill.

STANDARD OF REVIEW

[1,2] An action to quiet title and for an accounting sound in equity.[6] On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.[7]

ANALYSIS

Landfill Gases.

BDELUD makes several assignments of error regarding the ownership of the landfill gases, which can be restated as one: that as of September 1, 2006, the day after the Bauermeisters and the Deavers notified WMN of their intent to exercise their option to purchase under the agreement, they were the owners of record of the landfill gases. BDELUD argues that WMN did not raise the issue of the landfill gases in the specific performance action and that the ownership of those gases was finally decided in BDELUD's favor when the Court of Appeals found that the Bauermeisters and the Deavers were the owners of the real estate. In other words, BDELUD argues that the district court's decision was barred by res judicata or the law-of-the-case doctrine. We disagree.

Law-of-the-Case Doctrine.

To determine the application of the law-of-the-case doctrine, we must necessarily review our record of the 2009 appeal. A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.[8] In interwoven and interdependent cases, we can examine our own records and take judicial notice of the proceedings and

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[6] See, *Schellhorn v. Schmieding*, 288 Neb. 647, 851 N.W.2d 67 (2014); *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013).

[7] *Id.*

[8] *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

judgment in a former action involving one of the parties.[9] We can also take judicial notice of a document, including briefs filed in an appeal, in a separate but related action concerning the same subject matter in the same court.[10] We turn to the guiding principles under the law-of-the-case doctrine.

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.[11] Under this doctrine, an appellate court's holdings on issues presented to it conclusively settle all matters ruled upon, either expressly or by necessary implication.[12] The doctrine applies with greatest force when an appellate court remands a case to an inferior tribunal.[13] Upon remand, a district court may not render a judgment or take action apart from that which the appellate court's mandate directs or permits.[14]

Additionally, under the mandate branch of the law-of-the-case doctrine, a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case; the parties are deemed to have waived the right to challenge that decision.[15] But an issue is not considered waived if a party did not have both an opportunity and an incentive to raise it in a previous appeal.[16]

Here, the court's final order in the 2009 appeal shows that WMN's reservations of rights in the purchase agreement were encumbrances on the warranty deed, and we agree. As stated, the last sentence of paragraph 30 required the parties to record the sellers' purchase option "as deeded." That term must be

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[9] *Id.*

[10] *Id.*

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

[12] *Id.*

[13] *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008).

[14] *Id.*

[15] *Id.*

[16] *Id.*

understood in the context of the entire agreement, and the court's judgment excluded encumbrances of record as of March 22, 1989, from its order to convey the property. This exclusion implicitly referred to the parties' purchase agreement.

We conclude that the records in the 2009 appeal show that WMN had no incentive to raise its rights under the 1989 purchase agreement, because the court had permitted it to exclude its rights under the purchase agreement from the warranty deeds that the court ordered and approved. Additionally, we note that BDELUD has repeatedly claimed that under the agreement, WMN has continuing obligations to pay property taxes and to engage in environmental monitoring. These claims illustrate that the parties understood the purchase agreement as imposing continuing obligations and rights. It is untenable for BDELUD to claim that it is entitled to ongoing benefits under the agreement, but with no obligations.

In sum, because WMN had no incentive to raise its rights under the purchase agreement in the first appeal, and because those issues were not presented to us on appeal and are not required to be presented to us, neither our mandate nor the Court of Appeals' mandate precluded WMN from relying on those rights in the proceedings on remand.

Relatedly, res judicata did not preclude WMN from asserting its property interests on remand, because the court specifically allowed WMN to include exceptions in the warranty deeds for its rights under the purchase agreement.[17] We reject BDELUD's argument that our decision in the 2009 appeal precluded the court from considering the parties' rights under the 1998 purchase agreement.

Purchase Agreement Controls Right to Landfill Gases.

BDELUD concedes the purchase agreement expressly gives WMN title to the landfill gases and to the proceeds from

[17] See *State v. York*, 273 Neb. 660, 665-66, 731 N.W.2d 597, 603 (2007) (stating that "[d]octrine of res judicata, or claim preclusion, only bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits").

landfill gasification. As set out above, paragraph 6 explicitly reserves to the seller "all insitu oil, gas and mineral deposits located on the Premises." BDELUD directs us to no case law, and we find none, that definitively holds methane gas produced by the refuse is a mineral. And we need not decide that issue here, because paragraph 6 explicitly gave WMN title to gas generated by refuse in the landfill:

> [WMN shall have] the right to excavate, extract and . . . relocate . . . all other minerals, materials and substances of any nature whatsoever (whether solid, liquid or gaseous) produced at or under the Premises or emanating therefrom or incident to the utilization of the Premises as a Landfill (title to all of such substances being, upon extraction thereof from the Premises, the sole and exclusive property of Seller[s], *except that the title to any gas generated by the Refuse shall remain the sole and exclusive property of* [*WMN*].

(Emphasis supplied.)

BDELUD's only argument against applying these provisions is that upon reconveyance, all aspects of the real estate belong to it. We have rejected its argument that the court could not consider restrictions in the conveyance under the 1989 purchase agreement. We conclude there is no merit to BDELUD's assignments of error regarding the landfill gases.

Landfill Gas Fixtures.

The same reasoning applies to BDELUD's argument that the district court erred in concluding that the structures on the property used to collect the landfill gases were the property of WMN. BDELUD contends that these structures are fixtures and, further, that these issues were decided when this court and the Court of Appeals adjudicated the real estate ownership issues, as is discussed in further detail above. Because we have rejected that argument, paragraph 14 of the purchase agreement controls. Under that provision, whether WMN's gas collection system could be considered a fixture is irrelevant:

> [T]itle to all buildings, equipment and other improvements (collectively, "Improvements") installed, constructed or located by Purchaser upon the Premises shall

> remain in Purchaser and the same shall at all times remain Purchaser's personal property *regardless of the nature of fixation to the Premises*. Should Seller[s] exercise their option to purchase contained in Paragraph 30 hereof, Purchaser shall remove, unless otherwise agreed to in writing by Purchaser and Seller[s], all such Improvements that Purchaser has installed, constructed or located upon the Premises, *except those Improvements required or necessary to protect the environment* . . . .

(Emphasis supplied.) Additionally, paragraph 6(e) gave WMN "the right to carry out all gasification, waste handling, storage, treatment, disposal and similar operations."

Thus, prior to the exercise of the option by BDELUD's predecessors, the gas collection system was WMN's personal property, regardless of its fixation to the site. The record shows that the collection and removal of the landfill gases is necessary to protect the environment. And BDELUD has consistently noted that WMN has ongoing environmental monitoring responsibilities. We conclude that the parties did not intend for the collection system to become a fixture of the property after BDELUD exercised its purchase option as long as WMN was exercising its rights under paragraph 6.

Monofill.

In its last set of assignments of error, BDELUD assigns that the district court erred in finding that it was not entitled to past or future monofill revenues. The district court concluded that the predecessors of BDELUD had not objected to the construction of the monofill, had accepted royalty payments in connection with the gypsum deposits made on the land, and had accordingly waived and were equitably estopped from arguing that it had any entitlement to monofill revenues.

[3-5] Waiver is a voluntary relinquishment of a known right.[18] The doctrine of equitable estoppel applies where, as

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[18] See *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 280 Neb. 729, 790 N.W.2d 866 (2010).

a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.[19] Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.[20]

In finding waiver and estoppel, the district court noted that "[BDELUD's] predecessors' communications and conduct, and [BDELUD's] ongoing receipt of benefits under the 1989 Agreement illustrate [BDELUD] consented to the Monofill and considered the Monofill to be part of the 1989 Agreement. [BDELUD] cannot now ask for money [WMN] has made in relation to the Monofill."

We agree. Waiver and estoppel are both evident from the actions of BDELUD's predecessors, the Bauermeisters and the Deavers. At trial, BDELUD argued that the agreement did not envision using the land as an industrial landfill and that after it was built in 2001, it was not anticipated that the municipal landfill would close in 2003. And indeed, there is no mention of a monofill or industrial landfill in the agreement.

But there is a course of action by BDELUD's predecessors that suggests acquiescence in the chain of events as they

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

[20] *American Family Mut. Ins. Co. v. Regent Ins. Co.*, 288 Neb. 25, 846 N.W.2d 170 (2014).

occurred. When the monofill was anticipated in and around 2001, notice was sent to neighboring landowners, including to BDELUD's predecessors. Those predecessors were represented by counsel at meetings on the construction of the monofill. They did not object and in fact indicated that they had no objection so long as they continued to receive royalty payments. In fact, in a letter to WMN regarding the monofill, counsel acting on behalf of the Bauermeisters suggested that the monofill was "clearly within the Purchase Agreement and related documents" and that the Bauermeisters, among others, were "clearly entitled to the existing royalty on waste of any kind deposited in the [monofill] under the terms of the Purchase Agreement." Those royalty payments were paid by WMN right up until the closure of the monofill and past the August 31, 2006, date of the exercise of the option to purchase.

This course of action is contrary to the BDELUD's now-stated contention that its predecessors never intended to get their land back with gypsum reserves on it, or that they never intended that the monofill would operate past the operation of the landfill. This course of action suggests waiver, and further suggests that BDELUD should be estopped from asserting any position contrary to this course of action.

BDELUD's assignments of error regarding the monofill are also without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

WRIGHT, STEPHAN, and CASSEL, JJ., not participating.

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

863 N.W.2d 125

Filed May 15, 2015. No. S-14-765.

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 David N. Steier, respondent, on March 25, 2015. The court accepts respondent's conditional admission and enters an order of suspension for a period of 3 months and 12 months of monitored probation following reinstatement.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 15, 2009. At all relevant times, he was engaged in the practice of law in Omaha, Nebraska.

On August 29, 2014, 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 state that on November 9, 2012, respondent was retained by Allen Wagner, doing business as Take Flight Cheer Center, to assist in incorporating the business and applying for tax-exempt status under I.R.C. § 501(c)(3) (2012). Wagner paid respondent $800 by check as respondent's fee for doing the work. The formal charges state that although the check was negotiated by respondent on the date it was received and before any work had been done for the client, the check was not deposited into respondent's trust account. Wagner also issued separate checks to respondent payable to third parties as follows: $750 payable to the Internal Revenue Service (IRS), $35 for publication in a business journal, and $25 for the filing fee with the State of Nebraska.

The formal charges state that over the next year, respondent knowingly made a series of false and misleading statements to Wagner regarding the application. Respondent never submitted the application, although he continued to lead Wagner to believe that he had.

In late 2013, Wagner contacted the IRS directly and learned that nothing had been filed. Wagner demanded that respondent return all funds he had paid and the case file. Respondent did return the file, including the unsent third-party checks, and attempted to refund a portion of the fees.

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. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.15(a) and (c) (safekeeping property), and 3-508.4(a), (b), and (c) (misconduct).

On March 25, 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 conduct rules §§ 3-501.1, 3-501.3, 3-501.15(a) and (c), and 3-508.4(a), (b), and (c). In the conditional admission, respondent knowingly chose not to challenge or contest the truth of the matters conditionally admitted and waived all proceedings against him in connection therewith in exchange for a 3-month suspension and 12 months of monitored probation following reinstatement. Upon reinstatement, if accepted, the monitoring shall be by an attorney licensed to practice law in the State of Nebraska and who shall be approved of by the Counsel for Discipline. The monitoring plan shall include, but not be limited to, the following: During the first 6 months of probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible, which list shall include: the date the attorney-client relationship began; the general type of case; the date of last contact with the client; the last type and date of work completed on file (pleading, correspondence, document preparation, discovery, court hearing); the next type of work and date that work should be completed on the case; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly,

contingency, et cetera). After the first 6 months through the end of the probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information set forth above. Respondent shall work with the monitor to develop and implement appropriate office procedures to ensure that the clients' interests are protected. Respondent shall reconcile his trust account within 7 working days of receipt of the monthly bank statement and provide the monitor with a copy within 3 working days. Respondent shall submit a quarterly compliance record to the Counsel for Discipline demonstrating that respondent is adhering to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of probation. If at any time the monitor believes respondent has violated the professional conduct rules or has failed to comply with the terms of probation, the monitor shall report the same to the Counsel for Discipline. Finally, respondent shall pay all the costs in this case, including the fees and expenses of the monitor, if any.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's 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 truth of the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.1, 3-501.3, 3-501.15(a) and (c), and 3-508.4(a), (b), and (c) 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 for a period of 3 months. Should respondent apply for reinstatement, if accepted, his reinstatement shall be conditioned upon respondent's being on probation for a period of 12 months, including monitoring, following reinstatement, subject to the terms agreed to by respondent in the conditional admission and outlined above. 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, he shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

MERIE B. ON BEHALF OF BRAYDEN O., APPELLANT, V. STATE OF NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES AND VIVIANNE M. CHAUMONT, DIRECTOR OF DIVISION OF MEDICAID AND LONG TERM CARE, DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

863 N.W.2d 171

Filed May 22, 2015. No. S-14-007.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes.** Properly adopted and filed agency regulations have the effect of statutory law.
4. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. ____: ____. An appellate court will try to avoid, if possible, a statutory construction that would lead to an absurd result.
7. **Administrative Law: Judicial Notice.** Every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Reversed and remanded with directions.

Terrance A. Poppe and Benjamin D. Kramer, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellant.

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

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

WRIGHT, J.

I. NATURE OF CASE

Merie B. filed this action on behalf of her daughter, Brayden O., who suffers from Coffin-Lowry Syndrome. Brayden is a minor child, and she had been receiving home and community-based waiver services for approximately 12 years at the time this case began. On November 1, 2012, the Nebraska Department of Health and Human Services (DHHS) reassessed her condition. DHHS determined that she no longer qualified for waiver services and subsequently terminated the services.

Following an appeal hearing, DHHS upheld the discontinuance of services to Brayden. On appeal from DHHS' decision, the Lancaster County District Court affirmed. This case comes to us as an appeal from the judgment entered by the district court.

For the reasons discussed below, we reverse the judgment of the district court and remand the cause with directions.

II. SCOPE OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[1] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

III. FACTS

Brayden suffers from Coffin-Lowry Syndrome, which is generally characterized by craniofacial abnormalities, skeletal abnormalities, short stature, and hypotonia (a condition causing low muscle tone and reduced strength). She has also developed

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[1] *Nebraska Account. & Disclosure Comm. v. Skinner*, 288 Neb. 804, 853 N.W.2d 1 (2014).

[2] *Id.*

moderate kyphosis (a curving of the spine) and problems with her feet. She lacks pain awareness and suffers from a seizure disorder. Brayden's mother, Merie, is a registered nurse at a neurological and spinal surgery clinic. She described Coffin-Lowry Syndrome as follows:

> It's extremely rare. It is an X-linked dominant chromosomal abnormality. [Brayden] was born with [a]genesis [failure to develop during embryonic growth] of her brain. She has less than 10 percent of her corpus callosum, which in essence is the wiring between the two hemispheres [of the brain] that makes the connection.

As a registered nurse, Merie is able to provide service in her home in a way that non-health-care professionals would be unable. Merie has difficulty both working and personally providing care for Brayden without waiver services. At the time of trial, Merie's husband had been stationed in Afghanistan for 1 year and was unable to assist Merie in caring for Brayden.

Brayden's disability affects her in many ways. She has a history of seizures and requires 24-hour supervision. She was taking Phenobarbital and Dystat to control the seizures. Merie stated that if she were not trained as a nurse, Brayden would constantly be in the doctor's office for treatment. Merie ensures that Brayden takes her medication.

Brayden has a high palate, which necessitates that she be monitored for choking when she eats. She requires assistance at all times in bathing, dressing, and grooming. She is dependent on others and needs constant supervision in all parts of toileting. There is evidence that she has lost bowel and bladder control. She has extremely limited cognitive ability. She requires a hearing aid and has difficulty seeing a level of print.

At school and on the bus to and from school, Brayden requires constant supervision and has a one-on-one paraprofessional to assist her at all times. Brayden has no sense of danger or safety. She needs assistance on the playground, uneven surfaces, stairs, and curbs. She is almost completely dependent on others in her ability to communicate. She "communicates inappropriate intent" and is not able to effectively use communication boards or other adaptive devices.

As to her behavior, Brayden needs and receives regular intervention in the form of redirection because she has episodes of disorientation. She does not have any sense of herself in relation to space and requires supervision with respect to orientation. As to judgment, she lacks the ability to solve problems and make appropriate decisions. She can find the letter "G" on a keyboard but has difficulty finding other letters. She can identify the numbers 1 through 5 with 80-percent accuracy but cannot identify numbers 6 through 10, nor is she accurate in counting certain sets of items (e.g., two newspapers, three markers, et cetera).

As a result of her disabilities, Brayden has received home and community-based waiver services since 2001. Home and community-based waiver services offer eligible persons who meet the "Nursing Facility" (NF) level of care the choice between entering a nursing home facility or receiving supportive services in their homes.[3] The benefits under the waiver program are intended for children that are at a nursing home level of care. The parents' income is waived, and services are then provided at a capped amount, regardless of the parents' income. Each child receiving services is assigned a services coordinator who gathers necessary information to submit to DHHS' pediatric nurse consultant for the waiver program in order to make a level of care eligibility determination.

On or about November 1, 2012, DHHS reassessed Brayden's continuing eligibility for services. It notified her that home and community-based waiver services would be discontinued, effective November 11, because she failed to meet the specific eligibility criteria. It was determined that Brayden did not have a medical treatment need, nor was she eligible based on her "Activities of Daily Living and other Considerations. Manual Reference 480 NAC 5-002 C1(1f)[sic]."[4] (The regulation cited by DHHS in its notification of termination of waiver services

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[3] 480 Neb. Admin. Code, ch. 5, § 001.A (1998).

[4] See 480 Neb. Admin. Code, ch. 5, § 003.C1 (1998) ("[e]ligibility for services under the waiver may be denied or terminated for any of the following reasons: . . . f. The client fails to meet the specified eligibility criteria").

does not exist; we believe DHHS intended to cite to 480 Neb. Admin. Code, ch. 5, § 003.C1f, because of later references to that section.)

Notwithstanding DHHS' discontinuance of her waiver services, the only change in Brayden's condition was that her seizures were determined to be controlled with medication. Brayden was found to be independent in the areas of mobility, transferring, hearing, and vision. She remained dependent in all other criteria in the categories considered by DHHS.

Merie appealed DHHS' evaluation and termination of waiver services. Following a hearing, DHHS affirmed the termination of services for Brayden. Merie then appealed to the district court, contending that DHHS used the wrong criteria to evaluate Brayden's eligibility and that DHHS erred in finding that she did not meet the NF level of care criteria for waiver services.

Merie claimed that DHHS incorrectly relied upon title 480, chapter 5, § 3B (1998) (480 NAC 5-003.B), of the Nebraska Administrative Code and that title 471, chapter 12 (1999) (471 NAC 12-000), contained the appropriate criteria for NF level of care eligibility. She asserted that DHHS' assessment instrument—Form MILTC-13AD, Home and Community-Based Waiver Child/Client's Level of Care Document (exhibit 4)—did not integrate all the relevant criteria. It is not disputed that exhibit 4 was the document DHHS used in its assessment of eligibility for children.

The district court found that the only contested issue was whether Brayden met the NF level of care criteria. The court accepted DHHS' use of title 480, chapter 5, § 3B3b (480 NAC 5-003.B3b) to create exhibit 4 and found this was the regulation that provided the correct criteria. It concluded that the regulations provided for two distinct waiver services—children with disabilities and adults with disabilities—and that 480 NAC 5-003.B3b served as the basis for exhibit 4.

The court noted that while the NF level of care criteria in 471 NAC 12-000 were incorporated by reference into title 480,[5] they were incorporated as only one part of the criteria

[5] See 480 Neb. Admin. Code, ch. 5, § 002 (1998).

for waiver services. It therefore rejected Merie's claim that 471 NAC 12-000 provided the appropriate regulations for determining the NF level of care to waiver services eligibility. It accepted DHHS' creation and use of exhibit 4 as the appropriate method of evaluating a child's NF level of care for waiver services. Based upon exhibit 4, the court concluded that Brayden did not satisfy the NF level of care requirement for waiver services and affirmed the termination of those services. Merie timely appealed.

IV. ASSIGNMENTS OF ERROR

Merie assigns that the district court erred in finding that she did not meet the NF level of care criteria for waiver services and that the district court erred in not using the NF level of care criteria in chapter 12 of title 471.

V. ANALYSIS

1. Relevant Regulations

(a) Issue

We are presented with a question of law, which we decide independent of the lower court's determination. The issue is whether DHHS used the correct NF level of care criteria for waiver services to evaluate Brayden. To resolve this issue, we must examine the regulations that describe the criteria for waiver services. Merie claims that DHHS and the district court should have considered the NF level of care criteria found in 471 NAC 12-000. DHHS claims that 480 NAC 5-003.B3b is the regulation that provides the appropriate criteria. We therefore look to these provisions of the Nebraska Administrative Code for resolution.

[3-6] Properly adopted and filed agency regulations have the effect of statutory law.[6] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.[7] Statutory language

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[6] See *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).

[7] *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010).

is to be given its plain and ordinary meaning, and we will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[8] An appellate court will try to avoid, if possible, a statutory construction that would lead to an absurd result.[9]

[7] We take judicial notice, as did the district court, of 471 NAC 12-000 and title 480, chapter 5 (1998) (480 NAC 5-000), of the Nebraska Administrative Code. Every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State.[10]

(b) Home and Community-Based Waiver Services for Aged Persons, Adults, or Children (480 NAC 5-000)

The criteria for waiver services eligibility are described in 480 NAC 5-000. To be eligible for support through the "Aged and Disabled Waiver" program, a potential client must meet three general requirements: "1. Have care needs equal to those of Medicaid-funded residents in Nursing Facilities; 2. Be eligible for Medicaid; and 3. Work with the services coordinator to develop an outcome-based, cost effective service plan."[11]

Certain definitions are relevant to our analysis. An adult—for purposes of Medicaid and this waiver—is an individual age 18 or older.[12] An aged person is an individual age 65 or older.[13] A child is an individual age 17 or younger.[14] Age is the only distinction among the three descriptions of clients under this section. "Plan of Services and Supports" is a process for providing services and supports that takes into consideration

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[8] *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

[9] See *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014).

[10] Neb. Rev. Stat. § 84-906.05 (Reissue 2014).

[11] 480 Neb. Admin. Code, ch. 5, § 001.A.

[12] See *id.*, § 001.E.

[13] *Id.*

[14] *Id.*

each client's strengths, needs, priorities, and resources resulting in an individualized, written plan for each client.[15] "Waiver" is defined as "Nebraska's Home and Community-Based Waiver for Aged Persons or Adults and Children with Disabilities."[16]

The regulations describe the specific "Client Eligibility Criteria" for home and community-based waiver services. Clients must meet five specific requirements to be eligible for waiver services:

> Clients eligible for waiver services must -
>
> 1. Be eligible for the Nebraska Medicaid Assistance Program (NMAP);
>
> 2. Have participated in an assessment with a services coordinator;
>
> 3. *Meet the Nursing Facility (NF) level of care criteria (471 NAC 12-000)*;
>
> 4. Have care needs which could be met through waiver services at a cost that does not exceed the cap; and
>
> 5. Have received an explanation of NF services and waiver services and elected to receive waiver services.[17]

These regulations are not ambiguous, and they do not distinguish among clients who are aged persons, adults, or children, and therefore, *all* clients must presumably meet the requirements. In its waiver services assessment and termination notice, DHHS repeatedly referred to Brayden as a "client." Section 5-002 requires clients to meet the NF level of care criteria in 471 NAC 12-000 to be eligible for waiver services.[18] "Home and Community-Based Waiver Services" refer to "Aged Persons or Adults or Children with Disabilities."[19] As a result, the third requirement—meeting the NF level of care in 471 NAC 12-000—describes the NF level of care criteria under which all clients must be assessed. We therefore turn to 471 NAC 12-000.

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[15] *Id.*

[16] *Id.*

[17] *Id.*, § 002 (emphasis supplied).

[18] *Id.*

[19] 471 Neb. Admin. Code, ch. 12, § 001.04.

(c) NF Level of Care for "Persons" or "Clients" (471 NAC 12-000)

The regulations governing NF services are contained in 471 NAC 12-000. To be eligible for waiver services, a client must meet the NF level of care criteria in 471 NAC 12-000, which are specifically set forth therein. No differentiation except age exists among children, adults, and aged persons in 471 NAC 12-000.[20] Within the definition of terms in 471 NAC 12-000, "Home and Community-Based Waiver Services for Aged Persons or Adults or Children with Disabilities" is defined as an array of community-based services available to individuals who are eligible for NF services under Medicaid but choose to receive services at home.[21] Children are specifically referenced under this definition of "Home and Community-Based Waiver Services."[22] The purpose of the waiver services is to offer options to Medicaid clients who would otherwise require NF services.[23]

Each client is to be evaluated based upon the NF level of care criteria in title 471, chapter 12, § 003.02, of the Nebraska Administrative Code (471 NAC 12-003.02). That section requires DHHS to apply the criteria therein to determine the appropriateness of services on admission and at each subsequent review.[24] Services coordinators (DHHS staff or contractors) are required to collect information from four assessment categories: (1) activities of daily living (ADL), (2) risk factors, (3) medical treatment or observation, and (4) cognition.[25] A description of those categories is warranted.

The first client assessment category in title 471 is the ADL category, which includes seven ADL's: (a) bathing, (b) continence, (c) dressing/grooming, (d) eating, (e) mobility,

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[20] See *id.*, § 003.02(1) through (4) (referring only to "client" classification for NF level of care).

[21] *Id.*, § 001.04.

[22] See *id.*

[23] *Id.*

[24] *Id.*, § 003.02.

[25] See *id.*

(f) toileting, and (g) transferring (i.e., ability to move from one place to another, including bed to chair and back, and into and out of a vehicle).[26]

The second category, "Risk Factors," includes three areas:

> a. Behavior: The ability to act on one's own behalf, including the interest or motivation to eat, take medications, care for one's self, safeguard personal safety, participate in social situations, and relate to others in a socially-appropriate manner.
>
> b. Frailty: The ability to function independently without the presence of a support person, including good judgment about abilities and combinations of health factors to safeguard well-being and avoid inappropriate safety risk.
>
> c. Safety: The availability of adequate housing, including the need for home modification or adaptive equipment to assure safety and accessibility; the existence of a formal and/or informal support system; and/or freedom from abuse or neglect.[27]

The third assessment category is "Medical Treatment or Observation." A client can satisfy this category in three ways:

> a. A medical condition is present which requires observation and assessment to assure evaluation of the individual's need for treatment modification or additional medical procedures to prevent destabilization and the person has demonstrated an inability to self-observe and/or evaluate the need to contact skilled medical professionals; or
>
> b. Due to the complexity created by multiple, interrelated medical conditions, the potential for the individual's medical instability is high or exists; or
>
> c. The individual requires at least one ongoing medical/nursing service.[28]

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[26] *Id.*

[27] See *id.*

[28] *Id.*

This category provides a noninclusive list of 23 such medical/nursing services which may, but do not necessarily, indicate a need for medical or nursing supervision or care.

The fourth category, "Cognition," includes four areas: (a) memory, (b) orientation, (c) communication, and (d) judgment.[29]

Once the assessment of the criteria in the four described categories has been completed, DHHS can proceed to determine the NF level of care for waiver services based upon the information collected. Each client is to be evaluated based upon the prescribed number of limitations in each category. Title 471 describes the number of limitations required in each category for the NF level of care eligibility.[30] Services coordinators collect the information on the four criteria categories on "each individual" seeking NF or waiver services to determine the functional abilities and care needs of that individual.[31]

Persons who require assistance, supervision, or care in at least one of the following four categories meet the level of care criteria for waiver services:

> 1. Limitations in three or more [ADL's] AND Medical treatment or observation.
>
> 2. Limitations in three or more ADLs AND one or more Risk factors.
>
> 3. Limitations in three or more ADLs AND one or more Cognition factors.
>
> 4. Limitations in one or more ADLs AND one or more Cognition AND one or more Risk factors.[32]

Thus, 471 NAC 12-000 clearly describes the number of limitations in each category that a client must have in order to be eligible for waiver services. Using these four assessment categories, the client's limitations in each category are evaluated to determine whether the client has met the required number of limitations for waiver service eligibility.

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[29] *Id.*

[30] *Id.*, § 003.02A.

[31] *Id.*

[32] *Id.*

(d) Children With Disabilities (480 NAC 5-003.B)

The district court concluded that 480 NAC 5-003.B, rather than 471 NAC 12-000, provided the basis for DHHS' evaluation of children seeking waiver services. It found that DHHS adopted a specific regulation—480 NAC 5-003.B3b—to assess Brayden's level of care and used this regulation to create exhibit 4.

But 480 NAC 5-003.B pertains to disabled children seeking waiver services and describes how children and their families access home and community-based services through DHHS. The purpose of 480 NAC 5-003.B mirrors the purpose of title 480, chapter 5, § 003.A, of the Nebraska Administrative Code which pertains to disabled adults. That purpose is "[t]o allow easy entry into the health and human services system for children with disabilities and their families who are in need of services."[33]

Each child is evaluated by a services coordinator, and based upon intake/screening, the services coordinator determines the child's priority ranking.[34] If the potential waiver eligible child does not meet priority criteria, the services coordinator informs the referral source and provides notice to the child's guardian, if such contact has been made.[35] If the child is eligible to be assessed for waiver services, an assessment visit is scheduled.[36]

The purpose of the information gathered by the services coordinator at the assessment is "[t]o identify the potential waiver eligible child's and family's strengths, needs, priorities, and resources so an appropriate plan of services and supports can be developed."[37] The services coordinator meets in person with the child and his or her guardian to complete an

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[33] 480 Neb. Admin. Code, ch. 5, § 003.B1. See 480 Neb. Admin. Code, ch. 5, § 003.A1.

[34] *Id.*

[35] 480 Neb. Admin. Code, ch. 5, § 003.B2c.

[36] *Id.*, § 003.B2d.

[37] *Id.*, § 003.B3.

assessment of the child's and family's strengths, needs, priorities, and resources.[38]

The services coordinator is required to gather functional information to determine a child's NF level of care eligibility that reflects the child's developmental level and includes information in the following six NF domains: (1) ADL, (2) cognition, (3) environment, (4) medical/health status, (5) support network, and (6) transition.[39]

DHHS used only two domains—ADL and medical/health status—to create its assessment document, exhibit 4. We summarize the six domains as follows:

(1) ADL, which includes:

(a) behavior—ability to exhibit actions that are developmentally and socially appropriate in the areas of independence, maturation, learning, and social responsibility;

(b) general hygiene—bathing, dressing, and grooming;

(c) feeding/eating;

(d) movement—(1) mobility: ability to move from place to place indoors or outside, and (2) transferring: ability to move from one place to another, including a bed to a chair and back, and into and out of a vehicle;

(e) sight;

(f) hearing;

(g) communication; and

(h) toileting.

(2) Cognition: The ability to remember, reason, understand, and use judgment.

(3) Environment: The ability to function in his or her living situation, including health, housing, and accessibility.

(4) Medical/health status: Any medical or health condition that impacts the child's ability to function independently.

(5) Support network: The ability and capacity of extended family, friends, and community resources to provide informal and formal supports.

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[38] *Id.*, § 003.B3a.

[39] *Id.*, § 003.B3b.

(6) Transition: The availability of a coordinated set of activities designed to promote independence and movement through services and developmental stages.[40]

The services coordinators were to route this functional information gathered during the in-person assessment and other documentation to DHHS' central office for an NF level of care determination.[41] Following an evaluation, if the child did not meet the NF level of care, the services coordinator was to provide written notice of this decision to the child's guardian.[42]

But unlike title 471, chapter 12, § 003.02A, of the Nebraska Administrative Code (471 NAC 12-003.02A), neither 480 NAC 5-003.B3b nor any other portion of section B provides a specific description of which assessment categories or the number of limitations required in each category that are required to meet the NF level of care for eligibility. However, section B provides that the services coordinator shall: "Together with the child and family, further develop the plan of services and supports. This is accomplished by identifying desired client outcomes. Outcomes should occur in one or more of the following NF domains: [ADL]; cognition; environment; medical/nursing status; support network; and transition."[43]

A child is reassessed when he or she reaches the age of 18, using the criteria provided in 471 NAC 12-003.02, and if the child remains at the NF level of care, a new plan of services and supports must be completed.[44]

(e) Findings Regarding NF Level of Care Criteria for Children With Disabilities

We conclude that 480 NAC 5-003.B does not alter the criteria for the NF level of care described in 471 NAC 12-000,

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[40] See *id.*

[41] *Id.*, § 003.B3c.

[42] *Id.*

[43] *Id.*, § 003.B4a.

[44] *Id.*, § 003.B7f.

which is required of all clients to be eligible for waiver services.[45] Moreover, 480 NAC 5-000.B does not alter the NF level of care criteria and requirements provided in 471 NAC 12-000 as they relate to disabled children. We reach this conclusion for several reasons.

First, title 480 of the Nebraska Administrative Code requires that *all clients*—aged persons, adults, and children—eligible for waiver services must meet the NF level of care criteria in 471 NAC 12-000.[46] We find no ambiguity or limitation as to the plain meaning of this requirement. Statutory language is to be given its plain and ordinary meaning.[47]

Second, we note that the purposes stated in the relevant sections of 471 NAC 12-000 and 480 NAC 5-003.B have important differences. The purpose of the criteria and assessment categories described in 471 NAC 12-000 is to determine the appropriateness of services on admission and at each subsequent review.[48] Services coordinators collect the information in the listed criteria for *each individual*—children, adults, and aged persons—seeking NF or waiver services to determine the functional abilities and care needs of that individual.[49] Each of the assessment categories are evaluated according to the limitations required in each category as provided in 471 NAC 12-003.02. "*Persons* who require assistance, supervision, or care in at least one of the [four assessment] categories *meet the level of care criteria for* [*NF*] *or Aged and Disabled Home and Community-based Waiver services*."[50] As previously noted, the number of limitations in each category is expressly described in the regulations. The plain language of the purpose of 471 NAC 12-000 indicates that it was intended to provide the NF level of care criteria for waiver services for all persons. Moreover, 471 NAC 12-000 identifies its application to

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[45] See *id.*, § 002.

[46] See *id.*

[47] *Watkins v. Watkins, supra* note 8.

[48] 471 Neb. Admin. Code, ch. 12, § 003.02.

[49] *Id.*, § 003.02A.

[50] *Id.* (emphasis supplied).

children in its definition of home and community-based waiver services for aged persons, adults, and children.[51]

In contrast, the purpose of 480 NAC 5-003.B3b is "[t]o identify the potential waiver eligible child's and family's strengths, needs, priorities, and resources *so an appropriate plan of services and supports can be developed*."[52] This purpose is separate and distinct from the determination whether the person met the NF level of care. Thus, if a child qualified for waiver services under 471 NAC 12-000, the services coordinator was to further develop the plan of services and supports.[53] This was accomplished by identifying desired client outcomes.[54]

The services coordinator then "[routes] functional information gathered during the in-person assessment and other documentation to [DHHS] Central Office for a NF level of care determination."[55] The functional information—along with "other documentation"—is then used in making a level of care assessment. However, 480 NAC 5-003.B does not change the NF level of care criteria described in 471 NAC 12-000.

Third, 471 NAC 12-000 methodically describes four categories of criteria and the number of limitations within each category that are required to meet the NF level of care.[56] In contrast, 480 NAC 5-003.B provides no such assessment categories or required number of limitations. It does not state what categories are to be used or the number of limitations required for such category. Therefore, 480 NAC 5-003.B provides no basis for an eligibility assessment, as it would permit an arbitrary creation of eligibility requirements. The lack of such guidance in 480 NAC 5-003.B leads us to conclude that it does not alter or supersede the assessment scheme in 471 NAC 12-000 for disabled children. We discuss this point in greater detail later in our analysis.

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[51] *Id.*, § 001.04.

[52] 480 Neb. Admin. Code, ch. 5, § 003.B3 (emphasis supplied).

[53] *Id.*, §§ 003.B3b and 003.B4a.

[54] *Id.*, § 003.B4a.

[55] *Id.*, § 003.B3c.

[56] See 471 Neb. Admin. Code, ch. 12, §§ 003.02 and 003.02A.

We conclude that the correct NF level of care criteria to be applied to all persons—aged persons, adults, and children—are set forth in 471 NAC 12-000, which title 480 incorporates by express reference in chapter 5, § 002.

2. Exhibit 4

Because exhibit 4 was the assessment document used to evaluate children with disabilities, we discuss its use by DHHS. Instead of using the assessment categories and limitations provided in 471 NAC 12-000, DHHS created exhibit 4 as its document to assess the NF level of care for disabled children. The requirements in exhibit 4 differ significantly from those expressly provided in 471 NAC 12-000. Exhibit 4's assessment categories were created from two of the domains described above—medical treatment needs and selected ADL's. But the categories created in exhibit 4 were much more restrictive as applied to children. We discuss those categories and the requirements for each category.

Exhibit 4 contained three assessment categories. A disabled child had to satisfy the requirements of one of the three categories to be eligible. This is contrasted with the four categories described in 471 NAC 12-003.02A. The three categories in exhibit 4 used only two of the six domains described in 480 NAC 5-003.B3b: medical treatments/therapies and ADL. We find no explanation why DHHS used only these two domains as its assessment categories. DHHS did not explain why it failed to use or consider the remaining domains of cognition, environment, support network, and transition.

Under exhibit 4, disabled children were required to qualify in at least one of the three assessment categories. The three categories are set forth in detail:

(1) Medical treatments/therapies: This category had a list of nine possible medical treatments or therapies needed by a child so as to meet the NF level of care. The child had to require at least one of the nine treatments.

(2) ADL: This category incorporated seven ADL's described in 480 NAC 5-003.B3b(1)—dressing, grooming, bathing, eating, transfers, mobility, and toileting. The child was required to be dependent in six of seven areas in order to meet the

NF level of care under this category. There is no regulation that set forth the number of limitations required for this category.

(3) Other considerations: This category incorporated the remaining four ADL's in 480 NAC 5-003.B3b—behavior, communication, vision, and hearing. In order to qualify, the child was required to be dependent in three of four areas and also be dependent in four of the seven ADL areas in the second category. Similar to the second category, there is no regulation that set forth the number of limitations required for this category.

(a) First Category: Medical Treatments/Therapies

We do not expound on exhibit 4's first category, "Medical Treatments/Therapies," because the factual questions pertaining to Brayden's medical treatments were resolved against her. Exhibit 4 prescribes nine areas of medical treatment or needs. Number eight, "Unstable medical condition," is the only area applicable to Brayden. She was found not to have an unstable condition, because her seizures had become more controlled with medication.

(b) Second Category: ADL

When we compare the requirements of the second category, ADL, to the requirements described in 471 NAC 12-003.02, we find that the requirements in exhibit 4 are much more restrictive for children. Persons assessed under 471 NAC 12-003.02 were required to be dependent in one or three ADL's, depending on the client's limitations in other categories. See 471 NAC 12-003.02A. But exhibit 4 required disabled children to be dependent in six of seven.

The ADL's of dressing, grooming, bathing, eating, transfers, mobility, and toileting are described as criteria for all clients under 471 NAC 12-003.02. But exhibit 4 required a child to be dependent in six of seven of those ADL's and made eligibility impossible under the second category if the child was mobile (i.e., she could walk) and could transfer (i.e., get in and out of a chair, bed, or car). Therefore, despite having other profound

disabilities, Brayden—or any child who could walk and transfer—could not qualify under the second category.

(c) Third Category: Other Considerations

Alternatively, children could meet the requirements in the third category only if they were dependent in three of four evaluative areas of behavior, communication, hearing, and vision. And to qualify under the third category, children were required to be dependent in at least four ADL's from the second category and three of four in this third category.

Thus, the third category excluded children who could see and hear. Therefore, it was impossible for a child who was able to see and hear to meet the requirements under the third category of exhibit 4.

The standards provided in 471 NAC 12-003.02 did not require persons to have the high number of limitations that exhibit 4 imposed upon children.

3. Summary of Findings Regarding Exhibit 4

(a) Exhibit 4 Did Not Use Proper Criteria or Number of Limitations

Merie claims DHHS should not have used exhibit 4 as its assessment instrument. We agree. Title 480 requires all "Clients"—aged persons, adults, and children—to meet the NF level of care criteria in 471 NAC 12-000.[57] Age was not an assessment criteria for waiver service eligibility.

Instead, DHHS used 480 NAC 5-003.B3 as a basis for its assessment criteria and the person's status as a child. But the purpose of 480 NAC 5-003.B3 was "[t]o identify the potential waiver eligible child's and family's strengths, needs, priorities, and resources *so an appropriate plan of services and supports can be developed*."[58] Clearly, the unambiguous purpose of 480 NAC 5-003.B3b was not to prescribe the

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[57] 480 Neb. Admin. Code, ch. 5, § 002.

[58] *Id.*, § 003.B3 (emphasis supplied).

child's NF level of care criteria for eligibility. In contrast, the criteria in 471 NAC 12-000 were used "to determine the *appropriateness of services on admission* and at each subsequent review."[59]

DHHS' reliance on the domains in 480 NAC 5-003.B3b to create exhibit 4 was misplaced. Exhibit 4 did not incorporate the proper criteria or use the number of limitations required in each category as provided in 471 NAC 12-000. For example, exhibit 4 excluded two of the four assessment categories provided in 471 NAC 12-003.02—"Risk Factors" and "Cognition."

Equally important, exhibit 4 did not properly assess the number of limitations required for each category as set forth in 471 NAC 12-003.02A, which provided a clear and specific number of limitations required for eligibility.

Therefore, we conclude that exhibit 4 did not comply with title 480, chapter 5, § 002, of the Nebraska Administrative Code which required that clients eligible for waiver services must meet the NF level of care criteria in 471 NAC 12-000.

(b) Exhibit 4 Was Created Arbitrarily

Even assuming arguendo that 480 NAC 5-003B3b was the proper regulation to assess NF level of care for disabled children, we find that exhibit 4 was created arbitrarily. DHHS has not shown, and we find no basis, why DHHS placed seven ADL's in the second category and four ADL's in the third category or required six limitations in the second category and three limitations in the third category.

DHHS arbitrarily excluded four of six domains provided under 480 NAC 5-003.B3b. DHHS has not explained why it excluded the domains of cognition, environment, support network, and transition. It did not use or consider whether Brayden had the ability to remember, reason, understand, and use judgment (cognition); it did not consider her ability to function in her living situation (environment); it did not consider her ability and the capacity of extended family, friends, and community resources to provide informal and formal

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[59] 471 Neb. Admin. Code, ch. 12, § 003.02 (emphasis supplied).

supports (support network); it did not consider the availability of a coordinated set of activities designed to promote independence and movement through services and developmental stages (transition).[60] Instead, DHHS created two of the three categories using the ADL domain and then arbitrarily decided which ADL's would be placed in each category and how many limitations in these categories were required.

Even if 480 NAC 5-003.B3b was the basis for exhibit 4, nothing therein permitted DHHS to arbitrarily select which domains to either use or disregard for child evaluation. None of these domains were shown to be of greater importance than another. DHHS provided no explanation for why it created two of the three categories in exhibit 4 from the ADL domain and excluded the remaining four domains.

The exclusion of the domain of cognition from exhibit 4 is particularly egregious because it is listed in both 471 NAC 12-000 and 480 NAC 5-003.B. Under 471 NAC 12-000, cognition includes the areas of memory, orientation, communication, and judgment.[61] Under 480 NAC 5-003.B3b, it is defined as "[t]he ability to remember, reason, understand, and use judgment." Brayden was evaluated only for communication and was found to be dependent. But DHHS did not consider whether she could remember, reason, understand, or use judgment. The record indicates that she was also likely dependent in the other areas of cognition, but her cognition was not considered.

Even if these domains had been used, there is no regulation that prescribes how they were to be evaluated to determine eligibility. DHHS can point to no part of title 480, chapter 5, that states these are the categories and number of limitations to be considered. In the absence of such a regulation, we conclude that DHHS arbitrarily created the categories and greatly increased the number of limitations that disabled children must satisfy to qualify for waiver services.

In contrast, 471 NAC 12-003.02 sets forth what categories are to be used and the number of limitations in each category

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[60] See 480 Neb. Admin. Code, ch. 5, § 003.B3b.

[61] 471 Neb. Admin. Code, ch. 12, § 003.02.

that are required by a client for eligibility. DHHS disregarded this framework, and as a result, exhibit 4 arbitrarily placed a far greater burden on disabled children than similarly situated disabled aged persons and adults. We find no basis for this discrimination.

(c) By Placing Far Greater Burden on Disabled Children, Exhibit 4 Produced Unreasonable Result

DHHS' creation of exhibit 4 made it more difficult for disabled children than disabled adults to meet eligibility requirements for waiver services. The obvious result was to severely restrict the number of children who qualified for waiver services. Children who had profound disabilities requiring constant supervision were not eligible for waiver services if they had no immediate medical treatment necessity and could walk, transfer, see, and hear. The exclusion of such profoundly disabled children was unreasonable. Because the district court based its decision on exhibit 4, this unreasonable result is imputed to the district court's order which affirmed DHHS' termination of Brayden's waiver services.

In its analysis, the district court rejected Merie's argument that title 471 was the proper regulation for assessment of eligibility, because it found such interpretation would be contrary to DHHS' purpose in enacting title 480. We disagree. The stated purpose of title 480 as applied to *both children and adults* was "to allow easy entry into the health and human services system."[62] But that purpose was greatly undermined by the use of exhibit 4.

The manner in which DHHS created the three categories in exhibit 4 would exclude many of the disabled children who applied for waiver services. By selectively placing mobility and transferring ADL's in the second category and requiring a child to be dependent in six of seven ADL's, any child who could walk and get into and out of a bed or car was excluded under the second category. By selectively placing vision and

[62] 480 Neb. Admin. Code, ch. 5, § 003.B1. See 480 Neb. Admin. Code, ch. 5, § 003.A1.

hearing in the third category, any child who could see and hear was excluded under the third category. Sight and hearing were not listed as criteria in 471 NAC 12-003.02 and, therefore, not used for evaluation of adults and aged persons.

DHHS and the district court concluded that Brayden failed to meet the NF level of care for waiver services. But it was not disputed that she had received waiver services for nearly 12 years prior to the revocation. There had been no substantial change in her physical condition except her seizures were presently better controlled by medication. She remained dependent in toileting, bathing, dressing, grooming, eating, behavior, and communication. Although DHHS did not assess cognition, communication is one of the four cognition "factors" listed in 471 NAC 12-003.02.[63] There is substantial evidence that Brayden is also dependent or has severe limitations in the three other cognition factors of memory, orientation, and judgment. The record established that she did not have the ability to function independently without the constant presence of a support person. She lacked judgment to safeguard her well-being. However, despite being profoundly disabled, Brayden was denied waiver services.

Adults were treated much differently. An adult with Brayden's disabilities and limitations would likely have met the NF level of care under three of the four areas of the evaluation criteria and framework provided in 471 NAC 12-003.02. Given the purpose to allow easy access into the system, it is unreasonable to place a much higher burden on disabled children seeking waiver services than disabled aged persons and adults. The use of exhibit 4 was unreasonable.

4. Brayden Met NF Level of Care Under 471 NAC 12-000

To be eligible for waiver services, title 480 requires all clients—aged persons, adults, and children—to meet the NF level of care criteria in "471 NAC 12-000."[64] This includes both the criteria in the four categories and the number of limitations

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[63] See 480 Neb. Admin. Code, ch. 5, § 003.B3b(2).

[64] *Id.*, § 002.

provided in 471 NAC 12-003.02A. One such category provides that a person meets the NF level of care for waiver services if he or she has "[l]imitations in three or more ADLs AND one or more Cognition factors."[65]

Although neither DHHS nor the district court considered cognition in their evaluations of Brayden, she was found to be dependent in behavior, bathing, dressing, grooming, eating, toileting, and communication. Bathing, dressing/grooming, eating, and toileting are ADL's under 471 NAC 12-003.02. Communication is one of the four "factors" of cognition.[66] She was therefore dependent in at least three ADL's and one cognition factor. Consequently, DHHS should have found that Brayden met the NF level of care for waiver services.

VI. CONCLUSION

For the reasons set forth herein, we conclude the decision of the district court, which affirmed the revocation of waiver services by DHHS, did not conform to the law. DHHS' creation and use of exhibit 4 to evaluate Brayden was arbitrary and produced an unreasonable result. We reverse the judgment of the district court, which affirmed DHHS' revocation of Brayden's waiver service benefits, and remand the cause with directions that the district court order DHHS to reinstate Brayden's waiver services effective November 11, 2012.

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., participating on briefs.

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[65] 471 Neb. Admin. Code, ch. 12, § 003.02A.

[66] See *id.*, § 003.02.

KEEVA T. O'NEAL, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

863 N.W.2d 162

Filed May 22, 2015. No. S-14-262.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower 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. ____: ____. If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.
5. **Courts: Habeas Corpus: Jurisdiction: Venue.** By statute, any and all district courts in Nebraska have subject matter jurisdiction of claims for habeas corpus relief. The determination of which district court should hear a habeas petition is essentially a question of venue and not one of jurisdiction.
6. **Venue: Waiver.** Unlike jurisdiction, venue is a personal privilege which, if not raised by a party, is waived unless prohibited by law.
7. ____: ____. A claim of improper venue is a matter that may be waived by failure to make a timely objection.
8. **Venue: Time.** For an objection to venue to be timely in a civil case, it must be raised before or in the defendant's answer.
9. **Jurisdiction: Venue: Words and Phrases.** Jurisdiction and venue are not synonymous and interchangeable functions in litigation.
10. **Habeas Corpus: Jurisdiction.** The failure to attach a copy of the relevant commitment order to a petition for a writ of habeas corpus does not prevent a court from exercising jurisdiction over that petition.
11. **Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.
12. **Constitutional Law: Habeas Corpus.** A writ of habeas corpus in the State of Nebraska is quite limited in comparison to those of federal courts, which allow a writ of habeas corpus to a prisoner when he or she is in custody in violation of the federal Constitution, law, or treaties of the United States.
13. **Judgments: Collateral Attack.** Only a void judgment may be collaterally attacked.
14. **Habeas Corpus: Jurisdiction: Sentences.** A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose.
15. **Habeas Corpus.** A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Renee L. Mathias, of Schaefer Shapiro, L.L.P., for appellant.

Keeva T. O'Neal, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

Keeva T. O'Neal, an inmate at the Nebraska State Penitentiary in Lincoln, Nebraska, appeals from the order of the district court which denied his petition for a writ of habeas corpus. Because we find that the district court reached the correct result, we affirm.

II. SCOPE OF REVIEW

[1] On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo. *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[2] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower court. *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014).

III. FACTS

In 1997, pursuant to a plea agreement, O'Neal pled no contest to, and was convicted of, three counts of attempted first degree assault and two counts of use of a deadly weapon to commit a felony. Count I (one of the assault counts) and count II (the corresponding use count) related to actions

O'Neal took against an "Edward Duncan." He was sentenced to 4 to 5 years' imprisonment for the assault convictions and 20 to 25 years' imprisonment on the use of a weapon convictions. The sentencing court ordered all five sentences to run consecutively.

Following sentencing, O'Neal filed a direct appeal, but it was dismissed for failure to file a poverty affidavit. He then moved for postconviction relief, alleging ineffective assistance of counsel. The district court concluded that his trial counsel had failed to adequately perfect a direct appeal and granted relief in the form of a new direct appeal.

On direct appeal, the Nebraska Court of Appeals affirmed O'Neal's convictions and sentences for use of a deadly weapon to commit a felony, affirmed his convictions for attempted first degree assault, and modified the sentences imposed for attempted first degree assault to 20 months' to 5 years' imprisonment each. See *State v. O'Neal*, No. A-04-536, 2005 WL 1022027 (Neb. App. May 3, 2005) (not designated for permanent publication). The Court of Appeals concluded that O'Neal's assignments of error either lacked merit or were waived by his no contest pleas. In particular, it rejected O'Neal's argument that the information on which he was charged was defective for failing to properly identify the victim of counts I and II.

On August 23, 2013, O'Neal filed a pro se petition for a writ of habeas corpus in the district court for Douglas County. He alleged that his imprisonment for counts I and II was the equivalent of being committed for crimes "which never occurred," and thus was a violation of the 5th and 14th Amendments, because the victim of counts I and II was an "Allen Duncan" and not the "Edward Duncan" identified in the amended information. He further alleged that he was entitled to discharge, because at the time of his application, he had "already been confined for a period which exceed[ed] the terms of imprisonment imposed on counts III through V" and he was being imprisoned only on counts I and II. O'Neal's petition did not include a copy of the relevant commitment or detention order.

In January 2014, the district court entered an order "request[ing] that the State file a written response to [O'Neal's] Application for Writ of Habeas Corpus." The State complied with this request, and on March 3, it filed a response with the court. In its response, the State argued that O'Neal's petition "should be denied for lack of jurisdiction." It explained:

> [O'Neal] acknowledges in his writ that he is currently serving a term of incarceration and that he is currently in the Lincoln Penitentiary, which is not located in Douglas County. Thus, this Court lacks jurisdiction. *See Addison v. Parratt*, 204 Neb. 656, 284 N.W.2d 574 (1979) (finding dismissal by the district court in Sheridan County of a petition for habeas corpus appropriate when the petitioner and respondent were residing in Lancaster County); *Gillard v. Clark*, 105 Neb. 84, 179 N.W. 396 (1920) ("We are therefore of the opinion that an application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined.").

In its response, the State also argued that habeas relief should be denied on the merits of O'Neal's petition.

On March 7, 2014, the district court entered an order denying O'Neal's petition for a writ of habeas corpus due to lack of jurisdiction. The court concluded that under *Addison v. Parratt*, 204 Neb. 656, 284 N.W.2d 574 (1979), it did not have jurisdiction to consider a habeas petition from O'Neal, because he was "currently serving his incarceration at the penitentiary in Lincoln, Nebraska, which is not in Douglas County." The court also concluded that even if it had jurisdiction, O'Neal was not entitled to habeas relief.

O'Neal 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. ASSIGNMENT OF ERROR

O'Neal assigns that the district court erred in denying his application for a writ of habeas corpus.

V. ANALYSIS

1. JURISDICTION

[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. *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012). If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction. *Id.*

In the instant case, the jurisdiction of the district court to consider O'Neal's petition for a writ of habeas corpus has been challenged on two separate grounds. The district court concluded that it lacked jurisdiction over O'Neal's petition, because he was not confined within the county in which the court sat. The State also argues that the district court lacked jurisdiction, because O'Neal failed to attach a copy of his commitment order to the petition, as required by Neb. Rev. Stat. § 29-2801 (Reissue 2008). As we explain below, we conclude that neither O'Neal's failure to file his habeas petition in the county of his confinement nor his failure to attach a copy of his commitment order to his petition deprived the district court of jurisdiction.

(a) Petition Not Filed in County of Confinement

The first jurisdictional question is whether the district court was deprived of jurisdiction by virtue of the fact that O'Neal was not confined within the county where the action was commenced. We conclude that it was not.

It has long been the general rule that a petition for a writ of habeas corpus should be filed in the county where the petitioner is confined. See, *Addison v. Parratt*, 204 Neb. 656, 284 N.W.2d 574 (1979); *Gillard v. Clark*, 105 Neb. 84, 179 N.W. 396 (1920); *In re White*, 33 Neb. 812, 51 N.W. 287 (1892).

For many years, our case law viewed the failure to comply with this rule as creating a jurisdictional issue. In *Gillard v. Clark*, 105 Neb. at 87, 179 N.W. at 398, we held that where habeas proceedings were initiated in a county other than where the petitioner was confined, it was "the duty of the court" to

dismiss the petition for lack of jurisdiction unless the officer in whose custody the prisoner was held brought the prisoner into the court and submitted to its jurisdiction without objection. In *Addison v. Parratt*, we again held that where habeas proceedings were initiated in a county other than where the petitioner was confined, it was "'the duty of the court, on objection to its jurisdiction, to dismiss the proceedings.'" See 204 Neb. at 658, 284 N.W.2d at 575 (quoting *Gillard v. Clark, supra*).

[5] But in *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008), we revisited, and ultimately rejected, the proposition that failing to initiate a habeas proceeding in the county of confinement created jurisdictional problems. We concluded that by statute, any and all district courts in Nebraska have subject matter jurisdiction of claims for habeas corpus relief. The determination of which district court should hear a habeas petition is essentially a question of venue and not one of jurisdiction. See *id*.

Anderson v. Houston, supra, was decided more than 5 years before O'Neal filed his petition for a writ of habeas corpus. Under our holding in that case, the district court was not deprived of jurisdiction by the fact that O'Neal was not confined within Douglas County. Therefore, the district court erred in concluding that it lacked jurisdiction for this reason.

O'Neal's failure to file his petition in the county of his confinement may have had implications for venue. See *id*. But we need not determine whether venue in Douglas County was improper, because the State waived any objection it may have had to venue.

[6-8] Unlike jurisdiction, venue is a personal privilege which, if not raised by a party, is waived unless prohibited by law. *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011). In particular, "[a] claim of improper venue is a matter that may be waived by failure to make a timely objection." See *Krajicek v. Gale*, 267 Neb. 623, 628, 677 N.W.2d 488, 492 (2004). For an objection to venue to be timely in a civil case, it must be raised "before or in the defendant's answer." See *State v. Vejvoda*, 231 Neb. 668, 673, 438 N.W.2d 461, 466 (1989). Habeas corpus is "a special civil proceeding."

See *Peterson v. Houston*, 284 Neb. 861, 866, 824 N.W.2d 26, 32 (2012).

[9] In the instant case, the State did not object to venue in or before its response to the habeas petition. Although the State alerted the district court that O'Neal had not filed his habeas petition in the county of his confinement, the State explicitly framed this argument as an objection to jurisdiction. Jurisdiction and venue are not synonymous and interchangeable functions in litigation. *Hofferber v. Hastings Utilities, supra*. And the difference between a jurisdictional argument and a venue argument is "significant." See *Anderson v. Houston*, 274 Neb. at 922, 744 N.W.2d at 416. Moreover, in a prior case, we determined that an objection to jurisdiction did not preserve an objection to venue. See *In re Interest of Adams*, 230 Neb. 109, 430 N.W.2d 295 (1988). We therefore reject the State's argument that its jurisdictional objection should be viewed as an objection to venue.

The State did not raise a timely venue objection, and it therefore waived any objection to venue in the district court for Douglas County.

(b) Failure to Attach Copy of Commitment Order

The second jurisdictional question presented by this appeal is whether the statutory requirement to attach a copy of the relevant commitment order to a habeas petition is jurisdictional—that is, whether the failure to attach a copy of the commitment order to a habeas petition prevents a court from exercising jurisdiction over that petition. Under § 29-2801, when an individual makes an application for a writ of habeas corpus "to any one of the judges of the district court," he or she must "produce to such judge a copy of the commitment or cause of detention of such person."

The State argues that we previously decided this issue in *Gallion v. Zinn*, 236 Neb. 98, 459 N.W.2d 214 (1990). It alleges that in that case, we held that "the failure to attach a copy of the commitment is jurisdictional." See brief for appellee at 6. But we do not agree.

In *Gallion v. Zinn, supra*, Donnelle Gallion, an individual confined at the Lincoln Regional Center, filed a pro se petition for a writ of habeas corpus but did not provide a copy of his commitment or detention order. The lower court held a hearing on the petition and then dismissed it for the reason that the petition failed to state facts that would entitle Gallion to habeas relief. On appeal, within a broader discussion of whether Gallion's petition showed legal cause for habeas relief, we considered the effect of his failure to provide a copy of the commitment order. We concluded (1) that under § 29-2801, Gallion was "required to produce for the district court a copy of the order under which [he] was committed to and detained in the Lincoln Regional Center" and (2) that the "absence of the statutorily required copy of the commitment and detention order . . . prevented the district court from proceeding to the relief sought by Gallion's habeas corpus action." See *Gallion v. Zinn*, 236 Neb. at 100, 459 N.W.2d at 215. Accordingly, we found that Gallion's petition was properly dismissed.

At no point in *Gallion v. Zinn, supra*, did we discuss or mention jurisdiction. Moreover, we ultimately affirmed the dismissal of Gallion's petition for failure to allege facts which entitled him to relief. If we had concluded, as the State suggests, that the district court lacked jurisdiction over Gallion's petition due to the lack of a commitment order, we would not have affirmed the lower court's dismissal, which constituted a judgment on the petition. Therefore, we reject the State's argument that in *Gallion v. Zinn, supra*, we held that the failure to attach a copy of the commitment is jurisdictional.

[10] The State cites to no other cases which would lead us to conclude that the failure to attach a copy of the relevant commitment order to a petition for a writ of habeas corpus prevents a court from exercising jurisdiction over that petition. Indeed, in prior cases where a commitment order was not provided as part of the habeas petition, we have considered the merits of the petition and affirmed the lower court's dismissal on nonjurisdictional grounds. See, *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999); *Gallion v. Zinn, supra*.

The Court of Appeals has likewise considered the merits of a habeas petition which did not include a commitment order. See *Tyler v. Warden, Nebraska State Prison*, No. A-02-295, 2003 WL 21398153 (Neb. App. June 17, 2003) (not designated for permanent publication). Moreover, most states with statutory requirements similar to § 29-2801 do not treat compliance with such requirements as jurisdictional. See, *Nguyen v. State*, 282 Ga. 483, 651 S.E.2d 681 (2007), *overruled on other grounds, Brown v. Crawford*, 289 Ga. 722, 715 S.E.2d 132 (2011); *State ex rel. v. Adult Parole*, 80 Ohio St. 3d 639, 687 N.E.2d 761 (1998); *People ex rel. Negron v. Herold*, 33 A.D.2d 1076, 307 N.Y.S.2d 710 (1970); *State ex rel. Hansen v. Utecht*, 230 Minn. 579, 40 N.W.2d 441 (1950); *State ex rel. Chase v. Calvird*, 324 Mo. 429, 24 S.W.2d 111 (1930); *In the Matter of Beard*, 4 Ark. 9 (1842); *In re Spates*, No. 14-14-00524-CV, 2014 WL 3051311 (Tex. App. July 3, 2014) (unpublished). But see *Evans v. Dist. Ct.*, 194 Colo. 299, 572 P.2d 811 (1977). Consequently, we conclude that the failure to attach a copy of the relevant commitment order to a petition for a writ of habeas corpus does not prevent a court from exercising jurisdiction over that petition.

O'Neal's failure to provide a copy of the commitment order is raised by the State solely within the context of jurisdiction. The State does not argue that such failure rendered his petition insufficient or otherwise precluded him from obtaining habeas relief. Therefore, we do not consider whether there are nonjurisdictional consequences to failing to attach a copy of the relevant commitment order to a petition for a writ of habeas corpus, because such issues are not before us.

2. Denial of Habeas Petition

[11] Because the district court had jurisdiction, it erred insofar as it assigned lack of jurisdiction as the reason for denying O'Neal's habeas petition. However, "[a] proper result will not be reversed merely because it was reached for the wrong reason." See *In re Estate of Odenreider*, 286 Neb. 480, 490, 837 N.W.2d 756, 765 (2013). We must, therefore, consider whether the district court properly denied O'Neal's petition. We conclude that it did.

[12-14] A writ of habeas corpus in this state is quite limited in comparison to those of federal courts, which allow a writ of habeas corpus to a prisoner when he or she is in custody in violation of the federal Constitution, law, or treaties of the United States. *Peterson v. Houston*, 284 Neb. 861, 824 N.W.2d 26 (2012). Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction. *Id.* Only a void judgment may be collaterally attacked. *Id.* "'If the court has jurisdiction of the person of the accused and of the crime charged in the information[,] and does not exceed its lawful authority in passing sentence, its judgment is not void[,] whatever errors may have preceded the rendition thereof.'" *Hickman v. Fenton*, 120 Neb. 66, 70, 231 N.W. 510, 512 (1930). Thus, a writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose. *Peterson v. Houston, supra.*

[15] O'Neal claimed that he was entitled to habeas relief, because the information on which he was convicted incorrectly identified the victim of counts I and II. Although he attempted to connect this alleged default to the legality of his imprisonment under the 5th and 14th Amendments, he did not argue that the information's alleged error deprived the trial court of jurisdiction. Neither did he argue that it was not within the power of the sentencing court to impose the sentences which he received. Therefore, O'Neal did not raise an issue which could be addressed in a writ of habeas corpus proceeding in Nebraska. A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose. *Peterson v. Houston, supra.*

To the extent the district court assigned lack of jurisdiction as the reason for denying O'Neal's petition, it erred. But the court also concluded that if it had jurisdiction, O'Neal was not entitled to relief. Because the record adequately demonstrates that the decision of the district court dismissing the petition was correct, we affirm.

VI. CONCLUSION

For the foregoing reasons, we affirm the order of the district court which denied O'Neal's petition for a writ of habeas corpus.

AFFIRMED.

CASSEL, J., concurring.

Although I agree that the district court had jurisdiction of the application for writ of habeas corpus, O'Neal failed to identify the person or persons who were allegedly illegally detaining him. In my opinion, the district court should have summarily denied the application at the outset.

Habeas corpus, under statutes like our own, is a special proceeding, civil in character, providing a summary remedy open to persons illegally detained.[1] Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose.[2] Such a judgment is not void. Habeas corpus cannot be used as a substitute for a writ of error.[3] Habeas corpus is a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing a defendant.[4]

The writ must be "directed to the proper officer, person or persons who detains such prisoner."[5] If the writ is issued, the "officer or person to whom such writ shall be directed" is dutybound to "convey the person or persons so imprisoned or detained and named in such writ, before the judge allowing the same, . . . and to make due return of the writ."[6]

The application failed to name any person to whom the writ might have been directed. The application must be made to the

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[1] *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944).

[2] *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946).

[3] *Id.*

[4] *Id.*

[5] Neb. Rev. Stat. § 29-2801 (Reissue 2008).

[6] Neb. Rev. Stat. § 29-2802 (Reissue 2008).

judge "by oath or affirmation."[7] Without the name of any officer (or perhaps even a "John Doe" designation of some officer identified by means of the office he or she held), the application wholly failed to support issuance of a writ.

But instead of simply denying the writ, the district court, without any citation to authority under the habeas corpus statutes, directed the State to file a response. At this point, the court ceased to follow the procedure dictated by the habeas corpus statutes and basically made up its own procedure. It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it, and if it fails to state a cause of action, the court must enter an order denying a writ.[8] If the district court had simply followed the statutory procedure and summarily denied the writ for failure to comply with the statutes, this appeal would have been very straightforward. And this court would have had no need to discuss jurisdiction, venue, waiver, and the requirement to attach a copy of the commitment.

I do not disagree with the majority's reasoning or conclusion or the law that it cites. The district court's irregular procedure introduced complexity into an otherwise simple process. I write separately to encourage trial courts not to follow the trail blazed by the court below, but, rather, to adhere to the simple statutory procedure.

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[7] § 29-2801.

[8] See *Dixon v. Hann*, 160 Neb. 316, 70 N.W.2d 80 (1955).

STATE OF NEBRASKA, APPELLANT, V.
RENAE K. WARNER, APPELLEE.
863 N.W.2d 196

Filed May 22, 2015. No. S-14-345.

1. **Jurisdiction: Appeal and Error.** An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.
2. ____: ____. 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. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
4. ____: ____: ____: ____. Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) grants the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review. Strict compliance with § 29-2315.01 is required to confer jurisdiction.
5. **Prosecuting Attorneys: Final Orders: Appeal and Error.** By its language, Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) clearly requires that an error proceeding cannot be brought until after a "final order" has been entered.
6. **Criminal Law: Final Orders.** A judgment entered during the pendency of a criminal cause is final when no further action is required to completely dispose of the cause pending.
7. **Prosecuting Attorneys: Final Orders: Appeal and Error.** The test of finality of an order or judgment for the purpose of appeal under Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) is whether the particular proceeding or action was terminated by the order or judgment.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Appeal dismissed.

Joe Kelly, Lancaster County Attorney, Ryan Mick and Richard Grabow, and Meridith Wailes, Senior Certified Law Student, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The State filed this appeal as an error proceeding pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). In this criminal case, Renae K. Warner was charged with two felony counts of theft by deception, Neb. Rev. Stat. § 28-512 (Reissue 2008). The information alleged that Warner had written 55 bad checks on an account at one bank, constituting one felony count, and 23 bad checks on an account at a second bank, constituting the second felony count. Based on its reading of § 28-512, the district court for Lancaster County reasoned that the State should have aggregated all of

the alleged incidents into a single count of theft by deception rather than charging two separate counts and, therefore, sustained Warner's motion to quash the information. Although it sustained the motion to quash, the court gave the State 7 days to file an amended information. Instead of filing an amended information within that time, the State filed an application to docket error proceedings.

A threshold issue in this appeal is whether, under § 29-2315.01, the State may appeal an order which sustained a motion to quash but allowed the State time to file an amended information. We conclude that because there was no final order, the State may not take an appeal under § 29-2315.01 and we lack jurisdiction to consider this error proceeding. We therefore dismiss this appeal.

STATEMENT OF FACTS

The State filed an information against Warner in which it alleged that she had committed theft by deception in violation of § 28-512 when she wrote numerous bad checks drawn on accounts at two different banks. The State charged Warner with two counts of theft by deception—one count related to checks drawn on the first bank and a second count related to checks drawn on the second bank. The State alleged that each count involved over $1,500 and was therefore a separate Class III felony under Neb. Rev. Stat. § 28-518(1) (Cum. Supp. 2014).

Warner filed a motion to quash and asserted that the State had inappropriately charged the incidents as two counts. She argued that pursuant to § 28-518(7), the allegations should have been charged as one offense. Section 28-518(7) provides: "Amounts taken pursuant to one scheme or course of conduct from one or more persons may be aggregated in the indictment or information in determining the classification of the offense, except that amounts may not be aggregated into more than one offense."

The district court sustained Warner's motion to quash and provided its rationale. The court explained that prior to an amendment that was effective August 30, 2009, § 28-518(7) did not refer to "one or more persons" and instead it referred

to "[a]mounts taken pursuant to one scheme or course of conduct from one person." The court stated that the amended language "has to mean something," and the court therefore concluded that the allegations in this case could not be charged as more than one offense even though the allegations involved two different banks. In its order filed April 10, 2014, the court sustained Warner's motion to quash, but the court further stated that the State "is given 7 days to file an Amended Information, if it chooses to do so." The court set arraignment on any amended information for April 28 and ordered Warner to appear. No party sought dismissal, and the district court did not dismiss the case.

The State did not file an amended information. Instead, on April 17, 2014, the State filed an application for leave to docket an appeal of the April 10 order pursuant to § 29-2315.01. On April 17, the district court signed off on the application, stating that it found that the application had been timely filed and was in conformity with the truth. The court further found that the part of the record that the State proposed to present on appeal was adequate for a proper consideration of the matter. The State filed the application with the Nebraska Court of Appeals on April 18.

On May 21, 2014, the Court of Appeals granted the State's application for leave to docket error proceedings. Thereafter, we moved the case to our docket on our own motion. Warner moved this court to dismiss the appeal for the reason that the district court's ruling was not a final order and we lacked jurisdiction. We overruled Warner's motion for summary dismissal without prejudice to future dismissal for lack of jurisdiction. We allowed both parties the opportunity to address the jurisdictional issue in their briefs. As discussed below, we find the jurisdictional issue to be dispositive and dismiss this appeal.

ASSIGNMENT OF ERROR

The State claims that the district court erred when it sustained Warner's motion to quash and argues that it properly charged Warner with two counts of theft by deception because she engaged in two separate schemes.

STANDARD OF REVIEW

[1] An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law. *State v. Smith*, 288 Neb. 797, 851 N.W.2d 665 (2014).

ANALYSIS

[2] 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. *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014). Therefore, we first consider Warner's argument that the April 10, 2014, order was not a final order from which the State could properly bring an error proceeding. We agree with Warner that there was no final order as required under § 29-2315.01, and we therefore conclude that we do not have jurisdiction to consider this error proceeding and dismiss this appeal.

[3,4] In the absence of specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Penado*, 282 Neb. 495, 804 N.W.2d 160 (2011). Section 29-2315.01 grants the State the right to seek appellate review of adverse criminal rulings and specifies the special procedure by which to obtain such review. *State v. Penado, supra*. This court has consistently maintained that strict compliance with § 29-2315.01 is required to confer jurisdiction. *State v. Penado, supra*.

[5] Section 29-2315.01 generally provides that a prosecuting attorney may take exception to a ruling or decision by presenting to the trial court an application for leave to docket an appeal and, then, after the trial court has made certain determinations, presenting the application to the appellate court. With regard to the time for presenting the application to the respective courts, §29-2315.01 provides that the "application shall be presented to the trial court within twenty days *after the final order is entered* in the cause" and that "[t]he prosecuting attorney shall then present such application to the appellate court within thirty days *from the date of the final order*." (Emphasis supplied). By its language, the statute clearly requires that an error proceeding cannot be brought until after a "final order" has been entered.

[6,7] In considering the final order requirement in the context of § 29-2315.01, we have stated the following: "A judgment entered during the pendency of a criminal cause is final when no further action is required to completely dispose of the cause pending." *State v. Penado*, 282 Neb. at 500, 804 N.W.2d at 164. The test of finality of an order or judgment for the purpose of appeal is whether the particular proceeding or action was terminated by the order or judgment. *Id.*

The Nebraska appellate courts have previously concluded in several cases that jurisdiction over error proceedings brought under § 29-2315.01 was lacking when the State appealed from an order that was not a final order. For example, in *State v. Penado, supra*, we concluded that we lacked jurisdiction when the State attempted to appeal from an order in which the district court found that the defendant was not competent to stand trial; we reasoned that because the order did not terminate the proceedings and further action was required to completely dispose of the cause, the order was not a final order as required by § 29-2315.01. In *State v. Wieczorek*, 252 Neb. 705, 565 N.W.2d 481 (1997), we concluded that we were without jurisdiction to consider an error proceeding because, although the trial court directed verdict on three of four counts, the defendant was convicted of the fourth count and sentencing had not yet occurred on that count when the State filed its application for leave to docket an appeal. See, also, *State v. Coupens*, 20 Neb. App. 485, 825 N.W.2d 808 (2013) (order granting defendant's motion to dismiss one of two counts on speedy trial grounds not final order from which State could take error proceedings, because second count still pending and order did not dispose of action).

In the present case, the district court filed an order on April 10, 2014, in which it sustained Warner's motion to quash but stated that the State "is given 7 days to file an Amended Information, if it chooses to do so." In the order, the court also set arraignment on any amended information for April 28 and ordered Warner to appear. Within 20 days after the April 10 order, the State presented to the district court an application for leave to docket an appeal of the April 10 order, and within 30 days of the order, the State presented the

application to the Court of Appeals. Therefore, if the April 10 order was a final order, the State met the time requirements of § 29-2315.01.

We determine on this record, however, that because further action was required to completely dispose of the cause in the district court, the April 10, 2014, order did not terminate the proceedings below and was not a final order for purposes of § 29-2315.01. The court sustained Warner's motion to quash but allowed the State time to amend the information. No party sought dismissal, and the district court did not dismiss the case, a circumstance upon which we have previously commented. In *Dobrusky v. State*, 140 Neb. 360, 363, 299 N.W. 539, 541 (1941), the district court filed an order in which it sustained the defendant's motion to quash the information, but "the trial court neither dismissed the proceedings nor discharged the defendant." This court found the situation "to be analogous to sustaining a general demurrer in a civil case, not followed by the dismissal of the action" and noted that "it clearly appears from the record presented that the district court by the limitations of its order has, in effect, retained jurisdiction to have a disposal of this case made on the merits in the regular course of proceedings." *Id*. This court concluded that "it cannot be said that the mere sustaining of the motion to quash operated as a discharge of the defendant by due course of law, when the trial court refrained from entering such a judgment." *Id*. Applying the principles to which reference is made in *Dobrusky* to the present case, the April 10 order was not a final order.

We have recently reached a similar conclusion with respect to a civil case. In *Nichols v. Nichols*, 288 Neb. 339, 346-47, 847 N.W.2d 307, 313-14 (2014), we stated that "no appeal can be taken from an order that grants a motion to dismiss a complaint but allows time in which to file an amended complaint." We reasoned in *Nichols* that "such a conditional order is not a judgment" and therefore not a final judgment for purposes of determining whether the order is appealable. *Id*. at 347, 847 N.W.2d at 314. The appeal in *Nichols* was dismissed.

In the present case, not only did the district court in the April 10, 2014, order refrain from dismissing the action, the

court affirmatively allowed the State time to file an amended information and scheduled a date for an arraignment on any amended information that might be filed. Furthermore, the record reveals that after the State filed its application for error proceedings, the district court held a hearing at which counsel for both parties were present and thereafter filed an order stating that further proceedings in the district court were stayed pending resolution of the State's error proceeding.

It therefore cannot be said that the April 10, 2014, order terminated the proceedings in this case or that no further action was required to completely dispose of the cause pending in the district court. According to the record, the court contemplated further proceedings, and the court stayed proceedings pending resolution of this appeal. We therefore determine that the April 10 order was not a "final order" within the meaning of § 29-2315.01, and we conclude that we lack jurisdiction to consider the error proceeding brought by the State.

For completeness, we note that the State suggests that even if we conclude that the district court's order of April 10, 2014, is not a final order under § 29-2315.01, we should nevertheless consider the substance of this appeal, because the issue the State raises could evade review. The State cites the Nebraska Supreme Court's decision in *State v. Bourke*, 237 Neb. 121, 464 N.W.2d 805 (1991), in which the State appealed an order in which the district court sustained in part a motion to quash an information and declared unconstitutional a part of the statute pursuant to which the defendant was being charged. In *Bourke*, the Nebraska Supreme Court stated: "Although it is possible that this issue is not appealable as a final order at this time, we consider it, since in its posture it could evade review at a later time." 237 Neb. at 122, 464 N.W.2d at 806. The State asserts that the issue it raises in this appeal regarding whether crimes can be separately charged under § 28-512 could similarly evade review.

We do not accept the State's suggestion that we consider the merits of this appeal notwithstanding the absence of a final order. We do not agree with the State that the substance of its claim would truly "evade review" where the State could still bring an error proceeding to raise the claim after

the prosecution in the instant case is completed and a final order has been entered. While it is possible that the specific defendant in this case could "evade" conviction in the manner in which the State originally charged the defendant, the legal issue could still be reviewed by an appellate court in an error proceeding brought by the State after a final order is entered in this prosecution. And although double jeopardy may prevent the State from retrying this specific defendant if the State's arguments regarding § 28-512 succeed on appeal and the exception is sustained, we have recognized that "[t]he purpose of appellate review pursuant to § 29-2315.01 is to provide an authoritative exposition of the law to serve as precedent in future cases." *State v. Figeroa*, 278 Neb. 98, 101, 767 N.W.2d 775, 779 (2009).

We are aware that this court has recognized a public interest exception to the mootness doctrine when an issue might otherwise evade appellate review. See, e.g., *In re Interest of Elizabeth S.*, 282 Neb. 1015, 809 N.W.2d 495 (2012). However, the exception cannot be used to overcome specific statutory limits on an appellate court's jurisdiction, such as the "final order" requirement in §29-2315.01. We therefore disapprove *State v. Bourke, supra*, to the extent it suggests that there are circumstances in which an appellate court may consider the merits of an error proceeding even though the appellate court lacks jurisdiction under § 29-2315.01.

CONCLUSION

We conclude that the April 10, 2014, order was not a final order under § 29-2315.01 and that we lack jurisdiction to consider this error proceeding. We therefore dismiss the State's appeal.

APPEAL DISMISSED.

Paul A. Neun and Crystal A. Neun, appellants, v. John W. Ewing, Jr., Douglas County Treasurer, and Anne M. Determan, appellees.

863 N.W.2d 187

Filed May 22, 2015. No. S-14-623.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
4. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
5. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
6. **Statutes.** Statutes relating to the same subject are in pari materia and should be construed together.
7. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Paul D. Heimann, of Erickson & Sederstrom, P.C., for appellants.

Donald W. Kleine, Douglas County Attorney, and Timothy K. Dolan for appellee John W. Ewing, Jr.

Jeffrey J. Blumel, of Abrahams, Kaslow & Cassman, L.L.P., for appellee Anne M. Determan.

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

WRIGHT, J.

I. NATURE OF CASE

Paul A. Neun and Crystal A. Neun (Appellants) appeal from the order which disposed of their petition for a writ of mandamus against John W. Ewing, Jr., the Douglas County treasurer (Treasurer), and Anne M. Determan, the holder of the tax sale certificate for Appellants' property. Appellants petitioned for such relief after they attempted to redeem their property in the manner prescribed by Neb. Rev. Stat. § 77-1824 (Reissue 2009) and were advised by both the Treasurer and Determan that the only avenue of redemption available to Appellants was Neb. Rev. Stat. § 77-1917 (Reissue 2009), which, unlike § 77-1824, required payment of costs and attorney fees.

Appellants principally challenge the district court's determination that once a foreclosure action was filed, they could not redeem their property under § 77-1824 but had to use the manner of redemption provided in § 77-1917. This determination was the basis for entering summary judgment in the Treasurer's favor. Appellants also challenge the district court's conclusion that Determan did not owe them a duty to return the amount they paid in costs and attorney fees under § 77-1917. Because we find no error in either regard, we affirm.

II. SCOPE OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3,4] A district court's grant of a motion to dismiss is reviewed de novo. *SID No. 1. v. Adamy*, 289 Neb. 913, 858 N.W.2d 168 (2015). When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which

are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion. *Id.*

[5] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Id.*

III. FACTS

This case involves a parcel of real estate located in Douglas County, Nebraska, and owned by Appellants. Hereinafter, this real estate will be referred to as "the property."

On March 1, 2010, at a public tax sale, the property was sold to Determan for delinquent taxes. On that same day, a tax sale certificate for the property was issued to Determan.

On August 30, 2013, pursuant to Neb. Rev. Stat. § 77-1902 (Reissue 2009), Determan timely filed an action in the district court for Douglas County to foreclose the tax lien represented by the tax sale certificate. Determan prayed that the property be sold to pay the amount due under the tax sale certificate, plus interest, as well as costs and attorney fees. Appellants and various junior lienholders were named as defendants in the complaint, and they were served accordingly.

On October 9, 2013, Appellants attempted to redeem their property pursuant to § 77-1824 by tendering the balance due under the tax sale certificate to the Treasurer. The Treasurer rejected Appellants' tender, advised them that § 77-1824 was "not relevant to [their] situation," and directed them to contact Determan for information on the proper way to redeem the property. This started a debate between Appellants and Determan concerning the proper method of redemption. Appellants claimed that they were entitled to redeem their property pursuant to § 77-1824, which did not require payment of costs or attorney fees, and that they could make the necessary payment to the Treasurer. Conversely, Determan argued that because a foreclosure action had been filed, Appellants' exclusive method of redemption was § 77-1917.

Appellants ultimately paid Determan the amount required by § 77-1917, because they felt that they had "no other avenue

to redeem" the property and they did not want to "lose their home." Upon receipt of this payment, Determan moved to dismiss her foreclosure action with prejudice, which motion the district court sustained.

On the day the foreclosure action was dismissed, Appellants petitioned the district court in a separate action for a writ of mandamus ordering the Treasurer and Determan to accept redemption of the property pursuant to § 77-1824. Appellants alleged (1) that they had a "statutory, non-judicial right to redeem a tax certificate through the Treasurer under . . . § 77-1824 . . . whether or not there [was] a foreclosure action pending"; (2) that the Treasurer had a "ministerial duty to accept funds for purposes of redemption under . . . § 77-1824"; (3) that Determan was an agent of the Treasurer and thus had a "ministerial duty to honor a redemption tendered pursuant to . . . § 77-1824"; and (4) that Appellants had "no adequate remedy at law[,] because [the Treasurer and Determan] refuse[d] to allow [Appellants] to redeem through [the] Treasurer as requested." Appellants prayed for a writ of mandamus directing the Treasurer and Determan to complete redemption of the property in the manner prescribed by § 77-1824. Appellants also requested that the funds which Appellants had paid Determan be applied to the redemption under § 77-1824 and that the amount they had paid in costs and attorney fees be refunded.

In response, Determan moved to dismiss for failure to state a claim. The Treasurer and Appellants each moved for summary judgment.

After a hearing, the district court overruled Appellants' motion and entered judgment in favor of the Treasurer. Relying upon *Brown v. Glebe*, 213 Neb. 318, 328 N.W.2d 786 (1983), and the language of §§ 77-1824 and 77-1917, the court concluded that as the holder of a tax sale certificate, Determan could choose between "two distinct methods to satisfy tax certificates," and that Appellants were "bound" by her choice to pursue foreclosure. Accordingly, the court rejected Appellants' argument that they could "choose how to redeem their property." It held that as a matter of law, once Determan filed a foreclosure action, Appellants could not

redeem their property under § 77-1824, and that the exclusive method for Appellants to redeem their property was pursuant to § 77-1917.

The district court sustained Determan's motion to dismiss for failure to state a claim. It found that Determan was not the proper subject of a mandamus action, because "she is an individual and has no duty to [Appellants]."

Appellants timely appeal. 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

Appellants assign, restated, that the district court erred (1) in concluding that after the holder of a tax sale certificate files a foreclosure action, § 77-1917 is the exclusive remedy of redemption, and (2) in dismissing Determan as an improper party to a mandamus action.

V. ANALYSIS

There are two issues presented by this appeal: (1) whether the owner of property sold at a tax sale can redeem such property under § 77-1824 after the holder of the tax sale certificate has filed a judicial foreclosure action pursuant to § 77-1902 and (2) whether the district court erred in dismissing Determan from the case. We address each in turn.

1. Redemption While Judicial Foreclosure Is Pending

(a) Legal Background

We begin our analysis with an overview of the statutory scheme relating to tax sales. At the time Appellants filed their mandamus action, Neb. Rev. Stat. § 77-1837.01 (Cum. Supp. 2012) provided that all proceedings based on a tax sale certificate were governed by the laws in effect when such certificate was issued. Accordingly, in the instant appeal, we refer to the statutes in effect on March 1, 2010.

Under Neb. Rev. Stat. § 77-1801 et seq. (Reissue 2009), any real property on which taxes have not been paid in full

by the first Monday of March can be sold by the county treasurer for the amount of taxes due, plus interest and costs. "As a general matter, when a county treasurer sells real property for delinquent taxes, the purchaser receives a 'tax certificate,' but the owner of the property can redeem the property by paying the delinquent taxes plus interest." *SID No. 424 v. Tristar Mgmt.*, 288 Neb. 425, 435, 850 N.W.2d 745, 752 (2014).

There are two processes through which the holder of a tax sale certificate (hereinafter holder) can obtain a deed to the property purchased at a tax sale. See *SID No. 424*, *supra*. "Under chapter 77, article 18, [of the Nebraska Revised Statutes,] the holder . . . can obtain a tax deed from the county treasurer, after having given proper notice . . . ." See *SID No. 424*, 288 Neb. at 428, 850 N.W.2d at 748. Alternatively, under "chapter 77, article 19, [of the Nebraska Revised Statutes,] the holder . . . can foreclose upon the tax lien in a court proceeding and compel sale of the property, yielding a sheriff's deed, under . . . § 77-1902." See *SID No. 424*, 288 Neb. at 428, 850 N.W.2d at 748. "The former method is sometimes referred to as the 'tax deed' procedure and is authorized by § 77-1837, and the latter is sometimes referred to as a 'judicial foreclosure' and is governed by § 77-1901 et seq." See *SID No. 424*, 288 Neb. at 436, 850 N.W.2d at 752-53. The choice between these two procedures rests with the holder. See §§ 77-1837 and 77-1902.

Whatever process the holder elects to pursue, he or she must exercise his or her rights in the property within a specific period of time. Under § 77-1837, the holder must request a treasurer's tax deed "within six months after the expiration of three years from the date of sale." If the holder waits longer than 3 years 6 months from the sale, the tax sale certificate "ceases to be valid and the lien of taxes for which the property was sold is discharged." See *INA Group v. Young*, 271 Neb. 956, 960, 716 N.W.2d 733, 737 (2006). See, also, § 77-1856. Similarly, under § 77-1902, the holder can bring an action to judicially foreclose upon a tax lien only "within six months after the expiration of three years from the date of sale." A foreclosure action brought outside of this 6-month

period will be time barred. See *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997).

Timely redemption by the property owner prevents the holder from acting on the tax sale certificate under either the tax deed procedure or judicial foreclosure. If the property has been redeemed, the county treasurer cannot issue a treasurer's tax deed to the holder. See § 77-1837. Similarly, if there has been redemption, the foreclosure action is required to be dismissed. See § 77-1917(2).

Sections 77-1824 and 77-1917 provide separate procedures, requirements, and time limits for redeeming property. Section 77-1824 states:

> The owner or occupant of any real property sold for taxes or any person having a lien thereupon or interest therein may redeem the same at any time before the delivery of tax deed by the county treasurer by paying the county treasurer . . . the sum mentioned in his or her certificate, with interest thereon at the rate specified in section 45-104.01 . . . from the date of purchase to date of redemption, together with all other taxes subsequently paid . . . and interest thereon at the same rate from date of such payment to date of redemption.

Section 77-1917 provides as follows:

> (1) Any person entitled to redeem real property may do so at any time prior to the institution of foreclosure proceedings by paying the county treasurer . . . the sum mentioned in his or her certificate, with interest thereon at the rate specified in section 45-104.01 . . . from the date of purchase to the date of redemption, together with all other taxes subsequently paid . . . and interest thereon at the same rate from the date of such payment to the date of redemption.
>
> (2) Any person entitled to redeem real property may do so at any time after the decree of foreclosure and before the final confirmation of the sale by paying to the clerk of the district court the amount found due against the property, with interest and costs to the date of redemption . . . . During the pendency of a foreclosure action any person entitled to redeem any lot or

> parcel may do so by paying to the court the amount due with interest and costs, including attorney's fees, provided for in section 77-1909, if requested in the foreclosure complaint.

(b) Application

The question presented is whether the owner of property sold at a tax sale may use the procedure under § 77-1824 to redeem the property after the holder has filed a judicial foreclosure action pursuant to § 77-1902. The district court concluded that redemption under § 77-1824 was not permitted after a judicial foreclosure action had been filed, and we agree.

As stated above, there are two statutory procedures through which the holder can convert a tax sale certificate into a deed, one authorized by chapter 77, article 18, and the other authorized by chapter 77, article 19. See *SID No. 424 v. Tristar Mgmt.*, 288 Neb. 425, 850 N.W.2d 745 (2014). "Although the overall objective of both procedures is the recovery of unpaid taxes on real property, these [procedures] 'are two separate and distinct methods for the handling of delinquent real estate taxes'" which are "neither comparable nor fungible." See *id.* at 436, 850 N.W.2d at 753. Consequently, we have held that "'the provisions of Chapter 77, article 18, are not interchangeable with the provisions of Chapter 77, article 19.'" See *SID No. 424*, 288 Neb. at 436, 850 N.W.2d at 753. See, also, *Brown v. Glebe*, 213 Neb. 318, 328 N.W.2d 786 (1983).

It necessarily follows from the fact that the provisions of chapter 77, articles 18 and 19, are not interchangeable that once the holder has elected to proceed under chapter 77, article 19, the provisions of such article govern the rights of the parties in relation to the tax sale certificate. In other words, after the election to proceed by judicial foreclosure has been made, both the holder and the property owner are bound by that election.

By filing a judicial foreclosure action, the holder has elected to proceed under chapter 77, article 19. See § 77-1902. But the method of redemption provided in § 77-1824 is not contained in chapter 77, article 19. We thus conclude that once a judicial

foreclosure action has been filed, § 77-1824 cannot be used to redeem the property.

This conclusion is consistent with the plain language of § 77-1902. Section 77-1902 explicitly provides that judicial foreclosure actions should proceed "in the same manner and with like effect as in the foreclosure of a real estate mortgage, *except as otherwise specifically provided by sections 77-1903 to 77-1917*." (Emphasis supplied.) Section 77-1917 establishes a method of redemption distinct from that available in the foreclosure of real estate mortgages. See Neb. Rev. Stat. § 25-1530 (Reissue 2008). Therefore, § 77-1902 requires an individual to act pursuant to § 77-1917 in order to redeem property during the pendency of a foreclosure action.

[6] But instead of looking to the plain language of § 77-1902, Appellants focus on § 77-1824. They argue that § 77-1824 does not include any language which expressly prohibits a property owner from using this method of redemption during the pendency of foreclosure proceedings. However, the language of a statute is not interpreted in isolation. "[S]tatutes relating to the same subject are in pari materia and should be construed together." *Alisha C. v. Jeremy C.*, 283 Neb. 340, 353, 808 N.W.2d 875, 885 (2012). And when §§ 77-1824, 77-1902, and 77-1917 are read together, it is clear that the method of redemption in § 77-1824 was not intended to apply once judicial foreclosure has commenced.

In support of their argument, Appellants also rely on *KLH Retirement Planning v. Cejka*, 3 Neb. App. 687, 530 N.W.2d 279 (1995). In *KLH Retirement Planning*, the owners of property sold at a tax sale waited until a foreclosure action had been filed and then attempted to redeem their property under § 77-1824. They tendered payment of the taxes and interest due to the county treasurer, who issued them a certificate of redemption. The treasurer in turn tendered the redemption proceeds to the holder, who rejected the tender. Thereafter, the property owners filed an answer in the foreclosure action, claiming that they had redeemed their property by tendering payment of the taxes due to the county treasurer. The holder disagreed and argued that redemption was not allowed by law while a foreclosure action was pending.

The lower court found as a matter of law that the property owners could not redeem their property on the date they tendered payment to the county treasurer. It calculated the amount owed on the tax sale certificate with interest, costs, and attorney fees and ordered that the property be sold unless such amount was satisfied within 20 days of the decree.

On appeal, the Nebraska Court of Appeals considered a single issue: whether the property owners could redeem their property after the holder filed a foreclosure action. The holder had argued that redemption under § 77-1917 was not allowed while a foreclosure action was pending, because the statute only mentioned redemption after foreclosure and before confirmation. The Court of Appeals rejected this argument, concluding that redemption was permitted while a foreclosure action was pending. It reversed the order of the district court and remanded the cause for further proceedings on the property owners' tender to the county treasurer.

In its opinion in *KLH Retirement Planning, supra*, the Court of Appeals did not explicitly hold that the property owners were allowed to redeem their property under § 77-1824 while the foreclosure action was pending. It did not consider by what manner redemption was permitted during a foreclosure action, only whether it was permitted. However, its remand to the lower court for further proceedings on the property owners' tender could be interpreted as permitting owners of property sold at a tax sale to redeem their property under § 77-1824 after a foreclosure action was filed.

Under § 77-1917, the owners of property sold at a tax sale cannot redeem their property under § 77-1824 after a foreclosure action has been filed. Therefore, to the extent the Court of Appeals' opinion in *KLH Retirement Planning, supra*, can be interpreted as authorizing redemption under § 77-1824 after a foreclosure action has been filed, such interpretation is expressly disapproved.

The district court did not err in its determination that once a foreclosure action was filed, Appellants could not redeem their property under § 77-1824 but were required to use the manner of redemption provided in § 77-1917. Appellants' first assignment of error lacks merit.

2. Dismissal of Determan

In their second assignment of error, Appellants challenge the district court's decision to sustain Determan's motion to dismiss for failure to state a claim. Specifically, they argue that the court erred in its determination that Determan owed no duty to Appellants and thus was an improper party to a mandamus action.

[7] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face. *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013). Appellants' claim against Determan rested entirely on the presumption that after Determan initiated judicial foreclosure proceedings, they were still entitled to redeem their property in the manner prescribed by § 77-1824. For the reasons explained above, that presumption was erroneous. As a matter of law, once the foreclosure action was pending, Appellants could not redeem their property under § 77-1824. As such, Appellants' claim against Determan was not plausible on its face. The district court did not err in dismissing the complaint against Determan for failure to state a claim.

VI. CONCLUSION

For the foregoing reasons, we affirm the order of the district court which entered summary judgment in favor of the Treasurer and sustained Determan's motion to dismiss for failure to state a claim.

Affirmed.

Bruce R. Friedman, appellant, v.
Susan C. Friedman, appellee.
863 N.W.2d 153

Filed May 22, 2015. No. S-14-710.

1. **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.

2. **Jurisdiction: Pleadings: Parties.** A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.
3. **Service of Process: Waiver.** A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof.
4. **Due Process: Service of Process.** A general appearance waives any due process objection based on inadequate service of process.
5. **Foreign Judgments: Jurisdiction: Collateral Attack.** Under Neb. Rev. Stat. § 25-1587.03 (Reissue 2008) of the Uniform Enforcement of Foreign Judgments Act, collateral attacks on a final, foreign judgment are generally limited to claims that the judgment was void, such as for lack of jurisdiction over the person or the subject matter.
6. **Foreign Judgments: Records.** If the amount of a foreign judgment cannot be ascertained without resorting to facts outside the record of the foreign court, it cannot be registered under the Uniform Enforcement of Foreign Judgments Act.
7. **Divorce: Jurisdiction: Equity.** District courts in domestic dissolution actions retain equitable jurisdiction to determine amounts due under an ambiguous decree.
8. **Foreign Judgments.** The Uniform Enforcement of Foreign Judgments Act has no provision for modification or alteration of a foreign judgment, decree, or order.
9. **Judgments: Appeal and Error.** Whether a judgment is ambiguous is a question of law for which the appellate court has an obligation to reach a conclusion independent from the lower court's conclusion.
10. **Right to Counsel: Effectiveness of Counsel.** A pro se litigant will receive the same consideration as if he or she had been represented by an attorney, and, concurrently, that litigant is held to the same standards as one who is represented by counsel.
11. **Effectiveness of Counsel: Appeal and Error.** Pro se litigants, like any other, may not present issues, arguments, and theories for the first time on appeal.
12. **Appeal and Error.** A lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
13. **Rules of the Supreme Court: Appeal and Error.** Under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014), a party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Bruce R. Friedman, pro se.

Karl Von Oldenburg, of Brumbaugh & Quandahl, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The ex-husband appeals from an order generally overruling his objections to garnishment upon a foreign dissolution decree. The ex-husband asserts that he was not properly notified of the registration of the foreign judgment or of the garnishment, that the court should have declared the amount of the foreign judgment to be lower than what was sought by his ex-wife, and that the court inadequately addressed the percentage of his wages that should be garnished. We affirm.

BACKGROUND

On May 7, 2014, Susan Roggentine, also known as Susan C. Friedman (Roggentine), filed in the district court for Douglas County an affidavit for registration of a foreign judgment. According to the affidavit, Roggentine sought to enforce a total of $160,458.49 awarded in a Colorado dissolution decree against her ex-husband, Bruce R. Friedman. According to the affidavit, the award consisted of $145,243.49, plus $15,215 in court-awarded attorney fees, for a total of $160,458.49.

A certified copy of the decree, dated October 26, 2011, was attached to the affidavit. In the decree, the Colorado court ordered that Friedman pay Roggentine $100,000 in the division of assets and deliver to Roggentine described items of personal property and the title to specified vehicles. The court ordered that Friedman reimburse Roggentine for $45,243.49 that Friedman induced Roggentine to withdraw from her individual retirement account to pay Friedman's nondischargeable debts. The court awarded spousal maintenance in the amount of $2,000 per month for 12 months, but found that Friedman's default on $10,399 in temporary maintenance obligations justified that maintenance be awarded in a lump sum of $34,399. The court ordered Friedman to pay $15,215 in attorney fees and $850 in costs.

In the conclusion of the order, the Colorado court entered judgment in favor of Roggentine in the amount of $34,399, as

of November 1, 2011. The court further ordered Friedman to pay Roggentine $145,243.49 in cash or certified funds within 30 days of the court's order and ordered Friedman to pay the balance of attorney fees in the amount of $15,215 and costs of $850. Mathematically, these listed sums total $195,707.49. The order itself does not purport to set forth a total summation of the various amounts awarded.

The affidavit in support of registration of the foreign judgment set forth as Friedman's last known address the correct house number corresponding to the address where he lived, but the street number stated 188th Street. Friedman actually lived on 118th Street. Accordingly, subsequent to the filing of the foreign judgment, the clerk of the court sent notice to the incorrect address. The notice was returned as undeliverable.

On June 20, 2014, Roggentine filed an affidavit and praecipe for summons in garnishment after judgment. This listed Friedman's correct address and stated that the amount due on the judgment was $160,458.49, plus costs in the amount of $101.12, for a total of $160,559.61. The affidavit set forth that Friedman was not the head of a family for purposes of the percentage of disposable earnings subject to garnishment under Neb. Rev. Stat. § 25-1558 (Reissue 2008).

Roggentine asked that the summons in garnishment be issued by certified mail to Friedman's employer. Friedman's employer received the summons and order of garnishment in aid of execution on June 30, 2014. Although the summons/garnishment order lists the incorrect 188th Street address for Friedman, the certified mail receipts found in the transcript appear to show that it was sent to Friedman via certified mail to the correct address. The record does not reflect Friedman's receipt of that mailing, however.

On July 11, 2014, Friedman filed in the district court a pro se "Ex-Parte Motion to Quash," "Objection to Registration of Foreign Judgment," and "Objection to Garnishment." In the motion, Friedman alleged that he never received notice of the filing of the foreign judgment or of the garnishment until notified by his employer's payroll processor "via regular

postal mail" on July 7, 2013. Friedman alleged he was therefore "neglected of his opportunity" to object to the judgment Roggentine was attempting to register and to object to the garnishment of his wages.

In the motion, Friedman requested a hearing to challenge the allegation that he was not the head of a family for purposes of the garnishment calculation. Friedman also asked that the court quash the garnishment on the grounds that Roggentine had failed to (1) notify the clerk of his proper address when filing the foreign judgment, (2) mail the notice of the garnishment by certified mail to his correct address, and (3) certify to the court that she had complied with Neb. Rev. Stat. § 25-1011 (Cum. Supp. 2014).

Friedman received a hearing on his motion on July 18, 2014. At the hearing, Friedman first complained of the lack of notice and proper service of process. He argued in this regard that Roggentine could not garnish his wages, because she had failed to satisfy the statutory notice requirements. He also indicated his belief that Roggentine had purposefully provided the wrong address.

Second, Friedman challenged the amount of the foreign judgment that was registered, and which served as the basis for the garnishment. Friedman claimed he was obligated to pay only $149,000 under the foreign order. However, Friedman admitted he had made no payments to Roggentine pursuant to that order. Friedman also indicated that the order had been affirmed on appeal.

On this second point, the court—apparently adding up only the amounts awarded on the last page of its conclusion—stated that the order plainly totaled $160,000. Friedman admitted that was "what it says at the bottom of the document." The court responded that because the award was affirmed on appeal, "that's what you're stuck with."

Finally, Friedman explained the reasons he ought to be considered head of a family for purposes of any garnishment. Roggentine's counsel responded that Roggentine did not object to Friedman's being considered head of a family.

There was no indication at the hearing that Friedman had as of that time received a garnished paycheck. Friedman claims in his appellate brief that he had one paycheck garnished on July 14, 2014, at the non-head-of-a-family rate of 25 percent.[1] Neither party offered any exhibits at the hearing.

On August 5, 2014, the court issued the following order: "The Court finds that [Friedman's] objection to the registration of a foreign document and objection to garnishment should be overruled and denied. The Court further finds that [Friedman] is the head of a household." That same date, the court issued an order for continuing lien, which was sent to Friedman's employer. The order stated that "there is not successful objection to garnishment filed." The order for continuing lien does not specify whether Friedman is head of a family. Friedman indicates in his appellate brief that since the August 5 order, his paycheck has been garnished at the maximum head-of-family rate of 15 percent.[2] Friedman appeals.

ASSIGNMENTS OF ERROR

Friedman assigns that the court erred in (1) denying and overruling his objection to the registration of the foreign judgment on the basis that the amount was incorrect, (2) failing to enter a declaratory judgment setting forth the correct amount of the foreign judgment, (3) overruling and denying his objection to the registration of the foreign judgment on the grounds that he was denied notice and due process in relation to the registration of the judgment, (4) allowing a garnishment to proceed when there was no validly registered judgment, (5) overruling and denying his objection to the garnishment and not quashing the garnishment for lack of proper service and on the grounds that he was denied due process and the right to be heard prior to the garnishment of his wages, (6) allowing the garnishment at the maximum allowable level, and (7) failing to rectify the initial amount garnished at the "'not head of household'" level.

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[1] See § 25-1558(1)(a).

[2] See § 25-1558(1)(c).

STANDARD OF REVIEW

[1] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[3]

ANALYSIS

NOTICE

Friedman first argues that the garnishment order should have been set aside, because Roggentine failed to comply with the notice requirements of the statutes governing registration of foreign judgments and garnishments. He relatedly asserts that he was denied due process of law, arguing he was denied an opportunity to be heard on the issue of registering the Colorado judgment and on the amount of the garnishment.

Neb. Rev. Stat. § 25-1587.04 (Reissue 2008), of the Nebraska Uniform Enforcement of Foreign Judgments Act,[4] states that at the time of the filing of the foreign judgment, the judgment creditor or his or her lawyer shall make and file with the clerk of the court an affidavit setting forth the name and last-known post office address of the judgment debtor. The clerk of the court shall thereafter mail notice of the foreign judgment to the judgment debtor at the address given.

Section 25-1011(1), of the attachment and garnishment statutes, states that the summons and order of garnishment and the interrogatories in duplicate, a notice to judgment debtor form, and a request for hearing form shall be served upon the garnishee in the manner provided for service of a summons in a civil action.

Neb. Rev. Stat. § 25-516.01(1) (Reissue 2008) pertains to service of a summons in a civil action. As relevant here, § 25-516.01(1) states that "[t]he voluntary appearance of the party is equivalent to service." Section 25-516.01(2) elaborates that participation in the proceedings on any issue other than the defenses of lack of jurisdiction over the person,

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[3] *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000).

[4] Neb. Rev. Stat. §§ 25-1587.01 to 25-1587.09 (Reissue 2008).

insufficiency of process, or insufficiency of services of process, waives all such issues except as to the objection that the party is not amenable to process issued by a court of this state.

[2,3] We have summarized that a party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.[5] And a general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof.[6]

In his motion and appearance before the lower court at the July 18, 2014, hearing, Friedman did not simply argue that Roggentine failed to properly serve him notice of the registration of the judgment and garnishment. He also argued that the amount of the garnishment was incorrect.

[4] Friedman participated in the proceedings on issues other than the defenses listed under § 25-516.01(2): lack of jurisdiction over the person, insufficiency of process, or insufficiency of services of process. Friedman thus made a general appearance and waived his objections to the statutory provisions relating to jurisdiction over his person.[7] By making a general appearance, Friedman also waived any due process objection based on the inadequate service of process.[8]

Uncertainty of Amount

Friedman alternatively argues that the amount of the Colorado judgment was so uncertain as to be unenforceable. He argues that such unenforceability opened the door to a

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[5] See, *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *Glass v. Nebraska Dept. of Motor Vehicles*, 248 Neb. 501, 536 N.W.2d 344 (1995); *McKillip v. Harvey*, 80 Neb. 264, 114 N.W. 155 (1907).

[6] *Harris v. Eberhardt*, 215 Neb. 240, 338 N.W.2d 53 (1983).

[7] See, *Miller v. Steichen*, 268 Neb. 328, 682 N.W.2d 702 (2004); *Harrold v. Spaghetti Tree, Inc.*, 219 Neb. 139, 362 N.W.2d 44 (1985); *Thornton v. Thornton*, 13 Neb. App. 912, 704 N.W.2d 243 (2005).

[8] See, *U.S. v. Vacant Land*, 15 F.3d 128 (9th Cir. 1993); *Nash v. Salter*, 280 Mich. App. 104, 760 N.W.2d 612 (2008); *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199 (Tex. 1985).

declaratory judgment action in the district court to decide the correct amount of the ambiguous Colorado judgment. He asserts that his July 11, 2014, filing should have been liberally construed as bringing such an action for declaratory relief and that the court should have determined the amount due was only $149,000. Leaving aside whether a declaratory judgment action was properly pled, we find no merit to these arguments.

[5] Under § 25-1587.03, a foreign judgment filed pursuant to the Nebraska Uniform Enforcement of Foreign Judgments Act is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this state and may be enforced or satisfied in like manner. Collateral attacks on a final, foreign judgment are thus generally limited to claims that the judgment was void, such as for lack of jurisdiction over the person or the subject matter.[9]

[6] We indicated in *Cockle v. Cockle*[10] that a foreign judgment may be too uncertain to be enforceable under the Nebraska Uniform Enforcement of Foreign Judgments Act. The foreign judgment at issue in *Cockle* had awarded a percentage of future receipts, and therefore, the amount of the judgment could not be ascertained without resorting to facts outside the record of the foreign court.[11] We held that the judgment could not be registered.[12]

Our holding in *Cockle* is consistent with the general rule of law that a judgment must be sufficiently certain in its terms to be able to be enforced.[13] The judgment must be in such a form that a clerk is able to issue an execution upon it which an officer will be able to execute without requiring external proof and another hearing.[14] A judgment for money must

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[9] See *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999). See, also, e.g., *Harvey v. Harvey*, 6 Neb. App. 524, 575 N.W.2d 167 (1998).

[10] *Cockle v. Cockle*, 204 Neb. 88, 281 N.W.2d 392 (1979).

[11] *Id.*

[12] *Id.*

[13] See *Lenz v. Lenz*, 222 Neb. 85, 382 N.W.2d 323 (1986).

[14] *Id.*

specify with definiteness and certainty the amount for which it is rendered.[15]

[7,8] We have also said that district courts in domestic dissolution actions retain equitable jurisdiction to determine amounts due under an ambiguous decree.[16] But we have never directly addressed whether such jurisdiction can be exercised over a foreign decree pursuant to the Nebraska Uniform Enforcement of Foreign Judgments Act. We have noted in other contexts that the Nebraska Uniform Enforcement of Foreign Judgments Act has no provision for modification or alteration of a foreign judgment, decree, or order.[17]

[9] We need not decide in this case whether a Nebraska court can determine amounts due under an ambiguous foreign dissolution decree, because the Colorado judgment was not ambiguous. Whether a judgment is ambiguous is a question of law for which the appellate court has an obligation to reach a conclusion independent from the lower court's conclusion.[18] Although the Colorado order is lengthy, when read carefully, it is not susceptible of two or more reasonable but conflicting interpretations.[19] The fact that Roggentine and the district court during the hearing apparently failed to add into their calculations the lump-sum maintenance award does not make the judgment ambiguous.

The district court did not err in failing to find the Colorado judgment ambiguous and declare the amount due was $149,000. Likewise, to the extent Friedman attempts to make a separate argument that the Colorado judgment is unenforceable because it cannot be executed without external proof and another hearing, we find no merit to this argument.

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[15] *Id.*

[16] See, *Wilson v. Wilson*, 19 Neb. App. 103, 803 N.W.2d 520 (2011); *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[17] See, *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992); *Riedy v. Riedy*, 222 Neb. 310, 383 N.W.2d 742 (1986).

[18] See *Boyle v. Boyle*, 12 Neb. App. 681, 684 N.W.2d 49 (2004).

[19] See *id.*

Head of Household/Maximum Garnishment

Lastly, Friedman argues that the lower court erred in setting the garnishment at the maximum statutory allowable level when his personal circumstances justified a more moderate garnishment. Furthermore, he argues that the court should have returned to him the amount of the garnishment that occurred at a non-head-of-a-family calculation in the paycheck he received a few days before the hearing.

Neither of these issues were properly presented to the lower court. Friedman never asked the court to remedy the garnishment that had already occurred under the erroneous determination that he was not head of a family, and he never suggested to the district court that the garnishment should be calculated differently for any reason other than the fact that he was head of a family.

[10-12] A pro se litigant will receive the same consideration as if he or she had been represented by an attorney,[20] and, concurrently, that litigant is held to the same standards as one who is represented by counsel.[21] Pro se litigants, like any other, may not present issues, arguments, and theories for the first time on appeal.[22] A lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.[23]

We reject Friedman's claim that he failed to present these issues because the district court did not allow him to. Besides having the freedom to amend his motion, at one point at the hearing when Friedman asked the court if he could "add a couple of other things," the court responded, "Go ahead" and

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[20] *Martin v. Martin*, 188 Neb. 393, 197 N.W.2d 388 (1972).

[21] See *Pope-Gonzalez v. Husker Concrete*, 21 Neb. App. 575, 842 N.W.2d 135 (2013).

[22] See, *Simmons v. Precast Haulers*, 288 Neb. 480, 849 N.W.2d 117 (2014); *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). See, also, *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004); *Stone v. Harry*, 364 F.3d 912 (8th Cir. 2004); *Wolfe Elec., Inc. v. Duckworth*, 293 Kan. 375, 266 P.3d 516 (2011); *State v. McCall*, 754 N.W.2d 868 (Iowa App. 2008).

[23] See *Linda N. v. William N.*, 289 Neb. 607, 856 N.W.2d 436 (2014).

"say whatever you want." While Friedman may have felt discouraged by the court's attitude toward his arguments, there is no evidence in the record that he was precluded from presenting to the court any theory or evidence he wished to present.

The district court did not err in failing to award the alleged improperly calculated garnishment or in failing to consider factors other than Friedman's head-of-household status, because Friedman did not present those issues to the district court.

Cross-Appeal

Roggentine sets forth in her brief a "Cross Assignment of Error," asking that we correct the lower court's order to reflect the correct amount of the Colorado judgment, $195,707.49. Roggentine concedes that neither Roggentine's affidavit for registration of foreign judgment nor her affidavit and praecipe for summons in garnishment sets forth the correct amount of the Colorado judgment and that she did not raise this issue in the hearing below.

[13] Under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014), a party filing a cross-appeal must set forth a separate division of the brief prepared in the same manner and under the same rules as the brief of appellant.[24] Thus, the cross-appeal section must set forth a separate title page, a table of contents, a statement of the case, assigned errors, propositions of law, and a statement of facts.[25]

There is no designation of a cross-appeal on the cover of Roggentine's brief, nor is a cross-appeal set forth in a separate division of the brief as required by our court rules. Therefore, we do not consider the merits of Roggentine's purported cross-appeal.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

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[24] See *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

[25] *Id.*

STATE OF NEBRASKA, APPELLEE, V. SHELLEY L. CASTERLINE, APPELLANT.

863 N.W.2d 148

Filed May 22, 2015. No. S-14-911.

1. **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.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
3. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

Appeal from the District Court for Webster County: STEPHEN R. ILLINGWORTH, Judge. Affirmed.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

The defendant, Shelley L. Casterline, pled guilty to second degree murder and was sentenced to a term of life-to-life imprisonment. Casterline appeals. We affirm.

FACTUAL BACKGROUND

On November 14, 2013, Casterline was charged with first degree murder, use of a weapon to commit a felony, and burglary in connection with the death of Virginia Barone. Pursuant to a plea bargain, on April 22, 2014, Casterline pled guilty to second degree murder, a Class IB felony. On September 30, Casterline was sentenced to "not less than life and not more than life imprisonment," with credit for 353 days' time served.

ASSIGNMENT OF ERROR

On appeal, Casterline assigns, restated and consolidated, that the district court erred in sentencing her to a term of life-to-life imprisonment.

STANDARD OF REVIEW

[1] 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.[1]

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

ANALYSIS

Casterline's argument on appeal is that the district court erred in sentencing her to a life-to-life term of imprisonment. Casterline advances two primary arguments in support of this: (1) that Neb. Rev. Stat § 29-2204 (Cum. Supp. 2014) requires a minimum limit of "any term of years" and that a term of life imprisonment does not qualify and (2) that her sentence violates Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2014), 28-304(2) (Reissue 2008), and § 29-2204.

Section 29-2204 provides in relevant part:

> (1) Except when a term of life imprisonment is required by law, in imposing an indeterminate sentence upon an offender the court shall:
>
> . . . .
>
> [(a)](ii) Beginning July 1, 1998:
>
> (A) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum. If the criminal offense is a Class IV felony, the court shall fix the minimum and maximum limits of the

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[1] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[2] *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013).

> sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term and the maximum limit shall not be greater than the maximum provided by law; or
>
> (B) Impose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law;
>
> (b) Advise the offender on the record the time the offender will serve on his or her minimum term before attaining parole eligibility assuming that no good time for which the offender will be eligible is lost; and
>
> (c) Advise the offender on the record the time the offender will serve on his or her maximum term before attaining mandatory release assuming that no good time for which the offender will be eligible is lost.
>
> If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility or between the statement of the maximum limit of the sentence and the statement of mandatory release, the statements of the minimum limit and the maximum limit shall control the calculation of the offender's term. If the court imposes more than one sentence upon an offender or imposes a sentence upon an offender who is at that time serving another sentence, the court shall state whether the sentences are to be concurrent or consecutive.

Section 28-304(2) classifies the crime of second degree murder as a Class IB felony. And § 28-105 sets forth the minimum and maximum sentences for all classes of felonies, including a Class IB felony. A Class IB felony is subject to imprisonment for 20 years to life.[3]

We have addressed, and rejected, on several occasions Casterline's general contention regarding the permissibility of life-to-life sentences for second degree murder. In *State v.*

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[3] § 28-105(1).

Marrs,[4] we held that "[a]lthough § 29-2204(1)(a)(ii) permits a sentencing judge imposing a maximum term of life imprisonment for a Class IB felony to impose a minimum term of years not less than the statutory mandatory minimum, it does not require the judge to do so." We accordingly held that a life-to-life sentence was permissible.[5] We affirmed this holding in *State v. Moore*[6] and *State v. Abdulkadir*.[7]

[3] In fact, Casterline acknowledges that this is the current state of the law, and instead seeks to have these cases overturned. Casterline argues that this line of cases is based upon our decision in *State v. Schnabel*[8] and its incorrect interpretation of § 29-2204. Casterline also argues both that the Legislature made a mistake when it amended § 29-2204 and that this court need not be bound by the doctrine of legislative acquiescence, because it is a fiction. That doctrine generally holds that "when an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent."[9]

In *Schnabel*, we held that "[w]hen a flat sentence of 'life imprisonment' is imposed and no minimum sentence is stated, by operation of law, the minimum sentence is the minimum imposed by law under the statute."[10] But Casterline argues that the statute we relied upon in *Schnabel*, § 29-2204(1)(a)(ii)(B), applies only where a court imposes a sentence of a "definite term of years" and that life imprisonment, while a flat sentence, is not a term of years. Rather, Casterline contends, we should have relied upon § 29-2204(a)(ii)(A), found the

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[4] *State v. Marrs*, 272 Neb. 573, 578, 723 N.W.2d 499, 504 (2006).

[5] *Id.*

[6] *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

[7] *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

[8] *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000).

[9] *Wetovick v. County of Nance*, 279 Neb. 773, 790-91, 782 N.W.2d 298, 313 (2010).

[10] *Schnabel, supra* note 8, 260 Neb. at 622, 618 N.W.2d at 702.

defendant's sentence in *Schnabel* lacking, and remanded the cause for resentencing.

We decline to overrule our decision in *Schnabel*. Casterline's ultimate contention is based upon the conclusion that a term of life imprisonment is not a term of years. But we effectively found that it was in *Marrs*, *Moore*, and *Abdulkadir*, and we will not now revisit this conclusion.

Even assuming that a life sentence is not a term of years, Casterline's conclusion would lead to a strained reading of § 29-2204(1)(a)(ii)(B); where a flat term of years was given, that subsection would require that the statutory minimum was the minimum term of the sentence. But where a flat term of life imprisonment was given, that sentence would be invalid and require resentencing. This would be the result, despite the fact that life imprisonment is a permissible sentence for a Class IB felony.[11]

We reject Casterline's arguments that the Legislature made a mistake in amending § 29-2204. And it is not the place of this court to rewrite legislation, if indeed any mistakes were made with respect to § 29-2204. Nor will we ignore the doctrine of legislative acquiescence, as counsel urges us to do. Counsel indicated at oral arguments that mistakes were made in the 1993 amendments to § 29-2204; but that section has been amended seven times since 1993. Since this court decided *Schnabel* in 2000, the Legislature has amended § 29-2204 three times. This suggests that the Legislature has had ample opportunity to fix any "mistakes" that may have been made and, further, that the Legislature has had time to correct any misinterpretation of § 29-2204 made by this court.

We also reject Casterline's assertion that her life-to-life sentence was impermissible as a violation of §§ 28-105 and 28-304. Section 28-304 classifies second degree murder as a Class IB felony, while first degree murder is either a Class I or a Class IA felony. And § 28-105 states that the sentence for a Class I felony is death, a Class IA felony is life imprisonment, and a Class IB felony is a minimum of 20 years'

[11] See § 28-105(1).

imprisonment and a maximum sentence of life imprisonment. Casterline's argument is that she was convicted of a Class IB felony, but that her life-to-life sentence is an effective life sentence without parole and thus punishes her for a Class IA felony.

In *Moore*, we rejected the defendant's argument that § 28-105 prevented a life-to-life sentence for a Class IB felony. But Casterline additionally relies on *State v. Castaneda*[12] for the proposition that a life-to-life sentence in Nebraska is effectively a sentence of life imprisonment without parole.

This is not what we held in *Castaneda*. Our decision in *Castaneda* was premised on the question of whether our sentencing schemes provided the "meaningful" opportunity for parole within the meaning of *Miller v. Alabama*.[13] *Miller* dealt with the propriety of sentencing a juvenile offender to life imprisonment. We did not hold that a life-to-life sentence was equivalent to a sentence of life without parole, but instead we held, in part, that a life-to-life sentence did not provide juveniles a *meaningful opportunity* for parole for purposes of *Miller*.

Our case law clearly holds that a life-to-life sentence is permissible. That case law supports the conclusion that contrary to Casterline's arguments on appeal, a term of life imprisonment is a term of years within the meaning of the statute. There is no merit to Casterline's assignment of error on appeal.

CONCLUSION

The sentence of the district court is affirmed.

AFFIRMED.

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[12] *State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014).

[13] *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

STATE OF NEBRASKA, APPELLANT, V. PHILIP A. ARMSTRONG, APPELLEE.

863 N.W.2d 449

Filed May 29, 2015. No. S-14-339.

1. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014) for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. In an appeal involving such a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. In contrast, the appellate court independently resolves questions of law.
2. **Postconviction: Effectiveness of Counsel.** A postconviction claim that defense counsel provided ineffective assistance generally presents a mixed question of law and fact.
3. **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 his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
4. **Effectiveness of Counsel.** A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.
5. ____. Counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance.
6. **Effectiveness of Counsel: Conflict of Interest.** The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests.
7. **Effectiveness of Counsel: Proof.** To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
8. **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.
9. **Effectiveness of Counsel: Conflict of Interest: Presumptions: Proof.** If the defendant shows that his or her defense counsel faced a situation in which conflicting loyalties pointed in opposite directions and that his or her counsel acted for the other client's interest and against the defendant's interests, prejudice is presumed.
10. **Evidence: Witnesses: Corroboration.** Evidence that provides corroborating support to one side's sole witness on a central and hotly contested factual issue cannot reasonably be described as cumulative.

Appeal from the District Court for Sarpy County: Daniel E. Bryan, Jr., Judge. Affirmed.

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

Gregory A. Pivovar for appellee.

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

McCormack, J.

I. NATURE OF CASE

The defendant was charged with sexual assault of two girls he babysat. It was revealed during trial that defense witnesses had viewed forensic interviews of the girls. The State believed this was a violation of the trial court's discovery order and the statute pertaining to victim interviews, Neb. Rev. Stat. § 29-1926(2)(a) and (b) (Reissue 2008). Although defense counsel was unfamiliar with the legal issues surrounding the alleged discovery violation, counsel entered into an agreement with the State to strike the entire testimony of one defense witness and to exclude any testimony from two other defense witnesses. The defendant was convicted. The postconviction court granted the defendant's motion for postconviction relief on the ground that he was deprived of effective assistance of trial counsel. We affirm.

II. BACKGROUND

Philip A. Armstrong and his wife lived next door to a family with three young children. The family had moved to the Armstrongs' neighborhood in Omaha, Nebraska, in June 2006. The family had twin daughters, M.G. and H.G., born in April 2000, and a younger son. The Armstrongs and their neighbors developed a close relationship. The neighbors' children would often run back and forth between the neighboring yards to visit or play with the Armstrongs.

The neighbors' three children required babysitting Wednesdays after school from approximately 2 until 4 p.m. The children's mother was a teacher at the school the children

attended. The children's original babysitter died of cancer during the spring of 2007. When their first babysitter died, the girls were in first grade and the boy was in preschool.

Armstrong's wife, who was at home due to a work-related injury, began babysitting the children in March 2007 and for the remainder of that school year. During that time, Armstrong was working full time. Armstrong's wife went back to work at a school lunchroom in the fall of 2007. Armstrong had since retired, and arrangements were made for him to pick the children up from school on Wednesdays and watch them until their mother could arrive. Armstrong also agreed to watch the children on Thursdays before school, from approximately 7 to 8:30 a.m.

In July 2008, the girls told their parents that Armstrong had been touching them inappropriately. After an investigation, Armstrong was charged with one count of first degree sexual assault of a child and two counts of third degree sexual assault of a child. Armstrong pled not guilty, and the case was tried before a jury. Armstrong was represented by counsel, who was assisted by cocounsel.

1. Trial

(a) Opening Statements

During opening statements to the jury, the State painted a picture of betrayal by a close family friend and neighbor. The State told the jury that the evidence would show how, during the time of the alleged abuse, the victims' behavior changed. They became angrier. Also, witnesses would show how the girls became increasingly reluctant to spend time with Armstrong.

Defense counsel told the jury in opening statements that defense witnesses would testify that the girls were always happy to spend time with Armstrong. In fact, they often did not want to leave when their mother arrived to pick them up. Defense counsel told the jury that they would hear from Armstrong's family. Defense counsel made specific reference to Armstrong's wife, his daughter, son-in-law, and granddaughter, although counsel did not directly state those persons would testify.

(b) Case in Chief

During the State's case in chief, several witnesses described the girls as being happy when they were in first grade. They loved school. They had adjusted quickly to their move and had made lots of friends.

The girls' parents and school staff described a change in the girls' behavior and mood as they proceeded along in second grade. The girls, especially H.G., seemed preoccupied, more emotional, angry, clingy, and withdrawn. All witnesses agreed that the girls' brother remained happy throughout this time.

H.G. began seeing the school counselor during second grade. The girls' parents explained that M.G. and H.G. had transitioned from a traditional classroom in first grade into a Montessori classroom in second grade. None of the girls' first grade friends or classmates were in the new second grade classroom. A teacher at the school and the principal both testified that this transition normally did not cause great distress. The principal had, in addition, observed that the girls seemed comfortable in their new Montessori classroom. Nonetheless, the girls' parents partially attributed H.G.'s change in behavior to this transition.

The parents also testified that from June 2006 through May 2008, the girls' father occasionally had to be out of town for his job. H.G. described her father as being "gone a lot" during second grade. The girls' father testified that when in town, he worked long hours. In October 2008, the father had to be out of town for a more extended period of time, but visited his family on the weekends.

Witnesses from school noticed a particular change in behavior with regard to the girls' being picked up on Wednesdays by Armstrong. The girls used to run out to meet Armstrong in the beginning of second grade. As the year progressed, the witnesses testified the girls were habitually lagging behind Armstrong when walking to his car. H.G., especially, seemed "sad." The girls' brother continued to seem happy to go with Armstrong.

The girls' mother testified that when she arrived at the Armstrongs' home to pick the girls up, the girls were ready to

go home right away. Often they would go home before their mother was done visiting. The mother said that the girls never stayed at the house after she had gone home.

On cross-examination, the mother admitted that there were other times when the girls would run and hide from her when she arrived to pick them up. H.G. similarly testified that they would sometimes run and hide from their mother or father when they came to pick them up from the Armstrongs' home and that they would sometimes ask to stay a bit longer.

The girls' mother testified that as the girls' second grade year progressed, it was more often than not that Armstrong was alone watching the children when she arrived to pick them up. The girls' mother usually arrived at the Armstrongs' home around 3:30 or 4 p.m. During cross-examination, the girls' mother clarified that Armstrong's wife was there about as often as she was not. She admitted that in her pretrial deposition, she had said Armstrong's wife was "usually" home when she picked the girls up on Wednesday afternoons.

The girls' mother testified that the Armstrongs' granddaughter, who was living in the Armstrongs' basement during that period of time, was rarely home when the girls were being babysat.

M.G. and H.G. testified that both Armstrong's wife and granddaughter were "sometimes" at the house while they were being babysat.

The girls' mother testified that M.G. would often hang on Armstrong and his wife. Armstrong and his wife were generally affectionate with the girls and their brother and would pick them up, wrestle with them, and tickle them. H.G. testified that she and her siblings liked to jump on Armstrong and play with him. The girls' father testified that up until the day the girls reported the sexual assaults, they seemed to enjoy being with Armstrong and his wife. They wrestled and cuddled with Armstrong and sat on his lap. They demanded attention from both Armstrong and his wife. H.G. testified that she did not like sitting on Armstrong's lap, but that she liked to sit on the lap of Armstrong's wife or granddaughter.

The mother recalled one incident sometime after the middle of the school year when H.G. started kicking and wanted

down when Armstrong picked her up while the girls were playing and the families were together in the backyard. And, at some point, H.G. began saying she was not feeling well on Tuesday nights.

Several witnesses recalled an incident in the summer of 2008, when Armstrong and his son-in-law were handing the girls over the 6-foot fence between the neighbors' yards to their parents. H.G. said to Armstrong, "don't touch my private spot." The girls' mother explained that the girl's comment did not cause her any concern. Armstrong, she said, was incidentally touching H.G.'s bottom in order to get her over the fence.

In late July 2008, the girls' mother had arranged for the Armstrongs to babysit the girls and their brother for the day. As the girls' mother and father were tucking H.G. into bed, H.G. expressed reluctance and agitation when she learned she would be going over to the Armstrongs' house. Because this was not the first time H.G. had expressed reluctance to go to the Armstrongs, her mother began questioning H.G.

Eventually, H.G. disclosed that Armstrong had been sexually abusing her. When H.G.'s mother asked H.G. to demonstrate what Armstrong had done, H.G. sat on her father's lap and rubbed her hands back and forth against her vaginal area. The parents woke M.G. up and had a conversation with M.G. in which she said Armstrong had done similar things to her. The parents thereafter went to the girls' brother, who indicated no awareness of the alleged incidents of abuse.

The girls' mother waited several days before contacting the police. Throughout that week before reporting the matter to the police, the mother asked the girls more questions in order to be certain the girls were not misconstruing what had occurred. The mother testified that she never spoke to the girls about it at the same time and that she tried to keep the conversations neutral and brief.

After the parents reported the disclosure to the police, the girls were interviewed by a forensic interviewer at Project Harmony, a child advocacy center. The forensic interviewer testified at trial as to Project Harmony's protocols that are designed to avoid leading questions or nonverbal cues. The

interviewer described that it is preferable that a qualified forensic interviewer be able to speak to the child victim before the child is questioned by anyone else on the subject of the abuse. The forensic interviewer testified that about 80 percent of child victims do not disclose abuse right away, and she outlined the various reasons why that is the case.

M.G. and H.G. testified at trial. At the time of trial, the girls were 9 years old and starting fourth grade. Both M.G. and H.G. described how Armstrong would rub their vaginal area while sitting in Armstrong's lap watching television. H.G. testified that Armstrong would keep his hand on top of her underwear, but her underwear often "would go inside my baby hole." M.G. and H.G. testified that they never discussed the abuse with each other. Their testimony indicates that neither girl witnessed the other being abused.

There were no eyewitnesses to the alleged sexual abuse. The girls' parents testified that the chair where the assaults allegedly took place was immediately visible upon walking into the house from the usual entrance from the garage. H.G. described that when the assaults took place, no other adult was at home, and her sister and brother were not in the room. M.G. described that neither Armstrong's wife nor granddaughter were home when the assaults occurred but that H.G. and her brother were sometimes in the room when she was being assaulted.

(c) Defense

(i) Armstrong's Granddaughter

The State closed, and Armstrong presented his defense. Armstrong's granddaughter was the first witness to testify. The granddaughter testified that she lived in the Armstrongs' home from December 2006 to March 2008. She explained that she was "frequently" around the living room area when the children were being babysat on Wednesdays after school. She was usually at the Armstrongs' home from the time they were picked up at school until shortly before the children were to be picked up by their parents. The granddaughter testified that Armstrong's wife was usually home by 2:30 p.m. and was typically present when the children were there as well.

The granddaughter testified that the children loved to play "pretend games." She testified that the children also liked to sit on Armstrong's lap while watching television. The children would try to push each other off of Armstrong. Sometimes Armstrong would get on the floor with the children, who would then climb over him.

The granddaughter never observed the children anxious or nervous around Armstrong. The children never acted like they wanted to leave when their mother or father came to pick them up. According to the granddaughter, the children often stayed while their parents visited with the Armstrongs and, "[v]ery often," the children would stay for a while even after their parents had gone home.

(ii) Armstong's Son-in-Law

Armstrong's son-in-law was the next witness to testify in Armstrong's defense. He testified that he had seen the children interacting with Armstrong on many occasions when visiting the Armstrongs' home. He often observed the children "jump all over" Armstrong. He never observed the children demonstrate any reluctance to be around Armstrong.

The son-in-law testified that he was present during the incident in which one of the girls was being passed over the fence and said "'don't touch my privates.'" The son-in-law testified that, in fact, he heard the girls say "'don't touch my privates'" casually in other contexts—at least four or five times. Once, the girls said this when they were sitting on his wife's lap. It seemed to the son-in-law that the girls "were just saying it," sometimes "giggling" when they did. He indicated that the girls said this when they were not actually being touched in an inappropriate way.

During cross-examination, the State questioned the son-in-law at length about what materials he had reviewed prior to trial. The son-in-law explained that he had read the girls' pretrial depositions. Furthermore, the son-in-law confirmed that he had seen the Project Harmony video interviews of the girls. Upon further questioning, the son-in-law indicated that he, his wife, Armstrong, and Armstrong's wife had all seen the interviews. Soon thereafter, the trial came to a halt.

(iii) Alleged Violation of § 29-1926

The State approached the bench and an off-the-record discussion was had. The prosecutors, defense counsel, defense cocounsel, and the trial judge then moved to the hallway, where they had another off-the-record discussion. When the judge returned from the hallway, he told the jurors that a legal issue had come up and he dismissed the jury for a 10-minute break.

During that break, the judge called the granddaughter to the stand. She had apparently not been informed of the sequestration order before she testified. As a result, she had been in the courtroom after she testified, though not before. Armstrong's granddaughter told the judge that she had not spoken to anyone about her testimony or any testimony she had heard.

The judge asked the State if it was moving for a mistrial, apparently based on either the failure to sequester the granddaughter or on the fact that several family members who were to be called as witnesses had seen the interviews. The State said that it did not wish to move for a mistrial. The judge explained his view that there had been two violations of court orders, and he urged defense counsel to "follow the orders of this Court and the ethical code that you're both bound by as attorneys."

Another off-the-record discussion was had in the hallway. When the parties returned to the courtroom, the trial judge asked if the State had a motion. Defense counsel and the State asked for more time. The trial judge was reluctant to extend the trial beyond the duration that the jury was originally told, but the trial judge agreed to give the parties until after lunch. The jury was brought back in and dismissed for lunch. The court explained to the jury that the attorneys were "trying to resolve some issue with the witnesses."

Sometime during the break, the State moved on the record to exclude the testimony of Armstrong's wife and daughter and strike the son-in-law's testimony. The State explained that it believed defense counsel had violated the court discovery order and § 29-1926. Defense counsel responded that he did not have any objection to the State's motion and that he regretted any violation that had occurred.

The court questioned Armstrong about whether he had adequate time to speak with his attorney and whether he understood what was going to occur as a result of the State's motion. Armstrong indicated that he had and did.

The court granted the State's motion. When the trial reconvened, the jury was told only that they should disregard the son-in-law's testimony in its entirety. No other instruction or explanation was given with regard to the son-in-law or the absence of Armstrong's wife and daughter as witnesses.

(iv) Pretrial Discovery Ruling on Interviews

During discovery before trial, defense counsel had asked, pursuant to § 29-1926(2)(a), that the State release any recorded interviews of the children. The State responded that it had no objection, and the court issued the following order:

> ON THIS 25th day of March, 2009, the above-captioned matter came on before the Court on the Oral Request of counsel for [Armstrong], pursuant to Neb. Rev. Stat. § 29-1926(2)(a)(b), moves this Court for an Order allowing counsel for [Armstrong] to release a copy of the videotape recorded at Project Harmony, of the alleged victims in this matter. Said release is for the sole purpose of preparation for trial and for use by the expert witness. The Sarpy County Attorney's Office has no objection to the expert witness receiving a copy of the videotape and all parties agree that said tape shall be returned to counsel for [Armstrong] upon completion. It is further agreed that the expert witness shall keep a copy of the videotape in a secure locked location while in her possession.

The court also advised defense counsel:

> [Armstrong's] motion for the videotape pursuant to [§] 29-1926(2)(a) is granted and any state or agency in possession of a videotape of a child victim involved in this case is ordered to release the videotape to [Armstrong's] attorney, but [Armstrong's] attorney must comply with Nebraska law in *handling the storage of the videotape*. Do you understand what I'm saying [defense counsel]?

(Emphasis supplied.) Defense counsel affirmed that he understood.

Section 29-1926 primarily concerns the admissibility of videotape depositions or in camera testimony in lieu of courtroom testimony for child victims upon a showing of compelling need. Subsection (2) of § 29-1926 was added in 1997, through 1997 Neb. Laws, L.B. 643, § 1. It states in full:

> (2)(a) No custodian of a videotape of a child victim or child witness alleging, explaining, denying, or describing an act of sexual assault pursuant to section 28-319, 28-319.01, or 28-320.01 or child abuse pursuant to section 28-707 as part of an investigation or evaluation of the abuse or assault shall release or use a videotape or copies of a videotape or consent, by commission or omission, to the release or use of a videotape or copies of a videotape to or by any other party without a court order, notwithstanding the fact that the child victim or child witness has consented to the release or use of the videotape or that the release or use is authorized under law, except as provided in section 28-730. Any custodian may release or consent to the release or use of a videotape or copies of a videotape to law enforcement agencies or agencies authorized to prosecute such abuse or assault cases on behalf of the state.
>
> (b) The court order may govern the purposes for which the videotape may be used, the reproduction of the videotape, the release of the videotape to other persons, the retention and return of copies of the videotape, and any other requirements reasonably necessary for the protection of the privacy and best interests of the child victim or child witness.
>
> (c) Pursuant to section 29-1912, the defendant described in the videotape may petition the district court in the county where the alleged offense took place or where the custodian of the videotape resides for an order releasing to the defendant a copy of the videotape.
>
> (d) Any person who releases or uses a videotape except as provided in this section shall be guilty of a Class I misdemeanor.

(v) Armstrong's Testimony

After reconvening, Armstrong testified in his own defense. Armstrong confirmed that he always sat in a certain recliner that was immediately visible from the garage door entrance. There, he would often have M.G., H.G., or the girls' brother on his lap while they watched television. The children sometimes competed with each other as to whose turn it was to sit on his lap.

Armstrong testified that his daughter and son-in-law, who lived nearby, had an open invitation to come to the Armstrongs' house anytime and that they often did. They came in through the garage door with the garage code. His granddaughter also came and went that way. Armstrong testified that his wife was usually home from her job by 3 p.m. and would assist with the babysitting at that time.

Armstrong said that sometimes he would sit on the floor and let the children "pile on" him. During one such incident, Armstrong recalled that he moved H.G. off of him because her brother was screaming that he was getting crushed. H.G. said, "'don't touch my private parts.'" Armstrong also recalled the incident when he helped lift the girls over the fence. He did not recall the girls saying "'don't touch my private parts'" on any other occasions.

Armstrong denied ever touching any of the children in an inappropriate manner. Armstrong said he never heard the children object to being babysat, nor did they seem afraid while in the Armstrongs' home.

During cross-examination, Armstrong acknowledged that he had reviewed the girls' pretrial depositions and the interviews prior to trial.

(vi) Defense Expert Witness

Armstrong's expert witness was the last to testify in Armstrong's defense. The expert witness discussed the fact that a mental health examiner of a possible victim must be aware of alternate explanations for the victim's report, because the report could be inaccurate. If the report is simply taken at face value, an inaccurate report could be solidified

through the interview process by the authority figure. Based on the expert's review of the therapy notes and other information, the expert opined that certain facts could provide an alternative explanation of M.G.'s and H.G.'s reports of abuse. Particularly, the expert noted family tension and the occasional absence of the father from the home.

(d) Rebuttal

During rebuttal, the State recalled the girls' mother. She reiterated that the granddaughter did not appear to be home very often when the girls were being babysat. Indeed, Armstrong described the granddaughter as using the Armstrongs' house as a "pit stop."

The girls' mother was also asked what she had reviewed before testifying. The mother said she had reviewed only her own deposition. She had not seen the interviews. The mother explained that Project Harmony and the prosecutor's office had told her she was "not allowed to see them because they were evidence." The mother answered in the affirmative to the prosecutor's question, "And you wanted your testimony to be untainted?" The mother further explained that she did not want to "jeopardize my case." The State continued this theme of tainted witnesses during closing arguments. The prosecutor said that Armstrong's witnesses were "rehearsed," while the prosecution witnesses "just got up here and told you the truth."

(e) Convictions

The jury found Armstrong guilty of all three charges. He was sentenced to imprisonment of 15 to 30 years on count I, 5 to 5 years on count II, and 5 to 5 years on count III. All sentences were ordered to run concurrently. In a September 28, 2010, memorandum opinion, Armstrong's convictions and sentences were affirmed on direct appeal to the Nebraska Court of Appeals in case No. A-09-973. Although Armstrong had different counsel on direct appeal and attempted to raise the issue of ineffective assistance of trial counsel, the Court of Appeals found that the record was insufficient to address the ineffective assistance claims.

2. Postconviction

Armstrong subsequently brought a petition for postconviction relief. Armstrong made several allegations, but the court granted an evidentiary hearing only on the issue of whether trial counsel was ineffective for stipulating and advising Armstrong to stipulate to allow witness testimony to be stricken after it was revealed that the witnesses had viewed the interviews. The court's order denying an evidentiary hearing on the other alleged grounds for postconviction relief was summarily affirmed in an order filed on February 2, 2012, in case No. A-11-396, by the Court of Appeals, and is not at issue in this appeal.

At the evidentiary hearing, Armstrong presented the testimony of his counsel, cocounsel, wife, and daughter. The State presented the testimony of one of the prosecutors at Armstrong's trial.

(a) Prosecutor

The prosecutor testified that the discussion in the hallway centered around § 29-1926, and whether there had been a violation of a court order. It appeared at that time that neither he nor any of the other parties to that discussion had ever dealt with a similar situation before: "[I]t was all sort of new to all of us, frankly, including the judge." The prosecutor testified he was focused on the effect this breach had on the trial, and not on a criminal prosecution of defense counsel.

Eventually, the prosecutor told defense counsel that the son-in-law's testimony should be stricken and that the remaining witnesses, except Armstrong's expert and Armstrong, excluded. The prosecutor did not recall any discussion about a mistrial. The prosecutor could not recall any other time in his experience when he had asked that a defense witness' entire testimony be stricken. Nevertheless, the prosecutor told defense counsel that, with or without an agreement, he was going to move to strike the son-in-law's testimony and to exclude the remaining family witnesses' testimony.

The prosecutor testified that after defense counsel consulted with Armstrong, defense counsel and the prosecutor had a final discussion wherein they reached an agreement to

strike/exclude the witnesses who had seen the interviews. It was the prosecutor's recollection that the agreement was presented to the judge and that the State thus never needed to make a motion to strike/exclude the witnesses' testimony.

The prosecutor also testified that he did not believe Armstrong's son-in-law "came off well." He thought that the son-in-law's demeanor was offputting and that his answers were not consonant with the facts or the circumstances of the case.

(b) Defense Counsel

Defense counsel testified at the evidentiary hearing that he did not give Armstrong any specific instructions when Armstrong took the interviews home other than to look for any inconsistencies between Armstrong's and the girls' descriptions of events. Counsel further testified that he was unaware until the son-in-law's testimony at trial that anyone other than Armstrong and his expert witness had viewed the interviews.

Counsel testified that up to the moment of the son-in-law's revelation and the State's side bar, he was still planning on calling Armstrong's wife and his daughter as witnesses in support of Armstrong's defense. They would have testified that the girls' interaction with Armstrong was positive; the girls never appeared to have any fear or trepidation of contact with Armstrong. Counsel had some reservations about the demeanor of Armstrong's wife, but was planning on calling her despite those reservations.

Counsel described that things became "stressful" once it was revealed that several of Armstrong's witnesses had viewed the interviews. During the discussion in the hallway, the trial judge suggested that cocounsel speak for counsel, as counsel may have committed a crime. In a later conversation, the chief deputy county attorney told counsel that the State had a right to a mistrial or to strike or exclude the testimony of any defense witness who had viewed the interviews.

Counsel testified that he and cocounsel formulated a plan. When formulating that plan, counsel and cocounsel did not conduct any research or seek any advice as to whether any

violation had actually occurred, other than briefly reading § 29-1926. Counsel could not recall formulating any idea about whether they had actually violated a court order or committed a crime or ethical violation.

Counsel was under the impression that the court would grant a motion by the State to strike and exclude the testimony of those witnesses who had viewed the interviews. Counsel was not sure if a mistrial would be granted. In the event that a mistrial were granted, counsel considered whether Armstrong would have a better chance on retrial. Counsel determined he would not. Counsel's assessment of Armstrong's likely success in a new trial after mistrial was based on his conclusion that there was "a likelihood that any witnesses that had viewed that tape would still be barred from testifying" during the second trial after a mistrial.

Counsel thought that the cross-examination of the girls had been effective and that the second time around, the State would be able to better prepare its witnesses for trial based on the transcript of the witnesses' testimony from the first trial. In any event, counsel thought the son-in-law's testimony had not gone well. He thought the son-in-law's testimony directly contradicted some of Armstrong's daughter's testimony that she gave in her pretrial deposition. The son-in-law also leaned back in his chair "almost like he was lounging, and he would take little sips" from a water bottle while testifying. Counsel did not think that Armstrong's wife would make a particularly good witness either, because in the pretrial deposition, she had come off as "very bitter and cold and confrontational." In sum, counsel did not think that striking the son-in-law's testimony and excluding the daughter's and the wife's testimony was "a big deal."

Counsel told Armstrong that his best advice was to go ahead with trial and, although he was less clear on this point, to not object to the striking of the son-in-law's testimony or to excluding the testimony of his wife and daughter. Counsel testified that he did not consider asking the judge for a continuance to research issues concerning the disclosure of the interviews.

(c) Defense Cocounsel

Defense cocounsel described that the trial "stopped" when the son-in-law revealed he had seen the interviews. During the hall discussion the judge told cocounsel he needed to speak for counsel. Cocounsel felt "the situation was very ominous." Counsel seemed "nervous," and cocounsel was "scared for" counsel.

Cocounsel testified that he was unfamiliar with § 29-1926. He did not think about doing further research on the statute. It was an "unusual situation."

Cocounsel thought that "[t]hings were happening fast" and that he "wasn't comfortable with the situation." But cocounsel testified that the jury was waiting and that there was a "sense that it needed — something needed to be decided here fairly quickly." Counsel and cocounsel did not discuss the possibility of asking for more time to research the issue, but they did discuss whether counsel would be allowed to continue to represent Armstrong. They determined that if the judge did not allow counsel to continue Armstrong's representation, cocounsel, who had only recently begun assisting in the case, would not be able to assume counsel's responsibilities.

(d) Armstrong

Armstrong testified at the evidentiary hearing that before the trial, counsel called him and told him to pick up the interviews from counsel's law offices. Counsel was sick that day, and a law clerk gave the interviews to Armstrong. Neither counsel, the law clerk, nor any other person gave Armstrong instructions regarding who could view the interviews.

Armstrong testified that he, his wife, daughter, son-in-law, son, and daughter-in-law all viewed the interviews. He, his wife, daughter, and daughter-in-law later met with counsel to discuss the interviews. Armstrong stated that counsel would have been aware that they had viewed the interviews.

When it came out during the son-in-law's testimony that Armstrong's witnesses had seen the interviews, Armstrong described that it "was almost a complete halt to the trial" and that both counsel and cocounsel were "severely chastised by

the prosecution." Armstrong recalled that this occurred both in front of the jury and outside of the jury's presence. At one point, outside the presence of the jury, Armstrong heard one of the prosecutors say they "ought to put them all in jail."

Counsel explained to Armstrong that viewing the interviews was considered "a breach of law." Armstrong testified that counsel seemed "[n]ervous." Armstrong had never seen counsel that way. Counsel told him that if they tried to call his remaining family witnesses and did not strike the testimony of the son-in-law, then the prosecution would ask for a mistrial, which would likely be granted. Counsel thought a mistrial would be bad for Armstrong. Counsel did not explain that they had the option to resist the State's motion to strike and to exclude his witnesses' testimony. Armstrong testified that had he been told he had the option to resist the State's motion, Armstrong would have "definitely" chosen to resist and to have his witnesses testify.

(e) Armstrong's Wife and Daughter

Armstrong's wife testified at the evidentiary hearing that they had told counsel they had seen the interviews. Armstrong's wife testified that counsel, upon learning that family members had seen the interviews, did not make any comment indicating that they should not have viewed them.

Armstrong's wife expected to testify at trial until "everything went crazy." Had she been allowed to testify, her testimony would have been that she was usually present—approximately "nine-tenths of the time"—when Armstrong was babysitting M.G. and H.G.

Armstrong's daughter testified at the evidentiary hearing that after her husband revealed they had seen the interviews, she heard that if they went ahead with the planned testimony, the State would ask for a mistrial. She explained that had she been allowed to testify at trial, she would have testified that she lived less than a mile from the Armstrongs' home and dropped by often. She would have testified that she never saw anything inappropriate, and she would have described M.G.'s and H.G.'s demeanor around Armstrong. The daughter also would have testified that the girls had made similar

allegations about being touched inappropriately by other people. For example, there were times that they would be sitting on her lap and say, "'don't touch my privates.'"

3. Order Granting Postconviction Relief

In its order following the hearing, the postconviction court took judicial notice from its file of a September 26, 2008, order allowing Armstrong to inspect and make a copy of any videotaped statements of the girls regarding the alleged assaults. The court also recognized the March 25, 2009, order allowing the expert witness to view the interviews.

The court stated that neither discovery order specifically prohibited Armstrong from having a copy of the video or showing it to other potential witnesses. The court found that counsel gave no instructions or direction to Armstrong about who could view the interviews. Armstrong viewed the interviews with his wife, daughter, son, daughter-in-law, and son-in-law. The court found that Armstrong did not tell counsel that others had viewed the interviews.

The court found that defense counsel had planned on calling Armstrong's wife, daughter, son-in-law, granddaughter, and the expert witness. During opening statements, counsel told the jury they would be hearing from Armstrong's family. After the State rested its case, defense counsel still planned on calling all of those witnesses.

The postconviction court found that after the son-in-law's testimony, the trial judge told counsel he may have violated § 29-1926 and could be facing a criminal charge. Further, the trial judge told counsel that he had a right to remain silent and that he should have cocounsel speak on his behalf. Counsel was "visibly shaken."

The postconviction court found that the chief deputy from the county attorney's office told defense counsel that the options were asking for a mistrial or excluding witnesses who had watched the interviews from testifying and striking the witness who already testified. Counsel and cocounsel did not attempt to research whether a breach of § 29-1926 had actually occurred. Neither did they consider requesting a continuance.

Counsel and cocounsel discussed whether counsel could continue to represent Armstrong in light of the trial judge's comments about a possible violation, but they did not legally resolve that issue.

The postconviction court found that counsel believed there was a likelihood the witnesses who viewed the interviews would be excluded in a second trial if a mistrial were granted. In light of that, counsel did not believe a second trial would be to Armstrong's advantage; a new trial would give the State a chance to prepare for his witnesses. Counsel advised Armstrong to accept an agreement made with the State to strike and exclude Armstrong's witnesses in exchange for the State's not asking for a mistrial. Armstrong followed this advice.

The postconviction court found that the possible criminal violation facing counsel had a "chilling affect [sic] on his representation of Armstrong." Counsel's decision not to attempt to call Armstrong's wife or to resist the motion to exclude the son-in-law's testimony "was not a strategic or tactical decision." "[T]he trial strategy was changed because of an alleged discovery violation which carried criminal sanctions." In particular, counsel's "decision to agree with the State to exclude [Armstrong's wife's] testimony seemed to be more for accommodation to satisfy the State's ire, and avoid the criminal violation of Neb. Rev. Stat. [§] 29-1926, instead of trial strategy that would help Armstrong's defense." The postconviction court concluded that "[t]here was no real strategy other then [sic] to avoid a mistrial being requested by the State."

The postconviction court found that this was "a case that was entirely a she said, he said case. Credibility of the witnesses was the major issue for the trier of fact."

The court found that the son-in-law's testimony provided "substantive supportive credibility evidence." Further, the wife's testimony "was of major importance."

The court found that the decision not to call Armstrong's daughter was primarily strategic. Counsel realized that after Armstrong's son-in-law testified differently than expected, there was a problem of the daughter's impeachment if called.

The court concluded that defense counsel's representation of Armstrong was deficient. The court said that "[o]ne can argue" the discovery order concerning the interviews allowed no use of the interviews other than what was specifically ordered by the court. However, "[b]ecause of the language of the discovery trial orders in this case, and the language of Nebraska Statutes it is highly unlikely that any sanctions to strike or exclude witnesses would be granted."

The court also concluded that defense counsel should not have continued to represent Armstrong in light of the chilling effect of the threat of criminal and ethical violations—at least not without taking some steps to ensure he had some legal basis before continuing representation. Further, it was unreasonable for counsel to agree with the State's motion to allow the son-in-law's testimony to be stricken and the wife's testimony to be excluded, without having a legal basis for conceding the issue to the State.

The postconviction court concluded that at a minimum, counsel should have asked for a continuance. According to the court, counsel "literally abandoned his planned trial strategy, in the wake of the States [sic] intended requests without any legal basis."

The "big question," the court considered, was, "What did [counsel] get for himself and his client by recommending Armstrong consent to the State's request to strike and exclude his witnesses?" The court concluded that counsel did not get much. The court said that even counsel opined that the State would not get a mistrial.

The postconviction court concluded that Armstrong was prejudiced by counsel and cocounsel's deficient performance. There was a reasonable probability that but for counsel's unprofessional errors resulting in the absence of witnesses who would have provided credibility evidence, especially given the negative inference accompanying their failure to testify, the result of the proceeding would have been different.

In particular, the court found that agreeing to strike the son-in-law's testimony was prejudicial, because the son-in-law's testimony included observations of the girls, whose credibility was central to the case against Armstrong. Furthermore,

striking the son-in-law's testimony in its entirety without explanation or direction "likely leaves a negative inference in the minds of the trier of fact." The court elaborated:

> When a judge tells jurors to disregard the entire testimony of a parties' witness who has testified extensively before them without more of an explanation or direction, it more likely leaves a negative inference in the minds of the trier[s] of fact. . . . It is common sense that when a judge directs you to disregard the testimony of a person who has been testifying for a party it is not a good thing for that party.

Similarly, agreeing to exclude Armstrong's wife's testimony was prejudicial. She "had a substantial amount of evidence regarding her husband that only she could give to help him with any credibility issues before the jury." The court found little weight should be given to counsel's stated concerns about the wife's coming off as bitter and angry. This attitude was "perfectly understandable and reasonable given the accusations against her husband. It is something that can be explained to the jury if needed." And, as with the son-in-law, the court reasoned that there was a possible negative inference that the trier of fact could have made from her failure to testify.

Finally, the court rejected the idea that Armstrong had waived the ineffective assistance of counsel through his colloquy with the trial judge. Armstrong was relying on defense counsel's ineffective advice. "For there to be a valid waiver of Armstrong's claim for ineffective assistance of counsel . . . , Armstrong would have had to know not just what was being advised by [counsel], but, what [counsel] was advising was professionally deficient and prejudicial to his defense."

The court vacated Armstrong's convictions and granted a new trial. The State appeals.

III. ASSIGNMENT OF ERROR

The State assigns that the postconviction court erred by vacating Armstrong's convictions upon concluding that Armstrong was deprived of his federal and Nebraska constitutional right to effective assistance of trial counsel.

IV. STANDARD OF REVIEW

[1] In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014) for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.[1] In an appeal involving such a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.[2] In contrast, the appellate court independently resolves questions of law.[3]

[2] A postconviction claim that defense counsel provided ineffective assistance generally presents a mixed question of law and fact.[4]

V. ANALYSIS

[3] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[5] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[6] Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.[7] Findings of fact include the circumstances of the case and the counsel's conduct and strategy.[8] It is a question of law, however, whether those facts show counsel's performance was deficient and prejudiced the defendant.[9]

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[1] *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005).

[2] *Id*.

[3] See *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013).

[4] See, *State v. Banks*, 289 Neb. 600, 856 N.W.2d 305 (2014); *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

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

[6] *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014).

[7] *Strickland v. Washington, supra* note 5. See, also, *State v. Banks, supra* note 4; *State v. Dubray, supra* note 4.

[8] *State v. Thiel*, 264 Wis. 2d 571, 665 N.W.2d 305 (2003).

[9] See *State v. Dubray, supra* note 4.

The State argues that defense counsel's effectiveness must be viewed in light of "the uncharted waters of whether the [postconviction] court's pretrial order on disclosure and review of the Project Harmony tape had been violated."[10] Forgoing the testimony of Armstrong's wife and son-in-law, according to the State, was a reasonable strategic decision given the potential of a mistrial. Even if counsel's performance was deficient, the State asserts that forgoing the testimony of Armstrong's wife and son-in-law had an isolated, trivial effect on the trial and was, at best, cumulative of the testimony of Armstrong's granddaughter. We disagree.

1. Ineffectiveness of Counsel

[4] "'[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.'"[11] Counsel's performance was deficient if, in light of all the circumstances, it did not equal that of a lawyer with ordinary training and skill in criminal law.[12]

[5] "'In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'"[13] However, an appellate court will not second-guess reasonable strategic decisions by counsel.[14] Counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance.[15]

We reject the State's contention that defense counsel's actions were reasonable in light of the novelty of the situation presented at trial. This case is not about counsel's failing to raise novel arguments. The novel argument was thrust before

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[10] Brief for appellant at 18.

[11] *State v. Joubert*, 235 Neb. 230, 237, 455 N.W.2d 117, 123 (1990).

[12] See, *State v. Dubray, supra* note 4; *State v. Joubert, supra* note 11.

[13] *State v. Joubert, supra* note 11, 235 Neb. at 237, 455 N.W.2d at 123.

[14] *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

[15] *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014).

counsel and had to be resolved. Defense counsel's failure to research law he was unfamiliar with before deciding how to respond to that novel situation constituted conduct unequal to that of a lawyer with ordinary training and skill in criminal law.

This is especially true because counsel's uninformed decision was not one to be taken lightly. Counsel removed most of the planned defense witnesses from the jury's consideration, left the jury without any explanation as to why one defense witness' entire testimony was stricken and other family members were never called, and waived any error on direct appeal pertaining to the absence of these witnesses' testimony.

Defense counsel may have reached the agreement with the State to strike and exclude defense witnesses in order to avoid a mistrial. But counsel assumed a mistrial would disadvantage Armstrong, because counsel assumed that in a retrial after mistrial, Armstrong's son-in-law and wife would not be allowed to testify. That assumption was made without knowledge of the relevant law and without asking for a continuance to research the relevant law. It was not reasonable to formulate such a strategy without knowing if it would be legally correct for the trial court to strike and exclude the defense witnesses or to grant a mistrial under the circumstances presented.

We also agree with the postconviction court that the prospect of criminal or ethical violations had a chilling effect on defense counsel's representation. The postconviction court did not clearly err in finding that the trial judge told defense counsel he may be facing a criminal charge and had a right to remain silent. And, as a result, counsel was "visibly shaken."

[6] The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests.[16] Defense counsel's interest in avoiding criminal or ethical sanctions was in conflict with Armstrong's interest in presenting the strongest defense possible. As the postconviction court stated, counsel appeared to be trying to accommodate and satisfy the State's ire in order to avoid a

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[16] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

criminal violation rather than adopting a trial strategy that would benefit Armstrong. We note also that the failure to ask for a continuance seemed principally designed to prevent further irritation of the trial judge. Agreeing to strike and exclude defense witnesses without so much as asking for a continuance was more an act of appeasement for counsel's benefit than trial strategy to benefit Armstrong's defense.

2. Prejudice

[7,8] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[17] 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.[18]

[9] As discussed, there was an actual conflict of interest in counsel's continued representation of Armstrong.[19] An actual conflict for Sixth Amendment purposes is a conflict that adversely affects counsel's performance.[20] If the defendant shows that his or her defense counsel faced a situation in which conflicting loyalties pointed in opposite directions and that his or her counsel acted for the other client's interest and against the defendant's interests, prejudice is presumed.[21]

But even if we do not apply such presumption, we easily conclude that actual prejudice resulted from counsel's deficient performance. The effect of counsel's inadequate performance is evaluated in light of the totality of the evidence at trial:

> "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the

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[17] *State v. Poe, supra* note 14.

[18] See, *Strickland v. Washington, supra* note 5; *State v. Poe, supra* note 14.

[19] See *State v. Edwards, supra* note 16. See, also, *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

[20] *Id.*

[21] *Id.*

> entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."[22]

The State does not argue that defense counsel's failure to object was not prejudicial because it would have been legally sound to strike and exclude Armstrong's witnesses. To do so, the State would have to argue not only that a discovery violation actually occurred, but also that exclusion of defense witnesses was an appropriate sanction in light of the compulsory process rights of the defendant to present witnesses in his or her own defense.[23] The State does not make such arguments.

[10] Rather, the State argues that counsel's performance did not prejudice Armstrong because the testimony of Armstrong's wife and son-in-law would have been cumulative to the

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[22] *State v. Poe, supra* note 14, 284 Neb. at 774-75, 822 N.W.2d at 849, quoting *Strickland v. Washington, supra* note 5.

[23] *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). See, also, *Michigan v. Lucas*, 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991); *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007); *Noble v. Kelly*, 246 F.3d 93 (2d Cir. 2001); *Watley v. Williams*, 218 F.3d 1156 (10th Cir. 2000); *Tyson v. Trigg*, 50 F.3d 436 (7th Cir. 1995); *U.S. v. Johnson*, 970 F.2d 907 (D.C. Cir. 1992); *U.S. v. Peters*, 937 F.2d 1422 (9th Cir. 1991); *Escalera v. Coombe*, 852 F.2d 45 (2d Cir. 1988); *People v. Pronovost*, 773 P.2d 555 (Colo. 1989); *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997); *People v. Flores*, 168 Ill. App. 3d 284, 522 N.E.2d 708, 119 Ill. Dec. 46 (1988); *Hurd v. State*, 9 N.E.3d 720 (Ind. App. 2014); *Darghty v. State*, 530 So. 2d 27 (Miss. 1988); *State v. Bradshaw*, 195 N.J. 493, 950 A.2d 889 (2008); *McCarty v. State*, 107 N.M. 651, 763 P.2d 360 (1988); *State v. Wilmoth*, 104 Ohio App. 3d 539, 662 N.E.2d 863 (1995); *White v. State*, 973 P.2d 306 (Okla. Crim. App. 1998); 5 Wayne R. LaFave et al., Criminal Procedure § 20.6(c) (3d ed. 2007).

testimony of Armstrong's granddaughter and would have thus had an isolated, trivial effect. When no physical evidence or eyewitness testimony links the defendant to the crime and the case is a matter of determining credibility, courts regularly reject the idea that errors relating to the exclusion or failure to call a witness could be harmless or nonprejudicial simply because another witness testified similarly.[24] As one court explained, "Evidence that provides corroborating support to one side's sole witness on a central and hotly contested factual issue cannot reasonably be described as cumulative."[25]

In this case, we agree with the postconviction court that the issue of credibility was a "paramount consideration." There was no physical evidence of abuse or eyewitnesses to the alleged acts. There was not "overwhelming" record support for the convictions.[26] The jury had to determine whether to believe the girls' or Armstrong's testimony. The surrounding circumstances such as the girls' behavior and Armstrong's opportunity to have committed the alleged repeated acts of abuse were thus hotly contested issues central to the jury's determination.

The State presented numerous witnesses who lent credibility to the girls' testimony by stating they had observed a decline in the girls' mental well-being and an increased reluctance to be around Armstrong. The girls' mother testified that Armstrong usually was alone with the girls when he babysat. But after striking the testimony of Armstrong's son-in-law and excluding the testimony of Armstrong's wife, the defense was able to present only one witness who could present a different account. The testimony of that one witness, Armstrong's

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[24] See, e.g., *Grant v. Lockett*, 709 F.3d 224 (3d Cir. 2013); *Mosley v. Atchison*, 689 F.3d 838 (7th Cir. 2012); *Montgomery v. Petersen*, 846 F.2d 407 (7th Cir. 1988); *State v. Harris*, 132 Idaho 843, 979 P.2d 1201 (1999); *Com. v. Nock*, 414 Pa. Super. 326, 606 A.2d 1380 (1992). Compare *Lewis v. State*, 294 Ga. 526, 755 S.E.2d 156 (2014).

[25] *Mosley v. Atchison, supra* note 24, 689 F.3d at 848. See, also, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *Vasquez v. Jones*, 496 F.3d 564 (6th Cir. 2007).

[26] See *Strickland v. Washington, supra* note 5, 466 U.S. at 696.

granddaughter, was impeached by the girls' mother when she testified that the granddaughter was not often at home.

We cannot conclude, especially in light of such impeachment,[27] that Armstrong was not prejudiced by the failure to have before the jury the testimony of Armstrong's wife and his son-in-law. Both Armstrong's wife and his son-in-law would have lent credibility to Armstrong's testimony by describing how the girls were happy and comfortable around Armstrong. In addition, Armstrong's wife would have testified that she was around Armstrong when he was babysitting the girls "nine-tenths of the time." The wife's testimony, if believed, would have reduced Armstrong's opportunity to have committed the alleged repeated acts of abuse.

The son-in-law's and the wife's testimony would have accordingly altered the evidentiary picture that was presented to the jury and could have had a pervasive effect on the inferences to be drawn from the evidence. Even if Armstrong's son-in-law and wife did not present well to the jury, their demeanor could have been explained, as the postconviction court noted. Such concerns do not lead to the conclusion that their testimony would have been trivial.

We also agree with the postconviction court that the prejudicial effect of counsel's deficient conduct was compounded by the negative inferences the jury could have drawn from the unexplained striking of the son-in-law's testimony and the unexplained absence of Armstrong's wife. As to the son-in-law's testimony:

> When a judge tells jurors to disregard the entire testimony of a part[y's] witness who has testified extensively before them without more of an explanation or direction, it more likely leaves a negative inference in the minds of the trier[s] of fact. . . . It is common sense that when a judge directs you to disregard the testimony of a person who has been testifying for a party it is not a good thing for that party.

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[27] See, *Mosley v. Atchison, supra* note 24; *Montgomery v. Petersen, supra* note 24; *State v. Harris, supra* note 24.

As to Armstrong's wife, there is a natural negative inference any time a defendant's spouse fails to testify. This is because the "logical inference is that a party would be likely to call as a witness a person bound to him by ties of interest or affection unless he has reason to believe that the testimony given would be unfavorable."[28]

The negative inferences deriving from the absence of the wife at trial was made even worse because the jury reasonably expected from opening statements that the wife would be testifying and the jury knew the wife was present at least some of the time Armstrong babysat the girls. The jury could not have helped but wonder why, bound not only by affection but as a witness to Armstrong's babysitting interactions, the wife did not attempt to lend credibility to Armstrong's testimony. In *Ferensic v. Birkett*,[29] the court described the trial court as inflicting "double punishment" on the defendant by not only excluding the defense witnesses but by failing to instruct the jury as to the reason the witnesses described in opening statements were not testifying.

Thus, we agree with the postconviction court that Armstrong was prejudiced by defense counsel's deficient conduct of agreeing with the State to strike and exclude defense witnesses. Under the totality of the circumstances presented at trial, the decision would reasonably likely have been different but for counsel's error leading to the absence of the testimony of Armstrong's wife and son-in-law.

VI. CONCLUSION

We agree with the postconviction court that Armstrong met both prongs of his burden under *Strickland v. Washington* to show there was such a denial or infringement of his rights as to render the judgment void or voidable.[30] We therefore affirm the judgment of the postconviction court, which vacated Armstrong's convictions and ordered a new trial. In accordance

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[28] 1 Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 3:21 at 233 (15th ed. 1997).

[29] *Ferensic v. Birkett, supra* note 23, 501 F.3d at 478.

[30] See § 29-3001.

with the appellate jurisdiction of the Supreme Court, the district court is directed, upon the release of this opinion and prior to the issuance of the mandate, to forthwith consider whether it would be appropriate to grant release of Armstrong on bond under any conditions it deems warranted.

AFFIRMED.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JOSHUA J. McINTYRE, APPELLANT.
863 N.W.2d 471

Filed May 29, 2015. No. S-14-595.

1. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law which an appellate court resolves independently of the lower court's conclusion.
2. **Drunk Driving: Blood, Breath, and Urine Tests.** The State must establish four foundational elements for the admissibility of a breath test in a driving under the influence prosecution: (1) The testing device was working properly at the time of the testing; (2) the person who administered the test was qualified and held a valid permit; (3) the test was properly conducted under the methods stated by the Department of Health and Human Services; and (4) all other statutes were satisfied.
3. **Criminal Law: Statutes: Legislature: Intent.** In reading a penal 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.
4. **Criminal Law: Statutes.** Penal statutes receive a sensible construction, considering the evils and mischiefs sought to be remedied.
5. ____: ____. A court will not supply missing words or sentences to make clear that which is indefinite in a penal statute, or supply what is not there.
6. **Administrative Law.** For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.
7. **Administrative Law: Drunk Driving: Blood, Breath, and Urine Tests.** The driving under the influence statutes and the regulations promulgated by the Department of Health and Human Services do not bar evidence of the result of a chemical breath test with a deficient sample if the State lays sufficient foundation.
8. **Criminal Law: Indictments and Informations.** Where a statutory crime may be committed by any of several methods, the indictment or information may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other.

9. **Indictments and Informations.** Objections to the form or content of an information should be raised by a motion to quash.
10. **Pleas.** In general, a court cannot entertain a motion to quash if the defendant's not guilty plea still stands.
11. **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.
12. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

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

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

CONNOLLY, J.

SUMMARY

The State charged Joshua J. McIntyre with operating a motor vehicle under the influence of alcohol. The operative information further alleged either that McIntyre did so with a breath alcohol content of at least .15 of 1 gram by weight of alcohol per 210 liters of his breath or that he refused to submit to a chemical test of his breath. Witnesses for the State testified that McIntyre intentionally withheld air from the testing device, resulting in a sample size that the device labeled "Deficient." Nevertheless, the device reported that McIntyre's breath alcohol content was .218. The jury convicted McIntyre of operating a motor vehicle under the influence of alcohol and further found that his breath alcohol content was .15 or greater. On appeal, McIntyre argues that the results of the chemical test are inadmissible because the testing device

registered a "Deficient Sample." We conclude that evidence of a chemical breath test that records a deficient sample is admissible if the State lays sufficient foundation.

BACKGROUND

Factual Background

On April 10, 2013, McIntyre went to a bar with two coworkers. He arrived at 10:15 or 10:30 p.m. and left at about 2 a.m. on April 11. In less than 4 hours, McIntyre testified that he drank two beers, four or five mixed drinks, and about two shots of some type of liqueur. Although he knew that he was "under the influence of alcohol," McIntyre volunteered to drive his friend's car because his companions seemed even more intoxicated.

Sara Genoways, a Lincoln police officer, was on patrol during the early morning of April 11, 2013. Genoways was driving on Interstate 180 at 2:32 a.m. when she saw a red Mazda traveling northbound. Genoways followed the Mazda and saw it weave between lane lines and vacillate between 50 and 75 miles per hour in a 60-mile-per-hour zone.

Genoways stopped the Mazda and asked the driver, McIntyre, for his personal identification, vehicle registration, and insurance. Genoways said that McIntyre had "difficulty retrieving his license" and "was fumbling with his paperwork." Such "dexterity problems," Genoways testified, indicate impairment. In addition, Genoways noticed that McIntyre smelled strongly of alcohol, his eyes were "watery and bloodshot," his eyelids were "droopy," and he spoke with a "pronounced slur."

McIntyre agreed to perform field sobriety tests. Genoways administered the horizontal gaze nystagmus test, and McIntyre showed all six signs of impairment. Because of bad weather, Genoways did not administer any other standardized test.

Believing that McIntyre was intoxicated, Genoways arrested him and took him to a testing center. She interviewed McIntyre, and he admitted that he was under the influence. At trial, McIntyre testified that he "started to really feel it" at the testing center and was "pretty drunk."

After McIntyre's waiting period ended, Genoways prepared him to take a chemical test of his breath on a DataMaster, a device that uses the infrared absorption method to measure alcohol content. Genoways told McIntyre to "take a deep breath [and] blow long and consistently into the machine" until he was "completely out of air." He began the test, and the device started to make a constant tone, but then began beeping. Genoways explained that the device emits "short little beeps" if "somebody is not blowing" and "make[s] a long steady tone" if "somebody is blowing sufficiently." According to Genoways, McIntyre "was puffing out his cheeks and acting like he was blowing in the machine" without really doing so. Genoways believed that McIntyre understood her instructions and knew that he was not blowing hard enough.

McIntyre eventually exhausted the DataMaster's "two-minute window," and the device "time[d] out." After the test ended, the machine produced a "printout" stating "DEFICIENT SAMPLE, INCOMPLETE TEST." Nevertheless, the printout recorded a breath alcohol content of .218 and stated that the "VALUE PRINTED WAS HIGHEST OBTAINED." The printout includes a graph of the flow of air into the machine and the alcohol content of that air. The Nebraska Department of Health and Human Services' regulations provide a checklist to be completed by the officer administering the chemical test. Because the sample was deficient, Genoways wrote "Refused" in the field for McIntyre's breath alcohol content in the DataMaster checklist.

McIntyre testified that he misunderstood Genoways' instructions. He said that Genoways told him to "blow until I heard a flat line." So, he blew until he "heard the flat line" and then stopped. McIntyre testified that he tried to comply and denied that he was "just puffing [his] cheeks out." But McIntyre admitted that he knew that ".15 is a more offense [sic] than .08."

Todd Kocian was the officer responsible for maintaining the machine into which McIntyre blew. Kocian became a maintenance officer for the Lincoln Police Department's breath testing devices in 2009 and attended a 2-day class on the

DataMaster in 2012. Kocian testified that on March 19 and April 25, 2013, he performed maintenance checks on the device McIntyre used, and that the machine worked correctly on both occasions. Based on the maintenance records, Kocian opined that it was in working order on April 11.

Over McIntyre's objection, Kocian also testified about the accuracy of a test with a deficient sample. Kocian explained that a DataMaster's measurement of blood or breath alcohol content eventually "plateau[s]" once the subject provides "deep lung air" that is "consistent with the blood." The device deems a sample deficient if the measurement of breath alcohol never plateaued. But Kocian stated that a deficient sample could still yield a "scientifically accurate" result. He analogized:

> [I]f we had a large hill and I was going to have somebody measure the distance to the top of the hill, and I gave you some sort of measuring device, [and] I started you up the hill and never got to the top of the hill and stopped at some point, I don't know how tall the hill is, but I know how far you got up that hill.

That is, Kocian testified that .218 was McIntyre's minimum, but not maximum, breath alcohol content.

PROCEDURAL HISTORY

The State filed an information alleging that McIntyre operated a motor vehicle while under the influence of alcohol or when he had a breath alcohol concentration of .08 or more. The State further alleged that McIntyre had a concentration of .15 or more and that he had two prior convictions for driving under the influence.

Before trial, the State orally moved for leave to amend the information. McIntyre did not object, and the court sustained the State's motion. At the same hearing, the State amended the original information by interlineation. The amended information adds—as an alternative to the allegation that his breath alcohol content was at least .15—an allegation that McIntyre refused to submit to a chemical test. McIntyre told the court that he had a chance to review the amended information.

After accepting McIntyre's not guilty plea to the amended information, the court asked if "there is anything else we need to take up with respect to the Amended Information." McIntyre's attorney said that there was not. McIntyre did not move to quash the amended information.

McIntyre moved in limine to prohibit references "to any read out or result from the formal breath test during which the State claims that [McIntyre] failed to provide sufficient breath sample or refused to submit to a formal breath test." McIntyre argued that such evidence was irrelevant or, if relevant, the court should exclude it under Neb. Evid. R. 403.[1]

At the hearing on McIntyre's motion in limine, Kocian gave testimony similar to his testimony at trial. Kocian stated that .218 was an accurate measurement of "the lowest possible breath alcohol content" that McIntyre could have had at the time of the test.

The court overruled McIntyre's motion in limine the day before trial. The court stated that a breath sample deemed deficient by the testing device could nevertheless yield a reliable measure of alcohol content. The court offered an alternative to Kocian's hill analogy:

> Assuming that [a] thermometer is in good working order, it takes about two minutes under your tongue or under your arm to register a valid temperature. If somebody takes that thermometer out after one minute and that thermometer reads 101, that is reliable evidence of a fever. Even though the person's actual temperature may be higher than 101, it can reliably be concluded that the temperature is not lower than 101.

The court concluded "the test result is sufficiently reliable to be relevant and admissible."

McIntyre's attorney stated that "given the court's ruling on the motion in limine, I think the State should be required to elect as to whether it's .15 or refusal." Although the court viewed the theories as "logically inconsistent," it overruled McIntyre's "oral motion that the State elect between alternative theories."

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[1] Neb. Rev. Stat. § 27-403 (Reissue 2008).

The jury found McIntyre guilty of driving under the influence of alcohol and also found that he had a breath alcohol content of at least .15.

After an enhancement hearing, the court found that McIntyre had two prior convictions for driving under the influence. Because McIntyre had two prior convictions and the jury found that his breath alcohol content was at least .15, his crime is a Class IIIA felony punishable by up to 5 years' imprisonment.[2]

The court sentenced McIntyre to 365 days' imprisonment and revoked his operator's license for 15 years.

ASSIGNMENTS OF ERROR

McIntyre assigns, renumbered, that the court erred by (1) not excluding evidence of "the highest [breath alcohol content] value obtained from a deficient breath sample"; (2) not requiring the State to elect between the theory that he had a breath alcohol content of at least .15 and the theory that he refused to submit to a chemical test; and (3) imposing an excessive sentence. McIntyre also assigns that (4) the evidence is insufficient to support his conviction.

STANDARD OF REVIEW

[1] The meaning and interpretation of statutes and regulations are questions of law which an appellate court resolves independently of the lower court's conclusion.[3]

ANALYSIS

Evidence of Chemical Test With Deficient Sample

McIntyre argues that the results of a chemical test for which the motorist gives a "deficient" sample are inadmissible. He contends that "[t]he plain language of Title 177 [of the Nebraska Administrative Code] does not permit the numerical results of a deficient breath sample to be made part of the

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[2] See Neb. Rev. Stat. §§ 28-105 (Cum. Supp. 2014) and 60-6,197.03(6) (Cum. Supp. 2012).

[3] See *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011).

official record."[4] Because the result of a test with a deficient sample cannot be part of the official record, McIntyre argues that it cannot be evidence of his breath alcohol content.

Of course, the State sees it differently. It responds that McIntyre's interpretation of the regulations would permit bad faith test takers to "'game the system'": "A person could simply feign compliance with the test by providing a deficient breath sample, making it difficult to prove a refusal, and then any [breath alcohol content] measurement obtained from that sample would also be inadmissible, so [breath alcohol content] could not be proved either."[5]

We begin with an overview of the relevant statutes. Under Neb. Rev. Stat. § 60-6,196 (Reissue 2010), a person commits a crime by operating a motor vehicle (1) while under the influence of alcoholic liquor, (2) with a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood, or (3) with a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his or her breath.

The penalties for violating § 60-6,196 are described in § 60-6,197.03. Section 60-6,197.03(6) provides:

> If such person has had two prior convictions and, as part of the current violation, had a concentration of fifteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or fifteen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath or refused to submit to a test as required under section 60-6,197, such person shall be guilty of a Class IIIA felony . . . .

A chemical test of a person's blood, breath, or urine is admissible in a prosecution for driving under the influence if the requirements of Neb. Rev. Stat. § 60-6,201 (Reissue 2010) are met. Section 60-6,201(3) provides:

> To be considered valid, tests of blood, breath, or urine made under section 60-6,197 . . . shall be performed according to methods approved by the Department of

[4] Brief for appellant at 15-16.

[5] Brief for appellee at 20.

> Health and Human Services and by an individual possessing a valid permit issued by such department for such purpose . . . . The department may approve satisfactory techniques or methods to perform such tests and may ascertain the qualifications and competence of individuals to perform such tests and issue permits which shall be subject to termination or revocation at the discretion of the department.

The Legislature has therefore conferred on the Department of Health and Human Services the power to adopt methods for determining when chemical tests are valid.[6]

The regulations adopted by the department appear in title 177 of the Nebraska Administrative Code. The regulations define "[v]alid test" as one "performed according to methods approved by the Department by an individual possessing a valid permit."[7] The regulations, at 177 Neb. Admin. Code, ch. 1, § 002.01 (2009), address how breath test results are reported for "MEDICO-LEGAL PURPOSES." At the time of McIntyre's arrest, this regulation provided:

> Breath Test Results. Report of Breath Test Results of a test for alcohol of breath shall be reported as hundredths or thousandths of a gram of alcohol per 210 liters of breath on the checklist. Test results shall not be rounded upward. For example, an analysis producing a result of .138 shall be reported as .13 or as .138.
>
> 002.01A No digital result shall be reported on the checklist unless the device has received a sufficient breath sample and completely executes its prescribed program and prints a test record card to indicate that the program has been completed.
>
> 002.01B Prescribed Program. When a breath testing device fails to print a record card or the record card indicates an incomplete or deficient sample, this indicates that the device has not completed its prescribed program.

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[6] *Morrissey v. Department of Motor Vehicles*, 264 Neb. 456, 647 N.W.2d 644 (2002), *disapproved in part on other grounds, Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

[7] 177 Neb. Admin. Code, ch. 1, § 001.26 (2009).

> Such deficient sample does not constitute a completed test or sufficient sample of breath and would be considered to be a refusal. Such deficient sample does not constitute a completed test, but is scientifically probative up to the amount indicated by the testing device at the time that the breath testing procedure stopped.
>
> 002.01C The completed checklist found in these rules and regulations shall be the official record of breath test results.
>
> 002.01D The printing of a test record card indicates that the prescribed program of the evidentiary breath testing device has been completed.
>
> . . . .
>
> 002.01E Record Requirements in Performance of Tests. The testing records must show adherence to the approved method, and techniques.

The checklist approved for DataMaster tests is referred to as "Attachment 2."[8]

[2] The State must establish four foundational elements for the admissibility of a breath test in a driving under the influence prosecution: (1) The testing device was working properly at the time of the testing; (2) the person who administered the test was qualified and held a valid permit; (3) the test was properly conducted under the methods stated by the Department of Health and Human Services; and (4) all other statutes were satisfied.[9]

McIntyre contends that the State did not satisfy the third foundational element: compliance with the department's methods as described in the regulations. Acknowledging that other courts have held that tests of deficient samples can be evidence of a motorist's breath alcohol content,[10] McIntyre seeks to

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[8] See 177 Neb. Admin. Code, ch. 1, § 008.01C (2009).

[9] See *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

[10] See, *U.S. v. Brannon*, 146 F.3d 1194 (9th Cir. 1998); *State v. Mazzuca*, 132 Idaho 868, 979 P.2d 1226 (Idaho App. 1999); *State v. DeMarasse*, 85 N.Y.2d 842, 647 N.E.2d 1353 (1995); *State v. Conrad*, 187 W. Va. 658, 421 S.E.2d 41 (1992); *State v. Wilkinson*, 181 W. Va. 126, 381 S.E.2d 241 (1989); *Williams v. District of Columbia*, 558 A.2d 344 (D.C. 1989).

distinguish these cases on the ground that Nebraska's statutes and regulations specifically prohibit such evidence. Therefore, our task is one of interpretation.

[3-6] In reading a penal 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.[11] Penal statutes receive a sensible construction, considering the evils and mischiefs sought to be remedied.[12] We will not supply missing words or sentences to make clear that which is indefinite, or supply what is not there.[13] For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.[14]

The regulations promulgated by the Department of Health and Human Services obviously create some tension. Section 002.01 states that the result of a deficient sample is not a completed test, cannot be recorded on the appropriate checklist, and is considered a refusal. But § 002.01B specifically provides that a deficient sample "is scientifically probative up to the amount indicated by the testing device at the time the breath testing procedure stopped." So, the apparently Janus-faced regulation seems to both accept and reject the same thing. And the answer is not obvious. But we conclude that construing the regulations sensibly in light of the mischief sought to be remedied, they permit the State to introduce the results of a test with a deficient sample if the results are otherwise admissible.

It appears that § 002.01 synthesizes two aims. First, motorists with an alcohol content above the statutory thresholds should not be able to avoid criminal liability by withholding a sufficient sample, thereby preventing the device from determining their true breath alcohol content. Nor should a motorist be able to take advantage of giving a deficient sample by offering the

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[11] *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997).

[12] See *State v. Thacker*, 286 Neb. 16, 834 N.W.2d 597 (2013).

[13] See *id.*

[14] See *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002).

result as evidence of his or her actual (i.e., maximum) alcohol concentration. Thus, if a motorist manifests an unwillingness to submit to a chemical test by giving a deficient sample, the regulations require the arresting officer to record the result as a refusal. Second, a reliable measure of a motorist's minimum breath alcohol content should not be barred simply because the result would have been even higher if the motorist gave a full sample. If the test of a deficient sample exceeds the statutory alcohol concentration levels and the State satisfies the foundational elements for admissibility, then the State may offer the result as evidence of the motorist's minimum breath alcohol content despite the lack of a full sample.

McIntyre's interpretation also creates some wiggle room for bad faith test takers. An intoxicated motorist might withhold a full sample, thereby preventing the State from introducing the test results even if they exceed the statutory thresholds. But the motorist could still blow hard enough to cause the device to print a test record card, thereby lending credibility to the motorist's defense to a refusal charge. This strategy is obviously not a guaranteed winner, but it might give some motorists an incentive to evade giving a sufficient sample of their breath.

McIntyre directs us to *State v. Baue*,[15] but that case did not involve a deficient sample. There, the defendant sat for a chemical test of his breath and the device "registered both a digital readout of .12 and an error reading."[16] The device did not print a record card. The defendant took a second test, which resulted in a reading of .11 and no error message. Over the defendant's objection, the arresting officer testified about the result of the first test. The jury convicted the defendant of driving under the influence.

We reversed, concluding that the first foundational element for a breath test—the testing device worked properly—was not met as to the first result. The evidence showed that the device generated a printed card in addition to the digital

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[15] *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

[16] *Id.* at 971, 607 N.W.2d at 196.

display when it worked correctly. The checklist set forth in the regulations required the insertion and removal of the test record card, and we declined to assume that the card was a meaningless formality. The arresting officer himself believed that the lack of a test record card showed that the device did not work properly.

Here, the printout stated that the sample was deficient, not that the device encountered an error. Kocian testified that the "DEFICIENT SAMPLE" notation meant that the sample was large enough to measure only McIntyre's "minimum breath alcohol content." Nothing indicates that the device malfunctioned or otherwise worked improperly.

Nor are the series of Kansas cases that McIntyre cites persuasive.[17] Like the Kansas statutes at issue in those cases, § 60-6,196 provides that the State can convict a motorist on proof that the motorist operated a motor vehicle while under the influence of alcohol or with a particular alcohol content in his or her blood, breath, or urine. But Kansas' statutes expressly stated that the results of deficient sample tests were admissible in the first class of cases and not in the second. Nebraska's statutes and the regulations promulgated thereunder do not draw such a distinction.

[7] In conclusion, the driving under the influence statutes and the regulations promulgated by the Department of Health and Human Services do not bar evidence of the result of a chemical breath test with a deficient sample if the State lays sufficient foundation.

ELECTION

McIntyre argues that "a plain reading of the [driving under the influence] statutes" allowed the State to prosecute him on the theory that his breath alcohol content was at least .15

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[17] See, *State v. Stevens*, 285 Kan. 307, 172 P.3d 570 (2007), *abrogated on other grounds, State v. Ahrens*, 296 Kan. 151, 290 P.3d 629 (2012); *State v. Herrman*, 33 Kan. App. 2d 46, 99 P.3d 632 (2004); *State v. Maze*, 16 Kan. App. 2d 527, 825 P.2d 1169 (1992). See, also, *State v. Kieley*, 413 N.W.2d 886 (Minn. App. 1987); *State v. Hallfielder*, 375 N.W.2d 571 (Minn. App. 1985); *Godderz v. Commissioner of Public Safety*, 369 N.W.2d 606 (Minn. App. 1985).

or the theory that he refused a chemical test, but not both.[18] He contends that § 60-6,197.03(6) "does not authorize the State to proceed to trial under alternative theories in a single prosecution."[19] Because the theories are "logically inconsistent" as a matter of statutory interpretation, he argues that the State must pick one or the other.[20]

[8] McIntyre asserts that if the State charges a defendant with alternative means of committing the same crime, the alternatives must not be incongruous. He cites the rule that where a statutory crime may be committed by any of several methods, the indictment or information may charge in a single count that it was committed by any or all of the enumerated methods if they are not inconsistent with or repugnant to each other.[21]

[9] But McIntyre failed to preserve this issue for appellate review. Neb. Rev. Stat. § 29-1808 (Reissue 2008) provides: "A motion to quash may be made in all cases when there is a defect apparent upon the face of the record, including in the form of the indictment or in the manner in which the offense is charged." Objections to the form or content of an information should be raised by a motion to quash.[22] McIntyre's argument that the amended information alleged alternate enhancement theories that are inconsistent as a matter of law would be a defect apparent on the face of the record. Whether the theories were inconsistent under the rules of statutory interpretation did not depend on what evidence the State might adduce at trial. McIntyre could have raised the alleged defect in a motion to quash.[23]

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[18] Brief for appellant at 16.

[19] *Id*. at 33.

[20] *Id*. at 34.

[21] *State v. Novak*, 181 Neb. 90, 147 N.W.2d 156 (1966); *Hoffman v. State*, 164 Neb. 679, 83 N.W.2d 357 (1957).

[22] *State v. Johnson*, 290 Neb. 369, 859 N.W.2d 877 (2015).

[23] See, *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. Novak, supra* note 21; *Sudyka v. State*, 123 Neb. 431, 243 N.W. 276 (1932). See, also, *Winkelmann v. State*, 114 Neb. 1, 205 N.W. 565 (1925).

By failing to move to quash the amended information because it alleged inconsistent theories of committing a single crime, McIntyre waived that objection.[24] Neb. Rev. Stat. § 29-1812 (Reissue 2008) provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." Thus, we have held that a defendant's failure to move to quash an information generally waives any objections to it.[25]

[10] Nor can we treat McIntyre's last-minute oral motion to elect as a motion to quash. A defendant's waiver of defects under § 29-1812 is mandatory.[26] In general, a court cannot entertain a motion to quash if the defendant's not guilty plea still stands.[27] McIntyre did not move for leave to withdraw his plea to the amended information. Because his not guilty plea remained on the record, any motion to quash was untimely.[28]

McIntyre also urges us to treat the amended information as if it joined multiple offenses. He cites *Sheppard v. State*,[29] in which the State charged the defendant with three separate counts of receiving stolen automobiles. Each count related to a different date and a vehicle owned by a different person. The defendant argued that the trial court should have sustained his pretrial "motion to elect."[30] We explained that trial courts had discretion to permit "'joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment.'"[31] We affirmed because

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[24] See *Sudyka v. State, supra* note 23.

[25] See, e.g., *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). But see *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986).

[26] *State v. Liston*, 271 Neb. 468, 712 N.W.2d 264 (2006).

[27] See, *id.*; *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996).

[28] See *State v. Conklin, supra* note 27.

[29] *Sheppard v. State*, 104 Neb. 709, 178 N.W. 616 (1920).

[30] *Id.* at 710, 178 N.W. at 617.

[31] *Id.* at 711, 178 N.W. at 617, quoting *Pointer v. United States*, 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894).

the defendant had not shown that he was so "confounded or prejudiced in his defense as to call for a reversal."[32]

The joinder of offenses—the question addressed in *Sheppard*—is not before us in this case. Certain offenses are single crimes that the State can prove under different theories.[33] Because each alternative theory is not a separate crime, the theories do not require the State to charge the crime as separate alternative counts.[34] Here, the State charged McIntyre with a single count. We have noted that a violation of § 60-6,196 is one offense which can be proved in more than one way.[35] The same reasoning applies to the alternative theories under § 60-6,197.03(6). We note that Neb. Rev. Stat. § 29-2002 (Reissue 2008) now controls the joinder or separation of charges for trial.[36]

Furthermore, McIntyre has not explained how he was prejudiced. He argues:

> [T]he failure of the district court to require the State to elect between inconsistent theories prejudiced [McIntyre] by resulting in erroneous and prejudicial evidentiary rulings as discussed in the first assigned error. [McIntyre] was further prejudiced because he had to somehow structure the theory of his case to defend against conflicting and logically inconsistent evidence.[37]

Neither of these arguments are persuasive. First, we conclude that the result of his breath test was admissible despite the deficient sample. Second, the bare assertion that the court received "logically inconsistent evidence" does not conclusively show prejudice. Evidence that McIntyre gave a deficient sample was relevant to both the .15 and refusal theories. Even if there was some spillover of evidence between the two

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[32] *Id.* at 711, 178 N.W. at 617.

[33] *State v. Brouillette, supra* note 23.

[34] *Id.*

[35] *State v. Baue, supra* note 15.

[36] *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014).

[37] Brief for appellant at 34.

theories, we conclude that McIntyre was not so prejudiced as to require a new trial.

Excessive Sentence

McIntyre argues the sentence of 365 days' imprisonment is excessive. He emphasizes that he completed a substance abuse program and that he has a child support obligation of $83 per month, which he implies he will have trouble paying while incarcerated. McIntyre believes that probation was appropriate because "[t]he fact that [he] completed his prior probation sentences established that he would cooperate with probation."[38]

[11] We cannot say that the court abused its discretion by sentencing McIntyre to 365 days' imprisonment. The principles of law governing the review of sentences are so familiar that we need not repeat them here.[39] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[40] The court did not consider McIntyre to be a candidate for probation, because he underwent probation before and, as shown by his most recent conviction, probation did not prompt him to change his behavior. The court further reasoned that probation would depreciate the seriousness of the crime and that there was a "substantial" risk that McIntyre would reoffend. In addition to two prior driving under the influence convictions, McIntyre has convictions for driving under suspension, driving under revocation, and negligent driving.

Insufficient Evidence

[12] McIntyre argues that the evidence is not sufficient to support his conviction. In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on

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[38] *Id.* at 39-40.

[39] See *State v. Carngbe*, 288 Neb. 347, 847 N.W.2d 302 (2014).

[40] *State v. Ortega, ante* p. 172, 859 N.W.2d 305 (2015).

the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[41] The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[42]

We conclude that the evidence is sufficient. As to § 60-6,196, Genoways testified that she stopped a motor vehicle operated by McIntyre and that McIntyre showed signs of impairment. McIntyre himself testified that he drove "under the influence of alcohol." As to enhancement under § 60-6,197.03(6), the State presented evidence that McIntyre had two prior convictions and that his breath alcohol content was at least .218, well above the .15 threshold. A rational trier of fact could have found the essential elements of McIntyre's crime beyond a reasonable doubt.

CONCLUSION

Despite some textual friction, we conclude that the driving under the influence statutes and the regulations promulgated by the Department of Health and Human Services do not bar evidence of the result of a chemical breath test with a deficient sample if the State lays sufficient foundation. Furthermore, the district court did not abuse its discretion in sentencing McIntyre and the evidence was sufficient to support his convictions. We do not reach his argument that the amended information alleged two inconsistent methods of committing the same crime.

AFFIRMED.

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[41] *State v. Hale, ante* p. 70, 858 N.W.2d 543 (2015).

[42] *Id.*

STATE OF NEBRASKA, APPELLEE, V. WARD L. HUNNEL, APPELLANT.

863 N.W.2d 442

Filed May 29, 2015. No. S-14-620.

1. **Sentences: Appeal and Error.** Whether a defendant is entitled to credit for time served and in what amount are questions of law. An appellate court reviews questions of law independently of the lower court.
2. ____: ____. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Sentences: Prior Convictions.** Neb. Rev. Stat. § 83-1,106(4) (Reissue 2008) does not concern time spent serving a sentence on a prior conviction.
4. **Sentences: Words and Phrases.** Jail time is the time an accused spends in detention pending trial and sentencing.
5. ____: ____. Prison time is the time spent serving on a conviction.
6. ____: ____. "[T]ime spent in custody under the former charge," as found in Neb. Rev. Stat. § 83-1,106(4) (Reissue 2008), refers to jail time and not to prison time.
7. **Sentences.** With regard to a federal sentence still being served at the time of sentencing on a state conviction, the second sentence does not begin to run until the sentence which the prisoner is serving in another court has expired, unless the court pronouncing the sentence specifically states otherwise.
8. **Sentences: Evidence.** The 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.
9. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
10. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

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

Nathan T. Bruner, of Greenwall, Bruner & Frank, L.L.C., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Ward L. Hunnel appeals from his sentences for multiple convictions of felon in possession of a firearm and attempted felon in possession of a firearm. Hunnel presented no evidence at the sentencing hearing other than a newspaper article in which the local police chief described him as a hunting enthusiast who was not a threat to the community. The court refused to enter the newspaper into evidence. Hunnel argues that the court erred in refusing to consider the newspaper article. Hunnel also argues that the court erred in failing to grant him credit for 369 days previously served within the federal system on a federal sentence. We affirm.

BACKGROUND

Hunnel pled guilty in the Buffalo County District Court to one count of felon in possession of a firearm, a Class ID felony, and three counts of attempted felon in possession of a firearm, a Class II felony. In exchange, the State dismissed 26 counts of felon in possession of a firearm and changed 3 counts of felon in possession of a firearm to attempted felon in possession of a firearm. The original information was filed on February 15, 2013, and the amended information was filed on April 8, 2014.

The possession charges stem from law enforcement's discovering, on January 22, 2013, 30 weapons and copious amounts of ammunition in the home where Hunnel resided. Hunnel was arrested by the Kearney Police Department on January 24. The presentence investigation report (PSI) indicates that Hunnel was released on bond on February 8, 2013.

Hunnel has a criminal history beginning in 1982. Prior offenses include burglary as a juvenile, careless driving, hunting after hours, driving under suspension, willful reckless driving, criminal mischief, attempted third degree assault, disturbing the peace, violations of hunting and fishing regulations, issuing bad checks, intimidation by telephone call,

impersonating a public servant, violation of a protection order, violating motor carrier safety regulations, and multiple probation violations. In 2006, Hunnel was convicted on a federal charge of "Illegal Import of Wildlife" and was placed on 5 years' probation. That probation was subsequently revoked on August 11, 2008, and he served an 11-month sentence in the Bureau of Prisons.

The PSI noted that Hunnel has had problems with compliance when sentenced to probation. This included law violations as well as leaving the state without authorization, failing to file monthly supervision reports, neglecting to notify his probation officer of a change of address, and failing to pay restitution. In addition, the PSI found Hunnel to be at "Very High Risk" under the category of "Pro-Criminal Attitude/Orientation." The PSI stated that Hunnel did not take responsibility for his actions leading to the possession charges in Buffalo County and that Hunnel considered those actions to be "victimless crime[s]." The PSI indicates that when not in prison, Hunnel earned his living purchasing and selling animal hides across the Midwest.

The PSI shows that on December 10, 2013, Hunnel was sentenced to 12 months' imprisonment, followed by 3 years' supervised release, on a "Weapons Offense" in federal court. This conviction arose out of acts apparently occurring on March 30, 2013.

The PSI shows a "Federal Hold" on December 19, 2013. A bond review hearing for the possession charges was held in Buffalo County that same date. At the hearing, Hunnel's counsel indicated Hunnel had 4 months left on the federal sentence for the "Weapons Offense." The PSI indicates a return to the Buffalo County Detention Center on April 2, 2014, which was approximately 4 months after the bond review hearing.

The sentencing hearing on the firearms possession convictions in Buffalo County was held on June 12, 2014. The only evidence Hunnel's attorney offered at the sentencing hearing was a local newspaper article dated January 26, 2013, and entitled "30 firearms taken from felon's home." In the article,

the police chief "called Hunnel a hunting enthusiast and not a threat to the community." The police chief was quoted in the article as saying, "'I just don't see him as an immediate threat to the public.'"

The State objected to the article. The State noted that "the Court can receive it for whatever it's worth obviously," but argued that the exhibit was worth very little, because it was unclear what the police chief meant by his statement. The district court refused to enter the article into evidence, noting that the statement would "essentially be hearsay" and that "if you wanted to use [the police chief] as a character witness or reference, that could have been done directly."

Hunnel's attorney asked that the court sentence Hunnel to the minimum required by law. Hunnel's attorney described Hunnel as being no threat to the community. Hunnel violated the law by falling "into traps of his own passions which are outdoor life and the pursuit of being outdoors." Hunnel's attorney also noted that Hunnel was a cooperating federal witness and had been a cooperative and respectful inmate in the detention center.

Hunnel's attorney also asked that the court give Hunnel credit for 88 days served in Buffalo County, for 3 days in Grant County that were served as charges were dismissed as part of the plea bargain, for 3 days served in Platte County, and for 369 days served with the federal authorities. Hunnel's attorney offered no evidence relating to the December 2013 federal sentence or its underlying conviction. The State mentioned at the hearing that it believed Hunnel had spent 369 days in federal custody, although it did not elaborate or specifically respond to Hunnel's request for 369 days' credit. Hunnel's attorney stated at the hearing that the federal "Weapons Offense" listed in the PSI was really interstate transportation of an unlawfully killed deer. The State made no comment concerning the details of the federal crime.

On June 13, 2014, the court sentenced Hunnel to 7 to 15 years' imprisonment on count I and 20 months' to 5 years' imprisonment on counts II through IV. Counts II through IV were to be served concurrently to each other and consecutively to count I. The court granted Hunnel credit for 86 days

of time served. The court did not grant credit for 369 days in custody under the federal conviction. On July 10, Hunnel filed his notice of appeal from the June 13 order.

ASSIGNMENTS OF ERROR

Hunnel assigns as error that the district court imposed excessive sentences and abused its discretion at the sentencing hearing by failing to allow relevant evidence.

STANDARD OF REVIEW

[1] Whether a defendant is entitled to credit for time served and in what amount are questions of law. An appellate court reviews questions of law independently of the lower court.[1]

[2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[2]

ANALYSIS

Hunnel argues that the court erred in refusing to grant him credit for the 369 days he spent in federal custody. Hunnel also asserts that the court should have allowed into evidence the newspaper article containing favorable references to his character by the local police chief, reasoning that this character evidence would have mitigated his sentences. He requests that the sentences be vacated and that "fair and just"[3] lesser sentences be imposed, with 369 days' credit for time served.

Credit for Time Served

[3] We first address Hunnel's argument that the district court erred in failing to grant credit under Neb. Rev. Stat. § 83-1,106(4) (Reissue 2008) for 369 days spent in federal custody. The time in federal custody that Hunnel seeks credit for was spent serving the sentence imposed for his federal conviction. We find no merit to Hunnel's argument, because § 83-1,106(4) does not concern time spent serving a sentence on a prior conviction.

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[1] *State v. Carngbe*, 288 Neb. 347, 847 N.W.2d 302 (2014).

[2] *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

[3] Brief for appellant at 23.

Section 83-1,106(4) states:

> If the offender is arrested on one charge and prosecuted on another charge growing out of conduct which occurred prior to his or her arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge which has not been credited against another sentence.

[4,5] In cases decided under § 83-1,106, we have repeatedly equated "custody as a result of the criminal *charge*"[4] with "jail time."[5] We have said that jail time is the time an accused spends in detention pending trial and sentencing.[6] We have explained that "jail time" does not include "prison time." Prison time is the time spent serving on a conviction.[7]

[6] In *State v. Banes*,[8] we indicated that "'time spent in custody under the former *charge*'" pursuant to § 83-1,106(4) likewise concerns only jail time. We said that § 83-1,106(4) anticipates allocation of the period of incarceration during the time a defendant is awaiting trial on more than one case.[9] We have never given credit under § 83-1,106(4) for time spent

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[4] § 83-1,106(1) (emphasis supplied).

[5] See, *State v. Baker*, 250 Neb. 896, 553 N.W.2d 464 (1996); *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995); *State v. Frizzell*, 243 Neb. 103, 497 N.W.2d 391 (1993); *State v. Jordan*, 240 Neb. 919, 485 N.W.2d 198 (1992); *State v. Heckman*, 239 Neb. 25, 473 N.W.2d 416 (1991); *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989); *State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989); *State v. Fisher*, 218 Neb. 479, 356 N.W.2d 880 (1984); *Addison v. Parratt*, 208 Neb. 459, 303 N.W.2d 785 (1981); *State v. Tweedy*, 196 Neb. 246, 242 N.W.2d 626 (1976); *State v. McLeaney*, 6 Neb. App. 807, 578 N.W.2d 68 (1998). Compare *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[6] See, *State v. Baker, supra* note 5; *State v. Jordan, supra* note 5; *State v. Heckman, supra* note 5; *State v. Kitt, supra* note 5; *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988); *State v. Fisher, supra* note 5.

[7] See, *State v. Vrtiska, supra* note 6; *State v. Fisher, supra* note 5.

[8] *State v. Banes*, 268 Neb. 805, 811, 688 N.W.2d 594, 598 (2004) (emphasis supplied).

[9] *Id.* See, also, *State v. Carngbe, supra* note 1.

serving a sentence under a conviction. We hold that "time spent in custody under the former charge," as found in § 83-1,106(4), refers to jail time and not to prison time.

Only one subsection of § 83-1,106 pertains to credit for time spent serving a sentence after conviction. Subsection (2) specifies that credit may be given for time spent in custody "under a prior *sentence*." (Emphasis supplied.) But § 83-1,106(2) provides that the defendant may receive such credit for prison time only if the defendant is later "reprosecuted and resentenced" for the same offense or for another offense based on the same conduct. There is no provision under any subsection of § 83-1,106 allowing credit for time spent serving a valid sentence under a valid conviction.

What Hunnel really seeks is a retroactive concurrency of valid sentences for separate crimes. The record, though woefully sparse, indicates Hunnel finished serving the federal period of incarceration before being sentenced on the Buffalo County convictions. We are unaware of any legal principle that would allow a court to order a sentence to run concurrently with a sentence on another conviction that has already been served.

[7] With regard to a federal sentence still being served at the time of sentencing on a state conviction, we have said that the second sentence does not begin to run until the sentence which the prisoner is serving in another court has expired, unless the court pronouncing the sentence specifically states otherwise.[10] Such concurrency, like concurrency with another sentence in the same court, is left to the sentencing judge's discretion.[11]

We find no merit to Hunnel's arguments that the district court erred in failing to credit against his current sentences the 369 days he spent serving his federal sentence on a prior conviction.

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[10] See, *Nelson v. Wolff*, 190 Neb. 141, 206 N.W.2d 563 (1973); *State, ex rel. Allen, v. Ryder*, 119 Neb. 704, 230 N.W. 586 (1930). See, also, Annot., 90 A.L.R.3d 408 (1979).

[11] See *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014).

Newspaper Article

We next address Hunnel's arguments concerning the newspaper article. Hunnel asserts that the district court abused its discretion in refusing to enter the newspaper article into evidence. Hunnel argues that because of this error, we should vacate his sentences.

[8] The 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.[12] The traditional rules of evidence may be relaxed for this purpose, so that the sentencing authority can receive all information pertinent to the imposition of sentence.[13] Thus, reliance upon hearsay information in a presentence investigation is not inappropriate.[14]

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.[15] We conclude that the district court did not abuse its discretion.

While the rules of hearsay may not apply to sentencing hearings, it was reasonable for the district court to consider the foundation for the hearsay statement Hunnel sought to introduce. The court opined: "[I]f you wanted to use [the police chief] as a character witness or reference, that could have been done directly." There was no evidence or argument that the police chief knew Hunnel personally. Rather, it appears from the context that the police chief was giving his assessment of Hunnel's dangerousness based on the same information that the district court had before it at sentencing. The district court could make that judgment for itself.

[9,10] To the extent that Hunnel attempts to more generally challenge his sentences are excessive, we find they are not.

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[12] *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[13] See *id.*

[14] *State v. Ritsch*, 232 Neb. 407, 440 N.W.2d 689 (1989).

[15] *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[16] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[17] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[18]

A Class ID felony is subject to a minimum sentence of imprisonment of 3 years and a maximum sentence of 50 years.[19] A Class II felony is subject to a minimum sentence of imprisonment of 1 year and a maximum sentence of 50 years.[20] The court sentenced Hunnel to 7 to 15 years' imprisonment on the Class ID felony and 20 months' to 5 years' imprisonment on each of the Class II felonies. Counts II through IV were to be served concurrently to each other and consecutively to count I. The sentences imposed were well below the maximum statutory limits. Hunnel's extensive criminal history and noncompliance with probation justified the court's sentencing order.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[16] *State v. Kass, supra* note 2.

[17] *Id.*

[18] *Id.*

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

[20] *Id.*

MONTY S. AND TERESA S., APPELLEES, V. JASON W. AND REBECCA W., APPELLANTS.

863 N.W.2d 484

Filed May 29, 2015. No. S-14-879.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving custody of a child is reviewed by an appellate court de novo on the record.
2. **Parental Rights: Adoption: Proof.** The burden is on the natural parent challenging the validity of a relinquishment of a child for adoption to prove that the relinquishment was not voluntarily given.
3. **Parental Rights: Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
4. **Adoption.** In a private adoption, the child is relinquished directly into the hands of the prospective adoptive parents without interference by the state or a private agency.
5. **Parental Rights.** A natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment.
6. ____. A valid relinquishment of parental rights is irrevocable.
7. ____. The only right retained by the natural parents who have signed relinquishments of parental rights is the right to commence an action seeking to be considered as a prospective parent if the best interests of the child so dictate.
8. ____. Where the relinquishment of rights by a natural parent is found to be invalid for any reason, a best interests hearing is held.
9. ____. A change of attitude subsequent to signing a relinquishment of parental rights is insufficient to invalidate the relinquishment.
10. **Parental Rights: Adoption.** After a decree of adoption has been entered in a private adoption case, the natural parents of an adopted child shall be relieved of all parental duties and responsibilities for the child and shall have no rights over the child.
11. **Adoption.** Adoption was unknown to the common law and is a creature of statute.
12. ____. Adoptions are permissible only when done in accordance with statute.

Appeal from the District Court for Richardson County: DANIEL E. BRYAN, JR., Judge. Affirmed.

Jeanette Stull and Justin J. Knight, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellants.

Steven J. Mercure and Jessica D. Meyer, of Nestor & Mercure, for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

Teresa S. gave birth to an infant son in July 2013. Two days later, Teresa and Monty S., Teresa's husband and the child's biological father, each signed a consent and relinquishment, indicating that each gave up any parental rights to the child and further that they consented to the child's adoption by Jason W. and Rebecca W.

Teresa and Monty subsequently filed a motion for habeas corpus seeking return of the child. The couple alleged that the consents and relinquishments they signed were invalid. Following a trial, the district court concluded, on grounds not argued by Teresa and Monty, that their consents and relinquishments were invalid. Rebecca and Jason appeal. We affirm.

BACKGROUND

The parties in this case were friends. Rebecca was unable to have children, and a foster child that had been placed with Rebecca and Jason had been moved to a placement with biological relatives. Teresa and Monty "felt sorry" for Rebecca and discussed the possibility that Teresa might serve as a surrogate for the couple. Rebecca and Jason ultimately agreed, and it was decided that Teresa and Monty would conceive a child and, at the time of its birth, give that child to Rebecca and Jason for private placement adoption.

The parties agree that from the beginning, and certainly throughout Teresa's pregnancy and the days immediately following the child's birth, the intent was that Teresa and Monty would be a part of the child's life. The parties mostly agree that no discussions beyond this general agreement took place; it was an understanding, and not a detailed plan, that a relationship would exist.

Teresa testified that in her view, an "open" adoption was one in which the "adoptive parents [were] open to allowing the biological parents to be a part of his life and that his

records would never be sealed." The record suggests that this was the general definition of the term as understood by all the parties.

Monty testified that he and Teresa were not informed that "open" adoptions were essentially unenforceable in Nebraska. This was confirmed by the testimony of the attorney conducting the meeting, as well as by Rebecca and Jason. Teresa and Monty also testified that had they known that they would not be able to maintain contact with the child, they would not have signed the relinquishment forms.

Teresa gave birth to the child in July 2013. The child went to Rebecca and Jason's home from the hospital. Two days after the child's birth, both couples and the child rode together to a meeting at the office of Rebecca and Jason's attorney. During that meeting, Teresa and Monty each signed separate documents relinquishing their parental rights and consenting to the adoption by Rebecca and Jason. At this meeting, Rebecca tore up the nonconsent forms presented to Teresa and Monty and announced that they were unnecessary because the adoption was to be "open." Nonconsent forms are signed by biological parents to signify the intent that adoption records be sealed. Where the forms are not signed, such records are not sealed.

On May 12, 2014, Teresa and Monty filed a petition for habeas corpus, seeking return of the child. Teresa and Monty alleged that their consents and relinquishments were invalid for a number of reasons, including fraud, duress, and the failure to present the nonconsent adoption forms prior to signing the relinquishments.

The district court rejected all of Teresa and Monty's allegations. Nevertheless, relying upon *McCormick v. State*,[1] the district court invalidated the relinquishments, concluding that the parties' plan for an "open" adoption invalidated the relinquishments as conditioned upon the retention of some parental rights.

Following a best interests hearing, custody of the child was placed with Teresa and Monty. Rebecca and Jason appeal.

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[1] *McCormick v. State*, 218 Neb. 338, 354 N.W.2d 160 (1984).

ASSIGNMENTS OF ERROR

On appeal, Rebecca and Jason assign, reordered, that the district court erred in (1) excluding evidence of postrelinquishment visits by Teresa and Monty and why those visits were discontinued and (2) holding that the consents were conditioned upon the retention of parental rights and were therefore invalid.

STANDARD OF REVIEW

[1-3] A decision in a habeas corpus case involving custody of a child is reviewed by an appellate court de novo on the record.[2] The burden is on the natural parent challenging the validity of a relinquishment of a child for adoption to prove that the relinquishment was not voluntarily given.[3] In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.[4]

ANALYSIS

Evidentiary Objections.

We first turn to Rebecca and Jason's contention that the district court erred in not admitting certain evidence of the reasons why Rebecca and Jason ceased to allow Teresa and Monty visitation with the child. That evidence generally showed that Rebecca and Jason initially had the full intent of allowing Teresa and Monty to be a part of the child's life until Teresa's visits became so frequent that they began to interfere with Rebecca and Jason's relationships with the child.

Assuming without deciding that this evidence was relevant to Rebecca and Jason's defense that their actions did not amount to fraud or misrepresentation, and thus should have been admitted, we find any such error to be harmless. In fact, the district court did not find any fraud or misrepresentation in the signing of the relinquishments. Rather, it found

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[2] *Brett M. v. Vesely*, 276 Neb. 765, 757 N.W.2d 360 (2008).

[3] *Hohndorf v. Watson*, 240 Neb. 368, 482 N.W.2d 241 (1992).

[4] *Id.*

that the open adoption agreement itself acted as coercion and invalidated the relinquishments. Because Rebecca and Jason prevailed on the fraud and misrepresentation issues, they suffered no prejudice by the failure of the district court to admit this evidence.

There is no merit to this assignment of error.

Validity of Relinquishments.

[4] We now turn to whether the relinquishments in this case were invalid. This case presents a private adoption. In this situation, the child is relinquished directly into the hands of the prospective adoptive parents without interference by the state or a private agency.[5]

[5-7] A natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment.[6] A valid relinquishment is irrevocable.[7] The only right retained by the natural parents is the "right to commence an action seeking . . . to be considered as a prospective parent if the best interests of the child so dictate. The natural parent's rights are no longer superior to those of the prospective adoptive family."[8]

[8] Where the relinquishment of rights by a natural parent is found to be invalid for any reason, a best interests hearing is nevertheless held: "The court shall not simply return the child to the natural parent upon a finding that the relinquishment was not a valid instrument."[9]

[9] Such relinquishments are generally upheld. We have held repeatedly that a change of attitude subsequent to signing a relinquishment is insufficient to invalidate the relinquishment.[10] Rather, as we noted above, in the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed

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[5] *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991).

[6] *Id*.

[7] *Id*.

[8] *Id*. at 791, 467 N.W.2d at 877.

[9] *Id*. at 791-92, 467 N.W.2d at 878.

[10] *Yopp v. Batt, supra* note 5.

by a natural parent knowingly, intelligently, and voluntarily is valid.[11]

[10] Neb. Rev. Stat. § 43-111 (Reissue 2008) provides that after a decree of adoption has been entered in a private adoption case, the natural parents of an adopted child shall be relieved of all parental duties and responsibilities for the child and shall have no rights over the child.

In this case, the district court explicitly found that there were no threats, fraud, or duress involved in the execution of Teresa and Monty's relinquishments. But the district court, relying on this court's decision in *McCormick v. State*,[12] concluded that the relinquishments were conditioned upon the retention of some parental rights and were therefore invalid.

McCormick involved the parental rights of Richard and Joan McCormick to their son. The State had filed for termination of those rights. Just prior to the final hearing on the State's motion to terminate, a meeting took place between the McCormicks, their counsel, the guardian ad litem, and their caseworker. It was explained to the McCormicks that if they signed a relinquishment of their parental rights, there was a possibility that an "open" adoption could be arranged if cooperative adoptive parents were found. This idea was originally suggested by the caseworker. The McCormicks were told by their counsel that it was likely the court would terminate their parental rights if the hearing were held.

The McCormicks signed the relinquishments. Despite the conversation regarding the "open" adoption, the McCormicks were not permitted visitation with their son after they signed the relinquishments. The McCormicks filed a motion for a writ of habeas corpus, which was denied.

The McCormicks appealed. The court found that the McCormicks' relinquishments were coerced by the promise of the open adoption. We noted that "[a] relinquishment conditioned upon the retention of some parental rights is invalid."[13]

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[11] *Id.*

[12] *McCormick v. State, supra* note 1.

[13] *Id.* at 344, 354 N.W.2d at 163.

McCormick was decided in 1984. By 1988, the Legislature had passed 1988 Neb. Laws, L.B. 301, which provided for exchange-of-information contracts in cases involving children in temporary foster care. The legislative intent states:

> The Legislature finds that there are children in temporary foster care situations who would benefit from the stability of adoption. It is the intent of the Legislature that such situations be accommodated through the use of adoptions involving exchange-of-information contracts between the department and the adoptive or biological parent or parents.[14]

An exchange-of-information contract is defined by statute as a "two-year, renewable obligation, voluntarily agreed to and signed by both the adoptive and biological parent or parents as well as the department."[15] And Neb. Rev. Stat. § 43-158 (Reissue 2008) provides:

> When the department determines that an adoption involving exchange of information would serve a child's best interests, it may enter into agreements with the child's proposed adoptive parent or parents for the exchange of information. The nature of the information promised to be provided shall be specified in an exchange-of-information contract and may include, but shall not be limited to, letters by the adoptive parent or parents at specified intervals providing information regarding the child's development or photographs of the child at specified intervals. . . . Nothing in [these] sections . . . shall be interpreted to preclude or allow court-ordered parenting time, visitation, or other access with the child and the biological parent or parents.

Neb. Rev. Stat. § 43-160 (Reissue 2008), also enacted by L.B. 301, seems directed at this court's decision in *McCormick*: "The existence of any agreement or agreements of the kind specified in section 43-158 shall not operate to impair the validity of any relinquishment or any decree of adoption entered by a court of the State of Nebraska."

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[14] Neb. Rev. Stat. § 43-155 (Reissue 2008).

[15] Neb. Rev. Stat. § 43-156 (Reissue 2008).

By 1993, the exchange-of-information contract had been supplemented with the communication or contact agreement set forth in Neb. Rev. Stat. § 43-162 (Reissue 2008). That section provides:

> The prospective adoptive parent or parents and the birth parent or parents of a prospective adoptee may enter into an agreement regarding communication or contact after the adoption between or among the prospective adoptee and his or her birth parent or parents if the prospective adoptee is in the custody of the Department of Health and Human Services. Any such agreement shall not be enforceable unless approved by the court pursuant to section 43-163.

While there is not a single definition of an "open" adoption, in our view, it is clear that these statutorily-provided-for agreements would fit within the general understanding of such an adoption.

The enactment of the exchange-of-information contracts and communication or contact agreements shows us that the Legislature clearly responded to this court's decision in *McCormick*. However, it did so in a limited way: as is noted above, these contracts are available only in foster care situations. Not included in these statutes or covered by other statutes are private adoptions such as the one presented by these facts.

[11,12] Adoption was unknown to the common law and is a creature of statute.[16] As such, adoptions are permissible only when done in accordance with statute. While the Legislature responded to the *McCormick* holding in the foster-adopt situation, thus legitimizing the practice in that context, it has left *McCormick* untouched insofar as it applies to private adoptions. Thus, the central holdings of *McCormick*—that the effect of an open adoption acts as the retention of some parental rights and, further, that the retention of some parental rights renders a relinquishment invalid—remain intact.

In this case, the record is clear, and the parties do not dispute, that an open adoption was planned. But this retention

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[16] *Wulf v. Ibsen*, 184 Neb. 314, 167 N.W.2d 181 (1969).

of parental rights, however slight, is sufficient to invalidate Teresa's and Monty's relinquishments.

We are not unsympathetic to the plight of adoptive and biological parents as they navigate through the highly emotional process of adoption. And it may be that in some situations, benefit could result from open arrangements such as those endorsed by the Legislature in the foster-adopt situation. At the same time, it is not this court's place to make such policy judgments. Until the Legislature acts to approve of these open adoption arrangements in a private adoption context, this court will not recognize them and will instead continue to hold that relinquishments signed with the promise of such an open adoption are invalid.

Rebecca and Jason's second assignment of error is without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

McCORMACK, J., participating on briefs.

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